MEMORANDUM OF UNITED STATES REPRESENTATIVE JOHN CONYERS, JR. AS *AMICUS CURIAE* 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

INTEREST OF *AMICUS*

Amicus Curiae, the Honorable John Conyers, Jr., is a member of the United States House of Representatives. He currently serves as the Ranking Minority Member of the House Committee on the Judiciary.

Amicus has assumed an active role on federal election issues. In response to problems experienced by voters during the 2000 Presidential Election, *Amicus* called on then-President Clinton to investigate the Florida election. He then co-authored comprehensive election reform legislation to end discriminatory election practices, which was enacted in October 2002 as the Help America Vote Act, codified at 42 U.S.C. § 15481, *et seq*. This bill advanced voting rights, by, among other things, establishing federal minimum voting rights standards for election machines.

As part of his ongoing oversight of federal election administration, *Amicus* followed closely the 2004 federal election, including the controversy in Ohio that generated the instant dispute. In response to the documented irregularities that occurred in Ohio's presidential election, *Amicus* oversaw the preparation of a report issued by the House Judiciary Committee Staff that documented those irregularities. Further, in February 2005, *Amicus* introduced in the House of Representatives the Voting Opportunity and Technology

Enhancement Rights Act. If enacted into law, that legislation would, among other things, require states to provide for a verifiable audit trail, eliminate disparities in the allocation of voting machines and poll workers among a given state's precincts, and provide uniform standards for vote recounts.

Amicus takes no position on the underlying election contest that was *voluntarily* dismissed by the Contestors. Rather, *Amicus* provides an explanation of how Ohio's election contest mechanisms balance the important public interests of electoral integrity and finality, identifies the applicable standards for the granting of sanctions (an issue not substantially addressed by any party), and demonstrates that sanctions are plainly inappropriate in this case.

SUMMARY OF ARGUMENT

For over two hundred years, one of the strengths of our democracy has been that citizens may question the results of an election. Ohio's legislature has provided by statute a mechanism for this questioning through a series of rules that govern election contests. Those rules balance the important public interests of electoral integrity and finality. As demonstrated below, under Ohio law, sanctions should be awarded against Ohio election contestors only in extreme circumstances, if ever, and are plainly inappropriate in this case.

ARGUMENT

I. Ohio's Election Contest Mechanisms Balance the Important Public Interests of Electoral Integrity and Finality.

Public confidence in the democratic process is crucial to the legitimacy of government. Election contests are fundamental to maintaining that public confidence by promoting fair and regular elections. They "serve[] the public interest by raising and litigating important questions concerning the public's vote." *In re Election of Nov. 6, 1990 for the Office of Attorney Gen.* (1991), 62 Ohio St. 3d 1, 5, 577 N.E.2d 343, 346; *see also Bradley v. Perrodin* (2nd Dist. 2003), 106 Cal. App. 4th 1153, 1165, 131 Cal. Rptr. 2d 402, 411 (observing that "the fundamental right of self-determination for the citizens" of a given jurisdiction is implicated "in each and every election contest.").

Indeed, the nation's Founders recognized the importance of ensuring the availability of robust election contests to the legitimacy of electoral results. In 1798, Congress first enacted legislation allowing parties to election contests to obtain subpoenas for evidence discovery. 9 ANNALS OF CONGRESS 3704-05 (1799). Throughout the over-two hundred year history of election contests since then, the "vast majority of election contests have been initiated by private parties." *Dornan v. Sanchez* (C.D. Cal. 1997), 978 F. Supp. 1315, 1319.

