

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 OF THE REPUBLICAN PARTY OF
WISCONSIN FOR LEAVE TO FILE AN
AMICUS CURIAE BRIEF
AND
AMICUS CURIAE BRIEF IN SUPPORT OF
PETITIONER**

SCOTT C. BEIGHTOL
Counsel of Record
JOSEPH LOUIS OLSON
THOMAS A. JANCZEWSKI
MICHAEL BEST & FRIEDRICH LLP
100 EAST WISCONSIN AVE.
SUITE 3300
MILWAUKEE, WI 53202-4108
sbeightol@michaelbest.com
(414) 271-6560

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*AMICUS CURIAE***

Comes now the Republican Party of Wisconsin and files this motion pursuant to Sup. Ct. R. 37.3(b), for leave to file an *amicus curiae* brief in support of Petitioner, the Republican National Committee (“RNC”). The Republican Party of Wisconsin requested the consent to the filing of an *amicus curiae* brief from each of parties to this case, but consent was withheld by Respondent, the Democratic National Committee.

The Republican Party of Wisconsin submits that its proposed *amicus curiae* brief, attached hereto, will “bring to the attention of the Court relevant matter not already brought to its attention by the parties.” Sup. Ct. R. 37.1. The RNC petitions

this court for review of a Third Circuit order upholding a thirty-year old consent decree which in effect prohibits the RNC from coordinating with its state party constituents, like the Republican Party of Wisconsin, for election day operations unless those state party constituents forfeit all rights to challenge unlawful voter registrations and ballots. As a result, and as described more fully in the Republican Party of Wisconsin's proposed *amicus curiae* brief, the consent decree deprives Republican Party of Wisconsin from seeking the assistance and guidance of the RNC in complying with federal elections law, protecting the integrity of Wisconsin elections, and in acting as an effective advocate to ensure that all qualified electors are allowed to vote.

Although the Republican Party of Wisconsin is not a party to consent decree, the consent decree nevertheless impedes the Republican Party of Wisconsin's ability to carry out its mission. The Republican Party of Wisconsin submits that it is important for the Court to fully understand, and consider, the effect that the consent decree has over third-parties, like the Republican Party of Wisconsin. The Republican Party of Wisconsin is also in the best position to illustrate for the Court how the terms of consent decree are often incompatible with the nuances of state elections law.

Wherefore, the Republican Party of Wisconsin respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

Respectfully submitted,

SCOTT C. BEIGHTOL

Counsel of Record

JOSEPH LOUIS OLSON

THOMAS A. JANCZEWSKI

MICHAEL BEST & FRIEDRICH LLP

100 EAST WISCONSIN AVE.

SUITE 3300

MILWAUKEE, WI 53202-4108

sbeightol@michaelbest.com

(414) 271-6560

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, the Republican Party of Wisconsin is a political party registered under federal and state law with thousands of members, including state and federal legislators, local government officials serving at the county and municipal levels, and hundreds of thousands of constituents throughout all of Wisconsin's seventy-two counties.¹ The Republican Party of Wisconsin's mission is materially restricted by the consent decree that is the subject of the Republican National Committee's ("RNC") petition for a writ of certiorari.

As background, Wisconsin recognizes by statute a broad right of access to polling locations and acknowledges that political organizations (like the Republican Party of Wisconsin) are key participants in ensuring fair and honest elections:

Any member of the public may be present at any polling place, in the office of any municipal clerk whose office is located in a public building on any day that absentee ballots may be cast in that office, or at an alternate site under s. 6.855 on any day that absentee ballots may be cast at that site for the purpose of observation of

¹ All counsel of record received timely notice of the Republican Party of Wisconsin's intent to file an *amicus curiae* brief. Petitioner, RNC, consented to filing. Respondent, the Democratic National Committee, did not consent to filing. No counsel to a party has authored any portion of this brief. No party or entity other than the Republican Party of Wisconsin has contributed monetarily to the preparation or submission of this brief.

an election and the absentee ballot voting process ***The chief inspector or municipal clerk may reasonably limit the number of persons representing the same organization who are permitted to observe under this subsection at the same time.***

Wis. Stat. § 7.38 (emphasis added). In the interest of protecting the integrity of Wisconsin elections, the statutes also empower “any registered elector of a municipality [to] challenge the registration of any other registered elector.” Wis. Stat. § 6.48.

Towards this end, both the Republican Party of Wisconsin and Democratic Party of Wisconsin participate in election day observation. Unlike the Democratic Party of Wisconsin, however, the Republican Party of Wisconsin cannot currently coordinate with its national organization.

