

IN THE SUPREME COURT OF OHIO

Moss, et al.,

Contestors,

Case No. 04-2088

v.

Bush, et al.,

Contestees.

MEMORANDUM OF CONTESTORS' COUNSEL ROBERT J. FITRAKIS, SUSAN TRUITT, AND PETER PECKARSKY IN OPPOSITION TO MOTION OF SECRETARY OF STATE BLACKWELL AND OHIO'S TWENTY PRESIDENTIAL ELECTORS FOR SANCTIONS PURSUANT TO CIV. R 11 AND S. CT. PRAC. R. XIV, §5

Pursuant to S. Ct. Prac. R. XIV and Civ. R. 7 and 11 and for the reasons stated below and to be stated at the hearing (if any) on this motion, contestors and their counsel, Robert J. Fittrakis, Susan Truitt, and Peter Peckarsky oppose the Motion of Secretary of State Blackwell and Ohio's Twenty Presidential Electors for Sanctions Pursuant to Civ. R 11 and S. Ct. Prac. R. XIV, §5 ("Motion").

The United States was founded by people willing to risk their lives, their fortunes, and their sacred honor to be able to elect their leaders freely and fairly. Since the Revolution, free and fair elections have made our nation strong and provided the stable leadership necessary to overcome substantial obstacles. With knowledge of the numerous widespread irregularities which affected the vote in connection with the November 2, 2004, general elections, the Contestors chose to exercise their right to contest peacefully and lawfully the December 6, 2004, decision of Secretary of State J. Kenneth Blackwell (the co-chair of the Ohio 2004 Bush-Cheney campaign) to certify George W. Bush and Richard B. Cheney as the winners of Ohio's electoral votes.

It is precisely because of the need to maintain stable processes for selecting and placing elected leaders in office that an election contest must be conducted expeditiously. Given the Constitutional requirements, a contest of a Presidential election must be conducted with

extraordinary speed. U.S. Const., Amend. XII, Amend XX, § 1; R.C. § 3515.09.

Three of the lawyers (Susan Truitt, Robert J. Fitrakis, and Clifford O. Arnebeck, Jr.) representing contestors conducted hearings on November 13, 2004, and November 15, 2004, at which witnesses were placed under oath and testified from their own personal knowledge of election irregularities they witnessed. Transcripts of these hearings are being filed as Exhibit 1 and Exhibit 2, respectively, to this memorandum. A summary of just a few of the more glaring irregularities about which testimony was given on November 13 and 15, 2004, is set forth in "The Disenfranchised Speak Out Ohio Voters On 2004 Election Irregularities" which is being filed as Exhibit 10 to this memorandum. One of these lawyers (Dr. Robert J. Fitrakis) had experience as an international election observer in connection with the first free and fair election held in El Salvador. Affidavit of Robert J. Fitrakis, ¶¶ 2 and 7. (The Affidavit of Robert J. Fitrakis is being filed as Exhibit 15 to this memorandum.) Dr. Fitrakis was also in a position on election day 2004 (November 2, 2004) from which he was able to observe the election processes in Franklin County, Ohio (specifically in Columbus, Ohio) and gather information about the conduct of the election. Fitrakis Affidavit, ¶ 8.

The Status Report of the House Judiciary Committee Democratic Staff also demonstrates the factual basis for the assertion that hundreds of thousands of votes (enough to change the outcome in the Ohio Presidential election) and voters were affected by election irregularities.

The Status Report said at page 4:

"We have found numerous, serious election irregularities in the Ohio Presidential election, which resulted in a significant disenfranchisement of voters. Cumulatively, these irregularities, which affected hundreds of thousands of votes and voters in Ohio, raise grave doubts regarding whether it can be said the Ohio electors selected on December 13, 2004, were chosen in a manner that conforms to Ohio law, let alone

federal requirements and constitutional standards.”

After further investigation by contestors’ counsel which continued after the hearings held on November 13 and 15, 2004, a predecessor to this original action was filed on December 13, 2004; the captioned original action was filed on December 17, 2004.

Contestors had until Ohio’s electoral votes were accepted by the Congress to obtain a judgment declaring that the ticket of John Kerry and John Edwards won Ohio’s electoral votes.

While the first date on which Congress could theoretically consider whether to accept the electoral votes from Ohio cast by the Bush-Cheney electors was January 6, 2005, the Congressional consideration could have come a substantial number of days later as was explained in Contestors’ Response To December 22, 2004, Order Requiring Written Memorandum To Be Filed On Or Before December 28, 2004 With Respect To Two Questions which was filed in this original action on December 28, 2004 (“December 28 Memorandum”). The explanation is as follows:

Under 3 U.S.C. §15, the process of counting the electoral votes provides for a challenge to the electors from each state. Each challenge may be debated for up to two (2) hours by the full Congress. 3 U.S.C. § 15. After the debate, the Senate (100 members) and House (435 members) retire alone to their separate chambers to decide the challenge. Then they return to a combined meeting to consider the next state. The electoral votes from each state are considered in alphabetical order. 3 U.S.C. § 15. Ohio is thirty-sixth¹ on an alphabetical list of states. Given the time of debate and the time to separate into the House and Senate chambers, to vote, and to return to a joint session, it could take about four (4) hours to decide each challenge. Thus, about 140 hours could be required even to reach the point where the Congress could consider the electoral votes being submitted by

¹ In the December 28 Memorandum, it was mistakenly noted that Ohio was thirty-seventh in the alphabetical list of states. The correct numerical position of thirty-sixth and the appropriate number of hours (140) are used here. The essential point remains the same.

