UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No.04-4186

REPUBLICAN NATIONAL COMMITTEE,

Defendant-Appellant

v.

DEMOCRATIC NATIONAL COMMITTEE,

Plaintiff-Appellee

v.

EBONY MALONE,

Intervenor-Appellee

On Appeal from the
United States District Court
for the District of New Jersey
Civil Action No. 81-3876
Judge Dickinson R. Debevoise

EMERGENCY PETITION OF REPUBLICAN NATIONAL COMMITTEE FOR PANEL REHEARING OR REHEARING EN BANC FOR STAY PENDING APPEAL AND REQUEST FOR EXPEDITED CONSIDERATION

Late yesterday afternoon, the United States District Court for the District of New Jersey (Debevoise, J.), entered a preliminary injunction against the Republican National Committee ("RNC") that prevented it from challenging voters in Ohio using a list, compiled primarily from mail sent by the Ohio county Boards of Elections but returned as undeliverable, supplemented by undeliverable mailings sent by the Ohio Republican Party ("ORP") to newly-registered voters in

the five largest counties in Ohio. Around midnight, a panel of this Court (Judges Sloviter and Nygaard, with Judge Fisher dissenting), denied an application for emergency stay. The majority relied upon a decision earlier yesterday by the Southern District of Ohio enjoining the State of Ohio from allowing private challengers in polling places during today's election on the ground that the presence of challengers would disrupt the election and deny persons the right to vote. Early this morning, the United States Court of Appeals for the Sixth Circuit (Judges Ryan, Cole, and Rogers, with Judge Cole dissenting) stayed that decision, holding that there was no substantial likelihood of success on the merits; Judge Ryan added that plaintiffs lacked standing due to a failure to demonstrate non-speculative injury.

Because Judge Debevoise's decision and this Court's decision denying the stay were predicated on Judge Dlott's injunction order, the RNC hereby seeks panel rehearing and alternatively rehearing en banc of the order denying the stay, pursuant to F.R.A.P. 8(a)(2), 35 and 40 and 3d Circuit L.A.R. 8.1, 8.2, and 27.7, 35 and 40. In support of this petition, the RNC states as follows:

Overnight, the United States Court of Appeals for the Sixth Circuit stayed decisions of two district courts in that Circuit that enjoined private challenges to voting in Ohio polls that are permitted by state law. *See Summit County Dem. Central Comm., et al. v. Blackwell, et al.*, slip op., Nos. 04-4311, 04-3212 (6th Cir. Nov. 2, 2004) (attached hereto). In particular, the Sixth Circuit stayed the decision of Judge Susan Dlott of the United States District Court for the Southern District of Ohio, a decision relied upon by the District Court below in this case. This decision supports panel rehearing or rehearing en banc in this case for several reasons.

First, in language that demonstrates the erroneous nature of the decision below, the Sixth Circuit reasoned that the plaintiffs were *not* likely to prevail on the merits. Specifically, the court ruled that

> plaintiffs do not appear likely to succeed on the necessary primary finding that the presence of challengers burdens the right to vote. Challengers may only *initiate* an inquiry process by precinct judges . . . . *Longer lines may of course result* from delays and confusion when one side in a political controversy employs a statutorily prescribed polling place procedure more vigorously than in previous elections. *But such a possibility does not amount to the severe burden upon the right to vote that requires that the statutory authority for the procedure be declared unconstitutional. See* slip op. at 6 (emphasis added).

Second, and equally pertinent to this case, the Sixth Circuit concluded that the balance of equities weighed against the preliminary injunction because there "is a strong public interest in permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote." *Id.* at 6-7.

Third, the concurring opinion of Sixth Circuit Judge Ryan observed that plaintiffs' asserted injury – namely, the prospect of long lines and delays at the polling place – was "wholly speculative, conjectural, and hypothetical," and thus did not satisfy the bedrock requirement of standing. *Id.* at 1-2 (concurring op. of Ryan, J.). The purported injury to Intervenor Ebony Malone, below, is equally speculative. Indeed, it is for this very reason that Judge Fisher dissented from the panel decision in this case.

Finally, the District Court below erred as a matter of law because an existing consent decree may not be enforced by injunctive relief. For that independent reason, Intervenor Malone cannot prevail on the merits. *See Reynolds v. Roberts*, 207 F.3d 1288, 1300 (11th Cir. 2000). The panel overlooked this dispositive legal defense. We also refer the Court to our original moving papers for an extended discussion of why Intervenor Malone is not likely to prevail on the merits.

Counsel certifies pursuant to LARS 35 that in our reasoned judgment, the panel decision conflicts with decisions of the United States Supreme Court and involves a question of exceptional national importance. *See Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971).

CONCLUSION

For the foregoing reasons, this Court should stay the District Court's preliminary injunction pending appeal.

November 2, 2004

Respectfully submitted,

Bobby R. Burchfield
John G. Horan
M. Miller Baker
Jason A. Levine
Richard W. Smith
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 756-8000
Facsimile: (202) 756-8087

EXHIBITS

A *Summit County Dem. Central Comm., et al. v. Blackwell, et al.*, slip op., Nos. 04-4311, 04-3212 (6th Cir. Nov. 2, 2004)
B Panel Opinion
C RNC Emergency Motion for Stay

CERTIFICATE OF SERVICE

I certify that I served a copy of this brief by e-mail to opposing counsel at the time of filing as follows:

ButlerT@howrey.com
NieldsJ@howrey.com
genovaang@aol.com

Michael S. Nadel
McDermott Will & Emery LLP

EXHIBIT A

RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 04-4311, 04-4312

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Summit County Democratic Central and Executive Committee, et al.,	)	
Plaintiffs-Appellees,	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
J. Kenneth Blackwell, et al.,	)	
Defendants,	)	
and	)	
Matthew Heider, Sam Ewing, Elizabeth Coombe, and David Timms,	)	
Defendants-Intervenors-Appellants.	)	
Marian Spencer, et al.,	)	
Plaintiffs-Appellees,	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
J. Kenneth Blackwell, et al.,	)	
Defendants,	)	
and	)	
Clara Pugh, Sam Walton, Charles Winburn,	)	
Defendants-Intervenors-Appellants.	)	

Before: Ryan, Cole, and Rogers, Circuit Judges.

Rogers, Circuit Judge. The appeals in these cases have been consolidated. Both appeals involve Ohio Revised Code § 3505.20, which provides that "Any person offering to vote may be challenged at the polling place by any challenger, any elector then lawfully in the polling place, or by any judge or clerk of elections." Ohio Rev. Code Ann. § 3505.20 (Anderson 2004). The challengers referred to in § 3505.20 are provided for in § 3505.21, which provides:

> At any primary, special, or general election, any political party supporting candidates to be voted upon at such election and any group of five or more candidates may appoint to any of the polling places in the county or city one person, a qualified elector, who shall serve as challenger for such party or such candidates during the casting of the ballots, and one person, a qualified elector, who shall serve as witness during the counting of the ballots; provided that one such person may be appointed to serve as both challenger and witness.

Ohio Rev. Code Ann. § 3505.21 (Anderson 2004).

The first appeal, *Summit County Democratic Central and Executive Committee v. Blackwell*, # 04-4311, is an appeal from an order entered on October 31, 2004, by the Honorable John R. Adams of the United States District Court for the Northern District of Ohio, which granted a motion for a temporary restraining order, ordering that "persons appointed as challengers may not be present at the polling place for the sole purpose of challenging the qualifications of other voters" on November 2, 2004, the date of the Ohio general election. In that case, plaintiffs, the Summit County Democratic Central and Executive Committee and others, had filed a complaint on October 28, 2004, against J. Kenneth Blackwell, the Secretary of State of Ohio, members of the Summit County Board of Elections, unknown "challengers," and other unknown government officials pursuant to 42

U.S.C. § 1983. The complaint sought an order "prohibiting Defendants, while acting under color of state law, from depriving citizens of Ohio of their constitutional rights to due process and equal protection, through the application or enforcement of the so-called "challenge" procedures set forth in Ohio Rev. Code § 3505.20 . . . in the Ohio general election for local, state, and national offices on November 2, 2004, and thereafter." On October 31, 2004, the district court granted a motion to intervene filed by Matthew Heider, Sam Ewing, Elizabeth Coombe, and David Timms, challengers from the Ohio counties of Allen, Franklin, Summit, and Warren. The district court also granted a motion to intervene filed by the State of Ohio. On November 1, 2004, Defendants-Intervenors-Appellants Matthew Heider, Sam Ewing, Elizabeth Coombe, and David Timms filed a motion in this Court for an emergency stay of the district court's order, and also filed a notice of appeal.

The second appeal, *Spencer v. Blackwell*, No. 04-4312, is an appeal from an order entered on November 1, 2004, by the Honorable Susan J. Dlott of the United States District Court for the Southern District of Ohio, which granted a motion for injunctive relief, enjoining "all Defendants from allowing any challengers other than election judges and other electors into the polling places throughout the state of Ohio on Election Day." In that case, plaintiffs Marian and Donald Spencer had filed a complaint on October 27, 2004, against J. Kenneth Blackwell, the Secretary of State of Ohio, the Hamilton County Board of Elections, and the chair and members of that Board pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1973(a). The Amended Complaint in that action, filed on October 29, 2004, alleged that "African American voters . . . will face an imposing array of 'challengers' deployed to their precincts on Election Day. African American voters will be intimidated; racial

tension will rise and African American voters will be blocked from exercising their right to vote." The district court found that

> "[t]he evidence before the Court shows that in Tuesday's election, the polling places will be crowded with a bewildering array of participants—people attempting to vote, challengers (Republican, Democrat, and issue proponents or opponents), and precinct judges. In the absence of any statutory guidance whatsoever governing the procedures and limitations for challenging voters by challengers, and the questionable enforceability of the State's and County's policies regarding good faith challenges and ejection of disruptive challengers from the polls, there exists an enormous risk of chaos, delay, intimidation, and pandemonium inside the polls and in the lines out the door."

