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 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes/Rules

INDEX OF CITED EXHIBITS

RNC Ex. 25 Demonstrative, % of Absentee Votes Cast in Selected States: 2006 (source: RNC Ex. 23)

RNC Ex. 26 Commission on Federal Election Reform, *Building Confidence in U.S. Elections* (Sept. 2005)

RNC Ex. 27 Report, Fla. Dep't of Law Enforcement, *Florida Voter Fraud Issues: An FDLE Report and Observations* (Jan. 5, 1998)

RNC Ex. 28 Press Release, Fla. Dep't of Law Enforcement, *FDLE Investigates Statewide Voter Fraud* (Oct. 21, 2004)

RNC Ex. 29 Press Release, Federal Bureau of Investigation, *Preliminary Findings of Joint Task Force Investigating Possible Election Fraud* (May 10, 2005)

RNC Ex. 30 Complaint, *Daschle v. Thune et al.,* No. 04-4177 (D.S.D.) (Nov. 1, 2004)

RNC Ex. 31 Order, *New Jersey Democratic State Comm. v. New Jersey Republican State Comm.*, No. 81-3876 (D.N.J.) (Oct 31, 2002)

RNC Ex. 32 Order, *Daschle v. Thune et al.*, No. 04-4177 (D.S.D. 2004)

RNC Ex. 33 Order, *Democratic Nat'l Comm. et al. v. Republican Nat'l Comm. et al.*, No. 81-3876 (3d Cir.) (Dec. 20, 2004)

RNC Ex. 34 Brief In Support of Order to Show Cause, *Democratic Nat'l Comm. et al. v. Republican Nat'l Comm. et al.*, No. 81-3876 (D.N.J.) (Nov. 3, 2008)

RNC Ex. 38 James Zogby, *Amway vs. Outsourcing: How George Bush Won*, ZOGBY INTERNATIONAL, Nov. 5, 2004

RNC Ex. 40 Press Release, U.S. Attorney's Office, E.D. Mo. (Apr. 2, 2008)

RNC Ex. 43 Bipartisan Campaign Reform Act, 2 U.S.C. § 441i (excerpt)

RNC Ex. 44 "Motor Voter" Law, 42 U.S.C. §§ 1973gg, 1973gg-4, 1973gg-5(a)(4), 1973gg-6(d) (excerpts)

RNC Ex. 45 "Help America Vote" Act, 42 U.S.C. §§ 15301, 15482, 15512 (excerpts)

RNC Ex. 49 "You Can't Make This Up," *at* http://www.gop.com/votefraud.htm

RNC Ex. 58 *Crawford v. Marion County Elections Bd.,* 128 S. Ct. 1610 (2008)

RNC Ex. 59 Transcript of Proceedings, *Democratic Nat'l Comm. et al. v. Republican Nat'l Comm. et al.*, No. 81-3876 (D.N.J.) (Nov. 1, 2004)

RNC Ex. 70 Steve Friess, *ACORN Charged in Voter Fraud Case in Nevada*, N.Y. Times, May 5, 2009, at A18

DNC Ex. 1 Professional Biography of Chandler Davidson

DNC Ex. 2 Chandler Davidson *et al., Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – Or Both?*, A REPORT TO THE CENTER FOR VOTING RIGHTS & PROTECTION (Sept. 2004)

DNC Ex. 12 Professional Biography of Justin Levitt

DNC Ex. 18 Justin Levitt, *The Truth About Voter Fraud* (2007)

DNC Ex. 21 Professional Biography of Lorraine Minnite

DNC Ex. 25 Letter from Lorraine C. Minnite to U.S. Senator Dianne Feinstein, Committee on Rules and Administration (Mar. 11, 2008)

INTRODUCTION

The Consent Decree should be vacated because it is unnecessary, antiquated, and unduly onerous to the Republican National Committee ("RNC"). As the RNC showed at the evidentiary hearing, the Decree is unnecessary because it would be "political suicide" to engage in suppression or intimidation efforts aimed at minority voters, and the RNC has a strict "no tolerance" policy against such activities in any event. Importantly, other than the non-precedential incident in 2004, the Democratic National Committee ("DNC") has provided *no evidence* of RNC involvement in acts of alleged voter suppression or intimidation since the Decree was modified in 1987.

The Consent Decree is antiquated because federal and state laws enacted since 1987 have fundamentally changed the way this Nation conducts elections, and thus weakened the voter-protection rationale for the Decree. As the United States Supreme Court ruled just yesterday in reversing the Ninth Circuit's denial of a motion to vacate a nine-year old "institutional reform" consent decree: "injunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances – changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights – that warrant reexamination of the original judgment." *Horne v. Flores*, 557 U.S. ___, slip op. at 11 (2009) (attached hereto). This ruling is applicable here; the factual and legal circumstances pertaining to the Consent Decree have changed dramatically over the last 22 years. The "Motor Voter Law" of 1993 – and the adoption by over 30 States of "no excuse" absentee ballots and "early voting" – have led to substantial increases in minority voter registration and voting, and have permitted easy voting at home, thus largely vitiating the Decree's objective of preventing disenfranchisement of minority voters at the polls. The Help America Vote Act of 2002 mandated "provisional" ballots for persons whose eligibility to vote is

disputed, thus largely mooting the Decree's intended protection of voters from improper vote challenges. Relatedly, the Bipartisan Campaign Reform Act of 2002 gave rise to more non-political party involvement in voter registration and get-out-the-vote activity, thus enhancing the need for ballot security activities by the RNC that the Decree now restricts.

Finally, the Consent Decree has imposed onerous burdens upon the RNC that are contrary to the public interest. For example, the uncertainty over what constitutes permissible "normal poll watching" under the Decree has prevented the RNC from working with its state and local political parties to engage in perfectly legal poll watching that indisputably helps preserve the integrity of the electoral process. The Decree's pre-clearance provision has also proved to be unworkable because it requires the RNC to provide strategic political information, on an unrealistic timetable, to its principal political adversary – the DNC. Further, the malleability of the Decree over the past two decades has emboldened the DNC and its allies to impose substantial costs on the RNC through trumped-up enforcement suits filed on the eve of the last two Presidential elections, disrupting Republican election activities.

For these reasons, continuation of the Consent Decree is no longer equitable, and the RNC submits that it should be vacated.

