UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RANDY SMITH, et al., Plaintiffs, v. JON HUSTED, individually and as Secretary of State of Ohio, Defendant.	Case No.: 2:16-cv-212 Judge George C. Smith Magistrate Judge Elizabeth Preston Deavers

DEFENDANT'S MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Secretary of State Jon Husted respectfully moves this Court to dismiss the complaint of Plaintiffs with prejudice. The grounds supporting this motion are set forth in the attached memorandum.

Dated: March 11, 2016

/s/ Chad A. Readler
Chad A. Readler (0068394)
Trial Attorney
JONES DAY
325 John H. McConnell Blvd., Suite 600
P.O. Box 165017
Columbus, OH 43216.5017
Telephone: 614.469.3939
Facsimile: 614.461.4198
careadler@jonesday.com
mcushing@jonesday.com

Counsel for Defendant
Ohio Secretary of State Jon Husted

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DEFENDANT'S COMBINED MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT, AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

I. Introduction

Ohio's 2016 primary election began over three weeks ago. Nearly 200,000 votes have already been submitted in early and absentee voting. Nonetheless, just three days ago, Plaintiffs, 17-year olds who wish to vote to elect delegates to the respective national conventions of the Democratic and Republican parties as part of Ohio's March 15 primary election, brought suit to challenge a directive issued by Defendant Secretary of State Jon Husted in December 2015 to all Ohio county boards of elections concerning the eligibility of 17-year olds to elect delegates in this year's presidential primaries. Plaintiffs' suit alleges constitutional claims arising out of the Equal Protection Clause, the Due Process Clause, and the Twenty-Sixth Amendment, and a statutory claim based on the Voting Rights Act. Plaintiffs seek temporary and permanent injunctive relief allowing them to vote to elect delegates in this year's presidential primaries. For a host of reasons, their request should be denied, and their complaint dismissed.

First, Plaintiffs' failure to file this challenge until the last possible moment before the March 15 election dooms their Complaint on well-settled equitable grounds. Plaintiffs have been on notice of the language in the Secretary's directive since December 2015, when the directive was finalized. Yet they waited (without justification or excuse) until March 8 to bring their claim, *168 days* after the directive was made available for public comment, *85 days* after it was issued in final form, nearly *three weeks* after voting had started, and just *one week* before primary election day. The result is substantial prejudice to the Secretary and Ohio's 88 county boards of elections, as well as those 17-year olds who have already voted. Plaintiffs' assertion that they "have found no evidence" that the Secretary provided any guidance or other "meaningful notice" (Pls' Motion at 22) of the law applicable to 17-year olds is difficult to accept. These directives do not substantively change settled voting law, and in any event were

widely circulated for comment six months ago. That Plaintiffs were aware of a 32-year old informal, non-binding, non-electronically available "newsletter" from a prior Secretary of State, moreover, makes it hard to believe they were nonetheless entirely unaware of the public (and electronically available) proceedings from last fall articulating Ohio's settled voting procedures. Therefore, Plaintiffs' requested remedy is barred by laches, and Plaintiffs' complaint should be dismissed.

Second, the Court should abstain from ruling on Plaintiffs' motion here. At bottom, this case is about nothing more than whether, together the Ohio Constitution and the Ohio Revised Code allow, or do not allow, 17-year olds to vote. That question is simultaneously being litigated in the Ohio courts. *See Schwerdtfeger, et al. v. Husted*, Case No. 16-CV-2346 (Franklin County Court of Common Pleas). Therefore, under the well-established *Pullman* abstention doctrine, this Court should abstain from addressing the issues in this case until the Ohio courts have had a chance to interpret Section 3503.011. A state court ruling in Plaintiffs' favor on the proper interpretation of Section 3503.011 of the Ohio Revised Code would eliminate the need for the Court to address the federal questions raised by Plaintiffs in this action. Conversely, a state court judgment in the Secretary's favor would treat all 17-year olds equally, for purposes of voting in the Ohio presidential primary, dooming Plaintiffs' hodgepodge of federal claims.

Third, Supreme Court precedent weighs heavily against the issuance of an injunction here. The presidential primary election is scheduled for March 15, 2016, four days from now. The Supreme Court has repeatedly emphasized that last-minute injunctions affecting state election procedures are disfavored. This is true because "the inevitable result of [such an injunction] will be interference with orderly election administration and greater confusion among poll workers and voters. . . . Changing election rules in this manner while voting is occurring

disrupts the electoral process and threatens its fairness." *Serv. Employees Int'l Union Local 1 v. Husted*, 698 F.3d 341, 345-46 (6th Cir. 2012).

Fourth, Plaintiffs cannot show they are entitled to injunctive relief in any event, because they cannot show that they have a strong likelihood of success on the merits. Plaintiffs' claims presuppose that 17-year olds have a right to vote to elect delegates to a party's national convention in presidential primary elections. But as Ohio's Constitution and statutory framework make clear, no such right exists. They likewise presuppose unequal treatment among classes, when the relevant class—Ohio citizens who are under age 18 on March 15, 2016—are treated exactly alike under the Secretary's instructed voting protocol. Put differently, Plaintiffs' invocation of the concept of "Threshold Voters" is simply another way referencing Ohioans who are not 18 as of next Tuesday. And those voters will be treated the same, should the Secretary prevail in state court. Should Plaintiffs prevail on the constitutional claims, on the other hand, thereby denying the right of the State of Ohio to require that only those 18 and over vote on the direct election of persons holding a position or office, that in essence would be a springboard for other minors, of any age, to bring similar suits, as they too are being "denied" the right to vote. But there is no need for the Court to start down this slipperiest of slopes, given the many grounds for denying Plaintiffs' request for relief.

Finally, not only do the Plaintiffs start from an incorrect understanding of the law, but they also misunderstand the history of voting in Ohio. Plaintiffs claim that the Secretary's directive results in the "unprecedented denial of Plaintiffs' right to vote" to elect delegates to a party's national convention. *See* Mot. at 5. But Plaintiffs do not cite a single instance when Ohio allowed a 17-year old to vote to elect delegates to a party's national convention. A denial

of something that has never happened cannot be "unprecedented." Indeed, it is Plaintiffs' requested relief that lacks historical pedigree.

In short, Plaintiffs' claims are untimely and in any event baseless, and their request for injunctive relief accordingly should be denied.

