

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

COURT REPORTER

MARIAN A. SPENCER
AND DONALD A. SPENCER,

Plaintiffs,

vs.

J. Kenneth Blackwell, et al.,

Defendants.

Case No. **1:04 CV 738**

Judge **J. DLOTT**

**MOTION BY PLAINTIFFS FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

Pursuant to Fed. R. Civ. Pro. 65, plaintiffs hereby move for a temporary restraining order restraining the defendants from permitting challengers in the polling places in Hamilton County and from engaging in other racially discriminatory voting practices as further described below. Plaintiffs request that bond be set at \$1.00.

MEMORANDUM OF LAW

I. INTRODUCTION

Voting restrictions that have the purpose or effect of discriminating based on race are illegal and must be stopped. In Hamilton County, Ohio, the Republican Party is violating this basic principle of law. The Party has targeted the predominantly African American precincts and assigned to them "challengers" who will delay, deter and deny voting rights to African American voters in a discriminatory manner. If the voting proceeds as planned African American voters (who have historically voted Democratic) will be subjected to numerous challenges upon requesting ballots and be forced to a summary "trial" before the presiding precinct election judge who by law is a member of the Republican Party! This court must act to promote an equitable voting process for

eligible voters. The Defendants Secretary of State and County Board of Elections are not required to permit challengers inside the polling place. There are numerous other mechanisms in place to prevent voter fraud. The Republican challenging scheme proposed for Hamilton County is so likely to lead to politically biased and racially discriminatory rulings that this court should ban all challengers from the polling places.

II. STATEMENT OF FACTS

A. A Civil War Era Statute Practice Guiding Us Today

The current statute permitting challenges in the voting place traces its roots to a Blatantly racist post civil war statute. The Ohio legislature passed the Act of April 16, 1868 (65 Ohio L. 97) in order to “preserve the purity of elections.” The 1868 Act permitted challenges in the polling place to a male voter’s race and required the voter to prove he did not have an “admixture of African blood.” The voter’s race was challenged at the polls if he could not answer these questions to the satisfaction of the election judges:

Do you solemnly swear or affirm that you will to the best of your knowledge and belief, full and true answers make to such questions as may be put to you touching your qualifications as an elector? The judges shall put the following to him the following questions:

1. What is your age?
2. Where were you born?
3. Were your parents married . . . ?
4. Had your parents, or either of them, a visible and distinct admixture of African blood?
5. In the Community in which you live are you classified and recognized as a white or colored person, and do you associate with white or colored persons?
6. Are there schools for colored children in operation in the township . . . in which you live . . . ?

The Ohio Supreme Court declared this law unconstitutional holding that the law was calculated to impede and defeat the right to vote of persons with an “admixture” of

African blood by imposing on them unreasonable burdens of proof and additional evidence required of them, by authorizing the unconditional rejection of their votes, and for discriminating against them as to punishment and penalties for a violation of the election laws. *Monroe, et al. v. Collins*, 17 Ohio St. 665 (1867). It appears, therefore, that the roots of the statute authorizing polling place challengers are grounded in de jure discrimination.

The current statute permitting challengers is found at R.C. §3505.21. Under that provision political party operatives are permitted inside the polling place and allowed to challenge individual voters.

Pursuant to O.R.C. § 3501.22, each precinct in Hamilton County is monitored by 4 precinct judges appointed by the Hamilton County Board of Elections. Not more than one-half of these precinct election officers may be members of the same political party. The Board may appoint additional officials when necessary to expedite voting. O.R.C. § 3501.22 The Board designates one of the precinct election official **who is a member of the dominant political party** to serve as a presiding judge. The dominant political party in this election is Republican. O.R.C. § 3501.01 (G)

In conjunction with the Republican National Committee, the Ohio and Hamilton County Republican Parties have undertaken a self-described “ongoing, aggressive effort” to challenge voters’ eligibility. Pursuant to this campaign, for the election on November 2, 2004, the Hamilton County Republican Party has deployed challengers to majority African American precincts and not to precincts with majority white voters. The African American precincts tend to vote disproportionately vote for Democratic candidates.

