

No. 12-373

In the Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE,
Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit*

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF AND BRIEF FOR THE COLORADO
REPUBLICAN COMMITTEE AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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October 25, 2012

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**MOTION FOR LEAVE TO FILE
BRIEF *AMICUS CURIAE***

Pursuant to this Court's Rule 37.3(b), the Colorado Republican Committee respectfully requests leave of the Court to file this brief *amicus curiae* in support of Petitioners. Counsel for each party to this case was provided with ten days notice of the Colorado Republican Committee's intent to file this brief in accordance with this Court's Rule 37.2(a). Consent to the filing of this brief has been granted by counsel for the Petitioners. Counsel for the Democratic National Committee did not respond to Amici's notice of intent to file this brief. No party or entity other than the Colorado Republican Committee has contributed monetarily to the preparation or submission of this brief.

The Colorado Republican Committee files this brief to assist the Court in its review of the petition, and to address important issues presented from the perspective of the application of Colorado's election laws. As a state political party committee and recognized affiliate of the Republican National Committee, the Colorado Republican Committee believes that its perspective and experience will provide an additional and valuable viewpoint on the issues presented by this petition for certiorari.

For the foregoing reasons, the motion of the Colorado Republican Committee to file a brief *amicus curiae* should be granted.

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INTEREST OF THE *AMICUS CURIAE*¹

Amicus Curiae, the Colorado Republican State Central Committee (“Colorado Republican Committee”) is an unincorporated nonprofit association and state political party committee in the State of Colorado, and counts among its members state and federal legislators, statewide and district elected officials, county and local government elected officials, officers and representatives of affiliated district and county committees and Republican allied organizations, and hundreds of thousands of constituents throughout Colorado’s sixty-four counties. The Colorado Republican Committee effectively represents the over 1.1 million registered voters affiliated with the Republican Party in Colorado.

In addition to its statutory rights and responsibilities in administering the process of nominating candidates to the primary election ballot and fill vacancies in nomination and election for partisan elective offices, the Colorado Republican Committee “has the power to make all rules for party government” and “has full power to pass upon and

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*’s intention to file this brief. The Counsel for Petitioner provided verbal consent. The Counsel for Respondent did not respond. Pursuant to Rule 37.6 of this Court, *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, and its counsel made such a monetary contribution to its preparation or submission.

determine all controversies concerning the regularity of the organization of [the Republican] party” in the State. Colo. Rev. Stat. §§ 1-3-105(1), 1-3-106(1). As with each state political party committee or organization similarly affiliated with the Republican Party, the State Chairman of the Colorado Republican Committee and the National Committeeman and National Committeewoman from Colorado each serve as members on the Republican National Committee (“RNC”). The Colorado Republican Committee’s mission is unnecessarily limited and materially restricted by the consent decree that is the subject of the Republican National Committee’s petition for certiorari.

Thirty years ago, based upon (contested) allegations of misconduct in the State of New Jersey, the New Jersey District Court entered a consent decree (“the New Jersey Order”) that has since taken on a life of its own. *See* Pet. App. 170a–184a; Pet. App. 161a–163a. The New Jersey Order has been modified twice and as it presently stands requires the creation of a virtual firewall between the Colorado Republican Committee and the Republican National Committee. *See* Pet. App. 170a–184a; Pet. App. 161a–163a. The New Jersey Order prohibits the RNC from “engage[ing] in, ...assist[ing] or participat[ing] in, any ballot security program² unless the program (including the method and timing of any challenges resulting from the program) has been determined by this Court to comply

² “Ballot Security,” is defined as “any program aimed at combating voter fraud by preventing potential voters from registering to vote or casting a ballot.”

with the provisions of the Consent Order and applicable law.” Pet. App. 182a.