On November 1, 2004, Defendants-Intevenors-Appellants Clara Pugh, Sam Malone, and Charles Winburn filed a motion for an emergency stay of the district court's order, and filed a notice of appeal.

There is a significant question as to plaintiffs' standing. As the Supreme Court has held on many occasions, "the irreducible constitutional minimum of standing contains three elements," injury in fact, causation, and the likelihood that the injury will be redressed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing in this case is a difficult issue, considering the nature of the alleged injuries. However, I assume without deciding that the plaintiffs have standing,

given the short time in which we have to consider this issue, and the nonspeculative possibility that at least some actual injury will occur, in the form of greater delay and inconvenience in voting. To the extent that the lower court relied on additional "injury," such injury is speculative.

The next question is whether this court should grant Defendants-Intervenors-Appellants' motion for an emergency stay. The factors to be considered in determining whether an order should be stayed are the same factors considered in determining whether to issue a temporary restraining order of a preliminary injunction. *See Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrag*, 945 F.2d 150, 153(6th Cir. 1991). These factors are "(1) whether the movant has a 'strong' likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction." *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000).

Although it is possible that the plaintiffs will succeed on the merits, it is not likely. Neither district court relied upon racial discrimination as a basis for finding a likelihood of success on the merits. Instead, the courts below found a likelihood that the right to vote would be unconstitutionally burdened by having challengers present at the polling place, and that the presence of such challengers was not a sufficiently narrowly tailored way to accomplish legitimate government interests. Of course if we assume that the presence of challengers burdens the right to vote, it may certainly be argued that a more narrowly tailored approach is available. But the plaintiffs do not appear likely to succeed on the necessary primary finding that the presence of

challengers burdens the right to vote. Challengers may only *initiate* an inquiry process by precinct judges, judges who are of the majority party of the precinct. The lower court orders do not rely on the likelihood of success of plaintiffs' challenges to the procedure that will be used by precinct judges once a challenge has been made. Longer lines may of course result from delays and confusion when one side in a political controversy employs a statutorily prescribed polling place procedure more vigorously than in previous elections. But such a possibility does not amount to the severe burden upon the right to vote that requires that the statutory authority for the procedure be declared unconstitutional.

The balance of harms in this case is close. If plaintiffs are correct in their view of the law, assuming they have standing because of the likelihood of significant delay, they will suffer irreparable harm. On the other hand, if the plaintiffs are not correct in their view of the law, the State will be irreparably injured in its ability to execute valid laws, which are presumed constitutional, for keeping ineligible voters from voting. In particular, the State's interest in not having its voting processes interfered with, assuming that such processes are legal and constitutional, is great. It is particularly harmful to such interests to have the rules changed at the last minute.

On balance, the public interest weighs against the granting of the preliminary injunction. There is a strong public interest in allowing every registered voter to vote freely. There is also a strong public interest in permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote. Finally, there is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the hours immediately

preceding the election.

The above reasons support the GRANT of Defendants-Intervenors-Appellants' motions for emergency stays pending appeal.

Nos. 04-4311/4312
Summit County v. Blackwell

RYAN, Circuit Judge, concurring. I join Judge Rogers in granting the motion to expedite the appeal, consolidating the captioned cases, and staying the orders of the district court in each of the cases, which declared Ohio Rev. Code Ann. § 3505.20 unconstitutional and directed that persons appointed as challengers may not be present at the polling places in Ohio for the purpose of challenging the qualifications of voters. I do so, however, solely for the reason that, in my judgment, the plaintiffs have not shown the requisite standing to warrant the injunctive relief granted them by the district courts. By that, I mean that the plaintiffs have failed to demonstrate that they have suffered any "injury in fact" that is "actual or imminent, not conjectural or hypothetical." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000).

The plaintiffs have pleaded and the district courts have found a possible chamber of horrors in voting places throughout the state of Ohio based on no evidence whatsoever, save unsubstantiated predictions and speculation. The statute allowing for the presence of challengers at the polling place has been on the books for decades. In neither of the cases before us have the plaintiffs shown that the intimidation, chaos, confusion, "pandemonium," and inordinate delay they allege will occur tomorrow is "actual or imminent [and] not conjectural or hypothetical." Id.

The statute authorizing the presence of challengers at the polling places is presumed to be constitutional. The plaintiffs have offered no evidence that the injury they allege will occur tomorrow, has ever occurred before in an Ohio election or that there has been any threat by the defendants or anyone else that such injury will occur. The "injury" the district courts found that the plaintiffs will suffer tomorrow is wholly speculative, conjectural, and hypothetical.

Quite aside from the presumption of the constitutionality of the statute authorizing the

presence of the challengers at the polling places, the people of the State of Ohio are entitled to anticipate that tomorrow's election will be conducted in a lawful, orderly, and suitably expeditious fashion, to preserve every elector's right to vote. Should the inordinate delay and related horrors the plaintiffs posit become a reality tomorrow, the federal courts will be open to respond to proof-supported allegations of an unconstitutional burden on Ohio citizens' right to vote.

I agree that the temporary restraining orders issued by the district courts must be stayed.

R. GUY COLE, JR., Circuit Judge, dissenting.

We have before us today a matter of historic proportions. In this appeal, partisan challengers, for the first time since the civil rights era, seek to target precincts that have a majority African-American population, and without any legal standards or restrictions, challenge the voter qualifications of people as they stand waiting to exercise their fundamental right to vote.

When the fundamental right to vote without intimidation or undue burden is pitted against the rights of those seeking to prevent voter fraud, we must err on the side of those exercising the franchise. In this case, we need not go so far as to balance these interests in a vacuum, however, because here, the rights of those seeking to prevent voter fraud are already well protected by the election protocols established by the state: at each polling place, there are election officials, election judges, and ordinary voters who can challenge potential voter fraud.

The movant in this case bears the burden to show why this Court should reverse the well-reasoned decisions by two district court judges, appointed by a Democrat and Republican President respectively. Each judge independently came to the conclusion that a Temporary Restraining Order ("TRO") against the Challengers was constitutionally required. The Republican Ohio Secretary of State, J. Kenneth Blackwell, has publicly stated that he wants all Challengers banned from the polls on election day. *Spencer v. Blackwell*, No. C-1-04-738, at 6 (S.D. Ohio Order of Oct. 27, 2004). Now, this Court steps in to overturn the district court, permitting Challengers to go to any polls they wish to target tomorrow. As troubling as the public policy ramifications from this decision are, the legal implications are equally astonishing.

Judge Ryan's concurrence asserts that plaintiffs lacked standing at the outset of this case. In a case where no voter can know that it is he or she who will be injured, such a specific showing is not necessary for standing. *Sandusky County Democratic Party v. Blackwell*, Nos. 04-4265, 04-

4266, 2004 WL 2384445, at *6 (6th Cir. Oct. 26, 2004). All that is needed is a showing that an injury is likely to occur to *some* group of voters. This potential injury, necessary for the purposes of standing, as well as for the merits of this case, was shown at the district court level.

The factors which this Court must consider in deciding whether to grant a preliminary injunction have all been met in this case. First, in addressing the chaos and intimidation that will flow from the presence of the partisan Challengers, Judge Rogers states that it is "questionable at best that such a possibility 'burdens' the right to vote." Op. of Rogers, J., at 6. However, such a conclusion simply ignores the applicable standard of review. It is well settled that an appellate court reviews a trial court's issuance of a TRO, preliminary injunction, or a stay of such injunctive relief pending appeal, for an abuse of discretion. *Socialist Workers Party v. Att'y Gen. of the United States*, 419 U.S. 1314, 1315 (1974) (noting that appellate review for "either a stay or the reversal of a preliminary injunction" is for an abuse of discretion); *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross and Blue Shield Assoc.*, 110 F.3d 318, 322 (6th Cir. 1997) ("This court reviews a challenge to the grant or denial of a preliminary injunction under an abuse of discretion standard and accords great deference to the decision of the district court."); *Haman v. J.C. Penney Co., Inc.*, Nos. 89-5329, 89-5458, 1990 WL 82720, at *6 (6th Cir. July 19, 1990) ("The standard of review that we must apply in reviewing such a stay order is one of abuse of discretion."); WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE § 2904 (2d ed. 2004) ("An application [for a stay of injunction pending appeal] necessarily goes to the discretion of the court."); *see also Seven-Up Co. v. O-So Grape Co.*, 179 F. Supp. 167, 172 (N.D. Ill. 1959) ("And judicial precedent is legion which suggest that the likelihood of successfully urging an abuse of discretion in an appellate court is comparable to the

chance which an ice cube would have of retaining its obese proportions while floating in a pot of boiling water.").

