

IN THE SUPREME COURT OF OHIO

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Moss, et al.,	:	
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Contestors,	:	Case No. 04-2055
	:	
-v-	:	Original Action to Contest Election
	:	
Bush, et al.,	:	
	:	
Contestees.	:	

**CONTESTORS' MOTION FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION, AND OTHER RELIEF**

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DEC 13 2004
 MARCIA J. MELTZER, CLERK
 SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF MOTION

INTRODUCTION

This Court must act quickly to protect the fundamental right to vote of the citizens of Ohio.

In addition to the overwhelming statistical evidence of deliberate outcome determinative nationwide election fraud which extended to Ohio and which is explained in the complaint and in the affidavits supporting this motion, contestants just received this morning prima facie evidence presented by affidavit of a statewide fraud allegedly conducted at the direction of Secretary of State J. Kenneth Blackwell. The effect of Secretary Blackwell's alleged conduct was and is to cover up and obstruct the lawful investigation by Ohio citizens of the fraud which occurred on Election Day 2004.

The evidence attached to this motion and memorandum consists of:

1. Affidavit of Dr. Ron Baiman (including exhibits A-G thereto) dated December 13, 2004 (Exhibit 1).
2. Affidavit of Dr. Steven F. Freeman (including exhibit A thereto) dated December 11, 2004 (Exhibit 2).
3. Affidavit of Dr. Werner Lange (including three pages of poll book inspection results) dated December 13, 2004 (Exhibit 3).
4. Affidavit of Dr. Richard Hayes Phillips (Exhibit 4).
5. Affidavit of Dr. Jonathan D. Simon (including exhibits A-E thereto) dated December 13, 2004 (Exhibit 5).
6. Affidavit of Katrina Sumner dated December 13, 2004 (Exhibit 6).
7. Affidavit of Victoria Parks dated November 13, 2004 (Exhibit 7).

As summarized in the complaint, there were widespread, systematic problems with both the voting itself and with the counting and reporting of the vote in the 2004 Ohio general election. Far too many voters were disenfranchised for the results reported by the Secretary of State to be reliable, let alone to provide the public confidence in the outcomes of the various races, particularly given such problems as the grossly disproportionate under-assignment of voting machines to poor, minority, and heavily Democratic precincts. Moreover, the statistical anomalies are so numerous and so great that the conclusion is inescapable that the reported results do not accurately reflect the votes actually cast by the voters. While the existence of anomalies could possibly be explained by human error or technical malfunctions, the fact that, in every case in Ohio known to the contestors, the error favored the Bush-Cheney ticket, strongly indicates manipulation and fraud.

The evidence submitted through the Affidavits of Drs. Baiman, Freeman, and Simon establishes the near certainty (999/1,000) that the difference between the Ohio exit polls taken on November 2, 2004, and the results reported for the November 2, 2004, election was the result of either sampling error or deliberate election fraud. Baiman Affidavit, paragraph 6. Given the excellent reputation, proven ability and long experience of the exit poll director, Warren Mitofsky of Mitofsky International, the probability of sampling error was vanishingly small.

The evidence submitted through the Affidavit of Dr. Ron Baiman establishes the near certainty (44,999/45,000) that the difference between the Ohio exit polls November 2, 2004, and the results reported for the November 2, 2004, election was the result of either sampling error or deliberate election fraud. *See also* Simon Affidavit, ¶ 14. Given Mr. Mitofsky's capabilities and dedication, the reasonable conclusion is that there was deliberate nationwide vote fraud.

After detailed analysis of precinct-level results in various Ohio counties, Dr. Phillips set forth in his affidavit evidence of vote counting irregularities that reduced the vote for candidate Kerry by as much as 89,000 votes.

There is also evidence of “low-technology vote fraud” (ballot stuffing) that occurred. This evidence is available in plain view: the precinct poll books that voters must sign before casting their ballots. R.C. 3599.161 provides that the boards of election and their employees shall not “knowingly prevent or prohibit any person from inspecting, under reasonable regulations established and posted by the board of elections, the public records filed in the office of the board of elections.” R.C. 3599.42 provides: “A violation of any provision of Title XXXV of the Revised Code constitutes a prima facie case of fraud within the purview of such title.” Several such instances occurred.

