

ISSUED TO ATTORNEY

ORIGINAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

ON NOV 22 PM 5:06
NORTHERN DISTRICT OF OHIO
TOLEDO

Anita Rios
2626 Robinwood Avenue
Toledo, OH 43610

David Cobb, Green Party Candidate
P.O. Box 693
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Michael Badnarik, Libertarian Party Candidate
6633 Highway 290 East, Suite 100
Austin, TX 78723

Common Cause Ohio
50 West Broad Street, Suite 1750
Columbus, OH 43215

Victoria Lovegren
2226 Bellfield Avenue
Cleveland Heights, OH 44106

Phillip F. Fry, Jr.
5370 North Elm Road
Conover, OH 45317

Evan Davis
71 West Como Avenue
Columbus, OH 43202

Jeanne White
611 Fairgreen Avenue
Youngstown, OH 44510

Daryl Davis
3830 West 44th Street
Cleveland, OH 43202

Timothy J. Kettler
29674 Township Road 30
Warsaw, OH 43844

Plaintiffs,

v.

3:04 CV 7724

Judge
JUDGE JAMES G. CARR

J. Kenneth Blackwell,)
Secretary of State of Ohio,)
30 East Broad Street)
Columbus, Ohio 43215)
Defendant.)
_____)

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Plaintiffs seek declaratory and injunctive relief against defendant Secretary of State J. Kenneth Blackwell, and in support thereof, state as follows:

PRELIMINARY STATEMENT

1. The November 2, 2004 presidential election in Ohio was characterized by unprecedented obstacles faced by Ohioans seeking to cast their votes. These ranged from an insufficient number of voting machines and poll workers to handle the (anticipated) record turnout on election day to deliberate efforts aimed at discouraging minorities from voting.
2. Concerns have only increased in the post-election period, as reports have come in from across the state of vote-counting anomalies and inconsistencies in voting procedures. In Franklin County, for example, George W. Bush received 3,893 votes in one precinct alone, even though only 638 voters cast ballots in that precinct; in Sandusky County, for example, election officials counted 2600 ballots from nine precincts *twice*, resulting in an impossible 131 percent voter turnout; in Mercer County, one voting machine registered only 51 votes for president, despite the fact that nearly 300 people voted; in Mahoning County, one precinct recorded a negative 25 million votes cast; in Summit County, dozens of voters cast *both* absentee and provisional ballots; in two precincts in Montgomery County, 25 percent of all ballots cast did not register a vote for president, although on average results typically show one percent of undervotes; in Cuyahoga County, the Board of Elections failed to enter over 10,000 new and modified voter registrations; and in Warren and Lake Counties, election officials illegally

refused to allow the public or the press to observe the vote counting. As shocking as these problems are, they represent only the tip of the iceberg of problems related to voting and vote-counting experienced across Ohio this election.

3. Given the remarkably close results of the election — and the fact that Ohio’s 20 electoral votes will conclusively determine the next president of the United States — these voting irregularities underscore the urgency for a complete and manual recount of all votes cast for President in the state. Michael Badnarik, the Libertarian Party candidate for President, and David Cobb, the Green Party candidate for President, announced publicly that they would seek a complete recount of every vote cast in the state. However, defendant J. Kenneth Blackwell, the Republican Secretary of State of Ohio, has exercised and manipulated his discretionary statutory authority under Ohio’s recount provisions to frustrate a full and complete recount of the votes cast in time for official certification by December 7, 2004, the “safe-harbor” date by which Ohio’s presidential electors are conclusively determined. To ensure that nothing interferes with George W. Bush’s current lead in the votes as counted to date in Ohio, Secretary Blackwell — who, notably, is the co-chairman of George W. Bush’s re-election campaign in Ohio — has announced that he will certify the election results between December 3 and December 6, leaving as little as *one day* for the county Boards of Elections to conduct a recount. In light of more than 5.5 million votes cast in Ohio, it will be impossible to complete any meaningful recounting of the votes in time for Ohio’s presidential electors to be determined. As a result, both candidates and voters alike are denied their constitutional rights to have the votes in Ohio for the 2004 presidential election counted correctly and accurately.