Ohio. If these challenges were to occur and be considered at the rate of ten (10) hours per day, the issue of the validity of Ohio's electoral votes would not even arise until after noon on January 20, 2005. The Constitution and the Congress have provided for this eventuality in 3 U.S.C. § 19.

The results as certified by the Ohio Secretary of State ("Certified Results") were that the Bush-Cheney ticket defeated the Kerry-Edwards ticket by 118,775 votes.

While contestors' counsel found and alleged evidence that there was vote fraud in Ohio, in the specification of the minimum number of votes which were miscounted per county, contestors alleged that the results were due to "error, fraud, or mistake" which is in accord with Ohio law governing election contests. Verified Election Contest Petition, ¶ 94. The evidence contestors and their counsel found was the large difference between an exit poll conducted under the direction of world-renowned exit poll expert Warren Mitofsky and the results reported both in Ohio, nationally, and in other states. Baiman Affidavit generally and Exhibit H in particular.

Clear and convincing evidence is needed to prevail in an election contest. As is shown below by the deposition testimony (Exhibit 5 filed herewith) and affidavit (Exhibit 16 filed herewith) of contestors' expert Dr. Ron Baiman, the available evidence supports a conclusion that not only did contestors have clear and convincing evidence, they established their case beyond any reasonable doubt.

In an election contest, all evidence must be submitted to the Supreme Court in the form of deposition testimony. R.C. § 3515.16. In the view of contestors and their counsel, there were enough individual election irregularities with enough effect on the Certified Results to change the outcome of the Presidential election. It was not reasonable to conduct and file with the court transcripts of approximately 119,000 depositions in the twenty (20) days allowed by statute. R.C. 3515.16. While an extension of time was possible under Ohio law (although not guaranteed), the Constitutional and

federal statutory framework indicated it was reasonable to select a simpler and more expeditious manner of gathering and submitting the evidence of a number of votes being cast sufficient to change the outcome in Ohio's selection of its Presidential electors.

Instead, contestors and their counsel chose to present the proof through the deposition testimony of one expert in statistics (Dr. Ron Baiman), one expert in the analysis of anomalous data (Dr. Richard Hayes Phillips), and one minister with a doctorate (Dr. Werner Lange) who had first-hand knowledge of election irregularities in his county which, if repeated statewide, would have resulted in the casting and counting of some 62,000 unlawful absentee ballots. The Transcript of the December 30, 2004, Deposition of Dr. Phillips with Deposition Exhibits 1-22 were all filed in a timely manner on January 5, 2005, and are being filed as Exhibit 3 to this memorandum. The Transcript of the December 30, 2004, Deposition of Dr. Lange with Deposition Exhibits 1-2 were all filed in a timely manner on January 5, 2005, and are being filed as Exhibit 4 to this memorandum. The Transcript of the December 30, 2004, Deposition of Dr. Baiman with Deposition Exhibits 1-3 were all filed in a timely manner on January 6, 2005, and are being filed as Exhibit 5 to this memorandum.

The salient points of Dr. Baiman's testimony are:

1. Dr. Baiman has the education, experience, training, and background to serve as an expert in the field of statistics and in particular as an expert in the field of statistics as applied to analyzing exit poll results and reported results from the 2004 Presidential elections and other elections. Baiman Transcript ("Tr."), page 6, line 9 (6:9) to 10:25; Baiman Dep. Ex. 1, pages 1-3.
2. Dr. Baiman studied the relationship between the exit poll results and the reported or "actual" results for the November 2, 2004, election of President and Vice President on a national basis and in Ohio, among other places. Baiman Tr., 11:1 to 11:16.

3. Dr. Baiman and a Dr. Jonathan D. Simon prepared an article (“The 2004 Presidential Election: Who Won The Popular Vote? An Examination of the Comparative Validity of Exit Poll and Vote Count Data”) analyzing the relationship between the exit polls and the reported results for the November 2004 Presidential election. Baiman Tr. 11:12 to 12:3. A copy of the December 28, 2004, version of the article is Baiman Deposition Exhibit 2.
4. The data sources Dr. Baiman used for information on the exit polls and the national and state results is the type of information upon which Dr. Baiman would rely in his work as an economist and a statistician. Baiman Tr. 18:9 to 18:14.
5. Given the exit poll results and a methodologically correct exit poll, the probability that the Kerry-Edwards ticket won in Ohio was about 99%. Baiman Tr. 48:18 to 51:17.

These conclusions are supported and amplified with further analysis by Dr. Baiman in an Affidavit of Dr. Ron Baiman filed as Exhibit 16 to this Memorandum.

