

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

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

**Plaintiffs,** )

**v.** )

**NATIONAL VOTING  
RIGHTS INSTITUTE, ET AL.** )

**Defendants** )

**And** )

**KERRY-EDWARDS 2004, INC.** )

**Intervenor-Defendant  
(Motion Pending)** )

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**NATIONAL VOTING  
RIGHTS INSTITUTE, ET AL.** )

**Counter-Plaintiffs,** )

**v.** )

**DELAWARE COUNTY BOARD  
OF ELECTIONS** )

**And** )

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

**Counter-Defendants** )

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

**DEFENDANTS NATIONAL VOTING RIGHTS INSTITUTE,  
DAVID COBB AND MICHAEL BADNARIK'S  
ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS**

Defendants National Voting Rights Institute, David Cobb, and Michael Badnarik (together “Defendants”) for their answer to Plaintiffs’ Complaint and for their affirmative defenses and counterclaims, allege as follows:

1. Defendants admit the allegations in paragraph 1.
2. Defendants admit the allegations in paragraph 2.
3. Defendants admit the allegations in paragraph 3.
4. Defendants admit the allegations in paragraph 4.
5. Defendants admit the allegations in paragraph 5.
6. Defendants admit the allegations in paragraph 6.
7. Defendants admit that paragraph 7 claims that the action is for equitable relief.

Defendants deny the remaining allegations in paragraph 7.

#### **ANSWERING THE FIRST CLAIM**

8. Defendants repeat their admissions and denials as set forth above.
9. Defendants admit the allegations in paragraph 9.
10. Defendants admit the allegations in paragraph 10.
11. Defendants admit that paragraph 11 sets forth a portion of Ohio Revised Code § 3515.02.
12. Defendants admit the allegations in paragraph 12.
13. Defendants admit the allegations in paragraph 13.
14. Defendants admit the allegations in paragraph 14.
15. Defendants deny the allegations in paragraph 15.

## **ANSWERING THE SECOND CLAIM**

16. Defendants repeat their admissions and denials as set forth above.
17. Defendants admit the allegations in paragraph 17.
18. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18, and on that basis deny these allegations.
19. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19, and on that basis deny these allegations.
20. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20, and on that basis deny these allegations.
21. Defendants deny the allegations in paragraph 21.
22. Defendants deny the allegations in paragraph 22. Defendants also deny that the Plaintiffs are entitled to the relief requested in the “WHEREFORE” clause following paragraph 22.
23. Defendants deny all allegations of the Complaint not otherwise answered and denied.

## **AFFIRMATIVE DEFENSES**

Without in any way admitting any of the allegations of the Complaint and without admitting or suggesting that Defendants bear the burden of proof on any of the following issues, as separate and independent affirmative defenses, Defendants allege as follows:

### **FIRST AFFIRMATIVE DEFENSE**

24. The Complaint fails to state a claim upon which relief may be granted.

### **SECOND AFFIRMATIVE DEFENSE**

25. Plaintiffs lack standing to bring the Complaint.

**THIRD AFFIRMATIVE DEFENSE**

26. The Complaint fails to name necessary parties.

**FOURTH AFFIRMATIVE DEFENSE**

27. Defendants' right to a recount is protected under Article II, Section 1, Clause 2 of the United States Constitution.

**FIFTH AFFIRMATIVE DEFENSE**

28. Defendants' right to a recount is protected under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution and Article I, Sections 2 & 16 of the Ohio Constitution.

**SIXTH AFFIRMATIVE DEFENSE**

29. Defendants' conduct in seeking a recount is protected under the First Amendment to the United States Constitution and Article I, Section 11 of the Ohio Constitution.

**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 recount. In support, Defendants allege as follows:

**JURISDICTION**

30. This Court has jurisdiction over the subject matter of this counterclaim pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and the laws of the United States. This Court also has jurisdiction pursuant to 28 U.S.C. § 1367(a) because it arises 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.

31. 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 (Counter-Plaintiff) NVRI is incorporated in Massachusetts which is also its principal place of business. The amount in controversy is in excess of \$75,000.

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

#### **PARTIES**

33. 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.

34. 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.

35. Defendant (Counter-Plaintiff) 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.

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

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

38. 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.

39. Secretary Blackwell is a registered Republican, and was elected to the position of Secretary of State as a Republican. He served as the Co-Chairman of the Bush/Cheney presidential campaign in both 2000 and 2004.

40. 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 this counterclaim cannot be accorded among those already parties to this action.

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

42. 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

43. 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.

44. 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.

45. 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.

46. 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).

47. 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 has 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.

48. 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.

49. 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 has indicated that he does 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.

50. The calendar that Secretary Blackwell has 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.

51. 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 frustrates 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.

52. 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.

53. 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* Ohio Rev. Code §§ 3515.01-3515.071.

54. 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.

55. 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 to meet and give 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.

56. 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.

57. 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

58. 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.

59. 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.

60. 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.

