

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

STATE EX. REL DAVID YOST,)
ET AL.)

Plaintiffs)

Civil Action No. C2-04-1139
(ES/TK)

v.)

NATIONAL VOTING)
RIGHTS INSTITUTE, ET AL.)

Defendants)

And)

KERRY-EDWARDS 2004, INC.)

Intervenor-Defendant)

DAVID COBB, ET AL.)

Counter-Plaintiffs)

And)

KERRY-EDWARDS 2004, INC.,)

Intervenor-Counter-Plaintiff)

v.)

DELAWARE COUNTY BOARD)
OF ELECTIONS)

And)

J. KENNETH BLACKWELL,)
Secretary of State of Ohio)
30 East Broad Street)
Columbus, Ohio 43215)

Counter-Defendants)

_____)

**DEFENDANTS DAVID COBB AND MICHAEL BADNARIK'S
AMENDED COUNTERCLAIMS**

Defendants herein assert these counterclaims against Plaintiff Delaware County Board of Elections and against Counter-Defendant Secretary of State of Ohio J. Kenneth Blackwell.

Defendants seek declaratory and injunctive relief in order to protect their rights under federal and state law to have Ohio's Presidential electors participate fully in the federal electoral process in the manner intended by the legislature of Ohio, including a timely and fundamentally fair recount. In support, Defendants allege as follows:

JURISDICTION

1. This Court has jurisdiction over the subject matter of these counterclaims pursuant to 28 U.S.C. § 1331 because they arise under the Constitution and the laws of the United States. This Court also has jurisdiction pursuant to 28 U.S.C. § 1367(a) because they arise out of the same transactions and occurrences alleged in the Plaintiffs' Complaint so as to form a part of the same case or controversy within the meaning of Article III of the United States Constitution.

2. The Court also has diversity jurisdiction over this case pursuant to 28 U.S.C. § 1332(a). Defendant (Counter-Plaintiff) Badnarik is a citizen of Texas. Defendant (Counter-Plaintiff) Cobb is a citizen of California. Defendant NVRI is incorporated in Massachusetts which is also its principal place of business. The amount in controversy is in excess of \$75,000.

3. Defendants' counterclaims seeking declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202.

PARTIES

4. Defendant (Counter-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. Cobb may run again for President of the United States in 2008.

5. Defendant (Counter-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. Badnarik is likely to run again for President of the United States in 2008.

6. Defendant National Voting Rights Institute is a non-partisan organization dedicated to protecting the constitutional rights of all citizens to vote and to participate in the electoral process on an equal and meaningful basis.

7. Plaintiff (Counter-Defendant) Delaware County Board of Elections is the duly appointed Board of Elections in and for Delaware County, Ohio.

8. Plaintiff (Counter-Defendant) David A. Yost is the Prosecuting Attorney for Delaware County, Ohio.

9. Counter-Defendant J. Kenneth Blackwell is the Secretary of State of Ohio. In that capacity, Secretary Blackwell is Ohio's chief elections officer and is 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 determines and declares election results; and exercises his discretionary statutory authority by setting the calendar by which election results are counted and recounted.

10. 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 Ohio in both 2000 and 2004.

11. Pursuant to Federal Rules of Civil Procedure 13(h) and 19(a), Secretary Blackwell is joined as an additional party defendant to this counterclaim against Plaintiff Delaware County Board of Elections. In Secretary Blackwell's absence, complete relief on these counterclaims cannot be accorded among those already parties to this action.

12. Secretary Blackwell's interest relating to the subject matter of this counterclaim is aligned with Plaintiff Delaware County Board of Elections.

13. Secretary Blackwell's joinder will not deprive the Court of jurisdiction over the subject matter of this action.

THE STATUTORY RIGHT TO A RECOUNT

The November 2, 2004, Election and Secretary Blackwell's Abuse of Discretion

14. On November 2, 2004, the Presidential election was held nationwide. Although unofficial tallies of Ohio's results were available within hours of the polls closing, Ohio law requires that, before the Secretary of State can declare the *initial* results of the Presidential election in Ohio, each of the 88 county boards of elections ("county boards") must (1) canvass

the results in the county, (2) certify abstracts of those results, and (3) send the certified abstracts to the Secretary of State. Only after the Secretary of State receives the certified abstracts from the county boards is the Secretary able to canvass the abstracts to “determine and declare” the initial results of the Presidential election in Ohio. *See* Ohio Revised Code (“ORC”) § 3505.35.

15. The Secretary of State’s declaration of the initial results of a Presidential election in Ohio is not final. Under Ohio law, a recount of the initial results is required where the margin of victory is one-fourth of one percent or less, *see* ORC § 3515.001, *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 and remits the required bond. *See* ORC §§ 3515.02 & 3515.03.

