UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Anita Rios ***et al.*** Plaintiffs, v. **J. Kenneth Blackwell**, Secretary of State of Ohio Defendant.	Case No. ______________ Judge ________________

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs respectfully submit this Memorandum of Law in support of their motion, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a temporary restraining order and a preliminary injunction requiring Secretary Blackwell to begin immediately a complete and accurate statewide recount in Ohio for the 2004 election for the President of the United States.

PRELIMINARY STATEMENT

No right is more precious than the right to vote. When the ballots of over 90,000 voters are not counted, the right to vote is dishonored. When electronic voting machines produce more votes than registered voters, the right to vote is dishonored. Ohio provides for a mechanism to redress such problems: a complete, accurate, statewide recount. But the Ohio Secretary of State is delaying the recount so that votes will *not* be counted before Ohio chooses its electors for President. That is a violation of the United States Constitution.

Article II of the Constitution gives state legislatures authority over the selection of presidential electors. The Ohio legislature has decided that electors for President must be chosen

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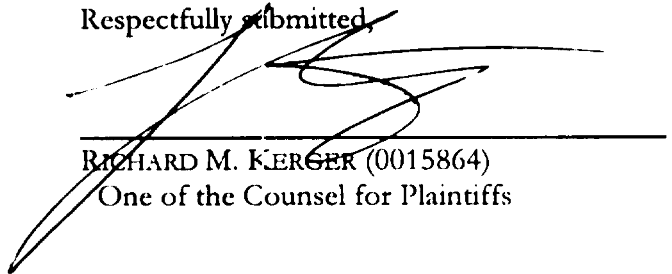
NORTHERN DISTRICT OF OHIO
TOLEDO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Anita Rios, et al.,	)	Case No. 3:04CV7724
Plaintiffs,	)	Hon. JUDGE JAMES G. CARR
v.	)	**CERTIFICIATE OF SERVICE**
J. Kenneth Blackwell,	)	
Defendant.	)	

This is to certify that we have served the Motion for Temporary Restraining Order, Motion for Preliminary Injunction and Memorandum in Support of same this 22nd day of November, 2004 by mailing same to Mr. J. Kenneth Blackwell, Ohio Secretary of State at 180 E. Broad Street, 16th Floor, Columbus, OH 43215.

Respectfully submitted,



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and the recount completed by December 7, 2004. Yet Defendants would begin the recount on *December 6*. That is a sham. Secretary Blackwell's plan — to delay the recount unnecessarily, then stop it midstream to declare "time's up" — will destroy the integrity of the electoral process, and raise questions about what would have happened had all Ohio votes been counted. It will thwart the Ohio legislature's purpose to ensure, through a complete and accurate recount, that *all* votes are counted. It will violate the United States Constitution.

Secretary Blackwell's intentional delay of the recount will also eviscerate plaintiffs' right to have their votes counted, and counted correctly, under the Equal Protection Clause, the Due Process Clause, and the First Amendment. Time and again, the Supreme Court has emphasized that "voters have a constitutionally protected right to vote, and to have their votes counted."[1] But under Secretary Blackwell's scheme, thousands of votes cast by Ohioans will not be counted at all.

Secretary Blackwell's inexcusable delay will cause irreparable harm — to Ohio's voters, to presidential candidates in Ohio, to the overall integrity of Ohio's electoral process, and, given Ohio's vital role in this election, to the integrity of the presidential election itself. The public will not be served by an incomplete recount. It will be served only by a complete, accurate recount that honors every vote before Ohio chooses its electors for President. This Court should order Secretary Blackwell to begin the recount now, and complete the manual recount before December 7, 2004.

[1] *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

STATEMENT OF FACTS

I. THE NOVEMBER 2, 2004 ELECTION PROCESS

1. On November 2, 2004, the general election was held nationwide. While unofficial tallies were available within hours of the polls closing, Ohio law requires that the official canvass in each county Board of Elections not begin until November 13, 2004, at the earliest, but no later than November 17, 2004. *See* Ohio Revised Code ("ORC") § 3505.32.

2. According to ORC § 3501.05(U), Secretary Blackwell must specify, no later than 35 days prior to the date of a presidential election, the date by which the boards are to complete their canvass of election returns. According to published press reports and a letter from the Secretary of State's office dated November 19, 2004, attached hereto as Exhibit A, this date has been set for December 1, 2004.

3. Press reports and a letter from the Secretary of State's office dated November 19, 2004, indicate that Secretary Blackwell plans to announce a statewide certified result for this year's presidential race on or about Monday, December 6, 2004.