In doing so, however, these citizens vindicate more than their own private rights: they protect the broader public interest. "Election contests are not typical adversary proceedings between individuals asserting personal rights or interests." *Bradley*, 106 Cal. App. 4th at 1171, 131 Cal. Rptr. 2d at 416 (internal quotations omitted). Rather, they "involve the right of the people to have the fact as to who has been duly elected by them judicially determined." *Id.* "The inquiry must be as to whether in a given instance the

popular will has been, or is about to be, thwarted by mistake or fraud. The public interest imperatively requires that the ultimate determination of the contest shall reach the right result." *Id.*

Also in the public interest, of course, is the finality of elections. Election contests in Ohio account for this interest by placing at least two substantial constraints on those contesting an election: a sharply constricted time frame and a high burden of proof.

First, election contests must be brought within a profoundly short time frame. In Ohio, contests must be filed "within fifteen days after the results of [the] . . . election have been ascertained and announced by the proper authority." R.C. § 3519.09. Moreover, once filed, the contest proceeding moves in an exceedingly brisk fashion: the contestor has only twenty days to take and file the deposition testimony. *See id.* at § 3515.16. Thus, this Court, in rejecting a contestee's argument that costs should be awarded against the election contestor, has emphasized "the closeness of the election" and "the very short time for filing a contest of election petition under R.C. 3515.09." *In re Election of Nov. 6, 1990*, 62 Ohio St. 3d at 5, 577 N.E.2d at 346.

Second, the evidentiary burden for proving an election contest—by "clear and convincing evidence"—erects a high barrier to gaining relief. This Court stated in *In re Election of Nov. 6, 1990* (1991), 58 Ohio St. 3d 103, 106, 569 N.E.2d 447, 450:

> We adopt the clear and convincing evidence standard. . . . . we define[] clear and convincing evidence as: that measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and

> which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. This is [a] contestor's burden of proof in [an election contest] case.

(internal citations and quotation marks omitted). Notably, this is a *proof* burden, not a pleading standard; Ohio election contests require "notice pleading," *not* "fact pleading." *See In re Election Contest of Democratic Primary Election Held on May 4, 1999 for Nomination of Clerk, Youngstown Municipal Court* (1999), 87 Ohio St. 3d 118, 120, 717 N.E.2d 701, 702 (noting that election contest challenges "do[] not fall within one of the limited exceptions to the general rule requiring notice pleading"). Thus, while ordinary *pleading* standards typically apply to Ohio election contests, the barrier to a contestor securing a favorable judgment is considerable.

These strict finality-promoting rules make it exceedingly difficult for a contestor to mount a comprehensively documented challenge. "[T]ime constraints that govern election contests, primarily designed to serve important interests and needs of election officials and the public interest in finality, simply do not work well in those elections where misconduct is of [a significant] dimension and multi-faceted variety." *Pabey v. Pastrick* (Ind. 2004), 816 N.E.2d 1138, 1147. Thus, in adjudicating a sanctions motion filed by a partisan government official against an election contestor, this Court should recognize that challenges in elections with pervasive and insidious election irregularities or misconduct are the *most* difficult to plead and prove within the tightly circumscribed constraints. *Accord In re Election of Nov. 6, 1990*, 62 Ohio St. 3d at 5, 577 N.E.2d at 346 (rejecting the contestee's argument that the

contestor should be required to pay for litigation costs despite the "[c]ontestee['s] argu[ment] that contestor asserted numerous contentions without any factual basis, without any reasonable prefiling investigation, and without any effort to demonstrate the relation to the specific election race and willingness to withdraw them when they proved totally groundless.").

II. Sanctions Should be Awarded Against Ohio Election Contestors Only in Extreme Circumstances, if Ever.

Because, as established above, Ohio election contests serve important public interests, Ohio courts must show determined restraint before imposing sanctions against those who seek to vindicate the public interest through an election contest. *See, e.g.*, *In re Election of Nov. 6, 1990* 62 Ohio St. 3d at 5, 577 N.E.2d at 346 (explaining a variety of reasons for refusing to impose certain cost sanctions against the contestor, including "the very short time for filing a contest of election petition under" Ohio law); *Carr v. Riddle* (8th Dist. 2000), 136 Ohio App. 3d 700, 706, 737 N.E.2d 976, 980 (holding that the trial court abused its discretion in imposing sanction, explaining that it was "not unmindful of the chilling effect applying the sanction remedy can have upon zealous advocacy brought ostensibly in the public interest."). Moreover, beyond the democracy-promoting value, contest proceedings also implicate important First Amendment interests such as the right to free speech and the right to petition the government for redress of grievances. Imposition of inappropriate sanctions could, therefore, have a broadly chilling effect far beyond those

