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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court exercise its certiorari power to enable the Republican National Committee to escape a consent decree to which it twice agreed with the advice of counsel and which the District Court found was still necessary, a decision reviewed for abuse of discretion?

2. Given that the Petition for Writ of Certiorari merely alleges erroneous factual findings and the misapplication of properly stated rules of law, are there "compelling reasons" as described in Rule 10 to justify this Court's review?

3. Does the interpretation by the United States Court of Appeals for the Third Circuit of *United States v. Munsingwear*, 340 U.S. 36 (1950), conflict with any other circuit's interpretation where no circuit has held that *vacatur* necessarily eliminates the persuasive effect of prior factual findings and where, in any event, the relevant facts were again made part of the record in this case?

4. Is the Third Circuit's decision that the District Court acted within its discretion in refusing to vacate the Consent Decree under FED. R. CIV. P. 60(b)(5) in conflict with the decision of other circuit courts, none of which have *required* a consent decree to be terminated based merely on substantial compliance over a period of time?

5. Does the Third Circuit's decision that the District Court acted within its discretion to modify a consent decree when it clarified ambiguities in the Consent Decree amount to a unilateral expansion of the Consent Decree, and, if so, is it in conflict with a decision of another circuit court of appeals?

RULE 29.6 STATEMENT

Pursuant to United States Supreme Court Rule 29.6, Respondent, Democratic National Committee, states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondent, Democratic National Committee (the "DNC"), opposes and asks this Court to deny the petition for writ of certiorari (the "Petition") filed by the Republican National Committee (the "Petitioner" or "RNC"), which seeks review of the judgment of the United States Court of Appeals for the Third Circuit (the "Third Circuit").

INTRODUCTION

Petitioner's introductory lament that it has "labored" under a nationwide Consent Decree for more than 30 years leaves the false impression that the RNC has been subject to the Decree's restraints involuntarily and without valid basis. However, the Consent Decree was not imposed by anyone: rather, the RNC, a sophisticated party aided throughout by competent counsel, made a calculated decision to accept the Consent Decree to avoid express judicial findings that it had repeatedly violated the Voting Rights Act by suppressing minority voting rights. The RNC chose to enter the Decree twice, in 1982 and 1987, and with the advice of counsel chose twice to limit its ability to engage in certain activities indefinitely. Pet. App. 19a-20a. As such, the RNC's burden to vacate the Decree was a heavy one. Although ultimately a judicial act, consent decrees have long been recognized as having many attributes of a contract; and where, as here, a party who has made a free and deliberate choice to enter an agreement later seeks to be relieved of the obligations thereunder, its burden under Rule 60(b) is greater than it would be had the party litigated and lost.

In a comprehensive 79-page opinion, Judge Dickinson Debevoise, the Senior District Judge who has presided over this matter since its inception, found that the RNC failed to satisfy its burden to prove that significant changes in fact or law required *vacatur* of the Decree, or that unforeseen circumstances had caused it to become substantially more onerous, unworkable, or inconsistent with the public interest. The Third Circuit unanimously affirmed, finding no abuse of discretion in the District Court's decision to modify but not vacate the Decree, properly according Judge Debevoise heightened deference given his longstanding oversight of the case. Judge Debevoise has seen every exhibit, heard every word of testimony, and rendered every decision – sometimes in the RNC's favor, sometimes in the DNC's – since this case was filed in 1981. Accordingly, his decision is informed not only by the evidence in the record, but also by the full weight of that history and his intimate familiarity with the facts, issues, and equities in the case.

The evidence presented below proved that the Consent Decree remains necessary today. That evidence includes proof that the RNC violated the Decree in 1990 and in 2004, when it created voter challenge lists that targeted minority voters; that between 1997 and 2008, Republican candidates and party organizations had engaged in separate voter suppression activities in various states, including Texas, Arkansas, Kentucky, Maryland, Michigan, Pennsylvania, and Wisconsin; and that the racially polarized voting that influenced the RNC in the 1980s persists today. This substantial evidence stands in stark contrast to the RNC's proffered "evidence," which included prominently the preposterous claim that because President Obama, Attorney General Holder, and former

RNC leaders Michael Steele and Boyd Rutherford are African-American, the RNC no longer has any incentive to suppress minority votes in violation of the terms of the Consent Decree.

The RNC's claim that the Decree has become onerous, unworkable, or inequitable is belied by its admission that its actions have not been inhibited by the Decree's alleged constraints, and by its choice to never use the pre-clearance procedure to which it agreed and which it now calls unduly burdensome. When given the opportunity, the RNC failed to provide the District Court with evidence that the Consent Decree precluded it from conducting appropriate poll watching activities in aid of preventing fraud. Indeed, the false choice proposed by the RNC – between voter suppression and "voter fraud" – was properly rejected below as a result of evidence that in-person voter fraud rarely occurs, while voter suppression continues and impacts large numbers of voters. The evidence below established that the Decree has a legacy of success and continues to serve a unique and valuable purpose.

STATEMENT OF THE CASE

A. Background of the Consent Decree.

In 1981, the RNC and New Jersey Republican State Committee ("NJRSC") created a "National Ballot Security Task Force" – off-duty law enforcement officers and others in official uniform armed to "patrol" predominantly Black and Hispanic voting precincts in New Jersey on Election Day. Pet. App. 4a-5a. In addition, the RNC and NJRSC used non-forwarding mail and outdated voter

registration rolls to develop a list of voters whose right to vote it would challenge, also in predominantly Black and Hispanic districts. Pet. App. 66a-67a. The DNC filed suit in the District Court, alleging that the RNC and NJRSC had targeted minority voters in an effort to intimidate them in violation of the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973, and the Fourteenth and Fifteenth Amendments. To avoid a trial on the merits that would have addressed the full extent of the RNC's activities, the RNC, with the advice of counsel, agreed to a consent order requiring it to refrain from undertaking any future ballot security activities where a purpose or significant effect of the activities was to deter qualified voters from voting. On November 1, 1982, the Honorable Dickinson R. Debevoise, U.S.S.D.J., entered the agreed order. Pet. App. 5a-6a.