PROPOSED FINDINGS OF FACT

I. THE ENTRY AND ENFORCEMENT OF THE CONSENT DECREE.

A. The Terms and History of the Consent Decree.

1. On November 1, 1982, this Court entered a Consent Decree to resolve a lawsuit filed by the DNC (and others), alleging that the RNC (and others) had engaged in unlawful and racially-motivated Election Day activities in connection with the 1981 New Jersey state elections. (RNC Ex. 2.) Without conceding wrongdoing or liability, the RNC and the New Jersey Republican Party agreed, in pertinent part, that they would:

> refrain from . . . 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.* at § 2(e).)

2. This Court modified the Consent Decree on July 27, 1987 after the DNC sued the RNC for allegedly violating the Decree in Louisiana. (RNC Ex. 3.) Again, the RNC did not admit wrongdoing or liability. The modification required the RNC to obtain pre-clearance by this Court of any "ballot security" program, after at least 20 days advance notice had been given to the DNC. (*Id.* § C.) The term "ballot security" was broadly defined to encompass *any* effort by the RNC to prevent or remedy voter fraud. (*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 has been so determined" by this Court. (*Id.* § B.)

B. Litigation Under the Consent Decree.

3. In 1990, the DNC sued the RNC (and others) in this Court, challenging certain pre-election activities in North Carolina. The Court *denied* the DNC any relief as to the RNC, holding only that it had only technically violated the Consent 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 the decree for their review." (RNC Ex. 11; 1 Tr. 48:21-49:7 (Josefiak).)

4. In 2002, this Court *rejected* a claim by the New Jersey Democratic State Committee that an email message sent from an official at Republican Douglas Forrester's United

States Senate campaign constituted a violation of the Consent Decree by the New Jersey Republican State Committee. (RNC Ex. 31; 1 Tr. 48:8-11 (Josefiak).)

5. On the eve of Election Day 2004, Democratic Senator Thomas Daschle filed suit in South Dakota seeking a temporary restraining order ("TRO") against his opponent, Republican John Thune, and the South Dakota Republican Party – *not* the RNC – to prevent the alleged intimidation of voters in violation of federal law and the Consent Decree. (RNC Ex. 30; 1 Tr. 49:22-25 (Josefiak).) The court granted the TRO but made no mention of the Decree or any findings as to its alleged violation, and the RNC was *not* a party. (RNC Ex. 32.)

6. Also on the eve of Election Day 2004, Ebony Malone, an African-American voter in Ohio, sued the RNC under the Consent Decree over a "voter challenge list" compiled by the Ohio Republican Party. (RNC Ex. 12.) This Court found that the RNC had violated the Decree and enjoined use of the list, even though the RNC's challenged act "was not itself illegal under Ohio or federal law." (RNC Ex. 59 at 66-67.) The RNC appealed the Court's decision to the U.S. Court of Appeals for the Third Circuit, which, sitting *en banc*, stayed this Court's order on Election Day. (RNC Exs. 13, 14.) After Supreme Court Justice Souter rejected Ms. Malone's attempt to vacate the stay, the Third Circuit dismissed the RNC's appeal as moot because Ms. Malone voted on Election Day. (RNC Exs. 15, 33.)

7. On November 3, 2008 – the day before Election Day – the DNC filed suit in this Court against the RNC, seeking a TRO against the RNC for alleged violation of the Decree in New Mexico. (RNC Ex. 34.) After the RNC demonstrated that the DNC's lawsuit was factually baseless, this Court promptly denied the requested relief and the DNC voluntarily dismissed its complaint. (1 Tr. 50:1-16 (Josefiak); 2 Tr. 122:11-17 (Levitt).)

8. Also on November 3, 2008, the RNC instituted this proceeding, requesting that the Court vacate or substantially modify the Consent Decree.

II. TESTIMONY AT THE EVIDENTIARY HEARING.

9. This Court conducted an evidentiary hearing on the RNC's motion to vacate or modify the Consent Decree on May 5-6, 2009. The RNC presented testimony from Thomas J. Josefiak, who – among other positions over his career –served as Counsel and Chief Counsel to the RNC from 1992 to 2008, and thus has extensive knowledge of the Consent Decree and its impact upon the RNC. (RNC Ex. 1; 1 Tr. 47:8-24, 48:14-20 (Josefiak).) Mr. Josefiak explained that the RNC has a "no tolerance" policy toward voter intimidation and suppression, independent of the Decree's obligations. (1 Tr. 64:19-25, 65:6-66:2 (the RNC's policy has "nothing to do with the consent decree" and instead reflects "practical reality").) Mr. Josefiak also testified about the statutory changes that have enhanced minority registration and voting since the Decree was entered (1 Tr. 72:20-74:5, 78:11-79:24, 80:2-14), and he discussed how the RNC has responded to these demographic trends through minority outreach. (1 Tr. 57:11-25.) Further, Mr. Josefiak explained how the Bipartisan Campaign Reform Act, 2 U.S.C. §§ 431 *et seq.* ("BCRA") has increased the prospects for voter fraud (1 Tr. 74:6-75:7, 77:22-78:10), and how he considered it his responsibility as RNC Chief Counsel to protect Republican candidates and voters from all manner of voter fraud. (1 Tr. 87:11-22.) Mr. Josefiak also described in detail how the Decree hinders the RNC's anti-fraud efforts by restricting its ability to monitor, report, and prevent voter fraud (1 Tr. 93:20-22, 112:21-113:9), and he further elaborated upon how the Decree constrains the RNC's ability to work with state and local parties in their Election Day operations. (1 Tr. 93:24-95:17, 96:1-7.)

10. The DNC presented testimony from three witnesses. Chandler Davidson, a professor at Rice University until his retirement in 2003, was offered by the DNC as the Nation's

"leading expert" on the subject of voter suppression. (DNC Ex. 1; 1 Tr. 154:24-155:1, 2 Tr. 17:18-21 (Davidson).) Professor Davidson testified that his research has revealed only 14 instances of voter suppression since the 1950s. (2 Tr. 22:2-6, 24:3-9; *see* DNC Ex. 2.) Of these 14 cases, two involved the RNC – namely, the events that led to the entry and later modification of the Consent Decree. (*See* DNC Ex. 2; 2 Tr. 26:1-17 (Davidson) ("I believe I'm correct in saying that the only connection that we mention between the Republican National Committee and one of these activities is the 1981 event that led to the consent decree, and the 1986 event in Louisiana.").) Further, despite the DNC's decades of claims that the RNC engages in systematic voter suppression, Professor Davidson admitted that he did not review the DNC's files to determine if there was any evidence to support these allegations. (2 Tr. 18:7-11, 19:2-12.) Nor did Professor Davidson interview any of the accusers or the alleged wrongdoers in the 14 cases of voter suppression that he cited. (2 Tr. 19:25-20:8, 27:8-13.)