16. In either instance, the Secretary of State “shall make an amended declaration of the results” of the Presidential election after a full and complete recount of the initial results throughout the state is completed. *See* ORC § 3515.05. Therefore, the Ohio legislature has determined that, in certain statutorily-defined circumstances, the Secretary’s *final* declaration of the results of a Presidential election in Ohio shall not occur prior to a full and complete recount of the initial results.

17. Under Ohio law, the Secretary of State is given discretion to fix the calendar by which the state’s Presidential election results initially are declared and by which a recount of those initial results can occur. Specifically, the Secretary has discretion to set the date by which Ohio’s 88 county boards must complete their canvass of election returns and send the certified abstracts of the results to the Secretary. *See* ORC § 3501.05(U).

18. According to published press reports and a letter from the Secretary of State’s office dated November 19, 2004, attached hereto as Exhibit 1, Secretary Blackwell directed that the county boards need not provide him with their certified abstracts before December 1, 2004 ?

29 days *after* the election. Therefore, at his own direction, Secretary Blackwell was not in a position to “determine and declare” the initial results of the November 2, 2004, Presidential election in Ohio prior to December 1, 2004.

19. Nothing in Ohio law, however, prohibited the county boards, including the Delaware County Board of Elections, from completing their initial canvass of returns and from sending the certified abstracts of the results to Secretary Blackwell prior to December 1, 2004.

20. According to published press reports and a letter from the Secretary of State’s office dated November 19, 2004, (*see* Exhibit 1), Secretary Blackwell also indicated that he did not plan to “determine and declare” the initial results of the Presidential election in Ohio until Monday, December 6, 2004 ? or earlier, “if it proves to be feasible.” Any statutorily mandated recount of the votes cast in Ohio for President cannot occur before the Secretary declares the initial results.

21. The calendar that Secretary Blackwell set for determining the final results of the 2004 Presidential election in Ohio operates to frustrate the Ohio legislature’s intent to ensure the correctness of the election results and to have the state’s correctly chosen Presidential electors participate fully in the federal electoral process.

22. The Delaware County Board of Elections’ refusal to conduct a recount and its efforts to enjoin Defendants from even requesting a recount in Delaware County also frustrated the Ohio legislature’s intent to ensure the correctness of the election results and to have the state’s correctly chosen Presidential electors participate fully in the federal electoral process.

23. 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.

24. 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. *See* ORC § 3505.10. As noted, the statutory scheme also includes procedures for the recount of votes cast to determine the correct and final results of elections. *See* ORC §§ 3515.01-3515.071.

25. The Ohio statutory scheme providing 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. *See* 3 U.S.C. §§ 1 *et seq.*

26. According to federal law, Presidential electors have one duty ? to “meet and give their votes” on a date set by federal law. 3 U.S.C. § 7. This year, the Presidential electors from each state are scheduled met and gave their votes on December 13, 2004. *See id.* Certificates of their votes will then be sent to the President of the United States Senate. *See* 3 U.S.C. § 11. If the President of the Senate does not receive a certificate listing the votes of a state’s Presidential electors by December 22, 2004, the President of the Senate shall request the immediate transmission of the certificate from the Secretary of State of that state. *See* 3 U.S.C. § 12. On January 6, 2005, the United States Congress will meet to count the electoral votes and to declare formally the results of the 2004 Presidential election. *See* 3 U.S.C. § 15.

27. Federal law also specifies that all controversies regarding the appointment of a state’s Presidential electors should be resolved six days prior to the meeting of electors ? for this year’s election, prior to December 7, 2004. *See* 3 U.S.C. § 5. Absent such resolution, the

vote of Ohio's Presidential electors may not be binding on the United States Congress when that body meets on January 6, 2005, to count the electoral votes and to declare formally the results of the 2004 Presidential election.

28. The Ohio legislature intended that Ohio's Presidential electors participate fully in the federal electoral process in accordance with 3 U.S.C. §§ 1 *et seq.* That is to say, the Ohio legislature intended that any recount conducted in accordance with Ohio law would be completed in time for the state's Presidential electors to participate fully in the federal electoral process.

Defendants' Efforts To Obtain A Timely Recount

29. As noted, 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.

30. Applications for recounts by candidates not declared elected must be submitted to each county board at which a recount is requested and must include: (1) a list of all precincts to be recounted; and (2) a deposit of ten dollars for each precinct. *See* ORC § 3515.03.