This preclearance requirement in the New Jersey Order is not limited to federal law, but to all “applicable law,” including all applicable provisions of state and local laws and regulations related to the conduct of elections. Pet. App. 166a. As a result, if the Colorado Republican Committee or similarly situated state or local political party committees wishes to coordinate its activities designed to identify and take appropriate and entirely legal steps to address instances of voter fraud, or to coordinate the recruitment, training, activities and operations of election judges, watchers, or legal team members with the RNC, the Colorado Republican Committee must first submit itself to the jurisdiction of the District Court of New Jersey so that the District Court of New Jersey can determine whether the Colorado Republican Committee is complying with the various Colorado elections statutes, regulations promulgated by the Colorado Secretary of State, the opinions of the Colorado Attorney General, the additional rules, regulations and procedures employed by the elected county clerk and recorder in each of Colorado’s sixty-four counties, as well as any applicable county and municipal ordinances or rules promulgated by the designated election official in each local jurisdiction or special district in Colorado with the authority to conduct elections. Seeking such preclearance in connection with each election is unduly costly and burdensome to the Colorado Republican Committee, and to all similarly situated political party committees.

The Colorado Republican Committee is therefore left with two undesirable options: (1) forfeit its statutory rights allowed under Colorado law that are designed to help ensure fair and accurate elections by permitting duly credentialed representatives of the political party committees to challenge illegal or fraudulent registrations, votes and ballots, and to challenge the illegal conduct of election officials; or (2) place a communications and operational firewall between itself and the RNC for anything that could be potentially construed to be related to “voter fraud”, “election integrity” or “ballot security.”

The firewall that is for all practical purposes required by the New Jersey Order makes it more difficult for the Colorado Republican Committee to fulfill its statutory duties to recruit and recommend the appointment of election judges, frustrates its ability to effectively recruit, train, support, and coordinate the efforts of party-appointed watchers, and hinders the Colorado Republican Committee in carrying out its goal of ensuring that elections in Colorado are administered with integrity and in compliance with all applicable federal, state and local laws. The Colorado Republican Committee has a strong interest in this Court granting the petition so that the New Jersey Order may be vacated or materially modified.

ARGUMENT

“[T]he court may relieve a party...from a final judgment, order, or proceeding” whenever “applying it prospectively is no longer equitable.” Fed. R. Civ. P. 60(b)(5). This “flexible standard” applies with equal force to consent decrees as it does to judgments on the

merits of the litigants' claims. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992). A significant change of law or fact may justify vacating or modifying a consent decree. *Id.* at 390. Furthermore, a consent decree “must further the objectives of the law upon which the complaint was based.” *Frew v. Hawkins*, 540 U.S. 431, 437 (2004).

The New Jersey Order was ostensibly designed to support the worthy goal of ensuring compliance with federal election laws, including the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, *et seq.* Now, over thirty years after the alleged conduct by a handful of operatives in the New Jersey gubernatorial election that gave rise to the initial consent decree, the New Jersey Order is no longer useful or needed. By prohibiting the RNC from effectively coordinating with the Colorado Republican Committee—a state political party committee that is far removed from that 1981 New Jersey gubernatorial election—the New Jersey Order actually makes compliance with federal and state election laws more difficult for the Colorado Republican Committee and for similarly situated state political party committees and the many candidates nominated and supported by the Republican Party in each election cycle. Because of the New Jersey Order, the RNC cannot assist the Colorado Republican Committee with common training, instructions, management structures or common operational controls, and cannot facilitate the sharing of ideas and best-practices among its affiliated state political party committees and Republican candidates.

Moreover, the New Jersey Order fails to take into account the multiple roles and purposes that watchers

appointed by the political party committee fulfill in connection with Colorado elections. Particularly since political party committees in Colorado are permitted to appoint only one watcher to be present at each polling place or location where ballots are being processed or where votes are counted at any one time, it is impossible to separate the watcher's get-out-the-vote functions from the watcher's election integrity functions. Thus, the supposed "protection" placed into the New Jersey Order to preserve the rights of the Colorado Republican Committee to coordinate with the RNC on "normal poll-watching functions" and issues unrelated to voter fraud is positively unworkable as applied to Colorado law.

The New Jersey Order should be vacated in its entirety or significantly modified and limited in its application. Accordingly, the Court should grant the petition for certiorari.

I. The New Jersey Order Defeats the Purpose for Which it Was Intended.

The original purpose of the Consent Decree was to ensure compliance with "with all applicable state and federal laws protecting the rights of duly qualified citizens to vote for the candidate(s) of their choice." Pet. App. 5a. The firewall that the New Jersey Order effectively imposes has made it more burdensome for the Colorado Republican Committee to ensure that elections in Colorado are conducted with integrity and in compliance with all applicable federal, state and local laws, effectively defeating the purpose for which the New Jersey Order was imposed in the first place.