11. The DNC also presented testimony from Lorraine Minnite, an assistant professor of political science at Columbia University, who focuses some of her research on voter fraud. (DNC Ex. 21; 2 Tr. 45:17-19, 46:7-12 (Minnite).) Professor Minnite testified that she used a unique and narrow definition of "voter fraud" in her research, and that she reviewed only federal, not state, prosecutions to reach her conclusion that voter fraud is "rare." (2 Tr. 51:20-52:9, 68:18-69:11, 71:20-23 (admitting that there are many nefarious activities that are not captured by her definition of voter fraud); 53:20-54:2 (stating that her research is based on indictments brought only in federal court); 47:11-14 (opining, with these caveats, that voter fraud is "rare" in American elections).) Professor Minnite also admitted that poll watchers serve many valuable functions in addition to preventing voter fraud. (2 Tr. 64:9-14, 64:23-65:1, 69:12-70:9.)

12. Finally, the DNC presented the testimony of Justin Levitt, who served as national voter protection counsel to the DNC in 2008 and currently works at the Brennan Center for Justice at the New York University School of Law. (DNC Ex. 12; 2 Tr. 79:5-6, 80:1-5, 96:25-97:3 (Levitt).) Mr. Levitt conceded that voter fraud does occur and should be investigated when it is reported. (2 Tr. 130:14-18, 136:24-25, 138:6-9; DNC Ex. 18 at 23.) Mr. Levitt also used a narrow definition of "voter fraud," which he admitted does not capture all methods of voting-related fraudulent conduct. (2 Tr. 128:11-129:10.) Mr. Levitt further acknowledged that the DNC uses poll watchers and that they serve valuable purposes. (2 Tr. 140:8-10.)

III. CHANGED FACTUAL AND LEGAL CIRCUMSTANCES SINCE THE RNC ENTERED INTO THE CONSENT DECREE.

A. Changed Factual Circumstances.

13. African-Americans now hold two of the four top leadership posts at the RNC: Chairman Michael Steele and Chief Administrative Officer Boyd Rutherford. (1 Tr. 62:19-23, 63:8-19, 104:7-8 (Josefiak) ("We have a change in leadership with an African-American at the lead who would never permit [voter suppression].").)

14. The RNC has a "no tolerance" policy for voter intimidation and suppression. (1 Tr. 64:19-25 (Josefiak).) This policy was articulated by former RNC Chairman Ed Gillespie in a letter to former DNC Chairman Terry McAuliffe dated June 15, 2004:

> You have falsely and unfairly charged the Republican Party with trying to intimidate voters. The Republican National Committee is not, and will not be, engaged in any effort to suppress or intimate voters. Our Party finds such conduct reprehensible and if we receive any evidence that such conduct is occurring, I will take all steps necessary to ensure that it ceases immediately. Rather, our goal is in this election is an unprecedented effort to register new voters and encourage participation in the political process.

(RNC Ex. 10; 1 Tr. 66:10-67:11 (Josefiak) (confirming that this paragraph accurately characterizes the RNC's position on voter suppression activity).

15. Even excluding the 2008 election, minority registration and voting have increased since 1982, in both absolute numbers and relative percentages of the total electorate. According to the U.S. Census Bureau, from 1982 to 2006, voter registration increased by 13.2% among non-Hispanic whites, but by 41.6% among African-Americans and by 201% among Hispanics. (RNC Exs. 4-6; 1 Tr. 51:14-16, 52:17-55:4 (Josefiak).) Actual voting levels among minority groups have also increased disproportionately from 1982 to 2006, with voting by non-Hispanic whites up 7.8%, voting by African-Americans up 31%, and voting by Hispanics up 152%. (RNC Exs. 4, 5, 7; 1 Tr. 55:13-56:10 (Josefiak).) Further, the total percentage of voters comprising African-Americans and Hispanics increased from 12.7% in 1982 to 17.7% in 2006. (RNC Ex. 4, 5, 20; 1 Tr. 145:5-14 (Josefiak).)

16. In recent years, the RNC has made a concerted effort to reach out to minority voters, particularly in view of demographic trends. (1 Tr. 57:11-58:24, 145:15-21 (Josefiak).) As Mr. Josefiak stated: "[T]he political realities are such that it would be political suicide . . . for us not to acknowledge minorities are part of any sort of winning team." (1 Tr. 104:2-5.)

B. Changed Legal Circumstances.

17. In 1993, Congress enacted the National Voter Registration Act, 42 U.S.C. §§ 1973gg *et seq.*, commonly known as the "Motor Voter Law." The Motor Voter Law has made it easier for all voters, including minority voters, to register to vote by allowing people to register while getting a driver's license or applying for public assistance benefits. (*See* 42 U.S.C. § 1973gg-5(a)(4); RNC Ex. 44; 1 Tr. 72:20-73:14 (Josefiak).)

18. In 2002, Congress enacted the Bipartisan Campaign Reform Act, 2 U.S.C. §§ 431 *et seq.* ("BCRA"). BCRA prohibits national political party committees such as the DNC and the RNC from soliciting, receiving, or spending corporate, union, or large individual donations, known as "soft money." (2 U.S.C. § 441i; RNC Ex. 43; 1 Tr. 74:6-75:2 (Josefiak); 2 Tr. 138:13-

22 (Levitt).) Since the passage of BCRA, the DNC has increasingly relied on ideologically-aligned outside groups, such as ACORN, to perform voter registration and get-out-the-vote efforts that political parties – before BCRA – paid for with "soft money." (1 Tr. 77:5-7, 77:14-78:10, 147:1-148:12 (Josefiak); RNC Ex. 38.) Non-political party groups such as ACORN are not subject to the same disclosure requirements or financial restrictions as the RNC and the DNC, and their assumption of the DNC's traditional political party activities has permitted the DNC to conserve its funds. (1 Tr. 75:18-76:4, 76:21-77:4 (Josefiak); 2 Tr. 138:23-139:9 (Levitt).)