On November 12, 2004, Victoria Parks was in the office of the Pickaway County Board of Elections inspecting poll books to determine whether they contained the necessary signatures of voters who had voted in the November 12, 2004 election. Affidavit of Victoria Parks, ¶¶ 1, 2. When she began asking questions about poll books that did not have the necessary signatures, she was stopped from inspecting public records filed with the Board. Parks Affid., ¶¶ 3-6. Ms. Parks was advised that her inspection of the public records was stopped at the direction of the Secretary of State. Parks Affid., ¶ 6.

On December 9, 2004, Katrina Sumner was inspecting public records with two colleagues in the offices of the Board of Elections of Greene County. Sumner Affid., ¶¶ 1-3. She was stopped from inspecting public records which reportedly came from the office of Secretary of State Blackwell. Sumner Affid., ¶¶ 4-5.

On November 8, 2004, and November 16, 2004, Dr. Werner Lange was prohibited from reviewing poll books at the Trumbull County Board of Elections. Lange Affid., ¶ 2. Dr. Lange was informed that Secretary of State Blackwell had ordered all 88 county boards of elections to refuse public access to precinct poll books until after certification of the Ohio vote. On November 30, 2004, and December 6, 2004, Dr. Lange returned to the Trumbull County Board of Elections and reviewed the poll books. Lange Affid., ¶¶ 4-5. After inspecting the records from just 106 precincts in Trumbull County, Dr. Lange determined that there were 580 more absentee votes than there were absentee voters. Lange Affid., ¶¶ 6-7. The appearance of more votes than voters is a sign of election and vote fraud. Dr. Lange noted that, if the trend observed were consistent statewide, then there would be over 62,000 absentee votes cast unlawfully in connection with the November 2, 2004 election. Pursuant to R.C. 3599.42, the actions of Secretary of State Blackwell constitute a prima facie case of statewide fraud, in violation of Ohio's election law.

Contestants challenge the certification of the vote results in Ohio and seek an immediate temporary restraining order and permanent injunction to restrain the Ohio electors from meeting on Monday, December 13, 2004, and until after resolution of this contest, and from casting Ohio's votes in the Electoral College, until this contest to the election can be determined. Pursuant to Fed. R. Civ. P. 65(b), a temporary restraining order may be granted where the movants show (1) a strong likelihood of success on the merits; (2) that the movants will suffer irreparable injury if the order does not issue; (3) that issuance of the order would not cause substantial harm to others; and (4) that the public interest would be served by issuance of the order. *Leary v. Daeschner* (6th Cir. 2000), 228 F.3d 729, 736; *Michigan Coalition v. Griepentrag* (6th Cir. 1991), 945 F.2d 150, 153. Contestors, as registered voters in the State of

Ohio, who voted in the 2004 presidential election and in the race for the Chief Justice of the Ohio Supreme Court, have standing to file an election contest under R.C. 3515.08.

The contestors are well aware that the relief they seek will be seen by some as drastic. But it would be far more drastic – even if Ohio had not effectively decided the presidential contest – to permit Ohio’s electoral votes to be incorrectly and illegally cast on the basis of an election and vote count so erroneous that the result is suspect to say the least. This Court must act with both courage and speed to do as the law of Ohio and of the United States requires.

ARGUMENT

A temporary restraining order is appropriate because the contestors are likely to prevail on the merits of this contest petition. The evidence, as summarized in the petition and as substantiated in the attached affidavits and exhibits, establishes that the certified results of the November 2004 Ohio election are erroneous, and in such magnitude that the outcome of the election is likely erroneous as well. In addition, it should be noted that, in separate and pending litigation, the Green Party and the Libertarian Party have lawfully requested a recount in the State of Ohio, which is scheduled to commence on December 14, 2004, the outcome of which further raises the probability of a change in the results of the November election. Therefore, the requested order is urgently needed to prevent the casting of electoral votes for the candidates **not** in fact chosen by the voters of Ohio.