Despite these challenges, the Colorado Republican Committee has expended considerable resources, time and effort over the past decade in particular in its efforts to develop and provide training and support for watchers and the hundreds of volunteers that have participated in election-integrity and legal operations in the state during that time. The present State Chairman served previously as legal counsel for the Colorado Republican Committee, and in that capacity has participated in or has been responsible for coordinating the legal team and poll watching operations of the Colorado Republican Committee benefiting its federal, state and local candidates over the past few election cycles. During that time, the application of the consent decree and the New Jersey Order to restrict the efforts and activities of the Colorado Republican Committee has been a frequent source of frustration and inefficiency. Moreover, the State Chairman's dual role as both chief officer of the Colorado Republican Committee and member of the RNC raises problematic questions regarding what involvement he may have in the legal team, poll watching, and election-integrity operations that are the subject of the New Jersey Order.

The Colorado Republican Committee believes the RNC is in the best position to assist the states in developing and disseminating legal advice, training, and best practices to ensure compliance with federal law and assist local political party officials and volunteers in their work to protect the integrity of elections and conduct effective election observation programs. If state political party committees like the Colorado Republican Committee were permitted to coordinate poll watching, legal operations, and election

integrity-related activities with the RNC, and if the RNC were permitted to perform such a function nationwide, it would help promote fair, honest elections throughout the country. The New Jersey Order has now ironically become an impediment to its own stated objectives.

II. The Supposed “Protections” in the New Jersey Order Fail to Take Into Consideration the Role of Election Judges and Watchers in Colorado, and Are Not Workable Under Colorado Law.

The New Jersey Order claims to preserve the rights of the RNC and state political party committees to coordinate get-out-the-vote efforts and effectively implement what the New Jersey Order identified as “normal poll-watch functions.” Pet. App. 161a–163a. But the New Jersey Order wrongly assumes that the Colorado Republican Committee can effectively separate its “ballot security” and election fraud prevention activities from its “normal poll watching” and get-out-the-vote activities, and the New Jersey Order fails to adequately address the different rights and functions that election judges and watchers may exercise under Colorado law. A somewhat detailed description of Colorado law in this regard will demonstrate the harm the New Jersey Order causes the Colorado Republican Committee.

Election Judges

Election judges are appointed by the county clerk and recorder or designated election official to perform duties in connection with the conduct of Colorado

elections. Election judges are the poll workers of the election, and are bound to perform their duties in connection with the election subject to the oath or affirmation of an election judge. Colo. Rev. Stat. § 1-6-114. The duties of election judges (which include supply judges, student judges, polling place judges, counting judges, receiving judges, and other election judges) include, among other things, coordinating the conduct of the election in the precinct, receiving and returning election supplies and equipment, inspecting the identification provided by voters, keeping the pollbook and recording information regarding electors who have voted, delivering the ballot to each eligible elector, inspecting ballots, duplicating ballots, receiving ballots, counting ballots, and providing assistance to voters. *See, e.g.*, Colo. Rev. Stat. §§ 1-6-101, *et seq.*; 1-7-109, 1-7-111. Election judges are expressly directed in Colorado law to “challenge any person intending to vote who the judge believes is not an eligible elector.” Colo. Rev. Stat. § 1-9-201.

Unlike many jurisdictions, Colorado law contains detailed and explicit provisions designed to ensure a level of partisan balance and representation in the appointment of election judges. For example, the clerk and recorder is required to appoint no less than three election judges to serve as polling place judges in each precinct, and there must be at least one election judge from each major political party appointed in each polling place. Colo. Rev. Stat. § 1-6-111(1). In partisan elections, each major political party is entitled to one-half of the total number of supervising supply judges appointed in the entire county (unless an odd-number of supply judges is appointed, in which case the county clerk is permitted to appoint the extra supply judge by

mutual agreement of the major political parties, or by lot). Colo. Rev. Stat. § 1-6-109.5.