19. News reports in recent year have provided ample basis for concerns about voter registration and voter fraud promoted by members of ACORN and similar non-political party groups. (*See* RNC Ex. 40 (discussing guilty pleas on election fraud charges by ACORN workers in Missouri); RNC Ex. 49 (compilation of news reports regarding acts of voter fraud nationwide during 2008 election cycle); RNC Ex. 59 at 64 (noting irregularities surrounding ACORN's voter registration activity); RNC Ex. 70 (discussing ACORN workers charged in voter registration fraud case in Nevada); *see also* 1 Tr. 93:6-19 (Josefiak); 2 Tr. 73:6-13 (Minnite).)

20. In 2002, Congress enacted the Help America Vote Act, 42 U.S.C. §§ 15301 *et seq.* ("HAVA"), which allows voters who do not appear to be properly registered on Election Day to cast "provisional" ballots, which are evaluated and – if valid – then counted after polls close. (*See* 42 U.S.C. § 15482; RNC Ex. 45; 1 Tr. 78:11-79:24 (Josefiak) (testifying that he is unaware of any circumstances in which HAVA does not entitle a person who comes to a polling place on Election Day to cast at least a provisional ballot).)

21. Since 1987, many States have adopted alternative methods of voting, such as early voting and no-excuse absentee voting. According to the National Conference of State

Legislatures, as of the year 2008, a total of 31 States allow early voting, 28 States permit no-excuse absentee voting, and five States have adopted permanent absentee voting. (RNC Exs. 21, 22; 1 Tr. 80:2-81:24; 82:10-21, 83:15-84:11(Josefiak).) These alternative means of voting are being extensively utilized by voters. The U.S. Election Assistance Commission found that, in 2006, 14.3% of voters cast absentee ballots, 5.6% voted early, and 1% – over 700,000 voters – cast provisional ballots. (RNC Exs. 23-25; 1 Tr. 84:12-85:9, 85:16-87:6 (Josefiak).)

IV. THE IMPACT OF THE CONSENT DECREE.

A. The Impact of the Consent Decree on the RNC.

22. The RNC has spent hundreds of thousands of dollars defending itself against lawsuits brought under the Consent Decree, at times by plaintiffs who are not parties to the Decree. (1 Tr. 100:18-23, 101:2-4 & 13-14) (Josefiak) (the RNC spent $300,000 defending against the *Malone* lawsuit in 2004).)[1] Although non-parties to the Decree can use "soft money" to fund such litigation, BCRA requires the RNC to use "hard money" to defend itself, which "take[s] away money from its political efforts." (1 Tr. 75:8-17, 98:21-99:4 (Josefiak).)

23. The DNC and its allies have used the Consent Decree to file lawsuits against the RNC on the eve of the past two presidential elections. (RNC Exs. 12, 34; 1 Tr. 49:12-21, 50:1-16 (Josefiak).) These lawsuits disrupted the RNC's operations at a critical point in the political process. (1 Tr. 98:21-99:8 (Josefiak) ("it takes away the focus on what we're all about, and that's winning elections, particularly a couple days before the election").) For example, in 2004, Maria Cino, the Deputy Chair of the RNC, and Blaise Hazelwood, the RNC's Senior Political

[1] The DNC *concedes* that the Consent Decree should be modified to specify that only the parties to the Decree may seek enforcement of the Decree. (DNC Br. 4, 23, 26; 1 Tr. 26:17-27:1 (DNC opening statement).)

Director, had to spend the final days before the election away from their official duties, preparing for depositions and being deposed in *Malone*. (1 Tr. 99:9-100:17 (Josefiak).)

24. The RNC works with its state and local parties and candidates on voter registration and get-out-the-vote efforts leading up to Election Day. (1 Tr. 93:24-94:7, 94:16-95:2 (Josefiak).) The RNC then pulls itself away from the team and does not become involved in Election Day activities because it is unsure what activities are deemed "normal poll watching" activities permitted under the Decree. (1 Tr. 93:24-94:15, 95:12-16, 96:1-7 (Josefiak).) "[A]s a practical matter," therefore, the RNC "stays out of all Election Day activities." (1 Tr. 94:10-11, 114:13-15 (Josefiak).)

25. The Consent Decree's pre-clearance provision mandates that before embarking on even an otherwise-legal ballot security program, the RNC must give the DNC at least 20 days advance notice before seeking approval from the Court. (*See* RNC Ex. 3.)[2] In effect, the pre-clearance provision requires the RNC to know about a potential election problem "more than 30 days or maybe even 45 days" in advance of implementing a responsive ballot security measure. (1 Tr. 97:2-7) (Josefiak).) Typically, the RNC does not know 20 days before an election what specific precincts will pose concerns during an election, let alone the specifics of any ballot security response. (1 Tr. 96:8-97:2 (Josefiak) ("So the idea of having to notify, in this case the DNC even before coming to this court with a plan, even if we wanted to provide a plan, becomes very impractical.").)

26. The Consent Decree's pre-clearance provision also requires the RNC to give up strategic information to its principal political opponent, the DNC. (1 Tr. 102:21-103:12

[2] The RNC's understanding, in view of *Malone*, is that the Court would expect it to seek approval for ballot security activities that are permissible under state and federal law. (1 Tr. 148:21-149:4 (Josefiak); RNC Ex. 59 at 66-67.)

(Josefiak) ("allowing the opposition party access to our plans and strategies with regard to . . . what we think may be issues is problematic to us").)

27. The DNC's position is that the Consent Decree requires the RNC to place equivalent poll watchers in all precincts, regardless of whether trouble is expected, and regardless of political considerations. (2 Tr. 174:11-175:2, 176:19-182:7 (DNC closing statement) (the RNC would violate the Consent Decree if it placed poll watchers in Democratic areas with many minority voters, but not in Republican ones with few minority voters).)

