IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-4615

DEMOCRATIC NATIONAL COMMITTEE, *et al.*
Plaintiffs – Appellees,

v.

REPUBLICAN NATIONAL COMMITTEE, *et al*.
Defendants – Appellants.

On Appeal From the United States District Court
For the District of New Jersey

REPUBLICAN NATIONAL COMMITTEE'S PETITION FOR REHEARING EN BANC

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PETITION FOR REHEARING *EN BANC*

Contrary to *United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950), the panel's decision, like the district court judgment it affirmed, improperly relied on rulings previously vacated as moot by this Court sitting *en banc*. Further, by upholding the district court's unilateral expansions of two consent decrees, the panel acted contrary to precedent that a court must "not strain the decree's precise terms or impose other terms in an attempt to reconcile the decree with [the court's] own conception of its purpose." *Harris v. City of Philadelphia*, 137 F.3d 209, 212 (3d Cir. 1998). Finally, the panel's holding that the Republican National Committee ("RNC") had waived its First Amendment objections to the district court's unilateral expansion of the decrees misinterpreted prior precedents requiring "clear and compelling" circumstances to support waiver of a "known" right. *See, e.g.*, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967). For these reasons, the RNC requests *en banc* review. A copy of the panel's decision (hereafter "Op."), 2012 WL 744683, is attached.

Required Statement Under Fed. R. App. P. 35(b)(1)

I express a belief, based on a reasoned and studied professional judgment, that the decision of the panel is inconsistent with precedential decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full Court is necessary to secure and

maintain uniformity of decisions in this Court, *i.e.*, the panel decision is contrary: to *Munsingwear,* 340 U.S. at 39-40, with respect to the effect and scope of vacatur due to mootness; to *Harris*, 137 F.2d at 212, with respect to the district court's unilateral expansion of the decrees; and to such decisions as *Curtis Publ'g Co.*, 388 U.S. at 145, with respect to the "clear and compelling" circumstances necessary to show voluntary waiver of "known" First Amendment rights.

BACKGROUND

Thirty years ago, in 1982, following allegations by the DNC and New Jersey Democratic State Committee ("DSC") of minority voter suppression during the 1981 New Jersey gubernatorial election, the RNC and New Jersey Republican State Committee ("RSC") entered a consent decree with the DNC and DSC. Without admitting wrongdoing, the RNC and RSC agreed to certain provisions intended to prevent purposeful suppression of minority votes. Insofar as relevant here, the decree required the RNC and RSC to "comply with all applicable state and federal laws protecting the rights of duly qualified citizens to vote for the candidate(s) of their choice," and to refrain from

> undertaking any *ballot security activities* in polling places or election districts [1] 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 [2] *where a purpose or significant effect of such activities is to deter qualified voters from voting*; ***and*** [3] the conduct of such activities disproportionately in or directed toward districts that have a substantial

> proportion of racial or ethnic populations shall be considered *relevant evidence* of the existence of such a factor or purpose.

App. 0401-02 (1982 Decree ¶ 2(e)) (emphasis added).

In 1987, based on allegations arising out of the 1986 election for United States Senate in Louisiana, the RNC and DNC (but not the RSC and DSC) amended the consent decree, again with no admission of wrongdoing. The 1987 modification expressly recited that "the RNC and DNC recognize the importance of preventing and remedying vote fraud where it exits." App. 0404 (1987 Decree Modification). The 1987 Decree stated that "the RNC may deploy persons on election day to perform normal poll watch functions," but for all other "ballot security efforts" required the RNC to seek preclearance from the court "following 20 days notice to the DNC." App. 0405 (1987 Decree Modification ¶¶ B-C).