4. According to Federal law, the meeting of electors for the Electoral College must take place on December 13, 2004. 3 U.S.C. § 7. In addition, Congress has specified that all controversies regarding the appointment of electors should be resolved six days prior to the meeting of electors, or prior to December 7, 2004, for purposes of this year's presidential election, in order for the vote of Ohio's electors to be binding on Congress when Congress meets on January 6, 2005, to formally declare the results of the 2004 election.[2] 3 U.S.C. § 5.

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[2] This December 7 deadline is the so-called "safe harbor" provision highlighted in *Bush v. Gore*, 531 U.S. 98 (2000).

5. Thus, by design, Secretary Blackwell has fixed a schedule that allows as little as *one* day to complete a full statewide recount. If Secretary Blackwell's schedule goes forward without change, the recount will not be completed before December 7, 2004, as required to take advantage of the federal "safe harbor" provision. As a result, the vote of Ohio's citizens may go uncounted.

6. Scott Konopasek, a nationally recognized expert on election and recount procedures, has indicated in a signed affidavit, attached hereto as Exhibit B, that a recount of votes such as the one contemplated in Ohio for this year's presidential election would take a *minimum* of five days, and likely several more.

II. THE OHIO RECOUNT PROCESS

7. Under Ohio law, a recount will be conducted automatically if either (1) the margin of victory is one-fourth of one percent or less *or*, (2) any candidate who is not declared elected applies for a recount within five days of the Secretary of State's declaration of the results of the election. *See* ORC §§ 3515.011, 3515.02.[3]

8. Under ORC § 3515.03, applications for recounts must be submitted to each county at which a recount is requested and include: a) a list of all precincts to be recounted; and b) a deposit of ten dollars for each precinct.

9. On November 17, 2004, candidate plaintiffs Cobb and Badnarik, through their counsel, sent an overnight letter to Secretary Blackwell and a similar overnight letter to each county Board of Elections director of each of the 88 counties in Ohio, informing them that they

[3] According to ORC § 1.14, if the last day for an act to be completed falls on a Sunday or legal holiday, "the act may be done on the next succeeding day that is not a Sunday or legal holiday." December 11, 2004, (5 days after December 6, 2004, the latest day anticipated for certifying the election results) falls on a Sunday. Therefore, December 12, 2004, would be the new deadline.

planned to exercise their rights under Ohio law to seek a full recount of all votes cast in Ohio for president. The letters asked that they immediately initiate appropriate procedures for starting the recount and that the recount be promptly initiated following the formal applications for the recount and the posting of the necessary bonds with each county Board of Elections. The letters highlighted the importance of a prompt initiation of the recount in light of the impending timetable with the casting of the presidential electors' votes for President. The letters further requested a response by noon on Friday, November 19, 2004, and that the response include whether they would commence the recount procedures in advance of the statewide certification, upon receipt of the bonds at the county boards of elections.

10. On November 18, 2004, candidate plaintiffs Cobb and Badnarik, through their counsel, filed, via overnight delivery for arrival on November 19, 2004, formal applications for a full recount with each of the 88 county boards of elections in Ohio. The applications included the posting of the necessary bonds with each of the county Board of Elections, totaling $113,620 in bond payments.

11. On November 19, 2004, plaintiffs' counsel received a letter from Monty Lobb, Assistant Secretary of State of Ohio. The letter stated that Secretary Blackwell refused to have the recount initiated or any recount procedures initiated prior to his certification of the statewide vote. The letter did not answer the candidate plaintiffs' concerns about the need to conduct a meaningful recount in a timely manner prior to the casting of the presidential electors' votes for President.

12. On November 18 and 19, 2004, plaintiffs' counsel also received responses from several county boards of elections. Kathy Kyle, the director of the Athens County Board of Elections, stated that the board would take its guidance on how to proceed from Secretary

Blackwell. Teresa Wooldridge, director of the Pike County Board of Elections, gave a similar response. Ann Hardin, director of the Hardin County Board of Elections, stated that she had been told by Secretary Blackwell's office to hold the bond payment until the "recount request is done properly." Bryan C. Williams, director of the Summit County Board of Elections, stated that "all recounts will be conducted in accordance with Ohio law and the direction of the Ohio Secretary of State." The directors of the boards of elections for Adams County, Delaware County, and Fayette County all gave similar responses. The Ashtabula County Board of Elections responded through its prosecuting attorney, Thomas L. Sartini, that the application for a recount was "premature" and that the bond payment was being returned.

13. Once the recount applications have been filed, all affected county boards must notify the applicant and all others who received votes in the election of the time, method and place at which the recount will take place, such notice to be no later than five days prior to the start of the recount. *Id.* at § 3515.03. Nothing in Ohio law prohibits the notices from being mailed prior to the certification of results. The recount must be held no later than ten days after the day the recount application is filed or the day the Secretary of State declares the results of the election. *See id.* The Ohio legislature has set no deadline for the completion of the recount.

