

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

MARIAN A. SPENCER	:	Case No. 1:04-CV-738
AND DONALD A. SPENCER,	:	
	:	
Plaintiffs,	:	Judge Susan J. Dlott
	:	
vs.	:	<u>PLAINTIFFS' PROPOSED</u>
	:	<u>FINDINGS OF FACT AND</u>
J. KENNETH BLACKWELL, et	:	<u>CONCLUSIONS OF LAW</u>
al.,	:	
	:	
Defendants	:	

Plaintiffs have filed a race discrimination case seeking to enjoin the use of hundreds of Republican Party Challengers inside the majority African American precincts on Election Day, November 2, 2004, in Hamilton County, Ohio. Through an amended complaint, they have also filed a broader constitutional and federal law claim against the Ohio laws and regulations which authorize last minute challenges to voter eligibility which will sidetrack all of the precinct poll workers and in many instances stop the voting process. For the reasons set out in this order, the court will grant the requested injunctions. Moreover, the Court notes that this action is consistent with the instruction that the Ohio Secretary of State gave to the Ohio Attorney General on October 29, 2004. He instructed the Attorney General, with respect to the election on November 2, 2004, to secure an order that “all challengers of all parties shall be excluded from polling places throughout the state.” Inexplicably the Attorney General has not followed his client’s direction.

Hamilton County has seen enough racial strife. The deployment of Republican Challengers disproportionately to the African American precincts ensures that voting in those areas will be delayed and African American voters subjected to a voter verification process that

is not imposed on white voters. The vehicle for these challenges is a little used statute with roots in the Jim Crow era. This blatant difference in treatment of African Americans will not be tolerated.

But through the course of the lawsuit a broader problem emerged that implicates voting statewide. The challenger system itself violates fundamental due process and other legal principles by

- * Misleading voters into believing they can be denied an opportunity to vote;
- * Exposing voters to a moving target of reasons for their alleged ineligibility to vote;
- * Avoiding the orderly procedures in place for revoking voter registrations and replacing them with a rushed hearing that provides the voter with no adequate notice of the issues; no meaningful opportunity to be heard; no right to representation or to present evidence; and no right to appeal;
- * Threatening voters with criminal prosecution for failing to correctly answer all of the questions sprung on the voter at the last minute, clearly sending a chill through any voter subjected to this surprise attack.

The order entered today simply directs the parties to rely on the trained staff already in place in the office of the Secretary of State and in the 88 county board of election so that the election will hopefully proceed smoothly and efficiently and in a nondiscriminatory manner. The orders entered in *Miller v. Blackwell*, and in this case have prevented voter challenges before the ballots are cast where due process protections cannot be ensured. But challengers remain free to serve as witnesses at the Board of Elections during the vote count and raise their concerns about any provisional ballots cast by voters.

I. FINDINGS OF FACT

A. Parties

1. Plaintiffs Marian and Donald Spencer are residents of the Avondale neighborhood in Cincinnati, Ohio. They vote in Ward 13, precinct H, which is almost a 100% 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.

2. 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.

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

4. 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 capacity.

5. Defendant intervenors include The State of Ohio, Sam Malone, Charles Winburn, and Clara Pugh.

B. Typical Elections

Plaintiffs have been voting faithfully since 1940. They have been voting in their African American neighborhood for many of those years. The poll workers or precinct judges assigned by the Hamilton County Board of Elections (HCBOE) to conduct elections in plaintiffs' precinct have been doing this work for more than twenty five years.

In Hamilton County, these precinct judges are bipartisan, both Democrats and Republicans. Williams Tr. ___. They are well experienced, trained, mature, and have an average age of over 60. Williams Tr. ___. The board of elections trains each judge and presiding judge.

They have a good history of performing their jobs well. Burke Tr. __, Williams Tr. ____. They are capable of ferreting out any unqualified voters and have performed their tasks well for at least the last 40 years. Burke Tr. __.

Ohio has a detailed system of laws regulating voter registration and cancellation of voter registration if a voter is not qualified to vote. All voter registration information is a public record and a person's registration can be contested by third parties who contend that the registration is not valid. That process includes notice to the voter and an opportunity to be heard.

C. Republican Challengers Assigned to African American Precincts for 2004 Election

The Spencer's precinct is one of approximately 250 majority African American precincts in which the Hamilton County Republican Party has assigned a "challenger." These Republican challengers are part of a group of more than 3,000 challengers that will be posted in polling places all over Ohio.

These challengers have been designated pursuant to a little used Ohio law that permits candidates to post representatives inside the polling place for the purpose of contesting the qualifications of voters. The statute, O.R.C. §3505.21, is an amended version of an early Ohio law used to exclude from voting persons with any African American ancestry.

Mrs. Spencer and Mr. Burke agreed that in their respective voting lifetimes in Cincinnati, there have never been challengers in polling places. While the Democrats and the Republicans every election file their list of central committee members (County Exs. 4-7), no challenger ever showed up on Election Day. This year was different. Burke Tr. __. This was the first time "real" challengers were identified who are being trained and intend to show up at the polls from 6:30 a.m. until the polls close on Election Day. Burke Tr. __; Hicks Tr. __.

This targeted deployment in African American precincts was obvious to anyone who looked at a precinct map and knows the Cincinnati majority African American neighborhoods. Unfortunately, Cincinnati is one of the most segregated cities in America. Mr. Burke took PX 1003 – the list of targeted priority Republican challengers and created a chart at PX 1010 of Republican targeted precincts. Those precincts are marked with an “R”. Plaintiffs summarized this data in a compilation which shows the targeted precincts by Ward, Precinct, and Cincinnati Neighborhood. PX 1008.

