UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Pennsylvania State Democratic Party,

Plaintiff,

v.

Republican Party of Pennsylvania, Donald J. Trump for President, Inc., Roger J. Stone, Jr., and Stop the Steal, Inc.,

Defendants.

Case No. 16-5664

SURREPLY OF DEFENDANT DONALD J. TRUMP FOR PRESIDENT, INC. TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff's coordinated, nationwide scheme to disrupt the 2016 presidential election is coming apart at the seams. As of filing its reply, Plaintiff had lost two of its cookie-cutter lawsuits, a fact Plaintiff's reply ignored. And just today the Sixth Circuit unanimously overturned the one injunction Plaintiff was able to win in Ohio. Those cases prove there is no merit to Plaintiff's accusation that nearly half the electorate, led by a presidential campaign, is engaged in a "conspiracy" to intimidate voters. The cases also confirm that Plaintiff's request for an injunction is absurd. Make no mistake, Plaintiff is asking this Court—on the eve of a presidential election—to enjoin one party, and only one party, from engaging in constitutional speech. And to justify that outlandish ask? Tweets, decade-old news reports, and inflammatory, unsubstantiated allegations about white supremacists. Courts in Nevada and Arizona as well as the Sixth Circuit have seen Plaintiff's stunt for what it is; this Court should too.

In Nevada, Judge Boulware, after affording the plaintiff every opportunity to present evidence—indeed, holding three separate evidentiary hearings on the plaintiff's TRO request—denied relief in full. *See* Tr. of Mot. Hearing (Ruling), *Nevada State Democratic Party v. Nevada Republican Party*, No. 2:16-cv-02514 (Nov. 4, 2016) (Ex. A). Likewise, in Arizona, Judge Tuchi held an evidentiary hearing and then denied plaintiff's TRO request in a 25-page written order. Judge

Tuchi concluded the plaintiff failed to show a likelihood of success on the same two claims raised in this action. *See* Order, *Arizona Democratic Party v. Arizona Republican Party*, No. 16-cv-03752 (Nov. 4, 2016) (Ex. B). Judge Tuchi's lengthy, careful Order explained that the plaintiff had "not demonstrated it is likely to succeed in showing the statements and actions of Defendants to-date constitute intimidation, threat, coercion or force against voters for voting or attempting to vote in violation of" the relevant statutes. *Id.* at 24. The same holds here.

To be sure, a court in Ohio issued an injunction in one of Plaintiff's cases—which swept in wide-ranging entities, including the *Hillary Clinton Campaign*. *Ohio Democratic Party v. Ohio Republican Party*, No. 1:16-cv-02645, Order 3 (N.D. Ohio Nov. 4, 2016) (Ex. C). But that order was quickly and unanimously reversed by the Sixth Circuit, which concluded "the Plaintiff did not demonstrate before the district court a likelihood of success on the merits, and that all of the requisite factors weigh in favor of granting the stay." *Ohio Democratic Party v. Ohio Republican Party* No. 16-4268, order 2 (6th Cir. Nov. 6, 2016) (Ex. D at 2).

Returning to this case, nothing in Plaintiff's reply carries their motion above the exceedingly high standard for obtaining preliminary relief. In fact, most of what it says just confirms the infirmity of Plaintiff's allegations and the unconstitutionality of the requested injunction. This Court should deny Plaintiff's request to issue an unconstitutional injunction, as three other federal courts have.

ARGUMENT

I. There Is No Evidence The Campaign Has Called For Voter Intimidation

Plaintiff opens its argument by crowing (at 1) that "The Trump Campaign does not dispute that its leader and principal repeatedly has made these statements at public rallies in Pennsylvania and elsewhere, typically attended by tens of thousands of Trump's vocal supporters." The relevance of this concession is unclear. Perhaps Plaintiff thinks that as more people hear a particular person speak, the less that person is free to say what he thinks. In any event, Plaintiff quickly confirms it has unearthed no evidence whatsoever of any effort by the Campaign to engage in or encourage voter intimidation. The most Plaintiff can muster is to again (at 2) turn to a white supremacist who claims he is going to set up "hidden cameras" and send "an army" to "watch the polls." The Campaign has no connection to this supposed person, and Plaintiff knows it. The only effect of including such an outrageous discussion in Plaintiff's reply is to unmask this lawsuit for what it is—an effort to paint half the electorate as deplorables.

Eventually, Plaintiff tacitly concedes (at 4) that there is no evidence of a conspiracy to intimidate voters. Plaintiff argues it does not need to show past violations to be entitled to a preliminary injunction. That argument is understandable—since Plaintiff has no evidence—but it is also damning.

