

No. 06-\_\_\_\_\_

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

Ohio Democratic Party,

Plaintiffs-Appellees,

v.

Cuyahoga County Board of Elections,

Defendant

J. Kenneth Blackwell, Ohio Secretary  
of State

Intervening Defendant-Appellant

On Appeal from

the United States District Court  
for the Northern District of Ohio

District Court Case No. 06-CV-  
02692

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EMERGENCY MOTION OF INTERVENING DEFENDANT-APPELLANT  
OHIO SECRETARY OF STATE TO STAY OR VACATE  
DISTRICT COURT ORDER EXTENDING OHIO VOTING HOURS

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**EMERGENCY MOTION OF INTERVENING DEFENDANT-APPELLANT  
OHIO SECRETARY OF STATE TO STAY OR VACATE DISTRICT  
COURT ORDER EXTENDING OHIO VOTING HOURS**

Ohio's Secretary of State urgently asks this Court to *immediately* reverse the district court's order, which just ordered Ohio officials to hold the polls open in 16 select precincts in Cuyahoga for extra hours, until 9:00 p.m. We all value the right to vote, and this order *undermines* that right to vote, by luring voters into a possible trap, by promising extra hours—but with no assurance that late votes will be counted. This order was entered without jurisdiction, without facts to justify it, and against any measured balancing of the equities and fairness. We ask the Court to reverse it immediately, and *to do so without an opposing response*. We understand that is a strong request, but time is too short—and the shortness of time is Plaintiff's fault. Giving them time to respond will merely reward their late hit, as the polls' normal closing time is in less than an hour, so giving them even minutes will already make the harm to democracy irreversible. *And this order may irreversibly change the outcome of Ohio's elections*. Reversal is needed for several reasons, which go to the very jurisdiction of the federal courts, the need for an orderly and fair election, and the complete lack of merits in this case. We urgently ask the court to restore, not damage, democracy.

This is an appealable order because the effects are permanent. The court ordered that *regular ballots*, not provisional ballots, be used, making them

untraceable. And the State should be allowed to appeal because the court implicitly allowed our intervention by asking us to speak. (And to the extent it was implicitly denied, we ask the court to fold in a reversal of that denial, as time is too short.)

Federal jurisdiction does not even exist. This order is allegedly based on a failure to follow a *state law*, as only state law sets voting hours. See R.C. 3501.32(A). No federal right to a 13-hour voting window exists. This is not a First Amendment claim; this is a *state law issue*. And federal courts have no jurisdiction to order state officials to follow state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Plaintiffs cite the First Amendment and the Voting Rights Act, but have not come close to meeting the elements of such claims. The only real federal law violation here is not by the State, but *by the court's order*. The federal Help America Vote Act requires that late voters of questionable validity be given *provisional* ballots. But the court has ordered late voters to get *regular ballots*, which could be untraceable forever.

Standing is questionable at best. The Ohio Democratic Party is the plaintiff, and they have not shown that party *members* are even remotely threatened with disenfranchisement. If someone had to wait in the morning for 20 minutes, they already voted. If someone left and planned to come back, they expected all day that polls would close at 7:30, and by now have planned accordingly. Ohio law already says that polls will remain open as long as it takes, as long as the voter was

in line by 7:30. R.C. 3501.32. So this order, entered about 6:30 PM, was unneeded to protect those voters who are still arriving as we write.

Granting bonus time to only selected precincts does enormous harm to Ohio's election. Both the Supreme Court and this Court have warned against last-minute changes in the rules, and this is as last-minute as it gets. See *Purcell v. Gonzales*, 549 U.S. \_\_\_, 2006 Lexis 8000 (Oct. 20, 2006); *Northeast Ohio Coalition for the Homeless v. Blackwell*, 2006 U.S. App. Lexis 27049 (Oct. 31, 2006). If polling places opened an hour late, at most, then they opened at 7:30 AM rather than 6:30 AM. This case could have been filed by 10 AM, or noon—not 5 PM, leaving the district court and this Court little time to assess the situation. Plaintiff should not be rewarded for gaming the system in this way. Indeed, State counsel have been talking to counsel for *this Plaintiff* repeatedly all day long, and they never mentioned this issue.

Giving bonus time to just these precincts creates a host of horrors. First, voters there get more time to vote than other Ohio voters, *even if those voters had not tried to vote all day, and were never "turned away" in the early hours.* Second, the media start broadcasting exit poll results right at 7:30 sharp, so these late voters are encouraged/discouraged based on those results, skewing the fairness in the system.

Worst of all, later hours could create a false sense of security for those who are, even now, aiming to reach the polls by 7:30—but may now take their time and stop for dinner, planning to vote at 8 or 8:30. If those votes are ultimately determined to be invalid, the fault for that disenfranchisement will not lie with the state, but with Plaintiff and with the court below. Indeed, CNN is reporting that polls are open until 10, further confusing voters.

Nor can that be cured by promising to count late, invalid votes. Ohio's Secretary owes it to the other millions of Ohioans, who played by the rules, not to commit to giving special treatment to selected voters. Indeed, giving such relief, guaranteeing counting, is in essence granting a *permanent* injunction, but without the evidence needed to justify such relief. It would be using less-than-TRO-level facts, but giving permanent relief.

Further, the court has ordered only *select* precincts to be opened. But if media reports instantly report this, and someone mistakenly thinks her polling place is open later, she may show up at 8—only to find out her precinct is not on the list.

Moreover, the court's order violates HAVA, the federal Help America Vote Act. 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, federal law leaves absolutely no doubt that late-cast votes *must be provisional*. The court's contrary order means that regular votes will be untraceable, so that Ohio's election outcomes will be permanently affected, or left in dispute forever—and Ohioans will know that courts made it happen.

This radical relief is not in any way justified by Plaintiff's allegations, as they have not shown that anyone lost the right to vote, yet they wish to give otherwise-invalid voters a chance to sneak in late. They have not shown that a single voter was turned away in the morning. If early birds arriving right at 6:30 had to wait until 7:30 to vote, that was likely as short a wait as those who came in at peak times at 8 AM or 6 PM. In sum, Plaintiff cannot show that *anyone* who somehow left in the early hours was prevented from coming back all day, and could not have voted by 7:30, and thus no one *needs* to vote by 9.

Other reasons for reversal exist, but we have no time to list them all. The intervention of the court below, however well-intentioned, does not help democracy—it throws a monkey wrench in the system. This court may be tempted to let it go, given the late hour. But we cannot stress enough that if the Court does

not reverse, and does not do so *now*, and if any race in Ohio has a margin less than the number of late voters, then Ohioans will always wonder whether the federal courts, and not the voters, decided our election.

### CONCLUSION

For the above reasons, the State of Ohio asks this Court to stay or vacate the order below.

Respectfully submitted,

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/s/ Stephen P. Carney

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