Colorado law also expressly recognizes the role of political party committees in recommending the appointment of election judges. Political party precinct committee persons are instructed to submit a list of potential election judges in the days following the precinct caucus in even-numbered years, and the county political party chairman is directed by Colorado law to provide a list of registered electors that are recommended to serve as election judges to each clerk and recorder, and may designate the order of preference of such persons recommended. Colo. Rev. Stat. §§ 1-6-102, 1-6-103. Although the ultimate selection, appointment and training of election judges rests with the county clerk and recorder, even after a particular election judge has been appointed by the county clerk and recorder, the chairman of the county political party who “believes that an election judge appointed to represent that party is not faithfully or fairly representing the party...may exercise a preemptive removal of the election judge.” Colo. Rev. Stat. §§ 1-6-101, 1-6-119(1).

The provisions in Colorado law that require balanced representation among election judges from each major political party are an important element that helps ensure the integrity of elections, and these provisions help instill in the public confidence that those administering the election are not predominantly aligned with the orientation of a particular county clerk and recorder or with one particular party with an interest in the outcome of the election. Nevertheless, the presence of one or more partisan election judges

alone in each polling place is insufficient to ensure that ineligible electors are challenged and that actions by election officials themselves that may compromise the integrity of the election are subject to appropriate scrutiny. Election judges are effectively hired and are compensated as temporary employees of the clerk and recorder or designated election official, and work at the clerk and recorder's direction in the performance of their assigned duties. Colo. Rev. Stat. §§ 1-6-101(1), 1-6-115. Individual election judges, while they may be affiliated with a particular political party, do not perform their functions at the direction of or in any direct coordination with their political party committees, and are frequently instructed in election judge trainings not to communicate with or reveal potentially damaging information about the conduct of the election to political party representatives.

Poll Watchers

Colorado law recognizes the need to have independent partisan observers in a position to not only monitor the conduct of elections but also challenge ineligible persons who illegally attempt to vote and challenge the conduct of election officials and election judges themselves whose actions or omissions, whether committed out of ignorance or with malicious intent, would undermine the integrity of the election and deny otherwise eligible voters their right to vote. As such, political party committees are empowered in Colorado with the ability to appoint poll watchers. Unlike other jurisdictions that grant any member of the public access and the right to observe or monitor the conduct of elections, Colorado notably limits such access by statute to only watchers certified by the political party

committees and certified by others with a particular interest reflected on the ballot:

Each participating political party or issue committee whose candidate or issue is on the ballot, and each unaffiliated and write-in candidate whose name is on the ballot...***shall be entitled to have not more than one watcher at any one time in each precinct polling place in the county and at each place where votes are counted...***The chairperson of the county central committee of each major political party...shall certify the names of one or more persons selected as watchers on forms provided by the county clerk and recorder and submit the names of persons selected as watchers on forms provided by the county clerk and recorder.

Colo. Rev. Stat. § 1-7-106.

Watchers selected and certified to the clerk and recorder by political party committees are also permitted to observe the conduct of primary elections, to monitor mail-in polling places, early voting, recounts, and may observe the conduct of canvass boards, but in all instances are similarly entitled to maintain only one watcher at each polling place or location where ballots are being processed or votes are being counted. Colo. Rev. Stat. §§ 1-7-105, 1-8-109, 1-8-206, 1-10.5-102 and 1-10-101. Even an attorney representing a political party committee or individual candidate is not permitted in the polling place unless such attorney is properly credentialed as a watcher. Colorado Code of Regulations (CCR) 1505-1, Rule 8.3.

Colorado law permits any registered elector to challenge the ineligible or fraudulent registration of any registered voter, but such challenges to the registration and eligibility of a voter must be filed with the county clerk and recorder no later than sixty days prior to any election. Colo. Rev. Stat. § 1-9-101(1)(a). However, during that critical period within sixty days of any election, a person's right to vote at a polling place or in an election may only be challenged by an election judge, by a properly certified watcher, or by an eligible elector of the precinct. Colo. Rev. Stat. §§ 1-9-101(1)(a) and 1-9-201(2). Since regular voters or members of the general public are not permitted to remain in polling places for any lengthy period of time after voting themselves, and are not permitted access to locations where mail ballots are processed and counted, where military and overseas ballots are processed and counted, where provisional ballots may be reviewed, processed and counted following an election, during early voting or at election centers where voters from many precincts may be voting in a single location, or during post-election recounts and election contests, only watchers appointed by political party committees can effectively exercise the right to challenge illegal or fraudulent votes or ballots and challenge the conduct of election officials that may be necessary to protect the integrity of the election and preserve the interests of the political party committee and its candidates under these circumstances. Colo. Rev. Stat. §§ 1-9-207, 1-9-208.