Thirty years ago, based upon (contested) allegations of misconduct in 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 creates a virtual firewall between the Republican Party of Wisconsin and the RNC. *See* Pet. App. 170a–184a; Pet. App. 161a–163a. Although by its terms the New Jersey Order does not bind the Republican Party of Wisconsin, it 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 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.” Pet. App. 166a. Most “applicable law” is state and local:

the responsibility for the administration of state and federal elections resides at the state level, and states regulate various aspects of elections including, for example, registration procedures, absentee and early voting requirements, and Election Day procedures. Within each state, responsibility for managing, planning, and conducting elections is largely a local process, residing with about 10,500 local election jurisdictions nationwide.

State Laws Addressing Voter Registration and Voting on or before Election Day, GAO-13-90R, 1–2 (Oct. 4, 2012).³ As a consequence, if the Republican Party of Wisconsin (or any state party constituent of

² “Ballot Security,” means “any program aimed at combating voter fraud by preventing potential voters from registering to vote or casting a ballot.” Pet. App. 165a–166a.

³ Indeed, Wisconsin has eight chapters of statutes governing the administration of elections and ten chapters of administrative regulations. *See* Wis. Stat. Ch. 5–12; Wis. Admin. §§ GAB 1–12.

the RNC) wishes to coordinate with the RNC, the Republican Party of Wisconsin must submit itself to the District Court of New Jersey so that the District Court of New Jersey can weigh in on whether the Republican Party of Wisconsin is complying with the various Wisconsin elections statutes, regulations and opinions of the Wisconsin Attorney General, and the Wisconsin Government Accountability Board, the state administrative agency delegated the authority to oversee Wisconsin elections.

For its part, RNC would have to bring over fifty different preclearance proceedings for each election cycle to coordinate with all of its state party constituents. This is impracticable. The Republican Party of Wisconsin is left with two undesirable options: (1) forfeit its state statutory rights to ensure fair elections through challenges to illegal votes and registrations; or (2) place a firewall between itself and the RNC. This is a Hobson's choice.

The firewall that is for all practical purposes mandated by the New Jersey Order hinders the Republican Party of Wisconsin in carrying out its mission. The firewall weakens the integrity of Wisconsin elections, and, in the case of absentee and military ballots, threatens to disenfranchise qualified electors. The Republican Party of Wisconsin has a strong interest in this Court granting the petition so that the New Jersey Order can be vacated.

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). Among other things, a significant change of law or fact may justify vacating or modifying a consent decree. *Id.* at 390. 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).

In this case, the New Jersey Order long ago outlived its usefulness. The original purpose of the New Jersey Order was to ensure compliance with federal elections law, and, in particular, the Voting Rights Act. By prohibiting the RNC from coordinating with its state-level constituents, however, the New Jersey Order actually makes compliance with federal election laws more difficult for state parties like the Republican Party of Wisconsin.

Moreover, the New Jersey Order fails to account for the multiple purposes of election day observation of challenging illegal voting by electors, facilitating the get out the vote program, *and* challenging illegal conduct by election officials that would deny the right to vote to qualified electors. The supposed "protections" placed into the New Jersey Order to preserve the rights of the Republican Party of Wisconsin to coordinate with the RNC issues unrelated to voter fraud are unworkable as applied to Wisconsin law.

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 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. Today, the New Jersey Order defeats the very purpose for which it was intended because it makes compliance with federal elections law more burdensome. The New Jersey Order should be vacated, and, accordingly, the Court should grant the petition for a writ of certiorari.

Because the New Jersey Order effectively prohibits the RNC from coordinating with its state party constituents, those constituents are left to their own devices to understand their rights and obligations under federal elections law. This is no small undertaking, and it gets more difficult every passing year. Thirty years ago, when the New Jersey Order was first entered, the state party constituents only had to understand the requirements in the Voting Rights Act, 42 U.S.C. § 1973, *et seq.* for election administration issues at the federal level.