The DNC unsuccessfully alleged violations of the Decree on the eves of the 2002 and 2008 elections. In another challenge arising out of the 1990 Senate race in North Carolina, Judge Debevoise found the DNC "has failed to establish that the [RNC] conducted, participated in, or assisted ballot security activities in North Carolina," and thus denied any relief. App. 0408 (D. Ct. Order ¶ 1). Nevertheless, he ruled that the RNC violated the decrees by failing to inform the North Carolina state party about the consent decrees, even though neither decree contained such a requirement. *Id.*

Also, the day before the 2004 election, Ohio resident Ebony Malone obtained a preliminary injunction based on an alleged violation of the decree by the RNC. Although a panel of this Court denied the RNC's request for a stay late on election eve, on election day this Court granted the RNC's petition for *en banc* rehearing, and "ORDERED that . . . *the opinion and order of this Court dated November 1, 2004, is vacated* and the November 1, 2004 order of Judge Debevoise is hereby stayed." App. 0513 (En Banc Op.) (emphasis added). That same day Ms. Malone sought a stay of the *en banc* order from Circuit Justice Souter, but because "she has already voted without challenge" he denied her petition. App. 0514 (J. Souter Order). On December 20, 2004, this Court acting *en banc* noted that Ms. Malone "voted in the November 2, 2004 election without challenge," dismissed the RNC's appeal as moot, and ruled "*the November 1, 2004 Order of the District Court is vacated. United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)." App. 0517-18 (emphasis added). Subsequently, Ms. Malone, the DNC, and the RNC entered a Joint Stipulation of Dismissal "[i]n accordance with . . . (3) the decision of the United States Supreme Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)." Judge Debevoise entered that stipulation on February 3, 2005. (Jt. Stip. of Dism'l, Feb. 3, 2005, No. 81-3876 (D.N.J. Dkt. Entry 37).)

In 2008, after another unsuccessful election eve accusation that the RNC had violated the decree, this time in New Mexico, the RNC concluded that the then-26

year old decree had become antiquated and was being used increasingly as a political weapon to distract the RNC's senior management at the most critical time before elections. Accordingly, on November 3, 2008, the RNC moved to vacate or modify the decree. The district court held a two-day evidentiary hearing on May 5-6, 2009. On December 1, 2009, the district court refused to vacate the consent decree but modified it in several respects. The modifications included addition of a termination provision eight years from the date of the court's order (December 1, 2017), with the prospect of further extensions if the DNC could prove a violation of the decree; clarification that only the DNC and DSC may enforce the decree; reduction of the preclearance notice period for ballot security programs to 10 days notice simultaneously to the DNC and the court; and, most important for present purposes, expansion of the decree to forbid, unless the RNC obtained preclearance, any and all efforts by the RNC to detect, prevent, or report voting fraud, even if fraud is observed during the course of "normal poll watching activities." App. 0044-45 (D. Ct. Op. at *41-42).

On appeal, the panel (Greenway, J., joined by Sloviter and Stapleton, J.J.) affirmed. The panel relied heavily on the vacated 2004 *Malone* rulings, and thereby misinterpreted and misapplied the rule of *Munsingwear*. Further, the panel affirmed the district court's unilateral expansion of the consent decrees in 1990 and 2009, and notwithstanding these expansions held that the RNC had *voluntarily*

waived its objections by agreeing to the decrees in the first place. For these reasons, the RNC urges that *en banc* review is appropriate and necessary.

REASONS FOR GRANTING THIS PETITION

As certified above (pp. 1-2), the panel decision conflicts with the rules of *Munsingwear*, *Harris*, and *Curtis Publ'g Co.* It also involves questions of exceptional importance to the ability of the RNC to participate fully and lawfully in election day poll watching activities. *See* Fed. R. App. P. 35(b)(1).

I. IN CONTRAVENTION OF *MUNSINGWEAR*, THE PANEL RELIED ON THE VACATED *MALONE* DECISIONS AS CRITICAL SUPPORT FOR UPHOLDING THE DECREES.

When this Court, sitting *en banc*, dismissed the RNC's 2004 appeal in Malone as "*moot*," and ruled that "the November 1, 2004, Order of the District Court is *vacated*," the Court expressly cited *Munsingwear* in its order. Subsequently, Ms. Malone, the DNC, and the RNC stipulated to dismissal of the district court case, and Judge Debevoise entered the dismissal, again "[i]n accordance with" *Munsingwear*. Notwithstanding these clear rulings, both Judge Debevoise and the panel relied heavily on the legal conclusions and factual findings in the *Malone* case.