JURISDICTION AND VENUE

4. This case is brought pursuant to 42 U.S.C. § 1983. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343, as the causes of action asserted herein arise under the Constitution and the laws of the United States, and allege violations of civil rights and the elective franchise. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) because a substantial part of the real and immediate harm faced by plaintiffs and their members is threatened in this judicial district.

PARTIES

6. Plaintiff Anita Rios is a citizen and registered voter of Toledo, Ohio, and cast a vote for president in the November 2, 2004 election at her appropriate polling precinct in Lucas County. Rios cast a write-in vote for David Cobb, who was not on the official Ohio ballot. Rios used a ballot required for an optical scan machine.

7. Plaintiff David Cobb was the Green Party candidate for President of the United States in the November 2, 2004 election. Cobb was a write-in candidate for President in Ohio, and he received multiple votes from Ohio voters in the election.

8. Plaintiff Michael Badnarik was the Libertarian Party candidate for President of the United States in the November 2, 2004 election. Badnarik was a candidate for President on the official Ohio state ballot. Badnarik received multiple votes from Ohio voters in the election.

9. Plaintiff Common Cause Ohio is a non-partisan, non-profit organization in Ohio organized to encourage honest, open, and accountable government and public policy, the promotion of citizen participation in government, and the protection and safeguarding of constitutional and civil rights. Common Cause Ohio has hundreds of members, many of whom are Ohio registered voters.

10. Plaintiff Victoria Lovegren is a citizen and registered voter of Cleveland Heights, Ohio, and cast a vote for president in the November 2, 2004 election via absentee ballot in Cuyahoga County.

11. Plaintiff Phillip Fry, Jr., is a citizen and registered voter of Conover, Ohio, and cast a vote for president in the November 2, 2004 election via absentee ballot in Champaign County.

12. Plaintiff Evan Davis is a citizen and registered voter of Columbus, Ohio, and cast a vote for president in the November 2, 2004 election at his appropriate polling precinct in Franklin County. Davis cast his vote on a provisional ballot.

13. Plaintiff Jeanne White is a citizen and registered voter of Youngstown, Ohio, and cast a vote for president in the November 2, 2004 election at her appropriate polling precinct in Mahoning County. White cast her vote on a direct recording electronic voting machine, sometimes referred to as a touchscreen voting machine.

14. Plaintiff Daryl Davis is a citizen and registered voter of Cleveland, Ohio, and cast a vote for president in the November 2, 2004 election at her appropriate polling precinct in Cuyahoga County. Davis cast her vote on a punch card ballot.

15. Plaintiff Timothy J. Kettler is a citizen and registered voter of Warsaw, Ohio, and cast a vote for president in the November 2, 2004 election at his appropriate polling precinct in Coshocton County. Kettler cast a write-in vote for David Cobb, who was not on the official Ohio ballot. Kettler used a ballot required for an optical scan machine.

16. Defendant J. Kenneth Blackwell is the Secretary of State of Ohio. In that capacity, he is Ohio's chief election officer and responsible for administering all statewide elections, including those for federal office. Among other duties, Secretary Blackwell appoints all members of local Boards of Elections to serve as his representatives; issues instructions and

regulations by directives and advisories to members of the boards as to the proper methods of conducting elections and any recounting procedures; compels the observance by election officers in all of Ohio's counties of the requirements of the state and federal election laws, including the recount procedures; oversees the canvassing and certification of election results and totals and announces election results; and exercises his statutory authority by setting dates and deadlines for counties by which election results must be certified. Secretary Blackwell is a registered Republican, and was elected to the position of Secretary of State as a Republican. He served as the Co-Chairman of the Bush/Cheney presidential campaign in both 2000 and 2004. Secretary Blackwell is being sued in his individual and official capacity.

ELECTION DAY PROBLEMS

17. Ohio voters faced massive problems on election day.

18. These systematic problems include the use of punch card voting machines that are inherently unreliable. Studies indicate that punch card ballots have the highest rate of unmarked, uncounted and spoiled ballots. Caltech/MIT Voting Technology Project, *Voting - What Is, What Could Be*, at 21 (July 2001), available at <http://www.vote.caltech.edu/Reports/2001report.html>. Moreover, African Americans, the poor, and those less educated are far more likely to have serious problems with punch card voting and therefore have their votes go uncounted.¹ Darrel Rowland, *Punch Cards May Hurt Blacks*, Columbus Dispatch, Oct. 17, 2004, at A1.