II. Background

A. The Ohio Constitution and the Ohio Revised Code put in place specific procedures for voting.

1. The Ohio State Constitution allows only those 18 and older to vote in elections.

Ohio, like many states, has a detailed constitutional, statutory, and regulatory framework governing who may vote, when, where, and for whom, among dozens of other election issues. *See generally* Ohio Const. art. V; O.R.C. 3501 *et seq.*; Ohio Admin. Code § 111:3-1 *et seq*. As to the question of who may vote, the Ohio Constitution requires that a citizen must be "of the age of eighteen years" to be qualified to vote:

> V.01 Who may vote
>
> Every citizen of the United States, *of the age of eighteen years*, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, *has the qualifications of an elector*, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.

Ohio Const. art. V, § 1 (amended Nov. 1977) (emphasis added). The Ohio Constitution was amended on the heels of the enactment of the 26th Amendment to the United States Constitution, which made clear that no State may deny anyone "eighteen years of age or older" the right to vote on account of age. U.S. Const. Amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

2. Ohio's primary election is an event at which both "nominations" for elected office are made, and delegates are "elected" to the convention of political parties.

Ohio law expressly defines the features of our "primary election." A "primary election" is defined as an event "held for the purpose of nominating persons . . . for election to offices, and for the purpose of electing persons . . . as delegates and alternates to the conventions of political parties." O.R.C. 3501.01(E)(1). By statute, the event of the primary election "shall be held on the first Tuesday after the first Monday in May," *id*., unless that year's primary election is "also held for the purpose of choosing delegates and alternates to the national conventions of the major political parties pursuant to section 3513.12 of the Ohio Revised Code," like the 2016 Ohio primary, in which case the event of the primary election "shall be held on the second Tuesday after the first Monday in March." O.R.C. 3501.01(E)(2).

As reflected by O.R.C. 3501.01(E)(1) and (E)(2), a primary election consists of a group of nominations and elections to be voted upon by voters at one place and time. Notable for today's purposes, a primary election can contain two distinct types of matters to be voted upon: (1) one type to "nominat[e] persons . . . for election to offices" at the general election in November, such as U.S. Senators, Representatives to Congress, and state officials; and (2) another to "elect[] persons . . . as delegates and alternates to the conventions of political parties." O.R.C. 3501.01(E)(1); *see also* O.R.C. 3501.01(E)(2) ("Presidential primary election" means a primary election as defined by division (E)(1) of this section at which an election is held for the purpose of choosing delegates and alternates to the national conventions of the major political parties pursuant to section 3513.12 of the Revised Code.").

3. To incentivize youth voting, Ohio's legislature has allowed 17-year olds to participate in aspects of primary elections that do not involve a direct vote to elect one to a position or office.

Against the backdrop of the constitutional prohibition on anyone under 18 serving as an

elector in an election, the Ohio General Assembly sought ways to promote civic engagement among 17-year olds approaching the age of majority. Thus, the Ohio General Assembly passed O.R.C. 3503.011, which allows select minors to participate in specifically-delineated aspects of the political process before they turn 18. To wit, any 17-year old who will turn 18 by the time of the next general election is allowed to participate in a "primary election," O.R.C. 3503.011, where such voting would not run afoul of the Ohio Constitution.

To that end, the Ohio Supreme Court seemingly has recognized a limited exception allowing those under age 18 to participate in Ohio's electoral process by drawing a distinction between primary elections that involve races which "nominat[e] persons . . . for election to offices," and those that "elect[] persons . . . as delegates." In 1908, the Ohio Supreme Court held that for purposes of Article V, Section 1, "a primary election held merely to name the candidates of a political party is not an election within the meaning of this section of the Constitution" because Section 1 does not refer "to the nomination of candidates." *State ex rel. Webber v. Felton*, 84 N.E. 85, 89 (Ohio 1908). In other words, if a race on a ballot at a primary election event involves a "nomination," such as for most federal and state official positions—for example, this year's Democratic contest for U.S. Senator—the voter is not "electing" one to an official position or office, and thus the voter need not meet the 18-years-old requirement of Article V, Section 1. *Id.* But if a race on a ballot at a primary election involves an "election," such as presidential primary election ballots to "elect[] persons . . . as delegates . . . to the national conventions of the major political parties," O.R.C. 3501.01(E)(2), then it is still subject to Section 1's requirements—including the requirement that the participant be at least 18 years old. *See* Ohio Const. art. V, § 1. The same is true for other positions that are "elected" during a primary election, including members of each major party's state central committee and county

central committees. *See* O.R.C. 3517.03 ("[C]andidates for election as state central committee members shall be elected at primaries in the same manner as provided in sections 3513.01 to 3513.32 of the Revised Code for the nomination of candidates for office in a county. Candidates for election as members of the county central committee shall be elected at primaries in the same manner as provided in those sections for the nomination of candidates for county offices.").

4. During a primary election, voters elect by direct vote delegates to the respective national political conventions.

Today's dispute thus turns on the interpretation of the provisions in O.R.C. 3501.01(E) addressing the selection of delegates and alternates to the convention. The election of these delegates has constitutional underpinnings: "All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors in a manner provided by law. Ohio Const. art. V, § 7; O.R.C. 3513.12 (requiring same). Implementing this constitutional command, the General Assembly prescribed a "presidential primary election" event, during which participants "*choos[e] delegates* and alternatives *to the national conventions* of the major political parties." O.R.C. 3501.01(E)(2) (emphasis added).

A "primary election" and a "presidential primary election" can happen at the same time—and indeed, often do. Thus, ballots can, and often do, contain both provisions "nominating persons" for office, for example, the U.S. Senate, and "electing persons . . . as delegates," for example, as delegates to the national convention for their political party for purposes of selecting the party's presidential nominee. O.R.C. 3501.01(E)(1) & (2). This year's Official Democratic Primary Ballot in Franklin County, for example, contains both kinds of provisions. It lists numerous federal and state races for which those participating in the primary election will "nominate persons," including U.S. Senator (either Sittenfeld, Strickland, or Prather), Representative to Congress for the 15th District, Prosecuting Attorney, and County

Commissioner. *See* Compl. Ex.. The official sample ballot also lists one race that participants will "elect[] persons . . . as delegates . . . to the" Democratic National Convention. *See id.* (section titled "For Delegates-at-Large and Alternates-at-Large to the National Convention").

The latter race is the subject of this dispute. Although the names listed in that race include Bernie Sanders, Roque "Rocky" De La Fuente, and Hillary Clinton, that portion of the ballot, as expressly required by both the Ohio Constitution and Revised Code, serves to "elect[] . . . delegates" who in turn will nominate either Bernie Sanders or Hillary Clinton at the Democratic National Convention. *See* O.R.C. 3501.01(E)(2) (during a "presidential primary election" event, participants only "choos[e] delegates and alternatives to the national conventions of the major political parties"). Indeed, although the names of the presidential candidates are listed on the ballot, the heading of the box in which their names appear makes clear that the voter is in fact selecting "Delegates-at-Large and Alternates-at-Large to the National Convention" by filling in a bubble, and not nominating a presidential candidate directly. See Compl. Ex. 4.