It makes no sense to lock in an Electoral College delegation in advance of consideration of the serious charges raised in this contest petition. The evidence to be presented in support of this petition, as summarized in the attached affidavits and exhibits, require that the ultimate designation of Ohio’s proper slate of electors be reserved until a dispositive determination of the

will of the Ohio voters can be made. To provide any lesser relief would render the contest procedure meaningless.

Both federal and state election statutes and constitutional provisions were grossly violated in Ohio in the November 2004 election, with the effect of calling into question its result. The statistical evidence in particular delineates such a widespread and numerically significant pattern of pro-Bush irregularities in the November 2 Ohio election results that this Court should hold that the illegitimate tallies for George Bush are likely to exceed the margin of vote differential between the Presidential candidates. *See* Affidavits of Jonathan Simon and ___, attached.

B. Irreparable Harm Will ensue Absent Issuance of a Temporary Restraining Order in This Case

Irreparable harm will ensue to the contestors and to all those who voted in the November 2, 2004 election in Ohio should this Court fail to temporarily restrain and to permanently enjoin the final designation of Ohio's slate of electors until the contest to the election is determined. The contestors embrace the notion that their votes, and all votes, should be counted as cast. This court must stand up to protect the voters from the deliberate subversion of their rights under the state and federal Constitutions. No state may abrogate the fundamental right of any eligible person to cast a meaningful vote. A vote is not meaningful unless it is counted as cast and can be recounted to reflect the intent of the voter. The votes in Ohio will not be meaningful unless the final designation of Ohio's electors is reserved until this contest is determined.

The irreparable harm inherent in a refusal to issue a TRO in this case is immediate and profound. The Ohio General Assembly has created a procedure for contest of elections, as is necessary to protect the right to vote itself and the integrity of our elections. But that protection is absent, and the right to contest an election purely illusory, if the results of the contest cannot

come in time effectuate the change that may be dictated by the contest. The faith of the voters in the fairness and transparency of our election system is essential to our democracy, and that faith is at stake here.

C. Balancing of Interests: There Would Be No Harm to the Respondents from Issuance of a Temporary Restraining Order

Issuance of the order to restrain the casting of Ohio's electoral votes before resolution of the contest would result in no harm to the respondents. Indeed, those who support the Bush/Cheney ticket are presumably as committed to the integrity of Ohio's elections as are the petitioners. If the contest does not change the outcome of the Ohio election, then there is no harm to the respondents of any kind; there is ample time for the contest to be determined and the electors renamed, in that case, before the Congress counts the vote on January 6, 2005. Even if the result does change, the respondents may be presumed to welcome an honest result as opposed to a false Ohio "victory" for their candidate, achieved through the abridgement of Ohioans' fundamental right to vote.

Nor have the respondents any right under state or federal law to have the contest determined prior to December 13, 2004. Under Article II, Section 1 of the United States Constitution, "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors equal to the whole Number of Senators and Representatives to which the state may be entitled in the Congress..." This means that the United States Congress must defer to the will of a state's legislature, as expressed in its statutes, in recognizing the electors qualified to cast the state's votes in the electoral college for the President and Vice President of the United States. *See Bush v. Gore* (2000), 531 U.S. 9. In Ohio, the manner directed by the legislature, the Ohio General Assembly, for appointment of electors is set forth in Chapter 35 of the Ohio Revised Code.

Section 5 of Title 3 of the United States Code, the “safe harbor” statute, provides (emphasis added):

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

Thus, a state may avail itself of the safe harbor if and only if it has established a procedure by which any challenges to the composition of its body of electors is to be resolved, and if and only if the state has in fact followed its own procedure.

