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ELECTION DAY CHALLENGES TO POLLING HOURS AND THE JUDICIARY'S CAUTIOUS RESPONSE

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I. INTRODUCTION

As evidenced by recent election cycles, the battle to win office now involves legal, as well as political, maneuvering by campaigns.¹ Parties and candidates prepare for Election Day by organizing teams of lawyers prepared to employ legal strategies to ensure their candidate or ballot measure has the best chance of winning.² Doug Chapin, the director of the nonpartisan Election Reform Information Project, summarized the increase in election-related litigation by saying, “[e]lection night is not necessarily the finish line anymore. Both sides are lawyering up.”³

One area of Election Day litigation is the battle over court-ordered extensions of poll closing hours.⁴ As part of Election Day strategy, candidates and political parties have brought Election Day lawsuits in hopes of receiving a court-ordered extension of polling hours to allow their candidate more time to find the votes

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¹ See, e.g., John Fund, Editorial, *Litigation Day: Control of Congress may be Decided in the Courts*, *Starting Nov. 8*, WALL ST. J., Oct. 23, 2006.

² See David M. Halbfinger, *Kerry Building Legal Network for Vote Fights*, N.Y. TIMES, July 19, 2004, at A1 (highlighting Democratic presidential candidate's preparation for legal battles on Election Day by organizing six “SWAT teams” of lawyers and political operatives as well as creating a field team of 10,000 lawyers across the country prepared to litigate Election Day issues in their respective regions).

³ Fund, *supra* note 1, at 1.

⁴ See, e.g., *Missouri ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000); *Republican Party of Ark. v. Kilgore*, 98 S.W.3d 798 (Ark. 2002).

necessary to win.⁵

Petitions for extending polling hours often allege that polling places are unable to receive votes in a timely manner during the statutorily-established polling hours due to any number of circumstances, such as delayed openings, malfunctioning voting machines, high voter turnout, lack of ballots, or other delays in voting caused by election workers.⁶ Proponents of extensions often argue that, in order for all qualified voters to be allowed to cast their ballots, polling hours must be extended to accommodate voting.⁷

While the court-ordered extension of polling hours pursuant to specific circumstances set forth in a state's election code is generally not considered to be controversial, judicially created and mandated extensions may create unfairness among voters, dilute voting results, and create violations of Equal Protection principles by "valu[ing] one person's vote over that of another."⁸ Further, when the courts act without statutory basis, this creates the potential of undermining the judiciary as it could be seen in such cases as merely another political player.

Despite some confusion over the legality of court-ordered extensions of polling hours,⁹ a review of the legal precedent

⁵ See *Baker*, 34 S.W.3d 410; *Kilgore*, 98 S.W.3d 798.

⁶ See, e.g., *Baker*, 34 S.W.3d at 411.

⁷ *Id.*

⁸ *Bush v. Gore*, 531 U.S. 98, 105 (2000). The political strategy in seeking an extension in voting hours is that candidates who are trailing in the polls are afforded more time to employ "knock and drag" tactics to bring favorable votes to the polling places. See, e.g., Robert D. McFadden, *The 2004 Campaign: Last-Minute Efforts; Record Turnout Forecast; Vote Drives Intensify*, N.Y. TIMES, Nov. 2, 2004, at A23.

⁹ See Edward B. Foley, *Federal Court Extension of Polling Hours: Problem, Proposal, Example*, Election Law @ Moritz, Mar. 18, 2008, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=381>; see also David C. Lipscomb, *State Blames Faulty Forecast for Failure to Prepare for Ice; Slippery Roads Snarled Traffic for Several Hours*, WASH. TIMES, Feb. 14, 2008 at B1 (where a spokesman for the Virginia Governor stated that seeking a court order to extend polling hours was "unknown territory").

established by federal and state courts from around the country provides a judicial framework for deciding such cases.¹⁰ Poll closing hours are established by state statute, and the courts generally decline to assert jurisdiction over the question of whether such hours should be extended, as the political branches have already decided the issue in the relevant election code.¹¹

Part II of this article reviews the authority of state legislatures to set polling hours, and the courts' jurisdiction to issue orders extending the hours established by statute.¹² Part III reviews remedies in election codes to ensure fairness in the event of a voting emergency.¹³ Part IV analyzes the narrow set of circumstances where the judicial extension of polling hours appears to be without controversy.¹⁴ Part V considers the minority cases where court-ordered extensions of polling hours have not been overturned.¹⁵ Part VI summarizes the law and policy underlying modern precedent.¹⁶

II. THE LEGISLATURE SETS POLLING HOURS BY STATUTE

Since elections are statutory creations, courts must act within the statutory parameters if asked to intervene in an election.¹⁷ Given that polling hours are established by state legislatures and codified in state statutes, courts across the country

¹⁰ See *infra* Parts II, IV, V; see, e.g., *Bush v. Gore*, 531 U.S. 98; *Southerland v. Fritz*, 955 F. Supp. 760 (E.D. Mich. 1996); *Etheridge v. Alabama ex rel. Olson*, 730 So. 2d 1179 (Ala. 1999); *State ex rel. Bonzon v. Weinstein*, 514 S.W.2d 357 (Mo. Ct. App. 1974).

¹¹ See, e.g., *Republican Party of Ark. v. Kilgore*, 98 S.W.3d 798 (Ark. 2002); *Baker*, 34 S.W.3d 410; see also *infra* p. 6 and note 35.