After a second voter caging program targeting tens of thousands of Black voters in Louisiana in 1986,[1] it became clear that the 1982 consent order alone was inadequate to protect the rights of minority voters and to ensure the RNC's compliance. Pet. App. 6a-8a. After the DNC notified the Court of the RNC's violations, the RNC, again with the advice of counsel, agreed to a modified consent decree, incorporating the 1982 consent order and memorializing additional agreements by the parties (the "Decree" or "Consent Decree"). Pet. App. 7a-8a. The Consent Decree prohibits the RNC from conducting any "ballot security program" other than "normal poll watch functions" and includes a "pre-clearance requirement" agreed upon by

1. "Caging" refers to the use of non-forwarding letters to assemble lists of voters whose right to vote may then be "challenged" at the polls. *See* Pet. App. 89a.

the parties. Pet. App. 7a-8a. To date, the RNC has never sought preclearance of any activity. Pet. App. 40a.

Judge Debevoise has continuously presided over this matter since 1981. Under his supervision, the parties agreed upon the terms of the Consent Decree. Over the years, parties and intervenors have sought relief under or from the Consent Decree, and Judge Debevoise has put their evidence to the test. Pet. App. 8a-11a. On some occasions, he found that, while there may have been non-sanctioned ballot security activities, the applicant did not provide enough proof to establish a violation of the Consent Decree. Pet. App. 8a-9a, 11a. On other occasions, he found that the applicants had satisfied their burden. Pet. App. 8a-11a. For example, in 1990, he concluded that the RNC had violated the Consent Decree in North Carolina. Pet. App. 8a-9a. Similarly, in 2004, he found violations by the RNC following an application by intervenor Ebony Malone to enforce the Consent Decree (the "*Malone*" action). Pet. App. 9a-11a. In that enforcement action, Ms. Malone – an African-American resident of Ohio – discovered that her name was on a 35,000-name "voter challenge list" that the RNC and Ohio Republican Party had created through a voter caging operation focused on predominately minority voting districts. Pet. App. 9a-10a. After discovery, briefing and argument, Judge Debevoise found a clear violation of the Consent Decree by the RNC. *See* Pet. App. 75a. The RNC sought a stay, but the Third Circuit denied its motion and affirmed the District Court's Order, finding that emails between the RNC and Ohio Republican Party showed collaboration between the two organizations sufficient to support the District Court's factual findings. Pet. App. 11a. The Third Circuit granted a petition for rehearing and procedurally vacated the Order, but before

the entire court could hear that matter *en banc*, Ms. Malone voted without challenge, and the Third Circuit later dismissed the appeal as moot without addressing the merits. Pet. App. 11a.

B. Proceedings Below.

In 2008, the RNC moved to vacate or modify the Consent Decree pursuant to FED. R. CIV. P. 60(b)(5). Pet. App. 12a. Judge Debevoise conducted a two-day evidentiary hearing in May 2009 during which the parties presented thousands of pages of exhibits and Judge Debevoise heard testimony from four expert witnesses. Pet. App. 12a-13a. After comprehensive post-hearing briefing, the District Court concluded that it would be equitable to make certain modifications to the Consent Decree, but that the RNC failed to meet its burden to demonstrate that *vacatur* of the Consent Decree was warranted or that the Consent Decree no longer served an enduring public interest in protecting minority voters. Pet. App. 12a-15a.

At the evidentiary hearing the RNC produced a single witness, Thomas Josefiak, an attorney who has been on the RNC's payroll for nearly two decades. *See* Pet. App. 79a. The DNC offered testimony from three independent experts: Dr. F. Chandler Davidson, a professor whose academic work over more than 40 years has focused on minority voting rights; Dr. Lorraine Minnite, a professor and author whose comprehensive studies of voter fraud are the subject of several monographs and peer-reviewed publications; and Justin Levitt, Esq., then Democracy Counsel at the non-partisan Brennan Center for Justice at New York University, and currently a professor of law at Loyola Law School. Pet. App. 88a-100a.

Professor Davidson testified that racially polarized voting ("where one race votes very heavily for one candidate and another race votes very heavily for another candidate") still exists, and that Republican Party efforts to suppress minority voters continue to be documented in every election cycle. Pet. App. 88a-92a; J.A. 0204, 221-22, 986-1012.[2] Professor Levitt described how modern database-matching techniques – which formed the basis of an unsuccessful Republican effort to challenge voters in Montana in 2008, among others – generate grossly over-inclusive lists, and can threaten the franchise of thousands of voters. J.A. 0307-09. Although the RNC attempted to discredit evidence of racially polarized voting as purely speculative, Judge Debevoise found that racially polarized voting created a continuing incentive for the RNC to suppress the votes of minority citizens and carry out ballot security programs with the substantial effect of suppressing eligible minority voters.

Professor Davidson also provided the District Court with an evaluation of the facts of *Malone* and relied upon a number of *Malone* documents that were re-introduced into the record below. Based on his evaluation of the evidence adduced in the 2009 hearing, Professor Davidson concluded that, in 2004, the RNC was "planning a caging operation" targeting African-American precincts in Ohio – which, absent pre-clearance from the District Court, would violate the Consent Decree. J.A. 0206-07. The District Court concluded, based upon Professor Davidson's testimony and documentary evidence, that the RNC's participation in the effort "was a clear violation of the 1987 consent decree." Pet. App. 259a-260a; Pet. 7.

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2. References to J.A. are to the Joint Appendix filed in the United States Court of Appeals for the Third Circuit.