Ballots include the presidential candidates' names as a matter of convenience. Indeed, the default rules under Ohio law are that unless the presidential candidate files a specific form substituting their name for the delegate's name, the delegate's name will appear on the ballot. O.R.C. 3513.151. *See also* Affidavit of Matthew M. Damschroder ¶ 21 (March 10, 2016). When a delegate is selected in a primary election, he or she receives a "Certificate of *Election*" entitling that delegate to attend that party's national convention. *See* O.R.C. 3513.12; O.R.C. 3513.151. *See also* Sample Certificate of Election, attached as Attachment F to the M. Damschroder Aff. The precise structure for electing convention delegates has been recognized by Secretaries of State and other public officials for decades, *see infra*, including by now-State Representative Kathleen Clyde when she was corresponding with constituents in 2008 as a

member of the Ohio Secretary of State's office. *See* E-mail memo from K. Clyde to K. Armentrout (Jan. 31, 2008), attached as Attachment C to the M. Damschroder Aff. (recognizing that the 2008 presidential "primary election is actually an election for presidential candidate delegates and alternate delegates to the national conventions of the different major political parties").

Under both the Ohio Constitution and the Ohio Revised Code, those elected to serve in the position of delegate to the national convention must be elected by "direct vote." The Ohio Constitution makes equally clear that such a direct vote to elect a person to a position or office cannot be made until the voter turns age 18. *See* Ohio Const. art. V, § 1 (limiting the right to vote to those 18 or older).

B. For at least 14 years, Ohio's Secretaries of State have interpreted Article V, Section 1 to prohibit 17-year olds from "electing" party officials and delegates in presidential primaries.

The Secretary of State is Ohio's chief election officer. O.R.C. 3501.04. As such, the Secretary is required to "[i]ssue instructions by directives and advisories . . . to members of the boards as to the proper methods of conducting elections," "[p]repare rules and instructions for the conduct of elections," and "[c]ompel the observance by election officers in the several counties of the requirements of the election laws." O.R.C. 3501.05(B), (C), and (M).

Accordingly, leading up to each election year, the Secretary issues directives to all boards of elections concerning various election-administration topics, including directives regarding who may participate in the primary election process, and, as is applicable to 17-year-olds, what races those minors are entitled to vote on. These directives are available on the Secretary of State's website. *See, e.g.*, Ohio Secretary of State, Directives Currently in Effect, http://www.sos.state.oh.us/SOS/elections/electionsofficials/Rules.aspx (last accessed Mar. 9, 2016); Ohio Secretary of State, Directives No Longer in Effect, http://www.sos.state.oh.us

/SOS/elections/electionsofficials/Rules/archive.aspx (last accessed Mar. 9, 2016) (archive of past directives).

1. Past Secretaries of State have interpreted the law to prohibit 17-year olds from electing delegates in presidential primaries.

Directives from Secretaries of State from both parties, going back to at least 2002, have consistently interpreted the statute at issue here, which allows 17-year olds to vote in a "primary election" under certain circumstances, to only allow 17-year olds to participate in the "nominations" part of the primary, and not the "election" part, due to Article V, § 1's prohibition on anyone under 18-years old being considered "electors."

(a) *Secretary of State J. Kenneth Blackwell*

In 2002, Secretary of State Blackwell issued Directive No. 2002-12 to all county boards of elections concerning whether 17-year olds could vote on the position of county central committee during that year's primary election. *See* Ohio Secretary of State J. Kenneth Blackwell, Directive No. 2002-12 (Apr. 19, 2002), attached as Attachment A to the M. Damschroder Aff. That directive noted that because "R.C. 3517.03 requires all members of political party controlling committees to be elected by direct vote," 17-year olds were not be eligible to vote in that race because they could "vote in the primary election only on candidates being nominated," not "elected." *Id.* As support for his directive, Secretary Blackwell relied on Article V, Section 1, O.R.C. 3503.011, and the Ohio Supreme Court's decision in *State ex rel. Webber*. *Id.*

Although 2002 was not a presidential primary year, Secretary Blackwell's directive as to county central committee members is analogous to presidential primary elections, because the Ohio Constitution requires that delegates to the national conventions also be "chosen by direct vote of the electors." Ohio Const. art. V, § 7.

Secretary Blackwell reaffirmed this position in 2006, in a March 13 directive: "Ohio law allows 17-year-old electors to vote *solely* on the *nomination* of candidates; they are *not* allowed to vote on the election of any member of a political party's state or county central committee, nor on any question or issue on the ballot." *See* Ohio Secretary of State J. Kenneth Blackwell, Directive No. 2006-39 (Mar. 13, 2006), *available at* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2006/Dir2006-39.pdf. These restrictions were included on the instructions, attached to Directive No. 2006-39, on how a 17-year old voter should vote. *See id.*

(b) *Secretary of State Jennifer Brunner*

In 2008, prior to the 2008 presidential primary election, then-Secretary-of-State Jennifer Brunner issued Directive 2008-22, which gave similar advice. *See* Ohio Secretary of State Jennifer Brunner, Directive 2008-22 (Feb. 5, 2008), *available at* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-22.pdf. In that directive, Secretary Brunner reminded all boards of elections that 17-year olds were eligible "to vote *solely* on the *nomination* of candidates," and "are not permitted to vote on any question or issue on the March primary election ballot as these questions and issues are specific to the election held on the date of the . . . primary election." *Id.* Secretary Brunner repeated these limitations on the instructions that were attached to her directive on how a 17-year old should vote: "you may vote only on the nominations of candidates. . . . You may NOT vote on any 'question' or 'issue' on the March primary election ballot, such as a school tax levy, charter amendment or local liquor option, because these questions and issues relate only to this primary election, *and you must be at least 18 years of age to vote on them*." *Id.* (emphasis added).