¹² See *infra* notes 17-37 and accompanying text.

¹³ See *infra* notes 38-65 and accompanying text.

¹⁴ See *infra* notes 66-78 and accompanying text.

¹⁵ See *infra* notes 79-98 and accompanying text.

¹⁶ See *infra* notes 99-108 and accompanying text.

¹⁷ *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900).

have generally found that the judicial branch lacks the jurisdiction and authority to grant orders altering poll closing times in certain situations.¹⁸

In *Missouri ex rel. Bush-Cheney 2000, Inc. v. Baker*, the Missouri Court of Appeals prohibited a circuit court trial judge from extending polling hours because the circuit court judge lacked jurisdiction to extend hours of voting which were established by state statute.¹⁹ In *Baker*, a registered voter filed a lawsuit against the City of St. Louis's Board of Election Commissioners.²⁰ Late on Election Day, the voter had not voted and feared he would be unable to vote because of long lines at polling places and machine breakdowns that lasted for several hours.²¹ The petition further alleged that, due to large voter turnout and an inadequate number of polling places, many eligible voters would de facto be denied their right to vote.²² Circuit court Judge Evelyn M. Baker held a hearing and heard witness testimony after which she entered an order extending the voting hours by three hours at all polling places in the City of St. Louis.²³

The court of appeals prohibited the lower court from enforcing the order, holding that the trial judge did not have jurisdiction to extend the voting hours.²⁴ The court reasoned that the polling hours of 6:00 a.m. to 7:00 p.m. were established by

¹⁸ See *State ex rel. Bonzon v. Weinstein*, 514 S.W.2d 357, 362 (Mo. Ct. App. 1974) (stating that since election contests are statutory actions, the jurisdiction of the circuit court is defined by the election statutes and the letter of the law is the limit of a circuit court's power); *State ex rel. Holland v. Moran*, 865 S.W.2d 827, 832 (Mo. Ct. App. 1993); *Etheridge v. Alabama ex rel. Olson*, 730 So. 2d 1179, 1181 (Ala. 1999); *Turner v. Cooper*, 347 So. 2d 1339, 1346 (Ala. 1977).

¹⁹ 34 S.W.3d 410 (Mo. Ct. App. 2000).

²⁰ *Id.* at 411.

²¹ *Id.*

²² *Id.* The petition based its claims on the language of the Missouri election law statute requiring the Board "to properly provide enough voting booths, voting rolls, and all other supplies and equipment necessary and appropriate for the polling places." See MO. REV. STAT. §§ 115.411, 115.415 (1994).

²³ *Baker*, 34 S.W.3d at 411-12.

²⁴ *Id.* at 412.

state statute, and, unless constitutionally repugnant, courts are obligated to follow and apply the law as written by the legislature.²⁵

Furthermore, the court held that the state's statute already included sufficient safeguards against disenfranchisement as it allows anyone in line when the polls closed to vote.²⁶ Since the state statute permits voters who arrive before the statutory closing hour the opportunity to vote, the allegations of long lines and delayed voting were rendered as insufficient justifications for extending polling hours.²⁷ An extension of polling hours by court order would not speed up the voting process or resolve the alleged voting equipment deficiencies identified in the petition.²⁸ "Extending the hours of voting," the court stated, "simply permits voting by persons not entitled to vote due to their failure to come to the polls on time."²⁹ Therefore, the court of appeals held that courts lack jurisdiction to change polling hours established by the state legislature.³⁰

In a case decided two years after *Baker*, the Supreme Court of Arkansas held in *Republican Party of Arkansas v. Kilgore* that a circuit court trial judge clearly abused his discretion and exceeded his authority in extending the polling hours for an additional one and a half hours.³¹ In *Kilgore*, the trial court granted an order extending polling hours in Pulaski County based on allegations

²⁵ *Id.* (citing *State v. Burns*, 978 S.W.2d 759, 761 (Mo. 1998)). However, Plaintiff made no allegation and the trial judge made no finding that the state statute was unconstitutional. *Id.*

²⁶ *Id.*

²⁷ *Id.* The court stated that extensions in polling hours would not alleviate the burden of voters lined up on time because they would eventually be permitted to vote; however, it would permit additional people, who did not arrive on time, to have their votes counted. *Baker*, 34 S.W.3d at 412; *see also* *Armantrout v. Bohon*, 162 S.W.2d 867, 872 (Mo. 1942) (discussing how long lines or delays in voting are insufficient allegations when seeking a new election).

²⁸ *Baker*, 34 S.W.3d at 412.

²⁹ *Id.*

³⁰ *Id.*

³¹ 98 S.W.3d 798, 801(2002).

that voters were being disenfranchised because of the state Board of Election's failure to provide polling places with sufficient voting booths, voting rolls, and other supplies and equipment given the number of voters.³² Following the filing of an Emergency Petition for Writ of Certiorari, the Supreme Court of Arkansas voided the order extending the poll hours.³³ The court held that trial courts lack jurisdiction to extend hours of voting fixed by state law.³⁴ Additionally, the court added that the state legislature had already spoken regarding the establishment of voting hours by not including any provision in the election statute that would authorize an extension of voting times by the judiciary.³⁵ Given the

³² *Id.* at 798-99. The hearing did not include testimony or other evidence in support of the allegations made in the petition. *Id.*

³³ *Id.* at 800-01.

³⁴ *Id.*; see ARK. CODE ANN. § 7-5-304 (2009) (statute establishes polling hours from 7:30 a.m. until 7:30 p.m.).