In contradiction to the RNC's asserted need to be relieved from the Consent Decree to combat so-called "voter fraud," Professor Minnite testified that voter fraud occurs at a rate which is "statistically zero," and that no incident of "voter fraud" has ever been detected using Election Day "ballot security." J.A. 0266-67. Professor Levitt also noted the existence of anti-fraud mechanisms in post-Consent Decree election laws, and observed that none of the laws had changed the freedom of party or non-party groups to engage in voter registration and party-building activities. J.A. 0285-94. Professor Levitt also demonstrated how alleged incidents of "voter fraud" are almost always the product of clerical errors and simple misunderstandings. J.A. 0294-98, 0876-0925.

The evidentiary hearing also revealed contradictions between the RNC's legal arguments and its evidence. For example, the RNC calls the Consent Decree onerous, but its sole witness, Mr. Josefiak, admitted that the RNC acts without regard to any constraints imposed by the Consent Decree. J.A. 0120. Mr. Josefiak also testified that "certainly the decree seems to allow for poll watching," and despite the RNC's allegation below that the pre-clearance requirement of the 1987 Order is particularly onerous, Mr. Josefiak admitted that the RNC has never sought pre-clearance under the Consent Decree. J.A. 0157; *cf.* J.A. 0074.

Mr. Josefiak also testified about the *Malone* matter. He admitted that no one at the RNC was fired in connection with *Malone*, despite his testimony that the RNC has a "zero tolerance policy" for the intimidation and suppression of minority voters. He also testified that tactics the RNC would pursue if the Consent Decree were

vacated could have the effect of denying eligible voters their right to vote. *See* J.A. 0175-76, 1080-81.

In another proffer of so-called "evidence," the RNC raised the racial identity of President Obama, Attorney General Holder, and former RNC officers Steele and Rutherford, as alleged proof that no minority voter will be targeted and/or have their vote suppressed. *See* Pet. App. 30a-31a; *id.* at nn.13-14. With respect to Chairman Steele, Mr. Josefiak testified, "The obvious speaks for itself"; i.e., because he is African-American, he "is not going to . . . suppress any minority voter." J.A. 0119. Mr. Josefiak also asserted that with an African-American President and Attorney General, "the laws . . . [against] voter suppression are going to be actively pursued by this Justice Department." J.A. 0120. The District Court and Third Circuit properly rejected the assumption that the race of these individuals inexorably would produce less minority vote suppression, with the District Court calling it "an unsubstantiated and offensive assumption," Pet. App. 112a, and the Third Circuit characterizing this argument as one that "hardly requires a serious response." Pet. App. 31a.

In addition to expert testimony, Judge Debevoise was presented with ample evidence of contemporary acts of voter suppression and Republican efforts to disenfranchise voters in minority communities and concluded that such activities persist despite the passage of time. *See* Pet. App. 115a. For example, in 2004, in addition to the suppression program outlined in *Malone*, RNC operatives took part in the creation of "caging" lists targeting minority populations in Florida and other states. *See* J.A. 0503-06, 1013-16, 1017-37 (emails between RNC

and Florida Republicans attaching "caging lists"); 1038 ("'Caging list' uncovered in errant e-mail"). The District Court also received the following additional evidence of continuing Republican efforts to disenfranchise minority communities:

- In Texas, in 1997 and 1998, signs posted in African-American neighborhoods offered a reward for evidence of voter fraud, and a county Republican party trained "ballot security" teams to target minority precincts. *See* J.A. 1039-41, 1042-43.

- In Arkansas, in 2002, Republican poll watchers allegedly focused exclusively on African-Americans, asking for identification and taking photographs. *See* J.A. 1047-48, 1092.

- In Kentucky, in 2003, Republicans placed challengers in 59 predominantly African-American precincts, and the Kentucky Republican Party announced a "ballot security task force" of over 100 attorneys. *See* J.A. 1093-97.

- In the 2003 Philadelphia mayor's race, where a white Republican candidate faced an African-American Democrat, Republican challengers used 300 sedans with magnetic signs designed to mimic law enforcement insignias, carried clipboards displaying federal law enforcement insignias, and "spent Election Day cruising . . . African-American neighborhoods and asking prospective voters to show them some identification." *See* J.A. 1103-04.

- In Michigan in 2008, a county Republican chairman announced plans to challenge voters whose homes had been foreclosed upon, a plan that disproportionately affected African-Americans. *See* J.A. 1111-13.

See generally J.A. 0929-85, 0986-1012; *see also* J.A. 0118, 1107-10, 1117-18, 1129, 1130-48 (documenting voter suppression in multiple states, including Wisconsin).

Based on this substantial evidence and the lack of any credible contrary proof from the RNC, the District Court, in a thoughtful and comprehensive 79-page opinion, concluded that the RNC had failed to meet its burden of showing a significant change in circumstances to justify *vacatur* of the Consent Decree. *See* Pet. App. 114a-115a. The evidence below demonstrated continuity, not significant change, in the Decree's key factual underpinnings, as evident from the various voter suppression activities that occurred between 1987 and 2008, as well as evidence that racially polarized voting continues. The Court also determined that the RNC had failed to prove a substantial change in law warranting *vacatur* of the Decree, since the laws which were changed (e.g. motor voter laws aimed at increasing voter registration and turnout) were not aimed at preventing voter suppression and therefore had no bearing upon the central purpose of the Decree. *See* Pet. App. 141a-152a. Although the Court deemed certain workability concerns raised by the RNC to be valid, it modified the Decree to address those workability concerns. Finally, Judge Debevoise found that the public interest supports retaining the Consent Decree because the intimidation and deterrence of voters will likely recur absent the Decree. *See* Pet. App. 134a-141a.

