



Constitutional magnitude, that are capable of repetition in future Presidential elections yet that would evade appropriate review absent the instant suit.

3. These fundamental defects in Secretary Blackwell's recount procedures include the following, each of which was demonstrated in the recount of the 2004 Presidential election vote:

- A built-in delay in the certification of the initial vote count that denies sufficient time for the recount of the Presidential election vote to be completed and the results of the recounted vote to determine the election in Ohio for President of the United States;
- Inadequate procedures to preserve and secure ballots, voting machines and other voting materials;
- Inadequate standards for the random selection of the initial 3% of the statewide votes to be hand counted in the recount;
- The absence of procedures to conduct a recount of votes cast on electronic voting machines; and
- Inadequate procedures to ensure uniform and proper treatment throughout the state of access by recount observers to provisional, absentee, and spoiled ballots, to poll books, to voting machines and to other materials.

4. These defects in the recount of votes cast in Ohio in the 2004 Presidential election are likely to occur again under Secretary Blackwell or his successors, who are likely to use the 2004 Presidential recount practices or ones essentially the same, absent judicial intervention and resolution of the issue raised in this action.

## **II. PARTIES**

5. The Plaintiffs are as follows:

a. Plaintiff and 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. As a Presidential candidate, Cobb invoked his right to a recount of the votes cast in Ohio in the 2004 Presidential election. Presidential candidate Cobb paid the bond required by statute for the recount. Cobb may run again for President of the United States in 2008.

b. Plaintiff and 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. As a Presidential candidate, Badnarik invoked his right to a recount of the votes cast in Ohio in the 2004 Presidential election. Presidential candidate Badnarik paid the bond required by statute for the recount. Badnarik is likely to run again for President of the United States in 2008.

c. 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 voting machine. Rios participated as a witness and regional coordinator for Presidential candidate Cobb in the recount administered by Secretary Blackwell of the votes cast in Ohio in 2004 for President of the United States.

d. 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. Members of Common Cause Ohio participated as witnesses in the recount administered by Secretary Blackwell of the votes cast in Ohio in 2004 for President of the United States.

e. 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. Lovegren participated as a witness for a Presidential candidate in the recount administered by Secretary Blackwell of the votes cast in Ohio in 2004 for President of the United States.

f. 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. Fry participated as a witness for a Presidential candidate in the recount administered by Secretary Blackwell of the votes cast in Ohio in 2004 for President of the United States.

g. 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.

h. 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.

i. 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.

j. 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 voting machine. Kettler participated as a witness and a regional coordinator for a Presidential candidate in the recount administered by Secretary Blackwell of the votes cast in Ohio in 2004 for President of the United States.

6. Defendant J. Kenneth Blackwell is the Secretary of State of Ohio and he and his successors in office are sued in their official capacity. In his capacity as the Ohio Secretary of State, Secretary Blackwell is Ohio's chief elections officer and he is responsible for administering all statewide elections, including those for federal office. ORC § 3501.04. He administered the 2004 Presidential election in Ohio. Among other duties, Secretary Blackwell appoints all members of local boards of elections to serve as his representatives and he may remove and replace them; 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. *See, e.g.*, ORC §§ 3501.05, 3501.11, 3506.15 and 3506.16.

### **III. JURISDICTION**

7. This Court has jurisdiction over the subject matter of the complaint and the counterclaims in these consolidated actions pursuant to 28 U.S.C. § 1331, because they arise

under the Constitution and the laws of the United States and otherwise present substantial questions of federal law. This Court also has jurisdiction over the subject matter in each claim pursuant to 28 U.S.C. § 1343(3) because Secretary Blackwell acted under color of State law to violate federal rights, privileges or immunities of Plaintiffs, Counter-Plaintiffs, and other parties.

8. The Court also has diversity jurisdiction of Case No. 3:05CV7286 pursuant to 28 U.S.C. § 1332(a). Plaintiff Cobb is a citizen of California. Plaintiff Badnarik is a citizen of Texas. Secretary Blackwell is a citizen of Ohio. The amount placed in controversy in this case exceeds \$75,000, as the cost of the actual recount in 2004 was in excess of that amount. The economic value of the declaratory and injunctive relief to Plaintiffs Cobb and Badnarik also exceeds \$75,000, as does the cost of such relief to the Defendant.

9. This Court has supplemental jurisdiction over the state law claims emanating from the same nucleus of operative facts as the federal claims presented pursuant to 28 U.S.C. § 1367.

10. Plaintiff seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202. There exists an actual controversy between the parties that is within the jurisdiction of this Court, Plaintiffs and Counter-Plaintiffs 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.

11. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b), because a substantial part of the events or omissions giving rise to the claims occurred here and because a substantial part of the future harm faced by Plaintiffs and Counter-Plaintiffs is threatened in this judicial district.

#### IV. FACTS

##### **A. Secretary Blackwell's Procedures Do Not Allow Sufficient Time For A Recount To Be Completed.**

12. As demonstrated by the 2004 Presidential recount in Ohio, Secretary Blackwell's interpretation of applicable law allows the results of a recount to be delayed until after Ohio's Presidential electors have already voted in the Electoral College. Thus, if a recount were to change the outcome in Ohio of a Presidential election, the results would arrive too late for the appointment by Ohio of its Presidential electors to reflect the will of the voters.

13. 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, e.g.*, ORC § 3505.10.

14. The statutory scheme enacted by the Ohio legislature for use in Presidential elections under Article II, Section 1, Clause 2, of the United States Constitution, includes procedures for the recount of votes cast to determine the correct and final results of elections. *See* ORC §§ 3515.01-3515.071.

15. 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.*

16. Following the 2004 Presidential election, which was held on November 2, 2004, the Presidential electors from each state met and gave their votes on December 13, 2004. *See id.* On January 6, 2005, the United States Congress met to count the electoral votes and to declare formally the results of the 2004 Presidential election. *See* 3 U.S.C. § 15.

17. Federal law 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 the 2004

Presidential 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.

18. 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.

19. Despite that requirement, for the 2004 Presidential election, Secretary Blackwell directed that the Ohio county boards of elections need not provide him with their certified abstracts before December 1, 2004, 29 days after the election. Secretary Blackwell intended to wait and did wait until December 6, 2004 to certify the statewide results of the 2004 Presidential election in Ohio based on the initial count of the vote.

20. Under the schedule set by Secretary Blackwell in 2004, no recount could occur prior to December 6, 2004 — just one day before the federal safe-harbor date.

21. The inadequacy of Secretary Blackwell's schedule was demonstrated by the recount of the 2004 Presidential vote which actually occurred. Such a recount was requested by Presidential candidates in the 2004 Presidential election, as provided for by Ohio law. *See* ORC §§ 3515.01-3515.71.

22. 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. 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.

23. On December 6, 2004, Secretary Blackwell certified the statewide results of the 2004 presidential election in Ohio based on the initial count of the vote. Neither Presidential candidates Cobb nor Badnarik were declared elected. Within five days of the Secretary of State's certification of the results and in accordance with ORC §§ 3515.02 & 3515.03, Presidential candidates 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.

24. The recount was not completed until January 7, 2005, when Secretary Blackwell certified the recount results.

25. Secretary Blackwell could have but did not set the schedule in Ohio for a Presidential recount to have been conducted in time for the results of the recount to be certified prior to the federal safe-harbor date of December 7, 2004 and to the meeting of Ohio's electors to cast their votes on December 13, 2004.

26. Secretary Blackwell was on notice that his schedule for a Presidential recount would not permit the recounted votes to determine the outcome of the Presidential election in Ohio. Yet Secretary Blackwell refused to modify the schedule.

27. It continues to be the policy of Secretary Blackwell that the recount of a Presidential election in Ohio need not be completed until after the federal safe-harbor date and after Ohio presidential electors have been appointed, met and cast their votes.

**B. Secretary Blackwell's Procedures Suffer From Numerous Other Defects**

28. On December 7, 2004, Secretary Blackwell 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.

29. In advance of and during the 2004 Presidential recount, participants in the recount put Secretary Blackwell on notice that the procedure he issued for the Presidential election recount, and the implementation of those procedures, were inadequate and would result in the inconsistent, non-uniform, arbitrary and otherwise fundamentally unfair conduct of the Presidential recount. Plaintiffs and Counter-Plaintiffs sought to have Secretary Blackwell prescribe and require the 88 Ohio county boards of elections to use, adequate, fair and uniform standards and instructions for conducting the statewide Presidential recount in Ohio. Secretary Blackwell resisted and refused to accommodate their concerns.

30. Moreover, Secretary Blackwell engaged in a pattern and practice of sanctioning and otherwise permitting the 88 Boards of Elections throughout Ohio to apply inconsistent, arbitrary and otherwise improper standards in implementing his procedures and in conducting the recount of the 2004 Presidential vote. Secretary Blackwell's failures compromised the integrity of the recount, resulted in materially disparate treatment by and between Ohio counties of votes for President and prevented the conduct of a uniform, fair and adequate statewide recount in that election.

