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	)	
NATIONAL VOTING RIGHTS INSTITUTE, ET AL.	)	
Counter-Plaintiffs,	)	
v.	)	
DELAWARE COUNTY BOARD OF ELECTIONS	)	
And	)	
J. KENNETH BLACKWELL,	)	
Counter-Defendants	)	

DEFENDANTS/COUNTER-PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

Defendants/counter-plaintiffs, the National Voting Rights Institute, David Cobb and Michael Badnarik, respectfully submit this Memorandum of Law in support of their motion, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a preliminary injunction requiring requiring Defendant Ohio Secretary of State Blackwell to prescribe and require the eighty-eight Boards of Elections to use adequate and uniform standards for conducting the state-wide recount in Ohio so that they may accurately and finally determine the results of the 2004 election for the President of the United States. Inasmuch as defendants/counter-plaintiffs can show all of the four factors required for the imposition of the preliminary injunctive relief that they seek, defendants/counter-plaintiffs' motion should be granted.

STATEMENT OF FACTS

On November 2, 2004, the general election was held nationwide in which Defendants David Cobb and Michael Badnarik were candidates for United States President.

On November 17, 2004, candidate defendants/counter-plaintiffs Cobb and Badnarik sent an overnight letter to Secretary Blackwell and a similar overnight letter to each county Board of Elections director of each of the 88 counties in Ohio, informing them that they planned to exercise their rights under Ohio law to seek a full recount of all votes cast in Ohio for president.

On November 18, 2004, candidate defendants/counter-plaintiffs 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 of elections in Ohio. The applications included the posting of the necessary bonds with each of the county

Board of Elections, totaling $113,620 in bond payments. Ohio Rev. Code Section 3515.03 (applicants must deposit "ten dollars . . . for each precinct so listed in application as security. . .).

As required by Secretary Blackwell, the eighty-eight county Boards of Elections certified their canvas on December 1, 2004. Secretary Blackwell certified the statewide results of the presidential election in the State of Ohio in the 2004 general election on December 6, 2004. Immediately following Secretary Blackwell's certification, presidential candidates David Cobb and Michael Badnarik (counter-plaintiffs in this action) and presidential elector candidate Anita Rios filed formal applications with each of the 88 county boards of elections in Ohio for a full recount of all of the votes cast in Ohio for President in the 2004 general election. Mr. Cobb, Mr. Badnarik, and Ms. Rios also sent a letter to Secretary Blackwell informing him of these applications.

On December 7, 2004, Rick Kerger and John Bonifaz, counsel for defendants/counter-plaintiffs, sent a letter to Secretary Blackwell identifying problems with Secretary Blackwell's Outline of Recount Procedures. (Ex. A). The letter identified specific problems as applied to this presidential election and recount and suggested corrective measures.

By memo also dated December 7, 2004 and addressed to the county Boards of Elections, Secretary Blackwell set forth the basic parameters for a recount and attached the inadequate Outline of Recount Procedures addressed in the Kerger and Bonifaz letter of the same date. (Ex. B). These procedures were not specifically designed for the 2004 presidential election.

After receiving these procedures from Secretary Blackwell, many Board of Elections representatives contacted John Bonifaz with questions or comments about the recount procedures. (See Declaration of John C. Bonifaz, attached as Ex. C). These calls demonstrated a complete lack of uniformity of the recount procedures to be employed. For example, some counties proposed to follow Secretary's Blackwell procedure for a 3% manual recount, while others plan to conduct only a machine recount. One county indicated that they would only recount those votes cast for Cobb and Badnarik, instead of all votes cast in the presidential election. Many counties also indicated the date they propose to begin the recount, some indicating that they will begin the recount as early as 7:00 a.m. on Monday, December 13, 2004.

Donald J. McTigue, counsel for Kerry-Edwards 2004, has also received inquiries from representatives of the various Boards of Elections. (See Declaration of Donald J. McTigue, Ex. D). The inquiries he received mirror those received by Bonifaz.

Many of these inquiries have been received by Bonifaz and McTigue in the last day or so, only now illustrating the great disparity among the various recount procedures to be employed. These disparities are the direct result of Secretary Blackwell's failure to prescribe adequate procedures for a recount in a presidential election and to require uniform statewide application thereof. Secretary Blackwell's failure in these regards is inexcusable considering that defendants/counter-plaintiffs' notification of their intent to seek a recount dated November 17, 2004.