A. The District Court and the Panel Placed Material Reliance on *Malone*.

The panel's decision plainly shows the importance it placed on the *Malone* decision. Rejecting the RNC's argument that its decades-long history of

compliance supported *vacatur* of the decrees, the panel stated: "The District Court did not abuse its discretion or err by considering the *Malone* finding that, in 2004, the RNC engaged in substantive and procedural violations of the decree." Op. at *56. Further, "the Court did not err in referring to and *relying upon its factual finding* of a 2004 violation in the Malone proceeding." *Id.* at *57 n. 27 (emphasis added). And "the District Court merely *considered its finding of fact* [in *Malone*] regarding the Decree violation as instructive regarding the RNC's level of compliance with the Decree." *Id.* at *56 (emphasis added).

Judge Debevoise's decision did far more than merely improperly "consider" his findings of fact in *Malone*; rather, his decision relied heavily upon the *Malone* ruling:[1] "the substantive merits of the Court's ruling [in *Malone*] have never been refuted, and its factual determination that the RNC engaged in conduct prohibited by the Consent Order remains undisturbed." App. 0013 (D. Ct. Op. at *6). Judge Debevoise spent nearly two pages reciting the vacated findings, *see* App. 0012-0013 (D. Ct. Op. at *4-6), and held that "the RNC was found as recently as five years ago in the *Malone* matter to have violated the Consent Decree." App. 0022, 27 (D. Ct. Op. at *16, 22).

[1] At the outset of the evidentiary hearing, Judge Debevoise instructed the parties not to "relitigate" *Malone*. App. 0068 (1 Tr. 3:13-14). The RNC reasonably understood this instruction as consistent with the prior dismissals pursuant to *Munsingwear*.

Reliance by the district court and the panel on the vacated *Malone* decision was not a harmless legal error; it was fundamental to the result. The DNC's only other evidence of the continuing need for the decrees was the testimony of Dr. Chandler Davidson, the "leading expert in the country on voter suppression." App. 0195, 0229 (1 Tr. 155:4-61, 2 Tr. 16:7-10). Although recounting numerous allegations of voter suppression going back almost 60 years (including an alleged incident involving William H. Rehnquist in Arizona, *see* App. 0198-99 (2 Tr. 158-159:5), Dr. Davidson could name only two incidents of alleged voter suppression involving the RNC: the ones in 1981 and 1986 on which the consent decrees are based. As the district court recounted:

> of the fourteen incidents of voter intimidation discussed in [Dr. Davidson's] book, the RNC was involved in only two: the program in Newark, New Jersey that led to the enactment of the Consent Decree in 1982 and the initiative in Louisiana that resulted in its 1987 modification . . . . In fact, the entirety of his book was based on press accounts.

App. 0018-19 (D. Ct. Op. at *12). Thus, without the *Malone* accusations, the evidence shows consistent compliance by the RNC with the consent decrees for well over 20 years. Because this Court has listed as considerations in determining whether to continue an injunction "the length of time since entry of the injunction" and "whether the party subject to its terms has complied or attempted to comply in

good faith with the injunction," *Bldg. & Constr. Trades Council v. NLRB*, 64 F.3d 880, 888 (3d Cir. 1995) ("*BCTC"*), the panel's reliance on *Malone* was material.[2]

B. The Panel Misinterpreted *Munsingwear*.

Munsingwear states that "[t]he established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 39. "That procedure *clears the path for future relitigation* of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id.* at 40 (emphasis added). Especially in the *Malone* matter, which arose in the context of a *preliminary injunction* order and became *moot "by happenstance*" while the RNC's appeal was pending, the findings of Judge Debevoise cannot support the panel's decision.

