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

PETITIONER'S REPLY BRIEF

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Try as it might, the Democratic National Committee ("DNC") cannot reconcile the decisions below with decisions of this Court or other circuit courts. Its claim that vacated decisions retain "persuasive" force relies on decisions addressing the effect of settlements, not decisions vacated as moot due to happenstance. Its claim that courts uniformly recognize substantial compliance as giving them discretion to terminate consent decrees both misreads the decisions and further indicts the decision below, which deemed substantial compliance irrelevant to termination. Finally, the DNC's effort to equate a court's authority to "*relieve*" a party from a consent decree under Federal Rule of Civil Procedure 60(b) with the *expansion* of this Decree is unpersuasive.

Accordingly, both as a case presenting issues of paramount national importance, and as one providing an opportunity for this Court to resolve three conflicts of law among the circuits, this case warrants review by the Court.

I. THE DNC'S EFFORT TO SQUARE THE DECISIONS BELOW WITH *MUNSINGWEAR* IS MISGUIDED.

As shown in the Petition, the only instance in which the district court found that the Republican National Committee ("RNC") conducted an unauthorized ballot security program in violation of the substantive terms of the Consent Decree was in the 2004 *Malone* case.[1] A

[1] In 1990, the DNC accused the RNC of involvement in a ballot security effort in the North Carolina Senate race. The court rejected that allegation, because the DNC "failed to establish that

divided panel of the Third Circuit denied the RNC's request for a stay—it did not, as the DNC claims, "affirm" the merits of the district court's decision—but within hours the Third Circuit sitting en banc *vacated* the panel's decision, granted en banc reconsideration, and entered the stay.[2] Later, Justice Souter denied Ms. Malone's request to reinstate the district court order, observing that she had voted without incident, rendering the case moot.[3]

Thereafter, on its own initiative, the en banc Third Circuit dismissed the appeal as moot, explicitly citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and remanded to the district court. On remand, the court entered the parties' stipulation dismissing Ms. Malone's suit as moot, citing *Munsingwear* twice. Pet. 8-9.

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the [RNC] conducted, participated in, or assisted ballot security activities in North Carolina." Pet. 186a. Nevertheless, the court *sua sponte* created a requirement that the RNC distribute information about the Consent Decrees. *Id.* 187a.

[2] A panel decision vacated by the en banc court is void. *See United States v. Sigma Int'l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002) (en banc) (vacated panel decisions "have no legal effect whatever. They are void.") (citations omitted); *Backman v. Polaroid Corp.*, 910 F.2d 10, 14 (1st Cir. 1990) (en banc) (panel opinion "'no longer [has] standing,' except to the extent that [the en banc court] adopt[s] it") (citation omitted).

[3] The DNC misstates *when* the case became moot. Opp. 18. Ms. Malone announced that she had "voted without challenge" *after* the Third Circuit en banc vacated the panel decision and while the petition was pending before Justice Souter. Pet. 290a.

Those three explicit references to *Munsingwear* make plain that *Munsingwear* governs. The RNC was "frustrated by the vagaries of circumstance" from pursuing its appeal on the merits and should be "treated as if there had [not] been a review." *Camreta v. Green*, 131 S. Ct. 2020, 2035 (2011).

Yet, as shown in the Petition (pp. 11-12, 15), both lower courts repeatedly invoked the *Malone* ruling. Until the Third Circuit's decision below, the circuits had uniformly interpreted *Munsingwear* as rendering decisions vacated as moot to be void, with no effect whatsoever. *See* Pet. 19-21. Thus, the Third Circuit's decision is in conflict with decisions of this Court and other circuits.

In response, the DNC makes three arguments. *First*, it cites four decisions as support for its claim that vacated decisions continue to have *persuasive*, though not *preclusive*, effect. One of those decisions confirms the RNC's point, however. In *County of Los Angeles v. Davis*, 440 U.S. 625 (1979), this Court declared the case moot, cited *Munsingwear*, and explained: "Of necessity our decision 'vacating the judgment of the Court of Appeals *deprives that court's opinion of precedential effect*.'" *Id.* at 634 n.6 (citations omitted) (emphasis added); *but see id.* at 646 n.10 (Powell, J., dissenting) (expressing concern that the vacated decision would "likely be viewed as persuasive authority if not the governing law of the Ninth Circuit").