In the Affidavit and an attached article (Exhibit E to the Baiman Affidavit), Dr. Baiman analyzes and rejects various explanations offered by Mr. Warren Mitofsky who conducted the exit polls (both of voters in various states including Ohio and a separate national sample).

Dr. Baiman’s conclusion in his Affidavit, ¶ 15 is:

“In my professional opinion, the fact that these exit poll discrepancies are so large, so one sided, and so concentrated in battleground states; and the fact that no plausible ‘exit poll error’ explanation for them has been offered (see Exhibit E); leaves no reasonable doubt that in a free and fair election John Kerry would have won in Ohio and would have won the national popular vote.”

Contestors sought to obtain an explanation of the large difference between the exit poll results and the reported results, but Mr. Mitofsky refused to provide either a deposition or the raw questionnaires needed to analyze the exit poll results independently. See Letter dated December 23, 2004, to John Zucker, Senior Vice President for Law and Regulation, ABC, Inc., from Peter Peckarsky (a copy of this letter is being filed as Exhibit 6 to this Memorandum).

The Motion is an attack on both the civil rights of the Contestors, who acted pursuant to powers granted to them in the Constitution of the United States by the Founding Fathers, and the civil rights of Ohio voters of all parties to contest any future Ohio election. U.S. Const, Art. II, Sec. 1, cl. 2 and Amend I.

Given the provisions of R.C. § 3515.11, it is arguable that Ohio law does not permit the granting of a motion for sanctions pursuant to either Ohio Rule of Civil Procedure 11 or Supreme Court Rule of Practice XIV, § 5 in the context of a contest of an election.

In *In re Election of November 6, 1990 for the Office of Attorney General of Ohio* (1991), 62 Ohio St.3d 1, this Court said:

“We do not accept the premise that contestee, alone, was defending the interests of the public in this election contest. A contestor who raises arguable claims, as contestor did here, also serves the public interest by raising and litigating important questions concerning the public’s vote.”

As shown by Exhibits 8, 9, 11, 12, and 13 to this Memorandum there is a high level of continuing public interest in maintaining free and fair elections which is the goal to which contestors were contributing with this original action.

In sum, contestors’ counsel were acting in good faith to represent their clients and the public interest of all people in Ohio and all Americans in fair and free elections. Affidavit of Susan Truitt

(Exhibit 17 to this Memorandum); Affidavit of Peter Peckarsky (Exhibit 18 to this Memorandum);
Supplemental Affidavit of Robert J. Fitrakis (Exhibit 19 to this Memorandum).

Contestors' counsel filing this Memorandum respectfully request that this Court deny the
Motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the persons listed below by mailing a copy by U.S. Mail addressed to the following at the addresses indicated below this 28th day of January, 2005.

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Robert J. Fitrakis

IN THE SUPREME COURT OF OHIO

Rev. Bill Moss, et al.,

Contestors,

vs.

Case No. 04 – 2088

George Bush, et al.,

Contestees.

**CONTESTOR ATTORNEY ARNEBECK'S MEMORANDUM CONTRA MOTION OF
SECRETARY OF STATE BLACKWELL ET AL. FOR SANCTIONS**

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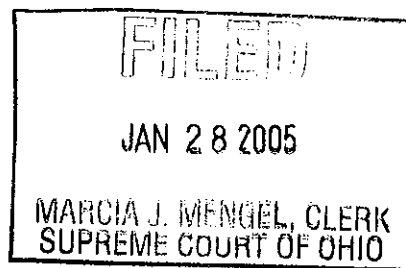
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**CONTESTOR ATTORNEY ARNEBECK'S MEMORANDUM CONTRA MOTION OF
SECRETARY OF STATE BLACKWELL ET AL. FOR SANCTIONS**

The Attorney General's motion for sanctions is false and defamatory. It appears to be submitted for the partisan purpose of attempting to discredit those who brought the challenge, and most particularly the undersigned attorney, because of his filing in federal court to pursue the civil rights and fraud issues raised in the challenge. (See Attachments 1 and 2, hereto). There is no basis for considering such a motion in this special statutory proceeding which is limited to the narrow purposes and processes set forth in the statute. Neither an action for frivolous conduct under R.C. 2323.51 nor under Civ. Rule 11 is a part of the statutory scheme. *In re Election of November 6, 1990 for the Office of Attorney General of Ohio* (1991), 62 Ohio St.3d 1.

What costs would the Attorney General have these public interest lawyers bear? The cost of the Attorney General's office time in stonewalling, or their time in trying to intimidate the voters who signed the challenge petition, or the time in preparing public relations statements in connection with their partisan and frivolous motion for sanctions?

The Attorney General's office's role in this litigation has been to defend Kenneth Blackwell acting in his partisan role as co-chairman of the Bush Cheney campaign in Ohio. When acting in that role Blackwell should have been defended at the expense of the Ohio Republican Party or, more specifically, the Bush Cheney campaign, not at the expense of Ohio taxpayers. The Attorney General has a conflict of interest when he represents the partisan interest of the Republican Party while purporting to represent the citizens of Ohio.

