

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

KING LINCOLN BRONZESVILLE  
NEIGHBORHOOD ASSOCIATION,  
*ET AL.*

CASE NO. 2:06-CV-00745

PLAINTIFFS,

v.

JUDGE MARBLEY  
MAGISTRATE JUDGE KEMP

J. KENNETH BLACKWELL, ET AL.

DEFENDANTS.

PLAINTIFFS' REPLY BRIEF ON JURISDICTION, DISCOVERY  
AND EVIDENCE ISSUES IDENTIFIED BY THE COURT

I. Changes in Ohio's administration of elections since the 2004 election, particularly Ohio's increased use of DRE touch screen voting machines, have increased the opportunity for Karl Rove's application of a vote shifting strategy and the likelihood of that such vote shifting will evade review

Suits involving challenges to election laws or allegations of improprieties in the conduct of elections often fall within the "capable of repetition, yet evading review" exception. See *Davis v. FEC*, 554 U.S. 724, 735, 128 S. Ct. 2759, 171 L. Ed. 2d 727 (2008). . . . *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005) (Challenges to election laws are one of the "quintessential categories" of cases satisfying "evading review prong.")

Moore's Federal Practice 3d, Section 101.99[1], 101-292.6.

Ohio's elimination of punch card ballots and its removal in 2007 of GovTech and SmarTech from the Ohio Secretary of State's election administration merely required a change in the tactics for implementing vote shifting in future Ohio elections. The increased use of cyber technology dramatically increases both the potential volume and breadth of election fraud. It is the strategic

use of cyber technology for election hacking in 2004, rather than the varying tactics for that application in succeeding elections that was and remains capable of repetition.

**II. There is an abundance of admissible evidence in support of plaintiffs' position in this suit. Karl Rove orchestrated from the White House an effective public relations campaign against any litigation challenging the integrity of the 2004 Presidential election.**

**A. The only admissible evidence offered in the Moss v. Bush contest of the 2004 Presidential election was through the depositions of Doctors Ronald Baiman, Richard Hayes Phillips and Werner Lange.**

Ohio Revised Code §3515.16 provides that: "In a contest of election in the supreme court, all testimony shall be in the form of depositions." The contestors in Moss v. Bush, Ohio Supreme Court No. 2004-2088, submitted the deposition testimony of Dr. Ronald Baiman to support the dramatic discrepancy between how a statistically valid sample of Ohio voters said they voted with the tabulation of Ohio votes reported by the Ohio Secretary of State Blackwell. This evidence was illustrated by Rolling Stone Magazine in the graphic, Exhibit 1 hereto, accompanying Attorney Robert F. Kennedy, Jr.'s June 2006 article attached to plaintiffs' initial brief.

Contestors also submitted the deposition of Richard Hayes Phillips to document, among other things, "the Connally Anomaly" of twelve Southwestern Ohio counties in which Democratic Supreme Court candidate Ellen Connally, along with most other losing Democratic candidates, reportedly received more votes than Democratic Presidential candidate John Kerry. This evidence was illustrated by Rolling Stone Magazine in the graphic, Exhibit 2 hereto,

accompanying Attorney Robert F. Kennedy, Jr.'s June 2006 article attached to plaintiffs' initial brief.

The respondents in Moss v. Bush chose not to appear and cross examine any of the contestors' witnesses.

Plaintiffs have reason to believe based upon a reliable confidential informant that Karl Rove's reframed the evidence and challenge to the reported results in the 2004 Presidential election as an attack upon the integrity of the wartime President and Commander in Chief on the eve of important battle and near term important democratic elections in Iraq.

President Bush established he did not condone criminal behavior when he fired Rove in July 2007, and when his Department of Justice appointed two special prosecutors whose targets included Rove, and refused to pardon Scooter Libby for his conviction in the Valerie Plame matter in which Rove appeared five times before the grand jury.

