

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<b>MARIAN A. SPENCER</b>	<b>::</b>	<b>Case No. 1:04-CV-738</b>
<b>AND DONALD A. SPENCER,</b>	<b>:</b>	
<b>Plaintiff,</b>	<b>:</b>	<b>Judge Susan J. Dlott</b>
	<b>:</b>	
<b>vs.</b>	<b>:</b>	<b><u>FIRST AMENDED</u></b>
	<b>:</b>	<b><u>COMPLAINT FOR</u></b>
<b>J. Kenneth Blackwell, et al.,</b>	<b>:</b>	<b><u>DECLARATORY AND</u></b>
	<b>:</b>	<b><u>INJUNCTIVE RELIEF</u></b>
<b>Defendants</b>	<b>:</b>	<b>(Class Action)</b>
	<b>:</b>	
	<b>:</b>	

**I. PRELIMINARY STATEMENT**

1. This amended complaint adds a claim challenging the constitutionality of O.R.C. §3505.20 on its face based upon testimony that came up at the first day of hearing on the motion for a temporary restraining order. Specifically, the statute sets out a procedure for challenging the qualifications of a voter and, if the voter fails the statutory tests, the precinct “judges shall refuse the person a ballot.” In response to questions from the court, Counsel for defendant Blackwell conceded that this statute was “superceded” by federal law. The testimony developed so far makes it clear that the statute deprives Ohio voters of their right to vote without providing those voters with elemental due process protection.

2. This amendment also clarifies that Michael Barrett is sued only in his official capacity; corrects the explanation of the presiding judge’s political party affiliation; and cleans up typographical and grammatical errors that were made in the original complaint. Since no TRO will be issued without a hearing, the verification has been deleted.

3. This is a civil rights class action challenging a Republican effort to seize on an old Jim Crow era law to prevent African Americans in Hamilton County, Ohio from exercising their right to vote. Plaintiffs are a class of African American voters that will face an imposing array of “challengers” deployed to their precincts on Election Day. African American voters will be intimidated; racial tension will rise and African American voters will be blocked from exercising their right to vote. Plaintiffs seek declaratory and injunctive relief for the class under the First and Fourteenth Amendments to the United States Constitution, The Voting Rights Act and other provisions of federal law.

## **II. JURISDICTION AND VENUE**

4. Jurisdiction over the federal claims is conferred on this Court by 28 U.S.C. §1331 and §1343(3) and (4). Venue is proper under 28 U.S.C. §1391.

## **III. PARTIES**

5. Plaintiffs Marian and Donald Spencer are residents of the Avondale neighborhood in Cincinnati, Ohio. They vote in Ward 13, precinct H, a predominantly African American precinct. They bring this action on their own behalf and on behalf of a class of African American voters throughout Hamilton County, Ohio.

6. Defendant J. Kenneth Blackwell is the Ohio Secretary of State and is the Chief Election Officer responsible for administering all statewide elections. He is sued in his official capacity.

7. Defendants Hamilton County Board of Elections, its members, and its Director are the Secretary of State’s representatives for county election matters (ORC § 3501.06). Defendant Board and its members are sued in their official capacity.

8. Defendant Michael Barrett is chair of the Hamilton County Republican Party and a member of the Board of Elections. He is sued in his official capacities.

#### **IV. CLASS ACTION ALLEGATIONS**

9. This action is brought, and may be properly maintained, as a class action under the provisions of Rules 23(a) and 23 (b) (2) of the Federal Rules of Civil Procedure.

Plaintiffs bring this class action on behalf of themselves and all others similarly situated.

The members of the class are as follows:

All African American or Black persons who reside in Hamilton County and are assigned to vote in precincts where the majority of voters are African American.

10. The number of class members is not known with precision but exceeds thousands of individuals. The class is so numerous that joinder of all members is impracticable.

11. The claims of the plaintiffs are typical of the claims of the class because plaintiff members and all class members will sustain and continue to suffer injury arising from defendants' wrongful conduct as alleged herein.

12. The representative plaintiffs will fairly and adequately protect the interests of the members of the class. Proposed class counsel is experienced in the prosecution of class actions, including cases arising from the deprivation of civil rights, cases regarding government misconduct, race discrimination and complex civil litigation.