The panel attempted to distinguish *Munsingwear* on the ground that the lower court considered only "its *factual finding* of a 2004 violation in the *Malone* proceeding." Op. at *57 n. 27 (emphasis added). To begin with, a judicial

[2] The panel asserted that even if the RNC had not violated the Consent Decree since 1987, such "temporary compliance" is not itself sufficient to constitute the "type" of changed circumstances that "warrant lifting an injunction." Op. at *58 (citing *BCTC*, 64 F.3d at 889). There has been no allegation—much less evidence— that the RNC has engaged in repeated "outrageous conduct" similar to that alleged in *BCTC*, in which the consent decree defendant had been subjected to "*four* consent contempt adjudications in seven years," *id.* at 889 (emphasis added). The more pertinent precedent is *SEC v. Warren*, 583 F.2d 115, 121-22 (3d Cir. 1978), which found vacatur proper after five years of compliance.

conclusion that a "violation" occurred is a mixed ruling of law and fact; it is not a simple finding of historical fact. More important, this Court interprets *Munsingwear* to mean that vacatur for mootness "wipe[s] the slate clean" of all judicial rulings whatsoever. *Randall v. Rumsfield*, 484 F.3d 236, 243 (3d Cir. 2007). Likewise, the Ninth Circuit has recently made clear that vacatur for mootness encompasses all past rulings, including the court's "judgment, injunction, opinions, orders, *and factual findings*." *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1168 (9th Cir. 2011) (emphasis added). The D.C. Circuit agrees: vacatur under *Munsingwear* drains "the court's underlying findings of fact of whatever vitality they might otherwise have had for *res judicata* purposes." *Aviation Enter.'s, Inc. v. Orr*, 716 F.2d 1403, 1407-08 (D.C. Cir. 1983). *See also United States v. Hernandez*, 216 F.3d 1088, 2000 WL 79332, at *4 (10th Cir. 2000) (unpublished decision) (vacatur transforms a decision into a "nullity with no precedential value," as though the case "was never filed.") The panel's misinterpretation of *Munsingwear* confuses the settled law in this Court and undermines its decision in this case.

II. BY AFFIRMING THE DISTRICT COURT'S UNILATERAL EXPANSIONS OF THE DECREES, THE PANEL MISINTERPRETED THIS COURT'S PRECEDENT GOVERNING CONSENT DECREES.

The original 1982 decree made clear that "the RNC and RSC have no present right of 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." App. 0402 (Decree ¶ 4). In its 1990 order, although recognizing that the DNC "failed to establish that the [RNC] conducted, participated in, or assisted ballot security activities in North Carolina," App. 0408 (D. Ct. Order ¶ 1), the district court nevertheless held that the RNC had violated a non-existent obligation, "by failing to include in ballot security instructional and informational materials guidance to state parties on unlawful practices under the consent decree or copies of such decree for their review," *id*. at ¶ 2.

More troubling, the district court's 2009 order expanded the decrees to prohibit the RNC from taking any steps, without judicial permission, to detect, prevent, or even report vote fraud. In the 1987 decree, the RNC and DNC expressly recognized "the importance of preventing and remedying vote fraud where it exists," and agreed that the RNC could engage in "normal poll watch functions," so long as the poll watchers did not "use or implement" the results of *other* ballot security efforts, for which preclearance was required. App. 0404-05 (1987 Decree Modification). In its 2009 order, the district court—again without the RNC's consent—redefined "normal poll-watch function" to *exclude* any efforts to detect or even report voter fraud. App. 0044-45 (D. Ct. Op. at *41-42). Specifically, the district court defined "normal poll-watch function" to "include stationing individuals at polling stations to observe the voting process and *report*

irregularities unrelated to voter fraud to duly-appointed state officials." App. 0004 ¶ 4 (emphasis added). The panel recognized that this amendment now requires the RNC to seek preclearance from Judge Debevoise for its poll watchers even *to report* individuals who vote multiple times. Op. at *47 n. 23. Needless to say, the RNC never agreed that judicial permission would be required for a lawful and well-behaved poll watcher who observes the same individual voting multiple times to report that fraud in real time to the polling station officials.[3]

This unilateral rewrite of the decree was contrary to this Court's precedent. The RNC has been clear that it has not agreed to the new terms imposed by the district court. *See* RNC Br., at 56-57 ("[I]t is not the agreed terms of the Decree, but the trial court's expansive interpretation since 1987, that has stifled communications about Election Day monitoring between the RNC and state parties. The RNC most emphatically did not agree to those interpretive restrictions"). In *Harris v. City of Philadelphia*, 137 F.3d 209 (3d Cir. 1998), this Court rejected the lower court's unilateral imposition of deadlines for completing a management information system mandated by an existing consent decree. The Court warned that the courts "must not strain the decree's precise terms or impose other terms in an attempt to reconcile the decree with our conception of its