Here, two separate district courts each heard testimony and reviewed evidence to support explicit factual findings that such a procedure may lead to suppression, intimidation, and chaos at the polls. *See Spencer v. Blackwell*, No. C-1-04-738, at 3-4, 7-8, 12-16 (S.D. Ohio Order of Oct. 27, 2004) (citing statements of election officials and other state officials, testimony of challengers evincing incomplete or confused understanding of proper Ohio election procedures, relevant statistics as to the racial population of the relevant Ohio counties, the lack of guidelines or directions regarding how to deal with challenges, and finding that all this will likely lead to voter intimidation); *Summit County Democratic Cent. and Exec. Comm. v. Blackwell*, No. 5:04CV2165, at 7, 9-14 (N.D. Ohio Order of October 31, 2004) (reaching similar conclusions). Nonetheless, without the benefit of reviewing any of this testimony or evidence, the lead opinion would reverse the decisions of two trial courts on the grounds that evidence establishes only a "questionable" burden. But our standard of review clearly indicates that in cases where the evidence is "questionable," we will defer to the reasoned discretion of the district court.

The burden on the right to vote is evident. In this case, we anticipate the arrival of hundreds of Republican lawyers to challenge voter registrations at the polls. Behind them will be hundreds of Democrat lawyers to challenge these Challengers' challenges. This is a recipe for confusion and chaos. Further, although the district courts did not render their decisions on Equal Protection grounds, Plaintiffs' evidence on this point is relevant to show the harm that will naturally ensue from the presence of the partisan Challengers. Numerous studies have documented the dramatic effect of

poll watchers on African-American voters. *See, e.g.,* Complaint, *Spencer v. Blackwell*, No. C-1-04-738, at 9-10 (S.D. Ohio).[1] These studies are strong evidence of both an effect and a burden on the voting rights of *all* voters. "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, *any alleged infringement*

[1]For example, the Complaint notes:

> A study published in the 1981 Civil Rights Research Review, reported that in almost half the counties in Georgia, poll watchers intimidated or discriminated against prospective African American voters. A November 11, 1993 report by Associated Press reporter Jim Abrams quoted an anonymous Justice Department Official about post-1988 developments in Los Angeles: "All of these moves are called ballot security moves, moves by plain citizens to keep illegal voters from the polls, but none targeted illegal voters. They all targeted minority voters and specifically threatened them with some dire consequence[s] if there are problems with voter records."
>
> In a 1996 study, David Burnham reported that The Republican National Committee and the New Jersey Republican State Committee engaged in a "concerted effort to threaten and harass black and Hispanic voters" via a "ballot security" effort.

of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (emphasis added).

The Supreme Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992), is also instructive. In that case, the Supreme Court found that allowing vote solicitation near the polls would cause voter intimidation. *Id.* at 206. This case is similar. In fact, in this case, voter intimidation is likely to be even greater because the partisan operatives at the polls will be challenging the right to vote itself, rather than merely campaigning for a particular candidate or issue. There is no question that this poses a burden.

Second, the balance of harms is not at all close in this case. The magnitude of burden imposed on voters is great. Although the State of Ohio does have a compelling interest in preventing voter fraud, that interest is served by election officials, election judges, and other voters lawfully at the polling place. Ohio Rev. Code § 3505.20. The statute providing for additional Challengers at the poll is not narrowly tailored to serve this interest, and is not the least restrictive means for doing so. The harm caused by the chaos and uncertainty imposed by hundreds of additional Challengers at the poll far outweighs any minor decrease in voter fraud as a result of the Challengers' presence. The election judges and other voters perform the same function as these Challengers. The potential harm to the defendants is protected by the political officials at the polls. The potential harm to the plaintiffs, in contrast, is not addressed. The balance of harms, therefore, weighs strongly in favor of denying the motion to stay.

Third, the public interest weighs in favor of allowing registered voters to vote freely. The freedom to vote is best served by allowing election officials, election judges, and citizens to protect

against voter fraud. Permitting hundreds of election Challengers to challenge voters at particular polls will promote chaos and uncertainty; it will divert the attention of election judges; and most importantly, it will create a level of voter frustration that could deter citizens from exercising their constitutional right to vote. There is no great justification for this infringement since the interests of the Challengers will be served by other parties. Election Judges represent both parties, with no one party having more than 50% of the judges. Ohio Rev. Code § 3501.22. This requirement alleviates any fear that the appellants have in this case. There is no reason to believe that these election judges, many of whom are members of the same party that insists on sending more lawyers to the polls, will fail to detect voter fraud, especially when it is their job to do so.

The majority indicates that the procedures for partisan political operatives to challenge an Ohio citizen's right to vote will not result in voter suppression, intimidation, or chaos at the polls. I deeply and sincerely hope they are right.

However, as voting is the very foundation of this Republic, our Constitution requires more than mere hope. Rather, the citizens of Ohio have the right to vote without the threat of suppression, intimidation, or chaos sown by partisan political operatives. I therefore dissent.

EXHIBIT B

UNITED STATES COURT FOR THE THIRD CIRCUIT

No. 04-4186

Democratic National Committee, et al.

v.

Republican National Committee, et al.

Ebony Malone, Intervenor

Republican National Committee, Appellant

On Appeal from the United States District Court for the District of New Jersey
(D NJ Civil No. 81-cv-3876)
District Judge: Honorable Dickinson R. Debevoise

Submitted on Motion for Stay Pending Appeal

BEFORE: SLOVITER, NYGAARD, AND FISHER, Circuit Judges

(Filed November 1, 2004)

Sloviter, J.,

This matter is before us on the emergency motion of Republican National Committee(RNC) for Stay pending Appeal and for expedited Consideration.

It appeals from the Order of the District Court, Judge Dickinson R. Debevoise of the

District of New Jersey, entered late this afternoon following a hearing today, which enjoined the RNC and its "agents, officers, and employees," "from using for challenging purposes on November 2, 2004 a list originally of 35,000 names prepared for that purpose by the Republican Party in the State of Ohio," and further providing that the RNC "shall instruct its challengers in the State of Ohio not to use such list or any part thereof for challenging purposes at the November 2, 2004, election."

The RNC claims that the Intervenor Ebony Malone, who initiated this matter before the District Court, is subject to challenge because of irregularities in her registration "which will cause Board of Election officials to challenge her registration, regardless whether the RNC or the Ohio Republican Party (ORP) makes such a challenge." The Motion states that Malone's claim is non-justiciable because the relief provides her no effective redress in that the County Board of Elections can officially challenge Malone's vote by operation of Ohio law because official correspondence to her was returned "undeliverable." The RNC further argues that it has not violated the Consent Decrees which are the basis for this action.

In 1981 the Democratic National Committee filed suit against the RNC and the New Jersey Republican State Committee alleging that they violated the Fourteenth and Fifteenth Amendments, inter alia, which was resolved by a consent decree entered into in 1982 which provided that the RNC will refrain from undertaking any ballot security activities in polling places or elections 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 i[s] 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.

The scenario set forth above was repeated in 1986 when the DNC brought a new action alleging RNC's breach of the 1982 Consent Decree and once again this action was settled by a new Consent Decree entered in 1987. The RNC states that the 1982 Consent Order remains in full force and effect, but the 1987 Consent Decree allows the RNC to deploy persons on election day to perform normal poll watch functions so long as such persons do not use or implement the results of any other ballot security effort. In the motion before us, the RNC emphasizes that the 1987 Consent Order restricts the RNC, but not any state party, from participating in any ballot security program unless it had been determined by the court to comply with the provisions of the Consent Order and applicable law.

Malone and other proposed intervenors brought suit against the RNC alleging they are newly registered minority voters in Ohio who learned that their names are on a 35,000 person list of challenged voters, which she claims appears to have been compiled and used in violation of the Consent Decrees referred to above. They claimed that the fact that their names are on the challenge list places in jeopardy their right to vote on election

day. The District Court scheduled an evidentiary hearing for this morning, November 1, 2004. Although the Democratic National Committee does not appear on Malone's original motion, it appeared at this morning's hearing and in support of Malone.

Following the hearing, the District Court entered an order rejecting the RNC's claim that Malone's claims are not justiciable, stating:

> The RNC contends that nothing is going to alter the fact that intervenor will be challenged come Election Day. Because she is flagged, the board workers will challenge her, and she will have to proceed to the same procedure that would follow the challenge of a challenger, that is the taking a seat and completing the 10U form. Her right to vote is no way impaired. This is a question of whether the simple existence of a flag requires a voter to go through the 10U procedure, or whether she answers the board member that she resides at the present district, she resides at the precinct, she'll be allowed to vote that morning.
>
> The more serious injury the intervenor would suffer [is] from the multiple challenges, the disruption of the voting process, from which she, [like] the rest of the voters, would suffer.
>
> There is a causal relationship between this disruption, and the challenged conduct, and the Court has a means to prevent it. This potential disruption was the basis of today's decision in Spencer v. Blackwell[1],[and the intervenor] therefore has standing.

The District Court then proceeded to summarize its findings, stating:

> I conclude that the RNC has violated the consent decree. It engaged in a valid security effort as described above, even though the Ohio Democratic Committee was out front in the implementation of the challenging program, as described above from at least the time of the RNC, August 10th, 2004 letter until recent days the RNC participated with the Ohio Republican Committee in the devising and implementation of the program.

Procedurally, the RNC is in clear violation inasmuch as it failed to obtain the vast determination that the ballot security program complies with the provisions of the consent decree. Further, the program violates the substantive provisions of the decree. It undertook valid security activities in polling places or election districts where the racial composition in such districts 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 vote. The RNC's original mailing in the Ohio State Committee's September 9th mailing were directed to the counties having the State's major cities and largest concentration of minority voters. There is a large portion of transient voters moving, like intervenor, from apartment to apartment.