The bipartisan staff of the Franklin County Board of Elections interpreted this Directive to mean that only votes cast for candidates for nomination, not election, were eligible to be counted when marked on a ballot by a 17-year old voter. M. Damschroder Aff. ¶ 12. As such,

when reviewing ballots cast by a 17-year old voter at the 2008 primary election (that had been placed in specially-marked envelope for that purpose), the board staff remade ballots (by placing removable stickers over filled-in ovals) whenever a 17-year old voter had marked the optical scan ballot for a contest for election of a presidential delegate, election of a member of state or county central committee, a ballot question or issue, or a local option. *Id.*

Secretary of State Brunner gave advice consistent with the above in numerous other directives from 2007 through 2010, reminding the boards of elections on each occasion that 17-year olds were "to vote *solely* on the *nomination* of candidates . . . . because they will be eligible to vote for the nominees for this office at the" upcoming November general election. *See* Ohio Secretary of State Jennifer Brunner, Directive 2007-05 (Mar. 28, 2007), *available at* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2007/Dir2007-05.pdf; Ohio Secretary of State Jennifer Brunner, Directive 2009-02 (Mar. 17, 2009), *available at* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2009/Dir2009-02.pdf; Ohio Secretary of State Jennifer Brunner, Directive 2010-46 (Apr. 13, 2010), *available at* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2010/Dir2010-46.pdf.

In addition to issuing directives, Secretary of State Brunner's staff issued guidance to election officials, presidential campaign staff, and others, confirming the office's position permitting a 17-year old voter who will be 18 years of age on or before the November general election to vote only on the nomination of candidates. M. Damschroder Aff. ¶ 13. For example, Erick Gale, Election Counsel to Secretary Brunner, advised a member of the Ottawa County Board of Elections that "Because candidates for state and county central committees are elected at the primary election—as opposed to nominated—someone who is not 18 as of the date of the primary election cannot vote on a political committee race." E-mail from E. Gale to J. Friar

(Feb. 21, 2008), attached as Attachment D to M. Damschroder Aff. In that same e-mail chain, Gretchen Quinn, also Election Counsel to Secretary Brunner, hypothesized in response to a comment that the technical meaning of the election-law term "nominated" might be confusing to a 17-year old, that the term in the directive to election officials may have been "sufficient to remind [them] of the restrictions *Ohio law has long placed on 17-year olds* voting on the day of a primary election." E-mail from G. Quinn to J. Friar (Feb. 22, 2008), attached as Attachment D to M. Damschroder Aff. (emphasis added).

2. Secretary Husted continued his predecessors' interpretation.

Secretary Husted has continued his predecessors' interpretation of O.R.C. 3503.011 in light of Article V, § 1, Article V, § 7, and *State ex rel. Webber*. For example, prior to the March 2012 presidential primary election, Secretary Husted issued Directive 2011-45. *See* Ohio Secretary of State Jon Husted, Directive 2011-45 (Dec. 27, 2011), *available at* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2011/Dir2011-45.pdf. Secretary Husted's instructions to 17-year old voters contained nearly identical language as the instructions issued by the previous administration: "As a 17-year-old voter who will be 18 years of age on or before the November 6, 2012 general election, you may vote only on the nominations of candidates at the March 6, 2012 primary election. This is because you will be eligible to vote in November for the candidate(s) nominated in March for these offices." *Id.*

The only non-substantive addition to the instructions was to inform the voter on the practical meaning of the legalese: "While you are 17, you may NOT vote on the election of presidential delegates and alternate delegate to a political party's nominating convention, state central or county central committee persons in March. In addition, you may NOT vote on any question or issue on the March primary election ballot, such as a school tax levy, charter amendment, or local liquor option, because these races, questions and issues relate only to this

primary election, and you must be at least 18 years of age to vote on them." *Id.* But this did not affect how boards of elections understood their responsibilities with respect to 17-year old voters. *See* M. Damschroder Aff. ¶ 14. Election officials reviewing a ballot cast by a 17-year old voter at the 2012 presidential primary election continued to remake the ballot when necessary to ensure that a 17-year old voter only had votes counted on the nomination of candidates, and not a contest for the election of a presidential delegate, election of a member of state or county central committee, a ballot question or issue, or a local option. *Id.*

The Secretary's challenged directives, Directives 2015-26 and 2015-29, repeat the same positions. The former repeats the consistent position of the Secretary that under Ohio law, 17-year old voters may "vote solely on the nomination of candidates seeking to be elected" at the upcoming November general election. *See* Ohio Election Official Manual ch. 4 § 1.01(F) (last updated Dec. 15, 2015), *available at* http://www.sos.state.oh.us/SOS/Upload/elections/EOresources/general/2015EOM.pdf. The latter repeats the same position, and offers the additional clarification provided in Directive 2011-45 that the effect of a 17-year old being limited solely to "the nomination of candidates" is that the 17-year old cannot vote on state or county party central committees, questions and issues, or presidential delegates "because delegates are elected and not nominated." *See id.* ch. 7 § 1.03(B)(1).

Numerous election officials from both parties have confirmed that the Secretary's interpretation is consistent with how Ohio law has always been interpreted with respect to limitations on how 17-year olds can participate in the electoral process. *See, e.g.*, Affidavit of Keith Cunningham ¶ 7 (Mar. 9, 2016) (former Director of the Allen County Board of Elections confirming consistency of Secretary Husted's 2012 directive with past practice); Affidavit of Steve Harsman ¶¶ 7-8 (Mar. 10, 2016) (Democratic Deputy Director of Montgomery County

Board of Elections confirming consistency and that in 2000, 2004, and 2008 elections, Montgomery County Board of Elections did not count votes cast by 17-year olds for delegates to a national convention); Affidavit of Karla Herron ¶¶ 6-7 (Mar. 10, 2016) (Republican Director of Delaware County Board of Elections confirming Secretary Husted's consistency with prior two Secretaries of State). *See also, e.g.*, Dayton Daily News, *Group Sues Ohio to Allow 17-Year-Olds to Vote in March Primary* (updated Mar. 9, 2016), *available at* http://www.daytondailynews.com/news/news/national-govt-politics/group-sues-ohio-to-allow-17-year-olds-to-vote-in-m/nqgX6/ (noting that "three local board of elections officials—from both the Democrat and Republican parties—and Aaron Ockerman, executive director of the Ohio Association of Elections Officials, all agreed that Husted is interpreting the law as it has always been interpreted"); *id.* ("One of the state's longest serving elections officials, Steve Harsman, deputy director of the Montgomery County Board of Elections said 17-year-olds have never been able to vote in the presidential primary. He said the young people may think they have voted because they fill out the same ballot as adults. But the ballots cast by the teens are segregated and their votes are not counted for anything but nominating candidates, said Harsman, a Democrat. Republican Jan Kelly, Montgomery County board director, and Democrat Jocelyn Bucaro, deputy director of the Butler County Board of Elections, agree with Harsman. As does Ockerman, who said the latest hullabaloo is pretty typical for Ohio."); Cleveland Plain Dealer, *Ohio 17-Year-Olds' Presidential Picks in Tuesday's Primary Won't Count But Pressure Building to Change the Rule* (updated Mar. 9, 2016), *available at* http://www.cleveland.com/naymik/index.ssf/2016/03/ohio_17-year-olds_presidential.html ("Here's the politically benign truth. For years, Ohio's boards of elections have not been counting the votes of 17-year-olds cast for primary presidential candidates. Boards didn't count them in 2012, when Husted was also at

the helm.").