31. On November 17, 2004, candidate-Defendants Cobb and Badnarik sent overnight letters to Secretary Blackwell and to the directors of the county boards in each of Ohio's 88 counties, informing the recipients that candidate-Defendants planned to exercise their rights under Ohio law to seek a full recount of all votes cast in Ohio for President. The letters requested the immediate implementation of appropriate procedures for starting the recount and the prompt initiation of the recount following receipt of the formal applications for a recount and the necessary bonds. The letters highlighted the importance of a prompt initiation of the recount

in light of the timetable for Ohio's Presidential electors to cast their votes for President. The letters further requested a response by noon on Friday, November 19, 2004, and that the response include a statement as to whether the county boards, upon receipt of the formal applications and the required bonds, would begin the recount process in advance of the Secretary of State's declaration of the initial statewide results.

32. On November 18, 2004, candidate-Defendants Cobb and Badnarik filed, via overnight delivery for arrival on November 19, 2004, formal applications for a full recount with each of the 88 county boards in Ohio. The applications included the posting of the necessary bonds with each of the county boards, totaling \$113,620 in bond payments.

33. On November 19, 2004, counsel for candidate-Defendants Cobb and Badnarik received a letter from Monty Lobb, Assistant Secretary of State of Ohio. *See* Exhibit 1. The letter stated that Secretary Blackwell refused to initiate the recount or to have any recount procedures initiated prior to his declaration of the statewide results. The letter did not address the candidate-Defendants' concerns about the need to conduct a meaningful recount in a timely manner prior to the date set for Ohio's Presidential electors to cast their votes for President.

34. Also on November 19, 2004, Secretary Blackwell's office sent a memorandum via electronic mail to all 88 county boards, including the Delaware County Board of Elections.

The memorandum, attached hereto as Exhibit 2, directed:

As a follow-up to the conference call this morning, no county board of elections is to begin a recount of the presidential race until you receive further instruction from this office.

35. On November 18 and 19, 2004, counsel for candidate-Defendants Cobb and Badnarik also received responses from several county boards. 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 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.

36. On November 22 2004, Defendants, along with several Ohio voters, initiated a lawsuit in the Northern District of Ohio seeking declaratory and injunctive relief against Secretary Blackwell in order to protect their rights to have their votes counted and to have Ohio's Presidential electors participate fully in the federal electoral process as the legislature of Ohio intended. *See Anita Rios et al. v. J. Kenneth Blackwell*, No. 3:04 CV 7724 (N.D. Ohio, filed November 22, 2004) (Carr, J.).

37. On November 24, 2004, Secretary Blackwell's office sent a memorandum to all 88 county boards, including the Delaware County Board of Elections. The memorandum, attached hereto as Exhibit 3, erroneously advised that the federal action pending before Judge Carr in the Northern District of Ohio had been dismissed, and accordingly directed the boards to "adhere to the information you have received from our office on this matter all along" ? namely not to begin a recount unless specifically so directed by the Secretary of State's office.

38. On November 23, 2004 ? the day *after* Defendants' initiation of the federal lawsuit and five days after Defendants' written application for a recount ? Plaintiffs David A.

Yost and the Delaware County Board of Elections filed suit in the Court of Common Pleas of Delaware County, Ohio, seeking to enjoin Defendants from “directly or indirectly requesting, requiring, or mandating the Board [*sic*] perform a hand or any other form of recount.” (Compl. at 4.)

39. Plaintiffs simultaneously filed an *ex parte* Motion for Temporary Restraining Order. On November 23, 2004, presiding Judge W. Duncan Whitney of the Court of Common Pleas of Delaware County, Ohio, issued an Order sustaining Plaintiffs’ *ex parte* motion and restraining Petitioners “from requiring the performance of a recount.” (Order at 1.) The Order terminated by its terms on December 1, 2004, at 12:00 p.m.

40. On November 30, 2004, Kerry-Edwards 2004, Inc., moved to intervene as a party defendant in the action.

41. Defendants removed the action to this Court on November 30, 2004. On December 3, 2004, Kerry/Edwards, Inc., 2004, moved to intervene as Counter-Plaintiffs and to join Defendant/Counter-Plaintiffs motion for a preliminary injunction, and the Court granted these motions.

42. At the hearing held December 3, 2004, Counter-Defendant Secretary Blackwell represented that he would cause to be conducted a recount, pursuant to ORC § 3515, of the ballots cast in Ohio for President of the United States in the November 2, 2004, election.

Fundamentally Unfair Presidential Recount is Conducted

43. On December 6, 2004, Counter-Defendant Secretary Blackwell certified the statewide results of the 2004 presidential election in Ohio based on the initial count of the vote.

44. Within five days of the Secretary of State’s certification of the results and in accordance with ORC §§ 3515.02 & 3515.03, Counter-Plaintiffs Cobb and Badnarik filed

applications and required bonds with each of the 88 county Board of Elections in Ohio for a full recount of all votes cast for President in Ohio in the 2004 election.

