IN THE SUPREME COURT OF OHIO

BILL MOSS, et al.,	:	
	:	
Contestors,	:	
	:	
vs.	:	**CASE NO. 04-2088**
	:	
GEORGE BUSH, et al.,	:	
	:	
Contestees.	:	

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

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Contestees, Secretary of State Blackwell and Ohio's Twenty Presidential Electors, ask that, pursuant to Ohio R. Civ. P. 11 and S. Ct. Prac. R. XIV, § 5, Counsel for Contestors, Mr. Fitrakis, Mr. Arnebeck, Ms. Truitt, and Mr. Peckarsky, be sanctioned for filing the underlying action in willful violation of these rules. Such sanctions are justified based upon the filing of a meritless complaint and for the actions of counsel subsequent to the filing of the contest action. A memorandum in support is attached hereto.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

The Contestees, the Ohio Presidential Electors and the Ohio Secretary of State file this motion for sanctions against the Contestors for the filing of a meritless claim and for the subsequent behavior of counsel during the course of this litigation. The Contestors utterly failed to exercise due diligence prior to filing the instant action. A contest proceeding is a special statutory proceeding with very clear procedures and standards. The case law involving the contest proceeding placed the Contestors on notice that they needed clear and convincing evidence that one or more irregularities occurred and that the irregularities affected enough votes to change the outcome. Instead of evidence, Contestors offered only theory, conjecture, hypothesis, and invective. Contestors did not have sufficient evidence to warrant the filing of this contest proceeding and did so only for partisan political purposes. As such, Contestors' behavior in filing this complaint constitutes the worst type of lawsuit abuse and should be sanctioned by this Court.

At the outset, the fact that the underlying action has been voluntarily dismissed is not an impediment for pursuing this remedy. As the Supreme Court of the United States has noted, the imposition of sanctions pursuant to Fed. R. Civ. P. 11 after a voluntary dismissal is permissible, because the sanctions action is collateral to the underlying action. *Cooter & Gell v. Hartmarx Corp.* (1990), 496 U.S. 384, 396-397. The Supreme Court also noted that the federal rules do not "codify any right of a plaintiff to file meritless actions." *Id.* at 397-398.

This Court has previously held that where the Ohio Rules of Civil Procedure are patterned after the federal rules, Ohio courts may look to federal case law as persuasive authority. *Industrial Risk Insurers v. Lorenz Equip. Co.* (1994), 69 Ohio St.3d 576, 579-580. Thus, it has been held that a sanctions action is considered collateral to the underlying

proceedings and a trial court retains jurisdiction for the limited purpose of applying Civ. R. 11 sanctions. *Lewis v. Celina Fin. Corp.* Mercer App. 1995), 101 Ohio App.3d 464, 470.[1]

This Court likewise expects that parties will not abuse the legal system. S.Ct. Prac. R. XIV, § 5 authorizes sanctions for any action that the Court believes is prosecuted "...for delay, harassment, or **any other improper purpose...."** (emphasis added). So great is this expectation that the rule permits this Court to grant sanctions *sua sponte*. Therefore, an action or appeal filed in this Court must be reasonably well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Contestors cannot satisfy any of these requirements.

In this case, a brief review of the complaint, and the amended complaint, demonstrates that the action was meritless. First, the Contestors completely failed to allege any fraud with the level of specificity required by Civ. R. 9(B). That rule states that, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The contest proceeding provided by the Revised Code does not specify that such a proceeding be premised on fraud. Rather, the statutes simply authorize a contest proceeding. R.C. 3515.08 *et seq.* Thus, it was the Contestors who voluntarily chose to allege fraud, rather than simply allege irregularities.