The Hamilton County Democratic Party has also assigned challengers to the polls for the 2004 election but the Party states that its challengers will not challenge voter qualifications. They are deployed solely to watch the Republican Challengers.

Challengers are regulated by Ohio law. Each party may have one challenger present in each polling place. A challenger may challenge that a voter is unqualified to vote. O.R.C. § 3505.21. Once a challenge is tendered, a lengthy process begins. The presiding judge, who is a Republican, of the polling place administers an oath to the voter. If the voter is challenged on the grounds she is not a citizen, all of the elections judges must ask three questions. If the voter is a naturalized citizen she will be forced to present proper paperwork or submit to further testimony under oath. O.R.C. § 3505.20 (A). If the voter is challenged on the ground she has not lived in the state for 30 days preceding the election, all of the elections judges must ask eight questions. If challenged on the ground she does not reside in the county or precinct, the judges shall ask 3 questions. O.R.C. § 3505.20 (B) & (C).

The statute also provides that the Republican presiding judge is permitted to put such other questions to the voter as are necessary to test the person's qualifications as an elector at the election. O.R.C. § 3505.20 (¶ following (D)).

A majority of the election officials may refuse the person a ballot if in their opinions the voter did not fully answer any question, the voter answered the questions differently than the answers on the registration form or for "any other reason." The decision of the judges is final. O.R.C. § 3505.20 (¶ following (D)).

This statutory framework encourages a partisan cross examination of a new voter which will serve to intimidate new voters, particularly the large number of African

American voters. It will also slow down the election process for every voter since all election officials will need to be pulled away from their other posts to question each challenge voter, discuss their positions, and vote on each challenge. Asking a lengthy series of questions to even a small number of voters will result in long lines and voters being turned away. Time is of the essence on Election Day, especially since no voter is allowed to occupy a voting compartment or use a voting machine more than five minutes when all the voting compartments or machines are in use and voters are waiting to occupy them. O.R.C. § 3505.23

B. Secretary of State's Challenger Memorandum and Required Affidavit

In anticipation of the large number of expected Republican challengers throughout Ohio, Defendant Secretary of State Blackwell issued a Memorandum dated October 20, 2004 to all county Boards of Election ("Memo") (Exhibit A). Blackwell acknowledges that the statute is vague because it "do[es] not specify the procedures and limitations for challenging voters." Therefore, he drafted a policy which admittedly provides for the "statutory rights of the challengers, while maintaining order in the polling location."

Blackwell's Memo directs the presiding judge to move the challenged voter to an area no less than 10 feet away from the poll worker table so as not to obstruct the other voters. His Memo, however, ignores the statutory requirement that all of the judges must be present to examine the voter. Thus all voting will cease while the judges move from the table to question the challenged voter. Additionally, the challenger could ask for no one to vote during the challenge of a voter so the challenger does not miss making another challenge. Blackwell also ordered that the Republican presiding judge ask the

questions which is contrary to the statute which requires all the judges to examine the voter.

Blackwell requires the challenged voter to provide greater proof than the statute. For example, Blackwell requires the presiding judge to administer a two page affidavit to the voter and forces the voter to sign it. Blackwell has ordered that if a voter refuses to sign this affidavit he will lose his right to vote. This ground for losing voting rights is not based in law, nor is the requirement to sign the affidavit. Furthermore, Blackwell's affidavit is intimidating and warns the voter in bold capital letters:

**WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY
OF A FELONY OF THE FIFTH DEGREE**

This warning is not required by the state law and is meant only to intimidate voters, especially in light of Blackwell's requirement that the voter must sign the form or lose his right to vote.

C. Hamilton County Challenger Policy

In response to this massive Republican challenge, the Hamilton County Board of Elections adopted a "witness and Challengers Policy" on October 22, 2004 for the first time since the challenge law has been in effect. (Exhibit B). This policy supplements Blackwell's Memo. Hamilton County is also concerned about the number of challenges that may be made and ruled that a challenger must have a good faith basis for challenging a voter and may not blanket challenge or randomly challenge voters. However, the Board has no authority to put these restrictions on the challengers because the state law does not qualify the basis of challenges. The Board's policy, while commendable, is unenforceable.