14. "At the time and place fixed for making a recount, the Board of Elections, in the presence of all witnesses who may be in attendance, shall open the sealed containers containing the ballots to be recounted, and shall recount them." *Id.* at § 3515.04. Each candidate may "attend and witness the recount and may have any person whom the candidate designates attend and witness the recount." *Id.* at § 3515.03. According to § 3515.04 of the ORC, the candidates' witnesses may only "see" the ballots, but may never be permitted to touch them.

15. Preliminary results indicate at least 5,481,804 total ballots were cast in Ohio during the 2004 presidential election. Also, Secretary Blackwell estimated that an additional 175,000 votes were cast as "provisional ballots," and several hundred thousand ballots were cast as absentee ballots.[4] Secretary Blackwell has established guidelines for each county board to recount these ballots.

16. Recount provisions established by the Secretary Blackwell indicate, among other things, that: a) the recount will be conducted by teams having equal numbers of Democrats and Republicans; b) the total votes cast will be compared to the number of voters recorded in polling records; and c) disputed ballots may be settled by the board or by a majority of the employees designated as teams by the board.[5]

17. Secretary Blackwell has suggested minimum procedures for selectively testing 3% of the ballots cast, but has allowed each Board to determine more accurate recounting procedures. Under Secretary Blackwell's 3% selective minimum test, each Board of Elections would randomly select, at a minimum, whole precincts whose total vote count equals at least 3% of the total votes cast in that county. The Board would then conduct both a manual and machine recount of the selected ballots. If there are discrepancies between the manual and machine recount results, Secretary Blackwell's procedures contemplate that a full manual recount must be conducted.

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[4] In the 2000 presidential election in Ohio, more than 440,000 votes were cast by absentee ballot, nearly 10% of the total vote in Ohio. This figure will likely be higher this election, in light of the increased voter turnout, as well as the deployment of troops in the war in Iraq.

[5] These provisions can be found at http://serform2.sos.state.oh.us/sos/elections/statewide/provisions_recounts.htm.

18. Secretary Blackwell also has established certain recount procedures to be used in the case of machine recount using each type of voting technology, including punch card systems, optical scan readers and DRE machines.

19. Approximately 72% of the ballots cast in Ohio during the 2004 presidential election were cast on punch card voting systems. A machine recount of the punch card ballots involves testing of the program first, followed by performing the actual recount. The testing phase involves manually counting then processing a test deck of punch cards in the machine to determine if the machine produces a result that is as accurate as the hand count. If the hand count is confirmed to be accurate and the machine count does not match the results from the hand count, all ballots must be manually counted. Next, in the recount phase, the ballot cards are inspected for hanging "chad," mutilations and other invalidities.[6] Section 3515.04 of the Ohio Revised Code states that a selection on a punch card ballot will not count as a vote unless the "chad" is detached in at least two corners. In addition, the Secretary of State's punch card recount procedures call for: a) overvotes and blank ballots to be separated from the stack of ballots and placed at the top of the stack after the header cards; and b) ballot page assemblies and rotation header cards to be checked for each precinct for candidate positions to verify that each candidate has been properly identified. At the conclusion of the recount, the machine must be retested using the pre-audited test deck of ballots.

20. Approximately 12% of the ballots cast in Ohio during the 2004 presidential election were cast using optical scan systems. To conduct a machine recount of optical scan

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[6] Section 3506.16 of the ORC defines "chad" as a small piece of paper or cardboard produced from a punch card ballot when a voter indicates his/her choice for a candidate, question or issue by piercing a hole in a perforated, designated position on the ballot.

ballots, the optical scan machines must first be tested, followed by an actual recount. The testing phase involves manually counting then processing a test deck of ballots in the machine to determine if the machine produces a result that is as accurate as the hand count. Next, the ballot cards are inspected for mutilations and other invalidities, and all ballots are processed through the machine. At the conclusion of the recount, the machine must be retested using the pre-audited test deck of ballots.

21. Approximately 16% of the ballots cast in Ohio during the 2004 presidential election were cast on DRE machines. As with punch card and optical scan systems, DRE systems are first tested before a recount begins. In the testing phase, a test cartridge is prepared then processed through the computer. If the cartridge results do not match the pre-determined votes cast for candidates, the programming is checked and the test program is rerun until the totals match. In the recount phase, the public counters and protective counters are checked to verify that the numbers displayed on those counters correspond with the pollbook, poll list, or signature pollbook records. Next, the rotation on each machine is checked to verify that it matches the proper candidate. The cartridges are then processed through the tabulator. If the totals are different than the totals of the official count, the cartridge totals are compared against the paper audit trail report. Once the recount is complete, the program is retested using the pre-audited cartridge.

