

JOHN O'GRADY
CLERK OF THE FRANKLIN COUNTY COMMON PLEAS COURT, COLUMBUS, OHIO 43215
CIVIL DIVISION

OHIO DEMOCRATIC PARTY
271 E STATE STREET
COLUMBUS, OH 43215-0000,

PLAINTIFF,
VS.

OHIO STATE SECRETARY J KENNETH BLACKWELL
FLOOR 16
180 E BROAD STREET
COLUMBUS, OH 43215-0000,

DEFENDANT.

06CVH-09-11609

CASE NUMBER

RECEIVED

SEP 19 2006

J. Kenneth Blackwell
Secretary of State

**** SUMMONS ****

09/06/06

TO THE FOLLOWING NAMED DEFENDANT:

OHIO STATE SECRETARY J KENNETH BLACKWELL
FLOOR 16
180 E BROAD STREET
COLUMBUS, OH 43215-0000

YOU HAVE BEEN NAMED DEFENDANT IN A COMPLAINT FILED IN FRANKLIN COUNTY
COURT OF COMMON PLEAS, FRANKLIN COUNTY HALL OF JUSTICE, COLUMBUS, OHIO,
BY: OHIO DEMOCRATIC PARTY
271 E STATE STREET
COLUMBUS, OH 43215-0000,

PLAINTIFF(S).

A COPY OF THE COMPLAINT IS ATTACHED HERETO. THE NAME AND ADDRESS OF
THE PLAINTIFF'S ATTORNEY IS:

RICHARD M. KERGER
KERGER AND KERGER
33 SOUTH MICHIGAN ST
SUITE 201
TOLEDO, OH 43602-0000

YOU ARE HEREBY SUMMONED AND REQUIRED TO SERVE UPON THE PLAINTIFF'S
ATTORNEY, OR UPON THE PLAINTIFF, IF HE HAS NO ATTORNEY OF RECORD, A COPY
OF AN ANSWER TO THE COMPLAINT WITHIN TWENTY-EIGHT DAYS AFTER THE SERVICE
OF THIS SUMMONS ON YOU, EXCLUSIVE OF THE DAY OF SERVICE. YOUR ANSWER
MUST BE FILED WITH THE COURT WITHIN THREE DAYS AFTER THE SERVICE OF A
COPY OF THE ANSWER ON THE PLAINTIFF'S ATTORNEY.

IF YOU FAIL TO APPEAR AND DEFEND, JUDGMENT BY DEFAULT WILL BE RENDERED
AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

JOHN O'GRADY
CLERK OF THE COMMON PLEAS
FRANKLIN COUNTY, OHIO

BY: SANDY THOMAS, DEPUTY CLERK

(CIV370-S03)

RECEIVED

SEP 19 2006

J. Kenneth Blackwell
Secretary of State

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY

06CVH09 11609

Ohio Democratic Party)
271 E. State Street)
Columbus, OH 43215)

Mary J. Ostendorf)
1853 Page Ave.)
East Cleveland, OH 44112)

and)

Jennifer Klide)
5300 Ira)
Cleveland, OH 44144,)

Relators,)

v.)

J. Kenneth Blackwell)
Secretary, State of Ohio)
180 E. Broad Street, 16th Floor)
Columbus, OH 43215)

Respondent.)

Case No. _____

Hon. _____

**PETITION FOR A WRIT OF
MANDAMUS**

Richard M. Kerger (0015864)
Kimberly A. Donovan (0074726)
Zachary M. Clark (0080450)
KERGER & ASSOCIATES
33 S. Michigan St., Suite 100
Toledo, Oh 43604
Telephone: (419) 255-5990
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COUNSEL FOR RELATORS

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
06 SEP -6 AM 11:01
CLERK OF COURTS-CV

Now come Relators and as their Complaint against Respondent, state

as follows:

PARTIES

1. Relator, the Ohio Democratic Party (“ODP”) is a “major political party,” as defined in Ohio Rev. Code §3501.1(F)(1). To elect the candidate who receives the most votes in the November general election, the ODP has an interest in having all votes cast by registered and eligible voters properly counted and included in the election results. The ODP’s adherents (the ODP’s “members,” i.e., Democratic voters) face a real and imminent threat, of violation of their federal rights guaranteed by the United States Constitution and by the Help America Vote Act of 2002, 42 U.S.C. §1530.1. The ODP sues on its own behalf and on behalf of its members.