The Board adds a ground for challenging a voter that is not authorized in the state law – impersonating an elector. Furthermore, the Board duplicates the same errors Blackwell did by requiring the presiding judge to ask the questions and by forcing the voter to sign the affidavit.

D. History of Race Discrimination in Voting in Hamilton County

Discriminatory tactics to suppress African American voting in the South are increasingly employed in Northern cities with large concentrations of minority voters, including Cincinnati. As the Supreme Court and Congress progressively eliminated formal legal barriers to registration and voting, partisan challengers have increasingly engaged in extra-legal intimidation of African American voters at the polls. A system of challengers posted disproportionately in African American precincts in Hamilton County under the rules of engagement approved by the Hamilton County Board of Elections will serve to intimidate African American voters in much the same way other techniques have been used to deny the franchise to African Americans.

The first era of black enfranchisement immediately following the Civil War ended with the compromise of 1877 resolving a contested Presidential election. As whites regained power throughout the South, the Democratic Party purged Republican former slaves from the voting rolls, bringing an end to African American representation in the U.S. Congress, state, and local government. Not until the 20th Century did the Supreme Court rule as unconstitutional tactics such as the grandfather clause, all white Democratic primary elections, and the gross racial gerrymander in Tuskegee, Alabama. None of those judicial opinions altered the reality of black disenfranchisement enforced by KKK nightriders, cross burnings, lynchings, and intimidation of vulnerable sharecroppers.

After the 1930s, the parties reversed roles, as Democrats increasingly championed the interests of their new African American supporters. A Democratic administration and Congressional majority responded to the civil rights movement with the 1965 Voting Rights Act that significantly increased minority representation in the House of Representatives as well as in state and local government.

According to *Political Participation*, a 1968 study by the U.S. Commission on Civil Rights, the act led to “a great upsurge in voter registration, voting, and other forms of political participation,” but new barriers were also being developed. The Commission noted the switch to at-large elections, consolidating counties so that African-American voters concentrated in the central city would become outvoted minorities in larger districts. When the Supreme Court declined to find such redistricting a 14th Amendment violation in Mobile, Alabama, Congress amended the Voting Rights Act to assist African Americans victimized by such changes.

That new provision had a direct local impact after the Republican controlled Ohio General Assembly consolidated the Cincinnati and Hamilton County municipal courts. African American plaintiffs obtained a 1986 federal court order under the Voting Rights Act that resulted in the creation of 14 judicial districts. The judgment enabled minority judges to win election to the bench.

The Voting Rights Act has not prevented another discriminatory practice that is increasingly widespread, both North and South. A study published in the 1981 *Civil Rights Research Review*, reported that in almost half the counties in Georgia, poll watchers intimidated or discriminated against prospective African American voters. A November 11, 1993 report by *Associated Press* reporter Jim Abrams quoted an

anonymous Justice Department official about post-1988 developments in Los Angeles: “All of these moves are called ballot security moves, moves by plain citizens to keep illegal voters from the polls, but none targeted illegal voters. They all targeted minority voters and specifically threatened them with some dire consequence if there are problems with voter records.”

In a 1996 study, David Burnham reported that The Republican National Committee and the New Jersey Republican State Committee engaged in a “concerted effort to threaten and harass black and Hispanic voters” via a “ballot security” effort. The NAACP in conjunction with People for the American Way has recently documented a nationwide pattern in “The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today”

The long history of discrimination against African American voters has not been fully remedied by legislated reforms of the civil rights era. Creative partisans have adapted new techniques to suppress the African American vote. The courts must once again address the Madisonian dilemma by securing minority rights in a liberal democracy governed by majority rule. The disproportionate deployment of Republican Poll challengers to African American precincts Hamilton County, Ohio under the protocol established by the Hamilton County Board of Elections will impose serious restriction on African American voters that require court intervention.