³⁵ *Kilgore*, 98 S.W.3d at 800-01; see, e.g., Order of Dismissal, *Nunez v. Martinez*, No. CV-MIS-02-01, (N.M. 3d Dist. Ct. 2003) (on file with author) (court denied the Democratic Party of New Mexico's request to extend polling hours in Dona Ana County because the court did not have the authority to grant the requested remedy). Additionally, not all examples of courts rejecting petitions for poll extensions are published. Numerous examples from media sources can also be found. See, e.g., Oralandar Brand-Williams & Tim Kiska, *Blacks, Labor Show Clout; Detroiters Complain of Long Wait at Polls*, THE DETROIT NEWS, Nov. 8, 2000, at 7A (U.S. District Court judge in Michigan denied a request for polling hours to be extended stating that high turnout and long lines were not sufficient reasons for extending polls, and that the resulting inconvenience was not equivalent to a denial of the right to vote); Brett Martel, *Activists Seek to Extend Orleans Voting Hours*, ASSOCIATED PRESS, Nov. 2, 2004 (trial judge rejected a request to extend polling hours despite allegations that poll workers had denied voters taking part in their first presidential election access to electronic voting booths, instead instructing them to use provisional ballots which did not include several state elections); Amy Goldstein & Alan Cooperman, *Courts Weigh In After Voting Difficulties Emerge at the Polls*, WASH. POST, Nov. 8, 2006, A35 (despite two hour waits at the polls, a district court judge refused to grant an order extending the polling times stating that it would be improper to change the rules in only one part of the state); Katie Aston, Alan Choate and Joe Pyrah, *Problems Plague Early Hours of Election Day*, DAILY HERALD, Nov. 8, 2006, at A1 (Utah county court declined a request to extend polling hours despite problems with technology and voting machines).

legislative duty to set polling hours, the *Kilgore* court found that the trial court's extension of those hours constituted a clear abuse of discretion.³⁶

Under *Baker* and *Kilgore*, the courts show deference to the legislatures' statutes on polling hours, which is pivotal to protecting the balance between ensuring that every properly registered voter has the opportunity to vote and that only those entitled to vote – those who abide by the law by appearing at the polls within the regular voting hours – are allowed to cast a ballot.³⁷

III. MOST STATE ELECTION CODES PROVIDE REMEDIES FOR COMMON VOTING PROBLEMS

Extending poll hours by court-order appears to be unnecessary in many cases. This is because state legislatures, through election codes, usually establish remedies for delays, confusion, and various other problems commonly encountered at polling places.³⁸ When exigent circumstances cause disruption in polling procedures, election clerks and the courts generally can look to the state election code to ensure that proper procedure is followed and done fairly rather than simply extending polling hours by judicial order.³⁹

The most common remedy for Election Day delays at polling places is to allow voters to take a place in line before the poll closes pursuant to the applicable statute.⁴⁰ In *Southerland v.*

³⁶ *Kilgore*, 98 S.W. 3d at 799-801.

³⁷ See *Missouri ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410, 413 (Mo. Ct. App. 2000).

³⁸ See *infra* notes 40-65 and accompanying text.

³⁹ See *infra* notes 40-65 and accompanying text.

⁴⁰ See, e.g., CAL. ELEC. CODE § 14401 (2009) (“[I]f at the hour of closing there are any other voters in the polling place, or in line at the door, who are qualified to vote and have not been able to do so since appearing, the polls shall be kept open a sufficient time to enable them to vote.”); IDAHO CODE STAT. ANN. § 34-

Fritz, a Michigan Eastern District Court denied a motion to extend polling hours, holding that it did not have the power to extend voting hours that had been statutorily prescribed.⁴¹ The Michigan Eastern District Court noted that the statute itself contained an adequate remedy for any delays at the polls.⁴²

In *Southerland*, lengthy lines caused by malfunctioning voting machines prompted Barbara Southerland, a registered voter, to move for a temporary restraining order and/or preliminary injunction to enjoin the polls at certain precincts to remain open past the statutorily-established closing time.⁴³ However, Michigan's election law statute reads that "[o]n the day of any election, the polls shall be opened at 7 o'clock in the forenoon, and shall be continuously open until 8 o'clock in the afternoon *and no longer*."⁴⁴ The court held that the law clearly stipulated the hours that a polling place may remain open, and that these hours may not be changed.⁴⁵ The court pointed out that the statute further provided that "[e]very qualified elector present and in line at the polls at the hour prescribed for the closing thereof shall be allowed to vote"⁴⁶ explaining that this statutory "remedy prevents any voter from being denied the right to vote due to long lines or delays at the precinct, and that this remedy is exclusive."⁴⁷

1101 (2008) ("Any elector who is in line at 8:00 P.M. shall be allowed to vote notwithstanding the pronouncement that the polls are closed.").

⁴¹ 955 F. Supp. 760, 761 (E.D. Mich. 1996).

⁴² *Id.*

⁴³ *Id.* at 760.

⁴⁴ MICH. COMP. LAWS § 168.720 (2009) (emphasis added). Other state statutes include additional time restrictions along with a specified poll closing time. *See, e.g.*, TENN. CODE ANN. § 2-3-201(a) (2008) ("Polling places shall be open...*no more than thirteen* (13) hours.") (emphasis added).