Ohio has established a procedure for resolution of election contests, but Ohio’s procedure does not require resolution by the deadline established by the federal safe harbor statute. In fact, Ohio’s scheme contemplates that election contests will **not** be determined prior to the safe harbor deadline or, indeed, the meeting of the electors. Ohio Revised Code Section 3515.09 (“Filing contest petition”) provides, in pertinent part:

A contest of election shall be commenced by the filing of a petition with the clerk of the appropriate court signed by at least twenty-five voters who voted at the last election for or against a candidate for the office or for or against the issue being contested, or by the defeated candidate for said nomination or election, within fifteen days after the results of any such nomination or election have been ascertained and announced by the proper authority, or if there is a recount, within ten days after the results of the recount of such nomination or election have been ascertained and announced by the proper authority. Such petition shall be verified by the oath of at least two such petitioners, or by the oath of the defeated candidate filing the petition, and shall set forth the grounds for such contest.

(Emphasis added). The Ohio Secretary of State’s certification of the vote is the first (if not the only) “ascertain[ment] and announce[ment] by the proper authority” of the results of the election.

Thus, under R.C. 3515.09, a challenge is to be filed up to fifteen days **after** the Secretary of State's certification. Secretary Blackwell waited until December 6, 2004, to certify the results of the November election. Therefore, anyone wishing to contest the recent election could not do so until at least December 6, 2004, and would be permitted to do so as late as December 21.

Moreover, the statute goes on to provide that, if there is a recount, then the contest is to be filed within ten days after the results of the **recount**. A petition for a recount may not be filed until after the certification of the vote. R.C. 3515.02 ("If the nomination or the candidacy for election ... concerning which a recount is applied for was submitted to electors throughout the entire state, the application shall be filed within five days after the day upon which the secretary of state declares the results of such election."). The Green and Libertarian Parties having complied with the recount statutes following the recent election, there will be a recount of the November 2004 ballots.

If the word "or" in R.C. 3515.09 is read to mean that the contestor is required to wait until after the recount, then the Ohio statutory scheme contemplates an even longer period before a contest can even begin. If the statute is read instead as giving the contestor the choice, it nevertheless contemplates that the contestor may wait until after the recount to file a contest, and certainly gives notice to the public that that is an option.

Even without a recount, the Ohio legislative scheme does not contemplate resolution of challenges by the federal safe harbor deadline set forth in 3 U.S.C. 5: "at least six days before the time fixed for the meeting of the electors" – this year, in Ohio, December 13, 2004. Section 3535.10 states that, when a petition to contest an election is filed, the Court is to "fix a suitable time for hearing such contest, which **shall be not less than fifteen nor more than thirty days**

after the filing of the petition.” (Emphasis added.) Moreover, the Court, for good cause shown, may grant a postponement or may on its own adjourn the matter, up to thirty days.¹ *Id.*

By requiring that contests not even be filed until certification of the results by the Secretary of State, and requiring that hearing on the petition not even begin for at least fifteen and up to thirty days (or even longer if the Court grants a postponement or adjourns), the Ohio General Assembly, unlike the State of Florida in *Bush v. Gore*, has not “provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors at least six days before the time fixed for the meeting of the electors,” as required in order to avail itself of the protection of the safe harbor statute, 3 U.S.C. 5. Any construction of 3 U.S.C. 5 to require the meeting of the Ohio electors on December 13, 2004, despite the pendency of the contest, would be unconstitutional as inconsistent with Article II, Section 1.

D. The Public Interest

Americans’ confidence in the accuracy and legitimacy of the results of their elections is perhaps at an all-time low. The question of the validity of the Ohio November 2004 election is no longer only about John Kerry or George Bush. Rather, this contest petition illustrates grassroots democracy at its best. If the contestants, registered voters who form the backbone of our democracy, are denied their right to pursue a meaningful contest prior to the Electoral College meeting, our voting rights are rendered meaningless. In order to prevent that result, this Court must issue the requested temporary restraining order and injunction. That relief will ensure that this contest to the election can have a meaningful and timely effect if it establishes, as

¹ Secretary Blackwell’s choice to wait until the last possible moment to certify the vote evidences his intention to ensure that the hearing could not even be held, let alone that the contest procedure could possibly be completed, prior to the safe harbor deadline.

the petitioners are persuaded that it will, that the current vote results are incorrect due to mistake, incompetence, or fraud.