E. Racially Discriminatory System Established for 2004 Election

On or about October 22, 2004, the Republican Party announced plans to challenge some of the newly registered voters in Hamilton County. The vast majority of the voters that the Republican Party has targeted are African American. On October 23, 2004 the

Republican Party withdrew its pre-election challenges in favor of another strategy -- challenging voters at the polls.

The Republicans have announced that 700 challengers have been recruited to enter inside the polling places and block African Americans from voting. The Republicans are using a provision of Ohio law. The modern day version of the law has been on the books for more than fifty years when segregation was widely practiced in Hamilton County.

Specifically, under R.C. §3505.21, Republicans have designated all of the predominantly African American precincts for placement of a representative who will challenge the eligibility of African Americans to vote.

The purpose and/or effect of this strategy are to deny, deter, and delay African Americans voters from exercising their fundamental right to vote.

III. ARGUMENT

A. Standard for Granting Preliminary Relief

The standard for evaluating a request for preliminary injunctive relief under Rule 65 is well established in this Circuit. Though, there is no “rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief, *Tate v. Frey*, 735 F.2d 986, 990 (6th Cir. 1984) (citations omitted), the court should consider the following four factors:

1. Whether the party seeking the injunction has shown a substantial likelihood of success on the merits;
2. Whether the party seeking the injunction will suffer irreparable harm absent the injunction;
3. Whether the injunction will cause others to suffer substantial harm;
4. Whether the public interest would be served by the preliminary injunction.

Memphis Planned Parenthood, Inc. v. Sunquist, 175 F.3d 456, 460 (6th Cir. 1999); *Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 n.3 (6th Cir. 1991). See also *Jane Doe v. Barron*, 92 F.Supp.2d 694, 695 (S.D. Ohio 1999); *Women's Medical Professional Corp. v. Voinovich*, 911 F. Supp. 1051 (S.D. Ohio 1995), aff'd, 130 F.3d 187 (6th Cir. 1997), cert. denied, 523 U.S. 1036 (1998).

These factors are “to be balanced and [are] not prerequisites that must be satisfied . . . they are not meant to be rigid and unbending requirements.” *McPherson v. Michigan High School Athletic Association*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc). A finding of irreparable injury “is the single most important prerequisite that the Court must examine when ruling upon a motion for preliminary injunction.” *Metrobank v. Federal Home Loan Bank Bd.*, 666 F. Supp. 981, 984 (E.D. Mich. 1987). “The probability of success that must be shown is inversely proportional to the degree of irreparable injury the plaintiffs will suffer absent an injunction.” *State of Ohio Ex Rel Celebrezze v. N.R.C.*, 812 F.2d 288, 290 (6th Cir. 1987); accord *Shell v. R.W. Sturge Ltd.*, 850 F. Supp. 620, 632 (S.D. Ohio 1993).

Even if the Court is not certain that a plaintiff is likely to succeed on the merits, a preliminary injunction is still appropriate where the plaintiff shows “serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant,” *DeLorean*, 755 F.2d at 1229 (quoting *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)), or if “the merits present a sufficiently serious question to justify further investigation,” *DeLorean*, 755 F.2d at 1230.

In this case, as thoroughly set out below and in the accompanying declarations, the plaintiffs meet the test for preliminary relief. Their likelihood of success on the merits, their irreparable harm, the balance of hardships and the public interest all strongly favor the issuance of an injunction.

B. Plaintiffs Have A Likelihood of Success on the Merits of Showing that the Defendants' Practices Discriminate Based on Race Under A Statute that is Vague as Applied by Defendants

1. Race Discrimination

42 U.S.C. §1973 (a) provides that voting rights may not be denied based on race or color. The statute is violated if “based on a totality of the circumstances, it is shown that [voting is] not equally open to participation by members of a class of citizens ..in that members of a class of citizens have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” §1973 (b). The Fourteenth Amendment to the United States Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” The facts that will be established at hearing will demonstrate that the Defendant Republican Party has targeted African American precincts for challenges and will therefore subject African American voters in a disparate manner to intimidation, deprivations and delays, not experienced by white voters.