The RNC's organization of names on the first list by zip code had knowledge of the significance of the areas in which the voters lived. In fact, the evidence shows were returned to precincts. They were predominantly minorities from predominantly white precincts.

This makes it fare more likely that the disruptive effects of the mass challenging the Republican party imposed to undertake would take effect in precincts where minority voters predominate, interfering with and discouraging voters from voting in those districts.

Having reached this conclusion that the RNC has violated the consent decree procedurally and subsequently, it is propose [d] to grant the relief the intervenor seeks, and enjoining the RNC from using the list, which it assembled in Ohio from challenging voters and to order the RNC to direct challenges not to use that list or any portion of it to challenge voters in the poles during the November election.

Intervenor is faced with irreparable harm and that her constitutional right to vote is threatened. Intervenor shows success on the merits. The relief entered does not prevent the RNC or public authorities from pursuing voter fraud by other means. The return of mail does not implicate fraud. There could be many reasons for that to happen, the RNC's study of the returns from its August 10th mailing showed a relatively small number of returns which it found suspicious and only ten that were going to be highly suspicious.

The public interest is always served by encouraging people to vote,

and to prevent violations of a party's constitutional right to vote.

The RNC concedes that we must review the decision of the District Court for abuse of discretion. After consideration of the record that was before the District Court we believe there is ample support for the factual findings of the District Court. For example, the emails between the RNC and Michael Magan for the Ohio Republican Party, Exhibit 1, show collaboration and cooperation between the RNC and the ORP. Were time not of the essence, we would set forth more evidence in the record, but this opinion is drafted with less than eight hours before the opening of the polls in Ohio. Moreover, we feel obliged to note that this opinion falls far short of the quality of opinions for which this court is noted. Nonetheless, we are satisfied that the District Court did not commit an error of law or abuse its discretion. Accordingly, the RNC's motion for a stay pending appeal is denied.

Fisher, J., dissenting.

I dissent and would grant the Republican National Committee's ("RNC") motion for a stay pending appeal because I believe that Intervenor Ebony Malone lacks standing to bring her claims.

We have summarized the constitutional standing requirements as follows:

> (1) the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be

> likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Storino v. Borough of Point Pleasant Beach, 322 F.3d 293, 296 (3d Cir. 2003) (citations omitted). "Plaintiffs bear the burden of proving standing." *Id.* (citations omitted).

In her declaration, Ms. Malone stated that she was "worried" that she would be "unable to vote on Election Day" and that she was "concerned that challenges made to voters at my precinct may slow down the electoral process and discourage other voters from casting a ballot." Subsequently, however, Ms. Malone testified at her deposition that she believed she would be able to vote as a result of efforts undertaken on her behalf by ACORN. She also testified at her deposition that she would "stay and vote, no matter how long it takes[.]" In other words, any delay or discouragement caused by any challenges to voters will not prevent Ms. Malone from exercising her right to vote. Thus, Ms. Malone's own testimony undermines her case for standing – she admits that she will be able to, and will in fact, vote today.

I also agree with the RNC that, at least insofar as Ms. Malone alleges that a challenge to her voting qualifications will impair her voting rights, this is unredressable in light of the apparent certainty that she will be challenged by election officials entirely independent of the RNC and its challenge list. Indeed, if the Sixth Circuit preserves a decision from the District Court for the Southern District of Ohio just issued yesterday, all "private" challenges will be outlawed in Ohio, conclusively mooting at least this

dimension of Ms. Malone's alleged injury.

Accordingly, I dissent.

UNITED STATES COURT FOR THE THIRD CIRCUIT

No. 04-4186

Democratic National Committee, et al.

v.

Republican National Committee, et al.

Ebony Malone, Intervenor

Republican National Committee, Appellant

On Appeal from the United States District Court for the District of New Jersey
(D NJ Civil No. 81-cv-3876)
District Judge: Honorable Dickinson R. Debevoise

Submitted on Motion for Stay Pending Appeal

BEFORE: SLOVITER, NYGAARD, AND FISHER, Circuit Judges

(Filed November 1, 2004)

ORDER

Appellant's motion for stay pending appeal is hereby denied. Judge Fisher dissents.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Date: November 1, 2004
PSD/cc:BRB, JGH, MMB, JAL, RWS,

JWN, PGB, LSS, ANR, CHL

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No.04-4186

REPUBLICAN NATIONAL COMMITTEE,

Defendant-Appellant

v.

DEMOCRATIC NATIONAL COMMITTEE,

Plaintiff-Appellee

v.

EBONY MALONE,

Intervenor-Appellee

On Appeal from the
United States District Court
for the District of New Jersey
Civil Action No. 81-3876
Judge Dickinson R. Debevoise

EMERGENCY MOTION OF REPUBLICAN NATIONAL COMMITTEE FOR STAY PENDING APPEAL AND FOR EXPEDITED CONSIDERATION

Defendant-Appellant Republican National Committee ("RNC") hereby moves pursuant to F.R.A.P. 8(a)(2) and 3d Circuit L.A.R. 8.1, 8.2, and 27.7 for (1) an emergency stay of the injunctive order issued by the District Court on November 1, 2004, and (2) expedited consideration of this motion. In support of this motion, the RNC states as follows:

INTRODUCTION

Late this afternoon, less than 15 hours before the polls in Ohio are scheduled to open, the United States District Court for the District of New Jersey (Debevoise, J.) entered an injunction against the Republican National Committee ("RNC") and its "agents, officers, and employees," "enjoin[ing] and restrain[ing] [them] from using for challenging purposes on November 2, 2004 a list originally of 35,000 names prepared for that purpose by the Republican Party in the State of Ohio," and further instructing that the RNC "shall instruct its challengers in the State of Ohio not to use such list or any part thereof for challenging purposes at the November 2, 2004, election." Order, ¶¶ 1 & 2. As its basis for the injunction, the court allowed Intervenor Ebony Malone to invoke a 22-year old consent decree between the RNC and the Democratic National Committee ("DNC"), even though--

(a) The Deputy Director of the Board of Elections for Cuyahoga County, Ohio, where Ms. Malone resides and is registered, has averred by sworn declaration that irregularities in her registration (she has registered four times at two different addresses) will cause Board of Election officials to challenge her registration, regardless whether the RNC or the Ohio Republican Party ("ORP") makes such a challenge;

(b) Ms. Malone has testified that she intends to vote, and will not be deterred by such challenges or by delays incident to such challenges;

(c) The anticipated challenges are provided for by Ohio state law;

(d) Evidence demonstrated that the RNC was in full compliance with the Decrees, in that (i) it did not "initiate, control, direct, or fund" the ORP's program of voter challenges (*Hunter Decl.* ¶¶ 2d, 3); (ii) the challenges will not disrupt voting tomorrow, especially since county officials have "flagged" many times more registrants for official challenge as are on the ORP list; and (iii) the list was compiled on racially neutral criteria with no statistically significant disparate impact on minority voters; and

(e) None of the series of Consent Decrees or orders pursuant thereto make provision for non-parties to seek enforcement of the decrees, and intervention is inappropriate here.

Because the injunction represents a clear abuse of discretion and is contrary to law, the RNC respectfully urges this Court to enter an immediate stay.

In this Emergency Motion, we demonstrate that the Intervenor's claim is nonjusticiable because, among other things, the relief provides her no effective redress: the Cuyahoga County Board of Elections has "flagged" Ms. Malone for an official challenge if and when she attempts to vote on November 2, 2004, based upon the return of official correspondence to her as "undeliverable." This challenge by the County Board of Elections is pursuant to state law and is independent of any action by the RNC and ORP. Thus, the District Court has engaged in a meaningless act – despite its apparent conclusion that Ms. Malone has a cognizable claim of injury, she will suffer it anyway by operation of Ohio law.

Moreover, the RNC has not violated the Consent Decrees.[1] The RNC has not directed, financed, initiated, or controlled the ORP challenge program. Instead, the ORP has utilized information provided by official mailings to registrants for the purpose of invoking challenge procedures provided for by Ohio law. As Judge Debevoise recognized in his oral opinion from the bench, there have been extensive media reports of fraudulent voter registrations in Ohio, *Reinschmidt Decl.* ¶¶ 2-4 (Attachment A), and tens of thousands of new registrations have been called into doubt by returned official correspondence from local election boards, *Dillingham Decl.* ¶¶ 20-21 (regarding registrations by "Project Vote") (Attachment C).[2]

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[1] Even if the RNC were in violation of the Consent Decrees, it is well-settled that a consent decree, which is an injunction, cannot be enforced via a second injunction. *See Reynolds v. Roberts*, 207 F.3d 1288, 1300 (11th Cir. 2000). This is an independent basis, in itself, for staying the District Court's order.

[2] The RNC has previously submitted to this Court the evidentiary materials filed in opposition to the Intervenor's Application for a Preliminary Injunction. Unless otherwise noted, all attachments referred to herein refer to attachments to the RNC's brief in opposition to the (continued…)

PROCEDURAL BACKGROUND

A. The 1982 and 1987 Consent Decrees

This matter arises out of a consent decree entered by the District Court in 1982 and modified in 1987. The consent decree was entered in an action that the DNC brought in December 1981 against the RNC and the New Jersey Republican State Committee ("NJRSC") in connection with their ballot integrity efforts in the New Jersey election for Governor in 1981. The DNC brought this action alleging violations of the Fourteenth and Fifteenth Amendments, and 42 U.S.C. §§ 1971(a)(1), 1971(a)(2)(B), 1973i(b), 1983, and 1985(3) by the RNC and the NJRSC, notwithstanding the absence of state action.