parties currently before the Court. *See, e.g., White v. Lee* (9th Cir. 2000), 227 F.3d 1214, 1228 ("Informal measures, such as the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation, can violate the First Amendment also.").

Ohio's statutory code evidences the legislature's intent to avoid judicial sanctions in the cauldron of election contest proceedings. As this Court has recognized, "[t]he procedures prescribed for election contests are specific and exclusive. . . . Given the exclusivity of the election contest procedures in R.C. 3515.08 et seq., [this Court] cannot afford relief except as provided therein." *In re Election of Nov. 6, 1990* (1991), 62 Ohio St. 3d at 1, 577 N.E. 2d at 344 (citing *State, ex rel. Daoust, v. Smith* (1977), 52 Ohio St.2d 199, 200, 371 N.E. 2d 536, 537 and *Foraker v. Perry Township Rural Sch. Dist. Bd. of Educ.* (1935), 130 Ohio St. 243, 199 N.E. 74) (internal citations omitted in quote). Ohio's legislature *could* have included election contest proceeding sanctions within the "procedures prescribed for election contests [that] are specific and exclusive." *Id.* But it did not do so. Thus, construed strictly, Ohio's election statutes do not empower this Court to award election contest sanctions. Unsurprisingly, Secretary of State Blackwell cites *no* examples where this Court (or indeed *any* court) has levied sanctions in the election contest context.

However, even if the Court elects to break new ground and construe Ohio's statutes governing elections liberally to give the Court the authority to award sanctions against election contestors, or their counsel, it should adopt a rule under which at *most*, such sanctions are granted only in quite extreme circumstances; the best reading of the legislature's

decision *not* to include in those procedures a vehicle for sanctions is that it evidences recognition of the pernicious chilling effect that would be presented by such sanctions. As discussed below, though, even if this Court concludes it has the authority to sanction election contestors, or their counsel, it plainly should decline to do so here.

III. Sanctions are Plainly Inappropriate in this Case

A. Standard for Awarding Sanctions

If this Court concludes that Ohio law grants it the authority to award sanctions against an election contestor, or contestor's counsel, it must then analyze the merits of the sanctions motion lodged by Secretary of State Blackwell. Secretary Blackwell asks this Court to impose sanctions against counsel for the Contestors pursuant to Ohio Rule of Civil Procedure 11 ("Rule 11") and Supreme Court Practice Rule XIV, § 5 ("Rule XIV, § 5"). As a preliminary matter, because the standards for granting sanctions under these rules are nowhere explicated in the Secretary's motion or supporting memorandum, *Amicus* briefly discusses those standards here.

Ohio courts have set forth a three-step process for Rule 11 analysis. First:

> [b]efore a trial court imposes sanctions pursuant to Civ. R. 11, it must consider whether the attorney who signed the pleading, motion or other document: read it; to the best of his or her knowledge, harbored good grounds to support it; and did not file the pleading, motion or other document for purposes of delay.