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[1]Counsel for these Contestees is well aware that this Court previously disapproved of using R.C. 2323.51 in a contest proceeding. *In re Election of November 6, 1990* (1991), 62 Ohio St.3d 6 (*In re Election II*). However, that decision was only as to being awarded costs. The focus of Civ. R. 11 is directed towards the attorneys rather than the parties. The purpose of Civ. R. 11 is to deter pleading and motion abuses. *Riley v. Thompson and Co.* (Hamilton App. 1994), 95 Ohio App.3d 151, 161. Further, the statutory contest procedure contemplates conforming to the Rules of Civil Procedure. "The proceedings at the trial ... shall be similar to those in judicial proceedings." R.C. 3515.11. R.C. 3515.12 provides for discovery, and in prior contest proceedings such discovery was conducted under the Rules. See, generally, *In re Election Contest of December 15, 1999 Special Election* (2001), 91 Ohio St.3d 302; *In re Election of November 6, 1990* (1991), 58 Ohio St.3d 103. In the instant case, since all testimony before the Court is by way of depositions, see R.C. 3515.16, the abuse of discovery proceedings would clearly apply "at the trial," distinguishing the instant case from *In re Election II, supra*. Therefore, this motion does not conflict with the precedents of this Court.

Further, the standard for prevailing in a contest proceeding is clearly established under Ohio law. A contestor must prove two facts by clear and convincing evidence to prevail: 1) that one or more election irregularities occurred, and 2) that the irregularities affected enough votes to change or make uncertain the result of the election. *In re Election of November 6, 1990 for the Office of Attorney General* (1991), 58 Ohio St.3d 103, syllabus paragraph (hereinafter "In re Election of November 6, 1990").

Therefore, legal counsel was clearly placed on notice of the legal standard that had to be satisfied to overcome a threshold motion to dismiss. Counsel nevertheless then deliberately chose to file a contest complaint that would require not only clear and convincing evidence of irregularities but also added fraud, requiring an even higher standard of pleading from them to survive a threshold motion to dismiss.

Yet, what was the evidence of irregularities sufficient to change or make uncertain the outcome of the election? Contestors relied on early exit polls that reported a different outcome. These exit polls clearly constituted hearsay evidence because the Contestors had not gathered the data, nor did they have access to the underlying data.[2] And, Contestors had no credible expert review of the hearsay, secondhand data they did have. Where was any evidence of fraud? Newspaper articles and anecdotes of random problems either on election day or in the official canvass or recount. Despite all the hysterical pleadings filed by Contestors, not one member of Ohio's eighty-eight bipartisan boards of elections, nor any of the employees of those boards, reported any fraud in reporting the outcome of the election on election night, in the official canvas, nor in the recount that occurred.

[2]Further, as noted in Contestees' Appendix to the Motion to Dismiss filed January 3, 2005, the results of the exit poll were widely criticized in press reports. And, the exit polls have a history of giving inflated margins.

It should be patently obvious to all that a contest proceeding is not to be undertaken lightly. The standards placed on such a procedure by this Court are enough testament to this statement. 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 political processes of representative government, at both the state and local level, are sufficient safeguards.

The starting point for any such inquiry is the local board of elections. These boards are bipartisan, so that members of both major political parties undertake all the business of the board in plain sight of each other. Witnesses are provided for by Ohio law to observe the election night totaling and the official canvass. Even challengers may be appointed to challenge the right of a person to cast a vote.

Despite these safeguards, Contestors alleged fraud in the election sufficient to change the outcome. Even when election board members of both parties constantly stated that no fraud occurred, Contestors continued filing meritless "emergency" motions.[3] For example, on the basis of an unsworn statement, Contestors filed a motion to prevent spoliation of evidence. That motion was quickly denied by this Court, based upon the Contestors' failure to plead any reliable or probative reason to grant the motion, or even to file a properly notarized affidavit that constituted admissible evidence. Such motions were filed for the purpose of generating headlines and harassing the rightful winners of the election.

The greatest failure to follow the contest procedure, and perhaps a reason the Contestors dismissed this case, was their failure to timely oppose the Contestees' motion to dismiss. The

[3]Perhaps the most reprehensible implication in the Contest proceeding is that Democratic members of the local boards, and employees of the same party, violated their oaths and consciences to participate in a scheme to deprive their candidate of the election. As patently ridiculous as such an allegation is, it is clearly the Contestors' theory since that is the only conclusion one can draw from their claims.