Mr. Yates, an African American elected official currently campaigning for re-election in Hamilton County, testified that the targeted neighborhoods were predominately African American. Of the 251 precincts, the vast majority were in African American neighborhoods.¹ Yates Tr. ___. The Republicans were obviously targeting African American precincts within Wards, since in Ward 2 they targeted Madisonville (predominately African American) but not Oakley (predominately white); in Ward 6 Pendelton (predominately African American) was targeted but not the Central Business District (predominately white); in Ward 14, Kennedy Heights (predominately African American) was targeted but not Pleasant Ridge (predominately white). Yates Tr. ___, PX 1001 (Map).

Dr. David Maume’s analysis of the Republican priority challengers’ deployment verified that there is a strong and statistically significant relationship between the allocation of Republican priority challengers and the racial composition of a voting location. PX1014 p.2; Tr. ___. The African American portion of the voting age population (VAP) averages 21% across all county voting locations. However, in those locations with Republican priority challengers, the

¹ Madisonville, Evanston, Pendelton, Walnut Hills, East Walnut Hills, Bond Hill, Roselawn, Paddock Hills, Mt. Auburn, Avondale, North Avondale, Over the Rhine, Kennedy Heights, West End, English Woods, North Fairmount, S. Fairmount, Millvale, South Cumminsville, Winton Place, and Winton Hills, Silverton, Lincoln Heights, and Woodlawn.

average African American portion of the VAP is 64%, whereas those without a challenger the average is 6%. *Id.* Overall, approximately 77% of African American voters are covered by a Republican priority challenger, compared to only 25% of non-African Americans. PX1014 p.3 Tr. ___.

Defendant Michael Barrett, chair of the Republican Party, did not testify or dispute that the Republicans have targeted 251 predominately African American precincts. Defendant Blackwell did imply in his questioning that the Republicans were using their challengers to target new voters, however Dr. Maume showed that this is not true. New voters in majority African American voting locations are much more likely to be covered by a Republican priority challenger than new voters in majority white voting locations. PX 1014 P.4. Dr. Maume concluded that the Republicans have chosen to allocate their priority challengers on a racial basis – i.e., targeting heavily black precincts. As a result of this pattern of allocation, black voters are significantly more likely than whites to be in a precinct with a Republican priority challenger. *Id.*

The Republicans have not restricted their challengers to Hamilton County; they have a system in place to deploy challengers on election in precincts statewide. PX1013. They are looking for voter fraud and voters who claim false identities or are ineligible to vote. *Id.*

Cincinnati is still recovering from a race riot that occurred in April, 2001. This Court currently supervises a class action settlement designed to rebuild relations between the Black community and law enforcement. Plaintiff Marian Spencer is a former Vice Mayor of the city. She testified that she and other African Americans will feel intimidated, angry and resentful when they come to the polls and for the first time experience last minute challenges to their right

to vote prompted by persons inside the polling place but not working for the BOE. She and Mr. Yates testified that this will make for tense precincts.

D. The Challenge Process is a Last Minute Ambush of the Voter

The existing rules for managing challenges are set out in O.R.C. §3505.20 and regulations issued by the Secretary of State and local Board of Elections. Under these rules a voter can be intercepted and quizzed about facts such as citizenship and age that she already established when she registered to vote and was placed on the rolls. In that sense a challenger can skip all of the opportunities to raise these issues with fair warning to the voter in favor of a last minute ambush for which the voter is totally unprepared.

These interrogations of the voter take place in front of other voters, ten feet from the line and according to the statute, will involve all of the precinct judges, totally stopping the voting process for everyone. In order to avoid this problem the regulations developed for the 2004 election implementing this law allow the presiding judge alone to confront the voter. But those regulations deprive the voter of her right to be heard by the full bipartisan team of poll workers who will all vote on her eligibility and are clearly inconsistent with the statute.

Moreover, under these provisions a voter can be blocked if she fails to answer any question the judges deem “necessary to test the person’s qualifications as an elector at the election.” The Secretary of State has issued a form for conducting this test, Form 10-U. That form is an affidavit which warns the voter of a felony prosecution if they fail to answer questions fully or accurately, also states that a failure to “answer any question fully or refusing to sign this form will result in your loss of your right to vote.” This statement directly conflicts with recent federal legislation entitling voters to receive provisional ballots. The form has nonetheless been

distributed to all 88 Boards of Election by the Secretary of State who has directed that they be utilized with all challenges.

It appears that challengers have been collecting information on voters and intend to lay in wait and confront them with accusations at the polls. Curiously, the United States Department of Justice seems to condone this last minute attack. In a letter sent to this court the Department of Justice stated that challenge statutes such as the one utilized here offer an opportunity to bring in “information pertinent to the crucial determination of whether an individual possesses all of the necessary qualifiers to being able to vote.” In yesterday’s New York Times, counsel for the Ohio Republican Party said challengers will be armed with their lists of 35,000 suspect new voters, absentee ballot requests, and deceased persons. If challengers are entering the polls with “hit lists” or investigative materials about prospective voters the current system for asking unlimited questions on ill defined standard will lead these last minute trials of the voters into far ranging, unfair tribunals which are anathema to a democratic country.

The defendants claim that any problems will be resolved because the local boards of election will offer a provisional ballot to voters of questionable eligibility. But the Boards have conflicting instructions and Form U-10 says that a voter who flunks the test will be denied a ballot rather than provided a provisional ballot. As set out in detail in the conclusions of law, the Ohio rules for provisional ballots themselves are not consistent with federal law.

E. The Defendant Secretary of State has Recommended that Challengers Be Excluded for the November 2004 Election

On October 29, 2004, the Defendant Secretary of State “instructed the [Ohio] Attorney General to offer the following recommendation to the federal courts in Hamilton and Summit counties for resolution of these matters now: **All challengers of all parties shall be excluded from polling places throughout the state.**” PX 1015. (emphasis in original). The Court

deems this as an admission that form U-10 and the procedures in place to implement the challenger and voter confrontation provisions are sufficiently questionable that the Secretary would rather eliminate the challenger process from the election.

