

I. INTRODUCTION

Amici Curiae, County Commissioners' Association of Ohio ("CCAO") and Ohio Association of Election Officials ("OAE") (collectively "Amici"), hereby file this Brief in opposition to the Motion for Injunctive Relief, filed on December 10, 2004 by Defendants/Counterclaim-Plaintiffs National Voting Rights Institute ("NVRI"), David Cobb ("Cobb"), and Michael Badnarik ("Badnarik") (collectively "Defendants").¹ In their Motion, Defendants seek an Order from this Court that essentially takes the administration of elections in Ohio out of the hands of the Ohio Secretary of State and Ohio's eighty-eight Boards of Elections, and puts it into the hands of a third party advocacy group and two third-party candidates for President who together received less than 1/3 of 1% of the approximately 6 million votes cast for President in Ohio. This Court does not have jurisdiction to provide the relief Defendants seek, and furthermore such relief is unnecessary for the assurance of a fair and appropriate recount of Ohio's Presidential election in accord with Equal Protection standards. For these reasons, Amici respectfully urge that Defendants' Motion be denied.

II. STATEMENT OF THE CASE

According to the certified results from the Ohio Secretary of State, President George W. Bush won the Presidential election in Ohio by more than 118,000 votes over Senator John Kerry. President Bush received a total of 2,858,727 votes in Ohio. Senator Kerry received a total of 2,739,952 votes in Ohio. Defendant David Cobb received 186 votes and Defendant Michael Badnarik received 14,695 votes in Ohio.

Senator Kerry has repeatedly stated -- both through the media and through his counsel in this Court -- that neither he nor any other Democratic official is requesting a recount or

¹ This Court granted CCAO and OAE leave to appear as *Amici Curiae* during the preliminary injunction hearing on December 3, 2004.

contesting the outcome of the election in Ohio. *See, e.g.*, Jules Witcover, Op-Ed, “Recount In Ohio,” *The Baltimore Sun*, 11/26/04:

“Our eyes are wide open, and to this date we’ve found no evidence of confirmed fraud,” said Dan Hoffheimer, Kerry Ohio Campaign Counsel. “About 155,000 such ballots were cast,” Mr. Hoffheimer says, “and Mr. Kerry would have had to win nearly all of them to overcome Mr. Bush’s lead of 135,000 votes in Ohio on election night. It would have to be a virtual miracle,” he says.

Similarly, Terry McAuliffe, DNC Chairman, was quoted as saying that: “Unlike 2000, the Republicans simply received more votes than the Democrats in this election . . . We are not contesting the outcome of this election.” Carl Weiser, “For Some, Ohio Still Is Not Decided,” *The Cincinnati Enquirer*, 11/13/04.

Plaintiffs David Yost and the Delaware County Board of Elections (“Plaintiffs”), commenced this action on November 23, 2004 in Delaware County Common Pleas Court seeking an Order that the Delaware County Board of Elections (“Delaware County BOE”) was not required to conduct a recount of the ballots cast for President in Delaware County. On that same day, the Delaware County Common Pleas Court issued a temporary restraining order prohibiting the Delaware County BOE from conducting a recount requested by Presidential Candidates Cobb and Badnarik.

Defendants removed the case to this Court on November 29, 2004, and Defendants joined Secretary of State J. Kenneth Blackwell as a Counter-Claim Defendant. On December 3, 2004, this Court conducted a preliminary injunction hearing on Plaintiffs’ Motion for Preliminary Injunction and Defendants’ Cross-Motion for Preliminary Injunction. This Court denied Plaintiffs’ Motion, finding that Chapter 3515 of the Ohio Revised Code required the Delaware County BOE to conduct a recount. This Court also denied Defendants’ Motion seeking an

expedited recount, finding that Defendants were seeking the same relief that had been denied them by Judge Carr in *Rios v. Blackwell*, N.D. Ohio No. 3:04-CV-7724 (filed November 22, 2004).

On December 10, 2004, Defendants filed a second Motion for Preliminary Injunction seeking an order from this Court to govern various recount procedures. Although Defendants contend that the counties will be conducting the recount in an arbitrary and inconsistent manner, that is simply not the case. Moreover, this matter does not properly rest before this federal court.

