

**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's Memorandum Contra  
Counter-Plaintiffs' Motion For  
A Temporary Restraining Order**

**I. Introduction**

In an affront to the dignity of the United States District Court for the Northern District of Ohio, David Cobb and Michael Badnarik have apparently determined they will simply ignore the adverse rulings of a federal judge by pressing those very issues once again before this Court. They are doing so despite this Court's total lack of jurisdiction over their claim, and despite the fact that they would be required to bring their claims in the Northern District. However, these Plaintiffs are doing something far worse than merely ignoring the requires of Article III of the United States Constitution. Through this litigation, they are asking this Court to replace the Ohio Secretary of State. This Court should reject the Plaintiffs' invitation and immediately remand this case to the State courts so that Ohio law can be interpreted by Ohio judges in conformity with Ohio precedent.

## II. Law And Argument

### A. This Court Lacks Jurisdiction To Grant The Plaintiffs Any Type Of Emergency Injunctive Relief.

In an ever-changing request for relief before this Court, Cobb and Badnarik originally asked this Court to declare that they had a right to a recount *under Ohio law*; that such recount should begin immediately, contrary to Ohio law;<sup>1</sup> that *Ohio law* demanded that notice of the recount must be mailed by December 6, 2004;<sup>2</sup> that all Ohio boards of elections had to complete the recount by December 7, 2004;<sup>3</sup> that the recount had to be completed by December 13, 2004 so that Ohio's electors could cast their votes in the electoral college;<sup>4</sup> permanently enjoin Secretary of State Blackwell from declaring and certifying the results of the Presidential election;<sup>5</sup> and granting other relief this Court deemed appropriate.<sup>6</sup>

The scope of the Plaintiffs' complaint does not allow this Court to exercise any jurisdiction whatsoever over the Plaintiffs' request for a temporary restraining order concerning the manner in which the recount in the State of Ohio is proceeding. First, the underlying lawsuit that allowed Cobb and Badnarik to remove this case is based purely upon State law. This court lacks any jurisdiction whatsoever under any of the claims based upon the removal and cannot grant these Counter-Plaintiffs any relief whatsoever since any order by this Court on their

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<sup>1</sup> Cobb and Badnarik filed a lawsuit in the Northern District of Ohio under Case Number 3:04-cv-7724 asking Judge Carr to order the immediate recount of Ohio's Presidential election and that such a recount be completed by December 1, 2004. Judge Carr denied the request and the Plaintiffs never appealed that decision. (See Complaint attached as Exh. A and Decision attached as Exh. B).

<sup>2</sup> Cobb and Badnarik asked Judge Carr to order notice of the recount be mailed by November 26, 2004.

<sup>3</sup> Cobb and Badnarik asked Judge Carr to order all Ohio counties to complete the recount by December 6, 2004.

<sup>4</sup> Although Cobb and Badnarik did not specifically ask Judge Carr to order the recount be complete before the meeting of the Electoral College, they did ask that Blackwell be enjoined from certifying the Presidential Election until the recount is completed and also that he be prohibited from issuing Ohio's electors certificates of election until the recount is completed. Of course, Ohio's Presidential Electors cast their ballots on December 13, 2004 in complete conformity with Ohio and federal law.

<sup>5</sup> Cobb and Badnarik asked Judge Carr to enjoin the Secretary of State from declaring the results of the Presidential election. The Judge denied that request.

<sup>6</sup> Cobb and Badnarik asked for that same relief in addition to attorneys fees in front of Judge Carr. He denied them any relief whatsoever.

counterclaim violates Article III of the Constitution.<sup>7</sup> Furthermore, even if jurisdiction were proper in the federal courts, this case must be heard in the Northern District, as that was where the first lawsuit was filed and where the specific relief prayed for in the complaint was initially denied.

