Voter Interference

Democratic National Committee v. Republican National Committee (Dickinson R. Debevoise and John Michael Vazquez, D.N.J. 2:81-cv-3876), Arizona Democratic Party v. Arizona Republican Party (John J. Tuchi, D. Ariz. 2:16-cv-3752), Nevada State Democratic Party v. Nevada Republican Party (Richard F. Boulware II, D. Nev. 2:16-cv-2514), Ohio Democratic Party v. Ohio Republican Party (James S. Gwin, N.D. Ohio 1:16-cv-2645), Pennsylvania Democratic Party v. Republican Party of Pennsylvania (Paul S. Diamond, E.D. Pa. 2:16-cv-5664), North Carolina Democratic Party v. North Carolina Republican Party (Catherine C. Eagles, M.D.N.C. 1:16-cv-1288), and Michigan Democratic Party v. Michigan Republican Party (Mark A. Goldsmith, E.D. Mich. 2:16-cv-13924)

A consent decree issued as a result of 1981 litigation between the two major parties was litigated in advance of the 2004 and the 2016 general elections.

Ohio 2004

Five days before the 2004 general election, two Ohio voters filed a motion in the District of New Jersey to reopen and intervene in a 1981 case, alleging that widespread voter registration challenges in Ohio violated consent decrees in the New Jersey case.[1] With their intervention motion, the plaintiffs filed a motion for a preliminary injunction.[2]

Judge Dickinson R. Debevoise was the presiding judge in the New Jersey case.[3] The consent decrees arose from concerns that ballot security initiatives, which are efforts to prevent or remedy voter fraud, were used to suppress minority voting.[4] The consent decrees only covered actions by the na-

1. Motion, Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 2:81-cv-3876 (D.N.J. Oct. 28, 2004), D.E. 1; Intervention Complaint, *id.* (Oct. 28, 2004), D.E. 6; Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 198 (3d Cir. 2012); Democratic Nat'l Comm. v. Republican Nat'l Comm., 671 F. Supp. 2d 575, 582 (D.N.J. 2009).

2. Preliminary Injunction Motion, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Oct. 28, 2004), D.E. 5.

3. Docket Sheet, *id.* (Oct. 28, 2004) [hereinafter D.N.J. Docket Sheet]; *Democratic Nat'l Comm.*, 673 F.3d at 196 n.1.

Tim Reagan interviewed Judge Debevoise for this report by telephone on August 14, 2012.

4. *Democratic Nat'l Comm.*, 673 F.3d at 196–98; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 578–81.

tional parties, but frequently during election cycles Judge Debevoise was called upon to determine whether the national parties engaged in activities in cooperation with local parties in violation of the decrees.[5]

Judge Debevoise heard the intervention motion at 2:00 p.m. on October 28, the day that it was filed, and he granted the motion as to one of the two voters.[6]

On November 1, Judge Debevoise heard and granted the preliminary injunction motion.[7] Judge Debevoise observed that Judge Susan J. Dlott in the Southern District of Ohio had issued a temporary restraining order on October 27 against administrative proceedings on the Republican Party's widespread registration challenges.[8] Judge Debevoise enjoined the Republican National Committee "from using or permitting to be used a challenger list originally containing 3500 names prepared by the Republican Party in the State of Ohio for use at the November 2, 2004 election."[9]

The Republican Party immediately appealed.[10] Over the dissent of one judge, a panel of the court of appeals denied the party a stay of Judge Debevoise's order, finding "ample support for the factual findings of the District Court."[11] On the morning of election day, however, the court of appeals ordered en banc rehearing.[12] Because the intervenor was allowed to vote on election day, the court of appeals later dismissed the appeal as moot.[13]

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5. Interview with Hon. Dickinson R. Debevoise, Aug. 14, 2012.

6. Order, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Oct. 28, 2004), D.E. 17; Minutes, *id.* (Oct. 28, 2004), D.E. 11; *see* John P. Martin, *Fight in A Battleground Lands in Newark Court*, Newark Star-Ledger, Oct. 29, 2004, at 1.

7. Order, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Nov. 1, 2004), D.E. 25 [hereinafter Nov. 1, 2004, D.N.J. Order]; Minutes, *id.* (Nov. 1, 2004), D.E. 24; *Democratic Nat'l Comm.*, 673 F.3d at 198–99; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 582–83; *see* Lisa A. Abraham, *Federal Judges Issue Stay of 2 Earlier Rulings*, Akron Beacon J., Nov. 2, 2004, at A1; Amy Klein, *GOP Dealt Setback on Ohio Voter Challenges*, N.J. Record, Nov. 2, 2004, at A1; John P. Martin, *Judge Bars GOP Poll Challenges*, Newark Star-Ledger, Nov. 2, 2004, at 9; Greg B. Smith, *GOP Wins Early Legal Skirmish in Ohio*, N.Y. Daily News, Nov. 2, 2004, at 4.