The public interest, insofar as the Secretary of State of Ohio as chief elections officer for the state of Ohio, was and is for the Secretary of State to perform his official duty to account

under oath for the validity of the 2004 election in Ohio instead of stonewalling against any real accountability. The stonewalling creates the appearance that there were both fraud and civil rights conspiracies as to which the Secretary of State was complicit. The Secretary of State does not want to be cross-examined, and his counsel recognizes Blackwell's vulnerability to cross examination as an instrument of getting to the truth.

Because of its misrepresentations, obvious to anyone familiar with the facts in the case, the Attorney General's motion is frivolous. Most significantly is the headline misrepresentation that the attorneys bringing the challenge did not present any evidence. Because the initial challenge was accompanied by a request for injunctive relief, the motion attached affidavits of experts supporting the requested decision that the Electoral College should not meet until the challenge was resolved, and as the litigation progressed the contestors placed substantial deposition testimony into the record which is before the court.

The motion by the Secretary of State/Attorney General is so devoid of legal merit and substance as to appear to have been prepared by the Attorney General's public relations office for nothing more than the kind of broadside attack used by tobacco companies in attacking "lawsuit abuse." When tobacco companies talk about lawsuit abuse they are referring to the billions of dollars they had to pay for their fraud and misrepresentation in knowingly selling and promoting a product which was dangerous to the health of Americans.

The transparent purpose of these motions by the Attorney General to is to give credibility to the threat of the Attorney General to use his office to engage in further defamatory activity against this attorney for his actions in federal court to further expose the fraud and civil rights

violations of the Bush Cheney campaign in the November 2, 2004, election. The motion for sanctions was filed on the next business day after the Friday on which Arnebeck filed a motion to intervene in a pending federal case involving voting rights violations in Franklin and Knox County on behalf of the Alliance for Democracy. On Friday of that week Arnebeck received the threat from the Attorney General to attempt a similar hatchet job against Arnebeck unless he withdrew his motion to intervene in the federal case.

A normal part of a serious motion for sanctions would include some evidence that the activity of a lawyer fell below the standard of care. A violation of Rule 11 involves more than mere negligence. A claim of negligence would require an expert affidavit. No such affidavit was submitted in this case by the Secretary of State or the Attorney General.

This effort by the Attorney General to seek Rule 11 sanctions in the context of this special statutory procedure is itself an abuse of process. If the Attorney General wants to make a claim against the lawyers for having abused process he should have filed a lawsuit for abuse of process, which could then be subject to a counterclaim, to discovery, and to the general protections, including right to jury trial to civil lawsuit. An affirmative affidavit of Attorney Arnebeck as Counsel for Contestors meeting the applicable standard of care is attached hereto as Attachment 3.

This kind of gamesmanship would nullify the effectiveness of the statutory procedure to function as it was intended. It derails it. It permits Bush to get away with a fraudulent election without anyone having to go under oath and without any respect for due process in the handling of the claim of fraud.

The Attorney General's proposed use of Rule 11 to sanction public interest lawyers, without a trial, for having tried to engage the legal process to hold accountable those responsible for fraud is misguided and illegal . The Attorney General seeks to engage a Republican Justice to carry out a partisan Republican plan to suppress dissent and the right to petition government for redress of grievances through the court system. This is totally inconsistent with both the statutory scheme and the fundamental concept of checks and balances built within the American constitutional system.

Because Arnebeck is the lawyer who has filed in federal court to press the investigation of fraud and civil rights conspiracy in the November 2, 2004 Presidential election, he has prevented partisan Republicans from being able to say that those who challenged the honesty of the Ohio election have given up and gone away.

Arnebeck's role in this case grew out of his work over the past four years on behalf of the Alliance for Democracy in seeking to counter the Chamber of Commerce's effort to buy the Ohio Supreme Court with the use of illegal corporate money.

Co-counsel Bob Fittrakis has achieved a high-level recognition and accomplishment as an investigative reporter. Corrupt government officials have gone to prison based upon Fittrakis' work as an investigative reporter. Fittrakis' work as an investigative reporter on behalf of death row inmates is legendary. The careful investigatory work and articulate reporting convinced the conscience of the Columbus community of the innocence of John Byrd.

To suggest that anything Bob Fittrakis would be associated with in a professional legal capacity is frivolous is ludicrous on his face. The complaint against Bob Fittrakis is that in his

combined role as both a lawyer in this case and publisher of the Free Press he did too good a job in communicating to the public and the world the facts in this election case.

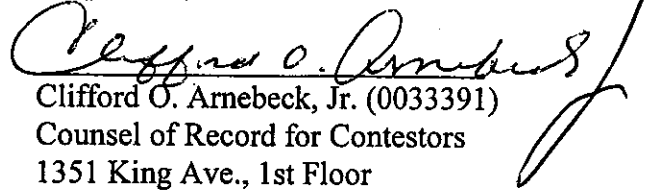
Co-counsel Susan Truitt has used her considerable skills both to articulate the legal issues involved in this flawed election with the creation of organizations that can carry the message to the public and give the public a meaningful role not only in judicial consideration of these issues but also the legislative consideration. Once again, any criticism of Susan from her legal adversaries is that she is too effective. Any suggestion that her analogy between the situation faced Ohio in this election and that faced by the citizens of the Ukraine is frivolous is itself frivolous because the analogy clearly applies and its logic is irrefutable.