B. The Impact of the Consent Decree on the Public.

28. Although its prevalence is disputed, voter fraud is a real phenomenon in American politics. (RNC Ex. 26 at 45 & RNC Exs. 27-29, 40, 58 at 1619; 2 Tr. 88:22-93:19 (Josefiak).) DNC witness Lorraine Minnite's review of federal election crime prosecutions over the period from October 2002 to September 2005 revealed *70 election fraud convictions*: 26 of voters, 11 of government officials, 30 of party and election workers, and three of election officials. (DNC Ex. 25 at 10; 2 Tr. 59: 3-15 (Minnite).) Similarly, DNC witness Justin Levitt's review of voter fraud – which he limited to three specific elections in three States – revealed six incidents of voter fraud in Missouri in the 2000 election, eight incidents of voter fraud in New Jersey in the 2005 election, and seven incidents of voter fraud in Wisconsin in the 2004 election. (DNC Ex. 18 at 23; 2 Tr. 130:14-25, 131:20-23, 132:5-12 (Levitt).)

29. As the DNC admits, poll watching is justified by many reasons beyond the need to detect "voter fraud," as that term was defined by Dr. Minnite and Mr. Levitt. For example, poll watchers can detect problems including malfunctioning equipment, overcrowded polling places, intimidation of voters at the polls, and even ballot box stuffing. (2 Tr. 64:9-14, 64:23-65:1, 69:12-70:9, 72:2-9, 12-14 (Minnite).)

30. The restrictions and ambiguities of the Consent Decree are the sole reasons why the RNC does not take part in poll watching on Election Day. (1 Tr. 93:20-94:11, 95:3-16, 96:1-7, 112:21-113:5, 114:3-15 (Josefiak).)

STANDARD OF REVIEW

The Court may vacate or modify the Consent Decree for several reasons:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(5), (6). Relief from the Consent Decree is appropriate under Rule 60(b)(5) if the RNC can show a "significant change in either factual conditions or in the law." *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (citation omitted). Equitable considerations supporting vacatur also 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. & Constr. Trades Council of Phila. & Vicinity v. NLRB*, 64 F.3d 880, 888 (3d Cir. 1995). Under Rule 60(b)(6), vacatur is also appropriate if reasons of public policy militate against continued enforcement of the 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").[3]

The DNC contends incorrectly that peculiarly stringent legal standards and evidentiary burdens apply in this case. Indeed, the United States Supreme Court specifically cautioned

[3] As the RNC previously explained, the Consent Decree should also be vacated pursuant to Rule 60(b)(4) because it is void *ab initio*. As this is a purely legal ground for vacatur, the RNC did not elaborate on it at the evidentiary hearing, but preserves the issue herein. *See infra* p. 26.

against too-strict requirements for motions to vacate consent decrees under Rule 60(b)(5) in *Horne*, rejecting the Ninth Circuit's requirement of "radical[]" change to justify vacatur of a consent decree, and further noting its failure to inquire broadly into the "changed conditions" underlying the motion to vacate. 557 U.S. ____, slip op. at 14. Here, the DNC argues that the RNC must "show a statutory or additional law change which would make legal what the decree was designed to prevent." (1 Tr. 33:13-23, 2 Tr. 168:19-21 (DNC opening and closing statements); DNC Br. 16).) As the Third Circuit has explained, however, the "changed legal circumstances" rationale for dissolving a consent decree does *not* require that the decree conflict with a later change in the law. *See Henderson v. Morrone*, 214 F. App'x 209, 215 n.3 (3d Cir. 2007) ("[T]here 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*.") (emphasis added); *see also Brown v. Phila. Hous. Auth.,* 350 F.3d 338, 348 n.6 (3d Cir. 2003) (same).

The DNC also asserts – without citation to authority – that the RNC must present "clear and convincing" evidence to support vacatur or modification of the Consent Decree. (1 Tr. 31:9-12; 2 Tr. 168:6-10, 171:15-17 (DNC opening and closing statements).) The RNC is aware of no authority for this proposition, and every judicial decision it has reviewed in connection with this matter has presupposed the usual burden of proof for civil litigation.[4]

[4] The RNC is aware of decisions applying a heightened burden of proof for motions seeking to vacate a judgment under Rule 60(b)(3) on grounds of fraud, misrepresentation, or misconduct by the non-moving party, but the RNC does *not* seek relief under this subsection. *E.g.*, *Brown v. Pa. R.R. Co.*, 282 F.2d 522, 527 (3d Cir. 1960). Further, even if (contrary to law) the Court were to require "clear and convincing" evidence here, the RNC submits that it has met this burden.

PROPOSED CONCLUSIONS OF LAW

The evidence adduced at the evidentiary hearing demonstrates that the Consent Decree should be vacated or substantially modified for three reasons. *First*, the Decree is unnecessary given the increase in minority registration and voting since 1987, and the RNC's "no tolerance" policy toward voter suppression or intimidation. *Second*, the Decree is antiquated in view of the substantial changes in the law that have occurred since it was modified. *Finally*, the Decree imposes unduly onerous burdens on the RNC and prevents it from undertaking appropriate and necessary poll watching activities.

I. THE CONSENT DECREE IS UNNECESSARY.

A. Substantial Increases in Registration and Voting by Minorities Since 1982 Belie Any Purported Need for the Consent Decree To Protect Against "Disenfranchisement" Efforts by the RNC.

The record is undisputed that minority voter registration and voting have both increased markedly since the Consent Decree was entered in 1982, both in terms of absolute numbers and percentages of the total electorate. (PFoF ¶ 15.) According to the U.S. Census Bureau, from 1982 to 2006, voter registration increased by 13.2% among non-Hispanic whites, but by *41.6%* among African-Americans and by *201%* by Hispanics. (*Id.*)[5] From 1982 to 2006, voting by non-Hispanic whites increased by 7.8%, but by *31%* among African-Americans and *152%* by Hispanics. (*Id.*) Further, from 1982 to 2006, the total percentage of registered voters comprising African-Americans and Hispanics grew from 12.7% to 17.7%. (*Id.*) These figures demonstrate that minority groups the Decree was ostensibly intended to protect from disenfranchisement are, in fact, registering to vote and voting at rates increasing far faster than the national average. This

[5] Although the U.S. Census Bureau also tracked these statistics for "Asians" in 2006, it did not do so in 1982, so the RNC cannot present comparative data for this minority group.

phenomenon belies any notion that the RNC or state Republican parties are suppressing or intimidating minority voters. It also statistically demonstrates the absence of an objective need for the Decree, and it shows that the RNC's incentive is to attract rather than repel minority voters, as explained below.