⁴⁵ *Southerland*, 955 F. Supp. at 762. The court also referenced two Michigan Attorney General's Opinions which stated that the legislative body of a city could not extend the closing time of the polls, and that the statutory language requiring the polls to remain open from 7:00 a.m. to 8:00 p.m. is mandatory. *Id.* (citing 23927 Op. Att'y Gen. 624 (1941-42); 1657 Op. Att'y Gen. 159 (1952-54)).

⁴⁶ *Id.* at 761 (citing MICH. COMP. LAWS ANN. § 168.720 (2009)).

⁴⁷ *Id.* at 762.

Most states share the same statutory remedy of allowing voters to vote, if they were standing in line prior to the poll closing, notwithstanding the fact the actual voting may occur after the hour designated for the poll to close.⁴⁸ Given that the majority of states possess a similar statutory scheme, it follows that, if this issue were to arise in the absence of specific statutory guidance, courts of first impression would likely borrow from the precedent established in jurisdictions with comparable statutes and allow voters in line before the poll closes to vote.⁴⁹

⁴⁸ The vast majority of states have statutorily-established voting hours that include a provision allowing the polling place to remain open exclusively for voters who arrive before the statutory closing time, but who were unable to vote by the closing time. *See* ARIZ. REV. STAT. ANN. § 16-565(D) (2009); ARK. CODE ANN. § 7-5-304(b) (2008); CAL. ELEC. CODE § 14401 (West 2009); COLO. REV. STAT. § 1-7-101(1) (2008); CONN. GEN. STAT. § 9-174 (2009), DEL. CODE ANN. tit. 15 § 4947 (2008); IDAHO CODE ANN. § 34-1101(2) (2008); IND. CODE § 3-11-8-11(a) (2009); IOWA CODE § 49.74 (2009); KY. REV. STAT. ANN. § 118.035(1) (2008), ME. REV. STAT. ANN. tit. 21-A, § 626 (2008); MD. CODE ANN., ELEC. LAW § 10-301 (West 2009); MICH. COMP. LAWS § 168.720 (2009); MINN. STAT. § 204C.05(2) (2009); MO. REV. STAT. § 115.407 (2009); NEB. REV. STAT. § 32-908(3) (2008); NEV. REV. STAT. § 293.305(1) (2009); N.J. STAT. ANN. 19:15-9 (West 2009); N.M. STAT. § 1-12-26 (2009); N.C. GEN. STAT. § 163-166.01 (2009); N.D. CENT. CODE § 16.1-01-03 (2008); OHIO REV. CODE ANN. § 3501.32(A) (West 2009); OKLA. STAT. tit. 26, § 7-104(A) (2009); OR. REV. STAT. § 254.470(10) (2009), *amended by* 2008 Or. Laws 1st Spec. Sess. Ch. 53, S.B. 1098 (2008); S.C. CODE ANN. § 7-13-850 (2008); S.D. CODIFIED LAWS § 12-2-3 (2009); TENN. CODE ANN. § 2-7-127 (2009); TEX. ELEC. CODE ANN. § 41.032(a) (Vernon 2009); UTAH CODE ANN. § 20A-1-302 (2008); VT. STAT. ANN. tit. 17, § 2561 (2009); VA. CODE ANN. § 24.2-603 (2009); WASH. REV. CODE § 29A.44.070 (2009); W. VA. CODE § 3-1-32 (2009); WIS. STAT. § 6.78 (2009); WYO. STAT. ANN. § 22-13-117 (2008).

⁴⁹ Note, however, that in some of the earliest published decisions on the subject, voters in line at the closing of the polls were not allowed to vote, nor were their ballots counted. *See, e.g.,* Caudill v. Stidham, 54 S.W.2d 654 (Ky. Ct. App. 1932) (voiding the results of an election because a significant amount of votes were cast after the statutory poll closing time); Hogg v. Caudill, 71 S.W.2d 1020 (Ky. Ct. App. 1934) (holding that ballots cast after statutory polling hours are illegal, and such votes should be deducted from vote totals); Boone v. Humphrey, 349 S.W.2d 822 (Ky. Ct. App. 1961) (holding that votes cast after

Along with the aforementioned remedy of allowing voters in line at the poll closing the opportunity to vote, some state statutes include specific provisions for extending polling hours in specified circumstances.⁵⁰ The North Carolina General Statute section 163-166.01, for example, grants the County Election Boards the power to extend voting hours by one hour due to “extraordinary circumstances.”⁵¹

Florida’s election law statutes include a provision granting its governor the authority to alter polling hours in response to an emergency.⁵² In 2002, Florida utilized this statutory remedy after implementing a new touch-screen voting system.⁵³ The new system was marred by technical malfunctions that caused delays at polling places statewide.⁵⁴ Delays prompted the governor to order all of Florida’s polling places to remain open one additional hour.⁵⁵

Florida’s election law corresponds with national precedent requiring polling hour extensions only if granted in accordance with established statutory schemes.⁵⁶ By specifying who may declare an election emergency and alter polling hours, Florida’s

the poll closing time were invalid even though the voters were present and in line at the poll before closing but were still waiting to vote).

⁵⁰ See, e.g., FLA. STAT. § 101.733 (2009); N.C. GEN. STAT. § 163-166.01; S.D. CODIFIED LAWS § 12-2-4.

⁵¹ The statute states: “In extraordinary circumstances, the county board of elections may direct that the polls remain open until 8:30 P.M.” N.C. GEN. STAT. § 163-166.01.