It is apparent therefore, that the challenger process and the statute and implementing rules and forms will be used to impose unequal voting procedures on African American voters in Hamilton County; impose burdens on other voters through vague criteria and last minute trials of voters in the polling place under humiliating and unfair circumstances wherever they are employed; and surely delay the vote frustrating many citizens in their effort to exercise the franchise as they wait on precinct judges to conduct these proceedings.

F. The Republicans have not trained their Challengers

On Election Day the polls will be staffed by well trained, experienced, mature precinct judges. If a ten year old boy registered to vote, the election judges can challenge his age as they have for years without the need for the Republican challengers. Instead of relying on the elections officials, the Republicans are relying on 251 Republicans who will be trained less than 2 days before Election Day.² One challenger, Drew Hicks, plans to be a challenger on Election Day. He is a member of the defense legal team in this case and would be expected to know what challengers will do. On the Friday before, however, he did not know where he was assigned (14 E a predominately African American precinct). He did not know what he was required to do, what he could not do, what the restrictions were for voting, how the challenge process worked, or literally anything about what he would be doing all day inside the polls on Election Day. This

² Defendant Republican Party agreed to provide to plaintiffs' counsel the training materials that were to be used at the Republican training session on Sunday October 31, 2004 in Hamilton County. Those materials were not produced. Therefore, to the extent any inference could be drawn from those materials on the issues of race discrimination, due process and federal law compliance, it will be drawn against the defendant. *Rogers v. T.J.Samson Community Hospital*, 276 F.3d 228 (6th Cir. 2002)(applying KY law); *Welsh v. Unites States*, 844 F.2d 1239, 1248 (6th Cir. 1988).

lack of serious preparation undermines the claim that the challengers would be present to protect against voter fraud.

If the Republicans were concerned about voter registration fraud, they had all calendar year to challenge those newly registered voters. Instead, they waited until it was literally too late to provide those targeted voters with due process. This court has blocked similar last minute voter challenges in *Miller v. Blackwell*.

II. CONCLUSIONS OF LAW

A. Standard for Preliminary Injunction

This Court utilizes the traditional, four-factored balancing test in determining whether to grant a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of preliminary injunctive relief would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunctive relief. *See Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000).

B. Ohio Secretary of State Instruction to the Ohio Attorney General to Agree to an Order Removing Challengers From the Polling Places

The Ohio Secretary of State “instructed the [Ohio] Attorney General to offer the following recommendation to the federal courts in Hamilton and Summit counties for resolution of these matters now: **All challengers of all parties shall be excluded from polling places throughout the state.**” PX 1015 (emphasis in original). The Ohio Attorney General has declined to follow that instruction. The Assistant Attorney General assigned to Mr. Blackwell has withdrawn from this litigation and been substituted by separate counsel. This unheeded instruction from Mr. Blackwell affects all four prongs of the preliminary injunction standard. First, it serves as an admission that the issues raised by plaintiffs are sufficiently meritorious that

the Secretary of State would concede the point for the upcoming election. Second, it serves as an admission that the balance of hardships and burden on the voters are best served by eliminating all challengers for the upcoming election. Finally, it serves as an admission that the public interest is best served by eliminating challengers and permitting the Secretary to administer the upcoming election through his professional staff.

These admissions by a Secretary of State are very important. The Ohio Secretary of State is the chief election officer of the state of Ohio. State legislation exclusively empowers him to appoint, control and direct elections through the 88 Boards of Elections. He is also the state official specifically required to conform state election practices to the federal laws at issue in this case involving discrimination and voter registration:

The secretary of state shall do all of the following:

(A) Appoint all members of Boards of Election;

(B) Issue instructions by directives and advisories to members of the boards as to the proper methods of conducting elections;

(C) Prepare rules and instructions for the conduct of elections;

...

(M) Compel the observance by election officers in the several counties of the requirements of the election laws;

(N) (1) Except as otherwise provided in division (N)(2) of this section, investigate the administration of election laws, frauds, and irregularities in elections in any county, and report violations of election laws to the attorney general or prosecuting attorney, or both, for prosecution;

...

(Q) Prescribe a general program to remove ineligible voters from official registration lists by reason of change of residence, which shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 and the National Voter Registration Act of 1993, including a program that uses the national change of address service provided by the United States postal system through its licensees;

...

(W) Perform other duties required by law....

O.R.C. § 3501.05.

The Ohio Attorney General is the Chief law officer in the state. O.R.C. §109.02. When requested he gives “legal advice to a state officer ...in all matters relating to their official duties.”

O.R.C. §109.12. The attorney general defends state officers in civil actions. O.R.C. §109.361.

It does not appear, therefore, that the Ohio Attorney General is empowered to overrule the Secretary of State in election matters committed to the discretion of the Secretary of State. At a minimum, the views of the Secretary of State should have more weight. *State ex rel. Beck v. Casey*, 51 Ohio St.3d 79, 81, 554 N.E.2d 1284, 1286 (1990).

It is obvious that the Secretary of State and Attorney General do not agree on the best course of action. In the short run, it certainly seems prudent to give more deference to the public official who must run the election than to his lawyer who has chosen to disagree with him. It may well be that the Secretary of State could not easily use his power to direct local officials to bar the challengers as that might have triggered more lawsuits from the challengers. The Court is therefore heavily influenced by the unheeded instruction of the Secretary of State to the Attorney General to secure an order “excluding all challengers from the polling places throughout the state.”

C. Basic Election Laws and Regulations in Ohio

1. Registering to Vote

A voter is eligible to vote in Ohio if she resides in the precinct in which that polling place is located.