Contestees properly filed an answer to the contest petition within ten days of service (January 3, 2005) pursuant to R.C. 3515.10. That same statute required the Contestors to respond within five days thereafter. Because the fifth day was a Saturday, Contestors had until the following Monday, January 10, 2005, to file a response to the motion to dismiss. Contestors failed to timely file a response. Therefore, Contestors defaulted on a response time, an irony given their own frivolous motion for default judgment for failure to attend a deposition (discussed *infra*).

Counsel for Contestee repeatedly had to remind opposing counsel of the requirements of the Rules of Civil Procedure for properly conducting discovery. Counsel, for example, without asking for expedited discovery, demanded massive amounts of documents be made available in 24 hours and directed people to appear for deposition with only 48 hour notice. Ultimately, Contestees were required to file a motion for protective order with this Court to protect from further abuses.

The Contestors' petition failed to meet the statutory requirements. The contest statute requires that a verified complaint be filed by at least two petitioners who cast a vote for or against a candidate for office. R.C. 3515.09. However, as demonstrated in Contestees' Supplemental Motion to Dismiss, one of the two signers of the verification voted for a non-candidate, Ralph Nader. Therefore, the complaint was defective from the beginning. It seems sensible to require attorneys to ascertain that the complaint will meet the minimum requirements of pleading, but Contestors failed to make that good faith effort.

A prime example of harassment is the filing of a motion for default judgment for the sole reason that several improperly noticed Contestees failed to attend a deposition. As noted in Contestees' Memorandum in Opposition to Contestors' Emergency Motion for Default Judgment, the notice of deposition at issue in that pleading was facially insufficient. Further, the

Contestors ignored the clear language of the very civil rule they cited as authority to seek a default judgment.

Civ. R. 37(B)(2) provides for various sanctions against any party or designee for failure to obey an **order** to provide or permit discovery. The provisions of R. 37 thus presume that a party has first obtained an order compelling discovery. No such order exists. No such order, to date, has even been sought. A failure by Contestors' Counsel to thoroughly read the Rules of Civil Procedure with due diligence therefore necessitates an unnecessary set of pleadings to be filed with this Court. And, the request for a default judgment for merely failing to attend a deposition (which was already the subject of a pending motion for protective order) is both extreme and unprecedented.

This Court has held that a trial court abuses its discretion to grant a default judgment for failure to respond to discovery requests when the record does not show willfulness or bad faith on the part of the responding party. *Toney v. Berkemer* (1983), 6 Ohio St.3d 455, syllabus. Contestors' motion is devoid of such information. Indeed, the Contestors could not make such a showing, since they were warned that no opposing parties would attend a deposition until this Court ruled on the pending protective order. Pursuant to well-known practices, Contestors should have filed a motion to compel. However, as noted, they instead took the extraordinary route of filing a motion for default judgment.

Further, granting of a default judgment requires the due process guarantee of prior notice. *Haddad v. English* (Medina App. 2001), 145 Ohio App.3d 598, 603. Therefore, at most the Contestors should have requested a hearing to show cause why a default judgment should not be issued against the parties refusing to appear and be deposed.

In this example, as in the others already discussed, a simple and careful review of applicable rules and case law would have advised the average attorney that filing a motion for default judgment was premature and not authorized by any authority. Perhaps in the rush to gain a headline, counsel for Contestors ignored this review process. Nothing, however, can excuse either this professional lapse of judgment or the Civ. R. 11 obligation to have a good faith basis for filing a motion with this Court. Accordingly, sanctions pursuant to Civ. R. 11 and S. Ct. Prac. R. XIV, § 5 against these counsel are appropriate and just.[4]

Finally, Contestors have very interesting views on why their contest proceedings actually had to be dismissed. The Contestors' Counsel blames this Court. In a pleading filed in another case, *Ohio Democratic Party v. Blackwell, et al.,* Case No. C2:04-1055, S.D. Ohio, lead counsel blames the Court's failure to "apply any discipline to the process of considering allegations of fraud...." *Emergency Motion of the Alliance for Democracy to Intervene As A Plaintiff,* p.3, attached as Exh. A. The fact that counsel initially filed a deficient complaint does not appear to account for any of the "lack of discipline."