Now, in addition to the Voting Rights Act, state party constituents must master: the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff; National Voter Registration Act, 42 U.S.C. § 1973gg; the Help America Vote Act, 42 U.S.C. 15301 *et seq.*; and the Military and Overseas Voters Empowerment Act, Pub. L. 111-84; 123 Stat. 2190; over 18,000 words of Department of Justice regulations; guidelines promulgated by the recently created U. S. Election Assistance Commission; various executive orders; and developing case law in the various federal district and circuit courts. Of the last category, in the last two-year election cycles alone, federal courts have entered 197 decisions citing to the Voting Rights Act, 18 decisions citing to the Uniformed and Overseas Citizens Absentee

Voting Act, 34 decisions citing the National Voter Registration Act, 21 decisions citing the Help America Vote Act, and 11 decisions citing the Military and Overseas Voters Empowerment Act.⁴ This multitude of new statutes, administrative rules, and interpretive decisions were neither accounted for nor anticipated when the district court entered the New Jersey Order in the 1980s.

Although the Republican Party of Wisconsin, has met the heavy burden at every step, as have virtually all state parties, the New Jersey Order was intended to facilitate compliance with federal elections law. Instead, it makes compliance harder. The New Jersey Order should be vacated because it does not “further the objectives of the law upon which the complaint was based.” *Frew*, 540 U.S. at 437.

Given the burdens created by the New Jersey Order it is no surprise that over the course of *thirty* years, across the “10,500 local election jurisdictions” estimated by the GAO,⁵ a handful of local party members and volunteers, acting ad hoc, have been *accused* of lapses. Even though those persons are not acting on behalf of or at the direction of the RNC (and thus not subject to the decree), the lower courts in this case, used these alleged lapses as evidence that the New Jersey Order is necessary. *See, e.g.*, Pet. App. 115a(refusing to vacate the New Jersey

⁴ Of course, this massive body of law is on top of Wisconsin elections statutes, regulations, and agency opinions and guidelines.

⁵ *State Laws Addressing Voter Registration and Voting on or before Election Day*, GAO-13-90R, pp. 1–2 (Oct. 4, 2012).

Order in part because of allegations of “voter suppression efforts undertaken by state and local Republican organizations.”). To the contrary, it is evidence that local party members and volunteers would benefit from the training and guidance that the RNC could provide.

In effect, the New Jersey Order’s firewall creates a feedback loop: the New Jersey Order makes it harder for local party members and volunteers to comply with federal elections law and any noncompliance becomes “evidence” that the New Jersey Order was necessary all along. When issues arise, however, the New Jersey Order is part of the problem. It is not the solution.

If state parties were permitted to coordinate with the RNC, the RNC could develop and disseminate legal advice, training, and best practices to ensure compliance with federal law as local party members and volunteers protect the integrity of their state elections. As a national organization with state-level counterparts, the RNC is in the best position to serve as a clearinghouse of developments and trends in election law issues. If the RNC is permitted to perform such a function, it would promote fair and honest elections with a consistent and accountable national standard. Ironically, the New Jersey Order is now an obstacle to the very interests it at one time sought to protect.

II. The New Jersey Order Hinders the Republican Party of Wisconsin's Efforts to Protect the Rights of Qualified Voters, and, In Particular, Military and Absentee Voters.

Election day observation programs serve multiple purposes. One objective is to ensure that *unqualified* electors are not permitted to vote illegally. The lower courts fail to appreciate that election day observation programs are also designed to ensure that *qualified* electors are permitted to vote. Under the terms of the New Jersey Order, if a state party chooses to exercise its state law rights to challenge unqualified voters—such as felons and nonresidents—it cannot coordinate with the RNC on its other function of ensuring that qualified electors are permitted to vote.

The New Jersey Order prohibits coordination on elections day operations if “one of its purposes [is] the prevention of either fraudulent voting or fraudulent voter registration.” Pet. App. 162a. Thus, because the Republican Party of Wisconsin exercises its state law rights to challenge voter qualifications under Wisconsin Statutes, Sections 7.38 and 6.48, the Republican Party of Wisconsin cannot coordinate with the RNC on other aspects of its election day operation unless the RNC and the Republican Party of Wisconsin undertake the impracticable effort of obtaining preclearance.

One area, in particular, where this presents a significant problem is in protecting the rights of absentee and military voters. The Democratic Party, at the federal and state level, has aggressively challenged military and absentee ballots in numerous elections around the country. *See, e.g.*,

1,000-Plus Absentee Votes Are Disqualified In Fla. Many Were Thrown Out Because of Postmark Issues, The Philadelphia Inquirer Nov. 18, 2000, at A03; *Parties spar over absentee voting*, The Kansas City Star, Sept. 21, 2004, at B2; *Ballot appeal hits roadblock*, The Times Union (Albany, New York) Oct. 4, 2005, at B9. The Republican Party has traditionally served as the defender of the rights of military and absentee voters. *Id.*