Every citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state thirty days immediately preceding the election at which the citizen offers to vote, is a resident of the county and precinct in which the citizen offers to vote, and has been registered to vote or thirty days, has the qualifications of an elector and may vote at all elections in the precinct in which the citizen resides.

O.R.C. § 3503.01; see also, §3503.07.

All voters must register to vote in Ohio. O.R.C. § 3503.06. A person may register through mail or in person by returning a voter registration card (PX 1016). On the card, the voter

shall declare under the penalty of election falsification that she has lived in the state for 30 days immediately preceding the next election and will at be least 18 years of age at the next general election. A board of elections that receives a voter registration application and is satisfied as to the truth of the statements made in the registration from shall register the applicant. O.R.C. § 3503.19(C).

2. Cancellation of Voter Registration

The board can cancel registrations for people who have moved away, died, or are not eligible to vote. O.R.C. § 3503.18; O.R.C. § 3503.24. The board of elections may conduct investigations, summon witnesses, and take testimony under oath regarding the registration of any voter. O.R.C. § 3503.25. The statute enables the Board to make sure only eligible voters register. For example, Mr. Burke testified that recently the board received 15 registration cards from an employee of an organization that was registering new voters. The board's staff became suspicious of 2 of the registration cards he submitted. The board investigated, cancelled the registrations, and referred the man who registered these ineligible voters for prosecution. Burke Tr. __; County Ex. 11.

3. Election Day Voting Procedures at Polling Places

On Election Day the polls will be run by 4 precinct election officers or judges (also called poll workers). O.R.C. § 3501.22. No more than half shall be members of the same party. 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).

Precinct judges swear to uphold the law and are required to perform all the duties for receiving the ballots and supplies, opening and closing the polls, and overseeing the casting of

ballots during the time the polls are open, and after the polls close. O.R.C. § 3501.22. No partisan activity is permitted within 150 feet of the polling location. O.R.C. § 3501.35.

Ohio has an adequate system for verifying voter registration and administering the election that is bipartisan and fair on its face without the intrusion of third party challengers and the diversion of the whole voting process into a series of hearings based on accusations first brought up at the moment a citizen reaches for a ballot.

D. Plaintiffs Have a Likelihood of Success on the Merits

1. Plaintiffs Have a Likelihood of Success on the Voting Rights Act Claim

Plaintiffs claim that the planned deployment of Republican Challengers in Hamilton County, Ohio violates their right to be free of race discrimination. The evidence clearly establishes that the deployment imposes a dramatic disparate impact on African Americans. On November 2, 2004, 77% of the African Americans in Hamilton County are likely to be exposed to a Republican Poll Challenger. Only 25% of the white Hamilton County voters are likely to be so exposed. In nearly every precinct with 50% or more African American voters there is a Republican Challenger assigned. That is not true in the majority white precincts.

The Voting Rights of 1965, as amended, 42 U.S.C. § 1973, was enacted “for the broad remedial purpose of ridding the country of racial discrimination in voting.” *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)). Discriminatory intent is not a prerequisite to a successful challenge under the Voting Rights Act. *See, e.g., Wesley v. Collins*, 791 F.2d 1255, 1259-60 (6th Cir. 1986). Instead, “[t]he essence of a [Voting Rights Act] § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and

white voters to elect their preferred representatives.” *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

In determining whether a disputed practice has had or will have a discriminatory effect on the right to vote, this Court must consider several factors (“the Senate factors”). These factors include but are not limited to:

- a. the history of voting-related official discrimination,
- b. the extent to which minority group members bear the effects of discrimination in other areas which hinder their ability to participate effectively in the political process,
- c. the extent to which the State has used voting practices that tend to enhance the opportunity to discriminate against the minority group.
- d. the extent of racially polarized voting,
- e. the exclusion of minority group members from candidate slating processes,
- f. the use of racial appeals in political campaigns,
- g. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. 97-417, at 28-29, 1982 U.S.C.C.A.N. 177, 206-07, *available at* 1982 WL 25033.

Additionally, this Court should consider whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group and whether the policy underlying the political subdivision’s use of such voting, qualification, prerequisite to voting, or standard, practice, or procedure is tenuous. *Id.*

It is clear that several of the Senate factors weigh heavily towards a finding of discriminatory effect. The statute upon which Defendant Republican Party relies in placing challengers in minority precincts on Election Day has its roots in a Reconstruction-era statute

that was intended to suppress votes of citizens who had descended from African Americans. Professor Howard Tolley clearly traced the history of racial discrimination in voting in this country, starting with the passage of the 15th Amendment to the U.S. Constitution and ending with the problems in Florida in 2000. Tolley Tr. ___ - ___. What was obvious was the voting booth challenge process was an early attempt to suppress the Black vote.

Most tellingly, the earliest reported Ohio Supreme Court case on voter challenges predates the 15th Amendment. In 1868 in Ohio only white men could vote. A man of mixed race, a student at Wilberforce College, showed up at the polls to vote. He was challenged for not being white enough. In 1868, 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 questions to the satisfaction of the election judges. First, the judges swore him in:

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?

Monroe. v. Collins, 17 Ohio St. 665 (1867). This oath is almost identical to the modern day version of this statute O.R.C. § 3505.20. Next 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 . . . ?

Monroe v. Collins. When the voter brought forth several witnesses to testify to the purity of his blood and he was still denied the vote, 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 v. Collins*. It appears, therefore, that the roots of the statute authorizing polling place challengers are grounded in *de jure* discrimination.

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. PX 1005 p.3.

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. PX 1005 p.4.

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. PX 1005 p.4-5.

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. PX 1005 p.5.

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.” PX 1005 p.5.

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.” PX 1005 p.5.

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. PX 1005 p.7.

The Republican Party’s deployment of challengers in African American precincts will cause the precinct judges 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. PX 1005 p. 7.