Co-counsel appears to have other views as to why the contest had to be withdrawn. In a December 31, 2004 article in The Free Press, co-counsel blames this Court. "But despite the fact that the contention rests in large part on Moyer's own re-election campaign, the Chief Justice refuses to recuse himself from this and related cases. He has helped write decisions denying a further public investigation into the count and recount processes, and has voted to protect Blackwell from providing public testimony under legal subpoena." Article attached as Exh. B. Co-counsel does not identify the specific ruling from this Court shielding Secretary Blackwell.

[4]The Ohio Attorney General has an obligation to not only defend the clients involved in the instant case, but also to defend the integrity of the statutory proceeding at issue. An election contest is a very serious matter and should not be abused for any purpose. This is so because only extreme circumstances affecting the integrity of elections are contemplated. *In re Election Contest of Democratic Primary Election Held May 4, 1999* (2000), 88 Ohio St.3d 258, 267.

That is, of course, no surprise since this Court never ruled on Contestees' motion for protective order. There is only one other contest case, rather than the "cases" identified in the story. And this Court issued no rulings other than the dismissal without prejudice of the deficient first complaint and the request for briefing on the mootness issue. How these two rulings denied public investigation is beyond comprehension. These false statements, though, highlight the state of mind of the Contestors – say it long enough and loud enough, and people will believe it. (Curiously, Contestors never mention a reason for withdrawing the other contest proceeding even though mootness is not an issue. Of course, Contestors were ordered to plead actual evidence of fraud and promptly dismissed the case.)

No election is perfect. There were undoubtedly mistakes made. However, a contest proceeding is not the appropriate vehicle to raise such issues. It may be that the political purpose of the Contestors to generally undermine faith in the election system in Ohio was served by this filing. However, the filing of this contest had no basis in either in the law or in the facts surrounding this case. The unsupported allegations of fraud collapse before the reality of a bipartisan, open vote counting process. A contest proceeding is not a toy for idle hands. 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. It is a special proceeding placed in the law by the people of Ohio to be used sparingly, in the necessary circumstances as warranted by demonstrable evidence, as a safety valve to protect the integrity of the election system.

Even a passing review of this Court's precedents would have placed the average attorney on notice of these requirements. The Contestors, in their haste to use the contest proceeding for their own purposes, ignored that precedent and failed to thoroughly study the law prior to filing. They filed a case without sufficient evidence to warrant its filing. They attempted to prosecute

their case without reference to the Rules of Civil Procedure. Their complaint constituted a meritless pleading. Their subsequent prosecution of the case was directed more towards headlines and harassment. As such, both the complaint and its prosecution violate Civ. R. 11 and S.Ct. Prac. R. XIV, § 5. Accordingly, Contestees respectfully request that this Court grant their motion for sanctions against all counsel for the Contestors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion of Secretary of State Blackwell and Ohio's Twenty Presidential Electors for Rule 11 Sanctions Pursuant to Civ. R. 11 and S. Ct. Prac. R. XIV, § 5 was served upon Clifford O. Arnebeck, Jr., 1351 King Avenue, 1st Floor, Columbus, OH 43212, and Kurtis A. Tunnell, Bricker & Eckler, 100 South Third Street, Columbus, OH 43215 by United States mail, postage prepaid, on this 18th day of January, 2005.

Arthur J. Marziale, Jr.
Senior Deputy Attorney General

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

The Ohio Democratic Party,

Plaintiff,

Case No C2 04 -- 1055

v Judge Marbley

Magistrate Judge Kemp

J Kenneth Blackwell, et al

Defendants

EMERGENCY MOTION OF

THE ALLIANCE FOR DEMOCRACY TO INTERVENE AS A PLAINTIFF

Pursuant to Civil Rule of 24 the Alliance for Democracy ("Alliance") moves to intervene as plaintiffs in the above captioned action