B. The RNC Does Not Engage in Voter Suppression and Its "No Tolerance" Policy Will Not Change if the Consent Decree Is Vacated.

The Court may vacate the Consent Decree if "applying it prospectively is no longer equitable." Fed. R. Civ. 60(b)(5). These equitable considerations include "whether the party . . . 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. & Constr. Trades Council*, 64 F.3d at 888. Both conditions are satisfied in this case.

The slim record of enforcement success against the RNC demonstrates that it has strictly complied with the Consent Decree since 1987, and there is no evidence to suggest that its behavior will change if the Decree is vacated. The DNC argues otherwise, claiming that "the RNC and its affiliated State and county parties have . . . continued to engage repeatedly in the . . . systematic effort at disenfranchisement targeted at minority communities." (DNC Br. 10.)[6]

At the evidentiary hearing, however, the DNC's own expert witness, Professor Chandler Davidson, could not identify a *single instance* in which the RNC was involved in voter suppression or intimidation since *1987*. (PFoF ¶ 10.) Indeed, Professor Davidson – described by the DNC as the Nation's leading expert on the subject of voter suppression – found only 14

[6] The DNC's only example of any supposedly "disenfranchising" behavior by the RNC is this Court's finding of a violation of the Decree in the 2004 *Malone* case. (2 Tr. 172:8-18 (DNC closing statement).) However, this Court's ruling in *Malone* was stayed by the Third Circuit, for reasons which were not articulated by the Court, and the RNC's appeal was dismissed as moot because Ms. Malone was permitted to vote. Under *Munsingwear, Inc. v. United States,* 340 U.S. 36 (1950), this Court's ruling in *Malone* has no precedential force. Indeed, even the DNC now concedes that Ms. Malone, a non-party to the Decree, should not have been allowed to bring her claim in the first place.

instances of voter suppression since the 1950s. (*Id.*) The only two instances that involved the RNC were the ones that led to the Decree and its later modification. (*Id.*) Moreover, the DNC concedes that "since the entry of the 1987 Order, the DNC itself has in fact sought enforcement of the Consent Decree *only twice*," and both times (1990 and 2008) unsuccessfully. (DNC Br. 7 (emphasis added); PFoF ¶¶ 3, 7.) Surely, if the RNC were actually engaging in the widespread voter suppression claimed by the DNC, then the DNC would have invoked the Decree more than twice in the past 22 years, and had some success doing so.

In any event, with or without the Consent Decree, the RNC has made plain that it does not and will not engage in voter suppression. Indeed, the RNC has a "no tolerance" policy for voter intimidation and suppression. (PFoF ¶ 14.) The RNC's policy "has nothing to do with the consent decree" and everything to do with the changing demographics that have occurred since 1982 at the RNC and in our national electorate. (PFoF ¶ 9.) Two of the four highest ranking officials at the RNC – Chairman Michael Steele and Chief Administrative Officer Boyd Rutherford – are African-Americans. (PFoF ¶ 13.) Former RNC Chief Counsel Thomas Josefiak emphatically testified that these RNC leaders would never tolerate anyone associated with the RNC engaging in behavior that would constitute voter suppression or intimidation, and this is indicative of RNC policy. (*Id.*)

Further, even setting aside the RNC's legal and moral obligations, it would be "political suicide" for the RNC to make the selective disenfranchisement efforts alleged by the DNC. (PFoF ¶ 16.) Given the trend of increased voter registration and voting by minorities, the RNC recognizes that "minorities are part of any sort of winning team." (PFoF ¶¶ 15, 16.) The RNC has responded to these trends in voter registration by actively reaching out to minority voters in the hope of generating more interest in the Republican Party and its candidates. (PFoF ¶ 16.) It

would be counterproductive for the RNC to attempt to suppress the very voters it seeks to attract through its minority outreach programs. (*Id.;* 1 Tr. 58:21-23 (Josefiak) ("Why would the RNC make concerted efforts to reach out to the minority communities and then at the same time prevent those minority communities from voting?").)

II. THE CONSENT DECREE IS ANTIQUATED.

The Motor Voter Law, HAVA, and state laws liberalizing voting procedures have increased access and participation in elections by all voters, including minority voters. Meanwhile, the enactment of BCRA has enhanced the prospects for voter fraud and, consequently, heightened the need for the RNC's involvement in poll monitoring on Election Day. These changes in the law render the Consent Decree outdated and justify vacatur.

A. Changes in the Law Since 1982 Have Greatly Increased Voter Registration And Voting, Particularly by Minority Voters.

Legal changes at the federal and state levels have made participation in the electoral process simpler at every step. The Motor Voter Law makes it easier for all voters, including minority voters, to register to vote. (PFoF ¶ 17.) HAVA requires States to permit any voter who actually comes to a polling place to cast at least a provisional ballot, the validity of which is determined later, even if the voter does not appear to be properly registered to vote or is challenged at the polls for some other reason. (PFoF ¶ 20.) Furthermore, most States have adopted alternative voting methods that enable voters to avoid polling places on Election Day altogether. (PFoF ¶ 21.) According to the National Conference of State Legislatures, 31 States have adopted early absentee voting, 28 States permit no-excuse absentee voting, and five States allow permanent absentee voting. (*Id.*) These alternative methods are being extensively used by voters. The U.S. Election Assistance Commission's report summarizing its key findings about the 2006 election revealed that 14.3% of the electorate in 2006 cast absentee ballots, 5.6%

utilized early voting, and approximately 1% of voters cast provisional ballots. (*Id.*) Thus, in the event that a voter is concerned about encountering intimidating behavior on Election Day, that voter may very well be entitled to vote early or even cast an absentee ballot from the comfort of his or her own home. Further, in the event a voter is improperly (let alone properly) challenged at the polls, he or she may still cast a provisional ballot that – if valid – will be counted. (PFoF ¶ 20.)

The liberalization of voter registration and voting methods detailed above has, as intended, led to increased participation by all voters, including minority voters (PFoF ¶ 15), thus disproving the DNC's amorphous allegations of "disenfranchisement." Further, the rise of provisional ballots effectively squelches any effort to disenfranchise a voter who appears at the polls (PFoF ¶ 20), and the substantial number of voters who cast their ballots before Election Day or in their homes cannot realistically be disenfranchised by "intimidation" or "suppression" as asserted by the DNC (PFoF ¶ 21). For these reasons, the Consent Decree has become antiquated as a matter of law: its provisions "protect" fewer and fewer voters. Yet its burdens on the RNC (detailed below) have become *more* onerous over time.