22. Given all of the factors discussed above, it is inconceivable that a proper recount can be performed given the schedule as it currently exists. *See* Declaration of Scott Konopasek, attached as Exhibit ___ (describing the amount of time that should be allocated to conduct recount).

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION DIRECTING AN IMMEDIATE RECOUNT THAT WILL BE COMPLETED BEFORE DECEMBER 7, 2004 THE "SAFE HARBOR" DATE

In ruling on this motion for a temporary restraining order and preliminary injunction, the Court must consider four factors: (1) whether the plaintiffs have a strong likelihood of success on the merits; (2) whether the plaintiffs would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati,* 363 F.3d 427, 432 (6th Cir. 2004); *News Herald v. Ruyle,* 949 F. Supp. 519, 521 (N.D. Ohio 1996) ("[I]f there is notice to the other side and a hearing, the Court applies the same standards governing issuance of a preliminary injunction in determining whether to issue a temporary restraining order."). Because plaintiffs have a clear and substantial likelihood of prevailing on the merits and because the failure to complete an accurate recount before Ohio selects its presidential electors would violate plaintiffs' constitutional rights and cause irreparable harm, this Court should issue a temporary restraining order, followed by a preliminary injunction, ordering the Ohio recount to begin immediately and to be completed before December 7.

II. PLAINTIFFS' CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS

To prevail on their § 1983 claims, plaintiffs must demonstrate that Secretary Blackwell (1) acted under color of state law; and (2) deprived plaintiffs of a federal right, either statutory or constitutional. *United of Omaha Life Ins. Co. v. Solomon,* 960 F.2d 31, 33 (6th Cir. 1992). Here, there is no dispute that Secretary Blackwell has at all times relevant to this case acted "under color" of Ohio law. Nor can there be any dispute that Secretary Blackwell's failure to conduct a

timely, accurate and complete recount violates plaintiffs' federal constitutional and statutory rights.

A. The Failure to Conduct the Recount in Time Violates Plaintiffs' Rights under Article II, Section 1, Clause 2 of the United States Constitution and under 3 U.S.C. § 5, and is Actionable Under 42 U.S.C. § 1983

Secretary Blackwell's conduct violates plaintiffs' federal right to choose Ohio's presidential electors and to have those presidential electors participate fully in the federal electoral process in accordance with the intent of the Ohio legislature and federal law. Article II, Section 1, Clause 2 of the United States Constitution provides "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President. U.S. Const. Art. II, § 1, cl. 2. As the Supreme Court has observed, this constitutional provision "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment. *McPherson v. Blacker,* 146 U.S. 1, 27 (1892). Because a state legislature's authority derives from the Constitution, the method it chooses for appointing presidential electors is a matter of federal law. *See Case of Electoral College,* 8 F. Cas. 427, 432-33 (C.C.D.S.C. 1876) ("When the legislature of the state, in obedience to [Art. II, § 1, cl. 2], has by law directed the manner of appointment of the electors, that law has its authority solely from the constitution of the United States. It is a law passed in pursuance of the constitution.").[7]

[7] The Supreme Court has addressed the strong federal interest in the appointment of Presidential electors on a number of occasions. For instance, in *Burroughs v. United States,* 290 U.S. 534, 545 (1934), the Court stated: "While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." (internal citation omitted). Likewise, in *Anderson v. Celebrezze,* 460 U.S. 780, 794-95 (1983), the Court stated: "in the context of a Presidential election, state-imposed restrictions implicate a

Accordingly, a "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore,* 531 U.S. 98, 113 (2000) (Rehnquist, CJ., Scalia, J., and Thomas, J., concurring) (hereinafter, simply "concurrence").

Pursuant to the grant of authority under Article II, Section 1, Clause 2, the Ohio legislature has enacted a detailed statutory scheme that provides for appointment of presidential electors by direct election. *See* ORC § 3505.10. Under this statute, votes cast next to the names of the candidates for President and Vice-President are "counted as a vote for each of the candidates for presidential elector whose names have been certified to the secretary of state . . . ." ORC § 3505.10(A). The legislature also has enacted a comprehensive framework of procedures for counting the votes cast for Presidential electors and for declaring the results of such an election. Importantly, that framework contemplates, by specifically providing mechanisms for, recounts. *See* ORC §§ 3515.01-3515.071.[8] Furthermore, the Ohio legislature has designated the Secretary of State as "the chief election officer of the state," with responsibilities for, among other things, "the conduct of elections" in accordance with Title 35 of the Ohio Revised Code. *See* ORC § 3501.04.

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uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."

[8] That the statutory framework providing for recounts applies to all elections in Ohio and not just to the election of presidential electors does not diminish its constitutional significance. As the Supreme Court has stated, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush v. Palm Beach County Canvassing Bd.,* 531 U.S. 70, 76 (2000) (*per curiam*).