The RNC appealed to the Third Circuit, arguing that "only *vacatur*" of the Consent Decree would be acceptable. Pet. App. 3a-4a. In a 59-page opinion, a unanimous Third Circuit panel (Judges Sloviter, Greenaway, Jr., and Stapleton) affirmed Judge Debevoise, finding no abuse of discretion in his determination that the RNC failed to demonstrate substantial compliance with the Consent Decree, and affording him substantial deference given his 30 years of oversight of the Decree. Pet. App. 3a-4a; 29a-43a. The Third Circuit also upheld the modifications to the Consent Decree – including modifications to provide more precise definitions of the terms "ballot security" and "normal poll-watch function" – holding that they were suitably tailored to any changes and workability concerns raised by the RNC below and provide greater clarity as to what types of activities do and do not require preclearance under the Consent Decree. Pet. App. 43a-55a.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition in its entirety because the RNC has failed to identify any compelling reasons for granting a writ of certiorari. *See* Sup. Ct. R. 10.

Contrary to Petitioner's assertions, the Third Circuit's decision does not conflict with any decision of any other circuit court of appeals.[3] Petitioner cannot identify any

3. Although Petitioner seeks a grant of certiorari on the grounds of an alleged circuit split on the three questions it has presented for review, Petitioner also asserts that the case merits review by the Court because "[t]he ability of the Republican Party, as one of the two national political parties, to conduct effective election observation programs is of national importance." Pet. 3. However, this argument is unpersuasive because, as the Third

court of appeals decision that prohibits consideration of the factual findings in a case later vacated on appeal where, as here, the factual findings had no impact on relitigation of the issues between the parties and were not used to "spawn[] any legal consequences." *Munsingwear*, 340 U.S. at 41. Additionally, though some courts of appeals have deemed substantial compliance with a consent decree over a long period of time to constitute a sufficient change in factual circumstances in a given case to justify termination of a consent decree, no court of appeals has held that substantial compliance over time, without more, **requires** *vacatur* of the decree and divests the district court of its broad discretion to consider any other facts and circumstances that bear upon the court's determination. Finally, Petitioner's claim that the modifications to the

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Circuit correctly noted, the Consent Decree does not prevent the Republican Party or any state parties or organizations from participating in the electoral process and party-building activities, and from conducting traditional poll-watching functions. It requires only that the RNC present a proposed "ballot security" program to the District Court for preclearance.

The *amici curiae* who submitted briefs in support of the Petition also speak to the alleged negative effects a continuation of the Consent Decree would have, specifically upon the Republican Party of Wisconsin and the Colorado Republican Committee. *See generally* RPW Amicus Br.; CRC Amicus Br. The Court should not give any weight to these submissions because they duplicate arguments already advanced by the RNC, in violation of Supreme Court Rule 37 (allowing amicus briefs to "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties . . ."). The amicus briefs also impermissibly seek to expand the record in this case, and it is well settled that "the brief of an *amicus curiae* . . . cannot be used as a vehicle to present additional evidence or new evidence to an appellate court." 4 Am. Jur. 2d *Amicus Curiae* § 8.

Consent Decree constitute a unilateral expansion of the Decree that conflicts with decisions of other circuit courts is both factually and legally erroneous, since the modifications simply clarified (and even narrowed) the Consent Decree, and in any event did not run afoul of any other circuit court opinions because they were implemented only after the RNC was given notice and an opportunity to be heard.

When the rhetoric in the Petition is stripped away, what remains is little more than the RNC's request for this Court to review alleged erroneous findings of fact and misapplications of law of the District Court. This Court has expressly excluded writ of certiorari review on such bases absent extraordinary and obvious error by the court of appeals. *See* Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Because Petitioner has not set forth compelling reasons for this Court to review the lower court decisions in this case, the Petition should be denied.

I. THE THIRD CIRCUIT'S INTERPRETATION OF *MUNSINGWEAR* IS CORRECT AND DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER CIRCUIT COURT OF APPEALS.

The RNC's first asserted basis for granting certiorari is its claim that the Third Circuit's "misinterpretation" of *Munsingwear* impermissibly allowed the District Court to give preclusive effect to facts and legal conclusions underpinning the vacated *Malone* judgment, contrary to the decisions of other circuit courts of appeals. This argument fails, however, because neither *Munsingwear*

nor any circuit court of appeals decision interpreting *Munsingwear* precludes a court from considering as persuasive authority the factual findings in a case later vacated on appeal. Moreover, even if *Munsingwear* generally restricts a court's reliance on factual findings underlying a vacated judgment, it is inapposite here because (1) the factual findings in *Malone* are part of the record in this case; and, (2) in any event, the District Court did not place "material" or "determinative" reliance on *Malone* in reaching its conclusion that Petitioner failed to meet its burden under Rule 60(b) to obtain *vacatur* of the Consent Decree.

A. *Munsingwear* is Inapposite Because the District Court Did Not Give *Malone* Preclusive Effect in this Case.

The *Munsingwear* Court held that the supervisory power of appellate courts is "commonly utilized . . . to prevent a **judgment**, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear, Inc.*, 340 U.S. at 41 (emphasis added). Thus, under *Munsingwear*, *vacatur* of a decision for mootness eliminates the decision's *preclusive* effect; however, it does not eliminate its *persuasive* effect. To the contrary, it is well established that an order vacating a judgment does not expunge the findings of fact upon which the vacated holding was based. *See Sentinel Trust Co. v. Universal Bonding Ins. Co.*, 316 F.3d 213, 222 (3d Cir. 2003) (an order vacating judgment "did not purport to expunge the findings of fact"); *see also County of Los Angeles v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting) ("the expressions of the court below on the merits, if not reversed, will continue to . . . be viewed as persuasive authority"); *Netzer v. City of Pasadena*, No. 91-55540, 1992

WL 107058, at *2 (9th Cir. May 12, 1992) ("[A] decision vacated upon grounds independent of that for which it is cited may still have persuasive effect."); *In re Finley*, 160 B.R. 882, 898 (Bankr. S.D.N.Y. 1993) ("A logical and well-reasoned decision, despite vacatur, is always persuasive authority, regardless of its origin or its ability to bind.").