⁵² FLA. STAT. § 101.733 (“Because of the existing and continuing possibility of an emergency or common disaster occurring before or during . . . [an] election, . . . and to protect the integrity of the electoral process . . . [t]he Governor may, upon issuance of an executive order declaring a state of emergency or impending emergency, suspend or delay any election.”).

⁵³ See Brendan Farrington, *Startup of Florida’s New Voting Machines Causes Opening Delays; Gov. Bush Extends Polling Hours*, ASSOCIATED PRESS, Sept. 10, 2002.

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *Missouri ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000); *Republican Party of Ark. v. Kilgore*, 98 S.W.3d 798 (Ark. 2002).

statute ensures that extensions are subject to certain conditions and, thus, are less likely to violate voters' rights.⁵⁷ Florida's statute specifically states that this remedy is in place not only to address election emergencies, but also to "protect the integrity of the electoral process."⁵⁸ Notably, the Florida statutes do not include any provision granting the courts authority to extend polling hours.⁵⁹

South Dakota's legislature has also established procedures for extending polling hours in the case of an emergency or in other extraordinary circumstances.⁶⁰ Its election emergency provision states:

[T]he county auditor may, upon request of the superintendent of an election precinct, if an emergency exists by reason of mechanical failure of a voting machine or an unanticipated shortage of ballots or like unforeseen event warrants it, extend the polling hours for that precinct until the emergency situation has been resolved.⁶¹

The statute only gives power to the county auditor to extend voting hours.⁶² While the language is broad enough to adapt to a variety

⁵⁷ Florida Governor, Charlie Crist, also invoked this provision on April 24, 2007, when regular hours at polling places in the central part of the state were disrupted by a bomb threat. Steve Bousquet, *Polling Hours Extended in House 49 Special*, Tampabay.com, Apr. 24, 2007, http://blogs.tampabay.com/buzz/2007/04/polling_hours_e.html; see also FLA. STAT. § 101.733 (2007) (granting the governor the power to declare an election emergency and issue an executive order to extend polling hours by an additional hour).

⁵⁸ FLA. STAT. § 101.733.

⁵⁹ See *id.* In addition to Florida, Louisiana's Election Code is nearly identical and grants the power to extend polls in the case of emergency to the Governor, not to judges. See LA. REV. STAT. ANN. § 18:401.1 (2008).

⁶⁰ S.D. CODIFIED LAWS § 12-2-4 (2008).

⁶¹ *Id.*

⁶² *Id.* Like nearly all the election emergency provisions nationwide, South Dakota's contains no language authorizing the judiciary to declare emergencies or alter polling hours. *Id.*

of emergencies, the statute still protects against arbitrary or subjective extensions by limiting the power to extend polling hours to a particular official.⁶³

Oklahoma's Election Code specifically confers the authority to extend polling hours to a particular official as well.⁶⁴ Oklahoma Election Code section 26-22-101 provides:

The Secretary of the State Election Board is authorized to declare an election emergency for any area of the state if it becomes impossible to conduct one or more elections using voting devices. . . . The Secretary of the State Election Board is authorized to prescribe procedures for elections conducted under said declaration consistent with purposes of the General Election laws.⁶⁵

Just as with similar statutes originating in other states, Oklahoma's statute gives someone other than a member of the judiciary the power to declare an emergency and alter statutorily-established procedures, for voting.⁶⁶

It appears from the framework of the aforementioned statutes that, if a state legislature desires to give a person or office other than the legislature the right to extend polling hours, it will do so in the election statutes of the state.

⁶³ *Id.*

⁶⁴ OKLA. STAT. ANN. tit. 26 § 22-101 (2008).

⁶⁵ *Id.*

⁶⁶ *Id.*

IV. CERTAIN EXTREME CIRCUMSTANCES SUCH AS TERRORIST THREATS AND SEVERE WEATHER MAY BE PROPER GROUNDS FOR EXTENDING POLL HOURS

The majority rule seems to be that courts lack the statutory jurisdiction to extend polling hours established by statute.⁶⁷ However, extensions have been ordered without apparent controversy in limited circumstances, including terrorist threats and severe weather.⁶⁸

During the November 11, 2006 elections, a bomb threat in Madison, Wisconsin halted voting at one city precinct.⁶⁹ Election officials suspended regular voting so voters and voting equipment could be moved to a secure outdoor location.⁷⁰ After three hours, the precinct was deemed secure, and election workers moved the poll back indoors.⁷¹ Election officials decided that the disruption and delays in voting caused by the bomb threat justified a one-hour extension of polling hours at the precinct.⁷² While Wisconsin's

⁶⁷ See *Missouri ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000); *Republican Party of Ark. v. Kilgore*, 98 S.W.3d 798 (Ark. 2002).

⁶⁸ Associated Press, *Madison Bomb Threat Halts Voting, Milwaukee Signs Spark Complaint*, USA TODAY, Nov. 7, 2006, http://www.usatoday.com/news/politicselections/vote2006/WI/2006-11-07-WI-polling-incidents_x.htm (terrorism); Eric M. Weiss and Joshua Zumbun, *Icy Rain Ties Up Traffic, Causes Dangerous Ride to the Polls*, WASH. POST, Feb. 12, 2008, <http://www.washingtonpost.com/wp-dyn/content/story/2008/02/12/ST2008021202302.html> (severe weather); see also Miranda S. Spivack, *Voters Persevere Despite Ballot Shortages, Lines*, WASH. POST, Feb. 13, 2008, at A21, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/12/AR20080212007778.html> (severe weather).