When duplicative lawsuits are pending in separate federal courts, “the entire action should be decided by the court in which an action was first filed.” *Smith v. S.E.C.*, 129 F.3d 356, 361 (6th Cir. 1997). The “first filed rule” is “a doctrine of federal comity that promotes judicial efficiency.” *Planting Resources, Inc. v. UTI Corp.*, 47 F. Supp. 2d 899, 903 (N.D. Ohio 199). Since Cobb and Badnarik first filed this identical litigation in the United States District Court for the Northern District of Ohio, this motion for a temporary restraining order is not properly before this Court and this case should be transferred to the Northern District.

**B. The Plaintiffs Have Failed To Demonstrate That They Are Entitled To Any Emergency Relief.**

The test for emergency injunctive relief is well-known and does not need to be repeated. It is obvious, however, that the Plaintiffs have completely failed in their endeavor to meet any of the elements of a temporary restraining order.

**1. The Plaintiffs Cannot Show Irreparable Harm.**

As noted above, the Plaintiffs have brought this identical claim in the case of *Rios v. Blackwell*, Case No. 3:04-cv-7724. In that case, the Court *sua sponte* denied the Plaintiffs any injunctive relief based solely upon its determination that two candidates who jointly received approximately 0.25% of the vote cannot possibly be harmed if a recount were conducted in the normal course and scope of Ohio law. Those candidates could not claim any irreparable harm because they could not claim that they would be certified as the winning candidate. The Court

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<sup>7</sup> Secretary of State Blackwell reserves the right to draft a motion to dismiss at the appropriate time further expanding upon this defense.

certified that issue for immediate appeal, but instead of attempting to litigate that case in the Sixth Circuit, the Plaintiffs brought an identical action before this Court. Instead of transferring this case, this Court agreed with the Northern District and also found that neither of the Plaintiffs could possibly suffer irreparable harm because neither of them would be victorious as a result of the recount.

The Friday before the recount started, the Plaintiffs filed yet another motion for a temporary restraining order with this Court. In that motion, the Plaintiffs asked this Court to assume complete and total jurisdiction over Ohio's election system by issuing a temporary restraining order over the manner in which Ohio's recount proceeded. They filed this motion even though such a request extends far beyond the scope of their complaint and the scope of relief sought in their complaint.<sup>8</sup>

This Court again denied Plaintiffs any relief. Regardless of the appropriateness of the scope of their request for a temporary restraining order, the Plaintiffs will not suffer irreparable harm absent an injunction.

The Plaintiffs allege that recounts are proceeding under different rules in different counties. They have, however, failed to submit any evidence whatsoever to this Court concerning that allegation. They filed their motion prior to the conducting of any recount and they merely postulated at that time that different counties would follow different rules. That allegation simply is not true. Secretary of State Blackwell issued Directive 2004-58 on December 7, 2004. That directive reiterated his instructions in October concerning the manner in which a recount is to take place. Under that directive, the board of elections is to randomly select precincts whose total votes equal at least 3% of the ballots cast in the county. Those

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<sup>8</sup> Secretary of State Blackwell's briefing of this subject is in no way an agreement from her under Fed. R. Civ. P. 15(B) to amend the complaint to conform to evidence.

ballots are to be hand counted and then run through the machines. If the counts are the same, the rest of the ballots are to be machine counted.

If recounts in various counties do not follow the very specific instructions of the Secretary of State, the Plaintiffs are not irreparably harmed. As several courts continue to point out to the Plaintiffs, they *will not receive Ohio's electoral votes as a result of this recount*. Thus, if any constitutional problem arises as a result of the recount, the appropriate way to address such a situation is through a full-fledged hearing with discovery and an opportunity to respond *after the fact*. As the Plaintiffs have failed to demonstrate that absent an immediate injunction, they would suffer irreparable harm, this temporary restraining order must be denied.

Also, the Plaintiffs' claims here have absolutely nothing to do with their newly discovered "evidence" on the uniformity of the recount procedures. Rather, they now allege one possibly hypothetical violation of Ohio law created when a computer technician properly performed work on a computer.<sup>9</sup> This activity has nothing at all to do with the recount procedures in any of the other 87 Ohio counties and does not go to the recount procedures themselves. Furthermore, any alleged, but unproven, violation of Ohio law can be addressed by the proper State authorities and is not part of this case.