Peter Peckarsky is a technical lawyer who took responsibility for the technical drafting of most of the pleadings in the case. Once again, there has not been a single criticism as to the inaccuracy of any number of specific facts placed in evidence. The Attorney General is trying to place the label frivolous on facts and arguments because he is unable to frame an argument based upon evidence and logic.

As the real target for this motion, filed for the purpose of intimidating Arnebeck as an attorney from aggressively representing his public interest client, Arnebeck can only say that honest government and legitimate elections are my professional interest. Arnebeck does not intend to be deterred from pursuing the public interest by the improper actions of any public official, even if that public official holds the title of attorney for the public and the State of Ohio. In this instance the Attorney General to state of Ohio may unwittingly have placed himself in a position of obstructing justice rather than upholding it through the filing of this partisan motion,

which is lacking legal merit and is intended to terminate the search for truth and accountability in an election of profound importance to in the citizens of Ohio, United States and the world.

Respectfully submitted,



Clifford O. Arnebeck, Jr. (0033391)

Counsel of Record for Contestors

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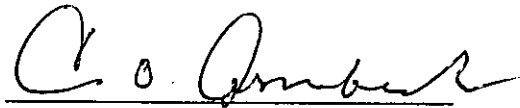
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon Kurtis Tunnell, 100 South 3rd Street, Columbus, OH 43215 and Richard Coglianesse, 30 East Broad Street, 17th Floor, Columbus, OH 43215 by ordinary mail and by hand delivery to co-counsel for the contestors, this 28th day of January, 2005.



Clifford O. Arnebeck, Jr.



THE PLAIN DEALER

Attorney general's call to punish lawyer is reply to election challenge

Wednesday, January 19, 2005

Reginald Fields
Plain Dealer Reporter

Columbus

— Ohio's attorney general has asked the state's high court to sanction a lawyer who counseled a group filing legal challenges to last year's presidential election.

The motion, which called the challenges "meritless," was filed on behalf of Secretary of State Ken Blackwell, Ohio's top elections official, said Kim Norris, spokeswoman for Attorney General Jim Petro.

Columbus attorney Clifford Arnebeck, who represents 37 voters seeking to overturn President Bush's Ohio victory, is the target of the motion filed Tuesday.

"This motion is frivolous," said Arnebeck, whose filings accused the state and the Bush administration of election fraud and a coverup.

The state's motion admits there were Election Day problems but called them "irregularities" and not fraud. And the motion states that the protesters filed a "meritless claim" for "partisan political purposes."

"A contest proceeding is not a toy for idle hands," the motion states. "It is not to be used to make a political point, or to be used as a discovery tool, or used to inconvenience or harass public officials, or to be used as a publicity gimmick."

"A contest proceeding is a wholly inappropriate forum to address the localized problems of long lines, shortages of machines, failing to receive notice of the proper voting precinct or casting of provisional ballots," the motion states.

But Arnebeck said his clients "put in a great deal of evidence in the form of affidavits and sworn testimony." He accused Blackwell of "stonewalling" and refusing to answer questions as requested in his December court filings.

"It is arrogant, and basically he is assuming a position as if he were the king and the king can do no wrong," Arnebeck said.

"Mr. Arnebeck is an individual harassing the Ohio election establishment with frivolous claims and providing no basis for his allegations and charges," said Carlo LoParo, Blackwell's spokesman. "Enough is enough."

Ohio's 20 electoral votes went to Bush, who won the state by 118,000 votes over Sen. John Kerry.

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

Ohio Democratic Party,	:	
	:	
Plaintiff,	:	Case No. 2:04-cv-1055
	:	
vs.	:	Judge Marbley
	:	
J. Kenneth Blackwell, <i>et al.</i> ,	:	Magistrate Judge Abel
	:	
Defendants.	:	

**Motion By Defendant J. Kenneth Blackwell and Intervening Defendant
The State of Ohio For Sanctions Against Purported Intervenor
The Alliance For Democracy Under Fed. R. Civ. P. 11**

Now comes Defendant J. Kenneth Blackwell and Intervening Defendant the State of Ohio and moves this Court for an order pursuant to Fed. R. Civ. P. 11 for sanctions against purposed intervenor The Alliance for Democracy and their attorney. A memorandum in support is attached.

Respectfully submitted,

JIM PETRO

Ohio Attorney General



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Memorandum In Support

I. Introduction

This case has had an interesting history. At approximately 7:00 p.m., on election night, the Ohio Democratic Party filed this lawsuit against Secretary of State Blackwell, and the Franklin and Knox County Boards of Elections.¹ The lawsuit complained about long lines in Franklin and Knox County and asked this Court to order those counties to provide paper ballots to people who were waiting in line. (Of course, it turns out that person who determined machine placement in Franklin County is a Democrat.)