2. Relators Mary J. Ostendorf and Jennifer Klide are registered voters in Ohio who are concerned that the action and inaction of the defendant are imperiling their right to vote. All of the Relators have the same interest in assuring a fair and honest election and join in the relief sought against Respondent and will hereinafter be referred to collectively as Relators.

3. Respondent J. Kenneth Blackwell is the Secretary of State of Ohio. In that capacity, he is Ohio’s chief election officer and is responsible for administering all statewide elections, including those for federal office. Among other duties, Respondent: appoints all members of local boards of elections to serve as his representatives; issues instructions by directives and advisories to members of the boards as to the proper methods of conducting elections; prepares rules and instructions for the conduct of elections; determines and prescribes the forms of

ballots and the forms of all blanks, cards of instructions, pollbooks, tally sheets, certificates of election, and forms and blanks required by law for use by candidates, committees and boards; compels the observances by election officers in the several counties of the requirements of the election laws; and oversees the canvassing of election results and totals and announces election results. Respondent is sued in his official capacity.

4. During general and primary elections in Ohio in the past several years, a variety of problems and irregularities arose in regard to the casting and counting of ballots of Ohio's voters. In particular, problems occurred with the various voting machines used in Ohio. Many polling places were inadequately supplied with machines resulting in lines of undue length causing stress and serious discomfort to those who stayed to vote and causing some voters to turn away without voting. Moreover, no provision was or has been made for the utilization of paper ballots or other backup systems in the event of congestion in Ohio's polling places. Reports of malfunctioning voting machines were common. Concerns were regularly expressed about the security of the voting machines and related equipment.

5. Respondent is required by law to issue directives to guide Boards in the holding of elections. He has the authority to investigate local boards, to take over their operation and replace any and all Board members. The members of the Board serve as his representatives subject to his control. The Secretary has issued directives concerning the forthcoming general election but they are inadequate in what they require and what they fail to require, meaning that the Secretary has not

carried out his statutorily imposed duties and this will impact the rights of plaintiffs as guaranteed under the United States Constitution.

6. In September 2005, a report organized by the Center for Democracy and Election Managements at The American University stressed that among other things necessary to restore confidence in voters the need to reduce congestion and avoid lines of voters at the polling places. Co-chairs for the report were former President Jimmy Carter and former Treasury Secretary James A. Baker, III. See excerpts attached as Exhibit A.

7. In recent years there has been an increase in the use of electronic voting equipment. There have been concerns have been expressed about the accuracy and reliability of these systems. Countless studies have been made which raise questions about the security and reliability of using these systems. Attached is one such study which appeared in the IEEE Synopsis on Security and Privacy 2004. The conclusion of the report, attached as Exhibit B, is that the requirement of a "voter-verifiable audit trail" is essential if electronic voting machines are to be used.

8. On August 15, 2006, the Election Science Institute, an organization selected by the Cuyahoga County commissioners to study that county's May 2006 primary election, issued its findings. Attached as Exhibit C is the Executive Summary of that report. In it was reported that serious flaws were noted in the voting system, particularly as regards to the voter verified paper audit trail or "VVPAT." There were significant differences between the results of voting machines

in terms of the number of ballots cast and the paper audit. Generally speaking the VVPATs recorded fewer votes cast than the machines did. Since the report was issued, various groups defending the voting machines have come forward. They point to the inadequacy of the study, the fact that the investigators did not appear sufficiently skilled to conduct the study and that, in any event, the machines appeared accurately to record the votes. The difficulty is that in the event of a recount, Ohio law mandates that it is the VVPAT that is the record of the vote, not the machine total. Accordingly, assuming the premise of the machines' defenders is correct, the study makes clear that any recount will be inaccurate. The VVPATs' report can have different totals than the voting machines. Despite these developments, the Secretary has taken no steps to either confirm or react in any manner to the results of the study and has taken no action with respect to assuring that the general election in Cuyahoga County will be conducted in a better manner than the May primary.