This is an emergency because the voting rights violations which this court found in Franklin and Knox Counties were but a small part of a statewide conspiracy to distort and miscount the Ohio vote in the presidential race for the purpose of reelecting President George W Bush ("Bush") Unless the controversy in this matter can be promptly adjudicated, the inauguration of Bush to a second term as president will take place on January 20, 2005, on the basis of an alleged fraud which has not been adjudicated In the face of allegations of fraud in the Ohio election Defendant Kenneth Blackwell ("Blackwell"), in his capacities as Ohio Secretary of State and Co-Chair of the Bush-Cheney Ohio Reelection Campaign has refused to testify under oath and, by his stonewalling has implicitly admitted to the alleged fraud Defendants Blackwell and the Ohio Republican Party are relying upon the inability and/or unwillingness to grant emergency relief and the accelerated schedule provided by Title 3 of the

Exhibit A

US Code for Congressional deliberation of election contests to enable them to complete the theft of the election before it can be independently investigated and adjudicated

Respectfully submitted

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MEMORANDUM IN SUPPORT OF MOTION

Movant Alliance has a compelling interest in the matter which is the subject of this action The protection of democratic institutions, one of the most important of which is the right to vote, is the core purpose of the Alliance The initial complaint filed by the Ohio Democratic Party, as well as the temporary injunctive relief granted by this court, sought to alleviate the extraordinarily long lines and delays being faced by voters within the City of Columbus and by voters in the precinct serving Kenyon College in Knox County Since shortly after the election the Alliance has been involved in organizing, fund-raising and staffing the legal challenge to the Ohio presidential election on the basis of both the civil rights violations which were the subject of this original complaint and the manipulation of the counting of votes Some members of the Alliance were individual Contestors in the Election Contest before the Ohio Supreme Court Fraudulent manipulation of elections has been a major focus of the work of the Alliance in the ten years of its existence owing in part to the fact that its founder, Ronnie Dugger, wrote the seminal magazine article in the New Yorker Magazine in 1988 on the vulnerability of electronic voting machines to manipulation The Alliance has been involved for the past four years in

litigation in both federal and state court over the illegal use of corporate funding and expenditures to influence the outcome of a Ohio Supreme Court election campaigns

In its funding and staffing of the legal challenge in the Ohio Supreme Court of the election results, the Alliance was attempting to address on a larger scale the problem which this court courageously and aggressively addressed on election day Because the Ohio Supreme Court did not apply any discipline to the process of considering allegations of fraud brought by citizens in their capacity as voters, unless the federal court promptly adjudicates the unprecedented level of fraud in the Ohio presidential election those who perpetrated the fraud will be able to enjoy the fruits of victory rather than the just consequences of criminal conduct

The Ohio Democratic Party appears, by its motion to dismiss its claims against the Franklin County Board of Elections, to have lost interest in further pursuit of this complaint. Intervenor Ohio Republican Party and defendant Blackwell appear to be seeking to nullify the importance of this court's injunction as an important precedent for protecting voting rights and according equal protection of law for all Ohio citizens Thus, there is no other party in this action that appears willing to aggressively represent the interest of the Alliance in protecting the democratic values at issue in this preceding

Wherefore, inasmuch as this motion meets the requirements of Rule 24, movant requests that its motion to intervene be granted without delay

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served by facsimile to the offices of William M Todd, attorney for intervenor Ohio Republican Party, 1300 Huntington Center, 41 South High Street, Columbus, Ohio 43215 – 6101, Kathleen M Trafford, attorney for the Ohio Democratic Party, 41 South High Street, Suite 2800, Columbus OH 43215 – 6194, Richard N Coghanese, Assistant Ohio Attorney General, 30 East Broad Street, 17th floor, Columbus, Ohio 43215 attorney for Ohio Secretary of State Kenneth Blackwell and Peter J Pinnnm, Assistant Prosecuting Attorney, Franklin County, Ohio, 373 South High Street, 13th floor, Columbus, Ohio 43215 – 6318, attorney for the Franklin County Board of Elections

C. O. Arnebeck

Clifford O Arnebeck, Jr

THE FREE PRESS
SPEAKING TRUTH TO POWER
Tue Jan 18 2005

Departments
Election 2004

Ohio's official non-recount ends amidst new evidence of fraud, theft and judicial contempt mirrored in New Mexico

by *Bob Fitrakis, Steve Rosenfeld and Harvey Wasserman*
December 31, 2004

COLUMBUS -- The Ohio presidential recount was officially terminated Tuesday, December 28.