13. Defendants have acted, or refused to act, on grounds generally applicable to the class, thereby making final injunctive and corresponding declaratory relief appropriate with respect to the class.

## V. FACTS

### **A. Jim Crow Era Law Resurrected in 2004**

14. The Civil War ended in 1865. Only two years later, in 1867, the Ohio Supreme Court struck down the practice of individually interrogating potential African American voters at the polling place regarding their race. The vehicle used to pursue these questions was a statute that permitted voter challengers to be posted inside a polling place. O.R.C. § 3505.20 is the present day version of that statute. For the first time in more than one hundred and thirty years, this statute is once again being used for a racially discriminatory purpose.

15. 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 officials who is a member of the dominant political party to serve as a presiding judge. The dominant political party is the majority party in the last governor's race in that precinct. O.R.C. § 3501.01 (G).

16. 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 the vast majority of their challengers to majority African American precincts. The African American precincts tend to vote disproportionately for Democratic candidates.

17. 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.

18. Challengers are regulated by Ohio law. Each party may have one challenger present in each polling place. A challenger may challenge a voter as “unqualified” to vote. O.R.C. § 3505.21.

19. Once a challenge is tendered, a lengthy process begins. The presiding judge 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 three questions. O.R.C. § 3505.20 (B) & (C).

20. The statute also provides that the 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)). The statute provides no parameters for this additional interrogation.

21. 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)).

22. This statutory framework requires a cross examination of a new voter which will serve to intimidate new voters, particularly a 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 challenged 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, Required Affidavit, and Directive on Provisional Balloting**

23. 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.”

24. Blackwell’s Memorandum 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 Memorandum, 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 that no one vote during the challenge of a voter so the challenger does not miss making another challenge. Blackwell also ordered that the presiding judge ask the questions which is contrary to the statute which requires all the judges to examine the voter.

25. 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.

26. The Secretary of State issued a directive 2004-42 on October 25, 2004 which in effect rewrites Ohio law without any action by the State Legislature. First, it adds additional burdens on the voter that are not permitted under the existing statute. It directs the poll worker to force the challenged voter to execute a written affirmation regarding his "voting residence" and where he "resides." If the voter refuses to sign this "affirmation" he will not be given a provisional ballot. Second, it takes the final decision away from the poll workers (in contravention of O.R.C. § 35035.20) and puts it in the

hands of the county Board of Elections, again, with no amendment of the statute by the Ohio Legislature. Neither the Legislature nor the Blackwell directives issued to date have conformed the procedures for challenging voters at the polls with conflicting procedures for challenging registered voters.

**C. Hamilton County Challenger Policy**

27. In response to the massive Republican deployment of challengers, the Hamilton County Board of Elections adopted a “witness and Challengers Policy” on October 22, 2004 for the first time since the challenger law has been in effect. (Exhibit B). This policy supplements Blackwell’s Memorandum. 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.

28. The Board duplicates the same errors Blackwell committed by requiring the presiding judge to ask the questions and by forcing the voter to sign the affidavit or be denied a ballot.

**D. The Statutory Scheme, the Secretary of State’s Directive and Memorandum, and the Board of Elections’ Policy Combine to Take Away a Voter’s Right To Vote Without Due Process**

29. An African American voter, voting in a targeted precinct who is successfully challenged by a Republican will be deprived of her right to vote without due process.

Without prior notice or the right to counsel, she will be subjected to a test, interrogation by 4 precinct judges, and unlimited interrogation from the presiding judge.

30. This voter will lose her right to vote if the majority of the judges find her answers insufficient or “for any other reason.” A majority of the judges have unlimited discretion to deny ballots and may arbitrarily deny the voter her right to vote.

31. This voter will not be allowed to vote, has no right to appeal, and has no other recourse to preserve her franchise.

32. The statute does not allow provisional balloting. The provisional balloting Blackwell directs is contrary to the law and is insufficient to cure these due process violations.

**E. History of Race Discrimination in Voting in Hamilton County**

33. 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.

34. 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 20<sup>th</sup> 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.

35. 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.

36. 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 14<sup>th</sup> Amendment violation in Mobile, Alabama, Congress amended the Voting Rights Act to assist African Americans victimized by such changes.