ARGUMENT

In ruling on this motion for a preliminary injunction, the Court must consider four factors: (1) whether the defendents/counter-plaintiffs have a strong likelihood of success

on the merits; (2) whether they would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004); *News Herald v. Ruyle*, 949 F. Supp. 519, 521 (N.D. Ohio 1996) ("[I]f there is notice to the other side and a hearing, the Court applies the same standards governing issuance of a preliminary injunction in determining whether to issue a temporary restraining order."). Because defendants/counter-plaintiffs have a clear and substantial likelihood of prevailing on the merits and because the failure to conduct the recount with adequate and uniform statewide standards would violate defendants/counter-plaintiffs' constitutional rights and cause irreparable harm, this Court should issue a preliminary injunction, ordering Secretary Blackwell to prescribe and require Ohio's 88 Boards of Elections to use adequate and uniform standards for conducting the statewide recount in Ohio so that they may accurately and finally determine the results of the 2004 election for the President of the United States.

I. DEFENDANTS/COUNTER PLAINTIFFS' CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS.

To prevail on their Section 1983 claims, defendants/counter-plaintiffs must demonstrate that Secretary Blackwell (1) acted under color of state law; and (2) deprived defendants/plaintiffs of a federal right, either statutory or constitutional. *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 33 (6th Cir. 1992). Here, there is no dispute that Secretary Blackwell has at all times relevant to this case acted "under color" of Ohio law. Nor can there be any dispute that Secretary Blackwell's failure to require

that each county in Ohio use adequate and uniform standards to conduct the statewide recount violates defendants/plaintiffs' constitutional rights.

Acting pursuant to Ohio law, Secretary Blackwell has developed and published an Outline of Recount Procedures. (Ex. B). As set forth in a letter dated December 7, 2004 from John C. Bonifaz and Rick Kerger to Secretary Blackwell, Secretary Blackwell's recount procedures are vague, fail to address the specifics of the various types of voting technology employed throughout the state, and are silent on some very important issues. (Ex. A). Some Boards of Elections have indicated that they intend to follow the Outline of Procedures but have indicated varying interpretations of those procedures. *See* Exs. C and D. As a result, each of the eighty-eight Boards of Elections will employ different procedures and standards for conducting the recount requested by Cobb and Badnarik. *Id.*

The identified disparities in proposed Ohio recount procedures are greater than those employed in the 2000 presidential election in Florida that were found to be violative of the rights to equal protection and due process. *Bush v. Gore*, 531 U.S. 98 (2000). As set forth in *Bush v. Gore*, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05. Any recount must be conducted with "necessary safeguards" to ensure that the "rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Id.* at 109. In order to conduct a recount that complies with the requirements of equal protection and due process, the recount must be conducted in a uniform manner using "adequate statewide standards for determining what is a legal vote, and practicable procedures to implement [those standards]." *Id.* at 110.

Secretary Blackwell's failure to prescribe and require the use of adequate, uniform statewide recount procedures results in a violation of the Equal Protection and Due Process Clauses of the Constitution. Defendants/counter-plaintiffs have demonstrated a violation of these constitutional rights and as a result are likely to succeed on the merits of their claims.

II. DEFENDANTS/COUNTER-PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE RECOUNT IS NOT CONDUCTED PURSUANT TO ADEQUATE AND UNIFORM STATEWIDE STANDARDS.

As demonstrated above, the failure to conduct the recount pursuant adequate and uniform statewide standards violates defendants/counter-plaintiffs' rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution. Where a party's constitutional rights are at issue, a successful showing of likelihood of success on the merits mandates a finding of irreparable harm. *ACLU v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Moreover, "a denial of an injunction *will cause irreparable harm* if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (citations and internal quotations omitted).

III. THE INJUNCTION WOULD NOT CAUSE SUBSTANTIAL HARM TO OTHERS.

"[N]o substantial harm can be shown in the enjoinment of an unconstitutional policy." *Chabad of Southern Ohio*, 363 F.3d at 436 (citations omitted). As demonstrated, if the statewide recount were to begin on Monday, December 13, 2004, pursuant to the disparate procedures and the inadequate, non-uniform standards by which Ohio's 88 counties intend to conduct the recount, the constitutional rights of defendants/counter-

plaintiffs will be violated. Because the immediate relief that defendants/counter-plaintiffs seek is to prevent the recount from being conducted in such an unconstitutional manner, no substantial harm to others can be shown to result from the issuance on the injunction.

IV. THE PUBLIC INTEREST WOULD BE SERVED BY THE INJUNCTION.

The "public interest is served by preventing the violation of constitutional rights." *Chabad of Southern Ohio*, 363 F.3d at 436 (citations omitted). There is no question where the public interest lies in this matter. The public interest is not served by a statewide recount conducted -- as will occur if the Court does not intervene -- pursuant to disparate procedures and inadequate, non-uniform standards. The public interest will only be served if the recount is conducted pursuant to adequate and uniform statewide standards as required by the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

CONCLUSION

For all the foregoing reasons, defendants/counter-plaintiffs' motion for a preliminary injunction should be granted.

Dated: December 10, 2004

Respectfully submitted,

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