Rust v. Harris-Gordon (Lucas App. Mar. 31, 2004), No. L-03-1091, 2004 Ohio 1636, 2004 WL 628230, at *5 (citing *Ceol v. Zion Indus., Inc.* (Lorain 1992), 81 Ohio App. 3d 286, 290, 610 N.E.2d 1076, 1080-81) (internal numbers omitted). Second, if any of these three rules are violated, "the trial court must then determine if the violation was 'willful' as opposed to merely negligent," a subjective, bad faith standard. *Id.* And, third, if the violation was willful, "the trial court may impose an appropriate sanction on the offending party, which may include an award to the opposing party of its expenses and reasonable attorney fees incurred in bringing the Civ. R. 11 motion." *Rust*, 2004 WL 628230, at *5 (internal quotation marks omitted).[1]

In contrast to Rule 11, Rule XIV, § 5 provides both a subjective and an objective standard. Rule XIV, § 5 provides that if this Court "determines that an appeal or other action is frivolous or is prosecuted for delay, harassment, or any other improper purpose, it may impose. . . appropriate sanctions." Delay, harassment, and improper purpose all suggest subjective bad faith. *See, e.g.*, *Black's Law* Dictionary (8th ed. 2004) (defining bad faith as "[d]ishonesty of belief or purpose.").

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[1] When adopted in 1970, Ohio's Rule of Civil Procedure 11 was nearly identical to its federal analogue. *Ceol v. Zion Indus., Inc.* (Lorain 1992), 81 Ohio App. 3d 286, 290, 610 N.E.2d 1076, 1080-81. In 1983, the federal Rule 11 was amended after '"receiving widespread criticism of its general ineffectiveness.'" *Id*. at 240, 1080 (quoting *Cooter & Gell v. Hartmarx Corp*. (1990), 496 U.S. 384, 391). Currently, the federal rule sets forth

objective standards, such as "the signer must conduct a "reasonable inquiry" into whether the action "is well grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *Ceol*, 81 Ohio App. 3d at 280, 610 N.E.2d at 1078. "Lacking these amendments, Ohio Civ. R. 11 still employs the subjective 'bad faith' approach." *Id.*

With respect to frivolousness, however, Rule XIV, § 5 provides an objective standard: it defines a frivolous action as one that "is not reasonably well-grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

The Secretary's motion levels charges against counsel for the Contestors based upon *both* the bad faith standards of Rules 11 and XIV, § 5 *and* the objective standard in Rule XIV, § 5 that is used to determine whether an action is "frivolous." As illustrated below, the Secretary has wholly failed to show that sanctions are warranted under any of these standards.

B. Sanctions Are Not Appropriate Under Any of the Applicable Standards

The Secretary argues that the Contestors' entire election contest suit served an "improper purpose." 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 ("Secretary's Brief"), at 3. Moreover, the Secretary appears to contend that both the filing and the subsequent prosecution of the suit evidence this purported improper purpose. However, an examination of the filing and the prosecution of the suit demonstrate that while, in the necessary rush of the suit that circumstances required if the perceived election irregularities were to be remedied, the Contestors may have committed procedural missteps, their conduct was clearly not worthy of sanctions.

1. The Contest Action Was Not Frivolous

The Contestors' good-faith filing met the requisite pleading requirements and was based on their consultation with multiple experts and the data available at the time. Given the importance of the election and the significance of quickly remedying any result-altering irregularities before Ohio's electoral results were accepted by the Congress, the contest served the entirely proper purpose of working to ensure that the election was legitimate. An analysis of the record demonstrates the good faith underlying the Contestors' conduct.

As a preliminary matter, the record unequivocally establishes that the Contestors met the notice pleading requirement necessary to initiate a contest action. The main statutory requirement of an election contest petition is that it must "set forth the grounds for such contest." R.C. § 3515.09. To comply with this statutory requirement, a contestor must allege the two elements of an election contest: that (1) one or more election irregularities occurred, and (2) the irregularity or irregularities affected enough votes to change or make uncertain the results of the election. *See, e.g.*, *In re Election Contest of Democratic Primary Election*, 87 Ohio St. 3d at 118-19, 717 N.E.2d at 702 (holding that the petition at issue should not be dismissed and reasoning that dismissal was inappropriate in part because the petition alleged that the board of elections failed to remove a withdrawn candidate's name from the ballot and that this irregularity affected enough votes to affect the outcome). As the contest petition in this case demonstrates, this pleading requirement was met. For example, Contestors' Verified Petition lists county-by-county the "number of votes actually cast for the Kerry-Edwards ticket and added to the number of votes actually