37. 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.

38. The Voting Rights Act has not prevented another discriminatory practice that is increasingly widespread, both in the 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.”

39. 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.”

40. 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 in Hamilton County, Ohio, under the protocol established by the Hamilton County Board of Elections will impose serious restrictions on African American voters that require court intervention.

**F. Racially Discriminatory System Established for 2004 Election**

41. On or about October 22, 2004, the Republican Party announced plans to challenge some of the newly registered voters in Hamilton County.

42. The vast majority of the voters that the Republican Party has targeted are African American.

43. On October 23, 2004 the Republican Party withdrew its pre-election challenges in favor of another strategy – challenging voters at the polls.

44. The Republicans have announced that 700 challengers have been recruited to enter inside the polling places and block African Americans from voting.

45. The Republicans are using a provision of Ohio law. The modern day version of the law has been on the books since segregation was widely practiced in Hamilton County.

46. 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.

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

**F. Need for Injunction**

48. There is no adequate remedy at law. The African American citizens in this community deserve an election free of racial discrimination. Every voter who is

selectively targeted for challenge; every voter who is unduly delayed; every voter who is deterred and intimidated faces irreparable harm. Moreover, the public deserves a system wherein voting is limited to qualified voters. The need is urgent for court action on this pressing problem. Only prompt action by this federal court ordering declaratory and injunctive relief will serve the public interest.

49. Furthermore, the statute O.R.C. § 3505.20, by its terms, and the implementation by the Secretary of State and the Board of Elections, denies Plaintiffs due process and equal protection rights to a hearing, the right to counsel, the right to introduce evidence, and the right to offer or cross-examine witnesses prior to a final decision to deny such voter a ballot. These schemes also conflict with state and federal voter registration laws and violate the Plaintiffs' due process and equal protection rights by denying the voters any right to appeal. This Statute, as applied by the government defendants, must be enjoined.

## **VI. CLAIMS FOR RELIEF**

### **First Claim – 42 U.S.C. §1983 - - United States Constitution**

50. Defendants, acting under color of law, have violated rights secured to the plaintiffs by the First, Fourth, and Fourteenth Amendments to the United States Constitution including the right to free expression, the right of association, the right to travel, the right to vote, the right to due process of law, and the right to equal protection under the law.

### **Second Claim – National Voter Rights Act, 42 USC §1973(a)**

51. The defendants have violated rights secured to the members of the plaintiff class by 42 U.S.C. §1973(a).

**Third Claim – National Voter Registration Act, 42 U.S.C. § 1977(gg)**

52. The defendants have violated rights secured to the members of the plaintiff class by 42 U.S.C. §1977(gg), et seq.

**VII. PRAYER FOR RELIEF**

**WHEREFORE**, plaintiffs request that this court:

- A. Certify this action as a class action pursuant to Fed. R.Civ. Proc. 23(a) and (b)(2);
- B. Issue a declaratory judgment that the practices at issue in this case violate the constitutional and statutory rights of the class members;
- C. Declare the provisions of O.R.C. § 3505, the Blackwell October 20, 2004 Memorandum and the Blackwell Directive 2004-42 which together create a scheme through which potential voters may be challenged and denied a ballot by action of the precinct judges violates the rights of citizens and shall be void and unenforceable.
- D. Issue a preliminary and permanent injunction against the defendants and all those acting in concert prohibiting the practices at issue in this action;
- E. Award to plaintiffs reasonable costs, expenses and attorney fees;
- F. Award such other and further relief as this court shall deem just and reasonable.

Respectfully submitted,

/s/ Jennifer L. Branch  
Alphonse A. Gerhardstein # 0032053  
Jennifer L. Branch #0038893  
LAUFMAN & GERHARDSTEIN  
Attorneys for the Plaintiff

617 Vine Street, Suite 1409  
Cincinnati, Ohio 45202  
(513) 621-9100  
(513) 345-5543 fax  
[agerhardstein@laufgerhard.com](mailto:agerhardstein@laufgerhard.com)  
[jbranch@laufgerhard.com](mailto:jbranch@laufgerhard.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on October 29, 2004, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

s/ Jennifer L. Branch  
Attorney for Plaintiffs