¹ According to a study done by the Civil Rights Project at Harvard University, a troubling and highly disproportionate share of overvotes from the 2000 presidential election in Florida occurred in counties with large minority populations. Michael Herron and Jasjeet Sekhon, *Overvoting and Representation: An examination of overvoted presidential ballots in Broward and Miami-Dade counties*, Sep. 28, 2001, available at <http://elections.fas.harvard.edu/election2000/HerronSekhon.pdf>. A study completed by the United States Commission on Civil Rights also found that African American and other minority voters were much likely to have their votes rejected in the 2000 election. *Voting Irregularities in Florida During the 2000 Presidential Election*, U.S. Comm. on Civil Rights Executive Summary, June 8, 2001, available at <http://www.usccr.gov/pubs/vote2000/report/exesum.htm>

19. Recognizing the problematic nature of punch card voting, the Help America Vote Act ("HAVA"), Pub. L. No. 107-252, established procedures requiring states to replace punch card voting machines prior to the 2004 federal election and providing federal funds to assist in equipment replacement. However, Ohio requested a waiver of this deadline and, as a result, 66 of the 88 Ohio counties continued to use the troubled punch card voting technology in the 2004 election. In total, reports indicate that the use of punch card ballots are known to have caused nearly 93,000 presidential votes in Ohio to go uncounted in the 2004 election. Mark Niquette, *Statewide Recount Appears Inevitable*, Columbus Dispatch, Nov. 16, 2004, at A1.

20. There were also too few voting machines on election day. The failure to provide enough voting machines caused some voters to wait in line up to 10 hours or more in order to cast their vote. Kristy Eckert, *Knox County Precinct Overwhelmed By Kenyon Turnout*, Columbus Dispatch, Nov. 4, 2004, at C8. Many individuals simply gave up and went home without ever voting. Fritz Wenzel, *Turnout in Ohio Largest in Decades, Polls Packed Despite Glitches, Delays, Drizzle*, Toledo Blade, Nov. 3, 2004, at A1. The long lines especially impacted elderly voters and voters with disabilities, many of whom were not provided adequate accommodations. *Turnout and Troubles: Waiting Was the Hardest Part*, Columbus Dispatch, Nov. 3, 2004, at A1. In Franklin County, moreover, the Board of Elections directed that fewer voting machines be provided for precincts in predominantly African-American neighborhoods than were provided in the 2000 election — despite dramatically increased numbers of registered voters and the certainty of a massive voter turnout. See Bob Fittrakis, *Document Reveals Columbus Voters Waited Hours as Election Officials Held Back Machines*, The Free Press, Nov. 16, 2004.

(commission found that African American voters were more than 10 times more likely to have their ballots rejected).

21. Voter confidence in the electoral process has also been diminished by rumors of vote tampering supported by situations such as in Mahoning County where some voting machines had to be recalibrated during the voting process because some votes for a candidate were actually being registered for a candidate's opponent, while other Mahoning County voting machines reported a net result of negative 25 million votes. *Errors Plague Voting Process in Ohio, Pa.*, Youngstown Vindicator, Nov. 3, 2004, at A1. Other serious problems include widespread reports of voting machines that froze during the voting process, machines that became jammed or inoperable, and precincts reporting unbelievably high numbers of undervotes. Ken McCall and Jim Bebbington, *Two Precincts Had High Undercounts, Analysis Shows*, Dayton Daily News, Nov. 18, 2004, at A1.

OHIO'S STATUTORY RECOUNT PROCEDURE

The November 2, 2004 Election Process

22. On November 2, 2004, the general election was held nationwide. While unofficial tallies were available within hours of the polls closing, Ohio law required 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.

23. According to § 3501.05(U) of the Ohio Revised Code ("ORC"), the Ohio Secretary of State must specify, no later than thirty-five days prior to the date of the November 2, 2004 presidential election, the date by which the Boards of Elections are to complete their canvass of election returns. Secretary Blackwell has done so, as published press reports and a letter from his office dated November 19, 2004 show: he has fixed December 1, 2004 as the deadline in each county to complete its canvass. *See Exhibit 1.*

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

25. According to Federal law, the meeting of electors for the Electoral College is set to take place this year on December 13, 2004. *See* 3 U.S.C. § 7. Congress has specified that all controversies regarding the appointment of electors should be resolved six days prior to the meeting of electors — for this year's election, prior to December 7, 2004. Absent such resolution, the vote of Ohio's electors may not be binding on Congress when Congress meets January 6, 2005 to formally declare the results of the 2004 election.² *See* 3 U.S.C. § 5.