45. On December 7, 2004, Counter-Plaintiffs Cobb and Badnarik, through their counsel, sent a letter via facsimile and overnight mail, to the Secretary of State outlining, in detail, a series of issues emerging from the Secretary's Outline of Recount Procedures which they said needed resolution "in order to ensure that the recount is conducted uniformly in the various county boards of election and in accordance with state and federal law." *See* Attachment 1, Letter to Secretary Blackwell dated December 7, 2004 (citing *Bush v. Gore*, 531 U.S. 98 (2000)).

46. Counter-Plaintiffs Cobb and Badnarik have yet to receive a response to that letter.

47. On December 7, 2004, the Secretary of State issued Directive 2004-58 to all county boards of elections entitled: "Recount for the Presidential Election *Only*: The November 2, 2004 General Election." The one-page directive summarized rules for the start of the recount. The Secretary attached to this directive his Outline of Recount Procedures as previously posted on his official website.

48. On December 10, 2004, Counter-Plaintiffs filed a motion for a temporary restraining order and preliminary injunction requiring the Secretary of State to prescribe and require the 88 Boards of Election to use adequate, fair and uniform standards and instructions for conducting the state-wide recount in Ohio. In a telephonic hearing on December 10, 2004, this Court denied the Counter-Plaintiffs' request for a temporary restraining order, but stated that if the Counter-Plaintiffs were to find that the recount was not conducted in accordance with uniform standards, they remained free to seek relief from the Court, including a potential court

order requiring new recounts. The Court ordered that the Counter-Defendants file their opposition to the preliminary injunction motion by December 16, 2004.

49. On December 23, 2004, the Counter-Plaintiffs filed a motion for a court order to preserve materials from the 2004 presidential election based on the emergence of evidence of the destruction of voting materials and a motion for limited expedited discovery to further develop that evidence.

50. On December 23, 2004, the Counter-Plaintiffs also filed new evidence demonstrating that county boards of elections throughout Ohio had applied inconsistent standards in conducting the recount of the 2004 presidential vote, in violation of equal protection and due process guarantees under the United States Constitution. The absence of uniform state-wide standards is a serious problem not only with respect to the 2004 presidential election, but to future federal elections as well.

**Inconsistent Standards in Selecting the Initial 3% Hand Count:
Many County Boards of Election Did Not Randomly Select the Precinct Samples**

51. Absent uniform state-wide standards, Ohio's 88 counties employed inconsistent standards in selecting the initial 3% of the ballots for a hand count. Many County Boards of Election did not randomly select the precinct samples.

52. Keith Cunningham, Director of the Allen County Board of Elections, explained at the start of the recount in that county that it would take considerably longer to carry out the recount if there were a random selection process employed. Instead, the Board pre-selected four precincts, totaling slightly more than the required three percent, for the recount. The Green Party and Democratic Party witnesses raised objections but to no avail.

53. The Clermont County Board of Elections selected the 3% precinct samples by choosing the thirteen precincts with the lowest number of voters plus the next number of

precincts that reached the total of 3% of the total votes cast in that county. This selection process eliminated larger and more diversified precincts. The staff of the Board admitted that small precincts were chosen because fewer problems would be encountered in smaller precincts. A Green Party witness objected to this selection process, but to no avail.

54. The Cuyahoga County Board of Elections decided to choose only precincts with 550 votes or more and from a cross-section of areas — one East side, one West side, one affluent, one non-affluent. This decision left only eight percent of precincts available to be selected. In addition, witnesses observed that the ballots were not in a random order, and that they had been previously sorted. As the ballots were fed into the counting machines, there were long runs of votes for only one candidate and then long runs for another, a statistical improbability.

55. The total number of votes cast in Morrow County was 16,694. Three percent of this number is 501. The Morrow County Board of Elections selected the Harmony Township precinct for the initial hand count because it had 517 ballots cast. When observers complained this was not random, the Board responded that it had the right to select the precinct. During this discussion, an election official with the Board called the Secretary of State's office and reported that the Secretary of State's office stated that the Board was correct.

56. The Hocking County Board of Elections met and Rod Hedges, a Republican Board member stated that he believed the Board should select a precinct that was not heavily in favor of George W. Bush or John F. Kerry. The Board decided to consider only the precincts where the vote totals for Bush and Kerry were similar. The Green Party observer objected that this was not a random selection, but to no avail.

57. Election officials in Medina County were aware of several "problem" districts, but instead chose to perform the manual 3% hand recount on two precincts that had been part of a school levy recount the previous Monday. That meant that those ballots had been taken out of the standard "double lock" situation and had been handled several times since that Monday.