Indeed, the Democratic Director of the Belmont County Board of Elections, who has managed elections in the county for *twenty-two years*, confirms that Ohio's Secretaries of State have consistently interpreted the law as Secretary Husted does in every presidential primary election since 1996. *See* Affidavit of William F. Shubat ¶¶ 4-6 (Mar. 10, 2016).

Likewise confirming the nature Ohio's direct election of delegates to the convention (as opposed to the nomination of candidates) is State Representative Kathleen Clyde, a frequent commentator on Ohio election law, including the very issue before the Court. *See, e.g.,* New Philadelphia Times-Reporter, *17-year-olds shut out of presidential primary* (Mar. 5, 2016) *available at* http://www.timesreporter.com/article/20160305/news/303059997 (State Representative Clyde: "I was astonished to learn that 17-year-old Ohioans who will legally become adults before the November election are now being prohibited from having a say in the direction of their country at the presidential ballot box during the primary."). As a then-law clerk to Secretary of State Brunner, Ms. Clyde advised a constituent by e-mail that the 2008 presidential "primary election is actually an election for presidential candidate delegates and alternate delegates to the national conventions of the different major political parties." E-mail from K. Clyde to K. Armentrout (Jan. 31, 2008), attached as Attachment C to the M. Damschroder Aff. Indeed, under both the Ohio Constitution and the Revised Code, delegates to the national convention can only be selected by "direct vote," which Ohioans are not allowed to do until they turn 18. *See* Ohio Const. art. V, § 1 (limiting the right to vote to those 18 or older). In sum, nothing in Secretary Husted's directives is any different from the directives issued by the prior two Secretaries, or past practice of the boards of elections. And for good reason: they are consistent with the Ohio Constitution, the Revised Code, and Ohio Supreme Court case law.

C. Plaintiffs delayed bringing suit until the last minute.

In fall 2015, Secretary Husted made available for public comment on the Secretary of State website a preliminary version of the 2015 Election Official Manual. M. Damschroder Aff. ¶ 15. The Election Official Manual collects in one location all of the Secretary's 2015 directives that are relevant to the upcoming election, including Directives 2015-26 and 2015-29 that are at issue here. *Id.* Directive 2015-26, found at chapter 4 of the Election Official Manual, was posted for comment on August 14, 2015, while Directive 2015-29, found at chapter 7, was posted on September 11, 2015. *Id.*

In December 2015, the Secretary released the final version of the Ohio Election Official Manual that contained the challenged directives. Compl. ¶ 18.

On February 17, 2016, early in-person and absentee voting began in Ohio. *See* Ohio Secretary of State, Voting Schedule for the 2016 Elections, http://www.sos.state.oh.us/SOS/elections/Voters/votingSchedule.aspx (last visited Mar. 10, 2016).

Plaintiffs did not file suit until March 8, one week before Ohio's primary election date. In other words, Plaintiffs waited 168 days after the directive was made available for public comment, 85 days after it was issued in final form, and nearly three weeks after voting had started, before filing suit seeking emergency relief. Other, similarly-situated plaintiffs brought suit on the same day in Ohio state court, seeking the same emergency relief based on an interpretation of the Ohio Revised Code. *See Schwerdtfeger, et al. v. Husted*, Case No. 16-CV-2346 (Franklin County Court of Common Pleas).

* * *

In the parallel state proceedings, plaintiffs submitted a number of affidavits just before the hearing before Judge Frye, including affidavits from William DeMora, Antoinette Wilson, Tim Burke, and Caleb Faux. The Secretary anticipates that Plaintiffs here may submit, or refer

to, some of those affidavits here as well. Given the pace of the litigation and the lack of further briefing, we briefly address those affidavits here.

In his affidavit in the state court proceeding, William DeMora states that "[t]he vote during the presidential primary election *does not actually elect anyone* specific. It only tells [the Ohio Democratic Party] the proportion of people who support one candidate versus another that the Ohio Democratic Party will send to the national convention." DeMora Aff. ¶ 5 (emphasis added). That assertion is contrary to settled procedures in the Ohio Constitution and Revised Code. *See supra*.

In her affidavit, Antoinette Wilson states that as the former Assistant Secretary of State to then-Secretary of State Jennifer Brunner, the previous administration interpreted the statute differently from Secretary Husted. But Ms. Wilson was not even employed by the Secretary of State at the time of the 2008 presidential primary or when Secretary Brunner issued her directive concerning 17-year old voters for that election. *See* Second Affidavit of Matthew Damschroder ¶¶ 9-11 (Mar. 11, 2016). As noted above, Secretary Brunner's 2008 directive confirms that 17-year olds were eligible "to vote *solely* on the *nomination* of candidates." Ohio Secretary of State Jennifer Brunner, Directive 2008-22 (Feb. 5, 2008), *available at* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-22.pdf. Electing delegates to a party's national conventions is not "the nomination of candidates," as established above.

Finally, in their affidavits, Tim Burke and Caleb Faux state that if an injunction were issued, the Hamilton County Board of Elections would suffer no administrative burden in complying and that it would "follow the same process" in remaking ballots. *See* Burke Aff. Neither Burke nor Faux discuss providing revised instructions to precinct election officials to issue to 17-year old voters. If the board would still "follow the same process" as Burke suggests,

the board would give the 17-year old voters the Secretary of State's prescribed instructions to *not vote* for election for delegate to the party's national convention. As established in the numerous affidavits submitted herewith, printing new instructions and re-training Ohio's approximately 40,000 poll workers would be a substantial burden on the Secretary and Ohio's 88 county boards of elections.

III. Motion to Dismiss

A. Standard of Review

To survive a motion to dismiss, a plaintiff must plead "sufficient factual matter, accepted as true, to 'state a claim [for] relief that is plausible on its face.'" *Chambers v. HSBC Bank USA, N.A.*, 796 F.3d 560, 567 (6th Cir. 2015) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Under this standard, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Plaintiffs' claims are barred by the doctrine of laches.