26. 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 by December 7, 2004, as required to take advantage of the federal "safe harbor" provision, and the vote of Ohio's citizens may go uncounted.

27. This is far too little time. A recount of votes such as the one contemplated in Ohio for this year's presidential election will take up to ten days. Even if advance preparations begin immediately, the actual recount will take a *minimum* of five days, and possibly longer. Secretary Blackwell's current schedule is guaranteed to frustrate the Ohio legislature's implementation of its Constitutionally delegated duties.

OHIO'S RECOUNT PROCESS

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

28. Under Ohio law, a recount is required where the margin of victory is one-fourth of one percent or less *or* where a candidate who is not declared elected applies for a recount within five days of the Secretary of State declaring the results of the election. *See* ORC §§ 3515.011 and 3515.02.

29. 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.

30. On November 17, 2004, candidate plaintiffs Cobb and Badnarik, through their counsel, sent an overnight letter to defendant 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 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.

31. 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.

32. On November 19, 2004, plaintiffs' counsel received a letter from Monty Lobb, Assistant Secretary of State of Ohio. The letter stated that defendant 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.

33. 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 the defendant 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 defendant 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.

34. 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 no later than five days prior to the start of the recount. ORC § 3515.03. Nothing in Ohio law prohibits the notices from being mailed prior to the certification of the 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.
ORC § 3515.03.

35. “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.” ORC § 3515.04. Each candidate may “attend and witness the recount and may have any person whom the candidate designates attend and witness the recount.” ORC § 3515.03. According to ORC § 3515.04, the candidates’ witnesses may only “see” the ballots, but may never be permitted to touch them.

36. 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.³ Secretary Blackwell has established guidelines for each county board to recount these ballots.

37. Recount provisions suggested by 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.⁴

38. Secretary Blackwell has suggested minimum procedures for selectively testing 3% of the ballots cast, but has allowed each Board to determine more accurate recounting

³ 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.

⁴ These provisions can be found at http://serform2.sos.state.oh.us/sos/elections/statewide/provisions_recounts.htm.

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.

39. Secretary Blackwell has also established certain recount procedures to be used in the case of a machine recount for each type of voting technology, including punch cards, optical scan machines, and DRE machines.

40. Approximately 72% of the ballots were cast on punch card voting systems in Ohio during the 2004 presidential election. 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 machine recount phase, the ballot cards are inspected for hanging "chad," mutilations and other invalidities. Section 3515.04 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.⁵ 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

⁵ Section 3506.16 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.

identified. At the conclusion of the recount, the machine must be retested using the pre-audited test deck of ballots.

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

42. Approximately 16% of the ballots were cast on DRE machines in Ohio during the 2004 presidential election. 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.

43. Given all of the factors discussed above, it is inconceivable that a proper recount can be performed given the schedule as it currently exists.

FIRST CAUSE OF ACTION

42 U.S.C. § 1983; U.S. Const. Article II, § 1, Cl. 2,
Constitution of the United States; 3 U.S.C. § 5

44. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-43 hereof as if set forth herein at length.

45. Article II, Section 1, Clause 2, of the Constitution of the United States provides that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct,” electors for President and Vice President.

46. Pursuant to its Article II, Section 1, Clause 2, grant of authority, the Ohio legislature has enacted a detailed statutory scheme that provides for appointment of Presidential electors by direct election. ORC § 3505.10. Under the 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).

47. The Ohio legislature has also enacted a comprehensive framework of procedures for counting the votes cast and for declaring the results of elections in Ohio. Under Ohio law, recounts of votes cast in Ohio elections are both anticipated and, in certain instances, required. ORC at §§ 3515.01-3515.071.

48. The Ohio statutory scheme for recounts applies to all elections in Ohio, state and federal. Although there is no express provision of Ohio law that states how a statewide recount is to be conducted in the context of a federal Presidential election, certain time limitations are imposed, by federal statute, as to when the Presidential electors from each state in the nation must be certified for attendance at and conclusive voting in the Electoral College.