58. The Board of Elections in Vinton County selected a precinct for the 3% hand recount test simply because its vote total was closest to 3% of the total votes cast in the county.

59. The Summit County Board of Elections selected precincts randomly with the Director and Deputy Director of the Board of Elections and two other Board employees present, both of whom were IT specialists for the Board so that they could compute the three percent. The Board shuffled 475 precinct cards and then chose randomly from the pile. The Summit County Board of Elections conducted this selection without any recount witnesses present.

60. The Brown County Board of Elections only had a certain number of precincts which were not too large for the 3% sample, so the Board put these in a hat and had the observers pull them out until the number equaled at least three percent, constituting a random selection.

61. In Athens County, the Board of Elections wrote the names of all of the precincts on equal size pieces of paper, placed all of the pieces of paper in a coffee can and drew randomly until it had reached the required 3% of the total votes cast in the county.

Inconsistent Standards in Applying the Full Hand Count Requirement: Counties Failed to Conduct a Full Hand Count after 3% Hand and Machine Counts did not Match

62. In Monroe County, the 3% hand recount failed to match the machine count twice. Subsequent runs on that machine did not match each other or the hand count. The Monroe County Board of Elections summoned a repairman from the Triad company to bring a new

machine and the recount was suspended and reconvened for the following day. On the following day, a new machine was present at the Board of Elections office and the old machine was gone. The Board conducted a test deck run followed by the 3% hand-counted ballots. The results matched this time and the Board conducted the remainder of the recount by machine.

63. In Fairfield County, the hand recount of the 3% test sample did not match the machine count, even after two attempts. The Board suspended the recount and stated that Secretary Blackwell recommended that the recount should begin again "from scratch." The Green Party recount observers were then told that it was 4:00 PM, the building was closed, and all had to leave. The Republican recount observers, however, were allowed to stay in a conference room for an additional ten minutes or so for a private discussion. When the Board reconvened a few days later, it announced that it would be conducting a machine count of the county's votes. When a Green Party observer objected, she was told by the Board that she was not allowed to speak.

64. The only county board of elections in Ohio to conduct a full hand count during the recount was the Coshocton County Board of Elections. However, the Coshocton County Board of Elections moved directly to a full hand count and bypassed the selection of a 3% hand count sample for matching with the initial machine count. In doing this, the Board also bypassed the procedure for examining and reviewing the tabulation equipment.

Inconsistent Standards in the Treatment of Ballots: Some Counties Marking Ballots and Some Counties Not Securely Storing Ballots

65. Absent uniform state-wide standards, Ohio's 88 counties employed inconsistent standards in the treatment of ballots. Some counties marked ballots, while others left them unsecured.

66. In Washington County, the Board of Elections had, in the first count, excluded ballots which included no votes and overvotes. During the recount, the Board altered many such ballots to make them register a vote. The Green Party observer protested this practice. An election official pulled a black marker from his right pocket near the beginning of the recount and stated that he was the "mark-up man." He proceeded to do all of the marking of the ballots. Another election official assisted with the "band-aids". The Green Party observer noted that all the re-marking and band-aiding of ballots did reflect the will of the voter, with one exception. In the precinct Belpre 4A, a voter had both marked the oval and put an X through it for presidential candidate Michael Peroutka and had marked the oval for Bush. The election official put a band-aid over the Peroutka vote and put his own X on the Bush vote. The Green Party observer objected that it should be counted as an overvote. The Board ruled that the vote should count for Bush.

67. In Lucas County, the Green Party observer witnessed the physical alteration of three ballots for the apparent reason of ensuring that the vote count produced by the optical scan machine would match the 3% hand count. At least one of the election officials stated that she did not want the hand count and machine count to be different because they did not want to do a complete hand count. The Board made the alterations to the ballot after determining the intent of the voters. Following a lunch break during the recount, the Board kept recount observers waiting while a technician from the Diebold company reprogrammed the machine.

68. In Ashland County, ballots cast in the presidential election were stored by precinct in open cubicles along one wall in the employee lunchroom/meeting room, completely open and visible to anyone who enters the room. Piled on top of the cubicles were bags of

Doritos, mugs, cleaning products, Glad Wrap and other miscellaneous items. Board of Election officials said the room was kept locked, except when used.

69. In Greene County, the Board of Elections' office was found open on the Saturday prior to the recount; the police were called to the scene.

70. In Coshocton County, the Board stored voted ballots mixed with blank, unused ballots in partially-opened boxes, unsealed at the time of observation and apparently never sealed after the election. While ballots were stored in a locked room, all Board employees had keys to the room.