9. While recognizing that the use of Direct Recording Electronic voting systems ("DRE") with a voter verified paper audit trail (VVPAT) will slow the voting process, he has issued no directive to deal with the problem of vote congestion. In Directive 2005-01, the defendant rejected the use of DREs with VVPATs in Ohio's elections. See Exhibit D. He found them too expensive and too slow. Then, a few months later, he reversed course in issuing Directive 2005-07 and found such machines were acceptable. He provided no meaningful explanation of why he no longer has his previously expressed concern about delays. See Exhibit E. Having recognized the VVPATs would slow the voting process, the Secretary

nonetheless did nothing to address the delays beyond adding one sentence saying that there should be one machine for every 175 voters, giving no rationale for that ratio. And this in face of the fact that in the last general election there were countless instances in which congestion of the polling place was a major problem. The delays became so critical on Election Night 2004 that the ODP filed suit in the United States District Court for the Southern District of Ohio to try to have paper ballots made available for use in the overcrowded polling places in Franklin and Knox Counties. A hearing was held at which it was made manifest that there was no way to deal with the problem at that point. Statements by lawyers for the Franklin County Board of Elections and the Secretary of State, as well as testimony by the Franklin County election director, made that clear:

MR. PICCININNI (Franklin County assistant prosecutor): Unfortunately, Your Honor, yes, we understand that it's a record turnout this year. But no one is being denied the right to vote. If these people choose not to wait in line, that is their choice Pg: 12.

* * * * *

MR. COGLIANESE (Assistant Attorney General: First, Your Honor, it is impossible to use paper ballots at this point. Those paper ballots have not been prescribed by the Secretary of State and as a result they would be illegal ballots under Ohio law Pg. 12.

* * * * *

THE COURT: There is no one at the precincts who understands how to hand out and administratively to process an absentee ballot?

THE WITNESS (Franklin County election director):
That is correct. Pg. 25.

The Court determined to issue a temporary restraining order and did so. See Exhibit F attached. In the course of announcing his decision, the Court stated:

THE COURT: Certainly not directly. No one is turning anyone away. But they're saying if you can wait here for the next two or three hours, if it's this important to you, then you can vote.

And on the one hand you're right. That's a decision that individuals have to make. No one promised in our representative democracy that participation would be easy. But on the other hand, it shouldn't be, in a participatory democracy, that participation is made onerous or burdensome. And certainly these election officials had to have know that this circumstance would occur. Pg. 31

10. On February 1, 2005 in a Report to the Community, the Franklin County Board of Elections reported on the significant congestion problems in the 2004 election which caused many voters to stand in line for hours. No clear plan to solve the problems in advance of this Fall's election were provided. However, in testifying before the Committee on House Administration at the request of then-Chairman Bob Ney, Congressman from Ohio, Respondent stated that his office "will conduct its own investigation" of the Franklin County problems. To date that investigation has not occurred. See Exhibit G.

11. This year's ballots will be at least as complicated as the ones used in 2004 due to the numerous complex statewide issues on the ballot, and election of candidates statewide.

12. Another critical problem not yet addressed by the Respondent relates to the handling of voting machines when they malfunction. Experts note that when repairs are attempted on such machines before the elections start, there is little danger since there are no votes recorded on them. But once an election is underway, attempts to repair such equipment run the risk of losing votes which have already been cast. Despite this risk, the Respondent has done nothing to provide guidance to the boards of election as to how they should handle malfunctioning machines so as to avoid the loss of already cast votes.

13. Security of the voting machines and related materials is a matter of great concern due to the difficulty of detecting either accidental or willful alterations of programs used to record the votes cast on each machine. Security of the machines and related equipment before, during and after the election is essential if the right to vote is to have any meaning. Yet all Respondent has done is point to the need for two keys to the machine storage areas (one for each party) and stressed the importance of machine security without providing any guidance as to how it is to be assured.

14. Knowing all of these problems, the Secretary has done nothing to assure that Ohio voters will have a reasonable opportunity to exercise their Constitutional right to vote and have those votes properly counted. Moreover, the Relator ODP served notice on Respondent last week of its desire to be assured he was willing to enact directives on these points. It was asked that he respond by 5:00 p.m. September 5, 2006. As of that date and time, no response had been given.

WHEREFORE, in order to insure that Relators are able to have their Constitutional right to vote at the next election protected, the Relators pray relief as follows:

1. A writ of mandamus directing Respondent to issue Directives which will provide direction to the County Boards of Elections as to how to;
 - a) alleviate congestion at polling places, including the use of back-up paper ballots;
 - b) manage malfunctioning voting machines to ensure that votes already cast are not lost;
 - c) assure the security of voting machines and related equipment so as to avoid accidental or willful adverse impacts on the voting process.

2. An award of such other relief as the Court may deem just and equitable.

Respectfully submitted,

RICHARD M. KERGER (0015864)
KIMBERLY A. DONOVAN (0074726)
ZACHARY M. CLARK (0080450)

By _____

Counsel for Relators

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