Professor Tolley concluded 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. PX 1005 p. 1.

Mrs. Spencer agreed. She recounted the discrimination she experienced in her 84 years of living in Ohio from the burning of a Ku Klux Klan cross at night, to being denied public accommodations in hotels, restaurants and Coney Island. She explained that African American voters will be intimidated to walk into their precinct and see for the first time in their lives Republicans challenging their right to vote. Or maybe they will see it happen to another voter and be discouraged from voting.

The presence of aggressive challengers in minority precincts will place a heavier burden on voters in these precincts than had the challengers been placed in white precincts. In *Mississippi Chapter, Operation PUSH, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991), the court struck down a statute whereby voters were required to register first with county registrar to vote in federal, state, and county elections, and again with a municipal clerk to vote in municipal elections. In holding that this “dual registration” system, the court noted that minorities predominated the service and blue-collar industries, and were less likely than white voters to have time to leave work to register to vote. The same reality holds true, presumably, in Cincinnati, making delays created by Republican challengers all the more unacceptable. In Hamilton County, racially-polarized voting is the norm, not an exception: the Republicans proffered justification for targeting minority neighborhoods is that residents in those areas are far more likely to heavily favor Democratic candidates, unlike residents in white neighborhoods.

Far from providing a defense to a voting act challenge this point actually cuts the other way. The Republicans are conceding that they are attempting to take advantage of racial block voting to impose greater scrutiny on the racially discreet voters – here African Americans. That is no different than other forms of illegal racial profiling.

Finally, the procedure at issue here—the use of partisan challengers who have not been trained by the Board of Elections—has only a tenuous connection to the policy goal advanced by Defendants—that is, to protect the integrity of the electoral process and reducing or eliminating voter fraud. Defendants have failed to present any evidence that voter fraud has occurred in past elections in which partisan groups did not send thousands of challengers to the polls. Given that a challenger need meet no eligibility requirements other than that he or she be a registered voter, the Court fails to see how untrained challengers can enhance the voter fraud prevention efforts of the Board of Elections trained precinct judges, many of which have been observing and conducting elections for decades.

Having weighed the Senate factors, the Court is convinced that the widespread presence of Republican challengers in minority district will have a discriminatory effect on the exercise of the franchise by African Americans. Because Ohio statutory law provides no guidelines for the exercise of a challenger’s discretion in making a challenge, the likelihood that Republican challengers will successfully utilize the antiquated statute to create delays in minority polling places is substantial. Accordingly, the Court finds that the assignment of Republican Challengers to precincts in Hamilton County, Ohio violates the Voting Rights Act of 1965.

2. Plaintiffs Have Established a Likelihood of Success on Their Challenge to O.R.C. §3505.20

Plaintiffs have established that O.R.C. §3505.20 and the Secretary Directives, as applied in federal elections, violates their rights to due process, equal protection, the National Voter Registration Act and the Help America Vote Act.

a. Due Process

The right to vote is of paramount importance, and thus is well-established as a fundamental right. *See, e.g., Harper v. Va. Bd. Of Elections*, 383 U.S. 663, 667 (1966) (“Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement must be carefully and meticulously scrutinized.”). That the State of Ohio has the power to regulate the manner of elections does not, without more, justify the abridgement of this fundamental right. *See, e.g., Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1967). Statutes that burden a fundamental right will be sustained only if they survive strict scrutiny—that is, if the statute or regulation in question is narrowly tailored to a compelling government interest. *See, e.g., United States v. Brandon*, 158 F.3d 947, 956 (6th Cir. 1998). In particular, election laws that impose a significant burden on the exercise of the franchise will be subject to strict scrutiny.

A voter who is denied a regular vote pursuant under O.R.C. § 3505.20 does not have a right to adequate notice of the reasons she cannot vote, has no right to present or cross-examine witnesses, and no right to counsel prior to the judges determining that they “believe[] the person is not entitled to vote.” O.R.C. § 3505.20.

Any person offering to vote may be challenged at the polling place by any challenger, any elector in the polling place or by any elections judge. O.R.C. § 3505.20. Each political 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. Once a challenge is tendered, a lengthy process begins.

The presiding judge administers an oath to the vote:

You do swear or affirm that you will fully and truly answer all of the following questions put to you, touching your place of residence and your qualifications as an elector at this election.

O.R.C. § 35035.20.

If the voter is challenged as unqualified on the grounds she is not a citizen, all of the elections judges must ask three questions:

- 1) Are you a citizen of the United States?
- 2) Are you a native or naturalized citizen?
- 3) Where were you born?

O.R.C. § 35035.20 (A). If the voter is a naturalized citizen she will be forced to present proper paperwork or submit to further testimony under oath. *Id.*

If the voter is challenged as unqualified 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.

- 1) Have you resided in this state for thirty days immediately preceding this election? If so, where have you resided? Name two persons who know of your place of residence?
- 2) Have you been absent from this state within the thirty days immediately preceding this election? If yes, then the following questions:
 - a. Have you continuously resided outside this state for a period of four years or more?
 - b. Did you, while absent, look upon and regard this state as your home?
 - c. Did you, while absent, vote in any other state?

O.R.C. § 3505.20 (B). If challenged as unqualified on the ground she is not a resident of the county or precinct, the judges shall ask three questions:

- 1) Do you know reside in this county?
- 2) Do you know reside in this precinct?
- 3) When you came into this precinct, did you come for a temporary purpose merely or for the purpose of making it your home?

O.R.C. § 3505.20 (C). If the person is challenged as unqualified on age, the judges shall ask: Are you eighteen years of age or more to the best of your knowledge and belief? O.R.C. § 3505.20 (D).

The statute also permits the presiding judge 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 or what the person must do or say to pass the test. A majority of the judges may then 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)). There is no provision in the statute to appeal the judges’ decision to the board of elections.

