

**In The United States District Court  
For The Southern District Of Ohio  
Eastern Division**

**State ex rel. Yost, et al.,**

**Plaintiffs,**

**vs.**

**Case No. 2:04-cv-1139**

**National Voting Rights Institute, et al.,**

**Judge Sargus**

**Defendants-Counter Plaintiffs,**

**vs.**

**Secretary of State Blackwell,**

**Counter-Defendant.**

**Secretary of State Blackwell's Motion To Dismiss**

Secretary of State Blackwell, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), asks this Court to dismiss the Counterclaim. A memorandum in support is attached.

Respectfully submitted,

JIM PETRO  
Attorney General

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## Memorandum In Support

### **I. Introduction**

Two presidential candidates, who between them received approximately 0.25% of the vote in the 2004 Presidential contest, have brought this frivolous and repetitive litigation against the Ohio Secretary of State despite the fact that their request for relief has already been soundly rejected by the United States District Court for the Northern District. Furthermore, as already determined by that United States District Court, some of the Plaintiffs do not even have legal standing to pursue the repetitive claims brought in this lawsuit. Finally, this Court is patently and unambiguously without jurisdiction to hear the claims raised in this counterclaim. As a result, this Court must dismiss the claims and remand this litigation to common pleas court.

### **II. Law And Argument**

#### **A. The National Voting Rights Institute Completely Lacks Any Legal Standing To Bring A Claim Against Secretary Of State Blackwell Over The Statewide Recount.**

Under Ohio law, only an unelected candidate for office can request a recount of the votes for that office. R.C. § 3515.01. A group of voters, or a “public interest” group cannot request a recount for a candidate race. They can only request a recount in an issue race. *Id.* As a result, NVRI completely lacks standing to complain about the Ohio recount and the speed at which it is proceeding.

In order to satisfy the standing requirement of Article III, “a plaintiff must show: ‘(1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.’” *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573

(6th Cir. 2004), quoting *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Furthermore, an association “has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Friends of the Earth*, 528 U.S. at 181.

In this case, NVRI does not have standing to bring any claim based upon Ohio’s recount. Neither NVRI nor its members can request a recount of the Ohio Presidential vote. They have no statutory right to request a recount and they have no ground to complain about the method in which the recount has taken place. It is for this very reason that the Court in *Rios v. Blackwell* found that individual electors lack standing to challenge the Ohio recount. See *Rios v. Blackwell*, attached as Exh. A. Thus, NVRI should immediately be dismissed from this lawsuit.

**B. This Court Lacks Jurisdiction Over The Counterclaim And Must Immediately Dismiss This Case.**

This case originated when the Plaintiff filed suit under Chapter 35 of the Ohio Revised Code against NVRI and two Presidential candidates concerning Ohio’s recount. The case was brought exclusively under Ohio law. NVRI then removed this case and added claims under federal law against the Ohio Secretary of State. However, the removal was completely improper and this Court is without any jurisdiction to hear this claim.

As already argued in the Secretary’s motion to remand, the well-pled complaint rule states that cases do not arise under federal law if the federal issues appear only as a defense. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). The underlying complaint in this case does not state any cause of action whatsoever under federal law. Instead, it merely speaks of recounts governed and allowed under

Title 35 of the Ohio Revised Code. The first claim is brought exclusively under R.C. § 3515.02. The second claim is brought exclusively under R.C. § 3515.03. Therefore, there is no federal claim in the complaint itself. Although it is true that NVRI raises federal issues as defenses, that is not sufficient to grant this Court jurisdiction under the well-pled complaint rule. In fact, the citation by Defendants in their counterclaim to Art. II, Sec. 1 of the United States Constitution affirmatively demonstrates this point. That provision states that “Each State shall appoint, in such Manner as the Legislature thereof may direct....” Thus, the issues raised in the instant case are exclusively matters of state law.

There is nothing that would allow this Court to have jurisdiction over the underlying claims in this case. *Bush v. Gore*, 531 U.S. 98 (2000), simply does not give this Court any jurisdiction hook over the removed complaint.

*Bush* arose in State court and concerned the recount ordered by the State Supreme Court.

As the *Bush* Court noted,

The petition presents the following questions: whether the Florida Supreme Court *established new standards for resolving Presidential election contests*, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses.

*Id.* at 103.

This was not a case that granted a separate jurisdiction basis to federal courts. Instead, it simply asked whether, when the Florida Supreme Court changed the rules of a recount by judicial *fiat* after the election, the Florida Supreme Court’s judicial action violated the Constitution. It further asked whether a standardless manual recount that contained no standard definition of what constituted a legal vote violated the Due Process and Equal Protection clauses.

It becomes clear from the majority opinion in *Bush* that the United States Supreme Court is not granting district courts unlimited jurisdiction over Presidential elections simply because Art. II § 1 of the United States Constitution grants the State Legislatures the power to determine the manner in which Presidential Electors are chosen. It is equally clear that the Supreme Court did not have jurisdiction to take an appeal over the case because it simply arose under Florida law. Instead, the reason that the United States Supreme Court was able to exercise appellate jurisdiction over a decision of the State Supreme Court was simply because there was a question whether a judicially ordered remedy violated the Constitutional provision that granted State Legislatures the power to determine the method under which the State selected Presidential Electors.

There is simply nothing in the *Bush* opinion that would allow a federal district court to exercise removal jurisdiction over a claim brought under State law concerning a recount. If *Bush* were read to mean that a federal court had jurisdiction over State law on an election because the State law might impact Art. II § 1 or 3 U.S.C. § 5, then the federal court's jurisdiction would be unlimited. The Court would even have the power to determine whether a State's method of using poll books for electors to sign would be proper. In addition, since the decision impacted a Presidential election, a federal court would have the power to determine a lawsuit over whether the State of Ohio can require voting machines to have a voter verified audit paper trail under Title 35. The theory in that example would be simple. Since the people of Ohio use that voting machine in a Presidential Election, a federal court must have jurisdiction to hear the complaint.

Obviously, such an argument is incorrect. As a result, there is no jurisdiction in this Court to hear the original complaint. Thus, this Court must dismiss the counterclaim and remand this case to the Delaware County Common Pleas Court.

### III. Conclusion

For the foregoing reasons, this Court should dismiss this case.

Respectfully submitted,

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#### **Certificate of Service**

This is to certify a copy of the foregoing was served upon all parties by means of the Court's electronic filing system on this 22<sup>nd</sup> day of December, 2004.

*/s Richard N. Coglianes*