cast for the Bush-Cheney ticket." Verified Petn. ¶ 94. This irregularity, the Petition avers, was due to "error, fraud, or mistake," *id*., and was result-altering. The very next paragraph alleges that "[a]fter correcting for at least 130,613 votes improperly and unlawfully deducted from those actually cast for the Kerry-Edwards ticket and the at least 130,613 votes improperly and unlawfully added to those actually cast for the Bush-Cheney ticket, the true result was that the Kerry-Edwards ticket won Ohio by at least 142,537 votes." *Id.* ¶ 95.

The Secretary charges that the contest petition was subject to a heightened pleading standard because, although not required by R.C. § 3515.09, the Contestors "voluntarily chose to allege fraud, rather than simply allege irregularities." Secretary's Brief at 3. As the Secretary notes, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Ohio Civil Rule 9(b). However, because this Court has held that election contests require only notice pleading, the question of what pleading standard applies if an election contest petition alleges fraud as one of the irregularities at least "remains open."[2] Accordingly, even assuming *arguendo* that the Contestors were required to plead fraud with particularity and ultimately did not do so, this could hardly be a basis upon which a *sanctions* motion could be sustained.

Moreover, the Contestors *did* allege fraud with substantial particularity. The gravamen of their Verified Petition was set forth at Paragraph 73:

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[2] Christopher M. Fairman, *Pleading and Discovery in an Ohio Election Contest*, available at <http://moritzlaw.osu.edu/electionlaw/analysis/041207b.htm> (Dec. 7, 2004) (citing *In re Election Contest of Democratic Primary Election Held May 4, 1999 for Nomination of Clerk, Youngstown Municipal Court* (1999), 87 Ohio St. 3d 118, 119, 717 N.E.2d 701, 703).

> "The pre-corrected exit poll data for Ohio predicted that Kerry would win 52.1% of the Ohio presidential vote. The actual certified result shows Kerry winning 48.7% of the Ohio vote. The difference between the exit poll projection of Kerry's share of the vote and the certified actual Kerry share of the Presidential vote is 3.4%. According to standard statistical analysis, assuming a random exit poll sample and an honest vote count, there is a probability of roughly one in a thousand (0.0012) that this certified election result would occur. This implies that there is a 999/1000 chance that the Ohio exit poll result is either not based on a random sample or that the election itself was not honest….the inescapable conclusion is that there was election fraud in connection with the vote counting in Ohio."

In addition, the petition alleged that:

- "[U]nlawful ballots (not cast by a registered voter but merely added to the stack of ballots being counted) were added to those cast by lawful voters and that lawfully cast ballots were either destroyed or altered." Verified Petn. ¶ 82 (parenthetical in original).

- "580 absentee votes were cast for which there was no notation of absentee voting in the poll books." *Id.* ¶ 83.

- "[D]efendant-contestor Blackwell using his official powers as Secretary of State ordered all 88 boards of election to prevent public inspection of poll books . . . in violation of R.C. §§3599.161(B) and (C), which constitutes a separate prima-facie case of election fraud." *Id.* ¶¶ 84-85 (internal brackets omitted).

• "On information and belief, one of these means of changing the legitimate result to a fraudulent result included gaining physical or electronic access to the tabulating machines and systems." *Id.* ¶86.

• "[V]otes were deducted from the total number of votes actually cast for the Kerry-Edwards ticket and added to the number of votes actually case for the Bush-Cheney ticket" *Id.* ¶ 94 (itemizing the minimum number of votes that were added and subtracted from the vote in a given county).

And finally, Contestors alleged that an article by University of Pennsylvania Professor Steven F. Freeman, attached as Exhibit A to the Verified Petition, had concluded that the odds of the exit-poll data and the certified results in Ohio, Florida and Pennsylvania being as different as they were equaled approximately *662,000* to 1. *Id.* ¶ 75.