**2. The Plaintiffs Are Unable To Show A Substantial Likelihood Of Success On The Merits.**

It appears as though no case dealing with the right to vote is more misunderstood than *Bush v. Gore*, 531 U.S. 98 (2000). *Bush* is a simple case that stands for a basic proposition – a State cannot have an election system under which there are different legal standards for what constitutes a vote. It most certainly does not stand for the proposition that each and every county

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<sup>9</sup> The Secretary of State will be filing a motion to strike the Plaintiffs' filings under separate cover.

board of elections must allow the same number of witnesses at a recount, or must select their random precincts in the same manner.

The issue before the Court in *Bush* was straightforward: “whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses.” *Id.* at 103. Because the local boards of election in Florida had continually redefined exactly what constituted a legally cast vote, the majority found that such a rudderless approach did violate the Equal Protection Clause. However, it is equally clear that *Bush* simply does not mean that everything in every election jurisdiction in a State must be the same.

Justice Souter, in his dissent, addressed that argument directly.

It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters’ intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on.

*Bush*, 531 U.S. at 134 (Souter, J., *dissenting*). It was not the fact that Florida had employed different voting systems that caused any type of problem. Instead, Justice Souter recognized that the constitutional problem may arise when “identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics” have different standards for what constitutes a legal vote. *Id.* at 134-35.

Furthermore, the United States District Court for the Northern District of Ohio has recently applied the *Bush* decision and the Equal Protection Clause to the issue of voting technologies. The Court held that “[l]ocal variety in voting technology, however, does not violate the Equal Protection Clause, *even if the different technologies have different levels of effectiveness in recording voters’ intentions, so long as there is some rational basis for the technology choice.*” *Stewart v. Blackwell*, (N.D. Ohio December 14, 2004) (Case No. 5:02-cv-

2028) (Attached as Exh. B) (emphasis added). The Court in *Stewart* properly recognized that different localities may use different voting technologies even if some of those technologies have a higher “error” rate. Similarly, different localities can use different rules for allowing witnesses to observe a recount *so long as the legal standard for a vote remains the same*. *Bush* is not a blanket proposition that everything must be the same in every single jurisdiction. After all, where would such a theory end? Conceivably, it would be a constitutional violation to have voters in one precinct sign the voter roll with blue ink while voters in another precinct signed the voter roll with red ink. After all, the color ink would be different rules in each of the precincts.

The specific rules at issue in this case do not go to the legal standard of a vote. They simply exist on the periphery. They concern who gets to observe a recount – not what constitutes a vote. Since the legal standard in all 88 Ohio counties is identical, there is no violation of the Equal Protection Clause and the Plaintiffs cannot succeed on the merits.

**3. The Public Good Demands That This Court Deny The Plaintiffs’ Motion For A Temporary Restraining Order.**

The Plaintiffs simply repeat their standard line that their constitutional rights are being violated, therefore, this Court must grant them emergency injunctive relief. Of course, the Plaintiffs simply have not suffered any irreparable harm and have not demonstrated a violation of any of their legal rights. On the other hand, the citizens of the State of Ohio will suffer harm if this Court grants an injunction. As of December 15, 2004, 31 of Ohio’s 88 counties have completed their recounts. The State is unaware of any genuine issue that has arisen in any of those counties. Thus, it is clear that the State of Ohio is capable of conducting a proper recount without this Court taking charge of vote counting at the behest of a candidate that received 24 votes out of the more than 5.7 million votes cast.

### **III. Conclusion**

For the foregoing reasons, the Secretary of State respectfully requests this Court to issue an order denying the Plaintiffs' motion for a temporary restraining order.

Respectfully submitted,

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**Certificate of Service**

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 16<sup>th</sup> day of December, 2004.

/s Richard N. Coglianesi  
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