61. 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.

62. 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.

63. 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.

64. 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.

65. 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.).

66. 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.

67. 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.)

68. 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.

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

70. Defendants removed the action to this Court on November 30, 2004.

## 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)

71. Defendants repeat and reallege each and every allegation contained in paragraphs 30-70 hereof as if set forth herein at length.

72. 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.

73. 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* Ohio Rev. Code Ann. § 3505.10. That scheme includes procedures for the recount of votes cast to determine the correct and final results of elections. *See* Ohio Rev. Code §§ 3515.01-3515.071.

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

75. 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.

76. 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.

77. Pursuant to his discretionary statutory authority, Secretary Blackwell has 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 has 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 has set does not allow for 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.

78. 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 frustrates 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.

79. 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.

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

81. 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.

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

83. 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;**

**(Against Delaware County Board of Elections and Secretary Blackwell)**

84. Defendants repeat and reallege each and every allegation contained in paragraphs 30-83 hereof as if set forth herein at length.

85. 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.

86. 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.

87. Pursuant to his discretionary statutory authority, Secretary Blackwell has 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.

88. 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.

89. Under color of state law, Secretary Blackwell and the Delaware County Board of Elections have acted to deprive Defendants 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.

90. Defendants 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 Secretary Blackwell, the Delaware County Board of Elections, and all other county boards of elections in Ohio must begin immediately the recount requested by David Cobb and Michael Badnarik;

(3) Declaring that the Boards of Elections in each county in Ohio must mail the notice required by Section 3515.03 of the Ohio Revised Code no later than December 6, 2004;

(4) Declaring that Secretary Blackwell, the Delaware County Board of Elections, and all other county boards of elections in Ohio must fully conduct and complete the recount requested by David Cobb and Michael Badnarik;

(5) Declaring that the statewide recount requested by David Cobb and Michael Badnarik must be fully conducted and completed by 12:00 a.m. on December 7, 2004, for the State of Ohio to avail itself of the benefit of the “safe harbor” provision set forth in 3 U.S.C. § 5;

(6) Declaring that the statewide recount requested by David Cobb and Michael Badnarik must be fully conducted and completed by 12:00 a.m. on December 13, 2004, for the Presidential electors from the State of Ohio to cast their votes at the meeting of the Electoral College on December 13, 2004;

(7) 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 recount of the votes cast in Ohio for President and from so declaring the final results without relying on the results of the recount;

(8) Preliminarily and permanently enjoining and restraining Secretary Blackwell from certifying Ohio’s Presidential electors until every county has fully conducted and completed a recount of its votes cast in Ohio for President and from so certifying without relying on the results of the recount;

(9) 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 2, 2004

By: /s/ Richard Kerger  
Richard Kerger, Ohio Bar 0015864  
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*Counsel for Defendants David Cobb,  
Michael Badnarik, and the National  
Voting Rights Institute*

\* *Pro Hac Vice* motion pending

# **EXHIBIT 1**



*J. Kenneth Blackwell*  
J. KENNETH BLACKWELL  
Ohio Secretary of State

180 E. BROAD STREET / 16TH FLOOR / COLUMBUS, OH 43215  
614.488.2655 / TOLL FREE: 877.767.6446 / FAX: 614.644.0648  
e-mail: blackwell@sos.state.oh.us www.state.oh.us/sos/

November 19, 2004

John C. Bonifaz  
General Counsel  
National Voting Rights Institute  
27 School Street, Suite 500  
Boston, Massachusetts 02108

VIA FACSIMILE AND U.S. MAIL

Dear Mr. Bonifaz,

Thank you for your letter of November 17, 2004. Since your letter's assertion that "Ohio law makes no reference to a recount demand filed in a presidential election" reflects a certain lack of familiarity with Ohio's election certification process, it may be helpful to review the process.

As you know, we do not vote directly for the candidates for president and vice-president. Rather, pursuant to R.C. 3505.10, votes cast next to the names of the candidates for president and vice-president are counted as votes for each of the candidates for presidential elector whose names have been certified to the Secretary of State by the respective candidates for president and vice-president. Since each candidate for presidential elector is a "candidacy for election [that] was submitted to electors throughout the entire state", R.C. 3515.02's recount procedure applies directly to persons seeking a recount regarding the votes cast in Ohio in the presidential race. Thus, under R.C. 3515.02, any application for a recount in Ohio's presidential race "shall be filed within five days after the day upon which the secretary of state declares the results of such election".

The Secretary of State's canvassing of the results from the various counties and his declaration of the results is the initial "count". Plainly, there can be no recount until there has been an initial count. One cannot "immediately initiate" a recount, until the initial count is completed. The Secretary of State will declare the results as soon as he is able to do so. However, before the Secretary of State can lawfully declare the results of the presidential election, Ohio law requires each county board of elections to (1) canvass the results (2) sign and post a declaration of the results, (3) certify abstracts of the results and (4) send the certified abstracts to the Secretary of State.