B. The Bipartisan Campaign Reform Act Has Enhanced the Prospects for Voter Fraud and Increased the Need for Ballot Security Efforts by the RNC.

As registration and voting have become easier, the prospects for voter fraud have increased. In recent federal elections, the DNC responded to the restrictions of BCRA by effectively outsourcing many of its voter registration and get-out-the-vote efforts to non-party organizations, such as ACORN. (PFoF ¶ 18.) Transferring these activities from the DNC to groups that lack its transparency and political accountability intrinsically increases the potential for voter fraud, because it removes the institutional and political disincentives to commit fraud. Indeed, members of ACORN and related groups have repeatedly been indicted for, and pleaded

guilty to, voter fraud in recent years. (PFoF ¶ 19; RNC Ex. 40 (discussing guilty pleas on election fraud charges by ACORN workers in Missouri); RNC Ex. 49 (compiling news reports regarding acts of voter fraud nationwide during the 2008 election cycle); RNC Ex. 70 (discussing ACORN workers charged with voter registration fraud in Nevada).)

These increased prospects for voter fraud intensify the need to have the RNC involved in ballot security initiatives, which are not permissible under the Consent Decree without pre-clearance, and in poll monitoring on Election Day. (PFoF ¶ 2.) As discussed below, obtaining pre-clearance under the Consent Decree is not feasible for several reasons, and uncertainties concerning what "normal poll watching" activities entail has led the RNC to *refrain* from poll monitoring. As a legal change that has increased the likelihood of voter fraud and, in turn, the need for the RNC to be able to help prevent such fraud, the passage of BCRA is yet another change in the law that makes the Consent Decree antiquated and supports vacatur.

III. THE CONSENT DECREE IS UNDULY ONEROUS AND DOES NOT PROMOTE THE PUBLIC INTEREST.

In addition to imposing significant financial and administrative burdens on the RNC, the Consent Decree also deters the RNC from working with its state and local parties to engage in legitimate poll watching activities on Election Day. The absence of the RNC from the polls on Election Day is politically burdensome to the RNC and contrary to the public interest.

A. The Consent Decree Imposes Inequitable Burdens on the RNC.

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 Consent Decree inflicts significant financial burdens on the RNC and permits its political opponents to disrupt its operations. The Decree also hinders the RNC's ability to work with its state and local parties in legitimate Election Day endeavors and – according to the DNC – it irrationally requires the RNC

to place equal numbers of poll watchers in all precincts irrespective of political considerations. These burdens on the RNC are all "equitable" factors the Court may consider in evaluating whether to vacate or modify the Decree.

1. The Consent Decree Imposes Substantial Burdens on the RNC.

The RNC has spent hundreds of thousands of dollars defending itself against lawsuits brought under the Consent Decree, including by plaintiffs who are not even parties to it. (PFoF ¶ 22.) Although non-parties to the Decree can use "soft money" to fund such litigation, the RNC – under BCRA – must use "hard money" to defend itself, which "take[s] away money from its political efforts." (*Id.*)

So long as the Consent Decree remains in effect, then, the DNC and its allies will predictably continue to exploit it politically, through pretextual Election Eve lawsuits – as in 2008 – that are intended to disrupt the RNC's operations. (PFoF ¶ 23.) These Election Eve fire drills are plainly planned to interrupt the RNC's election activities and distract high-ranking RNC officials at a critical time in the election process. (*Id.*) It is no accident, for example, that RNC Deputy Chairman Cino and Senior Political Director Hazelwood spent the week preceding the 2004 election preparing for and sitting for depositions in the *Malone* matter, rather than devoting themselves to their political work. (*Id.*) If the Decree remains available to the DNC and its allies as a strategic political weapon, they will have every incentive to use it, regardless of the merits of any enforcement action. Accordingly, equity compels that the Decree be vacated, or at least modified to preclude enforcement by non-parties to it – a result the DNC *endorses*. (DNC Br. 4, 23, 26; 1 Tr. 26:17-27:1 (DNC opening statement).)

2. The Consent Decree's Pre-Clearance Provision Is Unworkable.

As a practical matter, the RNC also cannot comply with the Consent Decree's pre-clearance provision in the vast majority of situations that would call for ballot security initiatives. (PFoF ¶ 25.) The Decree requires that, before undertaking a ballot security program, the RNC must give the DNC 20 days advance notice before seeking the Court's approval. (*Id.*) Thus, the provision effectively requires the RNC to know about a potential election problem "more than 30 days or maybe even 45 days" in advance of implementing a responsive security measure. (*Id.*) This many days before a federal election, the RNC cannot even definitively determine what the battleground States will be, let alone identify precincts that will require security measures. (*Id.*)

Even if it were possible for the RNC to make such determinations far enough in advance to seek pre-clearance, the RNC would still be forced to refrain from doing so because of the strategic burden the pre-clearance provision imposes on it. (PFoF ¶ 26.) Requiring the RNC to turn over critical election information to its principal political adversary – the DNC – essentially defeats the purpose of having a strategy in the first place. (*Id.*) This concern is particularly justified given that the DNC is so closely aligned with groups, such as ACORN, that so often engage in the types of conduct that warrant ballot security measures. (PFoF ¶¶ 18, 19.) Because the RNC cannot reasonably comply with the Consent Decree's pre-clearance requirement, the Decree should be vacated or at least modified to eliminate it.

3. The Consent Decree Interferes With the Relationship Between the RNC and Its State and Local Parties.

The RNC has the capability and incentive to exercise a salutary effect on state and local parties in their poll watching activities. But rather than do so, the RNC must – and does – stay out of Election Day activities because of the Consent Decree. (PFoF ¶¶ 24, 30.) Even though the RNC wants to take part in these activities and has the ability to make them more professional,

effective, and legally compliant, it refrains because the definition of "normal poll watching" under the Decree is unclear. (*Id.*)

This ambiguity is exacerbated by the Court's ruling in *Malone* that discussions between the RNC and the Ohio Republican Party violated the Decree even though they did not violate federal or Ohio law. (PFoF ¶ 6.) In its now-vacated (and *non-precedential*) 2004 Order, the Court extended the Decree to restrict the RNC's communications with state parties about their anti-fraud measures. (RNC Ex. 59 at 66-68.) This was inconsistent with this Court's 1990 Order, which *requires* the RNC to inform state parties about the Decree. (RNC Ex. 11.)