The cases cited by the RNC do not conflict with these principles. In *Log Cabin Republicans v. United States*, the Ninth Circuit specifically vacated the district court's judgment and all of its past rulings "**to clear the path completely for any future litigation**." 658 F.3d 1162, 1168 (9th Cir. 2011) (emphasis added). The court did not say that *vacatur* of a prior decision always and necessarily wipes away the persuasive effect of factual findings in the prior decision, a rule that would be inconsistent with other Ninth Circuit decisions. *See, e.g.*, *Netzer*, No. 91-55540, 1992 WL 107058, at *2 ("[A] decision vacated upon grounds independent of that for which it is cited may still have persuasive effect."). In *Aviation Enters., Inc. v. Orr*, the D.C. Circuit limited its holding to "res judicata purposes" and stated it held "no view as to whether the [vacated] District Court's opinion may have precedential value in other litigation." 716 F.2d 1403, 1407-08 n.37 (D.C. Cir. 1983). Similarly, the unpublished decision in *United States v. Hernandez* applies only in the context of the application of principles of res judicata and collateral estoppel, stripping the vacated judgment and factual findings of *preclusive* effect. 216 F.3d 1088, 2000 WL 797332 at *14 n.6 (10th Cir. 2000). None of these cases stand for the broad proposition advanced by the RNC: that *Munsingwear* necessarily "render[s] a vacated decision a nullity, as if it the case [sic] had never been filed, and drain[s] its factual findings of all vitality." Pet. 1.

Here, the District Court did not give preclusive effect to *Malone*. As the Third Circuit panel below correctly noted, *Munsingwear* is inapposite because the District Court "is not using the *Malone* judgment to 'spawn [] any legal consequences' and the Court's consideration of the findings of fact has no impact on 'relitigation of the issues between the parties.'" Pet. App. 56a n.27 (citing *Munsingwear*, 340 U.S. at 39-41). Instead, the District Court merely considered the fact findings it made itself – and which were back before the Court in the record in this case – as persuasive evidence that the Decree was still necessary. *Munsingwear* does not require this or any court to pretend that the RNC's 49,000 non-forwarding letters to Ohio voters were never sent, that its internal e-mails about "GOP fingerprints" were never written, or that Ms. Malone never feared her constitutional rights would be violated. *See* J.A. 1154, 1167-68, 1152. The RNC's theory, transparently self-serving, would scuttle effective enforcement of the Decree: any time a complaining voter voted successfully, the facts of her case would vanish, no matter how many citizens were similarly affected. This is neither the meaning nor the intent of the *Munsingwear* doctrine. The factual findings of *Malone* remain persuasive authority that were properly considered during the course of the proceedings below.

B. The Factual Findings in *Malone* Were Not Vacated and Are Properly Part of the Record Below.

Petitioner's principal objection to the lower court's consideration of *Malone* is its contention that "the mootness of *Malone* on appeal deprived the RNC [of] an opportunity to challenge the district court's conclusions

and findings." Pet. 20. However, the District Court did not simply "borrow" factual findings from another case without affording the RNC an opportunity to contest them: to the contrary, the facts and findings in *Malone* are part of the record in this case by virtue both of the application made in 2004 (contested by the RNC), and again, in connection with the RNC's motion to vacate in 2008. Indeed, as the Third Circuit panel in this case noted, "[t]he issue of whether the RNC had violated the consent decree was litigated before the District Court in this case and all the evidence submitted by the parties with respect to that issue remains part of the record in this case." Pet. App. 57a; *see also* FED. R. APP. P. 10(a). Judge Debevoise's finding of a violation in 2004 was affirmed by the Third Circuit, with the panel then concluding: "[a]fter consideration of the record that was before the District Court we believe *there was ample support for the factual findings of the District Court.*" Pet. App. 76a (emphasis added). It was only after that decision, when Ms. Malone voted without challenge, that the case became moot. *See* Pet. App. 76a. As Judge Debevoise correctly noted,

> The *en banc* decision did not address the merits of this Court's ruling. . . Thus, this Court's *factual determination that the RNC violated the Consent Decree* was never refuted and remains significant insofar as it rebuts the RNC's claims in connection with the pending Motion that it has not engaged in such activity since 1987.

Pet. App. 114a (emphasis added); Pet. App. 76a ("the substantive merits of this Court's ruling have never been refuted, and its factual determination . . . remains undisturbed"). As such, even if *Munsingwear* generally

barred the consideration of factual findings underlying a judgment vacated as moot, it is inapposite here because the District Court's finding in *Malone* that the RNC violated the Consent Decree has never been vacated on appeal and remains part of the record in this case. Without vacated factual findings, *Munsingwear* is not implicated.

Moreover, the District Court did not "borrow" from *Malone*: it considered anew in 2009 evidence that had been previously presented in 2004. The Court accepted hundreds of pages of direct factual evidence related to the *Malone* enforcement action, including deposition and hearing transcripts, emails, and computer spreadsheets. J.A. 1081-82, 1234-35. The RNC itself raised *Malone* in its briefs before the District Court, introduced *Malone* exhibits at the 2009 evidentiary hearing, and, most critically, told the District Court it was "happy to" rely on the record in *Malone*. *See* J.A. 0124, 1217, 1226, 1233, 0345. The RNC unsuccessfully challenged the claims in *Malone* in 2004, and had an opportunity to challenge the underlying facts of *Malone* in the 2009 hearing but declined to do so. As such, the concerns purportedly underlying Petitioner's *Munsingwear* claim – that the RNC was denied the opportunity to contest the findings in another vacated case – simply are not present in this case.

C. Even if the Lower Courts' Consideration of *Malone* Violated *Munsingwear*, the Error was Harmless Because the Lower Courts Did Not Place "Material" or "Determinative" Reliance on *Malone*.