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 the voting area to question each challenged voter, discuss their positions, listen to the Republican and the Democratic challengers, 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 or becoming discouraged and giving up. 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.

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”) PX1007. He said that:

Because statutes (sic) do not specify the procedures and limitations for challenging voters, and because it is widely anticipated that challenger confusion could cause undue delays in voting, it is necessary to develop a policy for dealing with challenges posed at the precinct. The goal of this policy is to provide for the statutory rights of the challengers, while maintaining order in the polling location.

PX1007 p. 5.

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. If the judges follow the statute, all voting will cease while the judges move from the table to question the challenged voter 10 feet away. Blackwell also ordered that the presiding judge to ask the questions by administering Form 10-U. PX1007 p. 6.

This 10-U form, entitled “Affidavit-Oath-Examination of Person Challenged,” is also contrary to the statute because it requires the challenged voter to provide greater proof than required by the statute. For example, Blackwell requires the presiding judge to administer a two page test or affidavit to the voter which is not required by the statute. In addition the voter is forced to sign it. Blackwell has ordered that if a voter refuses to sign this affidavit he will lose his right to vote. PX1007 p.8. This ground for losing voting rights is not based in law.

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.

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. States Ex. 1. 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. That may be prudent but it is done without any amendment of the statute by the Ohio Legislature.

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. *Burke Tr. ___, PX1006*. 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 or require any first hand knowledge or good faith belief. The Board’s policy, while commendable, is unenforceable.

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. These implementing documents (memo, directive, policy) all conflict with O.R.C. § 3505.20. Here, the discretion left to the precinct judges under O.R.C. 3505.20 is strikingly similar to that accorded Louisiana registrars and excoriated by the Supreme Court in *Louisiana v. United States*, 380 U.S. 145 (1965). In that case, the Court examined a provision of the Louisiana

constitution that permitted registrars to exercise significant discretion in determining the eligibility of voters. The Court held that the law was unconstitutional in that it unfairly impeded the exercise of the right to vote.

Moreover, the discretion left to the judges makes this scheme vague. Vague standards of unlawful conduct, coupled with the prospect of arbitrary enforcement, will in many instances chill the voters and cause them 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)).

Because Plaintiffs have demonstrated that voters will be subject to poll tests reminiscent of those prevalent during this nation’s “Jim Crow” era, the Court finds that O.R.C. 3505.20 will impose a severe burden on the right to vote for members of the plaintiff class. Under any level of scrutiny this statutory scheme must fail.

Prevention of voter fraud is a compelling state interest. The Supreme Court has not precisely articulated how to determine whether a statute that abridges the right to vote is “narrowly tailored.” *See, e.g., Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 209 (1999) (Thomas, J., concurring) (“When an election law burdens voting and associational interests, our cases are much harder to predict, and I am not at all sure that a coherent distinction between severe and lesser burdens can be culled from them.”). Nonetheless, the Court has made clear that when a burden on the right to vote is substantial, as is present in this case, it is “constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause *unless essential to serve a compelling state interest.*” *Brown v. Frommhamen*, 415 U.S. 724, 729 (1974) (emphasis added). Implicit within the notion of being

“essential” is that the challenged device is “an essential part of its overall mechanism to achieve its acceptable goals.” *Id.* at 736.

Defendants have failed to demonstrate that O.R.C. § 3505.20 is an essential part of its overall mechanism for protecting and deferring voter fraud. Indeed the Secretary is ready to exclude challengers from the polls on November 2, 2004 altogether. While Ohio Assistant Attorney General Coglianese was representing defendant Blackwell, he conceded that portions of the statute were “superceded” by federal law. Specifically, he agreed that the Help America Vote Act (HAVA) requires that all citizens be provided a provisional ballot if they allege that they are qualified to vote and an election official finds to the contrary. O.R.C. §3505.20 makes no reference to HAVA and the implementing regulations conflict with each other and, as set out *infra*, HAVA itself. Thus plaintiffs have established that the statute and its implementing directives violate the right of voters to secure due process before being denied a regular ballot.

b. Help America Vote Act

In the wake of the Florida elections errors, Congress passed the Help America Vote Act (“HAVA”) 42 U.S.C. §15301 *et seq.* HAVA was passed in order to alleviate “a significant problem voters experience[, which] is to arrive at the polling place believing that they were eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters.” *Sandusky County Democratic Party v. Blackwell*, 2004 WL 2384445 (October 23, 2004) at 4. HAVA set up a system for providing provisional balloting, which allows certain voters to cast a provisional ballot and later, if it is determined the voter was eligible to vote, then the ballot would be counted. *Id.* Provisional ballots shall be given to anyone whose name does not appear on the voter list or an election official asserts the voter is not eligible to vote. 42 U.S.C. § 15482 (a). “[T]he primary purpose of HAVA was to prevent on-

the-spot denials of provisional ballots to voters deemed ineligible to vote by poll workers.”

Sandusky at 4.

HAVA is quintessentially about being able to *cast* a provisional ballot. No one should be “turned away” from the polls, but the ultimate legality of the vote cast provisionally is generally a matter of state law. Any error by the state authorities may be sorted out later, when the provisional ballot is examined, in accordance with subsection (a) (4) of section 15482.

Id. at 9 (emphasis in original).

(1) The restrictions on casting a provisional ballot conflict with HAVA

The Statute and the implementing documents (memo, directive, policy) all create a scheme for challenging voters on Election Day. However, they conflict with HAVA. Ohio’s statute and implementing instructions prevent a provisional ballot from being cast and from being counted. First, the statute prohibits the election officials from giving the voter to have a ballot, regular or provisional. If a majority of the judges find the voter is not entitled to vote, whether for lack of citizenship, underage, not a resident, or for “any other reason,” **the judges shall refuse the person a ballot**. O.R.C. § 3505.20 (paragraph following (D)). This is not permissive, it is mandatory language.