The other three cited decisions address the effect of decisions vacated as a result of *voluntary settlement*, not decisions vacated as a result of *mootness by*

happenstance.[4] Decisions addressing settlement have no bearing here. Indeed, in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24-25 (1994), this Court unanimously ruled that *Munsingwear* does not apply when mootness results from settlement. It concluded: "The principles that have always been implicit in our treatment of moot cases counsel against extending *Munsingwear* to settlement." *Id.* at 24. As the Court explained:

> A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. . . . The same is true when mootness results from unilateral action of the party who prevailed below. . . . Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur. The judgment is not unreviewable, but simply unreviewed by his own choice.

Id. at 25 (citations omitted).

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[4] *Sentinel Trust Co. v. Universal Bonding Ins. Co.*, 316 F.3d 213, 215, 223 (3d Cir. 2003) ("We apply issue preclusion despite the fact that the earlier judgment had been vacated as a *term of settlement* of that case.") (emphasis added); *Netzer v. City of Pasadena*, 963 F.2d 379, 1992 WL 107058, at *2 (9th Cir. 1992) (unpublished) ("An order vacating *pursuant to a settlement agreement* casts no reflection on the persuasiveness of the analysis employed by the vacated opinion.") (emphasis added); *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 160 B.R. 882, 897 (Bankr. S.D.N.Y. 1993) (distinguishing decisions vacated as moot "under circumstances beyond the control of the parties" from the situation before it involving voluntary settlement).

Thus, when a case becomes moot by happenstance, the controversy disappears, and along with it Article III jurisdiction of the federal courts. The appealing party is precluded from pursuing what might turn out to be a meritorious appeal. The vacated ruling must carry *no* effect, whether deemed precedential or persuasive. This is especially true here, because the en banc Third Circuit granted a stay of the *Malone* ruling, suggesting that the RNC had a substantial likelihood of prevailing on the merits.

Second, the DNC asserts that the district court's findings of fact in *Malone* are "part of the record in this case." Opp. 18 (citing Pet. 57a). As demonstrated (Pet. 20-21), *Munsingwear* eviscerates both legal rulings and findings of fact.

Using a slightly different tact, the DNC asserts that the lower courts did not rely on the *Malone* ruling at all, but rather revisited the record in that case and made findings anew. Opp. 7 (quoting from the vacated *Malone* ruling, Pet. 259a-60a), 19.[5] The very wording of the lower court decisions rebuts that assertion. *See* Pet. 56a ("The District Court did not abuse its discretion or err *by considering the Malone finding* that, in 2004, the RNC engaged in substantive and procedural violations of the Decree.") (emphasis added); *id.* 114a (RNC claim of compliance "is belied by the fact

[5] The DNC asserts that the RNC was "happy to" rely on the *Malone* record (Opp. 19), but the RNC's counsel made clear that "the Third Circuit dismissed [*Malone*] as moot. And under *Munsingwear*, it is no longer controlling. . . The findings and . . . conclusions and the ruling in the *Malone* matter, with all due respect, your Honor, *are no longer binding*." J.A. 0345 (emphasis added).

that *this Court found* a mere five years ago in the *Malone* matter that the RNC had engaged in conduct that violated both the substantive and procedural provisions of the Decree.") (emphasis added); *id.* 114a n.10 ("this Court's factual determination [in *Malone*] that the RNC violated the Consent Decree was never refuted and remains significant insofar as it rebuts the RNC's claims . . . that it has not engaged in such activity since 1987").