71. In Hocking County, a representative from the Triad company was allowed unsupervised access to the tabulation room at the Board of Elections' office prior to the start of the recount. Outside the presence of candidate witnesses and the full county board, the Triad technician disassembled the computer and asked election officials which precinct had been selected for the 3% hand count. He advised the staff of the Board how to post a "cheat sheet" on the wall so that the hand count would match the machine count. The Hocking County Board of Elections placed ballots in a storage area with both a "Democratic Lock" and a "Republican Lock." This lock system was shown to be irrelevant when one key opened both locks.

72. In Belmont County, the Deputy Director of Elections stated that her county had hired an independent programmer ("at great expense") to reprogram the counting machines so that they would only count votes for President during the recount.

73. In Harrison County, a representative of the Triad company reprogrammed and retested the tabulator machine and software prior to the start of the recount. The Harrison County tabulating computer is connected to a second computer which is linked to the Secretary of State's Office in Columbus. The Triad technician handled all ballots during the machine

recount and performed all tabulation functions. The Harrison County Board of Elections kept voted ballots and unused ballots in a room open to direct public access during daytime hours when the courthouse is open. The Board had placed voted ballots in unsealed transfer cases stored in an old wooden cabinet that, at one point, was said to be lockable and, at another point, was said to be unlockable.

74. In Union County, the hard drive on the vote tabulation machine, a Triad machine, had failed after the election and had been replaced prior to the recount. The old hard drive was returned to the Union County Board of Elections in response to a subpoena.

75. In Fulton County, the Director of the Board of Elections stated that the Triad company had reprogrammed the computer by remote dial-up to count only the presidential votes prior to the start of the recount.

76. In Van Wert County, the Deputy Director of the Board of Elections and a Board member stated that the Triad company had serviced the tabulator machine over the phone via modem prior to the start of the recount.

77. Forty-one of Ohio's 88 counties use Triad voting machines.

78. In Fairfield County, a technician from ES&S, a voting machine company, spent time alone in the room at the Board of Elections where the tabulator was located and provided the Board with a new tabulator for the recount.

79. In Portage County, all ballot boxes were locked and reopened, locked and reopened again ? always in plain sight ? and transported methodically from the visual inspection area to the tabulator room.

80. The incidents in Hocking County and other counties concerning the potential tampering of voting machines prior to the start of the recount threaten the integrity of the recount

and threaten the ability of the presidential candidates, including Counter-Plaintiffs Cobb and Badnarik, and their witnesses to properly analyze, inspect, and assess the ballots and the related voting data from the 2004 presidential election in Ohio.

Inconsistent Standards in the Treatment of Witnesses at the Recount

81. In Summit County, recount witnesses were threatened with expulsion if they spoke to counting teams. In some instances, they were expected to "observe" from up to 20 feet away, which prevented them from being able to actually observe the recount.

82. In Huron County, the punchcard tabulator test was observed only by Republican witnesses. This test was conducted the day before the Green Party witness was invited to observe the recount.

83. In Putnam County, Board of Elections officials told the Green Party observer that their Board would meet on December 15th to decide the start date. When the observer called back on the 15th, she was told the recount had already taken place.

84. In Portage County, the Board treated the recount witnesses with respect, allowed them to see anything they missed, and allowed them to set the pace of the recount.

Inconsistent Standards in the Treatment of Access to Provisional, Absentee, and Spoiled Ballots

85. In Allen County, observers were not allowed to examine provisional ballots and absentee ballots during the recount. The Board told them that they must make an appointment at a later time working around the Board's schedule. The Board further stated that only the specific person who cast such a ballot is allowed to inquire whether his or her vote was counted.

86. In Holmes County, observers asked to see the spoiled ballot pile, comprised of five ballots, but the Board denied access, stating that they were in a sealed envelope that could not be opened.

87. In Licking County, the Board denied observers access to view provisional and absentee ballots.

88. In Mahoning County, the Board denied observers access to view rejected absentee ballots.

89. In Medina County, the Board denied observers access to view provisional ballot tallies, provisional ballots, and the actual machines and ballot booklets used.

90. In Morgan County, 30 of 160 provisional and absentee ballots were not counted, and the Board denied observers access to view these ballots. The Board stated that these ballots were locked away and would be destroyed 60 days after the election, even though ORC § and 42 U.S.C. § 1974 require that all election materials, including all ballots, be preserved for 22 months following the election.

91. In Stark County, the Board denied an observer's request to view the provisional ballots.

92. In Warren County, the Board denied an observer request to view provisional and absentee ballots. The observer requested that the Board have this decision reviewed by the county prosecutor and the Board is now awaiting the county prosecutor's decision.

93. In other counties, such as Pickaway County, the Boards of Elections granted the recount observers access to view provisional and absentee ballots which had been rejected in the initial count.

94. On information and belief, substantial additional inconsistencies and irregularities occurred in the recount that further give rise to the violations of law herein alleged.