The United States Code informs the application of Article II, Section 1, Clause 2 to the Ohio statutory scheme for appointing Presidential electors. *See Palm Beach County Canvassing Bd.*, 531 U.S. at 78 (remanding, in part, for clarification of Florida Supreme Court's consideration of 3 U.S.C. § 5); *Bush v. Gore*, 531 U.S. at 113 (concurrence) ("[Title] 3 U.S.C. § 5 informs our application of Art. II, § 1, cl. 2, to the Florida statutory scheme, which, as the Florida Supreme Court acknowledged, took that statute into account.") Specifically, 3 U.S.C. § 5 provides, in pertinent part:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

Thus, 3 U.S.C. § 5 creates a "safe harbor" for a state insofar as Congressional consideration of its electoral votes is concerned. "If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors." *Palm Beach County Canvassing Bd.*, 531 U.S. at 77-78.[2] Just like the Florida legislature — as recognized by both the United States and Florida Supreme Courts — the Ohio legislature, by enacting its comprehensive election code, "intended the State's electors to 'participat[e] fully in the federal electoral process,' as provided in 3 U.S.C. § 5." *Bush v. Gore*, 531 U.S. at 110 (*per curiam*) (citing *Gore v. Harris*, 772 So. 2d 1243, 1289 (Fla. 2000)). In other words, the Ohio legislature

[2] This year, the Electoral College meets on December 13. *See* 3 U.S.C. § 7. Accordingly, the federal "safe harbor" deadline — six days prior to that date — is December 7.

fully intended that, in order to take advantage of the federal "safe harbor," any recount undertaken in accordance with Ohio law would be completed at least six days before the meeting of the presidential electors.

Secretary Blackwell, however, has "frustrate[d] the legislative desire" that the foregoing scheme for choosing presidential electors be implemented, including both the completion of a recount and the attainment of the "safe harbor" provided by § 5. *See Bush v. Gore*, 531 U.S. at 113 (concurrence). He has done so by opting not to certify Ohio's election results until sometime between December 3 and December 6, 2004. Under Ohio law, an applicant may not file an application for the recount of an election of Presidential electors until the Secretary certifies the results of the election. *See* ORC § 3515.02. Because the federal "safe harbor" deadline is December 7, it would be virtually impossible for any recount — even if the Secretary were to certify on December 3 — to be completed on or before December 7. As a result, the Secretary has "jeopardize[d] the 'legislative wish' to take advantage of the safe harbor provided by 3 U.S.C. § 5." *Bush v. Gore*, 531 U.S. at 120-21 (concurrence) (citing *Palm Beach County Canvassing Bd.*, 531 U.S. at 78 (*per curiam*)). The motion to enjoin Secretary Blackwell to begin the recount *now* and complete the recount before December 7 should be granted.[10]

[10] Even if the Court were to find that the Ohio legislature did not intend to obtain the protection of the federal "safe harbor," the Court nonetheless should grant the relief plaintiffs have requested. It cannot be doubted that the Ohio legislature intended the state's Presidential electors to participate fully in the federal electoral process , which provides for their votes for president to be cast during the meeting of the Electoral College. Pursuant to 3 U.S.C. § 7, the Electoral College will meet on December 13, 2004. Under the recount timeline that Secretary Blackwell has imposed, there is a substantial likelihood that any meaningful recount could not be completed even by December 13, 2004.

B. The Failure to Conduct the Recount in Time Violates Plaintiffs' Equal Protection, Due Process and Freedom of Association Rights under the United States Constitution, and is Actionable Under 42 U.S.C. § 1983

1. Secretary Blackwell is Violating the Equal Protection Clause of the Fourteenth Amendment

Secretary Blackwell's failures with respect to the recount also violate plaintiffs' constitutional right to have their votes counted. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("the political franchise of voting" is a "fundamental political right, because preservative of all rights."). "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, . . . *and to have their votes counted*." *Reynolds*, 377 U.S. at 554 (emphasis added; collecting cases); *id.* ("it is 'as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box.'") (quoting *United States v. Mosley*, 238 U.S. 383, 386 (1915)). "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and *have them counted* . . . ." *United States v. Classic*, 313 U.S. 299, 315 (1941) (emphasis added).

The Supreme Court upheld these core principles only four years ago. "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." *Bush v. Gore*, 531 U.S. at 104. "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." *Id.*

Here, the Ohio legislature "has prescribed" a recount process to ensure — to the greatest extent possible — that *all* votes are counted. *Bush v. Gore*, 531 U.S. at 104. Ohio recognizes that, without the recount procedure, many votes will *not* be counted. The limited record in this case makes plain why a recount is critical to ensure that votes are counted: more than 90,000 punch card votes were not even recorded in the preliminary count (but certainly will be in the manual recount); many electronic voting machines have proven unreliable — both under- and overcounting votes, even counting more votes than registered voters in some precincts.