31. Secretary Blackwell's improper recount procedures, policies and practices included, but were not limited to, the following:

**1. Inconsistent Standards in Selecting Ballots for the Recount**

32. Because Secretary Blackwell failed to prescribe or enforce uniform and adequate state-wide standards, Ohio's counties employed materially inconsistent standards in selecting ballots for the recount

33. According to Secretary Blackwell's recount procedures in force for the 2004 Presidential election, "[t]he Board must randomly select whole precincts whose total equals at least 3% of the total vote. These precincts' ballots must be manually counted." Outline of Recount Procedures at F.4.(d) and F.5(d).

34. Secretary Blackwell was aware that not all boards were selecting precincts at random. Yet Secretary Blackwell took no corrective action. On the contrary, Secretary Blackwell's office informed at least one county board of elections that it "could select the 3% population however they wished."

35. Other counties interpreted Secretary Blackwell's vague standard in disparate and/or arbitrary ways that compromised the integrity of the recount and resulted in materially different treatment by and between Ohio counties of votes for President. The following examples are illustrative of this type of defect:

a. 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.

b. On information and belief, Secretary Blackwell knew about several “problem” districts in Medina County, but failed to prevent Medina County from choosing 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.

c. 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 Allen County Board pre-selected four precincts, totaling slightly more than the required three percent, for the recount.

d. 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.

e. The Cuyahoga County Board chose 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.

f. 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.

g. 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.

36. Secretary Blackwell's allowance of the arbitrary selection of precincts for the initial recount of the votes in the 2004 Presidential election prevented the conduct of a uniform, fair and adequate statewide recount in that election.

## **2. Inconsistent Standards in Applying the Full Hand Count Requirement**

37. According to Secretary Blackwell's recount procedures, after a Board has hand counted 3% of the ballots, it must then run those ballots through the relevant counting machine. If that machine recount of 3% of the vote does not match the initial hand count, the Board is required to conduct a full hand recount of all of the votes in that county. Outline of Recount Procedures at F.4(f) and F.5(f).

38. Secretary Blackwell was aware that in counties where the initial hand and machine recount did not match, some counties were not going forward with a full hand recount. In particular, Secretary Blackwell was on notice that counties were recounting 3% of the vote two or more times in an effort to avoid a full hand recount. The following examples are illustrative of this type of defect:

a. In Monroe County, the 3% hand recount failed to match the machine count twice, yet Secretary of State Blackwell did not require a full hand recount as required by his own procedures. Instead, after the 3% hand recount failed to match the machine count twice in Monroe County, subsequent runs on that machine did not match each other or the hand count.

On information and belief, Secretary of State Blackwell allowed the Monroe County Board of Elections to summon 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.

b. 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." 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 an observer objected, she was told by the Board that she was not allowed to speak.

39. Secretary Blackwell took no corrective action. Secretary Blackwell's failure to enforce the full hand recount requirement meant that some counties followed the requirement while others did not.

### **3. Inconsistent Standards in the Treatment of Voting Materials**

40. Secretary Blackwell's recount procedures do not adequately address how ballots, voting equipment and voting equipment programming are to be secured and how alterations to such materials are to be documented before or during the recount.

41. Secretary Blackwell was on notice regarding some or all of the foregoing inadequacies. He was, for example, aware of the lack of standards, documentation and oversight

by elections officials and witnesses when technicians from voting machine companies reprogrammed or otherwise handled voting equipment prior to and during the recount.

42. Secretary Blackwell also failed to promulgate adequate procedures for boards to use during the recount in resolving issues of what the voter intended and in the treatment of provisional ballots.

43. As a result of Secretary Blackwell's inaction, there were no uniform statewide procedures governing these matters and county boards of elections used materially inconsistent standards with respect to these matters. The following examples are illustrative of this type of defect:

a. Secretary Blackwell had prior notice of unsupervised access by a representative from the Triad company to the tabulation room at the Hocking County 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. The Triad technician 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.

b. 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.

c. 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.

d. 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.

e. In Van Wert County, 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. Forty-one of Ohio's 88 counties use Triad voting machines.

f. 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.

g. 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.

h. 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. An 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.” “Band-aids” consist of white-out tape or the like used to cover up a vote on an overvoted ballot to reflect the will of the voter to cast the remaining vote.

i. Three ballots in Lucas County apparently were physically altered solely 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.

j. The Ashland County Board of Elections stored ballots cast in the Presidential election 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 Elections officials said the room was kept locked, except when used.

k. The Coshocton County Board of Elections 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.