The parties undertook discovery but never engaged in motion practice to test the merits of the DNC's legal theories. Nor did the District Court actually adjudicate any of the DNC's factual allegations or legal claims in a trial. Instead, exactly twenty-two years ago -- on November 1, 1982 -- the parties entered into a court-approved consent decree dismissing the complaint with prejudice. *See Memorandum in Support of Motions on Behalf of Individual Minority Voters to Intervene and Reopen Case, and Take Expedited Discovery for the Purpose of Enforcing Consent Decrees, Exhibit F* (hereinafter "1982 Consent Decree").

Intervenor's Application for a preliminary injunction, a copy of which was electronically submitted to this Court's Clerk's office on October 31, 2004. Among other documents, these materials include the declarations of Shawn Reinschmiedt, Senior Research Analyst at the RNC; Maria Cino, Deputy Chairman of the RNC; Gwen Dillingham, the Deputy Directory of the Board of Elections in Cuyahoga County, Ohio, where Intervenor Malone is registered to vote; Caroline Hunter, Deputy Counsel of the RNC; Jeff Matthews, Director of the Board of Elections in Stark County, Ohio; and Dr. John Lott, resident scholar at the American Enterprise Institute. The RNC also submitted excerpts from the depositions of Maria Cino and Philip Klinkner, who is Intervenor Malone's purported expert witness.

Paragraph 2(e) of the 1982 Consent Decree provides, *inter alia*, that the RNC[3] will "in the future, in all states and territories" of the United States:

> (e) refrain from undertaking any ballot security activities in polling places or election districts *where the racial or ethnic composition of such districts* is a factor in the decision to conduct, or the actual conduct of, such activities there *and* where a *purpose or significant* effect of such activities is to *deter qualified voters* from voting; and the conduct of such activities *disproportionately* in [sic] 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. . . ."

1982 Consent Decree ¶ 2(e). (emphasis added).

The focus of the Decree is plainly on activities having a "purpose or *significant* effect" that "deter[s] *qualified* voters," when "*disproportionately* . . . directed toward districts" with substantial racial or ethnic minority populations. A deterrent effect, by itself, is not a violation of the decree, but merely "*relevant evidence*" of such a purpose.

In 1986, the DNC brought a new action in the District Court (captioned as Civil Action No. 86-3972 and hereinafter the "1986 Action") alleging the RNC's breach of the 1982 Consent Decree in the 1986 election cycle. Following the pattern set in the original action, the 1986 Action was settled without any actual adjudication of the DNC's factual allegations and legal theories. The 1986 Action was dismissed with prejudice, and the 1982 Consent Decree was modified by a new consent decree that was entered on July 27, 1987 (the "1987 Consent Decree"). *See* Exhibit E to Memorandum in Support of Motions on Behalf of Individual

[3] Significantly, the 1982 Consent Decree recognized that the RNC has "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." 1982 Consent Decree ¶ 4. In the Bipartisan Campaign Reform Act, commonly known as the "McCain-Feingold Statute", Congress has recognized the separate existence of national parties like the RNC from state parties like the ORP.

Minority Voters to Intervene and Reopen Case, and Take Expedited Discovery for the Purpose of Enforcing Consent Decrees.

The 1987 Consent Decree explicitly allows the RNC to "deploy persons on election day to perform normal poll watch functions so long as such persons do not use or implement the results of any other ballot security effort. . . ." 1987 Consent Order ¶ B. While the 1982 Consent Order "remains in full force and effect," the 1987 Consent Order states that the *RNC*, but *not* any *state* party, is restricted from engaging, assisting, participating in any "ballot security program unless the program . . . has been determined by this Court to comply with the provisions of the Consent Order [quoted above] and applicable law." *Id*. ¶ C.[4]

B. **The 2004 Election-Eve Intervention**

Late in the afternoon on Wednesday, October 27, 2004, the RNC was served with notices of deposition and motions for intervention, expedited discovery, and for preliminary injunctive relief to enforce the consent decrees submitted by Ebony Malone and Irving Agosto. Malone and Agosto are African-Americans registered to vote in Ohio. They alleged that the RNC was engaging in activities in violation of the 1982 and 1987 Consent Decrees and threatened their right to vote in the upcoming election.

The RNC responded with opposition briefing that was filed at approximately 12 PM the following day, Thursday, October 28. That same morning, the RNC also served notices of depositions of the Intervenors on their counsel. Shortly after receiving these notices of

[4] In 1990, the DNC brought an election-eve action alleging that the RNC had violated the Consent Decrees, but the District Court ruled that the DNC failed to prove that the RNC had "conducted, participated in, or assisted ballot security activities in North Carolina." Nov. 5, 1990 Order at ¶ 1. In 2002, the New Jersey Democratic Party also brought an election-eve action alleging that the New Jersey Republican Party had violated the Consent Decrees, but the District Court against found no violation and denied relief.

deposition, Intervenor's counsel abruptly informed the RNC's counsel that Agosto was withdrawing his motion to intervene, leaving only Malone as an intervenor.

The District Court held a hearing on the Malone's motions on the afternoon of October 28. The District Court granted her motion to intervene and to conduct expedited discovery. The District Court set a hearing on Malone's application for a preliminary injunction for the morning of Monday, November 1. Malone's counsel deposed the RNC's Fed. R. Civ. P. 30(b)(6) representative (Maria Cino, Deputy Chairman of the RNC) on Friday, October 29, and the RNC's counsel deposed Malone on Saturday, October 30. Each party also deposed the other's expert witness during this time period.

On Sunday, October 31, the parties provided briefing to the District Court in connection with Malone's application for a preliminary injunction. On Monday, November 1, the District Court heard argument, took evidence, and granted the application for a preliminary injunction. The RNC immediately moved to stay the injunction pending appeal, which motion was denied. The RNC thereafter immediately filed its notice of appeal to this Court of the District Court's October 28, 2004 order granting intervention and November 1, 2004 order granting preliminary injunctive relief.

FACTUAL BACKGROUND

The Consent Decrees

At the outset, it is important to note that in *none* of the prior proceedings did the RNC concede liability or admit the allegations, although it has for over 20 years operated under the severe restrictions of the Consent Decrees. It is also important to note that the DNC's prior complaints have centered upon allegations of conduct far more egregious than the assertions here – allegations of actual intimidation of minority voters and suppression of voting in targeted minority precincts.

As noted above, the 1987 Consent Decree explicitly allows the RNC to "deploy persons on election day to perform normal poll watch functions. . . ." 1987 Consent Decree ¶ B. While the earlier Consent Order "remains in full force and effect," the 1987 Order states that the *RNC*, but *not* any *state* party, is restricted from engaging, assisting, participating in any "ballot security program unless the program . . . has been determined by this Court to comply with the provisions of the Consent Order [quoted above] and applicable law." *Id.* ¶ C. It is the RNC's position that election day challenges to voters who are already "flagged" by county officials are within the normal poll-watching activities expressly permitted by the Decrees.

The RNC takes the Consent Decrees very seriously, and makes extensive efforts to insure compliance with them. The RNC's Chief Counsel Jill Holtzman Vogel and its Deputy Counsel Caroline Hunter conduct regular briefings for each of the RNC's divisions. *Decl. of Caroline Hunter* ¶ 2 (Attachment D to RNC's Opposition to Intevenor's Application for a Preliminary Injunction). They participate in meetings and conference calls with RNC personnel and with state party and campaign personnel when issues of voter registration and election day activities are being discussed. *Id*. They provide counsel on the Consent Decrees to the senior leadership of the RNC, including RNC Chairman Ed Gillespie, Deputy Chairman Mario Cino, Political Director Blaise Hazelwood, and others. As verified by Ms. Hunter's declaration, and out of an abundance of caution demonstrating the severely restrictive effect of the Decrees, the RNC Counsel's office has advised the RNC leadership not to be involved in the ORP's program to challenge voters, and to the best of Ms. Hunter's knowledge that advice has been followed. *Hunter Decl.* ¶¶ 2-4 (Attachment D).

The Ohio Mailings

On or about August 10, 2004, the RNC mailed a letter welcoming all newly-registered voters in Cuyahoga County, Ohio to the political process, and encouraging them to support the Republican ticket. *Cino Decl*. ¶ 4 and Exhibit 3 thereto (Attachment G). Cuyahoga County was the only county in Ohio selected for such a mailing not because it is predominately minority (which it is not), but because voter registration was expected to be heaviest there and the RNC wanted a maximum return on its dollars invested. Unlike letters challenged in prior proceedings before this Court, the August 10, 2004 letter, attached to the Cino Declaration as Exhibit 3, can hardly be characterized as intimidating. Although approximately 3,353 of the RNC letters were returned as undeliverable, *those returned letters have not been used as the basis for any voter registration challenges*. *Cino Decl.* ¶ 4 (Attachment G). Rather, 950 letters returned as undeliverable were analyzed by the RNC; approximately 50 of those were found to be "suspicious," and at least 10 were considered "very suspicious." Ms Cino testified that the results of this analysis are being held by the RNC for use as public relations material if the DNC initiates a post-election challenge to the results in the Ohio presidential election, but have not and will not be used for any challenges on election day. *Cino Dep. Tr.* at 77:3-78:17 (Attachment L). Before the lower Court, Intervenor's counsel claimed that the 950 undeliverable mailings were sorted by zip code to ascertain minority precincts, but *there is absolutely no evidence in the record that racial or ethnic considerations were taken into account in any respect.*

On or about September 9, 2004, the ORP sent letters to newly-registered voters in the five Ohio counties with the highest anticipated rates of new registrations: Cuyahoga, Franklin, Summit, Hamilton, and Montgomery. As with the RNC letter, these letters went to all newly-registered voters in those counties, *not* just to minority precincts. Approximately 15,238 letters

were returned as undeliverable. *Cino Decl.* ¶ 5 (Attachment G). A data analyst at ORP compiled the results of the undeliverable mailings from the information on the face of the returned envelopes; no zip code sorting of any kind was done. The spreadsheets were provided to the RNC's research division, but -- again contrary to Intervenor's claim before the lower court -- there is no evidence that the RNC did anything with them.