At stake is the exercise of a fundamental right to vote. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Kramer v. Union Free Sch Dist. No. 15*, 395 U.S. 621, 626 (1969); *Reynolds v. Sims* 377 U.S. 533, 562 (1964). African Americans have struggled to overcome numerous obstacles placed in their way in order to prevent them from exercising the right to vote. *Nixon v. Herndon*, 273 U.S. 536 (1927)(law excluded Blacks

from voting in Texas Democratic Primary); *see also Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944)(White Primary Cases).

The Sixth Circuit has held that residents in a community denied equal access to public services due to race discrimination have standing to sue to redress that discrimination. *Neighborhood Action Coalition v. Canton, Ohio*, 882 F. 2d 1012 (6th Cir. 1989). In that same decision, the Sixth Circuit held that a claim of racial discrimination in the provision of services (here, voting services) stated a claim by the plaintiffs under the Fourteenth Amendment equal protection clause which is actionable under 42 U.S.C. §1983. *Id* at 1017.

The discriminatory charging of discretionary offenses supports a claim of selective prosecution which is an equal protection violation under both the federal and state constitutions. *See Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) and *Cleveland v. Trxebuckowski*, 85 Ohio St.3d 524 (1999). *See also U.S. v. Armstrong*, 517 U.S. 456 (1996). Under the Hamilton County scheme prospective African American voters will be disproportionately grilled, summarily tried by precinct judges and charged with voter fraud based on race. This must not be allowed.

2. Vagueness

Violations imposed under vague laws that infringe on fundamental rights such as voting are subject to high levels of scrutiny. R.C. §3505 directs the presiding precinct judge (a Republican) to ask a series of questions of the challenged voter on any number of topics – and, if not satisfied – the presiding judge has discretion to ask any additional questions he or she deems fit. Right on the form the voter is asked to sign, the voter is threatened with a fifth degree felony if he or she makes a false statement to the

Republican precinct judge. This uncharted meandering through “additional questions” in search of an answer that might cause a voter to fear criminal prosecution is certain to send a chill through the voters in the exercise of this fundamental right.

As set out below, a vague criminal law may suffer from three defects. It fails to give adequate warning as to what conduct is proscribed; it is subject to arbitrary enforcement; and it may chill constitutionally protected conduct by causing citizens to steer their conduct away from the area of the legislation. R.C. 3505 as applied suffers from all three defects.

Due process prohibits laws so vague that persons “of common intelligence must necessarily guess at [their] meaning and differ as to [their] application.” *Smith v. Goguen*, 415 U.S. 566, 572 n.8 (1974) (citations omitted); see *Fleming v. United States Dept. of Agriculture*, 713 F.2d 179, 184 (6th Cir.1983) (citations omitted). The Supreme Court has held that a law is vague which fails to give adequate notice of prohibited conduct and has stated general standards for evaluating whether a statute is unconstitutionally vague:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Women’s Medical Professional Corporation v. Voinovich, 130 F.3d 187, 197 (6th Cir. 1997) cert. denied, 523 U.S. 1036 (1998) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (emphasis added)).

By failing to provide explicit standards not only for those who need to abide by them, but for those who apply them, vague laws give wide discretion to law enforcement officers and judges. Such a statute that is “so indefinite that ‘it encourages arbitrary and erratic arrests and convictions’ is void for vagueness.” *Colautti v. Franklin*, 439 U.S. 388, 391, 99 S.Ct. 675, 683 (1979) (citations omitted). As the Supreme Court has found:

if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned, 408 U.S. at 108. The Sixth Circuit in *Voinovich* found that:

In addition, ‘[t]he requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values ... and permits meaningful judicial review.’

103 F.3d at 197 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 629, 104 S.Ct. 3244, 3256 (1984)).

Preventing arbitrary and discriminatory enforcement of election laws is particularly important because there are deep divisions in society over elections. That some law enforcement personnel or prosecutors may be politically or philosophically motivated to enforce unclear laws in a capricious fashion is not only foreseeable, it is inevitable in some communities.