1. 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.

**4. Inconsistent Standards in the Treatment of Witnesses**

44. Absent uniform state-wide standards, or the enforcement by Secretary Blackwell thereof, the 88 Ohio county boards of elections employed materially inconsistent standards for the treatment of witnesses at the recount.

45. Secretary Blackwell's recount procedures provide for each Presidential candidate to have someone on his behalf witness the recount.

46. But in Secretary Blackwell's administration of the 2004 Presidential recount, Presidential witnesses were unable uniformly to witness the unsealing of the ballot boxes. Witnesses were also unable to access or have adequate time to review records relating to the recount. Secretary Blackwell knew or had reason to know of these problems, but failed to take preventative or corrective action. The following examples are illustrative of the type of defect:

a. In Summit County, recount witnesses here 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.

b. In Huron County, the punchcard tabulator test was observed only by Republican witnesses.

c. In Putnam County, the Board of Elections officials told an observer that their Board would meet on December 15<sup>th</sup> to decide the start date. When the observer called back on the 15<sup>th</sup>, she was told the recount had already taken place.

**5. Inconsistent Standards in the Treatment of Access to Provisional, Absentee, and Spoiled Ballots and Other Voting Materials**

47. Absent uniform state-wide standards, or the enforcement by Secretary Blackwell thereof, the Ohio county boards of elections employed materially inconsistent standards for the treatment of witness access to provisional, absentee, and spoiled ballots; poll books; provisional and absentee lists, applications and envelopes; voting equipment; voting equipment programming; test results; and other voting materials.

48. Secretary Blackwell's recount procedures do not address the treatment of access by witnesses to these materials. Secretary Blackwell knew or should have known that the failure to prescribe procedures for the treatment of access to these materials would result in some counties allowing access by witnesses to some or all of these types of materials, while other counties would deny such access.

49. In the recount of the votes cast in Ohio in 2004 for President of the United States, some counties permitted witnesses to access these materials, while others did not. As a result of witness involvement, review of these materials may have added or subtracted votes from the recounted vote in affected Ohio counties in the 2004 Presidential election. On information and belief, Secretary Blackwell knew or should have known of these material non-uniformities in the conduct of the recount, yet took no corrective action. The following examples are illustrative of this type of defect:

a. 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.

b. The Holmes County Board of Elections denied recount observers access to the spoiled ballot pile, comprised of five ballots. The Board denied access, stating that the ballots were in a sealed envelope that could not be opened.

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

d. The Mahoning County Board of Elections denied access by recount observers to view rejected absentee ballots.

e. The Medina County Board of Elections denied access by recount observers to view provisional ballot tallies, provisional ballots, and the actual machines and ballot booklets used.

f. The Morgan County Board of Elections failed to count 30 of 160 provisional and absentee ballots, and 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 § 3501.13 and 42 U.S.C. § 1974 require that all election materials, including all ballots, be preserved for 22 months following the election.

g. The Stark County Board of Elections denied a recount observer's request to view the provisional ballots.

h. The Warren County Board of Elections denied a recount observer request to view provisional and absentee ballots.

**6. Inadequate Procedures to Conduct Vote Recount for Electronic Voting Machines**

50. Secretary Blackwell is responsible for the absence of adequate procedures on how to conduct a recount of votes cast on electronic voting machines in the 2004 Presidential election.

51. For example, Secretary Blackwell's Presidential recount procedures failed to require that as part of the preparation of the test cartridges for direct record electronic ("DRE") voting machines, counting teams test data that includes, at a minimum, each ballot rotation. Nor do Secretary Blackwell's Presidential recount procedures require that the test cartridge for DREs be processed through a computer (other than the tally computer used on election day) that has a clean install of the tally program on it. Secretary Blackwell's Presidential recount procedures also failed to require that the public counters and protective counters for DREs be checked against the paper audit trail run from the machines in each precinct at the close of the polls, and the audit logs from each precinct, to verify that the numbers on the counters correspond with the numbers from the paper audit trail run and the audit logs.

52. The recount of the Presidential vote was unreliable absent adequate DRE recount procedures or their equivalent. Moreover, absent adequate DRE recount procedures, different counties recounted votes on DRE machines in materially different ways.

53. On information and belief, substantial inconsistencies and irregularities occurred in the recount in addition to those set forth above. These additional inconsistencies and irregularities also give rise to the violations of law herein alleged.