8. Transcript at 2, 73, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Nov. 1, 2004, filed Nov. 12, 2004), D.E. 29; *see* Temporary Restraining Order, Miller v. Blackwell, No. 1:04-cv-735 (S.D. Ohio Oct. 27, 2004), D.E. 11.

9. Nov. 1, 2004, D.N.J. Order, *supra* note 7.

10. Docket Sheet, Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 04-4186 (3d Cir. Nov. 1, 2004); *Democratic Nat'l Comm.*, 673 F.3d at 199; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 582.

11. Opinion, *Democratic Nat'l Comm.*, No. 04-4186 (3d Cir. Nov. 1, 2004), *filed as* Opinion, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Nov. 9, 2004), D.E. 32; *Democratic Nat'l Comm.*, 673 F.3d at 199; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 583; *see* Martin, *supra* note 6.

12. Order, *Democratic Nat'l Comm.*, No. 04-4186 (3d Cir. Nov. 2, 2004), *filed as* Order, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Nov. 9, 2004), D.E. 34; *Democratic Nat'l Comm.*, 673 F.3d at 199; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 583.

13. Order, *Democratic Nat'l Comm.*, No. 04-4186 (3d Cir. Dec. 20, 2004), *filed as* Order, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Dec. 20, 2004), D.E. 36; *Democratic Nat'l Comm.*, 673 F.3d at 199; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 583.

Judge Debevoise approved a stipulated dismissal of his case on February 3, 2005.[14]

2008

On the day before the 2008 general election, the Democratic National Committee moved to reopen the case again.[15] After extensive litigation, on December 1, 2009, Judge Debevoise denied the Republican Party's motion to vacate the consent decrees, but he agreed to modify applicable particulars, including the addition of a presumptive expiration date of eight years hence.[16] The court of appeals affirmed his decision on March 8, 2012.[17]

The 2016 Presidential Election

Thirteen days in advance of the 2016 general election, alleging an effort "to intimidate and discourage minority voters," the Democratic National Committee filed a motion in the District of New Jersey to enforce the consent decree.[18]

Because Judge Debevoise died in 2015,[19] the court reassigned the case to Judge John Michael Vazquez,[20] who scheduled a telephone conference for the afternoon of October 27, the day after the motion was filed.[21] At the conference, Judge Vazquez set a schedule for a discovery motion and set another telephonic proceeding for November 2.[22] On November 2, Judge Vazquez ordered some discovery.[23]

Judge Vazquez denied the enforcement motion on November 4 and deferred until after the election the question of whether the consent decree

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14. Dismissal, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Feb. 3, 2005), D.E. 37.

15. Letter, *id.* (Nov. 3, 2008), D.E. 38; *Democratic Nat'l Comm.*, 673 F.3d at 199; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 581.

16. *Democratic Nat'l Comm.*, 671 F. Supp. 2d 575.

17. Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192 (3d Cir.), *cert. denied*, 568 U.S.___, 133 S. Ct. 931 (2013); *see* Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 208 (2013).

18. Motion, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Oct. 26, 2016), D.E. 95; *see* Jonathan D. Salant, *DNC Accuses GOP of Trying to Intimidate Voters in N.J.*, Newark Star-Ledger, Oct. 28, 2016, at 3.

19. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html (noting Judge Debevoise's death on August 14, 2015).

20. D.N.J. Docket Sheet, *supra* note 3 (D.E. 99).

21. *Id.* (D.E. 100).

22. Order, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Oct. 27, 2016), D.E. 102; D.N.J. Docket Sheet, *supra* note 3 (D.E. 115).

23. Order, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Nov. 2, 2016), D.E. 118; *see* Jonathan D. Salant, *Judge Orders RNC, Trump to Disclose Poll Watcher Sites*, Newark Star-Ledger, Nov. 3, 2016, at 3; Jonathan D. Salant, *Judge Wants to Know if Trump Campaign Worked with RNC*, Newark Star-Ledger, Nov. 2, 2016, at 3; *see also DNC Seeks Order on RNC Push*, Newark Star-Ledger, Nov. 5, 2016, at 6; Thomas Moriarty, *Judge to Hear Arguments Today on Voter-Monitoring Challenge*, Newark Star-Ledger, Nov. 4, 2016, at 2.