⁶⁹ *Madison Bomb Threat Halts Voting*, *supra* note 67.

⁷⁰ *Id.*

⁷¹ *Id.* During a portion of the three hour search, voting was continued in a makeshift outdoor precinct by permission from the state election board. *Id.*

⁷² *Id.* But see *Bomb Threat Delays Voting at Ohio School*, ASSOCIATED PRESS, Mar. 4, 2008, <http://elections.foxnews.com/2008/03/04/bomb-threat-delays-voting-at-ohio-school/> (A bomb threat in Ohio precinct delayed voting for 90

statutes do not include a provision for voting emergencies, the severity of the situation justified the extension, even without express guidance from state election law. Of note, just as in states that have codified their election-emergency procedure, it was state election officials, not the courts, who made the decision to extend polling hours.⁷³

Severe weather may also justify a court-ordered poll extension. In Maryland, heavy ice storms created traffic jams, road closures, and power outages during the February 12, 2008 Presidential Primary election.⁷⁴ Fearing that voters would be unable to reach the polls the state election chief contacted a county judge to seek a court order extending the polling hours.⁷⁵ After conferring with the election chief, the judge issued an order to keep polling places open for an additional 90 minutes.⁷⁶ Although Maryland does not have a statutory provision for election emergencies, the severe weather and the fact that the idea for the extension came from the state election chief, as opposed to a candidate or party, served to justify the court's extension of polling hours in that situation.⁷⁷

Generally, the limited circumstances where poll extensions have been permitted outside of statutorily-established exceptions involve situations where extreme circumstances keep voters from *physically accessing* the polls during regular voting hours, thereby

minutes but polling hours were not extended since only 14 voters arrived during the evacuation and all agreed to return to vote later that day.). *Id.*

⁷³ See *supra* notes 52-55 and accompanying text.

⁷⁴ Weiss and Zumbrun, *supra* note 67.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See David C. Lipscomb, *State Blames Faulty Forecast for Failure to Prepare for Ice; Slippery roads snarled traffic for several hours*, WASH. TIMES, Feb. 14, 2008 (discussing how the same storm that battered Maryland also affected neighboring Virginia). Despite the weather, Virginia Governor Tim Kaine expressed that neither he nor the State Board of Elections had the power to extend polling hours. A spokesman for the Governor suggested that Virginia may have sought a court order similar to the one granted in Maryland, but that this action was "unknown territory." *Id.*

frustrating the usual remedy of allowing only those who reach the polls before closing hours the chance to vote.⁷⁸ While the validity of court orders extending hours in the foregoing types of emergency situations has not been scrutinized by the appellate courts, these situations highlight the severity of circumstances that have justified a judicial order contravening statutorily-established poll closing times in the past.

V. THE MINORITY CASES

In *Torres v. Board of Election Commissioners for City of Chicago*, the Appellate Court of Illinois chose not to overturn election results despite allegations by the plaintiff that there were voting irregularities, including a court order extending voting hours beyond the times established by the state's election code.⁷⁹ On Election Day, the circuit court judge issued an injunction requiring that the polling places in five precincts of Chicago's 26th Ward remain open until 9 p.m., two hours beyond the statutory closing time, because the polls did not open in a timely manner that morning.⁸⁰ In a consolidated appeal, Torres, a candidate for the office of Alderman in the 26th Ward, sought to enjoin the county clerk from certifying the election and appealed the circuit judge's order extending polling hours.⁸¹

The Appellate Court of Illinois held that the election results could not be overturned based solely on the contention that the circuit court erroneously extended the polling time by two hours on Election Day.⁸² While *Torres* may appear to tolerate the circuit court's extension of polling hours, the court's unwillingness to overturn the election results should not be read as an endorsement of the circuit court judge's actions in granting a court order extending polling hours, which the Illinois Court of Appeal

⁷⁸ See *supra* notes 36-41 and accompanying text.

⁷⁹ 492 N.E.2d 539, 540 (Ill. App. Ct. 1986).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 541.

declined to do.⁸³ The Illinois Court of Appeal's principle holding was that Torres could not enjoin the county clerk from certifying the election, and that Torres should have instead challenged the election results through the statutorily established procedures.⁸⁴ When faced with the second issue on appeal, regarding the legality of the circuit judge's order, the court refused to make a ruling and dismissed the appeal without prejudice.⁸⁵

Lake v. State Board of Elections of North Carolina is another case in which the court allowed election results to stand despite alleged voting irregularities caused by extended voting hours.⁸⁶ In *Lake*, high voter turnout exacerbated voting delays caused by inadequate voting machines, technological malfunctions, and a complicated ballot.⁸⁷ As a result of these problems, a state trial court judge in Guilford County, North Carolina extended voting for an additional hour.⁸⁸ The plaintiff, a candidate for Associate Justice of the North Carolina Supreme Court, filed an action in federal district court, alleging violations of federal and state statutes.⁸⁹ The plaintiff sought to have the election results

⁸³ *Id.* at 541-42.

⁸⁴ *Id.* at 541. The court explained that in order to qualify for injunctive relief, Torres would have to prove that there was no adequate remedy at law for the injury he had suffered. The court held, however, that Torres failed to establish this element because the state statute sets forth procedures for contesting elections that Torres did not pursue. *Id.*

⁸⁵ *Id.* at 542. The court instead stated that it did not have sufficient information to rule on the court-ordered extension because the parties had failed to sufficiently present the issues for the court to rule upon. *Id.*

⁸⁶ *Lake v. State Bd. of Elections of N.C.*, 798 F. Supp. 1199 (M.D.N.C. 1992).