It cannot be disputed that Ohio's recount procedure is necessary to protect the constitutional right of all Ohio voters "to have their votes counted." *Reynolds*, 377 U.S. at 554. The existence of the recount procedure is itself dispositive evidence that recounts are necessary to ensure that every vote is counted. It is equally beyond dispute that an incomplete recount is no recount at all. It would be absurd to choose Ohio's electors for President at the same time that a count of the *actual votes* for President is incomplete and still in progress. Yet that is Secretary Blackwell's plan. They would conduct a pointless half-count that will not possibly be complete by December 7, ensuring that thousands of votes are never counted at all.

The Equal Protection Clause demands more. It requires that votes that are cast are actually counted. *Reynolds*, 377 U.S. at 555; *Mosley*, 238 U.S. at 386; *Classic*, 313 U.S. at 315. It requires that all methods the "legislature has prescribed" to preserve the right to vote be effected, not thwarted. *Bush v. Gore*, 531 U.S. at 104. It requires that Ohio not delay any further, but begin the recount immediately and complete the recount by December 7, before Ohio selects its electors for President.

2. Secretary Blackwell is Violating the Due Process Clause of the Fourteenth Amendment

Secretary Blackwell's manipulation of the recount procedures also violates the substantive due process clause of the Fourteenth Amendment. Under the Constitution, citizens have a fundamental right to vote and to have their vote counted by way of election procedures that are fundamentally fair. *United States v. Mosley*, 238 U.S. 383, 386 (1915); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). The touchstone of Due Process Clause analysis is "fundamental fairness" — the idea that the state official cannot conduct an election or apply vote-counting procedures that are so flawed as to amount to a denial of voters' rights to have their voices heard and their votes count. Secretary Blackwell's attempt to forestall a meaningful recount until it is too late to matter in the 2004 presidential election is just such an abuse, and must be stopped.

A recount is fundamental to ensure a full and effective counting of all votes. Ohio courts have held that "[a] recount pursuant to R.C. 3515.13 is the only fair and equitable procedure to ensure the correct tally of all the votes." *Matter of Issue 27 on November 4, 1997*, 693 N.E.2d 1190, 1193 (Ohio C.P. 1998). As the Oklahoma Supreme Court recently emphasized, "[a] *timely* recount is an integral part of an election." *McKye v. State Election Bd. Of State of Oklahoma*, 890 P.2d 954, 957 (Okla. 1995) (emphasis added). The West Virginia Supreme Court, construing a recount statute similar to Ohio's recount provisions, stressed the importance of an election recount to the fairness and integrity of the election itself:

> Inherent in the recount procedure is the concept of fairness to all interested candidates in an election. The recount procedure is the only mechanism available in an election dispute which gives the interested candidates a chance to identify and define problematic votes, thereby establishing the parameters for an election contest. . . . It is, therefore, evident that where the challenge to election results stems from specific votes cast, *a recount plays an integral and indispensable role tantamount to fundamental principles of due process, which cannot be ignored or omitted.*

Miller v. County Comm'n, 539 S.E.2d 770, 776 (W.Va. 2000) (emphasis added). Indeed, courts in states which provide a statutory right to a recount uniformly have held that an election cannot be deemed over and final until a recount provided under state law has been completed.[11]

Where "organic failures in a state or local election process threaten to work patent and fundamental unfairness, a . . . claim lies for a violation of substantive due process." *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001); *see also Marks v. Stinson*, 19 F.3d 873, 888 (3d Cir. 1994) (finding that substantive due process violation exists where there is a "broad-gauged unfairness" that infects the results of an election); *Duncan v. Poythress*, 657 F.2d 691, 700 (5th Cir. 1981) (holding that "the due process clause of the fourteenth amendment prohibits action by state officials which seriously undermine the fundamental fairness of the electoral process"); *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) ("If the election process itself