should be extended past 2017.[24] Judge Vazquez found that the consent decree governed the national Republican Party but not its presidential candidate, Donald Trump, "unless the [Trump Campaign] acted as an agent or representative of the [party]."[25] The quick discovery permitted by the tight time frame did not result in evidence of coordination between the party and the campaign on ballot security measures.[26]

Citing the consent decree, state Democratic Parties in Arizona,[27] Michigan,[28] Nevada,[29] North Carolina,[30] Ohio,[31] and Pennsylvania[32] filed federal voter intimidation complaints from October 30 to November 4 against defendants that included state Republican Parties and the Donald Trump presidential campaign.[33] A third defendant was Roger Stone, an alleged "vocal proselytizer of Trump's false voter fraud claims and his calls for vigilante action."[34] The fourth defendant was Stop the Steal, Inc., an organization allegedly "devoted to promoting [the third defendant's] conspiracy theories regarding voter fraud, and to using fears of a 'rigged' election to organize and recruit poll watchers to harass and intimidate perceived Democratic voters on Election Day."[35]

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24. Opinion, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Nov. 4, 2016), D.E. 138 [hereinafter Nov. 4, 2016, D.N.J. Opinion], 2016 WL 6584915; *see Federal Judge Rejects Voter Intimidation Arguments*, Miami Herald, Nov. 6, 2016, at 16A; Brent Kendall, *Courts Rule Quickly on Campaign Procedures*, Wall. St. J., Nov. 7, 2016, at A8.

25. Nov. 4, 2016, D.N.J. Opinion, *supra* note 24, at 24.

26. *Id.* at 26–27.

27. Complaint, Ariz. Democratic Party v. Ariz. Republican Party, No. 2:16-cv-3752 (D. Ariz. Oct. 31, 2016), D.E. 1.

28. Complaint, Mich. Democratic Party v. Mich. Republican Party, No. 2:16-cv-13924 (E.D. Mich. Nov. 4, 2016), D.E. 1; *see* Tresa Baldas, *Dems Sue Trump Campaign to Ward Off Intimidation*, Detroit Free Press, Nov. 5, 2016, at A10; Michael Gerstein, *Dems Accuse GOP, Trump of Voter Intimidation*, Detroit News, Nov. 5, 2016, at A13..

29. Complaint, Nev. State Democratic Party v. Nev. Republican Party, No. 2:16-cv-2514 (D. Nev. Oct. 30, 2016), D.E. 1.

30. Complaint, N.C. Democratic Party v. N.C. Republican Party, No. 1:16-cv-1288 (M.D.N.C. Nov. 3, 2016), D.E. 1; Temporary Restraining Order and Preliminary Injunction Motion, *id.* (Nov. 4, 2016), D.E. 4.

31. Complaint, Ohio Democratic Party v. Ohio Republican Party, No. 1:16-cv-2645 (N.D. Ohio Oct. 30, 2016), D.E. 1 [hereinafter *Ohio Democratic Party* Complaint]; *see* Jessie Balmert, *Democrats Sue Trump, GOP, to Head Off Voter Intimidation*, Cincinnati Enquirer, Nov. 2, 2016, at A6; Eric Heisig, *Democrats' Fears of Intimidation of Voters to Be Aired*, Cleveland Plain Dealer, Nov. 4, 2016, at A16; Eric Heisig, *Trump Campaign Lawyer Defends "Poll Watching" Targeted in Lawsuit*, Cleveland Plain Dealer, Nov. 3, 2016, at A3.

32. Complaint, Pa. Democratic Party v. Republican Party of Pa., No. 2:16-cv-5664 (E.D. Pa. Oct. 30, 2016), D.E. 1; *see* Chris Brennan, *PA Democrats Ask Judge to Bar Trump's Polling Place Observers*, Phila. Inquirer, Nov. 1, 2016, at A4; Tracie Mauriello, *Lawsuits Charge Voter Intimidation*, Pittsburgh Post-Gazette, Nov. 1, 2016, at A4; Daniel Simmons-Ritchie, *Suit Accuses Trump of Intimidation*, Harrisburg Patriot News, Nov. 1, 2016, at A15.

33. *See* Mark Berman & William Wan, *Lawsuits Allege Voter Intimidation in 4 States*, Wash. Post, Nov. 2, 2016, at A6.

34. *E.g.*, N.D. Ohio Complaint, *supra* note 31, at 5.