FIRST COUNT

**U.S. Const. art. II, § 1, cl. 2; 3 U.S.C. § 1 et seq.;
Title 35 of the Ohio Revised Code**

(Against Delaware County Board of Elections and Secretary Blackwell)

95. Defendants repeat and reallege each and every allegation contained in paragraphs 1-94 hereof as if set forth herein at length.

96. 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.

97. 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. *See* ORC § 3505.10. That scheme includes procedures for the recount of votes cast to determine the correct and final results of elections. *See* ORC §§ 3515.01-3515.071.

98. The Ohio statutory scheme for recounts applies to all elections in Ohio, state and federal.

99. 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. *See* 3 U.S.C. §§ 1 *et seq.* Therefore, 3 U.S.C. §§ 1 *et seq.* informs the application of Article II, Section 1, Clause 2, to Ohio’s statutory scheme for recounts in Presidential elections.

100. The Ohio legislature intended that Ohio's Presidential electors participate fully in the federal electoral process in accordance with 3 U.S.C. §§ 1 *et seq.* Accordingly, the Ohio legislature intended that any recount conducted under Ohio law would be completed in time for the state's Presidential electors to participate fully in the federal electoral process in accordance with the schedule set by 3 U.S.C. §§ 1 *et seq.*

101. Pursuant to his discretionary statutory authority, Secretary Blackwell fixed the calendar by which the state's Presidential election results initially are declared and by which a recount of those initial results can occur. The calendar that Secretary Blackwell set frustrates the intent of the Ohio legislature to ensure the correctness of the election results and to have Ohio's correctly chosen Presidential electors participate fully in the federal electoral process. The schedule that Secretary Blackwell set did not allow for sufficient time to conduct a statewide recount of the votes cast for President within the timeframe that federal law sets for the Presidential electors' full performance of their federal duty. Secretary Blackwell's conduct is an abuse of the discretionary authority that the Ohio legislature has granted to the Secretary of State.

102. The Delaware County Board of Elections' refusal to conduct a recount and its efforts to enjoin Defendants from even requesting a recount in Delaware County also frustrated the Ohio legislature's intent to ensure the correctness of the election results and to have the state's correctly chosen Presidential electors participate fully in the federal electoral process.

103. The conduct of Secretary Blackwell and the Delaware County Board of Elections has the effect of depriving Defendants of their rights guaranteed by Title 35 of the Ohio Revised Code, and by Article II, Section 1, Clause 2, of the United States Constitution and 3 U.S.C. § 1 *et seq.*

104. Defendants have the right to a recount that is recognized under Title 35 of the Ohio Revised Code.

105. Because the Ohio legislature enacted Title 35 pursuant to a grant of authority from Article II, Section 1, Clause 2, of the United States Constitution, Defendants also have a right to a recount that is recognized under federal law.

106. Defendants have no adequate remedy at law for such deprivation of their rights under the United States Constitution, and under federal and state law.

107. There exists an actual controversy between the parties that is within the jurisdiction of this Court, Defendants are interested parties in the controversy, and the controversy may be determined by a declaration of the rights and other legal relations of the parties.

SECOND COUNT

**42 U.S.C. § 1983; U.S. Const. Amend. XIV;
Title 35 of the Ohio Revised Code**

(Against Delaware County Board of Elections and Secretary Blackwell)

108. Defendants repeat and reallege each and every allegation contained in paragraphs 1-107 hereof as if set forth herein at length.

109. The Fourteenth Amendment's Equal Protection and Due Process Clauses guarantee candidates for public office the fundamental right to election procedures that are fundamentally fair.

110. Ohio law expressly provides for recounts under certain circumstances ? including when a candidate requests and is prepared to pay the required bond. Thus, the Ohio legislature has determined that recounts are necessary to ensure the fundamental fairness of

elections and to ensure that the constitutional rights of both candidates and voters are protected and preserved. The Ohio legislature has determined that recounts provide a necessary checking mechanism for determining the results of elections, given the vagaries of the state's election machinery.

111. Pursuant to his discretionary statutory authority, Secretary Blackwell fixed the calendar by which candidates Cobb and Badnarik are prohibited from exercising their statutory rights to a recount before the final declaration of the results of the election. Secretary Blackwell's conduct is an abuse of the discretionary authority that the Secretary of State has been granted by the Ohio legislature.

112. The Delaware County Board of Elections' refusal to conduct a recount and its efforts to enjoin Defendants from even requesting a recount in Delaware County also violates Defendants' statutory right to a recount.

113. Under color of state law, Secretary Blackwell and the Delaware County Board of Elections have acted to deprive Defendants of 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 42 U.S.C. § 1983.