This Court heard undisputed testimony that it would be physically impossible to provide paper ballots to any precincts that were experiencing lines. Additionally, Defendants noted to the Court that voters waiting in line did not qualify as provisional voters. In either case, Defendants warned that any voter who cast a ballot in any fashion other than provided by law would be disenfranchised. Nevertheless, this Court ordered paper ballots to be distributed to anybody who wanted one. The counties reluctantly prepared to comply despite the fact that such ballots were and are illegal under Ohio law and would result in the automatic disenfranchisement of anybody unfortunate enough to vote on the illegal ballot.

Apparently recognizing that their request for relief would result in the disenfranchisement of Ohio voters, the Ohio Democratic Party faxed a letter to the boards of elections in Franklin and Knox Counties informing them that they did not intend to try and enforce the Court's order, but that the Democratic Party merely wanted each of those counties to make people waiting in line "as comfortable as possible."

¹ For some inexplicable reason, the Ohio Democratic Party filed this claim against Secretary of State Blackwell despite the fact that the purchase and placement of voting machines in Ohio is controlled by the local boards of elections.

Understanding that the end result of this litigation would result in voters being disenfranchised, the State of Ohio filed a counterclaim against the Ohio Democratic Party. ODP has dismissed its claims against the county boards and has asked this Court to dismiss its claims against the Secretary of State as well. Yet, despite the procedural history of this case, a new party that has failed to articulate any legitimate basis for intervention and has failed to properly plead a claim now seeks to intervene in a case as plaintiffs even though the original Plaintiff is trying to dismiss its own claims. Because the Alliance for Democracy has filed their intervention motion and request for immediate depositions merely for harassment purposes and without any good faith basis under the law, the Secretary of State and the State of Ohio ask this Court to order them sanctioned under Fed. R. Civ. P. 11.

II. Law and Argument

A. The Purported Intervention Motion Is Frivolous, An Abuse Of Civil Litigation, And Brought For The Sole Purpose Of Harassment.

Fed. R. Civ. P. 11 “imposes a legal duty on attorneys to certify that any papers filed with the court are legally tenable.” *Donaldson v. United States*, 109 Fed. Appx. 37, 42 (6th Cir. 2004). The test for sanctions under Rule 11 is whether the attorney’s conduct was reasonable under the circumstances. *McGhee v. Sanilac*, 934 F.2d 89, 93 (6th Cir. 1991). In this case, the conduct of counsel for intervenors is completely unreasonable and subject to sanctions under Fed. R. Civ. P. 11.

- 1. The Alliance For Democracy has failed to state any basis upon which they should be allowed to intervene in a case that the Plaintiff has sought leave to dismiss.**

In order to demonstrate entitlement to intervene as a matter of right under Fed. R. Civ. P. 24(a), the proposed intervenors are required to show: (1) that their motion to intervene is timely; (2) that they have a substantial legal interest in the subject matter of the pending litigation; (3)

that the disposition of the action might impair or impede their ability to protect their legal interest absent intervention; and (4) that the parties to the litigation may not adequately represent their interest. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000). As the Alliance for Democracy has absolutely no interest in the Ohio Democratic Party's claims in this case, they know they cannot be allowed to intervene and therefore they also know that their attempt to intervene is frivolous.

a. The Alliance for Democracy has waited too long to attempt to intervene in the Plaintiff's case.

The Ohio Democratic Party voluntarily dismissed their claims against Knox and Franklin Counties on December 2, 2004. They have also filed a motion on the same day seeking leave to dismiss their claims against the Secretary of State.² Despite the fact that the Ohio Democratic Party long ago abandoned its claims in this case, the Intervenor is now attempting to step in and press a claim. Since the Intervenor has waited over two months to try and intervene in this case and has waited more than one month after the Plaintiff sought leave to dismiss this case, the Intervenor has waited too long to participate in this case and should not be allowed into these proceedings. Furthermore, since the Intervenor should be well aware of this case and its failure to timely intervene, the motion at this late stage is sanctionable.

b. The Alliance for Democracy has no interest whatsoever in the litigation between the Ohio Democratic Party and the Secretary of State.

The Alliance for Democracy has failed to articulate what its interest in this pending litigation is. Instead, it merely states that unless this Court acts quickly, President Bush will be inaugurated for his second term beginning on January 20, 2005. Of course, regardless of what

² And as noted above, immediately after this Court granted their request for a temporary restraining order, the Ohio Democratic Party, apparently recognizing that their request would lead to the disenfranchisement of voters, immediately faxed letters to the Franklin and Knox County Boards of Elections stating that they would never seek to enforce this Court's order. Copy of letters attached as Exhibit A.

this Court does, *President Bush will be inaugurated for his second term beginning January 20, 2005*. This Court is completely powerless to prevent the inauguration. Any lawyer who was not simply attempting to abuse the legal system would understand that.³

Furthermore, based upon a reading of the complaint the Alliance for Democracy filed with their motion to intervene, it is impossible to determine how that group could conceivably have standing to intervene in this lawsuit. The Alliance for Democracy is not a registered voter in the State of Ohio. The Alliance for Democracy makes no claim that any of its members were denied the right to vote in Ohio. Instead, the Alliance for Democracy, again without a shred of evidence, merely repeats the mantra of an irrational fringe element – the 2004 election was stolen.⁴ Yet, it repeats that mantra without recognizing a simple truth. If the 2004 election were stolen, the Ohio Democratic Party, and its local members on the boards of elections, would have been complicit in that theft. Clearly, such a conclusion is wholly unwarranted, spurious, and frivolous.