[11] As the Indiana Supreme Court has emphasized, "[a] recount is merely an extension of this voting process and has been provided for by the legislature in an effort to assure the correctness of the vote count." *State ex rel. Wheeler v. Shelby Circuit Court*, 369 N.E.2d 933, 935 (Ind. 1977); *see also Meyer v. Lamm*, 846 P.2d 862, 870 (Colo. 1993) ("Because the election is not final and the results are not complete pending the recount authorized by statute, a district court may exercise subject matter jurisdiction over such recount proceedings in order to ensure that they are conducted in accordance with constitutional and statutory provisions. A number of courts in other states have reached similar conclusions"); *Hawke v. Bd. of Registrar of Voters*, 1996 WL 17898, at * 4 (Mass. Ct. App. Jan. 10, 1996) ("To simply uphold the original tally [without conducting a recount] would effectively deny Hulette of her right to challenge the results of the election, and would be patently unfair to her, given the slim margin of votes between her and Hawke"); *Blackburn v. Hall*, 154 S.E.2d 392, 396 (Ga. Ct. App. 1967) ("where, as a part of the election proceedings, a recount is provided for in proper instances, an election cannot be considered as over or final until a recount is allowed"); *Wickersham v. State Election Bd.*, 357 P.2d 421, 425 (Okla. 1960) ("our recount statute is an integral part of our election laws, and in view of the further fact that an election in our opinion is not over or final until a proper application for a recount timely filed is disposed of, there are no substantial grounds for distinguishing the right to a recount in a proper case from a right to a count of the votes in the first instance"); *City of Barre v. Kidder*, 155 A.2d 742, 744 (Vt. 1959) ("A 'recount' is not a contest. It is an ascertainment of the result shown by the ballots. Such statutes are liberally construed to accomplish the purpose of determining the result of an election as evidenced by legal ballots").

reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order"); *Siegel v. LePore*, 234 F.3d 1163, 1187 (11th Cir. 2000) (a federally protected right is implicated "where the entire election process including — as part thereof the state's administrative and judicial corrective process — fails on its face to afford fundamental fairness") (citations omitted).

In the seminal case *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), the First Circuit explained when federal courts would act to prevent a violation of due process in the context of election irregularities:

> [Federal courts have properly intervened when] the attack was, broadly, upon the fairness of the official terms and procedures under which the election was conducted. The federal courts were not asked to count and validate ballots and enter into the details of the administration of the election. Rather they were confronted with an officially-sponsored election procedure which, in its basic aspect, was flawed. Due process, '(r)epresenting a profound attitude of fairness between man and man, and more particularly between individual and government,' . . . is implicated in such a situation. . . . In cases falling within such confines, we think that a federal judge need not be timid, but may and should do what common sense and justice require.

Griffin, 570 F.2d at 1078 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring)).

By purposefully setting the certification date so late in the process as to deny a complete and uncontestable recount, and by refusing to allow the recount to begin as soon as possible, *see* Exhibit 1 (letter dated November 19, 2004), Secretary Blackwell's actions go far beyond the mere human error or garden-variety of voting irregularities that courts have held do not rise to the level of a due process violation. *See Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998). Rather, by fixing such a late certification date that makes it impossible to fully and timely complete a recount of all 5.5 million votes cast, Secretary Blackwell has effectively denied

plaintiffs their legal right to the recount guaranteed by ORC § 3515.01 *et seq*. *See, e.g.*, *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995) (a post-election departure from state's statutory mandate and previous election practice would undermine the fundamental fairness of the election). Secretary Blackwell's refusal to allow for a meaningful recount for the 2004 presidential election "undermines the integrity of the vote," resulting in a violation of due process. *Bennett*, 140 F.3d at 1226.

3. Secretary Blackwell is Violating the First Amendment

Secretary Blackwell's failures with respect to the recount also violate plaintiffs' First Amendment rights to freedom of speech and association. The Supreme Court repeatedly has held that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Elsewhere, the Supreme Court has observed, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes *effectively* . . . rank among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (emphasis added). This right to have a voice in the election and to cast votes effectively is rooted not only in the Fourteenth Amendment; it is also rooted in the First Amendment. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (it is "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech").

In an election, "voters can assert their preferences only through candidates or parties or both." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). Thus, this First Amendment right is

"heavily burdened" where the voters' candidate of choice is not on the ballot. *Id.* Ballot-access cases are therefore typically analyzed through a First Amendment lens. *See, e.g.*, *id.*; *Illinois Elections Bd. v. Socialist Workers Party,* 440 U.S., 173, 186 (1979) ("an election campaign is a means of disseminating ideas as well as attaining political office . . . . Overbroad restrictions on ballot access jeopardize this form of political expression"); *see also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (striking down various restrictions on gathering of initiative petitions). "The exclusion of candidates [from the ballot] burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Anderson*, 460 U.S. at 787-88.

Just as excluding candidates from the ballot "burdens voters' freedom of association," *id.*, so too does the exclusion of actual votes *for* a candidate. Just as "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot," *Williams*, 393 U.S. at 31, the right of a party or candidate to be *on* the ballot means little if votes for that party or candidate are not *actually counted.* In the former case, the voter cannot associate with the candidate because the candidate is not on the ballot. In the latter, the voter cannot associate with the candidate because the vote is not counted. In both cases, the voter's right to associate with a candidate is not only "burdened," but eviscerated. If anything, this case is even more troubling than the ballot-access cases. Here, the voter — tricked into believing he is voting for someone — is actually voting for no one at all.