35. *E.g.*, *id.*

Ohio

On November 1, Northern District of Ohio Judge James S. Gwin ordered a defense response by the following day.[36] Following a November 4 hearing[37] on a November 3 motion for a temporary restraining order,[38] Judge Gwin issued an injunction against defendants other than the Republican Party against engaging in voter intimidation activity.[39] "While 'obey the law' injunctions are generally disfavored, this motion for injunctive relief does not fit in that category. . . . [W]here there is a legitimate possibility that particular laws may be imminently violated, ordering compliance with those laws is appropriate."[40] On Sunday, November 6, the court of appeals issued an emergency stay of Judge Gwin's order, "conclud[ing] that the Plaintiff did not demonstrate before the district court a likelihood of success on the merits."[41] The Supreme Court declined to interfere, and Justice Ginsburg noted "that Ohio law proscribes voter intimidation."[42]

Arizona

"In light of the absence of a request for a hearing and considering the little time left for the Court to resolve Plaintiff's claims, [District of Arizona Judge John J. Tuchi] *sua sponte* [set] a schedule for briefing and a [November 3] hearing."[43]

The Democratic Party served the Republican Party on October 31, but it did not serve Stone or Stop the Steal until November 2,[44] the day that defendants' briefs were due.[45] Judge Tuchi, therefore, accepted briefing after the hearing.[46]

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36. Docket Sheet, Ohio Democratic Party v. Ohio Republican Party, No. 1:16-cv-2645 (N.D. Ohio Oct. 30, 2016); *see* Eric Heisig, *GOP, Trump Ordered to Respond to Dems' Claims*, Cleveland Plain Dealer, Nov. 2, 2016, at A13.

37. Minutes, *Ohio Democratic Party*, No. 1:16-cv-2645 (N.D. Ohio Nov. 4, 2016), D.E. 26.

38. Temporary Restraining Order and Preliminary Injunction Motion, *id.* (Nov. 2, 2016), D.E. 8.

39. Order, *id.* (Nov. 4, 2016), D.E. 27 [hereinafter Nov. 4, 2016, N.D. Ohio Order], 2016 WL 6542486; *see* Eric Heisig, *Judge's Order Aims to Head Off Voter Intimidation*, Cleveland Plain Dealer, Nov. 5, 2016, at A10; Kendall, *supra* note 24; Michael Wines, *Judge's Ruling Preserves Voting Rights for Thousands in North Carolina*, N.Y. Times, Nov. 5, 2016, at A13.

40. Nov. 4, 2016, N.D. Ohio Order, *supra* note 39, at 2.

41. Order, Ohio Democratic Party v. Donald J. Trump for President, Inc., No. 16-4268 (6th Cir. Nov. 6, 2016), D.E. 18; *see* Kendall, *supra* note 24.

42. Ohio Democratic Party v. Donald J. Trump for President, 580 U.S. ___, 137 S. Ct. 15 (2016).

43. Order, Ariz. Democratic Party v. Ariz. Republican Party, No. 2:16-cv-3752 (D. Ariz. Oct. 31, 2016), D.E. 7 [hereinafter Oct. 31, 2016, D. Ariz. Order]; *see* Temporary Restraining Order and Preliminary Injunction Motion, *id.* (Nov. 1, 2016), D.E. 10.

44. Proof of Service, *id.* (Nov. 4, 2016), D.E. 26 (Stone); Proof of Service, *id.* (Nov. 3, 2016), D.E. 19 (Stop the Steal).

45. Opinion at 1–2, *id.* (Nov. 4, 2016), D.E. 31 [hereinafter D. Ariz. Opinion]; *see* Oct. 31, 2016, D. Ariz. Order, *supra* note 43.

46. D. Ariz. Opinion, *supra* note 45, at 2; Minutes, *id.* (Nov. 3, 2016), D.E. 24.

Although Judge Tuchi denied on November 4 a defense motion to dismiss the complaint, he also denied the Democratic Party immediate injunctive relief.[47] The evidence presented did not show a likely risk of voter intimidation.[48]

Pennsylvania

Three days after the complaint was filed, Eastern District of Pennsylvania Judge Paul S. Diamond ordered service on the defendants by the following day, ordered the filing of a motion for the emergency relief sought in the complaint, and set a hearing in the Eastern District of Pennsylvania for November 7.[49]

Following the hearing, Judge Diamond denied the Democratic Party immediate relief.[50]

> Remarkably, Plaintiff did not actually move for injunctive relief until Thursday, November 3, after I ordered it to do so. Plaintiff has not explained this delay, which has crippled Defendants' ability to respond, made relief impracticable, and likely precluded appellate review of this Memorandum and Order before tomorrow's election. Moreover, Plaintiff has produced no evidence of any planned voter intimidation in this District. Finally, insofar as Plaintiff asks me to enjoin conduct that is already prohibited by criminal statutes, such an injunction is impermissible.[51]