Plaintiff's request for emergency relief rests upon an alleged conspiracy

among the state Republican party, the Campaign, and others to "threaten, intimidate, and thereby prevent" voters from voting in the 2016 election. Compl. ¶ 1. But two district courts have already held—after lengthy evidentiary hearings with extensive live testimony and, in Nevada, actual discovery—that these accusations have no basis in reality. In Nevada, Judge Boulware ruled that the Nevada Democratic Party faced no irreparable harm because the Campaign and the Nevada Republican Party "are not involved . . . in activities that constitute voter intimidation or coercion." Ex. B at 7. Likewise, in Arizona, Judge Tuchi ruled that "the inferences necessary to reach a conclusion that there is a conspiracy to intimidate voters have reached the point of speculation." Ex. C at 19. Similarly, the Sixth Circuit found that the Plaintiff had not demonstrated a likelihood of success on the merits. Ex. D at 2.

Given the serious nature of Plaintiff's allegations—and the fact that three courts have already found them meritless—one would expect Plaintiff to have presented firm evidence that one of this State's two main political parties actively seeks to deny Pennsylvanians their fundamental right to vote. But that evidence is nowhere to be found in the 28-page Complaint, the 25-page motion for a TRO, or the 13-page reply. And Plaintiff has submitted no fact declaration.

Plaintiff does say cryptically in its reply (at 5) that it has identified "reports of voter intimidation in Philadelphia by those associated with Defendants [that]

have arisen in the recent past." That opaque claim appears to refer to the *more-than-ten-years-old prediction* by a newspaper that some "Republican volunteers" were going to "try to block" some people "from casing votes" and the report that some attorneys were challenging voter credentials. Cmplt. ¶ ¶ 44-45. As the Campaign has explained, even if these decade-old reports were true, they have no connection to the Campaign—which *did not exist over a decade ago*.

But surely Plaintiff has something more to demonstrate the likelihood that the Campaign will cause Plaintiff harm on Election Day? No. The best Plaintiff can find (at 4) is admittedly "subtle" evidence that supporters have been told to "watch." But "simply arguing there is voter fraud and urging people to watch out for it is not, without more, sufficient to justify the extraordinary relief that an injunction constitutes." *Arizona Democratic Party*, No. 16-cv-0375 (Ex. B, at 17). Plaintiff also (at 5) utters an un-cited claim that "unknown numbers of Trump's supporters are mobilizing for action." But not even this benign statement rises to the level of *intimidation*. The complete lack of evidence relating to force, threats, intimidation, or coercion, is apparent on the face of Plaintiff's motion and dooms Plaintiff's claims.

The absence of evidence here also distinguishes the lone case Plaintiff relies upon in arguing that past violations are not necessary to justify an injunction. In that case, there was concrete evidence of past intimidation. *Daschle v. Thune*,

TRO, Civ. 04-4177 (D.S.D., Nov. 1, 2004).[1] Indeed, as Judge Tuchi in Arizona wrote on Friday, distinguishing *Daschle*: "Without any of these several types of evidence, the Court is unable to evaluate in any meaningful way the likelihood of the harm Plaintiff urges will occur in terms of actual or attempted voter intimidation as a result of the Trump Campaign's statements." *Arizona Democratic Party*, No. 16-cv-03752 (Ex. B, at 18).

II. Plaintiff's Suggested Order Unconstitutionally Restricts Protected Speech

Plaintiff's next argument (at 6) is "[s]ensible limitations on 'poll monitoring' activities is consistent with the First Amendment." But Plaintiff is not seeking anything "sensible," or anything consistent with the First Amendment. Plaintiff's argument runs this way: The proposed order would only "restrain Defendants" from "voter intimidation." And since voter intimidation is not protected speech, Plaintiff's injunction does not offend the First Amendment. QED.

The problem, however, is how Plaintiff defines "voter intimidation."

[1] *United States v. Tan Duc Nguyen*, 673 F.3d 1259 (9th Cir. 2012), is inapposite. There, the defendant was convicted of obstruction of justice. *Id.* at 1261. Moreover, the case had nothing to do with an injunction; it was a criminal case. But to the extent the court's discussion of voter intimidation is relevant here, the *Nguyen* court made clear that there was direct evidence. Nguyen had targeted 14,000 "newly registered voters with Hispanic surnames," informing them in Spanish that "there is no incentive for voting in this country." *Id.* The letter also threatened to send their personal information to an anti-immigration organization if the newly registered voters voted. In this case, Plaintiff has come forward with nothing even remotely resembling those egregious facts.