This is not a serious legal pleading. This is not a serious claim. Instead, this is a claim brought about by a group who simply seeks news coverage of a theory that is and must be sanctioned.

³ See, e.g., *In the Shadow of Dr. King, counting the vote remains a civil rights issue*, Columbus Free Press, <http://www.freepress.org/departments/display/19/2005/1096>, attached as Exhibit B. One of the authors of that article has been an attorney who originally filed a contest action in the Ohio Supreme Court against President Bush which has been subsequently dismissed. It is apparent from Bob Fitakis' comments that the only reason this litigation was filed was the clearly impossible desire to have this Court issue an injunction against the Presidential Inauguration. Of course, this Court lacks any legal ability to do that. Such an order would be void because the proper parties were not and are not involved in this litigation. Thus, it is abundantly clear that no competent, ethical attorney could possibly believe this case is anything but frivolous, sanctionable, and brought in bad faith.

⁴ The basis for this claim is the claim that the early exit polls "prove" that John Kerry won the Presidency. Yet, today, the group that compiled the exit polls again mentioned the simple truth that those early exit polls were incorrect.

- c. **Since the Alliance for Democracy has failed to state any theory of standing or why it is bringing a legally cognizable claim, it has also failed to demonstrate that any decision in the underlying claim brought by the Democratic Party would jeopardize its legal interests absent intervention.**

As noted above, the Alliance for Democracy simply continues to spout the universally rejected cry that the 2004 election was stolen and John Kerry had actually won Ohio. It makes this claim despite the fact that John Kerry himself has conceded that he lost the 2004 election and that he and the rest of his 17,000 lawyers found absolutely no evidence of fraud. Intervenors bring this claim despite the fact that if it were true, their co-Plaintiff would have been an active willing participant in that fraud.⁵ Since the proposed intervenors have failed to state a cognizable claim, it is impossible to imagine any circumstance under which their legal rights in that non-existent claim might be compromised.

- d. **Ohio Democratic Party has been adequately representing the interests of the Plaintiffs in this case.**

As noted above, as soon as the Ohio Democratic Party received the very order they asked this Court for on election night, the party immediately sent a letter to the Franklin and Knox County boards of elections informing those two governmental bodies that the party had no intention whatsoever of ever actually enforcing the order. It is not clear, therefore, why ODP filed the case in the first place. However, by not actually enforcing the Court's order, the Ohio Democratic Party did not disenfranchise voters. Had they actually sought to require or had either

⁵ As Defendants have previously noted in other cases, this allegation requires this Court to believe that the bipartisan boards of elections in Ohio colluded in the fraud. It is an insult to the members and employees of these bipartisan boards. Whatever the explanations in differing counties for the long delays, deliberate efforts to deprive people of the right to vote is not a viable one. For example, the claim that Franklin County residents were disenfranchised by the placement of voting machines falls because that task was handled by democratic members of the Franklin County Board of Elections who were responsible for the distribution pattern of those machines and the democratic presiding judges at various precincts who determined to send extra machines back to the warehouse.

Franklin or Knox County actually successfully did what the evidence shows was physically impossible, voters in the State would have been disenfranchised.

The Alliance for Democracy claims that it wants to challenge the voting lines in the State of Ohio in time to prevent the Bush inauguration from occurring on January 20. Since they will never be able to do that and since any interest they might have in this case is properly represented by the Ohio Democratic Party, there is no reason to allow them to participate.

B. The Alliance For Democracy Only Wants To Use This Case In Order To Futher Harass Busy Government Officials.

Without a shred of evidence, the Alliance for Democracy claims that it needs to take the depositions of Secretary of State Blackwell and Matthew Damschroder before January 20 so that it can apparently prove its case that George Bush should not be inaugurated. Notwithstanding the sheer level of ridiculousness in that request and the alleged reasons for it, such depositions would not get to any level of knowledge of the vote totals in Ohio in 2004 or why machines were placed where they were.

As noted already, the local bipartisan boards of elections, not the Ohio Secretary of State, determine where voting machines are placed in an election. Thus, there is absolutely no reason whatsoever for the emergency motion to depose Secretary of State Blackwell. Likewise, the request for an emergency deposition of Matt Damschroeder is equally absurd. All reports in Franklin County show that it was a democratic employee of the Franklin County Board of Elections who determined the placement of machines. Thus, it appears as though the Alliance for Democracy should be seeking to depose employees who actually made the decisions at issue.

This is an attempt to intervene in litigation that is tangential to the Intervenors' claims. It is a theory in search of proof, since to date Intervenors have been unable to demonstrate how long lines at the polls results in a change in the outcome of the election.