III. LAW AND ARGUMENT

A. This Court Is Without Jurisdiction To Adjudicate Defendants' Motion.

1. The Standard for Federal Jurisdiction

It is axiomatic that the federal courts are courts of limited jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994). Indeed, the party seeking to invoke the subject matter jurisdiction of a federal district court bears the burden of showing that the matter is properly before that court. *See Serras v. First Tenn. Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 80 L. Ed. 1135, 56 S. Ct. 780 (1936)).

Title 28 U.S.C. § 1331 provides that the “district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” In determining whether an action “arises under” federal law, district courts refer to the well-pleaded complaint rule, which requires that a federal question be presented on the face of the complaint. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987); *Louisville v. Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152, 53 L. Ed. 126, 29 S. Ct. 42 (1908).

As this Court recognized in the preliminary injunction hearing held on December 3, 2004, the Court’s jurisdiction must be based on Plaintiffs’ Complaint, not Defendants’

Counterclaim. It is a well-established principle of the well-pleaded complaint rule that a counterclaim cannot form the basis for federal jurisdiction. The well-pleaded-complaint rule does not allow a counterclaim to serve as the basis for a district court's "arising under" jurisdiction. To rule otherwise would contravene the face-of-the-complaint principle set forth in this Court's prior cases, see, *e.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 107 S. Ct. 2425, and the longstanding policies furthered by that principle: It would leave acceptance or rejection of a state forum to the master of the counterclaim rather than to the plaintiff; it would radically expand the class of removable cases; and it would undermine the clarity and ease of administration of the well-pleaded-complaint doctrine." *Holmes Group, Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, syllabus at (b) (2002).

Accordingly, a case arises under federal law, for purposes of Section 1331, when it is apparent from the face of the plaintiffs' complaint either that (1) the plaintiffs' cause of action was created by federal law, *Mottley*, 211 U.S. at 152, or, (2) if plaintiffs' claim is based on state law, a substantial, disputed question of federal law is a necessary element of the state cause of action. *Gully v. First Nat'l Bank*, 299 U.S. 109, 112, 113, 81 L. Ed. 70, 57 S. Ct. 96 (1936). "Only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983).

There is no constitutional or statutory basis for this Court to exercise jurisdiction over the laws adopted by the Ohio legislature to conduct a recount. Nor can Defendants properly raise a federal question in the context of this case. Defendants' Motion should be denied and the case remanded to state court.

2. Defendants' Counterclaims Do Not Present A Federal Question

Defendants in the instant case attempt to invoke this Court's jurisdiction under 28 U.S.C. § 1331, as a "civil action arising under the Constitution, laws or treaties of the United States" by basing their Motion for relief upon 42 U.S.C. § 1983. *See* Memo. in Support, at 4-5. But Plaintiffs did not bring a claim for relief under Section 1983. *See generally* Complaint. The Section 1983 claim was raised by Defendants in their counterclaim. *See* Counterclaim, ¶¶ 30, 85-90. As the Supreme Court held in *Holmes Group, supra*, and as this Court has already held, jurisdiction must be found in a plaintiff's well-pleaded complaint, not a defendant's counterclaim.

Neither does Article II, § 1, Clause 2 of the United States Constitution provide a mechanism for federal jurisdiction in this instance. The Constitution makes clear that the mechanism and manner for choosing a state's electors is up to each individual state:

Each State shall appoint, in such Manner as the Legislature hereof may direct, a Number of Electors, equal to the whole Number of senators and Representatives to which the State may be entitled in the Congress (Emphasis added.)

U.S. Const., Art. II, § 1, Cl. 2; *see also* *Bush v. Gore*, 531 U.S. 98, 104, 148 L. Ed. 2d 388, 121 S. Ct. 525 (2000) (recognizing right of state to determine manner for choosing Presidential electors); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 861, 131 L. Ed. 2d 881, 115 S. Ct. 1842, n.8 (1995) (recognizing that the Constitution leaves to the states the manner in which it selects its Presidential electors); *McPherson v. Blacker*, 146 U.S. 1, 28-35, 36 L. Ed. 869, 13 S. Ct. 3 (1892) ("the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States" and recognizing that the State legislature's power to select the manner for appointing electors is plenary, it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the framing of our Constitution.)