According to Plaintiff, "[q]uestioning" a voter constitutes intimidation. Cmplt. ¶82(d). "How are you doing, George?" Enjoined. According to Plaintiff, "[f]ollowing" a voter is intimidation. *Id.* "Hold on; do you want an 'I voted' sticker?" Enjoined. According to Plaintiff, "taking photos" of voters is intimidation. *Id.* "Want a selfie?" Enjoined.

Judge Tuchi got it right in Arizona: "Plaintiff has not provided the Court with a narrowly tailored injunction that would not unintentionally sweep within its ambit other activities that constitute exercise of freedom of speech." *Arizona Democratic Party*, No. 16-cv-03752 (Ex. B, at 23). Moreover, any injunction could "have a chilling effect on protected First Amendment speech by others." *Id.* Plaintiff's injunction against "intimidation" is too imprecise to withstand First Amendment scrutiny. "It is settled that" restraints on speech "so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face." *Winters v. N.Y.*, 333 U.S. 507, 509 (1948). Plaintiff would surely prefer the Campaign and its supporters to remain silent on election day, but the First Amendment stands in the way.

The First Amendment also stands in the way of Plaintiff's reliance on accusations of voter fraud as evidence of voter intimidation. Plaintiff wholly ignores the long history Pennsylvania has when it comes to voter fraud by

Democrats. A history well evidenced by *Marks v. Stinson*, 19 F.3d 873, 878 (3d Cir. 1994), which continues today.[2] But whether concerns about fraud are legitimate (and they are), political speech "is at the core of what the First Amendment is designed to protect." *Morse v. Frederick*, 551 U.S. 393, 403 (2007). And what Mr. Trump has said is nothing more than that—political speech.

Similarly, Mr. Trump's call for supporters to volunteer as poll watchers is a legal request that Plaintiff cannot mute. The practice is explicitly sanctioned by Pennsylvania law. 25 Pa. Stat. § 2687(a).[3] Indeed, Plaintiff concedes (at 9) that inside poll watching by credentialed poll watchers is permitted. But Plaintiff quickly turns to arguing that Mr. Trump has encouraged individuals to violate Pennsylvania's county-residency requirement for poll watching. Of course, to be a certified poll watcher in Pennsylvania, one must be a resident of the county in which the voter serves as a watcher. *Id.* But that restriction only applies to certified watchers who can go *inside* the polling places. Nothing restricts Pennsylvanians (or any other person's—for example, the news media) right to

[2] Pennsylvania state police are investigating 7,000 potentially illegal registrations in Delaware and Philadelphia Counties. *See* Thomas Sullivan Declaration, Ex. R. As to corruption, Attorney General Kane, state Treasurer McCord, U.S. Rep. Fattah, a Philadelphia state senator, and five representatives were convicted or pled guilty to offenses in 2015 and 2016. Philadelphia's District Attorney has even established a task force to fight election fraud. *Id.* Ex. G-Q.

[3] Plaintiff also (at 7) tries to justify its injunction against "exit polling." Plaintiff inexplicably ignores the fact that the Campaign *has no intention of conducting exit polling*. The arguments on this score are thus irrelevant.

observe outside the polling place, so long as they do so ten feet from the polling place and in a manner that does not illegally disrupt the voting process. More to the point, Plaintiff does not even allege Mr. Trump was calling on non-residents to be official, credentialed poll watchers. And besides, Plaintiff has been recruiting an eclectic bunch of supporters—supporters it will presumably ensure do not try to proclaim themselves inside poll watchers on election day. *See* Sullivan Decl. Ex S-T.[4]

Plaintiff's last ditch effort to get around the First Amendment is to argue (at 8) that the real right at stake in this case is the right to vote. The Campaign respects every voter's right to vote for his candidate of choice. And Plaintiff has pointed to no evidence here—or in any of the *six* lawsuits it has filed—that the Campaign has done anything to undermine that sacrosanct right. It is not the Campaign that is trying to deny anyone's rights, it is Plaintiff.

III. The Court Should Not Issue a TRO the Afternoon Before The Presidential Election

"The Supreme Court has repeatedly instructed courts to carefully consider the importance of preserving the status quo on the eve of an election." *Veasey v.*

[4] No more availing is Plaintiff's loose invocation (at 10) of *DNC. v. RNC*, No. 81-3876 at 25 n.13 (D.N.J. Nov. 5, 2016). The Campaign was not a party to that case, nor was Plaintiff; and it involved a decades-old consent decree. Moreover, the DNC *lost* the case. In any event, the judge's comments had nothing to do with Pennsylvania's carefully structured regime governing poll watching.