But the end comes amidst bitter dispute over official certification of impossible voter turnout numbers, over the refusal of Ohio's Republican Supreme Court Chief Justice to recuse himself from crucial court challenges involving his own re-election campaign, over the Republican Secretary of State's refusal to testify under subpoena, over apparent tampering with tabulation machines, over more than 100,000 provisional and machine-rejected ballots left uncounted, over major discrepancies in certified vote counts and turnout ratios, and over a wide range of unresolved disputes that continue to leave the true outcome of Ohio's presidential vote in serious doubt.

Officially, Republican Secretary of State Kenneth Blackwell has confirmed substantial errors in the vote count, with a shift of some 1,200 votes based on statewide recounts of about 3% of the vote. But additional new evidence of massive vote-counting fraud across the state continues to be unearthed, calling into question George W. Bush's alleged victory in Ohio and pending re-election in the Electoral College.

Blackwell, who was co-chair of the Bush-Cheney campaign, announced that his recount awarded 734 additional votes to Kerry and 449 additional votes to Bush. Meanwhile, more than 92,672 machine-rejected ballots remain unchecked and uncounted, as do at least 14,000 provisional ballots. Conservative estimates of Kerry's net gain among those ballots are another 36,000 to 40,000 votes. No accounting in the count or recount has been made for voters turned away at the polls due to insufficient voting machines, computer malfunction, tampering with registration data, mishandling of absentee ballots, misinformation and intimidation, or a wide range of other problems.

Blackwell's certified statewide returns now give Bush a margin of 118,775 votes. Ohio's electoral votes would give Bush the presidency if they are certified by Congress on January 6. A challenge by members of the House of Representatives is expected under an 1887 law passed in response to the disputed election of 1876, during which Republican Rutherford B. Hayes took the presidency in the Electoral College despite losing the popular vote. The challenge must be joined by at least one Senator.

Meanwhile, a new precinct-by-precinct analysis in many Ohio counties indicates that Bush's margin here was likely obtained by fraud. That is the main claim of the election challenge suit now at the Ohio Supreme Court, where Ohio's GOP Supreme Court Chief Justice, Thomas Moyer, has refused to recuse himself, even though allegations of vote switching – where votes cast for one candidate are assigned to another in the computerized tabulation stage – involve his own re-election campaign.

Ohio's official recount was conducted by GOP Secretary of State Kenneth Blackwell, despite widespread protests that his role as co-chair of the state's Bush-Cheney campaign constituted an serious conflict of interest. Blackwell has refused to testify in the election challenge lawsuit alleging massive voter fraud, as have a number of GOP county election supervisors. Blackwell also refuses to explain why he has left more than 106,000 machine-rejected and provisional ballots entirely uncounted.

Exhibit R

The final recount tested roughly 3% of the roughly 5.7 million votes cast in the state. But contrary to the law governing the recount, many precincts tested were selected not at random, but by Blackwell's personal designation. Experts with the election challenge suit have noted many of the precincts selected were mostly free of the irregularities they are seeking to investigate, while many contested precincts were left unrecounted.

The official overall shifting of nearly 1200 votes was deemed "absolutely unacceptable" by Colby Hamilton of the Green Party, which joined the Libertarian Party in paying $113,600 to have the recount done. The Greens and Libertarians are now asking for another recount, charging that the first one was woefully incomplete and unreliable.

The Kerry campaign, which raised millions of dollars to guarantee "every vote will be counted" in the 2004 election, has challenged the results in just one county, where a technician dismantled at least one voting machine prior to the recount. Daniel J. Hoffheimer, an attorney hired by the Kerry campaign has emphasized his belief that despite that challenge, "this presidential election is over. The Bush-Cheney ticket has won."

Hoffheimer is affiliated with Taft, Stettinius and Hollister, a Cincinnati firm with deep Republican ties to Ohio's current GOP governor, Bob Taft. Hoffheimer said "the Kerry-Edwards campaign has found no conspiracy and no fraud in Ohio," but more serious researchers continue to uncover plenty. While struggling to find the financial resources necessary for the legal challenge, the Election Protection team has continued to uncover deeply disturbing evidence of manipulation, theft and fraud that went unaudited by the official recount.