**FIRST COUNT**  
**U.S. Const. art. II, § 1, cls. 2 and 3;**  
**3 U.S.C. §§ 1 *et seq.*; 42 U.S.C. § 1983**  
**Title 35 of the Ohio Revised Code**

54. Plaintiffs and Counter-Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-53 hereof as if set forth herein at length.

55. Acting under color of state law, 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 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.

56. The calendar fixed by Secretary Blackwell for counting and recounting the votes cast in Ohio in the 2004 Presidential election deprived Plaintiff and Counter-Plaintiffs their right to a timely and meaningful recount as provided by Title 35 of the Ohio Revised Code, and by Article II, Section 1, Clauses 2 and 3, and Amendment XXII of the United States Constitution and 3 U.S.C. §§ 1 *et seq.*, since the recount conducted by Secretary Blackwell was too late to have the recounted votes conclusively determine the electors chosen from Ohio to vote for the President and Vice-President.

57. Plaintiffs and Counter-Plaintiffs have the right to a recount that is recognized under Title 35 of the Ohio Revised Code. 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, Plaintiff and Counter-Plaintiffs also has a right to a recount of votes cast in Ohio for President that is recognized under federal law. This right is asserted directly under Article II of the Constitution as well as under 42 U.S.C. § 1983.

58. Plaintiffs and Counter-Plaintiffs have no adequate remedy at law for such deprivation of its rights under the United States Constitution, and under federal and state law.

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

59. Plaintiffs and Counter-Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-58 hereof as if set forth herein at length.

60. 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. Plaintiffs and Counter-Plaintiffs assert their rights herein directly under these clauses of the Fourteenth Amendment as well as under 42 U.S.C. § 1983.

61. Ohio law expressly provides for recounts. 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.

62. Acting under color of state law, Secretary Blackwell fixed the calendar by which Presidential candidates are prohibited from exercising their statutory rights to a recount before the final declaration of the results of the election.

63. In preventing a timely recount of the votes cast in Ohio in 2004 for President of the United States, Secretary Blackwell deprived Plaintiffs and Counter-Plaintiffs 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.

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

64. Plaintiffs and Counter-Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-63 hereof as if set forth herein at length.

65. The Fourteenth Amendment's Equal Protection and Due Process Clauses guarantee candidates for public office, and those who vote for them, the right to election procedures that are fundamentally fair. Plaintiffs and Counter-Plaintiffs assert their rights herein directly under these clauses of the Fourteenth Amendment and under 42 U.S.C. § 1983.

66. Ohio law expressly provides for recounts 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.

67. In conducting the Presidential recount without fair, accurate and adequate uniform statewide procedures, Secretary Blackwell acted arbitrarily, capriciously and in violation of law.

68. In failing to prescribe and require the use of fair, accurate and adequate, uniform statewide recount procedures, Secretary Blackwell, under color of state law, has acted to deprive Plaintiffs and Counter-Plaintiffs of the rights, privileges, and immunities secured by the Constitution and laws of the United States, in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and of 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs and Counter-Plaintiffs ask this Court to enter an Order and Final Judgment:

(1) Declaring that the procedures established by Secretary Blackwell for the recount of the votes in the 2004 Presidential election violated the United States Constitution and other applicable law and restraining Secretary Blackwell and his successors in office from using such procedures in future Presidential elections;

(2) Permanently enjoining Secretary Blackwell, and his successors in office, (a) to prescribe, adopt, administer and enforce uniform, accurate, fair and adequate statewide procedures to ensure the accurate recount of the votes in Presidential elections for use in the 2008 Presidential election and thereafter, and (b) to schedule the counting and recounting of the votes in future Presidential elections to provide sufficient time for the recount to be completed and the recounted votes to be used to determine the election of the President of the United States;

(3) Awarding Plaintiffs and Counter-Plaintiffs their attorneys' fees, litigation expenses and court costs in maintaining this action under 42 U.S.C. § 1988 or any other valid basis; and

(4) Granting Plaintiffs and Counter-Plaintiffs such additional or other legal or equitable relief as justice may require.

Dated: September 19, 2005

Respectfully submitted,

/s/ Richard M. Kerger

Richard M. Kerger (0015864)

Kerger & Associates

33 South Michigan Street, Suite 100

Toledo, OH 43602

Telephone: (419) 255-5990

Fax: (419) 255-5997

John C. Bonifaz, admitted *pro hac vice*

National Voting Rights Institute

27 School Street, Suite 500

Boston, MA 02108

Telephone: (617) 624-3900

Fax: (617) 624-3911

*Counsel for Plaintiffs*

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 19<sup>th</sup> day of September, 2005. 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

Richard M. Kerger