[3] Although expressing skepticism at the scope of voter fraud, App. 0031-35 (D. Ct. Op. at *30-34), Judge Debevoise quoted statistics showing that, of provisional ballots cast in 2006, 3,147 were disqualified on the ground that the voter had already voted, and 30 on the ground that the voter was "deceased." App. at 0040 (D. Ct. Op. at *35).

purpose," 137 F.3d at 212, and "[a] court should not later modify the decree by interposing terms not agreed to by the parties or not included in the language of the decree." *Id*. As was true in *Harris*, the obligation to educate state parties about the decree and the prohibition of poll watchers' reporting of voter fraud to appropriate authorities "cannot be found anywhere within the four corners" of the 1982 or 1987 decrees. *Id.*

III. THE PANEL MISINTERPRETED PRECEDENTS GOVERNING KNOWING AND VOLUNTARY WAIVER OF CONSTITUTIONAL RIGHTS.

As shown (pp. 3, 11 above), the lower court's 1990 order imposed a duty on the RNC to communicate to state and local parties about the decree. This mandate that the RNC communicate about the decrees to state and local parties runs afoul of the prohibition on "forced speech." *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). Further, the RNC demonstrated that the decree was interfering with its ability to collaborate with state and local parties about critical election day activities. Both of these edicts run afoul of the First Amendment speech and associational rights of political parties recognized in decisions of the Supreme Court post-dating the decrees. *See, e.g.*, *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (Political party speech is "core First Amendment activity."); *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) ("[P]artisan political organizations enjoy

freedom of association protected by the First and Fourteenth Amendments."). The 2009 redefinition of "normal poll-watch functions" places a prior restraint on the RNC's ability to report voter fraud. *See New York Times v. United States*, 403 U.S. 713 (1971) (Pentagon Papers decision).

Although not disagreeing with the existence or gravity of these infringements, the panel ruled that the RNC had voluntarily relinquished the rights being infringed. Its ruling misinterpreted and misapplied precedents addressing voluntary relinquishments of First Amendment rights. In *Curtis Publ'g Co.*, 388 U.S. at 145, the Court required "clear and compelling" circumstances to show waiver of a "known" First Amendment right when the law between trial and appeal had changed. The district court's 1990 and 2009 expansions of the decree were hardly based, as the panel said, on "'clear' and 'compelling' evidence" of a waiver that was "voluntary, knowing, and intelligent." Op. at *24 n. 11 (citing numerous decisions); *see Erie Telecomm., Inc. v. City of Erie*, 853 F.2d 1084, 1094 (3d Cir. 1988). Even if the RNC had voluntarily accepted "certain" limits on its First Amendment freedoms in 1982 and 1987, Op. at *27-28, it did *not* accept the far more drastic limits unilaterally imposed in 1990 and 2009. Further, in view of the broad application of the First Amendment over the last thirty years to political party speech and association, the panel's ruling that the RNC knowingly and intelligently waived those rights is unfounded.

Thus, the panel's decision misinterprets prevailing precedents on waiver on two respects. First, it imposes a waiver on the RNC even though the RNC did not agree to the new provisions of the decree that are infringing its rights. Second, it presupposes a knowing and intelligent waiver of constitutional rights that were undeveloped at the time of the waiver.

CONCLUSION

Accordingly, for the reasons set forth above, the Republican National Committee urges this Court to grant its Petition for Rehearing *en banc*, and to set this matter for briefing and argument before the full court.

Respectfully submitted,

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Dated: March 22, 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Petition for Rehearing *en banc* was filed on March 22, 2012, using the Court's Electronic Case Filing system, which causes a Notice of Docket Activity to be sent by email to all registered attorneys participating in this case.

/s/ Bobby R. Burchfield
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March 22, 2012