Some 14.6% of Ohio votes were cast on electronic machines with no paper trail, rendering them unauditable. But on election night, electronic machines and computer software were used throughout the state to tabulate paper ballots. The contrasts are striking. Officially, Bush built a narrow margin of roughly 51% versus 48% for Kerry based on votes counted on election night. But among the 147,400 provisional and absentee ballots that were counted AFTER election night, Kerry received 54.46 percent of the vote. These later totals came from counts done by hand, as opposed to counts done by computer tabulators, many of which came from Diebold.

Many of the electronic voting machines with no paper trail also came from Republican-dominated companies, including some from Diebold, whose owner, Wally O'Dell, infamously guaranteed in 2003 that he would deliver Ohio's electoral votes to Bush.

Diebold also manufactured many of the tabulators used to count punch card ballots. In the vast majority of Ohio precincts, those tabulations were not rechecked or recounted. In at least two counties, technicians from Diebold and from Triad dismantled all or part of such tabulating machines prior to the recount. In Shelby County, election officials admitted that they discarded crucial tabulator records, rendering a meaningful recount impossible. In many cases, the recounts were conducted not by public election officials, but by private corporations, many of them with Republican ties.

In other precincts, impossibly high voter turnout figures -- nearly all of them adding to Bush's official margin -- remain unexplained. In the heavily Republican southern county of Perry, Blackwell certified one precinct with 221 more votes than registered voters. Two precincts -- Reading S and W. Lexington G -- were let stand in the officially certified final vote count with voter turnouts of roughly 124% each.

In Miami County's Concord South West precinct, Blackwell certified a voter turnout of 98.55 percent, requiring that all but 10 voters in the precinct cast ballots. But a freepress.org canvas easily found 25 voters who said they did not vote. In the nearby Concord South precinct, Blackwell certified an apparently impossible voter turnout of 94.27 percent. Both Concord precincts went heavily for Bush.

By contrast, in heavily Democratic Cuyahoga County, amidst record turnouts, a predominantly African-American precinct, Cleveland 6C, was certified with just a 07.85

December 24, 20

"Uncounted vote County"
December 24, 20

"Provisional ball County"
December 24, 20

"Uncounted vote County"
December 24, 20

"Uncounted vote County"
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"Default settings County"
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December 19, 20

percent turnout. The official count was 45 votes for Kerry versus one for Bush, in a precinct where the day's overall voter turnout would have indicated eight or nine times as many voters.

Independent statistical studies of Cuyahoga County indicate that if the prevailing statewide voter turnout was really 60 percent of the registered voters, as seems likely based on turnout in other major cities in Ohio, Kerry's margin of victory in Cleveland alone was wrongly reduced in the certified returns by 20,000 or more votes.

New research has added confirmation to apparent widespread fraud -- most likely in the computer tabulation stage -- in at least three heavily Republican southern Ohio counties. Mathematical researcher Richard Hayes Phillips, PhD., has shown that Clermont, Butler and Warren Counties, surrounding Cincinnati, netted Bush votes on par with his margin of victory in the state. But for Bush to have built up his margins in these three counties, 13,500 Democrats would have had to have split their tickets by voting for Supreme Court Chief Justice candidate Ellen Connally while simultaneously voting for Bush, by all accounts a virtually impossible event.

The numbers are startling. In Butler Country, Bush officially was given 109,866 votes. But conservative GOP Chief Justice Moyer was given only 68,407, a negative discrepancy of more than 40,000 votes. Meanwhile, Moyer's opponent, a pro-gay, pro-abortion African-American liberal from Cleveland, was officially credited with 61,559 votes to John Kerry's 56,234.

The Blackwell-approved tally would mean that more than 5,000 Butler County voters ignored Kerry's name near the top of the ballot, but jumped to the bottom of the ballot to vote for Connally. And this was to have happened in an area where some 40,000 Republicans did exactly the opposite, voting for the President while skipping the race for Chief Justice. Few who are familiar with Butler County politics believe such an outcome to be even remotely credible.