Further, vague standards of unlawful conduct, coupled with the prospect of arbitrary enforcement, will in many instances cause voters to “‘steer far wider of the unlawful zone’ ... than if the boundaries of the forbidden areas were clearly marked.” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). This consequence raises special concerns where, as here, the vague statute

encroaches upon constitutional rights. *See Colautti*, 439 U.S. at 391 (that a vague law violates due process is “especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights”).

We therefore must keep in mind that ‘[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment.’ When criminal penalties are at stake, a relatively strict test is warranted. ‘Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.’

Voinovich, 130 F.3d at 197 (citing to *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982)).

When measured by these standards, RC 3505, as applied in Hamilton County is unconstitutionally vague because it fails to give fair warning, is subject to arbitrary and discriminatory enforcement, and chills voters from engaging in their constitutionally protected right to vote.

C. Plaintiffs Are Experiencing Irreparable Harm

Denying a voter his or her right to vote constitutes irreparable harm. Racially discriminatory practices that interfere with voting rights constitute irreparable harm. Chilling a person in the exercise of fundamental rights constitutes irreparable harm.

D. The Balance of Hardships and the Public Interest Favor Issuance of an Injunction

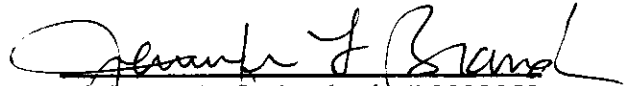
Race discrimination is pernicious. Especially when facilitated by government. Race Discrimination reflects our national legacy of slavery – our worst legacy as a nation. It undermines our democratic principles and reinforces stereotypes that we must overcome if we are to establish a free society with equal opportunity for all. No hardship could flow to the government from an order requiring the Secretary of State and Board of

Elections to conduct the 2004 election in Hamilton County free of race discrimination and free from the application of a vague law that will further chill the exercise of the franchise by African American voters. The public interest will be served by issuance of an injunction.

IV. CONCLUSION

This Court should issue a preliminary injunction restraining the Defendants, their agents, employees and those acting in concert with them, from discriminating against the members of the class based on race, and include in such order, if necessary, a ban on challengers at the polls in Hamilton County.

Respectfully submitted,



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Fulbright scholar on U.S. Constitutional Law and politics at the University of Nijmegen, Netherlands, and I have had visiting appointments at Northern Kentucky University's Chase Law School and on Semester at Sea. I serve on the Ohio State Employment Relations Board Roster of Neutrals.

I am not receiving a fee for my work in this case. I am providing this testimony as an independent expert, and I am not speaking as a representative of the University of Cincinnati. My earliest study of racial discrimination in 1965 while a college student in Vermont, took me to Montgomery Alabama for the march organized by the Rev. Martin Luther King, Jr. in support of the federal Voting Rights Act. I subsequently taught at the middle school level in Central Harlem while a graduate student in New York, and I instructed African American undergraduates at Wilberforce University, Ohio from 1971 through 1983.

III. OPINION

All of my opinions expressed in this declaration are held to a reasonable degree of professional certainty.

It is my opinion that discriminatory tactics to suppress African American voting in the South are increasingly employed in Northern cities with large concentrations of minority voters, including Cincinnati. As the Supreme Court and Congress progressively eliminated formal legal barriers to registration and voting, partisan challengers have increasingly engaged in extra-legal intimidation of African American voters at the polls. A system of challengers posted disproportionately in African American precincts in Hamilton County under the rules of engagement approved by the Hamilton County Board of Elections will serve to intimidate African American voters in much the same way other techniques have been used to deny the franchise to African Americans.

BASIS FOR OPINION: Over a thirty-year career in higher education, I have annually taught Civil Rights classes that included units on equal protection case law involving racial gerrymanders and minority voting rights. In addition, my classes on Judicial Process examine Cincinnati racial issues that have brought national attention to our city's polarization. In preparing for my undergraduate, graduate, and law school lectures I have studied the latest developments in the field.