Where, as here, the First Amendment rights of voters and candidates "are at stake," Secretary Blackwell "must establish" that their actions are "necessary to serve a compelling interest." *Illinois Elections Bd.*, 440 U.S. at 184. Holding an incomplete recount serves no

interest at all, much less a "compelling interest." An incomplete recount, as currently contemplated by Secretary Blackwell, does not count all the votes, rectify the errors of the first count or even attempt to count the more than 90,000 paper ballots that were not counted initially. This procedure does not add credibility to Ohio's electoral process. To the contrary, an incomplete recount — stopped arbitrarily when Ohio chooses its electors for President — *undermines* the integrity of the electoral process by raising questions about what would have happened had all Ohio votes been counted. It also thwarts the Ohio legislature's purpose to ensure, through a complete and accurate recount, that *all* votes are counted. Secretary Blackwell cannot justify the incomplete recount they plan to conduct. The candidate-plaintiffs have posted the appropriate bonds in each of the 88 counties in Ohio, totaling $113,620, constituting the necessary payments by a candidate for a statewide recount, in accordance with ORC § 3515.03. Nor can Secretary Blackwell blame administrative difficulties in certifying the election sooner than December 6, because, if Secretary Blackwell truly cannot complete the initial count for a November 2 election before December 6, it is incredible to think a complete and meaningful recount will be completed between December 6 and 7.

"[T]he right of qualified voters . . . to cast their votes effectively . . . rank[s] among our most precious freedoms." *Williams*, 393 U.S. at 30. A vote that is not counted is no vote at all. Secretary Blackwell should be enjoined to begin the recount now, so that all Ohio votes are counted, and voters' rights to associate with the candidates of their choice are respected.

III. PLAINTIFFS WILL SUFFER DEVASTATING HARM IF THE RECOUNT DOES NOT BEGIN IMMEDIATELY, AND BE COMPLETED BY DECEMBER 7— HARM THAT CAN BE REMEDIED ONLY BY AN ORDER DIRECTING THE RECOUNT TO BEGIN IMMEDIATELY

Because plaintiffs have demonstrated a likelihood of success on the merits, the Court's inquiry is effectively at an end. Where constitutional rights are concerned, a successful showing

of likelihood of success on the merits mandates a finding of irreparable harm. *ACLU v. McCreary County,* 354 F.3d 438, 445 (6th Cir. 2003) (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976)). Moreover, "a denial of an injunction *will cause irreparable harm* if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban County Gov't,* 305 F.3d 566, 578 (6th Cir. 2002) (emphasis added); *see also Elrod*, 427 U.S. at 373 (the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Chabad of Southern Ohio,* 363 F.3d at 436 ("[E]ven minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citations and internal quotations omitted). The harm that plaintiffs face without this Court's immediate intervention is quintessentially "irreparable harm." No monetary damages, retroactive relief or settlement could make any difference. Unless this Court intervenes now, thousands and potentially tens of thousands of votes will not be counted.

IV. THE INJUNCTION WOULD NOT CAUSE SUBSTANTIAL HARM TO OTHERS

"[N]o substantial harm can be shown in the enjoinment of an unconstitutional policy." *Chabad of Southern Ohio,* 363 F.3d at 436 (citations omitted). There can be no harm, much less "substantial harm," in *counting* Ohio's votes and determining how many votes each candidate for President actually received. Indeed, the only possible harm would arise if the recount is *not* completed and all Ohio votes are not considered before Ohio chooses its electors for President. That would be "substantial harm" indeed — to Ohio's voters, to Ohio's candidates, to the integrity of Ohio's electoral process, and, given Ohio's important role in this election, to the integrity of the Presidential election itself.

V. THE PUBLIC INTEREST WOULD BE SERVED BY THE INJUNCTION

The "public interest is served by preventing the violation of constitutional rights." *Chabad of Southern Ohio*, 363 F.3d at 436 (citations omitted). There is no question where the public interest lies in this case. The public is not served by a sham recount, a half-recount or a non-recount. It is served only by a complete, accurate recount that honors every vote before Ohio chooses its electors for President.

CONCLUSION

For all the foregoing reasons, plaintiffs' motion for a temporary restraining order and for a preliminary injunction should be granted.

Dated: Toledo, Ohio
November 22, 2004

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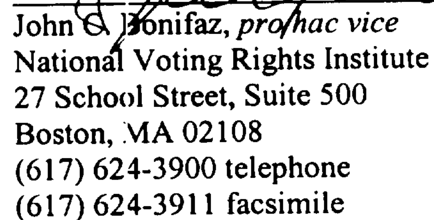

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