

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE OHIO DEMOCRATIC PARTY	:	
	:	
Plaintiff,	:	CASE NO. 1:06-CV-02692
	:	
v.	:	JUDGE WELLS
	:	
THE CUYAHOGA COUNTY BOARD OF	:	
ELECTIONS,	:	
	:	
Defendant.	:	

DEFENDANT OHIO SECRETARY OF STATE'S
MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER TO
ORDER POLLS KEPT OPEN BEYOND 7:30 P.M.

INTRODUCTION

Plaintiffs in this action seek to extend the hours of each polling location in Ohio beyond the statutory required time of seven-thirty p.m. (7:30 pm) to permit persons *arriving at the polling place after 7:30 pm to vote*. However, Ohio Revised Code §3501.32 does not allow the polls to be open longer than 7:30 p.m., “unless there are voters waiting in line to cast their ballots.” Only voters who arrive at the polls *before 7:31 pm* may vote. Any polling place that has voters in line at 7:30 pm can stay open as long as is necessary to accommodate *those voters*, but polling places cannot remain open to accommodate those who arrive after 7:30 pm. The Ohio General Assembly has spoken to the time that polling places should be open, and this Court does not have jurisdiction to extend the time of polling. Furthermore, Plaintiffs have not challenged the constitutionality of R.C. §3501.32. Therefore, this action should be dismissed. In the

alternative, if this Court orders that the polling places must remain open after 7:30 p.m. this evening, the ballots cast must be with a provisional ballot.

LAW AND ARGUMENT

The United States Constitution requires that elections be conducted according to standards established by state legislators, not courts. U.S. Const. Art II, § 1, cl. 2. Federal law provides that, in order to be given conclusive effect, elections must be conducted according to standards established “prior to” election day. 3 U.S.C. § 5. *See generally Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000).

Ohio law provides concrete standards to regulate the time, place and manner of elections. Specifically, Ohio Revised Code §3501.32 clearly provides the parameters for the opening and closing of election polls in Ohio:

§ 3501.32. Opening and closing the polls

(A) Except as otherwise provided in division (B) of this section, on the day of the election the polls shall be opened by proclamation by the presiding judge, or in his absence by a presiding judge chosen by the judges, at **six-thirty a.m. and shall be closed by proclamation at seven-thirty p.m.** unless there are voters waiting in line to cast their ballots, in which case the polls shall be kept open until such waiting voters have voted.

(B) On the day of the election, any polling place located on an island not connected to the mainland by a highway or a bridge may close earlier than seven-thirty p.m. if all registered voters in the precinct have voted. When a polling place closes under division (B) of this section the presiding judge shall immediately notify the board of elections of the closing.

[R.C. §3501.32 (emphasis added)].

Outside of these parameters, a court cannot extend the opening and closing of polls, and no other provision in the Ohio Revised Code permits such an extension.

Courts in other states have addressed the extension of poll times and have held that to enjoin the polls from closing would violate constitutional state law. For example,

in the Michigan case of *Southerland v. Fritz*, 955 F. Supp. 760 (E.D. Mich. 1996) the Eastern District of Michigan refused to enjoin the closing of polls in three precincts that were experiencing delays attributed to malfunctioning polling machines and a lengthy ballot. The *Southerland* court reasoned that the law mandates the time polls open and close, and is self-regulating if an emergency occurs:

The Court finds that the clear import of these statutes, taken together, is that (1) the law mandates the hours and times which polls may be held open in elections in Michigan; (2) those hours are from 7 AM to 8 PM; (3) if there is an emergency affecting poll operation, the law provides an emergency procedure which municipalities must use if they encounter machine breakdowns or other problems; and (4) that this is the only procedure available.

Southerland v. Fritz, 955 F. Supp. 760, 762 (E.D. Mich. 1996).

Additionally, in *State ex rel. Bush-Cheney 2000 v. Baker*, 34 S.W.3d 410 (Mo. App. 2000), a Missouri appeals court issued peremptory writs of prohibition against a circuit court judge that ordered the Board of Election Commissioners of the City of St. Louis to keep the polling places open past the statutory closing time. The state of Missouri has a statute similar to Ohio's R.C. 3501.32 that provides that "the election judges shall open the polls at six o'clock in the morning and keep them open until seven o'clock in the evening. At seven o'clock in the evening, all voters at the polls, including any in line to vote, shall be permitted to vote." Revised Statutes of Missouri §115.407.

The Missouri Court found that no claim was made and no findings established that §115.407 was unconstitutional. The Respondent, Judge Evelyn M. Baker, a Circuit Judge of the Circuit Court of the City of St. Louis, could not extend the voting hours beyond what was provided in the Missouri statute. *State ex rel. Bush-Cheney 2000 v. Baker*, 34 S.W.3d 410, 412 (Mo. App. 2000). The Court reasoned that "extending the

hours of voting simply permits voting by persons not entitled to vote due to their failure to come to the polls on time.” *Id.*

Finally, in Arkansas, a similar attempt to keep the polling places open failed because an Arkansas statute expressly provided the time that polling places are to remain open. In *Republican Party of Arkansas v. Kilgore*, 350 Ark. 540 (Ark. 2002), the Arkansas Supreme Court voided an emergency order extending voting hours issued by Circuit Judge Collins Kilgore. The Court struck down the emergency order, reasoning that Arkansas Code §7-5-314(c) clearly states when the polls are to be opened and closed, and no provision in the Election Code authorizes the extension of voting times by the judiciary. *Id.* at 544. The Arkansas Supreme Court also pointed out that no one challenged the constitutionality of Ark. Code Ann. §7-5-314(c), and the circuit judge made no finding of unconstitutionality. *Id.* The same reasoning should be used by this Court to find that the polling times should not be extended beyond the mandates of R.C. §3501.32.

Although the Ohio Supreme Court has said that “the provision of the statute fixing the time for the opening and closing the polls at elections is directory and not mandatory,” (*In re Contest of the Special Election at Village of Chagrin Falls*, 91 Ohio St. 308 (Oh. 1915)), *Chagrin Falls* dealt with local elections back in 1915, not statewide or national elections. *Id.* at 309. In fact, the local election was a special election in that case dealing with an issue applicable only to the village of Chagrin Falls, and was held pursuant to a local-option law, not Ohio law. *Id.* at 312. The case at hand is not a local or special election – rather it is a federal election dealing with state-wide issues.

This Court does not have jurisdiction to extend the polling time beyond 7:30 p.m., because no provision in the Ohio Revised Code allows such an extension. No challenge to the constitutionality of R.C. §3501.32 has been made, nor have any findings been issued to that effect. Additionally, the Ohio statute is self-regulating, and has a determined beginning and ending time for individuals who wish to cast their ballot. Therefore, this action should be dismissed in its entirety.

In the alternative, if this Court orders that the polls remain open beyond 7:30 p.m., federal law provides that any vote cast after the time established by State law must be cast with a provisional ballot. The Help America Vote Act (HAVA), 42 U.S.C. 15482(c) provides:

Any individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law in effect 10 days before the date of that election may only vote in that election by casting a provisional ballot under subsection (a). Any such ballot cast under the preceding sentence shall be separated and held apart from other provisional ballots cast by those not affected by the order.

Thus, if this Court orders that the polls remain open beyond the time stated in R.C. §3501.42, any vote cast must only be with a provisional ballot.

CONCLUSION

For these reasons, this action should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2006, a copy of the foregoing *Memorandum in Opposition* was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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ASSISTANT ATTORNEY GENERAL