The doctrine of laches bars Plaintiffs' claims here. "[I] n election-related matters, extreme diligence and promptness are required. When a party fails to exercise diligence in seeking extraordinary relief in an election-related matter, laches may bar the claim." *McClafferty v. Portage Cnty. Bd. of Elections*, 661 F. Supp. 2d 826, 839 (N.D. Ohio 2009) (internal citations and quotation marks omitted). If a plaintiff has not been diligent in asserting his claim, resulting in prejudice to the defendant, his claim is barred by laches. *United States v. City of Loveland*, 621 F.3d 465, 473 (6th Cir. 2010) (citation and internal quotation marks omitted).

Laches is commonly applied to bar election-related claims. *See, e.g., Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (barring challenge to state election-law statute filed less than two months prior to election because plaintiff had known of injury for more than two weeks prior to

filing suit); *Arizona Pub. Integrity Alliance Inc. v. Bennett*, 2014 WL 3715130, at *2–3 (D. Ariz. June 23, 2014) (barring challenge to state election-law statute filed more than two months prior to election because (1) the statute was not new and (2) the plaintiffs' had been considering its constitutionality for more than sixth months before filing suit); *Gelineau v. Johnson*, 896 F. Supp. 2d 680, 683–86 (W.D. Mich. 2012), aff'd (6th Cir. Sept. 19, 2012) (barring challenge to state election-law statute filed less than two months prior to election because plaintiffs had known of injury for more than four months prior to filing suit); *State ex rel. Landis v. Morrow Cnty. Bd. of Elections*, 88 Ohio St. 3d 187, 189 (2000) (noting that the Ohio Supreme Court has found that even delays "as brief as nine days can preclude . . . consideration of the merits" on laches grounds). As the *Kay* court explained, as an election grows closer, "the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the [plaintiff's] claim to be a serious [plaintiff] who has received a serious injury becomes less credible by his having slept on his rights." 621 F.2d at 813.

Under this well-established precedent, Plaintiffs' claims here are barred.

First, Plaintiffs have demonstrated a lack of diligence in bringing their claims here. Plaintiffs' were on notice of the final directive since it was promulgated in December 2015. *See* Compl. ¶ 18. Nonetheless, Plaintiffs waited to file this action until March 8, 2016, less than a week before the March 15, 2016 primary election, nearly six months after the Secretary's directive was made available for public comment, and nearly three months after the final directive was promulgated. Plaintiffs have not pursued their claim with any semblance of diligence. *See Kay*, 621 F.2d at 813; *Bennett*, 2014 WL 3715130, at *2–3; *Gelineau v. Johnson*, 896 F. Supp. 2d at 683–86; *State ex rel. Landis*, 88 Ohio St. 3d at 189

Second, Plaintiffs' lack of diligence has prejudiced the Secretary, to say nothing of the 88 Ohio county boards of elections and the 40,000 poll workers who administrate voting at election sites. By waiting until the last minute, Plaintiffs have unjustifiably forced the parties and the Court to address their complaint on an expedited briefing schedule, thereby restricting the Secretary's time to prepare and defend against Plaintiffs' claims. That is a sufficient showing of prejudice to apply laches in an election case. *See, e.g.*, *State ex rel. SuperAmerica Grp. v. Licking Cnty Bd. of Elections*, 80 Ohio St. 3d 182, 186 (1997) ("Prejudice occurred because SuperAmerica's inexcusable and unreasonable delay made this case an expedited election matter . . . thereby restricting respondents' time to prepare and defend against SuperAmerica's claims.").

Furthermore, by waiting so long Plaintiffs have ensured that this Court cannot craft a remedy that does not create its own problems—but of a constitutional, rather than statutory, dimension—which will place substantial burdens on the Secretary and boards of elections around the state. Early and absentee voting began on February 17, and as of March 8, more than 173,000 ballots had already been cast. *See* Secretary Husted Announces Early Voting Numbers (Mar. 8, 2016), *available at* http://www.sos.state.oh.us/sos/mediaCenter/2016/2016-03-08.aspx. Some number of those votes were cast by people, like Plaintiffs, who are 17 years old now, but who will be 18 by the time of the general election. *See, e.g.*, Herron Aff. ¶ 9 (noting that Delaware county has already received and processed at least one absentee ballot from a 17 year old). Although ballots filled out by 17-year olds are initially segregated from general population ballots and placed into sealed envelopes, *see* Ohio Election Official Manual ch. 4 § 1.01(F)(1), now that we are so close to the primary, counties have begun to open those envelopes to verify the ballot's compliance with the special rules applying to 17-year olds, *see, e.g.*, M.

Damschroder Aff. ¶ 17; Ohio Election Official Manual ch. 5 § 1.06. Once the ballot is verified to be compliant, *it is mixed in with all of the rest of the general population's ballots*. *See* M. Damschroder Aff. ¶ 17. After this point, it is no longer possible to distinguish the ballots of 17-year olds from those of the general population. *Id.* (noting that "[i]t cannot be retrieved or segregated"); *see also* Shubat Aff. ¶ 7. Indeed, as Karla Herron, Director of the Delaware County Board of Elections, states in her affidavit, Delaware County has already received at least one absentee ballot from a 17-year old voter that it has processed, separated from its identification envelope and put in with the rest of the general population's ballots, and therefore it cannot be retrieved. *See* Herron Aff. ¶ 9.

Accordingly, if Plaintiffs' remedy were granted and Plaintiffs were allowed to vote to elect delegates to the national party conventions, this Court would be creating two separate classes of 17-year olds: those who voted prior to this Court's decision, and everyone else. In addition to potentially creating an equal protection violation by treating those two classes differently (as there would be no way to retrieve the ballots of those who had already voted, *see* M. Damschroder Aff. ¶ 17, and thus they could not cast votes to elect delegates in the presidential races), Plaintiffs' remedy would also substantially burden the Secretary and boards of elections around the State. *See id.* ¶¶ 17-18. Boards of elections would have to reprint instructions that have already been printed and packed away in each precinct's supply kits, and would have to retrain precinct election officials, many who have already been trained for this election. *Id.* ¶ 18. The time and expense would be enormous, and would be impossible to conduct while also attempting to run the State's primary on Tuesday. *See also, e.g.*, Shubat Aff. ¶¶ 7-9; Herron Aff. ¶¶ 9-12; Harsman Aff. ¶¶ 10-11.

Had Plaintiffs brought a timely suit, none of these difficulties would have been

encountered. Plaintiffs could have filed suit in December or January, or, at the absolute latest, when early and absentee voting started in February. Instead, Plaintiffs waited until one week before the election. Their delay has caused substantial prejudice to the Secretary, the county boards of elections, and others, and therefore their remedy should be barred by laches and their Complaint dismissed.