Each of these allegations constituted particularized pleading of the circumstances of the alleged elections fraud. Nevertheless, the Secretary's sanctions motion is based on the assertion that the Verified Petition did not provide *evidence* of fraud. *See, e.g.*, Secretary's Brief at 4 ("Yet, what was the *evidence* of irregularities sufficient to change or make uncertain the outcome of the election? Contestors relied on early exit polls. . . . These exit polls clearly constituted hearsay *evidence*. . . . And, Contestors had no credible expert review of the hearsay. . . . Where was any *evidence* of fraud?") (emphasis added). That

argument is directly undercut by the extensive and specific examples of Contestors' particularized pleading.

Moreover, Secretary Blackwell's arguments concerning what he views as the insufficiency of the evidence, however, are simply not appropriately aimed at the Verified Petition. "This argument is more appropriately made on summary judgment, where the plaintiff may be required to provide direct or circumstantial evidence to support its legal claims. In its complaint, . . . plaintiff[s] [are] not required to plead evidence." *U.S. Sec. and Exch. Comm'n v. Blackwell* (S.D. Ohio 2003), 291 F. Supp. 2d 673, 689 (analyzing pleading requirements in the context of fraud allegations); *see also Michaels Bldg. Co. v. Ameritrust Co., N.A.* (6th Cir. 1988), 848 F.2d 674, 680 n.9 (recognizing that Rule 9(b) "requires only that the 'circumstances' of the fraud be pled with particularity, not the evidence of the case").

Finally, it is notable that, as discussed below, Contestors' allegations that there were serious irregularities in the election place them in substantial company, including that of the Judiciary Committee Democratic Staff, two dozen congressional representatives, many non-partisan civil rights and civil groups, and even staff in Secretary Blackwell's own office. First, according to the Status Report of the House Judiciary Committee Democratic Staff (attached hereto as Exhibit 1):

> 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.[3]

Second, as a result of this report, twenty-four members of the U.S. House of Representatives stated, in a letter to the leaders of Congress (attached hereto as Exhibit 2), that "we believe there were numerous, serious election irregularities in the recent presidential election, which resulted in a significant disenfranchisement of voters." and remarked upon the "the massive and unprecedented extent of irregularities in Ohio."[4] (Indeed, as a result of these widely perceived irregularities, Congress debated the first challenge to a state's slate of electors[5] since the federal Electoral Count law was enacted in 1877).[6] Similarly, a coalition of over fifty major *non-partisan*, non-profit civic and civil rights organizations have also been prompted by the many complaints of irregularities in the 2004 election they received from voters in Ohio and other states to issue a detailed report chronicling those irregularities, attached hereto as Exhibit 3.[7] Finally, as quoted in a recent Columbus Dispatch article,

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[3] *Preserving Democracy: What Went Wrong in Ohio*, Status Report of the House Judiciary Committee Democratic Staff (Jan. 5, 2005).

[4] Letter from Rep. Conyers, *et al.*, to the Hon. Richard Cheney, *et al.* (Jan. 5, 2005), available at http://www.house.gov/judiciary_democrats/leadershipelectionltr1505.pdf.

[5] See 151 Cong. Rec. S41-03, 2005 WL 27057 (Cong. Rec.), Senate Proceedings and Debates of the 109th Congress, First Session (Jan. 6, 2005) (debating S41, titled "Objection To Counting Of Ohio Electoral Votes"); 151 Cong. Rec. H84-06, 2005 WL 27020 (Cong. Rec.), Proceedings and Debates of the 109th Congress, 1st Sess. (Jan. 6, 2005).

[6] *See* 90 Cong. Rec. 373 (Feb. 3, 1887) (enacting "[a]n act to . . . provide for and regulate the counting of votes for President and Vice-President and the decision of questions arising thereon").