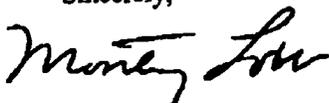
Under R.C. 3505.32, each of Ohio's 88 boards of elections must begin to canvass the election returns no earlier than November 13, 2004, and no later than November 17, 2004. The canvassing is to continue daily until it is completed. When each board of elections has completed the canvass of the election returns from the precincts in its county, the board must meet, determine and declare the results. Pursuant to R.C. 3505.33, "[s]uch declaration shall be in writing and shall be signed by at least a majority of the members of the board". The declaration of results shall be "posted for a period of at least five days". After this statutory five day period of posting the results, "the board shall promptly certify abstracts of the results". R.C. 3505.33 requires, *inter alia*, that the boards certify upon a specified form "[a]n abstract of the votes cast for the office of president and vice-president of the United States". After each board so certifies, "[o]ne copy of each of these forms shall promptly be sent to the secretary of state".

The Secretary of State has requested each of Ohio's 88 counties to provide to him the certified abstracts by no later than December 1, 2004. This deadline is significantly shorter than the usual deadlines in non-presidential years. Once the Secretary of State has received abstracts from all 88 counties, R.C. 3505.35 requires the Secretary of State to canvass the abstracts and to "determine and declare the results of all elections in which electors throughout the entire state voted". R.C. 3505.35 requires the Secretary of State to fix the time for canvassing the abstracts within ten days after all 88 counties have provided the abstracts to him. R.C. 3505.35 also requires the Secretary of State to give advance notice of such meeting to "the governor, auditor of state, attorney general, and the chairman of the state central committee of each political party".

The Secretary of State does not intend to wait ten days from the receipt of all 88 certified abstracts before determining and declaring the results of the statewide races. To the contrary, the Secretary of State intends to declare the statewide results as quickly as it is feasible for him to do, consistent with his duties to comply with federal and state law. If it proves to be feasible to determine and declare these results even before December 6, 2004, the Secretary of State will endeavor to do this, provided that the accuracy and integrity of the process is not sacrificed.

In short, the timing and procedures to conduct the official "count" are governed by statute and are being followed with such promptness as Ohio law allows, and, indeed, with even greater promptness than is legally mandated. I hope this letter answers the questions that you have raised.

Sincerely,



Monty Lobb  
Assistant Secretary of State

## **EXHIBIT 2**

10516171 - 171-0216

**Butler County BOE**

---

From: "Walch, Dana" <DWALCH@sos.state.oh.us>  
To: "All Counties" <AllCounties@sos.state.oh.us>  
Cc: "Field Staff" <FieldStaff@sos.state.oh.us>; "Hoffman, Judith A." <JHoffman@sos.state.oh.us>;  
"Quinn, Gretchen" <GQUINN@sos.state.oh.us>  
Sent: Friday, November 19, 2004 4:18 PM  
Subject: Presidential Recount

MEMORANDUM

TO: COUNTY BOARDS OF ELECTIONS

FROM: DANA WALCH

DATE: NOVEMBER 19, 2004

SUBJECT: PRESIDENTIAL RECOUNT

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We are aware that county boards of elections are receiving correspondence and payments from the National Voting Rights Institute requesting a recount of the presidential race in Ohio. As a follow-up to the instruction given on our conference call this morning, no county board of elections is to begin a recount of the presidential race until you receive further instruction from our office. A recount of the presidential race cannot begin until the Secretary of State concludes the official canvass. This will not take place until all counties have submitted their certified results to our office.

Please do not hesitate to contact us if you have any further questions.

## **EXHIBIT 3**



Ohio Secretary of State J. Kenneth Blackwell  
Elections Division - 180 E. Broad St., 15<sup>th</sup> Floor, Columbus, OH 43215  
Tel. (614) 466-2585 Fax (614) 752-4360 e-mail: election@sos.state.oh.us

## MEMORANDUM

TO: All County Boards of Elections  
FROM: Keith A. Scott, HAVA Attorney/Acting General Counsel  
DATE: November 24, 2004  
RE: Recount

As some of you are aware, a lawsuit was filed against the Secretary of State on 11/22/04 on the issue of recounting the presidential vote. The same people who generated the National Voting Rights Institute letter you received last week filed that suit, which sought to compel Secretary Blackwell to issue a mandate to you to begin the recount early. Late yesterday afternoon, the case was dismissed in the United States District Court in Toledo. Therefore, please adhere to the information you have received from our office on this matter all along - particularly the Memorandums you received from Dana Walch and myself on November 19, 2004. Continue to conduct your canvass as you have done in previous elections. We will advise you as to when the recount can commence, which by law will be after the official canvass has been certified by the Secretary.

As an additional reminder, please note that our office will be closed on Friday, November 26, 2004. However, if you have any questions, the HAVA hotline will be open for your convenience and I will be available to receive your call. That number is (614) 728-8361.