IV. Response in Opposition to Motion for Temporary Restraining Order

A. The Court should abstain from ruling on Plaintiffs' Motion.

Currently pending before the Franklin County Court of Common Pleas is a case in which similarly-situated plaintiffs to those here are challenging the Secretary's final directive interpreting O.R.C. 3503.011. *See Schwerdtfeger, et al. v. Husted*, Case No. 16-CV-2346 (Franklin County Court of Common Pleas). *Pullman* abstention is appropriate because a state court ruling in Plaintiffs' favor on the proper interpretation of O.R.C. 3503.011 would eliminate the need for the Court to address the federal questions raised by Plaintiffs in this action.

"The *Pullman* abstention doctrine requires that 'when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state law question and thus avoid the possibility of unnecessarily deciding a constitutional question.' " *Assoc. Gen. Contractors of Oh., Inc. v. Drabik*, 214 F.3d 730, 739 (6th Cir. 2000) (quoting *Harris Cnty. Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975)). "[T]he purpose of abstention is not to afford state courts an opportunity to adjudicate an issue that is functionally identical to the federal question," but rather, "the purpose of *Pullman* abstention in such cases is to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy." *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323, 339 (2005).

Here, Plaintiffs seek (1) a declaratory judgment that the Secretary's final directive interpreting Section 3503.011 of the Ohio Revised Code violates the 14th Amendment, the 26th Amendment, and Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 and (2) injunctive relief enjoining the Secretary from applying his final interpretation of Section 3503.011 to prevent Threshold Voters from participating in the presidential primaries scheduled to take place on March 15, 2016. *See* Compl. at ¶¶ 61–101. In contrast, the plaintiffs in the state court action seek (1) a declaratory judgment that the Secretary's final directive violates Section 3503.011 of the Ohio Revised Code and (2) injunctive relief to ensure that they and similarly situated 17-years olds can vote in Ohio's 2016 presidential primary election. *See* Compl. ¶¶ 2-3, *Schwerdtfeger, et al. v. Husted*, Case No. 16-CV-2346 (Franklin County Court of Common Pleas). Thus, all of Plaintiffs' claims here depend on an interpretation of Section 3503.011 of the Ohio Revised Code.

There is no question that the proper interpretation of Section 3503.011 of the Ohio Revised Code is a question of state law. And both parties rely on the same Ohio Supreme Court case from 1908 to support their proposed interpretation, in the absence of a state court decision squarely addressing the issue raised here (to wit, a right seemingly never previously asserted in court). The first element of *Pullman* abstention is therefore satisfied.

So too is the second element of *Pullman* abstention. If the state court rules in favor of the plaintiffs there, Plaintiffs here would receive their requested relief, and the Court would "'avoid the possibility of unnecessarily deciding a constitutional question.'" *Drabik*, 214 F.3d at 739 (quoting *Moore*, 420 U.S. at 83). That is the precise purpose of *Pullman* abstention. *See San Remo Hotel, L.P.*, 545 U.S. at 339. Conversely, should the Secretary prevail below, that holding would result in similar treatment of the real class at issue—Ohioans who have not turned age 18

by March 15, 2016. All would be treated the same with respect to whether they are allowed to vote this Tuesday for a delegate to their selected party's national convention.

As the Sixth Circuit has explained, under these circumstances, *Pullman* abstention "*requires* that . . . 'the federal court should stay its hand in order to provide the state court an opportunity to settle the underlying state law question[.]'" *Drabik*, 214 F.3d at 739 (quoting *Moore*, 420 U.S. at 83) (emphasis added). The Court should abstain from ruling on Plaintiffs' Motion accordingly.

B. Supreme Court precedent weighs heavily against the issuance of an injunction here.

The presidential primary election is scheduled for March 15, 2016, less than four days from now. Last-minute injunctions affecting state election procedures (like the one sought here) are disfavored. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (vacating interlocutory injunction of Arizona voter identification procedures and emphasizing that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."); *Reynolds v. Sims*, 377 U.S. 533, 585–86 (1964) (instructing courts to exercise "proper judicial restraint" before making "precipitate changes" to election procedures and policies when "an impending election is imminent and a State's election machinery is already in progress."); *see also Husted v. Ohio State Conference of the NAACP*, 135 S. Ct. 42 (2014) (staying the district court's order that required Ohio to restore portion of early voting period and was issued two months prior to the November 2014 election); *North Carolina v. League of Women Voters*, 135 S. Ct. 6 (2014) (staying Fourth Circuit's preliminary injunction that enjoined portions of a North Carolina statute concerning early voting and counting ballots cast in the wrong precinct and was issued a month before the November 2014 election); *Frank v. Walker*,

135 S. Ct. 7 (2014) (vacating Seventh Circuit's stay that permitted enforcement of Wisconsin's voter identification statute and was issued two months before the November 2014 election); *Veasey v. Perry*, 135 S. Ct. 9 (2014) (affirming Fifth Circuit's stay of district court injunction that enjoined Texas's voter identification law and was issued weeks prior to early voting beginning); *Riley v. Kennedy*, 553 U.S. 406, 426 (2008) (citing *Purcell*, 549 U.S. at 5–6) ("we have recognized that practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges").

This authority weighs against an injunction here. As previously discussed, early voting has already begun in Ohio, and some number of those votes were cast by people, like Plaintiffs, who are 17 years old now, but who will be 18 by the time of the general election. To attempt to avoid an equal protection problem, any remedy ordered by the Court here would require the Secretary and state election administrators to develop new election policies and materials for 17 years olds who have yet to vote, devise procedures by which 17-year olds who have already voted could vote in the presidential primary, and train poll workers to implement those policies and procedures. The Secretary and state election administrations would have to accomplish all of this in the span of few days during their busiest week of the year. "[T]he inevitable result of [such an injunction] will be interference with orderly election administration and greater confusion among poll workers and voters. . . . Changing election rules in this manner while voting is occurring disrupts the electoral process and threatens its fairness. *Serv. Employees Int'l Union Local 1 v. Husted*, 698 F.3d 341, 345-46 (6th Cir. 2012).

That fairness concern is especially pressing here. After all, because some 17-year olds have already voted (and properly were not allowed to vote to elect a delegate for their party convention), and because their ballots have already been removed from the special 17-year old

envelopes and mixed in with all other votes from those 18 and older, those votes cannot be retrieved and removed from the vote totals. *See, e.g.*, Herron Aff. ¶ 9 (Delaware County has already done this for at least one 17-year old voter). Thus, any judicial order allowing those individuals to vote again would amount to voting twice, perhaps the most grave constitutional violation of all. Likewise, an order that allows only other 17-year olds to vote (in other words, those who have not voted yet), impermissibly creates two classes of similarly situated voters: one group of 17-year olds who have already voted, and did not vote for national convention delegate, and those who will vote following the order, and thus will vote for national convention delegate.