1. Post Reconstruction White Supremacy in the South and in Cincinnati

The first era of black enfranchisement immediately following the Civil War ended with the compromise of 1877 resolving a contested Presidential election. As whites regained power throughout the South, the Democratic Party purged Republican former slaves from the voting rolls, bringing an end to African American representation in the U.S. Congress, state, and local government. Not until the 20th Century did the Supreme Court rule as unconstitutional tactics such as the grandfather clause, all white Democratic primary elections, and the gross racial gerrymander in Tuskegee, Alabama. None of those judicial opinions altered the reality of black disenfranchisement enforced by KKK nightriders, cross burnings, lynchings, and intimidation of vulnerable sharecroppers.

The Ohio legislature passed the Act of April 16, 1868 (65 Ohio L. 97) in order to "preserve the purity of elections." The 1868 Act permitted challenges in the polling place to a male voter's race and required the voter to prove he did not have an "admixture of African blood." The voter's race was challenged at the polls if he could not answer these questions to the satisfaction of the election judges:

Do you solemnly swear or affirm that you will to the best of your knowledge and belief, full and true answers make to such questions as may be put to you touching your qualifications as an elector? The judges shall put the following to him the following questions:

1. What is your age?
2. Where were you born?
3. Were your parents married . . . ?
4. Had your parents, or either of them, a visible and distinct admixture of African blood?
5. In the Community in which you live are you classified and recognized as a white or colored person, and do you associate with white or colored persons?
6. Are there schools for colored children in operation in the township . . . in which you live . . . ?

The Ohio Supreme Court declared this law unconstitutional holding that the law was calculated to impede and defeat the right to vote of persons with an “admixture” of African blood by imposing on them unreasonable burdens of proof and additional evidence required of them, by authorizing the unconditional rejection of their votes, and for discriminating against them as to punishment and penalties for a violation of the election laws. *Monroe, et al. v. Collins*, 17 Ohio St. 665 (1867). It appears, therefore, that the roots of the statute authorizing polling place challengers are grounded in de jure discrimination.

2. The 1965 Voting Rights Act and Redistricting Hamilton County

After the 1930s, the parties reversed roles, as Democrats increasingly championed the interests of their new African American supporters. A Democratic administration and Congressional majority responded to the civil rights movement with the 1965 Voting Rights Act that significantly increased minority representation in the House of Representatives as well as in state and local government.

According to *Political Participation*, a 1968 study by the U.S. Commission on Civil Rights, the act led to “a great upsurge in voter registration, voting, and other forms of political participation,” but new barriers were also being developed. The Commission noted the switch to at-large elections, consolidating counties so that African-American voters concentrated in the central city would become outvoted minorities in larger districts. When the Supreme Court

declined to find such redistricting a 14th Amendment violation in Mobile, Alabama, Congress amended the Voting Rights Act to assist African Americans victimized by such changes.

That new provision had a direct local impact after the Republican controlled Ohio General Assembly consolidated the Cincinnati and Hamilton County municipal courts. African American plaintiffs obtained a 1986 federal court order under the Voting Rights Act that resulted in the creation of 14 judicial districts. The judgment enabled minority judges to win election to the bench.

3. Intimidating African American Voters at the Polls

The Voting Rights Act has not prevented another discriminatory practice that is increasingly widespread, both North and South. A study published in the 1981 *Civil Rights Research Review*, reported that in almost half the counties in Georgia, poll watchers intimidated or discriminated against prospective African American voters. A November 11, 1993 report by *Associated Press* reporter Jim Abrams quoted an anonymous Justice Department official about post-1988 developments in Los Angeles: "All of these moves are called ballot security moves, moves by plain citizens to keep illegal voters from the polls, but none targeted illegal voters. They all targeted minority voters and specifically threatened them with some dire consequence if there are problems with voter records."