Significantly, Intervenor Malone was not on the mailing list to receive either the RNC letter or the ORP letter. *Id.* ¶¶ 4-5.

Independently of any activities by the RNC or ORP, the Ohio County Boards of Elections sent informational packages to newly-registered voters, informing the new registrants of the location of their polling stations and other important information. These mailings were sent at various times during 2004. Neither the RNC nor the ORP had any responsibility for these mailings. *Id.* ¶ 6. Tens of thousands of those letters were returned to the boards of election as undeliverable.

The ORP's Decision to Challenge Questionable Registrations

On or about October 7, 2004, the ORP began to receive reports that numerous letters sent by the County Boards of Election had been returned as undeliverable. A week later, on or about October 14, 2004, the number of returned letters had swelled to tens of thousands. Approximately 35,247 mailings throughout the state were ultimately returned as undeliverable. A chart showing the number of returned mailings per county is attached as Attachment J. This fact was widely reported in the Ohio press, and became a matter of intense interest to the public, to the ORP, and the RNC. Intervenor Malone was on the mailing list for one or more County

Boards of Elections, and one or more of her registrations was returned as undeliverable. *Dillingham Decl.* ¶¶ 30-31 (Attachment C).

Concurrently with the reporting of tens of thousands of undeliverable voter packets, the media reported widespread instances in Ohio of voter registration irregularities. As described in the Declaration of Shawn Reinschmiedt, which Judge Debevoise apparently found credible, fraudulent voter registration activities by individuals and organizations affiliated with the Democratic Party have been rampant this election cycle. In Defiance County, Ohio this year, for example, the NAACP Voter Education Fund collected highly suspicious voter registration forms in the names of "Dick Tracy," "Mary Poppins," and "Janet Jackson" that were obtained by an individual in exchange for a payment of crack cocaine. *See Decl. of Shawn Reinschmiedt* ¶¶ 3(a) (Attachment A). In Summit County, Ohio, the AFL-CIO submitted 50 voter registration cards that election officials have deemed illegitimate on the basis of apparently forged signatures and non-existent mailing addresses. *Id*. ¶ 3(d). And Franklin County, Ohio is investigating hundreds of cases of apparent voter fraud, including 62 suspicious voter registration forms submitted by ACORN and another six submitted by the Columbus Urban League. *Id*. ¶ 3(b).

Voter fraud is by no means confined to Ohio, of course, and it can occur on a massive scale. As reported by the *Miami Herald* in August 2004, for example, the State of Florida has determined that approximately 46,000 persons are registered to vote in both New York and Florida. *Id*. ¶ 4(d). Further, it also appears that up to 1,000 people – a number larger than the margin of victory for President Bush in Florida in the 2000 election – may have voted twice, both in Florida and New York, in the same election over the past several years. *Id*. In another recent example, a single county in New Mexico has uncovered 3,000 questionable voter registration cards containing faulty addresses, signatures, and social security numbers. *Id*. ¶ 4(h).

In Colorado an individual admitted this month that she signed herself up to vote 25 times, and signed up three of her friends 40 times, so that her boyfriend could collect payments of $2 per registration from ACORN. *Id*. ¶ 4(a).

The October 20, 2004 Press Conference

Against this background, the ORP invited RNC Chairman Ed Gillespie to participate in a press conference on October 20 during Mr. Gillespie's previously-scheduled trip to Ohio to speak at a Franklin County Republican Dinner and meet with the editorial board of the *Columbus Dispatch*. *Cino Supp. Decl.* ¶ 4 (Attachment B). On the evening of October 19, Chairman Gillespie met with officials of the ORP, who detailed the growing evidence of voter registration improprieties, including news reports of forged registrations, criminal investigations, and payments of voter registration workers with crack cocaine, as well as the large volume of Board of Elections mailings returned as undeliverable. In discussing the upcoming press conference, Mr. Gillespie made clear to ORP that he could discuss only the party's concern with voter fraud and the degrading effect such fraud has on the democratic process, both in loss of voter confidence and potentially even affecting the results in a close election. Mr. Gillespie emphasized, however, that the Consent Decree precluded him from discussing any actions to challenge the registrations, or from commenting on such actions at the upcoming press conference. It was agreed that any questions concerning future actions would be handled by ORP Chairman Robert Bennett. *Id.* ¶ 6.

At the October 20, 2004, press conference, the ORP detailed the growing evidence of improper voter registrations. Chairman Gillespie spoke about the general problem of voter fraud, its degrading effect on the democratic process, and the special concern about it in an expected close election. During that press conference, the ORP announced no plan to challenge

the voter registrations, and when asked about the existence of such a plan, ORP Chairman Bennett indicated that the ORP was considering its legal options. *Id.* ¶ 6. Two days later, on October 22, the ORP announced its challenge plan. Neither Chairman Gillespie nor anyone else from the RNC has engaged in, assisted, or participated with the ORP in its challenge to the suspicious voter registrations. *Id.* ¶ 7; Cino Tr. 47-48. Of the 35,000 challenges arguably made by the ORP, only 23,000 remain. *See* James Dao, *Rulings halt challenges to Ohio voter registrations*, N.Y. TIMES, Oct. 30, 2004.

Ohio Challenge Procedure

As set forth in the Declaration of Jeff Matthews, the Director of the Board of Elections in Stark County, Ohio, there are both pre-election and election day challenges to voters in the State of Ohio. Pre-election day challenges are governed by Sections 3509.19 and 3503.24 of the Ohio Election Code. Challenges must be filed no later than 11 days before the election. The voter being challenged must receive notice of the challenge and an opportunity for hearing. On October 29, 2004 the United States District Court for the Northern District of Ohio enjoined the pre-election challenge procedure.

Pursuant to Ohio state law, the Records of Elections in both Stark County and Cuyahoga County (where Intervenor Ebony Malone resides) "flag" the names of persons to whom undeliverable mail has been sent. If and when such a person appears to vote, the county officials challenge the voter. To respond to the challenge, the voter may file a Form 10-U "Affidavit-Oath Examination of Person Challenged" attesting to his eligibility to vote, and the person will then be allowed to cast a regular ballot. *Dillingham Decl.* ¶ 25 (Attachment C); *Matthews Decl.* ¶ 27 (Attachment E). If the voter refuses to fill out the Form 10-U, the person is offered a provisional ballot. At the present time, 180,221 registrants have been flagged in Cuyahoga

County, ***including Intervenor Malone***, and 17,575 have been flagged in Stark County. *Dillingham Decl.* ¶ 17 (Attachment C); *Matthews Decl.* ¶ 22 (Attachment E). Despite this number of flagged registrants, neither Ms. Dillingham nor Mr. Matthews anticipates disruptions at the polls on election day. (These two counties have 6 times as many flagged voters as the ORP has challenged in the entire state of Ohio). Typically, a small percentage of flagged registrants appear at the polls to vote, and those that do are processed quickly by the polling station officials. *Dillingham Decl.* ¶ 27 (Attachment C); *Matthews Decl.* ¶ 23 (Attachment E).

Election day challenges by private parties are governed by Section 3505.20 of the Ohio Election Code. A person may be challenged when attempting to vote on the ground that the person is not a U.S. citizen, not a resident of Ohio for thirty days immediately preceding the election, not a resident of the county or precinct, or not 18 years of age. The statute provides procedures that the judges at the polling place will follow if a person is challenged, and specifies questions that the election judges should ask the person challenged, depending upon the basis of the challenge. According to both Ms. Dillingham and Mr. Matthews, election officials follow these procedures and the procedures have been efficient without impeding the ability of other persons to vote. *Dillingham Decl.* ¶¶ 26-27 (Attachment C); *Matthews Decl.* ¶¶ 20-23 (Attachment E). Indeed, a memorandum issued by the Secretary of State on October 20, 2004, entitled "Challenger and Witness Guidelines," instructs Board of Elections officials that challenges to voters must not obstruct or delay the voting process.

Although the Help America Vote Act extended election day provisional balloting throughout the United States, Ohio has had a provisional balloting procedure for many years. *Matthews Decl.* ¶¶ 15-16 (Attachment E). Thus, unlike election officials in some states, Ohio election officials are well-experienced in provisional ballot procedures. The Challenger and

Witness Guidelines policy instructs presiding judges in each county to expel from the polling place any challenger who attempts to intimidate voters. Moreover, when a voter is challenged, the presiding judge is instructed whenever possible to move the challenged person to an area no less than ten feet away from the poll worker table while resolving the challenge.