49. Federal statutes, in particular 3 U.S.C. § 1 et seq., inform how Art. II, Section 1, Clause 2, is applied to presidential elections in Ohio and throughout the nation by fixing the calendar for the meeting of the Electoral College. This year, pursuant to 3 U.S.C. § 7, the Electoral College is to meet on December 13, 2004. More importantly, however, pursuant to 3 U.S.C. § 5, the federal “safe harbor” provision, Ohio’s determination of presidential electors must be made at least six days prior to the meeting of the Electoral College in order for that determination to be conclusive under federal law. This year, the federal “safe harbor” date is December 7, 2004.

50. The Ohio legislature intended the State’s Presidential electors to participate fully in the federal electoral process. Specifically, the legislature intended, in order to take advantage of the federal “safe harbor,” that any recount of a Presidential election would be completed at least six days prior to the time of the meeting of the Presidential electors. Plaintiffs, therefore, have a federal right to have Ohio’s Presidential electors participate fully in the federal electoral process in accordance with the intent of the Ohio legislature and federal law.

51. Under the current Ohio statutory recount scheme for statewide elections (including Presidential elections), recounts may only commence after the Secretary of State has certified the results from every county in the State. ORC § 3515.02. Moreover, Secretary Blackwell cannot certify the statewide results until after the county Board of Elections submit their certified results to the Secretary.

52. Pursuant to his discretionary authority under ORC § 3501.05(U), Secretary Blackwell has issued a directive stating that each county Board of Elections in Ohio need not submit their certified results to the Secretary until December 1, 2004 — nearly a full month after the election. In addition, the Secretary’s office publicly has disclosed that the Secretary therefore will not certify the statewide election results — including those relevant to the federal

Presidential election — until December 3, 2004, at the earliest, and December 6, 2004, at the latest.

53. Because of Secretary Blackwell's actions, a statewide recount of the votes for President and Vice President cannot currently commence before December 3, 2004, at the earliest, and in fact may not be able to commence before December 6, 2004. Given the steps required to conduct such a recount in all 88 of Ohio's counties, and in light of the calendar set by Secretary Blackwell, a meaningful statewide recount in Ohio cannot be fully completed and accurately determined prior to the December 7, 2004, the federal "safe harbor" date provided in 3 U.S.C. § 5.

54. Secretary Blackwell's conduct is designed to and has the effect of depriving plaintiffs of their rights secured by 42 U.S.C. § 1983, and by Article II, Section 1, Clause 2, of the United States Constitution, and 3 U.S.C. § 1 et seq. Secretary Blackwell acted under pretense and color of state law, in his individual and official capacity, and within the scope of his employment as an officer of the State of Ohio and its political subdivisions. Said acts by the Secretary Blackwell were beyond the scope of his constitutional and statutory authority, and in abuse of his powers, and Secretary Blackwell acted willfully, knowingly, and with the specific intent to deprive plaintiffs of their federal constitutional and statutory rights as set forth above.

55. Plaintiffs have no adequate remedy at law for such deprivation of their rights under the United States Constitution and federal law.

SECOND CAUSE OF ACTION
42 U.S.C. § 1983; Amendments I, and XIV
of the Constitution of the United States

56. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 - 55 hereof as if set forth herein at length.

57. The Fourteenth Amendment's Equal Protection and Due Process Clauses grant plaintiffs and other qualified voters in Ohio the right to vote and have their votes properly counted as cast in elections that are fundamentally fair. Additionally, the First Amendment grants voters the right to freely associate and express their political preferences through voting in elections. Singly and together, these constitutional provisions provide qualified voters with a fundamental right to vote that cannot lawfully be diluted, diminished or destroyed by the actions of a state official. Candidates for office, who are engaged fundamentally in vote-getting and associational activities with the voters from whom they seek support, have derivative rights to fundamentally fair elections under the United States Constitution.

58. Ohio law contemplates that, under certain circumstances — including when a candidate requests and is prepared to pay the required bond — recounts are necessary to ensure that the voters' constitutional right to vote is protected and preserved. Ohio has determined that recounts provide a necessary checking mechanism for determining the results of elections, given the vagaries of the State's election machinery.