In a 1996 study, David Burnham reported that The Republican National Committee and the New Jersey Republican State Committee engaged in a "concerted effort to threaten and harass black and Hispanic voters" via a "ballot security" effort. The NAACP in conjunction with People for the American Way has recently documented a nationwide pattern in "The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today"

<http://www.pfaw.org/pfaw/general/default.aspx?oid=16367> Selected examples include:

*In 1987 “ballot security” efforts were launched against minority voters in Louisiana, Georgia, Missouri, Pennsylvania, Michigan and Indiana. Republican National Committee documents said the Louisiana program alone would “eliminate at least 60- 80,000 folks from the rolls,”

*In 2002 **Pennsylvania** GOP Rep. George Gekas reportedly put together a systematic effort to “challenge” voters in counties favorable to his Democratic opponent. The *Lebanon Daily News* wrote: “Gekas...has distributed among county officials and volunteers an 18-page manual that includes a section about ‘challenging a voter.’ That’s right: Gekas volunteers aren’t just going to challenge absentee ballots, but are going to try to block some people who show up at the polls from casting votes.” A Gekas campaign spokesman who said the manual “had been drafted by Republican authorities at the national level and had not been tailored to Pennsylvania law.”

*In 2002 In Pine Bluff, **Arkansas**, five Republican poll watchers – including two staff members of Senator Tim Hutchinson’s office – allegedly focused exclusively on African Americans, asking them for identification and taking photographs during the first day of early voting. The chair of the county Democratic Party and Election Commission said the tactics caused some frustrated black voters to not vote. “They are trying to intimidate African American voters into not voting,” said the Democrat coordinating national efforts with Arkansas’ campaigns. “They were literally going up to them and saying, ‘Before you vote, I want to see your identification.’” Local law enforcement officials escorted the poll watchers out, but they later returned.

*In 2002 a **Tennessee** state Republican Party plan to challenge would-be voters at polling places drew the scrutiny of elections officials and the Justice Department just a few days before the general election. The state’s Election Coordinator accused state Republicans of spreading “misinformation” about voter eligibility to GOP poll workers and urged county election officials to reject inappropriate challenges at the polls. The warning was prompted by an internal GOP e-mail, obtained by Justice Department lawyers, which encouraged party poll watchers to “Challenge voters who concern you.” A subsequent memorandum of understanding identified unlawful activities as: directly confronting voters, intimidating legitimate voters, giving voters misleading information, dressing to look like law enforcement officials, photographing voters with the intent of intimidating them, and interfering with voters as they prepare to and cast their ballots.

*In the 2003 mayoral campaign in Philadelphia, voters in African American areas were systematically challenged by men carrying clipboards, driving a fleet of some 300 sedans with magnetic signs designed to look like law enforcement insignia.

*In summer 2004, **Michigan** State Rep. John Pappageorge (R-Troy) was quoted in the *Detroit Free Press* as saying, “If we do not suppress the Detroit vote, we’re going to have a tough time in this election.” African Americans comprise 83% of Detroit’s population.

*This summer In **Kentucky**, Jefferson County Republican chair Jack Richardson§ announced plans to put challengers in predominantly Democratic precincts for the

November elections. The party had executed a similar plan in 59 minority precincts in 2003, with a recruitment flyer alleging voter fraud by black labor unions. A group of Republicans described the challenger plan as "rogue and racist behavior" and called for Richardson to resign.

4. Hamilton County Challenger Scheme

I understand that the Hamilton County, Ohio Republican County has filed a list of challengers in predominantly African American precincts. Pursuant to the protocol for challengers issued by the Hamilton County Board of Elections, challenges by Republicans will cause the precinct election judges headed by the presiding Republican judge to subject African American voters to a detailed regimen of questions backed by a threat of a fifth degree felony if there should be an incorrect answer. This procedure will surely intimidate potential African American voters, unfairly deny some the right to vote, delay others to the point that they leave the voting lines and impose burdens on the franchise far in excess of any benefit possibly achieved from the procedure.

IV. CONCLUSION

The long history of discrimination against African American voters has not been fully remedied by legislated reforms of the civil rights era. Creative partisans have adapted new techniques to suppress the African American vote. The courts must once again address the Madisonian dilemma by securing minority rights in a liberal democracy governed by majority rule. The disproportionate deployment of Republican Poll challengers to African American precincts Hamilton County, Ohio under the protocol established by the Hamilton County Board of Elections will impose serious restriction son African American voters that require court intervention.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Howard Tolley, Jr.

Howard Tolley, Jr., Ph.D., J.D.

Dated: Oct. 27, 2004