Watchers certified by the political party committees are also granted additional rights within the polling place that relate to the get-out-the-vote functions and

activities run by the political party committees and candidates, namely:

Each watcher shall have the right to maintain a list of eligible electors who have voted, to witness and verify each step in the conduct of the election from prior to the opening of the polls through the completion of the count and announcement of the results, to challenge ineligible electors, and to assist in the correction of discrepancies.

Colo. Rev. Stat. § 1-7-108(3).

Watchers help facilitate the get-out-the-vote efforts and programs of political party committees by tracking and reporting who has voted in each precinct or polling place, and communicating with political party officials important information regarding turnout throughout the conduct of the election and on election day. State law does allow “party candidates or county party officers” to visit polling locations “to observe the progress of voting in the precincts,” but party officers and candidates are generally not permitted to remain in a polling place for any lengthy period of time and are not allowed in the immediate voting area, nor are candidates or party officers permitted to challenge voters or exercise any of the other rights of watchers. Colo. Rev. Stat. § 1-7-106. *See also*, Colo. Rev. Stat. § 1-7-115 (imposing limits on time in voting area). Candidates and any member of the candidate’s immediate family are prohibited from serving as an election judge or as a watcher in any election where that candidate appears on the ballot, thus candidates must rely on the watchers appointed by the political

party committee to adequately protect their interests. Colo. Rev. Stat. §§ 1-6-101(2)(e), 1-6-101(7)(c)(VI) and 1-7-108(2).

Harm Caused by the New Jersey Order

The New Jersey Order prohibits coordination of a legal operation, recount preparation, election monitoring and/or poll watching program with the RNC if “one of its purposes [is] the prevention of either fraudulent voting or fraudulent voter registration.” Pet. App. 162a. The Colorado Republican Committee does not have the ability—as the New Jersey Order wrongly assumes—to appoint one watcher or election observer (who can coordinate with the RNC) to conduct “normal poll watching” and get-out-the-vote efforts, and appoint a separate watcher or election observer (who cannot coordinate with the RNC) to conduct “ballot security” activities. Thus, the Colorado Republican Party cannot coordinate with the RNC on key aspects of its election operations unless the RNC and the Colorado Republican Committee undertake the costly and impracticable effort of obtaining preclearance.

Given the important role of partisan election judges in conducting elections, and of partisan watchers in monitoring the conduct of elections, both the Colorado Republican Committee and the Colorado Democratic Party actively recruit and recommend the appointment of election judges, and participate in the recruitment, selection and certification of watchers. Both the Colorado Republican Committee and the Colorado Democratic Party prepare and provide training and information to prospective election judges and watchers, and coordinate poll watching and other

election integrity efforts in counties throughout the state. Both the Colorado Republican Committee and the Colorado Democratic Party actively administer and participate in other election-related operations designed to ensure that state and federal laws are being followed in the conduct of the election, and work to help ensure and encourage each citizen and eligible voter to exercise the franchise and to do so with the confidence that their vote will be properly counted and properly reported.

However, and unlike the Colorado Democratic Party, the Colorado Republican Committee is effectively prohibited from coordinating with its national political party organization in such activities, giving its Democratic counterpart in the state an important competitive advantage. Accordingly, the New Jersey Order not only harms the ability of the Colorado Republican Committee to coordinate its election place monitoring functions with the RNC, it insures an unlevel playing field relative to the Colorado Democratic Party and the Democratic National Committee.

CONCLUSION

For the forgoing reasons, the New Jersey Order should be vacated or significantly modified and limited in its application, and the Court should grant the Republican National Committee's Petition for Certiorari.

Respectfully submitted,

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