This interference with the RNC's relationship and communications with its state and local parties is a substantial burden on the RNC, made even more inequitable by the fact that the DNC is not so restricted. (PFoF ¶ 12.) Accordingly, the Consent Decree should be vacated or at least modified to clarify that the following activities are not precluded by the Decree: (1) poll watching and ballot security programs that are consistent with state and federal law; and (2) communications between the RNC and state and local parties regarding such programs.

4. The DNC Contends That the Consent Decree Requires the RNC To Place Poll Watchers Equally in Every Precinct.

Under the Consent Decree, an activity that is likely to have a "disparate impact" on minority voters is "relevant evidence" bearing on whether race was a factor in an effort "to deter qualified voters from voting" and thus in violation of the Decree. (PFoF ¶ 1.) The DNC now takes the remarkable position that, to avoid violating the Decree under the "disparate impact" test, the RNC must place poll watchers either in every precinct, or in no precinct. (PFoF ¶ 27.) The DNC claims that it would be a violation of the Decree (and civil rights laws) for the RNC to place poll watchers in heavily-Democratic precincts with a large minority population – such as Newark – but not also in precincts in heavily-Republican but less diverse areas – such as Short

Hills. (*Id.*) According to the DNC, it would be irrelevant that the RNC lacked any racially discriminatory intent in allocating its poll watchers in this way, but did so solely based on (1) political considerations and (2) knowledge of the fact that groups such as ACORN operate predominately in low-income and minority communities. (2 Tr. 174:11-19, 174:23-175:2, 182:8-183:1 (DNC closing statement).)

In addition to being an inaccurate reading of the Consent Decree and "disparate impact" law generally,[7] the DNC's interpretation of the "disparate impact" test would impose an incredible burden on the RNC. As this Court noted at the hearing, "practical sense suggests that you ought to be able to put your poll watchers where they're going to do the most good without 'discriminating.'" (2 Tr. 181:2-4.) The fact that the DNC would feel justified in challenging the RNC under the Decree if the RNC followed this "practical sense" approach underscores why the RNC has refrained from poll watching, and is another reason why the Decree should be vacated.

B. The Consent Decree Is Contrary to the Public Interest.

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. Pro. 60(b)(6). Here, substantial reasons of public policy militate against continued enforcement of the Consent Decree. *Evans*, 475 U.S. at 727 n.13 (noting that if performance of a consent decree violates public policy, "the entire agreement is unenforceable").

Although the exact prevalence of voter fraud is debatable, it is a real phenomenon in American politics. (PFoF ¶ 28.) Even the DNC's own witnesses, Professor Lorraine Minnite and Mr. Justin Levitt – despite their strenuous efforts to trivialize the problem by narrowly

[7] The case law in effect at the time the Decree was entered 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).

defining it – admit that voter fraud occurs and is important enough to be investigated. (PFoF ¶¶ 11, 12, 28.) Professor Minnite, looking only at federal cases from October 2002 to September 2005, found *70 convictions and guilty pleas* of election fraud. (PFoF ¶ 28; DNC Ex. 25 at 10.) Mr. Levitt found *21 instances* of voter fraud in three specific elections conducted in just three States. (PFoF ¶ 28; DNC Ex. 18 at 23.) As non-party groups such as ACORN assume a more prominent role in our Nation's electoral process, concern about voter fraud continues to intensify. (PFoF ¶¶ 18, 19.)

Political parties, candidates, the Government, and the general public all have an interest in protecting the integrity of the election process. As the Supreme Court held last year in *Crawford v. Marion County Elections Bd.*: "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 election fraud may well be debatable, the propriety of doing so is perfectly clear." 128 S. Ct. 1610, 1619 (2008). As discussed above, the RNC has every incentive – and the ability – to aid state and local Republican party efforts to prevent and detect election fraud and other irregularities by participating in poll watching. Yet the Consent Decree, with its ambiguous terms and impractical pre-clearance requirement, effectively prevents the RNC from doing so.

As the DNC's witnesses acknowledged, there are other valid reasons, in addition to preventing election fraud, to have poll watchers from a transparent and accountable organization like the RNC, who are knowledgeable about state and federal election laws, involved in poll monitoring. (PFoF ¶ 29.) Poll watchers can detect such problems as malfunctioning equipment, overcrowded polling places, intimidation of voters, and even ballot box stuffing. (*Id.*) Because

the Consent Decree hinders the RNC's ability to help monitor the polls on Election Day, the Decree is contrary to the public interest and should be vacated.

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

As the RNC explained in its opening and reply briefs on the motion to vacate, the Consent Decree is also void *ab initio* and should be vacated under Rule 60(b)(4). *See* RNC Opening Br. 17-22; RNC Reply Br. 10-11. 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, 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). The DNC has admitted that its original Complaint was based on acts taken by the RNC "under color of state law." (DNC Br. 28.) Yet, the injunctive relief entered by this Court in 1982 (and expanded in 1987) encompasses *all* anti-fraud activity of the RNC in *all* local, state, and national elections – including conduct that is "not in and of itself illegal." (DNC Ex. 59 at 66-67). *Frew* held that a consent decree must "come within the general scope of the case made by the pleadings." 540 U.S. at 437. Because the Consent Decree goes far beyond the DNC's "state action" pleadings to encompass *private* activity of the RNC touching upon the prevention of voter fraud, the Decree is void *ab initio* and should be vacated.

CONCLUSION

For the foregoing reasons, the RNC urges this Court to vacate the Consent Decree.

Alternatively, the RNC urges modification of the Decree to: (1) exclude enforcement by non-party intervenors – a result the DNC endorses; (2) eliminate the pre-clearance requirement; (3) re-define the term "normal poll watch functions" to include poll watching and ballot security programs that comply with state and federal law; and (4) re-define the term "ballot security

program" to exclude mere discussions between the RNC and state and local party committees about those "ballot security" plans.

Respectfully submitted,

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