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

THIRD COUNT

**42 U.S.C. § 1983; U.S. Const. Amend. XIV;
Title 35 of the Ohio Revised Code**

(Against Delaware County Board of Elections and Secretary Blackwell)

115. Defendants repeat and reallege each and every allegation contained in paragraphs 1-114 hereof as if set forth herein at length.

116. The Fourteenth Amendment's Equal Protection and Due Process Clauses guarantee candidates for public office the fundamental right to election procedures that are fundamentally fair.

117. Ohio law expressly provides for recounts under certain circumstances ? including when a candidate requests and is prepared to pay the required bond ? and in doing so mandates that the recount be conducted in a manner that is fundamentally fair and thus does not permit arbitrariness, capriciousness, or inconsistency with the law.

118. In conducting the Presidential recount without fair, accurate and adequate uniform statewide procedures, Counter-Defendant Blackwell and Plaintiff/Counter-Defendant Delaware Board of Elections acted arbitrarily, capriciously and in violation of state law.

119. The Fourteenth Amendment's Equal Protection Clause guarantees candidates for public office the fundamental right to election procedures that ensure that basic requirements of equal treatment and fundamental fairness are satisfied. In failing to prescribe and require the use of fair, accurate and adequate, uniform statewide recount procedures, Counter-Defendant Secretary Blackwell, under color of state law, has acted to deprive Counter-Plaintiffs Cobb and Badnarik of the rights, privileges, and immunities secured by the Constitution and laws of the United States, in violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

120. The Fourteenth Amendment's Due Process Clause further guarantees candidates for public office the fundamental right to election procedures that ensure that basic requirements of equal treatment and fundamental fairness are satisfied. In failing to prescribe and require the use of fair, accurate and adequate, uniform statewide recount procedures, Counter-Defendant Secretary Blackwell, under color of state law, has acted to deprive Counter-Plaintiffs Cobb and

Badnarik the rights, privileges, and immunities secured by the Constitution and laws of the United States, in violation of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

121. In participating in a recount of the Presidential election that failed to provide fair, accurate and uniform statewide standards, Plaintiff/Counter-Defendant Delaware Board of Elections violated the due process and equal protection rights of candidates Cobb and Badnarik.

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

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

(1) Declaring that Presidential candidates David Cobb and Michael Badnarik have the right to a recount under state and federal law;

(2) Declaring that the right to a recount means a recount conducted in accordance with fair, accurate and adequate uniform standards throughout the state of Ohio;

(4) Declaring that the right to a recount means a recount conducted in time to provide the final outcome of the Presidential election in Ohio for purposes of the Constitutional process by which the President of the United States is selected;

(3) Declaring that Plaintiffs/Counter-Defendants and Counter-Defendant Secretary of State Blackwell have violated the right of Counter-Plaintiffs Cobb and Badnarik to a meaningful and fundamentally fair recount;

(4) Declaring that Secretary Blackwell's failure to schedule the earliest possible dates for the counting and recounting of the ballots cast in Ohio for the Presidential election violated

the right of Counter-Plaintiffs Cobb and Badnarik to a meaningful and fundamentally fair recount;

(5) Declaring that Secretary Blackwell's failure to impose uniform statewide standards to prevent the pre-selection of precincts for the initial 3% hand recount violated Counter-Plaintiffs Cobb and Badnarik's right to a meaningful and fundamentally fair recount;

(6) Declaring that Secretary Blackwell's failure to impose uniform statewide standards to prevent ballots and voting machines from being left unsecured or altered or destroyed violated Counter-Plaintiffs Cobb and Badnarik's right to a meaningful and fundamentally fair recount;

(7) Declaring that Secretary Blackwell's failure to impose uniform statewide standards to ensure consistent and fair treatment of absentee and provisional ballots violated Counter-Plaintiffs Cobb and Badnarik's right to a meaningful and fundamentally fair recount;

(8) Declaring that Secretary Blackwell's failure to impose uniform statewide standards to ensure consistent and fair access by witnesses to the recount violated Counter-Plaintiffs Cobb and Badnarik's right to a meaningful and fundamentally fair recount;

(9) Declaring that Secretary Blackwell's failure to impose uniform statewide standards in other and all respects, alone and together, violated Counter-Plaintiffs Cobb and Badnarik's right to a meaningful and fundamentally fair recount;

(10) Preliminarily and permanently enjoining and restraining Secretary Blackwell from declaring the final and official results of the Presidential election in Ohio until every county has fully conducted and completed a meaningful and fundamentally fair recount of the votes cast in Ohio for President in accordance with uniform standards throughout the state of Ohio;

(11) Granting Defendants 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.

Dated: December 30, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 30th day of December, 2004. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Richard M. Kerger