In Warren County, Bush was credited with 68,035 votes to Kerry's 26,043 votes. But just as the county's votes were about to be counted after the polls closed on November 2, the Board of Elections claimed a Homeland Security alert authorized them to throw out all Democratic and independent observers, including the media. The vote count was thus conducted entirely by Republicans.

Here Blackwell's certified tally says the slightly funded Connally somehow outpolled Kerry by more than 2,400 votes, nearly 10 percent of his county wide total.

Phillips' latest analysis was conducted at the precinct-by-precinct level. When looking at returns before they have been blended into countywide figures, Phillips says the suspect nature of the outcome in these three counties is heightened by the fact that precincts within them yield wildly inconsistent data. A few municipalities show Republicans and Democrats voting along party lines – as one would expect. But throughout most of these three counties are precincts with massive margins for Bush that are inconsistent with the rest of the counties and impossible to conceive except by some sort of manipulation. This is an almost certain indicator of fraud, says Phillips.

The statistical analysis of these results show Blackwell's certified vote is deeply flawed. It does not, however, identify how the fraud was perpetrated. Based in part on these inconsistencies, the Election Protection legal team has filed suit with the state Supreme Court, asking it to overturn Ohio's presidential election.

But despite the fact that the contention rests in large part on Moyer's own re-election campaign, the Chief Justice refuses to recuse himself from this and related cases. He has helped write decisions denying a further public investigation into the count and recount processes, and has voted to protect Blackwell from providing public testimony under legal subpoena.

Parallel problems have now surfaced in New Mexico, where a bitter recount battle is also

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being waged. At a public hearing in Columbus convened by Rep. John Conyers (D-MI), senior Democrat on the US House Judiciary Committee, Rev. Jesse Jackson testified that Sen. Kerry was informed in a phone conversation that optical scan machines were being used in New Mexico to steal votes. New Mexico allegedly went to Bush by some 7,000 votes in an election with widespread charges of manipulation and fraud, especially in heavily Hispanic precincts. According to Jackson, Kerry said he know that every single New Mexico precinct fitted with optical scan machines went for Bush, demographically a virtual impossibility.

But New Mexico's Democratic Gov. Bill Richardson has refused to cooperate with Green Party and Audit the Vote activists demanding a recount, acceding to decisions that could raise the price for a recount to well over a million dollars. Despite its huge leftover war chest, the Democratic Party has not come forward to help push New Mexico's recount, which many believe could give the state to Kerry. As of now, no recount has even begun, with the issue still mired in the courts over the question of finances.

On Monday, January 3, Rev. Jackson will lead a rally in Columbus demanding, among other things, an Ohio revote. Ironically, the apparently defeated Republican gubernatorial candidate in Washington is now demanding the same thing. Moreover, unlike Ohio, in Washington state the Democrat emerged victorious after that state's Supreme Court ordered all ballots counted and certified totals adjusted.

If anything, Blackwell's refusal to testify, Moyer's refusal to recuse, and the staggering flood of new evidence from a non-credible non-recount have helped further spread the belief that the Ohio vote -- and thus the presidency -- has been stolen. The findings from New Mexico confirm that Ohio was not the only state where fraud and vote theft may have provided Bush with a margin of victory. Challenges in Florida have also reached the court system.

The alleged Bush victory could be challenged in the much-anticipated January 6 reporting of the Electoral College to Congress. But given the mounting indications of manipulation, fraud and theft, it is virtually certain the debate over who really won Ohio -- as well as New Mexico and Florida -- and the presidency will be bitterly disputed for many years to come.

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Bob Fitrakis, Steve Rosenfeld and Harvey Wasserman are co-authors of OHIO'S STOLEN ELECTION: VOICES OF THE DISENFRANCHISED, 2004, to be published by **http://freepress.org**. Tax-deductible contributions to this book/film project are gladly accepted at **http://freepress.org/store.php#don_pub** or by check to the Columbus Institute for Contemporary Journalism at 1240 Bryden Road, Columbus, OH 43205.

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