Third, the DNC claims its voter suppression expert Dr. Davidson relied on "a number of *Malone* documents that were re-introduced into the record below." Opp. 7. To the contrary, the district court found that only two incidents cited by Dr. Davidson—the ones in 1982 and 1987 on which the original decree and modification were based—involved the RNC, and that "the entirety of his book was based on press accounts." Pet. 92a. As for the DNC's allegation of voter suppression by unidentified "Republicans" in seven states, Opp. 2,[6] the district court correctly found those instances "are not attributable to the RNC," Pet. 115a, and—even if

[6] The DNC brought no charges against the RNC related to those claims of suppression. This is because the 1982 decree is clear that "the RNC . . . [has] no present right or 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." Pet. 176a. In 1990 and 2008, the district court rejected DNC claims of voter suppression because the RNC was not involved. *Id.* 186a (DNC "failed to establish that the [RNC] conducted, participated in, or assisted ballot security activities in North Carolina as alleged in the [DNC's] motion to reopen."); *id.* 296a-97a (denying motion for preliminary injunction).

accurate—those incidents would not show a violation of *these* decrees.[7]

In short, both the district court's decision and the Third Circuit decision affirming it relied heavily on the vacated *Malone* ruling. By so doing, the Third Circuit created a conflict among the circuits regarding the scope and vitality of *Munsingwear*.

II. CONTRARY TO THE DNC'S ARGUMENT, THE LOWER COURTS DISCLAIMED DISCRETION TO TERMINATE THE CONSENT DECREE BASED ON SUBSTANTIAL COMPLIANCE.

As shown, (Pet. 22), this Court deemed "mistaken" the view that "compliance alone cannot become the basis for modifying or dissolving an injunction." *Bd. of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 246 (1991).[8] Following *Dowell*, the Eleventh

[7] The district court's assertion that the RNC continues to have an "incentive" to suppress minority voters is both irrelevant to substantial compliance and wholly unsupported. *See* Pet. 83a (testimony of Thomas J. Josefiak that minority voter suppression would be "political suicide").

[8] Since the decision in *Dowell*, numerous courts have terminated consent decrees on various grounds. *See, e.g., NLRB v. Carpenters 46 N. Cal. Cntys. Conf. Bd.*, 191 F.3d 460, 1999 WL 680341, at *2 (9th Cir. 1999) (terminating 1986 decree); *United States v. Eastman Kodak Co.*, 63 F.3d 95, 109 (2d Cir. 1995) (terminating 1921 antitrust decree); *James v. Lash*, 949 F. Supp. 691, 694 (N.D. Ind. 1996) (terminating 1982 decree); *North State Law Enforcement Officers Ass'n v. Charlotte Mecklenburg Police Dep't*, 862 F. Supp. 1445, 1460 (W.D.N.C. 1994) (terminating 1974 decree). Last month, the Democratic Senatorial Campaign

Circuit remanded a consent decree case to the district court with instructions to consider termination of the decree based on substantial compliance and revisit the finding that "the 'basic objectives' of the Consent Decree have *not* been achieved."[9] Likewise, the Second Circuit affirmed a district court order terminating a consent decree after nineteen years of compliance because "that objective [of the decree] has been reached."[10] Three other circuits appear to agree that compliance may justify termination. *See* Pet. 28 n.14. The Third Circuit and two others disagree. *See* Pet. 25-26.

After contending below that compliance will not support termination, the DNC now changes position. Now, it asserts that *all* courts recognize substantial compliance as *sufficient* to give a court discretion to terminate a decree, but that compliance does not *mandate* termination of a decree. As shown (Pet. 25-28), the DNC's assertion does not accurately describe the state of the law.[11]

Committee, the DNC's sister committee, persuaded the Federal Election Commission to vacate a consent decree entered in 1995. *See* FEC Agenda Document No. 12-79, Nov. 9, 2012, *available at* http://www.fec.gov/agenda/2012/mtgdoc_1279.pdf.

[9] *United States v. City of Miami*, 2 F.3d 1497, 1498, 1508 (11th Cir. 1993) (emphasis added).

[10] *Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity*, 13 F.3d 33, 39 (2d Cir. 1993).)

[11] In the words of the Ninth Circuit, "obedience to a mandate 'provides no justification for dissolving the injunction. Compliance is just what the law expects.'" *SEC v. Coldicutt*, 258 F.3d 939, 943 (citation omitted). *See* Pet. 25-26.

More important, however, it misdescribes what the Third Circuit did in this case. According to the Third Circuit:

> [A] party must establish at least one of the following four factors by preponderance of the evidence to obtain modification or vacatur: (1) a significant change in factual conditions; (2) a significant change in law; (3) that "a decree proves to be unworkable because of unforeseen obstacles"; or (4) that "enforcement of the decree without modification would be detrimental to the public interest".