59. Ohio's election statutes permit recounts to commence only after the statewide election results have been certified by the Secretary of State. ORC § 3515.02. In this case, pursuant to his discretionary statutory authority under Ohio law, Secretary Blackwell has decided to delay the certification of the statewide election results — including those relevant to the federal Presidential election — until December 3, 2004, at the earliest and December 6, 2004, at the latest. This means that, under Ohio law, a statewide recount of the votes for President and Vice President cannot commence before December 3 at the earliest.

60. Given the steps required to conduct such a recount in all 88 of Ohio's counties, and in light of the calendar set by Secretary Blackwell, a meaningful statewide recount in Ohio

cannot be fully completed and accurately determined prior to December 7, 2004, the federal “safe harbor” date provided in 3 U.S.C. § 5.

61. As a result, the votes of the voter-plaintiffs and other qualified voters in Ohio will not be accurately and meaningfully counted — and may not be counted at all — toward the election of electors from the State of Ohio for the offices of President and Vice President, all in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Additionally, inasmuch as votes for them in Ohio cannot be accurately or meaningfully counted prior to December 7, 2004 — and may not be counted at all — candidate-plaintiffs Cobb and Badnarik will be denied their derivative rights to support from voters who wished to vote for them in the 2004 Presidential election in Ohio, all in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Finally, both the voter-plaintiffs and the candidate-plaintiffs will, by virtue of the Secretary Blackwell’s conduct in refusing to conduct a fully, accurate and meaningful recount prior to December 7, 2004, be denied their rights to associate and express their individual and collective political preferences through the process of voting, in violation of the First Amendment.

62. Under color of state law, Secretary Blackwell has maintained a system which denies plaintiffs the rights, privileges, and immunities secured by the Constitution and laws of the United States, all in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the First Amendment of the United States Constitution, and 42 U.S.C. § 1983.

63. Secretary Blackwell’s conduct in refusing to permit the commencement of the statewide recount prior to December 3, 2004, at the earliest is designed to and has the effect of depriving plaintiffs of their rights secured by 42 U.S.C. § 1983, and by the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the First Amendment of the United

States Constitution. Secretary Blackwell acted under pretense and color of state law, in his individual and official capacity, and within the scope of his employment as an officer of the state of Ohio and its political subdivisions. Said acts by the Secretary Blackwell were beyond the scope of his constitutional and statutory authority, and in abuse of his powers, and said Secretary Blackwell acted willfully, knowingly, and with the specific intent to deprive plaintiffs of their federal constitutional rights as set forth above.

64. Plaintiffs have no adequate remedy at law for such deprivation of their rights, privileges and immunities under the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs ask this Court to enter an Order and Final Judgment:

(1) Declaring that the Ohio statutory recount provisions, as interpreted and applied by Secretary Blackwell, violate Article I, Section 1, Clause 2, of the United States Constitution, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, violate the Substantive Due Process Clause of the Fifth Amendment of the United States Constitution, and violate the First Amendment of the United States Constitution;

(2) Declaring that the vote recount sought by Presidential candidates David Cobb and Michael Badnarik on November 17, 2004, must begin separately in each county in Ohio immediately after that county has certified its county results to the Secretary of State, without waiting for a state-wide certification from Secretary Blackwell, and that each county must begin its recount no later than December 1, 2004;

(3) Declaring that each county must take whatever steps necessary to fully conduct and complete the recount by no later than December 6, 2004;

(4) Declaring that the Boards of Elections in the 88 counties in Ohio must mail, and that Secretary Blackwell shall not interfere with the mailing of, the notice required pursuant to ORC 3515.03 no later than November 26, 2004;


(5) Declaring that each county must conduct the recount of every vote manually, by hand;

(6) Declaring that Secretary Blackwell is prohibited from declaring the final and officials results of the Presidential election in Ohio until every county has fully conducted and completed a manual recount of its votes for president;

(7) Declaring that Secretary Blackwell is prohibited from mailing to Ohio's Presidential electors certificates of their election until every county has fully conducted and completed a manual recount of its votes cast there by United States citizens for president;

(8) Granting plaintiffs such additional relief as justice may require, including recovery of their attorneys' fees pursuant to 42 U.S.C. § 1988, and their costs and expenses in maintaining this action.

Respectfully submitted,



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