**B. The only credible scientific studies of DRE touch screen voting machines repeatedly and unanimously confirm that such machines are readily hackable.**

See Project EVEREST, an acronym for Evaluation and Validation of Election Related Equipment, Standards and Testing, Exhibit 3 hereto.

For a general estimate of the cyber threat to the nation the testimony of a prominent expert from

the FBI is instructive. Stanley Borgia, Associate Dir. of Counterintelligence Office of Intelligence and Counterintelligence US Department Of Energy testified as follows before the Subcommittee on Oversight and Investigations Committee of Energy and Commerce US House Of Representatives on September 25, 2008, on a subject he described as being "of critical importance: The Cyber Threat."

In closing, the attacks we see place virtually every computer connected to the Internet at risk of compromise, including those of the U.S. Government and our critical energy infrastructure. Moreover, an attacker has a significant advantage over the "protect and defend" cyber security community. DOE's Office of Intelligence and Counterintelligence will continue to pursue all available lawful means to detect, investigate, and mitigate the pervasive cyber threats we, as a nation, now face.

---

**C. The reports submitted by the Ohio Boards of Elections reporting the large scale destruction of 2004 ballots in violation of federal law, as well as evidence from anonymous or confidential witnesses with inside knowledge of criminal cyber election hacking conspiracy, is relevant to ultimate proof of the plaintiffs' civil rights claims in their existing suit.**

In July 2008 the Ohio Election Justice Campaign sought to intervene as plaintiffs in this action and filed a motion to impose criminal sanctions upon boards of elections that had violated federal law and/or this court's order to retain ballots from the 2004 Presidential election. In their memorandum in support of their motion this group accurately described the history of this discovery issue and submitted the reports from the boards, in part manually and in part in electronic format, into the court's records.

Exhibit 4 hereto is plaintiffs' trial counsel's document hold notice of August 23, 2008 to OSOS Blackwell which was emailed and faxed to all 88 Ohio boards of elections.

Exhibits 5 and 6 hereto are, in two volumes, the reports of the boards of elections provided to plaintiffs' trial counsel by the Ohio Attorney General's Office. These document widespread destruction of evidence consistent with a coordinated effort by those responsible for illegal manipulation of the ballots and vote count to cover-up their activity.

Assessing a sanction against those counties that appear to have willfully violated the court's order and/or the plaintiffs' document hold notice and/or the federal statutory ballot retention period at a level consistent with Ohio's liberal compensation approach for the destruction and/or failure to produce public records (see *Kish v. City of Akron*, Ohio Supreme Court No. 2004-0738, -- March 20, 2006 on questions of state law certified to the Court by the Sixth Circuit) would provide plaintiffs with funding for the costs of proceeding with this action made higher because of the destruction of such evidence.

Evidence sufficient to support the reasonableness and propriety of the issuance of document hold notices to the Chamber of Commerce and for Karl Rove's Emails was based upon independent expert research and independent expert and fact witness advice to plaintiffs' counsel. That has been reinforced by one or more anonymous informants whose information has been independently confirmed as credible and reliable and by multiple confidential informants having personal inside knowledge of related corrupt criminal activity and/or documentation of that criminal activity in a form that would be admissible in court. On the basis of that evidence which plaintiffs would present in due course, or present in advance of discovery in camera with a confidentiality order to counsel obtaining access to that information, Plaintiffs have reasonable

grounds to believe the allegations they have made through counsel.

Evidence of criminal activity may lead to the discovery of evidence on the basis of which the court or a special master may conclude that, more likely than not, the use of touchscreen electronic voting machines are an essential part of the ongoing conspiracy to deprive plaintiffs of their 14<sup>th</sup> Amendment rights guaranteed by the United States Constitution. It is, therefore, under the liberal discovery rules, discoverable and preservable for use at trial.