North Carolina

Middle District of North Carolina Judge Catherine C. Eagles set her case for hearing on November 7.[52] She also denied the Democratic Party immediate relief.[53]

> While the statements of the defendant Roger Stone, the defendants' presidential nominee, and the nominee's surrogates, taken in context, may be susceptible to the interpretation that Mr. Stone and the Trump campaign are encouraging their supporters to intimidate voters, there is little evidence that supporters are acting on these indirect suggestions. . . .
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> . . . On Election Day, if it becomes apparent that agents of any defendant or supporters encouraged by any defendant are making an effort to intimidate minori-

47. D. Ariz. Opinion, *supra* note 45; *see* Howard Fischer, *No Evidence That Arizona Voters Will Face Intimidation, Judge Finds*, Ariz. Daily Star, Nov. 5, 2016, at C1; Wines, *supra* note 39.

48. D. Ariz. Opinion, *supra* note 45.

49. Order, Pa. Democratic Party v. Republican Party of Pa., No. 2:16-cv-5664 (E.D. Pa. Nov. 2, 2016), D.E. 10; *see* Temporary Restraining Order and Preliminary Injunction Motion, *id.* (Nov. 3, 2016), D.E. 14.

50. Opinion, *id.* (Nov. 7, 2016), D.E. 47, 2016 WL 6584832.

51. *Id.* at 1.

52. Docket Sheet, N.C. Democratic Party v. N.C. Republican Party, No. 1:16-cv-1288 (M.D.N.C. Nov. 3, 2016); *see* Minutes, *id.* (Nov. 7, 2016), D.E. 27.

53. Opinion, *id.* (Nov. 7, 2016), D.E. 30.

ty voters or to further incite intimidation of voters, the plaintiff may renew the motion.[54]

Nevada

District of Nevada Judge Richard F. Boulware II set his case for hearing on November 2, 3, 4, and 7.[55] Because Stone and Stop the Steal promised to inform persons on their contact list about what would constitute improper voter interference, Judge Boulware decided that a court order was not necessary.[56]

Voluntary Dismissals

On the day after the election, the state Democratic Parties voluntarily dismissed the actions in Arizona,[57] Michigan,[58] Nevada,[59] North Carolina,[60] Ohio,[61] and Pennsylvania.[62]

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54. *Id.* at 2, 4.

55. Docket Sheet, Nev. State Democratic Party v. Nev. Republican Party, No. 2:16-cv-2514 (D. Nev. Oct. 30, 2016) [hereinafter D. Nev. Docket Sheet] (D.E. 15, 17, 33, 74, 75, 65, 76); Order, *id.* (Nov. 3, 2016), D.E. 47; Order, *id.* (Nov. 1, 2016), D.E. 16; *see* Temporary Restraining Order and Preliminary Injunction Motion, *id.* (Nov. 1, 2016), D.E. 6.

56. *See* D. Nev. Docket Sheet, *supra* note 55 (D.E. 71, 72); Notice, *Nev. State Democratic Party*, No. 2:16-cv-2514 (D. Nev. Nov. 7, 2016), D.E. 70; Declaration, *id.* (Nov. 6, 2016), D.E. 60; *see also* David Ferrara, *Trump Supporter's Group "Stop the Steal" to Inform Pollsters About Federal Voting Laws*, Lax Vegas Rev.-J., Nov. 7, 2016.

57. Docket Sheet, Ariz. Democratic Party v. Ariz. Republican Party, No. 2:16-cv-3752 (D. Ariz. Oct. 19, 2016) (D.E. 33); Voluntary Dismissal, *id.* (Nov. 9, 2016), D.E. 32.

58. Order, Mich. Democratic Party v. Mich. Republican Party, No. 2:16-cv-13924 (E.D. Mich. Nov. 17, 2016), D.E. 18; Order, *id.* (Nov. 9, 2016), D.E. 16.

59. D. Nev. Docket Sheet, *supra* note 55; Notice, *Nev. State Democratic Party*, No. 2:16-cv-2514 (D. Nev. Nov. 9, 2016), D.E. 73.

60. Notice, N.C. Democratic Party v. N.C. Republican Party, No. 1:16-cv-1288 (M.D.N.C. Nov. 9, 2016), D.E. 31.

61. Order, Ohio Democratic Party v. Ohio Republican Party, No. 1:16-cv-2645 (N.D. Ohio Nov. 10, 2016), D.E. 35; Notice, *id.* (Nov. 9, 2016), D.E. 33.

62. Notice, *Pa. Democratic Party*, No. 2:16-cv-5664 (E.D. Pa. Nov. 9, 2016), D.E. 31.