Intervenor's Lack of Controversy

Critically, since Intervenor Malone is on the list of returned mail sent by the Cuyahoga Board of Elections, Cuyahoga County officials will challenge her when she appears to vote, ***regardless of whether anyone else challenges her***. *Dillingham Decl*. ¶¶ 32, 34 (Attachment C). Thus, whether Intervenor Malone obtains the relief sought against the RNC and its "agents, officers, and employees" or not, she will be challenged at the polls on November 2. Her complaint in this case – that she will be "hassled" when she appears to vote – cannot be solved by the Court. *Dep. of Ebony Malone Tr.* at 74:24-75:6. Accordingly, the Court is powerless to provide effective relief to Ms. Malone.

ARGUMENT

This Court considers four factors in considering whether to grant a stay pending appeal pursuant to F.R.A.P: 8(a)(2): (1) the likelihood of success on the merits; (2) irreparable injury to the moving party if the stay is denied; (3) substantial injury to the party opposing the stay if one is issued; and (4) whether granting the stay would be in the public interest. *See Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991). These factors "contemplate individualized judgments in each case." *Id*. (citation omitted).

I. THE RNC IS LIKELY TO PREVAIL ON THE MERITS OF THE PENDING APPEAL

A. Malone's Claim Is Not Justiciable

Article III of the United States Constitution limits the federal judicial power to "cases" or "controversies." In order to constitute a case or controversy, there must be (1) injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc*., 517 U.S. 544, 551 (1996). Non-parties seeking to invoke Fed. R. Civ. P. 71 to enforce a court's order that allegedly benefits them must still show that they have standing to seek relief. *See Moore v. Tangipahoa Parish Sch. Bd.*, 625 F.2d 33, 34 (5th Cir. 1980).

1. The Court Cannot Redress Intervenor Malone's Grievance.

Intervenor Ebony Malone has admitted to filing at least four different voter registration forms listing two different addresses. *Malone Decl.* ¶¶ 2-3; *see also Dillingham Decl*. ¶ 31 (Attachment C). She appears on the challenge list not as a result of either the RNC or ORP mailings, but as a result of one or more undeliverable mailings by Cuyahoga County Board of Elections. *Dillingham Decl.* ¶ 31 (Attachment C); *Cino Decl.* ¶ 7 (Attachment G).

Under Ohio law, a county Board of Elections must flag any registrant from whom mail is returned as undeliverable. *Dillingham Decl.* ¶ 13 (Attachment C). Because Intervenor Malone's mailings from the Cuyahoga Board of Elections were returned as undeliverable, her name has been flagged by the Cuyahoga Board of Elections. Flagged names are challenged on election day by county officials. Accordingly, under the law of Ohio, if and when she attempts to vote on

November 2, Intervenor Malone will be challenged, not by the RNC or the ORP, but by the Cuyahoga County Board of Elections. *See Dillingham Decl.* ¶ 32 (Attachment C).

The record in this case makes clear that nothing this Court does in this proceeding will reduce the prospect of Ms. Malone being challenged on election day. Accordingly, her case is not justiciable, and there is no case or controversy for this Court to address. Her challenge must be dismissed, and the District Court's ruling reversed.

In this case, Intervenor Malone will be challenged at the polls on election day regardless of any actions taken by this Court. Any "injury" associated with such a challenge will not be redressed by a favorable decision. Her claim is also not redressable because she will suffer her alleged injury by operation of Ohio law regardless of what this Court does. *Cf. Renne v. Geary*, 501 U.S. 310, 312 (1991) (constitutional challenge to statute was not justiciable in part because alleged injury would occur anyway by operation of a different statute).

As if this were not enough, Ms. Malone's allegations, even if amenable to redress, do not constitute "injury in fact." She has not been denied the right to vote. No one has threatened her in an effort to intimidate her from voting. In her declaration she asserts that "I am worried that I will be unable to vote on Election Day. Also, I am concerned that challenges made to voters at my precinct may slow down the electoral process and discourage other voters from casting a ballot." This rank speculation cannot support a finding of Article III injury. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (alleged injury must be "distinct and palpable," not "abstract, or conjectural, or hypothetical") (citations omitted). Indeed, Ohio law demonstrates that Ms. Malone has no injury in fact, because she is guaranteed the right to vote by provisional ballot if necessary. *See* Attachment I.

Moreover, the allegation of worry in Ms. Malone's declaration is contradicted by her sworn deposition testimony, in which she expounds on her belief that she will be able to vote regardless of the outcome of this litigation:

> Q: To your knowledge, has ACORN contacted the County Board of Elections on your behalf?
>
> A: Yes, I believe they said they did try to talk to someone at the board on my behalf.
>
> Q: Is this something that Stewart told you on October 25?
>
> A: Yes.
>
> Q: What did he say about that conversation?
>
> A: Just that they were working with the board to try to correct the problem and ensure that I would be able to vote.
>
> Q: So was it your understanding that ACORN was working with the board to make sure that you could vote?
>
> A: Yes, that it was trying to come together on my behalf. That was my understanding.
>
> Q: Do you believe that you will be able to vote as a result of those efforts?
>
> A: Yes, I do.
>
> Q: Is that true regardless of what happens with the litigation that we are here for?
>
> A: I would like to think so.

Dep. of Ebony Malone Tr. at 26:14-27:13.[5] Ms. Malone further explained that all she is seeking in this litigation is the "right to prove that I'm eligible to vote and to be able to do so." *Id.* at 28:9-10. Thus, Ms. Malone testified that the injury she perceived when she agreed to be an

[5] Citations to the Deposition of Ebony Malone are to the Rough ASCII transcript provided by the court reporter at the conclusion of the deposition.

intervenor in this suit – the threat to her right to vote – has already been cured. She believes she will be able to vote. Ms. Malone also admitted in her deposition that she will not be discouraged from voting or intimidated by any challenges that take place at the polls on election day. *Id.* at 73:5-17. Additionally, she stated that she will vote no matter what delay election day challenges may cause:

> Q: Am I correct, you will stay and vote, no matter how long it takes?
>
> A: Absolutely.

Id. at 77:19-21.

Given that Ms. Malone is no longer alleging an injury in fact, she lacks standing, and there is no jurisdiction for this proceeding to continue.

2. The Intervenor's Claim May Well Be Moot.

Ohio Secretary of State Ken Blackwell has issued an order barring challengers of all parties from Ohio polling places. *See* Attachment K. Although the matter may be subject to litigation, it is quite possible at this juncture that Intervenor Malone's claim for preliminary injunctive relief will be moot, because no partisan challengers will be permitted within Ohio polling places on Election Day.

B. The RNC Has Complied Fully With The Letter And Spirit Of The Consent Decree.

At the October 28, 2004, hearing, the District Court indicated that:

> "I suppose we're down to three, three critical questions. One is whether the RNC had anything to do with it? Second is, how the list is going to be used, and what the impact on the actual voting will be? And the third is, is there a racial impact?"

Despite extraordinary efforts by the parties and counsel over time past four days, it is now apparent that Intervenor cannot meet her burden on any of these questions. The results of factual investigation have confirmed that Intervenor Malone has been "flagged" by county officials for challenge on election day pursuant to state law. Because the Consent Decrees authorize the RNC to participate in normal poll-watching activities, it is the RNC's position that a challenge by a statutorily-authorized poll challenger, based on statutory grounds, using information provided by the Government, is comfortably within allowable poll-watching activities. Accordingly, the RNC requested from the District Court (and reiterates its request to this Court for) an order allowing it to participate in such challenges on election day.[6]

It is bedrock law in this Circuit and elsewhere that a party alleging non-compliance with an injunction or a consent decree has the burden of establishing non-compliance with "clear and convincing evidence." *Harris v. City of Philadelphia*, 47 F.3d 1311 (3d Cir. 1995) ("A finding of civil contempt must be supported by clear and convincing evidence"), citing *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 974 (3d Cir. 1982). *Accord United States v. City of Jackson*, 359 F.3d 727, 731 (5th Cir. 2004); *Reynolds v. McInnes*, 338 F.3d 1201, 1211 (11th Cir. 2003); *Ford Motor Co. v. B&H Supply, Inc.*, 646 F. Supp. 975, 1002 (D. Minn. 1986). Intervenor Malone plainly falls far short of meeting this burden. Moreover, even if such non-compliance is established by clear and convincing evidence, declaratory and injunctive relief is not an appropriate remedy for an alleged violation of a consent decree. *See Reynolds*, 207 F.3d at 1300.

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[6] Moreover, it is the RNC's position that the activities at issue do not implicate the Consent Decree because they constitute normal poll-watching activity that is specifically exempted from the terms of the Decree.

1. The RNC Is Not Responsible For the Registration Challenges.

After extensive investigation, the RNC's Deputy Chairman Maria Cino has testified that the ongoing challenge to voter registrations in Ohio was the brainchild of the ORP, not the RNC, and that the RNC was not asked to approve or participate in that program. *Cino Supp. Decl.* ¶ 7. The evidence is now undisputed that the RNC's August 10 mailing has not been used in any way to conduct a ballot security program. *Cino Decl.* ¶ 4 (Attachment G). RNC Deputy Counsel Caroline Hunter confirmed in her declaration that the RNC Counsel's office monitors meetings and telephone calls at which voter registration, get-out-the-vote, and poll watching activities are discussed to ensure compliance with the Consent Decrees. *Hunter Decl.* ¶ 2(c) (Attachment D). Ms. Hunter's declaration also addresses certain emails that Judge Debevoise believed provided evidence that the RNC was a participant in the ORP's challenges, noting that the emails related to the possible challenge to *absentee ballots*, not election day challenges, and that the information is not, in fact being used for any challenges whatsoever. *Id.* ¶¶ 4-7. Although Intervenor relied on ambiguous press reports of RNC Chairman Ed Gillespie's comments at an October 20 press conference to assert RNC collaboration, the factual record about that press conference shows that: (1) as of October 20, the ORP had formulated no plan to challenge the registration and made that clear at the press conference; and (2) Chairman Gillespie spoke at the press conference only about the degrading effects of fraud on the democratic process. Thus, it is apparent that the RNC cannot be held responsible for the registration challenges, and that the District Court's injunction against the RNC prohibiting its involvement in the challenges is ineffective because the true challenger, the ORP, was not the RNC's "agent" and therefore has not been enjoined.