Finally, even if the District Court's consideration of the facts underlying *Malone* were deemed to run afoul of the *Munsingwear* doctrine, its error was harmless

because the District Court did not place "determinative" reliance on *Malone* in reviewing the RNC's compliance with the Consent Decree. *See* Pet. 17. The District Court referenced the events of *Malone* as one example to refute Petitioner's assertion that it has substantially complied with the Consent Decree. However, the District Court considered and relied upon a wealth of other evidence – including other violations of the Decree by the RNC – to support its conclusion that Petitioner had not met its burden under Rule 60(b) to show changed factual circumstances justifying *vacatur* of the Consent Decree.

As Petitioner acknowledges, the "central purpose" of the Consent Decree is "preventing the intimidation and suppression of minority voters." *See* Pet. 18 (citing Pet. App. 19a). In reaching his decision to deny *vacatur* of the Consent Decree, Judge Debevoise pointed not only to the evidence of noncompliance with the Consent Decree found in 2004 in *Malone*, but also evidence that the RNC violated the Decree in 1990. *See* Pet. App. 71a. He also considered proof of recent acts of voter suppression and Republican efforts to disenfranchise voters in minority communities in Florida, Texas, Arkansas, Kentucky, Pennsylvania, and Maryland; proof of the continued incentive for the RNC to engage in voter suppression, Pet. App. 115a, including Professor Davidson's testimony that racially polarized voting still exists and that Republican Party efforts to suppress minority voters continue to be documented in every election cycle; the relative lack of risk from in-person voter fraud, supported by testimony by Professors Levitt and Minnite; and the lack of proof by the RNC that changes in federal election laws or the racial identity of national officeholders or party officials eliminated incentives for suppressing minority votes. *See* Pet. App. 108a-156a.

In short, Petitioner's attempt to elevate the District Court's consideration of *Malone* to "determinative" status is belied by the record below. Even without *Malone,* there is ample evidence to support Judge Debevoise's finding that the RNC had failed to establish a significant change in facts to warrant *vacatur* of the Decree. Accordingly, even if the District Court's consideration of *Malone* violated *Munsingwear* and decisions of other courts of appeals, any error attributable to this act is harmless and not worthy of this Court's consideration. *See Rutherford v. Barnhart*, 399 F.3d 546, 553 (3d Cir. 2005) (error is harmless when it does not affect the outcome, especially when the determination is supported by other evidence); *see also* FED. R. CIV. P. 61 ("Unless justice requires otherwise, no error in admitting or excluding evidence – or any other error by the court or a party – is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

II. THE THIRD CIRCUIT'S CONSTRUCTION OF THE STANDARDS FOR *VACATUR* UNDER RULE 60(B)(5) DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER CIRCUIT COURT OF APPEALS.

The RNC's claim that a split exists among the circuit courts of appeals in their application of Rule 60(b)(5) when a movant seeks *vacatur* of a consent decree due to changed factual circumstances is similarly unavailing. The question at issue in this case is not whether substantial compliance with a consent decree over a period of time, standing alone, is *sufficient* to terminate the decree; the question is

whether substantial compliance, standing alone, *requires* termination of the decree. The circuits are not split on this issue: they uniformly hold that proof of substantial compliance does not mandate *vacatur* of a consent decree. This is not surprising, since to hold otherwise would ignore the other factors that this Court and other courts have deemed relevant to a court's Rule 60(b)(5) analysis, *see, e.g.*, *Rufo v. Inmates of Suffolk Co. Jail*, 502 U.S. 367, 393 (1992); *Building & Constr. Trades Council v. NLRB*, 64 F.3d 880 (3d Cir. 1995), and also divest the District Court of its broad discretion to determine if *vacatur* or modification of a consent decree is appropriate under the facts and circumstances of a given case.

Under Rule 60(b) a district court's inquiry should be "flexible," taking into account the circumstances and history of the matter. *Rufo*, 502 U.S. at 393. Furthermore, courts "review the denial of Rule 60(b) relief for an abuse of discretion." *Coltec Industries, Inc. v. Hobgood*, 280 F.3d 262, 269 (3d Cir. 2002) (quoting *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 653 (3d Cir. 1998), *abrogated on other grounds recognized by Forbes v. Eagleson*, 228 F.3d 471 (3d Cir. 2000)). The scope of appellate review is limited, and courts of appeals are cautioned against substituting their judgment for that of the district court. *Rufo*, 502 U.S. at 393-94 (Thomas, J., concurring) ("*If the District Court takes into account the relevant considerations . . . and accommodates them in a reasonable way, then the District Court's judgment will not be an abuse of its discretion, regardless of whether an appellate court would have reached the same outcome in the first instance.*") (citations omitted) (emphasis added). This admonition against substituted judgment is even stronger where, as here, the District Court has had

longstanding involvement in and familiarity with a case. *See id.* ("Our deference . . . is heightened where . . . the trial judge [has] years of experience with the problem at hand.").

A number of circuits have expressly rejected a request for termination of a consent decree based merely on substantial compliance. Indeed, Petitioner recognizes three circuits, the Third, Ninth, and DC Circuits, which have so held. In other circuits, the district court, exercising its broad discretion, allowed for termination of a decree based on substantial compliance, but a review of these cases reveals that termination of the consent decree, though within the discretion of the district court, was not required by these courts.

For example, in *Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity*, 13 F.3d 33 (2d Cir. 1993), the Second Circuit indicated that changed circumstances or substantial attainment of the decree's objectives *could* justify termination, and that the district court was entitled to terminate the decree on the basis of substantial compliance because the decree had served its purpose. However, the court also made clear that the district court was *not required* to terminate the decree on that basis. *Id.* at 39 ("[W]e agree with Judge Conner that the decree has served its purpose, and that all of its provisions may be ended. Again, we do not decide that the District Court was required to vacate these additional provisions, only that it was entitled to do so."). *Accord United States v. Eastman Kodak Co.*, 63 F.3d 95 (2d Cir. 1995); *United States v. Dist. Council*, 571 F. Supp. 2d 555, 564 (S.D.N.Y. 2008) ("In *Patterson*, the Second Circuit held that a district court may terminate the entire decree

when its dominant objective has been achieved, but not that the court was required to do so.").