The threats to the voting rights of servicemen and servicewomen are particularly severe in the State of Wisconsin, where election officials have chronically failed to protect the rights of military and absentee voters. *See Romney for President, Inc. v. State of Wisconsin*, No. 12-cv-00745, Dkt. # 1 (W.D. Wis., Oct. 12, 2012)(complaint based upon violations of the Military and Overseas Voters Empowerment Act); *United States of America v. The State of Wisconsin*, No. 12-cv-00197, Dkt. # 4 (W.D. Wis., Mar. 23, 2012)(consent decree for violations of Uniformed and Overseas Citizens Absentee Voting Act); *United States of America v. State of Wisconsin*, No. 10-cv-00518, Dkt. # 4 (W.D. Wis., Sept. 15, 2010)(same).

The Republican Party of Wisconsin is an important advocate for the rights of absentee and military voters, and its volunteers must be prepared to respond if they witness election officials rejecting lawful absentee and military ballots. The Republican Party of Wisconsin could better advocate for these voters if volunteers were allowed to draw on the expertise of its national organization. Under the terms of the New Jersey Order, however, the Republican Party of Wisconsin cannot coordinate with the RNC in its efforts to prevent military and

absentee voters from being disenfranchised. This, too, works to the detriment of our Wisconsin elections system.

III. The Supposed “Protections” in the New Jersey Order Are Not Workable Under Wisconsin Law.

The New Jersey Order purports to preserve the rights of the state parties and the RNC to coordinate get out the vote efforts and to conduct what the New Jersey Order defines as “normal poll-watch functions.” Pet. App. 161a–163a. The New Jersey Order demonstrates the folly of attempting to create a one-size-fits-all solution for “10,500 local election jurisdictions.”

Under Wisconsin law, the Republican Party of Wisconsin must prepare for a single volunteer at each polling place to perform the so-called “ballot security” activities, the “normal poll watching” activities, and the get out the vote campaign.⁶ By statute, “[t]he chief inspector or municipal clerk may reasonably limit the number of persons representing the same organization who are permitted to observe . . . at the same time.” Wis. Stat. § 7.38. In practice, this often means that if a polling site is crowded, one observer from each organization is allowed to remain at the polling site.

The Republican Party of Wisconsin does not have the luxury—as the New Jersey Order apparently assumes—of sending one election

⁶ Poll watchers are necessary to a well-functioning get out the vote campaign because they are asked to keep track of whether known supporters have voted. Supporters that have not appeared at the polls are contacted and encouraged to do so.

observer to conduct “normal poll watching” and get out the vote efforts (who can coordinate with the RNC) and a separate election observer to conduct “ballot security” activities (who is subject to the firewall). If an election official decides to limit the number of observers, the Republican Party of Wisconsin would have to choose between exercising its statutory rights to challenge unqualified voters, and its other important election day functions. Meanwhile, its counterpart in the Democratic Party of Wisconsin would never have to face such a dilemma.

Moreover, as applied to Wisconsin law, if the Republican Party of Wisconsin elected to forgo the so-called “ballot security” functions in the described scenario it would lead to further absurd results. Under the New Jersey Order, “normal poll-watching” includes “report[ing] irregularities unrelated to voter fraud to duly-appointed state officials,” and therefore excludes reporting voter fraud. Pet. App. 161a. That is, if a “normal poll watcher” witnesses a known felon with a ballot in hand, he or she cannot alert the responsible election official in charge.

Under Wisconsin law, felons are not qualified electors, and it is a Class I felony for unqualified electors to cast a ballot. Wis. Stat. §§ 6.03(1)(b), 12.13(1)(a), 12.60(1)(a). In other words, if the RNC and the Republican Party of Wisconsin were working together, the New Jersey Order would require Republican Party of Wisconsin members and volunteers to remain silent—under threat of contempt of court—while witnessing a felony in commission. Equity, which governs whether to vacate a consent decree, *see* Fed. R. Civ. P. 60(b)(5), simply cannot favor an order that would require law-

abiding citizens to conceal serious crimes from the proper authorities.

CONCLUSION

For the forgoing reasons, the Court should grant the Republican National Committee's Petition for a Writ of Certiorari.

Respectfully submitted,

SCOTT C. BEIGHTOL

Counsel of Record

JOSEPH LOUIS OLSON

THOMAS A. JANCZEWSKI

MICHAEL BEST & FRIEDRICH LLP

100 EAST WISCONSIN AVE.

SUITE 3300

MILWAUKEE, WI 53202-4108

scbeightol@michaelbest.com

(414) 271-6560