2. Challenges on Election Day Will Not Unreasonably Disrupt Voting in Ohio.

Even if the RNC could be deemed complicit in the registration challenges, the record makes clear that challenges by the ORP to suspicious voter registrations will not disrupt the election process. To begin with, press reports make clear that the number of active challenges has declined to 23,000. *See* James Dao, *Rulings halt challenges to Ohio voter registrations*, N.Y. TIMES, Oct. 30, 2004. In a state as large as Ohio, 23,000 challenges over the course of election day is not system-threatening, and Intervenor has identified no specific precincts – much less minority precincts – where problems are expected. This number of challenges is a small fraction of the number that will be challenged in Cuyahoga County alone by county election officials.

Second, and relatedly, Cuyahoga County already has 180,221 registrants flagged for challenge by county election officials. *Dillingham Decl.* ¶ 17 (Attachment C) That number likely includes all, or virtually all, of the registrants being challenged by ORP. Likewise, Stark County has flagged 17,575 of its 267,979 registrants. *Matthews Decl.* ¶ 22 (Attachment E). Yet, officials from both counties express confidence that the challenges can be handled on election day without undue disruption to the election process. *Dillingham Decl.* ¶¶ 26-27 (Attachment C); *Matthews Decl.* ¶¶ 20-23 (Attachment E). Plainly, Intervenor's alarmist cries that the challenges will disrupt voting and turnout throughout Ohio are specious.

3. Any Minimal Disruption Caused by the Challenges Is Not Racially Motivated.

Even if the Court were to find, as did the District Court, that the RNC has participated and assisted in the challenges, and even if the Court were to find that the challenges will severely

disrupt voting procedures on election day, there is simply no basis for concluding that the impact will be racially disparate, or that the challenges are racially motivated.

For a claim of disparate impact to be established, there must be a showing of a statistical disparate impact. Put another way, to state a disparate impact claim there must be evidence that the "questioned policy or practice has had a disproportionate impact." *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 192 (3d Cir. 1980); *see also id.* ("This conclusion should be as obvious as it is tautological: there can be no disparate impact unless there is a disparate impact."). In the absence of any showing by Intervenor of a disparate impact on minority voters, there can be no violation of the Consent Decrees.

To begin with, Intervenor's suggestion that the challenges will have a disparate racial impact is wholly without basis. Professor Klinkner's analysis is so flawed as to have no probative value. First, Professor Klinkner, cherry-picked two counties with high African-American populations for his analysis. With no apparent explanation, he conducted *no* analysis of the challenge list on a *statewide basis,* even though the challenges are being pursued statewide. Nor did he include white voters in his analysis. Simply put, he purported to calculate the effect only in minority precincts located in two counties. As a legal as well as a purely statistical matter, Professor Klinkner's failure to consider the effect on white voters or to analyze the impact in counties with smaller minority populations makes it impossible for him to conclude that there is a legally sufficient disparate impact. In *EEOC v. Greyhound Lines, Inc.*, the Third Circuit rejected a claim of disparate impact that was based on statistical evidence that African American men have a high incidence of a facial disease that was worsened by Greyhound's "no beard" policy. 635 F.2d at 192. The EEOC presented no evidence of the effect of the policy on whites. The court pointed out that it is impossible to find a disparate impact on one group until

the full effect of a policy on the allegedly favored group is also evaluated. "Without comparative statistics showing the percentage of white males who suffer from diseases or skin conditions that make shaving painful or impossible, EEOC's evidence that many black males are unable to shave because of PFB simply does not permit the inference of a disproportionate impact." *Id.* Thus, Professor Klinkner's exclusive focus on counties with large African-American populations is fatal as a matter of law as well as statistics and common sense.

Second, Professor Klinkner failed to take account of alternative explanations for the distribution of challenges. A simple regression analysis using a single test variable, as used by Professor Klinkner, is highly unreliable. *Lott Supp. Decl.* ¶ 3 (Attachment F). Once Dr. John Lott, the RNC's expert, included other possible variables, any statistical relationship between the challenges and African American precincts disappeared.

Third, Professor Klinkner's own data disproved his assertion that "the percentage of voters that are challenged increases as the black composition of the precincts goes up." *Klinkner Decl.* ¶ 1. Indeed, at his deposition, Professor Klinkner graphed out the distribution of his own data showing a jagged rather than linear line; in some instances, being African-American suggests a *lower* chance of being challenged. *Klinkner Dep.* at 110:18-112:22 (Attachment H).

Once the plain errors of Professor Klinkner's analysis are corrected, as Dr. Lott has done, it is apparent that there is no relationship between the challenges and race. *Lott Supp. Decl.* ¶ 16 (Attachment F). But, under the Consent Decrees, even if a disproportionate impact of the challenges on minorities could be shown – and it cannot – this would merely "be considered *relevant evidence* of the existence of such a factor and purpose." It is certainly not "clear and convincing evidence" as required here, and would not establish any improper racial motivation

for the challenges. *See November 1, 1982 Consent Decree* at ¶ 2(e). Case law makes clear that even a statistical demonstration of disproportionate impact, standing alone, is insufficient to establish a racial motivation in violation of the law. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 239-42 (1976); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). Here, even if Professor Klinkner's specious argument were deemed to be "relevant evidence" of a disparate impact, the record is otherwise devoid of any suggestion that the ORP's statewide voter registration challenges based upon mailings by the County Boards of Elections and returned as undeliverable have any improper racial motivation. Accordingly, Intervenor is entitled to no relief.

II. The Absence of a Stay Will Irreparably Injury the RNC

The RNC is national party committee that is fully engaged in lawful electioneering activities in Ohio and elsewhere on the eve of a national election. Ohio law plainly permits the voter challenge process at issue here; indeed, there is clear evidence that Cuyahoga County election officials themselves will make the challenges. Ohio law recognizes the danger of fraudulent voting, and strikes the appropriate balance in ensuring that only properly registered persons actually vote in the election. Injunctive relief here will disrupt the RNC in connection with its lawful activities in a major state and obstruct reasonable efforts to ensure the integrity of the vote. Simply put, to construe the Consent Decrees as prohibiting the RNC from the very same activities that the county officials are obligated to pursue would be unreasonable, and demonstrates the oppressive effect the Decrees are having on the RNC's legitimate activities.

In this regard, it should be emphasized that Intervenor has not alleged that the RNC's activities actually violate or purport to violate any of the underlying provisions of federal law that served as the basis of the complaint filed in this action in 1981. Nor could any such

allegation be colorably made. Federal and state law permit the activities at issue here – the only question is whether such activities violate a consent order entered over two decades ago.

III. The Intervenor Will Not Suffer Any Injury As a Result of a Stay.

The Intervenor has showed no injury, irreparable or otherwise, to justify preliminary injunctive relief. She admits that she is going to be able to vote in this election. The complete absence of any harm to Intervenor is an independent basis to stay the District Court's injunction. *Cf. Ecri v. McGraw-Hill, Inc*., 809 F.2d 223, 226 (3d Cir. 1987) ("Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a 'clear showing of immediate irreparable injury.").

IV. The Public Interest Favors a Stay Pending Appeal

The public interest favors a stay. This is because the RNC is engaged in lawful electioneering activities at the climax of a closely-contested national election, and the District Court's injunction amounts to a prior restraint of those lawful electioneering activities. These lawful activities of the RNC implicate core First Amendment values of the right of association and the right to petition the government.

Few rights are more fundamental to the public interest than election-related activities protected by the First Amendment. For example, in *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390 (9th Cir. 1991), the Ninth Circuit struck a provision in a consent decree that prohibited the plaintiff from exercising his right to seek elective office. The Ninth Circuit reasoned that "the public interest at stake in this case is of the highest order. It involves the most important political right in a democratic system of government: the right of people to elect representatives of their own choosing to public office." *Id.* at 1400. *See also Monitor Patriot*

Co. v. Roy, 401 U.S. 265, 271-72 (1971) (The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office."). The First Amendment, and thus the public interest, favor the lawful exercise of political rights. Put simply, what Intervenor has alleged here would not violate the law, even if it those allegations were undisputed (and they are not). Thus, the public interest in free and unrestrained political discourse weighs in favor of a stay of an injunction order that amounts to an unconstitutional prior restraint.

CONCLUSION

For the foregoing reasons, this Court should stay the District Court's preliminary injunction pending appeal.

November 1, 2004

Respectfully submitted,

Bobby R. Burchfield
John G. Horan
M. Miller Baker
Jason A. Levine
Richard W. Smith
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 756-8000
Facsimile: (202) 756-8087

CERTIFICATE OF SERVICE

I hereby certify that while transmitting this brief to the Court by e-mail, I served opposing counsel by e-mail as follows:

agenova@gbvlaw.com

butlert@howrey.com

nieldsj@howrey.com

Michael S. Nadel
McDermott Will & Emery LLP