Similarly, in *United States v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993) – an employment discrimination case in which the only purpose of the decree was to remedy the effects of past discrimination – the Eleventh Circuit held that substantial compliance alone was not sufficient to support termination; the district court also had to consider whether vestiges of past discrimination were eliminated to the extent practicable in considering whether to terminate the decree. *Id.* at 1506. This approach is similar to the reasoning applied by the District Court here, which found that the Consent Decree's purpose of eliminating minority vote suppression had not been achieved, and therefore exercised its considerable discretion not to terminate the Consent Decree at that time. Pet. App. 20a-21a, 32a-33a.

The remaining cases relied upon by Petitioner in support of its argument also hold only that good faith compliance over a period of years, "***may***, without more, justify termination of a consent decree," Pet. 28 (emphasis added), not that it requires termination of the decree. *See, e.g., Consumer Advisory Board v. Glover*, 989 F.2d 65 (1st Cir. 1993) (district court had "considerable discretion" to terminate a consent decree after years of compliance, but made clear that the analysis should be tied to whether any compliance has demonstrated that the decree has served its purpose); *Alexander v. Britt*, 89 F.3d 194 (4th Cir. 1996) (substantial compliance could be sufficient grounds for termination of the decree if the decree specifically stated that substantial compliance would trigger termination); s*ee also Thompson v. United*

States HUD, 404 F.3d 821 (4th Cir. 2005) (deference to district court which is intimately involved and has broad discretion in terminating a consent decree); *Crutchfield v. United States Army Corps of Eng'rs*, 175 F. Supp. 2d 835 (E.D. Va. 2001) (length of time and good faith compliance are just some of the factors to be taken into consideration to modify or dissolve an injunction), *reversed on other grounds by Broaddus v. United States Army Corps of Eng'rs*, 380 F.3d 162 (4th Cir. 2004); *Johnson v. Sheldon*, 2009 U.S. Dist. LEXIS 90050 at *24-25 (M.D. Fla. Sept. 30, 2009) ("[T]he court declines Defendant's invitation to terminate the Consent Decree, despite Defendant's substantial compliance.")

None of the cases Petitioner relies upon hold that a long period of compliance with a consent decree, without more, requires termination of the decree.[4] Each case cited by the RNC in support of its "conflict" theory demonstrates that an alternative ruling, denying the motion to vacate, could also have been reached. What

4. In *Alliance to End Repression v. City of Chicago*, 237 F.3d 799 (7th Cir. 2001), *abrogated as stated in Rahman v. Chertoff*, 530 F.3d 622 (7th Cir. 2008), the court decided the case based on the standard for modifying a consent decree, but the court did not rule on whether substantial compliance alone was sufficient to terminate a consent decree. However, other cases within the Seventh Circuit have suggested that Petitioner's contention that substantial compliance requires termination is untenable. *See Chi. Firefighters Local 2 v. City of Chicago*, 249 F.3d 649 (7th Cir. 2001) (cases dealing with remedy of past discrimination might be different from compliance with ongoing requirements); *ACLU v. City of Chicago*, 2008 U.S. Dist. LEXIS 76316 (N.D. Ill. Sept. 30, 2008) (recognizing vast discretion of federal judges over decrees and listing numerous factors a district court must consider in deciding whether to terminate a consent decree.)

this demonstrates is not a conflict among the circuits on whether substantial compliance is enough to vacate a consent decree, but rather that courts, given differing factual situations, exercised their discretion under Rule 60(b)(5) to grant motions to vacate a consent decree. When the "conflict" alleged is not one of an application of the law but simply divergent outcomes based on different factual circumstances, no such conflict exists, and review by this Court is unwarranted and unnecessary.

The RNC's real complaint seems to be with the District Court's finding (upheld under an abuse of discretion standard) that the RNC has not substantially complied with the Consent Decree and that voter intimidation and suppression continue to exist. These factual findings were sufficient for the District Court to determine that the RNC did not meet its burden under Rule 60. The RNC cannot now avoid these findings – supported by volumes of evidence admitted below – by claiming that the District Court merely ignored that standard. Petitioner's claims are just another thinly veiled attempt to have this Court review the factual finding below that the RNC has not been in substantial compliance with the Consent Decree. Pet. App. 114a-115a. Review by this Court is not warranted on that basis under Rule 10. *See Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (Supreme Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). On this independent basis, the Court should deny review of Petitioner's claim.

III. THE THIRD CIRCUIT'S HOLDING THAT THE DISTRICT COURT'S MODIFICATIONS TO THE CONSENT DECREE WERE SUITABLY TAILORED TO RESOLVE AMBIGUITIES IN THE DECREE IS CORRECT AND DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER CIRCUIT COURT OF APPEALS.

The RNC's assertion that the courts below permitted unilateral expansion of the Consent Decree in contravention of authority from other circuit courts of appeals is premised on a central fallacy: that the District Court's modifications expanded the Decree. In fact, the District Court did not expand the Consent Decree: it merely clarified ambiguities in the Decree, a discretionary power it clearly may exercise under Rule 60(b)(5). *See United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 597 (1971) ("[I]f there is any ambiguity in the decree the appropriate course is to clarify it. . . ."); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 n.11 (1975) (court can interpret ambiguous terms of a consent decree); *City of El Paso v. El Paso Entm't, Inc.*, 382 Fed. Appx. 361, 368 (5th Cir. 2010) (recognizing that courts can look to extrinsic evidence to resolve ambiguities in consent decrees); *Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F.3d 846, 861 (9th Cir. 2007) (same); *Reynolds v. Roberts*, 202 F.3d 1303, 1316 (11th Cir. 2000) (court justified in attempting to resolve ambiguity in consent decree). Moreover, the District Court exercised this power in direct response to the concerns the RNC had raised about alleged ambiguities in the Decree, thus providing the RNC with a remedy to cure the very ills which supposedly gave rise to its application to vacate the Decree in the first place.