Second, Hamilton County does not permit provisional balloting if the person fails the impersonator test. While they do provide an appeal to the Board there is no right to a provisional ballot. PX 1006 § (h). Furthermore, Hamilton County requires some challenged voters to sign the 10-U affidavit before being given a provisional ballot:

If the prospective voter’s name is not in the signature book, but the voter is otherwise qualified to cast a provisional ballot, if that voter is challenged, he or she shall complete the Form 10-U and if their answers indicated they are qualified to vote and they sign the form under oath, they shall be instructed to cast a provisional ballot.

PX 1006 § (7)(g). This requirement is in direct conflict with HAVA. As the Department of Justice pointed out in their October 29, 2004 letter to this Court, challenged voters must be give a

provisional ballot “even if they are unable to answer the specific questions posed by election judges.”

Finally, even the Secretary of State’s own documents are contradictory. On page 5 of its Memo he says a ballot shall be refused if the judges vote that the person is not eligible to cast a vote. But in his directive, he says a provisional ballot shall be provided.

In addition, even if a voter were able to cast a provisional ballot, it will not be counted, again in violation of HAVA. The Hamilton County board of elections has a simple policy for counting provisional ballots. If the voter signs the affidavit (which is required by § H of their policy), the affirmation, and the envelope only then will the provisional ballot be counted.

(2) The restrictions on counting a provisional ballot conflict with HAVA

Once the voter obtains the provisional ballot, her vote will only count if she signs the affirmation and the envelope. HAVA only requires an affirmation that the voter is a) a registered voter in the jurisdiction in which the individual desires to vote and b) she is eligible to vote in that election. Blackwell requires the following:

I affirm that my name is _____ that my date of birth is _____ and at this time my voting residence is _____ in the City/Village of _____ in _____ County of the State of Ohio and that this is the only ballot that I am casting in this election.

If I am voting elsewhere in the precinct where I reside, I understand that my entire ballot will not be counted.

Under the signature lines the form states in all capital letters:

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

Furthermore, the voter must also fill out the envelope on the provisional ballot which, for a third time, asks the voter where she resides, under oath, and under the warning that falsification is a fifth degree felony.

The Court in *Sandusky* held the state was free to make the affirmation more strict than HAVA by requiring the voter to affirm she lives in the “precinct” instead of “jurisdiction.” The Court did not address the use of the words “residence” and “reside,” which can be confusing to a voter who does not own or rent but “stays with” someone else. These terms are not required in the HAVA affirmation. Mr. Burke and Mr. Williams both admitted that they had concerns regarding how to interpret these words. Burke Tr. ___, Williams Tr. ___. Mr. Burke, an attorney, acknowledged that there are various legal interpretations of residency and the precinct judges are not trained in the finer points of the law. Burke Tr. ___. A voter who is unclear of the legal meaning of residency may be reluctant to sign the 10-U affidavit, the affirmation and the envelope. Burke Tr. ___, Williams Tr. ___.

After she casts her provisional ballot it will be opened at the board of elections. When her provisional ballot is opened by staff in the 10 days after the election, they will look to see if the 10-U affidavit, affirmation, and envelope are signed. If any one signature is missing the ballot will not be counted. Period. Williams Tr. ___. There is no mechanism for the voter to be notified of a hearing,³ no opportunity to attend a hearing, and no opportunity to explain to the board that she did not sign because she “stays with her mom” and did not want to be prosecuted for a felony if “stays with” is not the same as being a resident of the precinct. Williams Tr. ___, Objection of Attorney Stevenson (wherein he acknowledged there was no notice or procedure for notifying the voter before her provisional ballot is counted.) Compliance with HAVA compels the Court to enjoin use of the 10-U affidavit and the underlying statute O.R.C. § 3505.20.

³ Mr. Williams did explain that each provisional voter received a card with the board’s phone number so they could call and see if their vote was counted. This notification is required by HAVA. 42 U.S.C. § 15482 (5). However, he acknowledged that it is hard to reach a person at the board this time of year and there was no way any staff person could answer the caller’s question about when her provisional ballot would be ruled upon. Williams Tr. ___.

c. National Voter Registration Act

The National Voter Registration Act (“NVRA”), 42 U.S.C. § 1977gg *et seq.* was passed by Congress to increase the disproportionately lower voter participation by racial minorities. *Association of Community Organizations for Reform Now (ACORN) v. Edgar*, N.D.Ill.1995, 880 F.Supp. 1215, affirmed as modified 56 F.3d 791. Congress had found that it was the duty of the Federal, State, and local governments to promote the exercise of that fundamental right. Congress found the NVRA was necessary since “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.” 42 U.S.C. § 1977gg (a). The NVRA, sometimes referred to as the “motor voter” law, enacts national procedures for voter registration and administration of the voter rolls.

The system of challengers and the subjective and inconsistent terms of O.R.C. 3505.20 and 3505.21 and the implementing regulations and forms violate the law by shortcutting the uniform voter registration laws in Ohio.

d. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment also protects voters against disenfranchisement through discriminatory state action. “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

The use of challengers and polling place trials violates even rational basis. Recently, for instance, the court in *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill 2002), held that the plaintiffs had stated a viable cause of action when they alleged that less accurate voting machines were used in black precincts than those used in white precincts. Relying on *Bush v. Gore, supra*, the *Black* court wrote:

[S]ome authorities will choose a system with less accuracy than others. As a result, voters in some counties are statistically less likely to have their votes counted than voters in other counties in the same state in the same election for the same office. Similarly situated persons are treated differently in an arbitrary manner. As in *Bush* the lack of a rational basis for implementing a different system of vote counting results in vote dilution. In addition, the Plaintiffs in this case allege that the resulting vote dilution, which was found to be unacceptable in *Bush* without any evidence of a disproportionate impact on any group delineated by traditional suspect criteria, is impacting African American and Hispanic groups disproportionately.