Consistent with Article II, § 1 of the United States Constitution, the method that the Ohio legislature has chosen to select its Presidential electors is a direct election by the people of Ohio through popular vote. R.C. § 3505.10. Votes cast next to the names of the candidates for President and Vice President are “counted as a vote for each of the candidates for presidential elector whose names have been certified to the secretary of state.” R.C. § 3505.10(A). Ohio statutes also govern certification and conduct of Presidential electors. R.C. §§ 3505.39 and 3505.40.

Plaintiffs’ Complaint was based solely on Ohio’s recount statute. It did not reference federal law or raise a disputed issue of federal law, but rather only Ohio law as it relates to the counting and recounting of Ohio ballots. While the United States Constitution might generally give states the authority to conduct elections, the issue of how recounts will be conducted in Ohio arises exclusively under Ohio’s election laws. In fact, this Court denied Delaware County’s request to be excused from participation in the statewide recount. In accordance with that order, Delaware County began its recount on December 18, 2004. All other counties are proceeding with recounts pursuant to state law and the Secretary of State’s direction. Accordingly, Defendants’ Motion must be denied.

B. The Procedures For Recounting Votes Issued By Secretary of State Directive Do Not Implicate *Bush v. Gore*.

Defendants further assert that federal jurisdiction is appropriate under *Bush v. Gore* and allege that a number of unsupported, perceived and miniscule differences between the manner in which the recount is proceeding somehow implicates *Bush*. However, *Bush v. Gore* is not implicated in this situation as uniform standards and guidelines are in place and applicable to all counties. Even if there were minor differences between the methods used by counties, such differences do not rise to the level of a constitutional violation. In fact, *Bush v. Gore* itself so holds.

The United States Supreme Court ruled in *Bush* that the Florida Supreme Court's attempt to require a last minute change in the recount procedures in the 2000 presidential election in Florida was an unconstitutional exercise in violation of the Fourteenth Amendment's Equal Protection Clause. *Bush*, 531 U.S. at 109-115. In the weeks following the 2000 Presidential election, the Supreme Court of Florida and other Florida courts ordered several counties to undertake differing methods of counting ballots after an automatic recount had already taken place. The Florida Supreme Court also required that certain votes be included in the already-completed certified results, the recounting of uncounted votes, and a full statewide manual recount of all votes not originally subject to manual tabulation. *See Bush*, 531 U.S. at 100-103. The U.S. Supreme Court reviewed the actions of the Supreme Court of Florida finding a violation of the Equal Protection Clause with respect to the directionless manual recounts ordered by Florida's highest court.

The U.S. Supreme Court concluded that the Florida Supreme Court's adoption of new recount procedures, put forth weeks *after* the conclusion of the November 2000 Presidential election, were inconsistent with the obligation to avoid arbitrary and disparate treatment of

members of its electorate. *Bush*, 531 U.S. at 105. As Chief Justice Rehnquist noted in his concurring opinion, while isolated sections of the [Florida] Code may well admit to more than one interpretation, the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility between the legislature and the Secretary of State. *Id.* at 113-114. The Chief Justice continued that in a Presidential election, courts must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those expressly empowered by the legislature to carry out its constitutional mandate. *Id.*

The situation in the present case is much different than that faced by the *Bush* Court. In Florida, the “directives” were issued by the Florida Supreme Court after the election. The standard enunciated by the Florida Court – the “intent of the voter” standard – was stricken by the United States Supreme Court as imprecise and subjective. *Bush*, 531 U.S. at 106 (“The problem inheres in the absence of specific standards to ensure its equal application.”).² In that instance, the standard as to how to count votes and what votes would be counted as legal votes were open to subjective interpretation on a county-by-county basis. In the present case, uniform standards were established in law and applicable to all counties long before the election.

Further, in Florida in 2000, the critical issue was a lack of standards for counting certain ballots. As the Supreme Court in *Bush* stated:

Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to count them. In some cases a piece of the card -- a chad -- is hanging, say by two corners. In other cases there is no separation at all, just an indentation.