Perry, 769 F.3d 890, 892 (5th Cir. 2014). Conducting an election is a logistically complicated task, and changing the ground rules shortly before election day causes "serious disruption of [the] election process." *Williams v. Rhodes*, 393 U.S. 23, 35 (1969). Further, "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell* v. Gonzalez, 549 U.S. 1, 5 (2006). As a result of these considerations, courts "generally decline to grant an injunction to alter a State's established election procedures" "[w]hen an election is 'imminen[t]' and when there is 'inadequate time to resolve [ ] factual disputes' and legal disputes." *Crookston v. Johnson*, — F.3d —, No. 16-2490, 2016 WL 6311623, at *2 (6th Cir. Oct. 28, 2016) (quoting id. at 5–6). Indeed, three days ago, Judge Pappert rejected the Republican Party of Pennsylvania's lawsuit explaining it was too late: "[t]here is good reason to avoid last-minute intervention in a state's election process." *Republican Party of Pennsylvania v. Cortes*, No. 16-05524, slip op. 6 (E.D.Pa. Nov. 3, 2016). "Any intervention at this point," Judge Pappert wrote, "risks practical concerns including disruption, confusion or unforeseen deleterious effects." *Id.* And in this case, all of Mr. Trump's quoted statements were made a month ago. Yet Plaintiff waited to file suit until it was politically advantageous.

In a footnote (n.9), Plaintiff says *Cortes* was different, because there the plaintiff wanted to change the status quo. Here, Plaintiff claims it "seeks to

maintain the status quo." If that is all Plaintiff wants—an order that Defendants follow the law—then why are we here? Indeed, Pennsylvania already forbids voter intimidation and harassment generally. 25 Pa. Stat § 3527 (forbidding the "use [of] any intimidation, threats, force or violence with design to influence unduly or overawe any elector"). Federal courts do not issue "obey-the-law" injunctions absent compelling evidence the law will be broken. *See Belitskus v. Pizzingrilli*, 343 F.3d 632, 650 (3d Cir. 2003). But Plaintiff wants to have its cake and eat it too. On the one hand, it wants nothing more than a "fair, orderly" election: follow the law is all we are asking. Reply at 10 n.9. On the other hand, Plaintiff wants an order enjoining only one political campaign and its supporters from being able to "question" voters or "distribut[e] literature" regarding voter fraud. Proposed Order 2. Whichever injunction Plaintiff really wants, Plaintiff is not entitled to it.

Truth be told, however, Plaintiffs really wants the broadest, most malleable injunction possible. *See* Proposed Order 2. That way Plaintiff is armed with a federal sword if it sees a Trump supporter exercising his First Amendment rights. The requested injunction is, in reality, just an eleventh-hour attempt to revamp the rules governing poll watching, exit polling, and campaigning—turning those activities into potential violations of federal law.

In the past, the Supreme Court has concluded that orders changing election procedures even "weeks before an election" came too late. *Purcell*, 549 U.S. at 4.

For example, during the 2014 election season, the Supreme Court "halted three [lower court] decisions that would have altered the rules of [the] fall's general election [up to eight weeks] before it beg[an]." *Veasey*, 769 F.3d at 894; *see North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014) (staying order entered on October 1). Similarly, during this election season, when a court of appeals issued an election-related order on November 4, the Supreme Court unanimously stayed the order the very next morning. *Tatum v. Arizona*, No. 16A460. "[T]he common thread is clearly that the decision of the [lower court] would change the rules of the election too soon before the election date." *Veasey*, 769 F.3d at 895. The Sixth Circuit did exactly the same thing today by staying the Ohio order. All of these cases confirm this Court should not issue an injunction the *day* before the election.

* * *

Plaintiff has brought forth no evidence to justify the outrageous injunction it wants. Three courts have rebuffed the claims this lawsuit is based on, and this Court should do the same. If Plaintiff prevails, this Court will either issue a needless follow-the-law injunction or a sweeping injunction that will chill core political speech. Either way, Plaintiff will have succeeded in co-opting the judiciary in Plaintiff's quest to upend the election mere hours before the polls open.

Plaintiff's motion should be denied.

Dated: November 6, 2016

Respectfully submitted,

/s/ Chad Readler

Chad A. Readler (*admitted pro hac vice*)
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215
(614) 469-3939
careadler@jonesday.com

Attorney for Defendant
Donald J. Trump for President, Inc.

/s/ Bruce S. Marks
Bruce S. Marks, I.D. No. 41299
MARKS & SOKOLOV, LLC
1835 Market St., Suite 1717
Philadelphia, PA 19103
Attorneys for Defendant
Donald J. Trump for President, Inc.

/s/ Thomas C. Sullivan
Thomas C. Sullivan, I.D. No. 63541
MARKS & SOKOLOV, LLC
1835 Market St., Suite 1717
Philadelphia, PA 19103
Attorneys for Defendant
Donald J. Trump for President, Inc.