⁸⁷ *Id.* at 1202.

⁸⁸ *Id.* at 1203. *Lake* also involved similar claims against another North Carolina county, Durham County. *Id.* at 1202. In Durham County, the Board of Elections voted to extend polling hours from 7:30 p.m. to 8:30 p.m. pursuant to the authority granted them by North Carolina General Statute Section 163-2 (1987). Later, a superior court judge granted a motion further extending the voting until 10 p.m. While the judge's order extending voting hours beyond 8:30 p.m. was in violation of section 163-2, the claims related to the misconduct in Durham County were dismissed on other grounds unrelated to the present discuss. *Id.* at 1202, 1204.

⁸⁹ *Id.* at 1201.

voided and requested an order mandating a new election.⁹⁰ The district court was unwilling to overturn the election results because the state court's order ultimately had the same effect even though the state statute granted only the Board of Elections the authority to extend polling hours by one hour.⁹¹

Ultimately, the district court upheld the state court's decision stating that the orders were within the bounds of a previously-established election law statute and was issued in good faith to salvage the voting process.⁹² The district court dismissed the claims and certified the election results, finding that the state court's order did not rise to a level sufficient to justify overturning the election results.⁹³ In its holding, the district court did not, however, endorse the state court's actions.⁹⁴ Rather, it acknowledged that granting an order extending polling hours may have been "somehow legally erroneous," highlighting the fact that the state legislature had already established a process for extending polling hours.⁹⁵

While the *Torres* and *Lake* courts upheld election results where court-ordered extensions of polling hours took place, in neither of these cases did the court endorse the proposition that courts have jurisdiction to extend statutorily-mandated poll closing hours.⁹⁶ Indeed, the *Lake* court expressly questioned that proposition.⁹⁷

⁹⁰ *Id.* at 1201-02.

⁹¹ *Id.* at 1205.

⁹² *Id.* at 1208.

⁹³ *Id.* at 1205-06.

⁹⁴ *See generally id.*

⁹⁵ *Id.* at 1208. Voting in Guilford County, North Carolina was again extended under a court order in 1996, as mentioned in *Democratic Party of Guilford County v. Guilford County Bd. of Elections*, 467 S.E.2d 681 (N.C. 1996). The issue before that court was who would be responsible to pay the additional fees incurred during the court-ordered extension; validity of a court-ordered poll extension was not at issue. *See id.*

⁹⁶ *See Torres v. Board of Election Comm'rs for City of Chicago*, 492 N.E.2d 539, 540 (Ill. App. Ct. 1986); *Lake*, 798 F. Supp. 1199.

⁹⁷ *Lake*, 798 F. Supp. 1199.

Subsequently decided cases such as *Baker*, *Kilgore* and *Southerland* confronted the issue of poll hour extensions squarely and held that the courts lack jurisdiction and authority to order polls to stay open past statutorily-established deadlines.⁹⁸

⁹⁸ See, e.g., *Southerland v. Fritz*, 955 F. Supp. 760 (E.D. Mich. 1996); *Missouri ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000); *Republican Party of Ark. v. Kilgore*, 98 S.W.3d 798 (Ark. 2002). It should be noted, however, that media reports of poll hour extensions still arise each election cycle. Since many Election Day attempts to extend polling hours are not nationally published, and because many media reports do not provide sufficient details or legal analysis, there is insufficient information to classify these cases. They do, however, illustrate the potential risk of inconsistent decisions and results in these types of cases. See, e.g., David McLemore, *Confusion Left Some Bexar Democrats Unable to Vote*, DALLAS MORNING NEWS, Mar. 13, 2002 at 14A (Texas state district court judge extended hours at 50 polling places because consolidation of several polling places left many voters confused as to where to vote); Kristin Chapman, *Problems at the Polls*, WORLD MAGAZINE, web extra, Nov. 7, 2006, <http://www.worldmag.com/webextra/12408> (judges in Delaware and Pennsylvania ordered polls to remain open one hour later than usual due to technical problems with voting machines); Christine Hauser & John Holusha, *Problems Lead 8 States to Extend Some Voting Hours*, N.Y. TIMES, Nov. 7, 2006 (hundreds of precincts were kept open due to late poll openings, technical difficulties, confusion over where to vote, and other similar problems in South Carolina, Ohio, Georgia, North Carolina, Illinois, and Indiana); Cameron W. Barr & Miranda S. Spivack, *Poll Hours Extended for Maryland Voters*, WASH. POST, Sept. 12, 2006 (judge in Maryland ordered polls to remain open an additional hour in Montgomery county after election officials failed to deliver to precincts the electronic cards needed to operate computerized voting machines, leaving many unable to vote and told to return later or vote on paper ballots); Steve Brown and Jeff Goldblatt, *Questions Raised Over Decision to Extend Ohio County Precinct Hours*, Foxnews.com, Mar. 4, 2008, available at <http://www.foxnews.com/politics/elections/2008/03/04/tussle-over-ballots-bad-weather-mark-ohio-voting/> (Ohio judge extended polling hours for 90 minutes because the county had run out of paper ballots, forcing election workers to turn away 300-400 voters). It does not appear that any of the foregoing cases resulted in published decisions at the trial or appellate court level that would serve as precedent in future cases or allow the courts' legal reasoning to be analyzed.