The only issue that remains in this case is the counterclaim filed by the Ohio Secretary of State and the State of Ohio. That counterclaim challenges the notion that a voter already at the polling place within the proper county, and who do not qualify as provisional voter pursuant to 42 U.S.C. § 15301, et seq. (the Help America Vote Act) can be authorized to vote on any ballot other than the approved ballot for that county. That issue has long-term consequences for future orderly elections.

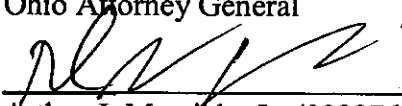
The Intervenors in this case seek to morph this simple case into an indictment of the current election and seek relief this Court cannot grant. This election is over. And any attempt to challenge that reality in the context of this case is irrational and frivolous.

III. Conclusion

For the foregoing reasons, the Secretary of State and the State of Ohio ask this Court to issue a finding under Fed. R. Civ. P. 11 that the actions of Clifford Arnebeck are sanctionable and further ask this Court to schedule a hearing on attorneys fees.

Respectfully submitted,

JIM PETRO
Ohio Attorney General



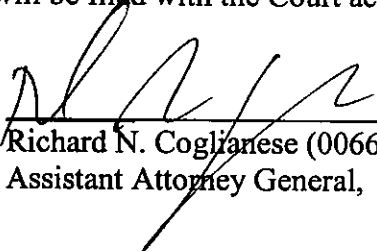
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Certificate of Service

I hereby certify that on January 19, 2005, a copy of the foregoing *Motion by Defendant J. Kenneth Blackwell and Intervening Defendant the State of Ohio for Sanctions Against Purported Intervenor The Alliance for Democracy Under Fed. R. Civil P. 11* was mailed to all counsel of record as required by Fed. R. Civ. P. 11. It will be filed with the Court according to rule.



Richard N. Coglianesse (0066830)
Assistant Attorney General,

Affidavit

Now comes Clifford O. Arnebeck, Jr. and having been duly sworn states as follows:

1. I give this affidavit based upon my personal knowledge.
2. I have been engaged in the practice of law within the State of Ohio for 35 years. Ten years of this was practice in the corporate law departments of two major Ohio corporations, Ohio Bell and Ohio Power Company, five of which were as head of the corporate legal department of the Ohio Power Company. In these capacities I had responsibility for supervising the work of outside law firms. I also served as a partner in a major Ohio based law firm, Jones Day Reavis & Pogue for five years. For the past 15 years I have been principally involved in public interest law practice.
3. I have had a specialty in election law since the early 1980s at which time I served as general counsel to the Ohio Senate Republican Campaign Committee and managed major election litigation on behalf of that client, all of which was resolved favorably in every court, including the Ohio Supreme Court.
4. In 1991 and 1992 I was involved, first as chairman of the Legal Committee of the Coalition to End the Permanent Congress, and subsequently as the Republican co-chairman of the Coalition in a suit against the United States Congress in connection with

an aspect of the franking privilege which the Coalition believed was unconstitutional. That litigation was resolved favorably to the Coalition by the United States Court of Appeals for the District of Columbia.

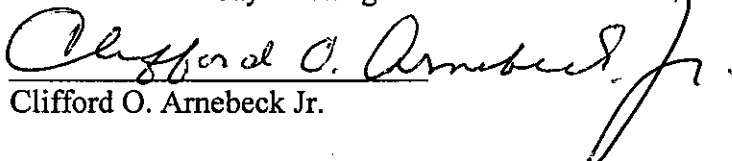
5. For the past four years I have been intensively involved in litigation on behalf of the Alliance for Democracy and Common Cause/Ohio, as a member of its Governing Board and chairman of its Legal Affairs Committee, in regard to the efforts by the Ohio Chamber of Commerce and Chamber of Commerce of the United States to influence Ohio Supreme Court elections with illegal corporate treasury contributions and expenditures. That litigation which was subject to appeals in both the state and federal court system has been resolved favorably in its most important respects to the Alliance for Democracy and Common Cause/Ohio, including, most recently, a favorable decision before the Ohio Supreme Court.
6. In the course of my practice I have obtained and maintained a knowledge of the standard of care among Ohio attorneys engaged in election litigation in the State of Ohio.
7. With respect to the election contest originally filed as Moss vs. Bush and subsequently refiled as Moss vs. Bush, with its allegations limited to the presidential race, I was the Counsel of record in these cases and was responsible for organizing the legal team that prosecuted these cases.

8. In my professional opinion to a reasonable degree of certainty, the contest of election brought by myself and my co-counsel met the standard of care for lawyers practicing election law in the State of Ohio.

9. In my professional opinion as a public interest lawyer, to reasonable degree of certainty, the action was brought in the public interest and was not a part of any partisan effort by myself or anyone with whom I was involved.

10. It was and remains my good faith belief that there were and are factual bases for the allegations of the complaint in Moss v. Bush, and that in the course of further discovery those allegations will be proven.

Further Affiant Sayeth Naught.


Clifford O. Arnebeck Jr.

Sworn and subscribed before me this 28th day of January 2005.


Notary Public

SUSAN TRUITT, Attorney At Law
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.