It is not in the public interest for a large and growing number of voters to be plagued by the specter that their election system is illegitimate. The voices of those questioning the results of the Ohio Presidential Election of November 2004 reverberated to the halls of Congress, which just a few days ago held a public forum at which a number of Ohio voters appeared and gave testimony regarding the many problems with the November 2, 2004 election in Ohio. The Congressional House Judiciary Committee sent an invitation to Ohio State Secretary of State, Kenneth Blackwell, to answer and explain some of the serious charges leveled against him. He did not attend and refused even to respond.

The United States Governmental Auditing Office is also investigating Ohio voting irregularities. Rallies were held at almost every state capital building in the nation on Sunday, December 12, 2004, to protest against convening the Electoral College until every vote is counted in Ohio. Exacerbating the tension further is the circumstance that our nation is at war, for which the voters must provide billions of dollars and for which many send their sons and daughters to risk their lives. The instability caused by the serious questioning of the integrity of our elections can only be quelled by determination of this contest before the Ohio electors cast Ohio's votes for what could very well be, based on the evidence, an unelected candidate. Unless this Court issues a temporary restraining order to ensure that the recount and the contest will be meaningful, the public confidence in the election system, and indeed in the judicial system responsible for insuring its fairness and honesty, will be further eroded.

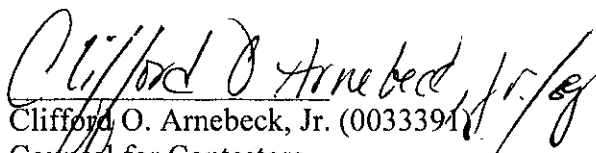
CONCLUSION

The stakes and the emotions are high, and the case is controversial to say the least. The most dedicated and wise public servants understandably feel reluctance to wade into a repeat of the 2000 post-election litigation. But this Court may approach this petition with the knowledge that the issues complicating that situation are absent here, and that this contest can be determined with an efficiency, seriousness, and grace that will distinguish Ohio in reversing the slide from fair play and democracy our nation is perceived, not only by the other nations of the world, but by its own citizens, to be experiencing in recent years.

In fact, the stakes may be great, but the task is not. The petitioners believe that the hearing (which the petitioners urge this Court to set at the earliest possible date) can be completed in as little one day, or even waived in favor of submitted evidence and oral arguments. The issues are important, but they are not complicated. This Court is fully capable of adjudicating this action well before January 6, 2005, the date upon which the Congress counts the electoral vote.

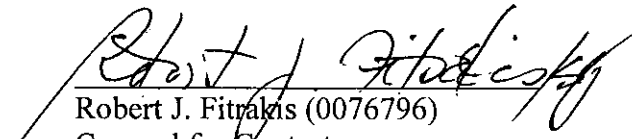
But without a temporary restraining order and an injunction, this Court's work will be in vain. This Court must act quickly to prevent the votes of the Ohio electors from being cast before the serious and substantial questions about the legitimacy of their election are resolved.

Respectfully submitted,

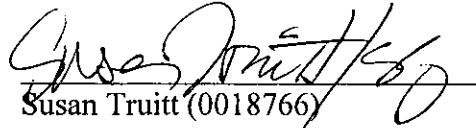


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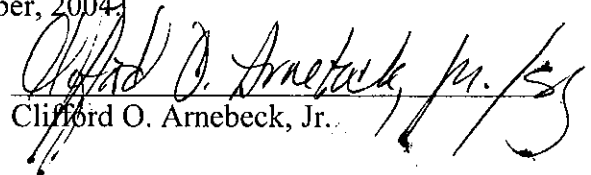
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Temporary Restraining Order was served by hand delivery upon Secretary of State Kenneth Blackwell at his office at 180 East Broad Street, 16th Floor, Columbus, Ohio, 43215 and upon all the following by U.S. mail, postage prepaid, this 13th day of December, 2004.



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