Evidence so scandalous that the U. S. Chamber of Commerce asserted to the Washington Post that it should not be believed—their hiring of defense intelligence contractors to conduct cyber warfare against critics of the Chamber of Commerce, is actually worse than reported by the Washington Post and attached to plaintiffs’ initial brief. The proposed contract of the Chamber of Commerce with HbGary and Team Themis Exhibit 7 hereto, was for \$12 million payable over six months at \$2 million per month rather than a total of \$2 million.

Michael Connell was emphatic in his deposition testimony of November 2008, that it was Ken Blackwell rather than he who placed SmarTech inside the Secretary of State’s office to mirror the election function of the Ohio Secretary of State’s office in its offices in Chattanooga, Tennessee. This setup was described by plaintiffs’ cyber security expert Stephen Spoonamore as a classic man in the middle cyber fraud situation. In more common terms it appears to be a classic case of placing a fox to guard a henhouse. It supports Plaintiffs’s naming and serving J. Kenneth Blackwell in both his capacity as Ohio Secretary of State during 2004 election and as an

individual defendant in their civil rights claims.

Furthermore, Blackwell's role in this situation provides the basis for Blackwell as an individual defendant in the potential state RICO claim. Participation in a criminal conspiracy is outside the scope of one's official employment and such participation strips a state official from the benefit of state immunity.

Ohio Revised Code §9.86 provides:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

Neither the *Ex parte Young* doctrine restricting a federal claim against a state for prospective relief nor *Pennhurst State Sch. and Hosp. v. Haldeman*, 465 U.S. 89, 106, restricting a claim against a state based upon state law would apply to plaintiffs' potential claim against J. Kenneth Blackwell for his involvement in an Ohio Corrupt Practices Act conspiracy.

Evidence of a pattern of corrupt activity is relevant and/or may lead to the discovery of evidence relevant to Plaintiffs' Civil Rights claims--even if these individuals are not named as defendants in Plaintiffs' lawsuit against J. Kenneth Blackwell and the office of the Ohio Secretary of State

If witnesses with relevant knowledge of an ongoing pattern of the cyber hacking of elections such as Karl Rove, Jeff Auerbeck and Tom Donohue invoke the Fifth Amendment rather than come forward with that information, it would provide a basis for state and federal law enforcement authorities to bring to bear their criminal enforcement resources to this critical problem still facing the United States. The Bush Administration's Department of Justice under AG Mukasey initiated two special prosecutions targeting Rove, among others, after those targets had refused to cooperate in civil inquiries.

**III. Plaintiffs sought and continue to seek prospective declaratory and prospective relief in their civil rights claims**

Plaintiffs' original complaint and amended complaint sought the court's appointment of a special master to oversee the next election. Upon the lifting of the stay and establishment of a case schedule to bring this matter to a just and expeditious trial plaintiffs will continue to seek prospective relief to secure the integrity of future Ohio elections through judicial supervision.

Respectfully submitted,

*/s/Clifford O. Arnebeck, Jr.*

Clifford O. Arnebeck Jr. (0033391)  
Trial Attorney for Plaintiffs  
[clifford.arnebeck@gmail.com](mailto:clifford.arnebeck@gmail.com)  
1021 East Broad Street  
Columbus, Ohio 43205  
614-224-8771

Robert J. Fitrakis (0076796)  
[robertfitrakis@gmail.com](mailto:robertfitrakis@gmail.com)  
1021 East Broad Street  
Columbus, Ohio 43205  
614-374-2380

Henry W. Eckhart (0020202)  
[henryeckhart@aol.com](mailto:henryeckhart@aol.com)  
Eckhart Law Offices  
1200 Chambers Road, Suite 106  
Columbus, OH 43212  
614-461-0984  
Counsel for Plaintiffs

**CERTIFICATE OF SERVICE**

A copy of the foregoing was served upon counsel through the court's electronic filing system,  
this 16th<sup>th</sup> day of August 2011.

*/s/ Clifford O. Arnebeck, Jr.*

---

Clifford O. Arnebeck, Jr.