Id. at 899. In the instant case, Plaintiffs have more than adequately demonstrated that the Republican methodology for targeting specific precincts will have a disproportionate impact on African American voters and the defendants haphazard and subjective system for handling challengers will result in arbitrary results.

3. Plaintiffs have standing

Plaintiffs have standing to bring this lawsuit. Their claim is not too remote or speculative. Marian Spencer testified that she and her husband will vote in their precinct, 13-H, which is on the list of those slated to receive a Republican Challenger. See PX. 1010. They will either be challenged themselves or delayed or deterred by the interrogations triggered by the challengers and/or the precinct workers who are applying O.R.C. § 3505.20.

This Court has described standing as involving two levels of inquiry: 1) whether the plaintiff has shown that a “case or controversy” exists, which can be shown by proving actual injury or injury in fact likely to be redressed by a favorable decision; and 2) whether the plaintiff

is the proper proponent of the rights on which the action is based. *See Miller v. Blackwell*, No. C-1-04-735 (S.D. Ohio Oct. 27, 2004), Doc. 11 slip op. at 6 (citing *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987)).

Plaintiffs cannot, of course, prove with certainty that their own right to vote will be challenged. However, as the Sixth Circuit recently explained, such circumstances are not fatal to a determination that standing exists:

Appellees have not identified specific voters who will seek to vote at a polling place that will be deemed wrong by election workers, but this is understandable; by their nature, mistakes cannot be specifically identified in advance. Thus, a voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker who mistakenly believes the voter is at the wrong polling place. It is inevitable, however, that there will be such mistakes. The issues Appellees raise are not speculative or remote; they are real and imminent.

Sandusky County Democratic Party v. Blackwell, --- F.3d ---, 2004 WL 2384445, at *6 (6th Cir. 2004). In a similar case, the Eleventh Circuit held that “chilling of plaintiffs associational and political rights, specifically, the right to vote, is a real injury that was traceable to the alleged government policy.” *Smith v. Meese*, 821 F.2d 1484, 1496 (11th Cir. 1987). Plaintiffs clearly have standing in this case.

E. Irreparable Injury

Given the Court’s finding that the Plaintiffs have demonstrated constitutional and statutory violations that interfere with their right to vote, the Court can only find that Plaintiffs will suffer irreparable injury in the absence of injunctive relief. *See, e.g., Overstreet v. Lexington-Fayette Urban County Gov’t*, 305 F.3d 566, 578 (6th Cir. 2002) (courts have held that injunction should issue where denial of one will result in infringement of a constitutional right). *See Miller v. Blackwell*, No. C-1-04-735 (S.D. Ohio Oct. 27, 2004), slip op. at 9.

F. Substantial Harm to Others

As noted in this Court's analysis of Plaintiffs' Due Process and Equal Protection claims, Defendants have failed to demonstrate that the presence of partisan challengers will have any meaningful impact on the deterrence, prevention, or detection of voter fraud. Accordingly, the Court finds that no harm to others will inure as a result of the relief sought by Plaintiffs. *See Miller v. Blackwell*, No. C-1-04-735 (S.D. Ohio Oct. 27, 2004), Doc. 11 slip op. at 9-10.

G. Public Interest

"It is always in the public interest to prevent violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). Thus, the public interest in this case favors the issuance of an injunction. *See Miller v. Blackwell*, No. C-1-04-735 (S.D. Ohio Oct. 27, 2004), Doc. 11 slip op. at 10.

IV. CONCLUSION

As the foregoing analysis demonstrates, Plaintiffs have demonstrated a strong likelihood of success on the merits and satisfied all of the prerequisites for injunctive relief. Pursuant to the Findings of Fact and Conclusions of Law, this Court Orders as follows:

Order re Racial Discrimination Claim:

The Court hereby **ENJOINS** Defendants J. Kenneth Blackwell, the Hamilton County Board of Elections (HCBOE), including Tim Burke, Chair HCBOE, Michael Barrett, Todd Ward, and Daniel Radford, Members HCBOE, John Williams, Director HCBOE and Michael Barrett, Chair of the Hamilton County Republican Party, their respective agents, servants, employees, successors, and all persons acting in concert with each and any of them from permitting Challengers designated by the Hamilton County Republican Party under O.R.C. §3505.21 or any similar local rules or regulations to enter or perform said functions at any

polling place in Hamilton County on November 2, 2004. This order does not restrict the ability of the Republican Party to post witnesses at the HCBOE for the vote count. Defendants shall seek court approval for any alternative distribution of Republican Challengers.

Order Re: Constitutional Claim:

The Court hereby **ENJOINS** Defendants J. Kenneth Blackwell, the Hamilton County Board of Elections (HCBOE), including Tim Burke, Chair HCBOE, Michael Barrett, Todd Ward, and Daniel Radford, Members HCBOE, John Williams, Director HCBOE, their respective agents, servants, employees, successors, and all persons acting in concert with each and any of them from enforcing or utilizing O.R.C. §3505.20 and those portions of O.R.C. §3505.21 regarding Challengers as well as any similar local rules or regulations used to implement these provisions, including but not limited to Secretary of State Form U-10. The Boards of Election of all 88 counties in Ohio are included in this order and Defendant Secretary of State J. Kenneth Blackwell shall so inform these Boards of Election of the terms of this order immediately upon receipt of this order.

Pursuant to HAVA, if the precinct judges appointed by the Boards of Election determine that an individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot.

Respectfully submitted,
/s/ Alphonse A Gerhardstein
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