[7] Election Protection 2004, *Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections 20-23 (Dec. 2004)*, available at <http://www.lawyerscomm.org/preliminaryreport.pdf> (detailing a litany of problems with Ohio's administration of the 2004 election, including voter intimidation, voter suppression, and malfunctioning of the voting machines disproportionately in predominantly African-American areas of Ohio).

Secretary of State Blackwell's own spokesperson acknowledged that Franklin County is "historically inept at election administration," conceded that "a Nov[ember] 2 computer glitch temporarily inflated President Bush's vote total in one polling place," and termed opposition to "challenges over new voting systems" in Franklin County to be "mind-boggling."[8] Thus, the specific allegations, multiple inclusions of evidence of fraud, and credible theory of election irregularity in Ohio, taken together and cumulatively make clear that the Verified Petition was filed for the entirely proper purpose of challenging an election that seemed deeply flawed and suspicious.

2. The Prosecution of the Contest Did Not Constitute Harassment

The Secretary also appears to make a cumulative argument under which, taken together, the following acts by the Contestors in prosecuting the case after the Petition was filed constitute harassment: filing a motion to prevent spoliation of evidence; propounding discovery demands seeking documents within 24 hours and people within 48 hours, which led to a motion for a protective order; filing a verified complaint allegedly defective because a signatory voted for Ralph Nader for President; and filing a motion for default judgment based upon what the Secretary describes as a faulty reading of Ohio Civil Rule 37.

Amicus takes no position as to whom—between the Secretary and the Contestors—has the better arguments on the procedural technicalities. Rather, it is sufficient to note that, as evidenced by the Secretary's motion and the oppositions to that

[8] Robert Vitale, *Voting System Directive: Blackwell Went Too Far With Edict, Petro Says*, COLUMBUS DISPATCH A1-2 (Feb. 9, 2005) (quoting "Blackwell spokesman Carlo LoParo").

motion filed by Counsel for the Contestors, these issues are plainly debatable. Under the incredibly truncated time-frame of an election context, procedural error—even in situations where the requirements are beyond question—occurs.

Moreover, Secretary Blackwell has provided no direct evidence of the subjective state of mind of contestors or their counsel as to their good faith in the filing and prosecution of the election contest. In contrast, Contestors' counsel -- who include experienced practitioners with election-monitoring expertise[9] -- have subsequent to voluntarily dismissing the contest filed affirmative, *sworn* affidavits in this action, stating that "I had a good faith belief that there was a factual basis for the allegations in the petition and *all pleadings filed* in the case on behalf of contestors."[10]

Under these circumstances, a finding of bad faith and imposition of sanctions would be highly inappropriate and would serve to chill advocacy of important interests that are implicated by election contests. One of the strengths of our democracy is that citizens are free to question the results of an election. Those who—in good faith—attempt to complain

[9] *See, e.g.*, App. 6 (Exhibits 15-19) to 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 (Affidavit of Robert J. Fitrakis) (on file with Court) (setting forth counsel's qualifications, including that he has a J.D. and a Ph.D. in political science, is employed as a tenured full professor at Columbus State Community College, and has served as an international election observer in El Salvador).

[10] *See* App. 6 (Exhibits 15-19) to 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 (affidavits of Susan Truitt and Peter Peckarsky, and Supplemental Affidavit of Robert J. Fitrakis) (on file with Court) (each setting forth in a sworn affidavit filed in the instant action the affirmation quoted in the above text) (emphasis supplied). And *see* Affidavit of Clifford Arnebeck attached as Exhibit 3 to Contestor Attorney Arnebeck's Memorandum Contra Motion of Secretary of State Blackwell et al. for Sanctions (on file with the Court).

through legally provided channels about the deficiencies of an election are protected by law from retaliatory sanction motions.

CONCLUSION

For the reasons stated above, *Amicus Curiae* U.S. Representative John Conyers, Jr. respectfully requests that this Court deny the motion for sanctions.

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 delivering a copy to the addresses indicated below this 14th day of February, 2005.

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