Pet. 17a (quoting *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 384 (1992)). *See also* Pet. 106a (district court applying same factors). The Third Circuit concluded: "Even if the RNC had not violated the Decree since 1987, *that fact alone is not necessarily sufficient to justify vacating the Decree because compliance is the purpose of the Decree*." Pet. 57a (emphasis added). Even though the Decree's purpose is to prevent intimidation and suppression of minority voters—for the purpose, in turn, of allowing minorities to vote—the Third Circuit deemed increased voter registration and turnout among minorities "not statistically relevant" because those data "could be evidence that the Decree is necessary and effective." *Id.* 32a. Contrary to the DNC's argument, the courts below deemed substantial compliance with the Decree both insufficient and irrelevant to the decision on termination.[12]

[12] The district court declined to consider the RNC's substantial compliance, relying upon its vacated *Malone* ruling to show that

Thus, the circuits are in conflict over whether substantial compliance with a consent decree is sufficient on its own to justify termination of the decree. The conflict is not, as the DNC claims, with the exercise of discretion once substantial compliance is found. Indeed, the Third, D.C., and Ninth Circuits reject the view that substantial compliance triggers even a need to *exercise discretion*. The failure of the court below to understand that compliance bestowed discretion was an error of law.[13]

III. UNILATERAL IMPOSITION OF GREATER RESTRICTIONS ON THE RNC DID NOT "RELIEVE" THE RNC FROM BURDENS OF THE DECREE.

In the Petition (pp. 29-30), the RNC demonstrated that the district court's modifications of the Decree expanded the Decree's scope and its restrictions on the RNC in two fundamental ways. First, the court expanded the scope of the Decree to encompass any and all activities aimed at combating voter fraud. Second,

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the RNC had violated the Decree as recently as 2004, and speculating that the RNC still has an "incentive" to suppress minority voting. Pet. 114a-15a. This "incentive" purportedly derives from "racially polarized voting"—an innuendo-laden term meaning only that minorities have tended to vote for Democrats in higher percentages than they have voted for Republicans.

[13] Failure to exercise discretion was also an abuse of discretion. *See, e.g., Ray v. Robinson*, 640 F.2d 474, 478 (3d Cir. 1980) ("If a district court fails to exercise its discretion, that is itself an abuse of discretion."); *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993) ("most obvious manifestation" of abuse of discretion "is in a failure or refusal, either express or implicit, actually to exercise discretion").

the court expanded the Decree to prevent any RNC poll watcher from reporting clear instances of voter fraud to a responsible public official. The DNC did not request this expansion, it submitted no evidence to support such an expansion, and the RNC first received notice of the expansion when it appeared in the district court's order. The Third Circuit confirmed and endorsed the expansion, suggesting that the RNC use the preclearance process to seek relief. Pet. 48a n.23.

Critically, the DNC does not deny this dramatic expansion. Rather, it contends that the district court merely clarified "ambiguities" in the language of the Consent Decrees. Opp. 28. This observation does not rebut the RNC's point: the Decrees are now much broader and more burdensome than the ones the RNC agreed to in 1982 and 1987.

Next, the DNC argues that "[e]ven if the modifications to the Decree could be deemed an 'expansion,' the District Court was permitted to *modify* the Consent Decree." Opp. 29. (emphasis added). As the DNC recognizes, however, the pertinent language in Rule 60(b) is "the court may *relieve* a party . . . from a final judgment [or] order. . . ." *Id.* As both the Sixth Circuit and an earlier panel of the Third Circuit recognized, an *expansion* of the restrictions or burdens imposed by a decree cannot be considered "relief." *See Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1152-53 (6th Cir. 1992); *Harris v. City of Philadelphia*, 137 F.3d 209, 212 (3d Cir. 1998).

Finally, the DNC suggests that the imposition of greater burdens on the RNC was due to unspecified changed circumstances. To the contrary, the DNC

neither advocated nor introduced evidence to justify greater restrictions, and the district court identified no changed circumstances and made no findings to support the greater restrictions.

CONCLUSION

For the reasons set forth above and in the RNC's Petition, petitioner RNC respectfully urges this Court to grant the Petition.

Respectfully submitted,

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