VI. POLICY UNDERPINNING THE COURT'S RELUCTANCE TO EXTEND STATUTORILY MANDATED POLLING HOURS

When a state legislature prescribes election procedures for its citizens, the right to vote is fundamental.⁹⁹ This fundamental voting right lies in the equal weight accorded to each vote and the equal dignity owed to each vote.¹⁰⁰ With this principle in mind, state legislatures have often created provisions within their state's election code to handle various situations where voters are at risk of not being able to vote within the set polling hours.¹⁰¹

Such statutory provisions have a two-fold purpose: first, protecting the rights of persons qualified to vote and ensuring them equal access to the polls; and second, protecting the value of the votes cast by qualified persons from dilution or debasement brought about by mixing qualified votes with votes cast contrary to state law. When courts order extensions of polling hours, the qualified votes of those who adhered to state law by casting their ballots during statutory time limits may be diluted when mixed with votes cast by those who come to the polls past the legal hour, yet are still allowed to vote. This concern is heightened when only certain polls in a state or county are affected by a trial court's order to extend polling hours, thus causing citizens in different parts of a state or county to be treated unequally as it relates to the window in which citizens are allowed to vote.¹⁰²

States have, in most cases, established voting procedures, including voting hours and specific processes for emergencies, to protect against arbitrary or unfair election practices. By making these important procedures matters of statutory concern, responsibility to conduct elections and respond to emergency

⁹⁹ *Bush v. Gore*, 531 U.S. 98, 104 (2000).

¹⁰⁰ *Id.*

¹⁰¹ For example, many states have absentee voting statutes. *See, e.g.*, CAL. ELEC. CODE § 3000-3024 (2009); N.C. GEN. STAT. § 163-226 (2009); N.Y. ELEC. LAW § 8-400 (2009).

¹⁰² *Bush*, 531 U.S. at 104-05.

circumstances is placed in the hands of designated officials, and not delegated to the courts.¹⁰³

Court-ordered polling hour extensions, absent a statutory basis, also risk violating the Fourteenth Amendment of the U.S. Constitution, which requires states to give “equal protection of the laws” to any person within its jurisdiction.¹⁰⁴ Simply put, the “Equal Protection Clause” requires states to give similarly situated persons or classes similar treatment under the law.¹⁰⁵ The principles of Equal Protection may be violated when court-ordered poll extensions grant an extra opportunity to vote to some portions of the electorate, but not to others.¹⁰⁶ Court orders allowing votes to be cast after statutory poll closings may also disrupt the requirement that all votes be cast on “equal terms” and violate the equal protections granted by the Fourteenth Amendment by “valu[ing] one person's vote over that of another.”¹⁰⁷

By adhering to the statutorily mandated polling hours and declining to order extensions upon demand, recent court decisions have avoided the risks noted above inherent in allowing polls to remain open past the statutory deadline.

VII. CONCLUSION

Polling hours are set by statute. Recent appellate court precedent holds that courts do not generally have jurisdiction or authority to contravene state law by granting orders to keep polls open after statutory closing hours.

State statutes usually include remedies to ensure that voters are able to cast timely ballots. For example, states generally ensure that the votes of registered voters are properly and equally valued by stipulating exact hours when voting may occur and allowing voters who present themselves at the polls during these

¹⁰³ See *Bush*, 531 U.S. at 116 (Rehnquist, C.J., concurring).

¹⁰⁴ U.S. CONST. amend. XIV, § 1.

¹⁰⁵ BLACK'S LAW DICTIONARY 577 (8th ed. 2004).

¹⁰⁶ *Foley*, *supra* note 9.

¹⁰⁷ *Bush*, 531 U.S. at 104-05.

hours the right to vote, even if they are still waiting in line at the close of the statutory voting hours. In addition, certain statutes include provisions for emergencies, conferring the power to extend polling hours to specific individuals under specific circumstances. In the absence of such statutory provisions governing emergency situations, election officials and courts have extended polling hours without controversy in severe circumstances such as threat of terrorism or extreme weather.

Earlier cases affirming elections in which poll hours were extended do not appear to have endorsed the proposition that courts have the authority to extend polling hours. Leading opinions provide that requiring conformity to statutory voting provisions ensures that voters are treated equally and that their votes are protected from dilution. The *Baker* court's holding provides such guidance:

We recognize that in the heat of a closely-contested election campaign, trial judges may be called upon to make difficult decisions with little time for deliberation. Where fundamental rights are at stake, such pressures are magnified. But commendable zeal to protect voting rights must be tempered by the corresponding duty to protect the integrity of the voting process. Courts should not hesitate to vigorously enforce the election laws so that every properly registered voter has the opportunity to vote. But equal vigilance is required to ensure that only those entitled to vote are allowed to cast a ballot. Otherwise, the rights of those lawfully entitled to vote are inevitably diluted.¹⁰⁸

By relying on statutory schemes – codes established by the legislature long before the heat of Election Day battles – courts can protect the judicial branch and the voters from being manipulated as part of Election Day political/legal strategies that promote one

¹⁰⁸ Missouri *ex rel.* Bush-Cheney 2000, Inc. v. Baker, 34 S.W.3d 410 (Mo. Ct. App. 2000).

party's or candidate's interests. Such restraint also lessens the likelihood that the courts will be viewed as political actors in an election.