² It is noteworthy that the dissent in *Bush* stated that the “intent of the voter” standard was not so subjective as to constitute an Equal Protection violation. *Bush*, 531 U.S. at 125-26 (Stevens, J., dissenting).

Bush, 531 U.S. at 110. In contrast, Ohio law sets forth explicitly what constitutes a legal vote, *see* R.C. §§ 3515.04, 3506.16, and the Directives issued by the Secretary of State specifically set forth the manner by which the recount is to be conducted. An Equal Protection problem does not arise simply because the Directives are not as specific or contain the level of minutiae that Defendants would prefer.

Moreover, Defendants are wrong that the various Boards of Elections will not be following the same procedure throughout Ohio. Each Board of Election is required to follow the same statutes and directives in conducting their recount. Simply put, no Equal Protection issue arises in regard to the Ohio vote because these procedures outlined by the Directives are applicable in every county throughout Ohio. For example, every county does a manual recount of a 3% sample of all ballots, and then “runs” this sample through the counting machine to determine the accuracy of the machine. Every county conducts a full machine recount or a full manual recount based upon the Directives thereafter. And every county determines what is and what is not a vote the same way – in accord with established Ohio law. In *Bush*, the Supreme Court noted that the Constitutional problem arose when no minimum standards were in play, resulting in counties applying differing standards *ab initio* in recounting the vote. Such is not the case in Ohio. Ohio’s Boards of Elections each count the vote the same way and determine what constitutes a legal vote the same way.

Bush is also inapplicable because the Electoral College has already met and cast its electoral votes. In *Bush*, the Constitutional crisis arose when votes could not be recounted in such a uniform manner in time be completed by the safe harbor date provided in 3 U.S.C. § 5. No similar problem exists in Ohio. The safe harbor date was December 7, 2004 and the Electoral College met and cast their votes on December 13, 2004. There is no deadline to meet

in this case in order to ensure that Ohio's electoral votes are cast and recognized before Congress, making the narrow factual application of *Bush* inapplicable in this case.

Finally, an Equal Protection problem does not arise simply because Ohio's Boards of Elections conduct voting with different types of voting machines, or some Ohio counties use punch card ballots. This week, Judge David Dowd held that Ohio's use of punch card voting systems (as well as the use of optical scan ballots with central location tabulation) does not violate the Voting Rights Act or Equal Protection Clause of the United States Constitution. *See Stewart v. Blackwell*, N.D. Ohio No. 5:02-CV-2028, at 29-33 (Dec. 14, 2004).

Nor does *Bush v. Gore* require the state to impose, or counties to follow, a lock-step process that regulates every minute detail of the electoral process. As Justice Stevens wrote in *Bush*, a county's decision regarding which balloting systems to use and how ballots are designed does not provoke a Constitutional problem:

'We must remember that the machinery of government would not work if it were not allowed a little play in its joints.' *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501, 75 L. Ed. 482, 51 S. Ct. 228 (1931) (Holmes, J.). If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ -- despite enormous differences in accuracy -- might run afoul of equal protection. So, too, might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.

Bush, 531 US at 126 (Stevens, J., *dissenting*). *Bush* does not govern this case and does not require a finding that the Directives at issue violate Equal Protection standards.

IV. CONCLUSION

For the above reasons, Amici respectfully urge this Court to remand this case to the State Court or, if no remand is ordered, deny the relief requested by Defendants in this action.

Respectfully submitted,

/s/ Mark Landes by Jeffrey A. Stankunas
(0072438) per authority given 12/16/04
Mark Landes, Esq. (0027227)
ISAAC, BRANT, LEDMAN & TEETOR LLP
250 East Broad Street, Ste. 900
Columbus, Ohio 43215
Telephone: (614) 221-5149
Facsimile: (614) 365-9146
E-mail: marklandes@isaacbrant.com

Attorney for Amici Curiae
County Commissioners' Association of Ohio and
Ohio Association of Election Officials

CERTIFICATE OF SERVICE

I certify that the foregoing document was electronically filed with this Court on the 16th day of December, 2004. 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/ Mark Landes by Jeffrey A. Stankunas (0072438)
per authority given 12/16/04
Mark Landes