The modifications at issue were addressed to ambiguities in the language of the Consent Decree. In 1987, the Consent Decree placed restrictions on the RNC's ability to engage in "ballot security activities," and provided as a definition of such term: "ballot integrity, ballot security or other efforts to prevent or remedy vote fraud." Pet. App. 7a. In addition, the Consent Decree allowed the RNC to deploy people for "normal poll watch[ing] functions," within certain limitations. In response to the RNC's complaint that the definitions in the 1987 Order were too vague, the District Court drew a clear, bright line between "ballot security" and "normal poll watch functions." The District Court substantially clarified the definition of "ballot security," expanding it from 18 words to 157, including a practically exhaustive list of activities for which pre-clearance is required. *See* Pet. App. 161a-162a. The District Court's revised definition of "normal poll watch function" is essentially drawn from the testimony of the RNC's own witness about what the RNC would like to do on Election Day. *See* J.A. 0160-61 ("providing individuals to be in polling places . . . to observe"; "to . . . have RNC volunteers outside of the polling places . . . to provide [voters with] . . . information on candidates and issues"; "generally . . . [to] be around and monitor the activities of polling places"). Given that these terms were ambiguous in the original Consent Decree, the Third Circuit properly noted that the District Court acted within its authority and in light of its in-depth familiarity with this matter and the record to interpret and resolve that ambiguity. As the Third Circuit stated, the modifications were "suitably tailored to resolve the prior ambiguity and [do] not strive to conform to the constitutional floor by allowing the RNC to engage in all activities without preclearance." Pet. App. 51a.

The RNC may engage in ballot security activities without restriction simply by getting pre-approval from the District Court, pursuant to the bargain it struck in 1987. *See* J.A. 0405. Pre-clearance has been available to the RNC for 25 years, but the RNC has declined to take advantage of it. The RNC embraces the position that "pre-clearance" means handing over to the DNC, and the Court, strategically sensitive information, *see* Pet. App. 47a, but it has no basis for this conclusion, because it has never explored what quantum of information would suffice.

Even if the modifications to the Decree could be deemed an "expansion," the District Court was permitted to modify the Consent Decree, and its exercise of that power in this case does not run afoul of any precedent from other circuits. Rule 60(b)(5) states: "on motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order [when] . . . it is no longer equitable that the judgment should have prospective applications." This motion requirement "can be satisfied on the district court's own motion." *See Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 190 (5th Cir. 2008). In fact, in the context of equitable relief, when the court's modification of an injunction is "preceded by appropriate notice and an opportunity for hearing, the district court may *sua sponte* modify an injunction." *See id.* at 190. This principle applies equally to modifications to a consent decree. *See, e.g., Davis v. N.Y. City Hous. Auth.*, 278 F.3d 64, 80 (2d Cir. 2002) (court can protect integrity of consent decree through any reasonable action taken to secure compliance).

The two cases Petitioner relies upon are distinguishable, on two principal grounds: first, they deal with modifications

of provisions that were clearly beyond the four corners of the respective decrees; and second, there were no factual findings or legal conclusions made with respect to substantial compliance and/or violations of the decrees in issue by the reviewing courts.

In *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141 (6th Cir. 1992), in issue was a desegregation consent decree that expressly placed a $1 million limitation on the State's liability. The district court enlarged that amount to $9 million, which was found to be an abuse of discretion. The Sixth Circuit held that the consent decree was clear and unambiguous regarding the limitation on liability and noted that there had never been a finding of any constitutional violation at any stage of the litigation and that the consent decree prevented the court from opining on the merits of that issue. Therefore, the court of appeals held that the district court could not circumvent the express terms of the decree in the absence of an adjudicated violation of the law.

In *Harris v. City of Philadelphia*, 137 F.3d 209 (3d Cir. 1998), the court held that certain additional requirements imposed by the district court could not be found anywhere within the four corners of the decree, and also noted that there was no finding of a lack of substantial compliance by the City. For these reasons, the court deemed the modification to the decree invalid.

These cases stand in stark contrast to this case, where the definitions of "ballot security" and "normal poll-watch function" modified by the District Court merited clarification principally to assist the RNC in determining which activities were permitted and which

required preclearance. To the extent unambiguous terms were modified – such as reducing the 20-day pre-clearance period to 10 days, limiting the parties to just the RNC and DNC, and placing an expiration date on the Consent Decree – the modifications indisputably narrowed rather than expanded the Decree. Significantly, although the RNC claims that the Decree was expanded impermissibly, it has not sought to reinstate the Decree's previous terms, arguing instead that the only remedy for a purported "expansion" of the decree is *vacatur* of the entire decree.

Even when a party does meet "the burden of establishing that a significant change in circumstances warrants *revision* of the decree," the Court must "consider whether the proposed modification is *suitably tailored* to the changed circumstance." *Rufo*, 502 U.S. at 383 (emphasis added). That is precisely what Judge Debevoise did below when he limited the modifications to the few RNC concerns that were supported by evidence. The modifications to the Consent Decree upheld by the Third Circuit were not an expansion of the Consent Decree, but rather a clarification of its terms. In fact, the RNC had complained about this lack of clarity. Because the modifications to the Consent Decree addressed and ameliorated workability concerns for the RNC, and because they actually narrowed and clarified the Consent Decree, they are fully consistent with Rule 60(b)(5) and provide no basis for review of the Third Circuit's decision by this Court.

CONCLUSION

For the foregoing reasons, Respondent, Democratic National Committee, respectfully requests that this Court deny the petition for a writ of certiorari in its entirety.

Respectfully submitted,

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