All told, "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes" before the Court, an injunction is not warranted here. *Purcell*, 549 U.S. at 5–6; *see also id.* at 6 (Stevens, J. concurring) ("Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality. . . . Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.").

C. Plaintiffs cannot demonstrate that they are entitled to injunctive relief.

"A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000)). Courts balance the following factors when considering a motion for preliminary injunction:

> (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3)

> whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.

City of Pontiac Retired Emps. Assoc. v. Schimmel, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (internal quotation marks and citations omitted). "None of these factors, standing alone, is a prerequisite to relief; rather, the court should balance them." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). Where constitutional rights are implicated, however, "the likelihood of success on the merits often will be the determinative factor." *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014). Here, Plaintiffs have no likelihood of success because, as 17-year olds, they have no right to vote to elect delegates to a party's national convention.

1. Plaintiffs have failed to demonstrate a likelihood of success on the merits of their claims.

Plaintiffs cannot show that they have a strong likelihood of success on the merits. Plaintiffs' claims presuppose that 17-year olds have a right to vote in presidential primary elections. But as Ohio's Constitution and statutory framework make clear, no such right exists. That fact alone dooms their claims. Second, even if the Court were to conclude that Section 3503.011 of the Ohio Revised Code is susceptible to competing plausible interpretations, the canon of constitutional avoidance compels a finding in support of the Secretary's position. Third, Plaintiffs' constitutional claims fail on their merits.

(a) *Plaintiffs' claims for injunctive relief are contingent on Plaintiffs having a statutory right to vote in presidential primary elections, and the plain language of the Ohio Constitution and Ohio Revised Code make clear that no such right exists.*

As explained above, only those "of the age of eighteen years" are eligible to be an elector in Ohio. Ohio Const. art. V, § 1. Ordinarily, that plain constitutional command alone would end the debate about whether a 17-year old can vote in an election. And if that is not enough, the

Ohio Constitution likewise makes clear that at a presidential primary, the voters are electing "delegates from this state to the national conventions of political parties," which the voters shall do by a "direct vote of the electors":

> All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. *All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors in a manner provided by law.* Each candidate for such delegate shall state his first and second choices for the presidency, but the name of no candidate for the presidency shall be so used without his written authority.

Ohio Const. art. V, § 7. Plainly, the act of voting in a presidential primary is the making of a "direct vote by the elector[]," something those under 18 are barred from doing. Put another way, per the Constitution, a vote in the presidential primary is in fact a vote for a "delegate[] from this state to the national conventions of the political parties."

To be sure, the General Assembly, seeking to maximize voting opportunities for Ohioans, has authorized 17-year olds to participate in the political process where they will turn 18 by the time of the general election. *See* O.R.C. 3503.011. But in light of constitutional restrictions in place on voting, the General Assembly properly has restricted the extent of those minors' participation to only primary election races to nominate candidates for election to offices, rather than to elect individuals to the position sought, in this case, the office of "delegate" "to the national conventions of political parties." Ohio Const. art. V, § 7; O.R.C. 3501.01(E)(1) (races at primary elections can involve either "nominating persons . . . for election to offices" or "electing persons . . . as delegates and alternates to the conventions of political parties"). By statute, in fact, the General Assembly has articulated the specific process for electing delegates to the national conventions. O.R.C. 3512.12 (Delegates to national party convention); O.R.C.

3513.151 (Arrangement of names of candidates for delegate and alternate to national convention of political party). Those under 18 are also barred from voting for party central committee officials, a point Plaintiffs do not challenge. *See* O.R.C. 3517.03 ("[C]andidates for election as state central committee members shall be elected at primaries in the same manner as provided in sections 3513.01 to 3513.32 of the Revised Code for the nomination of candidates for office in a county. Candidates for election as members of the county central committee shall be elected at primaries in the same manner as provided in those sections for the nomination of candidates for county offices.").

The General Assembly articulated this process to adhere to constitutional commands. And that articulation, both in the Ohio Constitution and by statute, confirms that 17-year-old voters would be directly electing a candidate who will hold a position or office, in violation of the Constitution's ban on voting before age 18, were they to elect delegates to a party's national convention. Ohio Const. art. V, § 1 (only 18 year olds can elect); *State ex rel. Webber*, 84 N.E. at 89 (differentiating between "nominating" and "electing" for purposes of Article V, § 1).

This is true regardless whether the name on the ballot is of the presidential candidate, or of the delegate actually being elected by the presidential primary process. Ohio law, it bears noting, allows either possibility as to district delegates to a national party's convention. *See* O.R.C. 3501.01(E)(2) (presidential primary elections "choos[e] delegates . . . to the national conventions"); O.R.C. 3513.151 (authorizing names of delegates to appear on ballot); O.R.C. 3513.151(A) ("*Candidates for delegate and alternate to the national convention of a political party shall be represented on the ballot, or their names shall appear on the ballot, in accordance with this section.*" (emphasis added)); O.R.C. 3513.151(C) ("The state central committee of each major political party . . . shall file with the secretary of state a statement that stipulates . . .

whether or not the names of candidates for district delegate and district alternate to the national convention of that chairperson's party are to be printed on the ballot." (emphasis added)).

The Clyde Memo confirms this understanding: "This year's presidential primary will be held on March 4, 2008. The primary election is actually an election for presidential candidate delegates and alternate delegates to the national conventions of the different major political parties." *See* E-mail from K. Clyde to K. Armentrout (Jan. 31, 2008), attached as Attachment C to the M. Damschroder Aff. So does the certificate delegates receive—a "Certificate of Election"—once selected in a primary. *See* O.R.C. 3513.12; O.R.C. 3513.151. *See also* Sample Certificate of Election, attached as Attachment F to the M. Damschroder Aff.

Plaintiffs' contrary interpretation of O.R.C. 3503.011 must be rejected. Plaintiffs claim that they can vote in the presidential primaries, despite being only 17, because O.R.C. 3503.011 gives them the right to "vote . . . at the primary election," and "primary election" includes the right to "nominate persons as candidates or political parties for election to offices." Assuming that the General Assembly may, as a constitutional matter, authorize certain kinds of voting by those who have not reached age 18, Plaintiffs' argument is a bridge too far. It ignores both the specialized meaning of "nominate" in election law as well as the structure of the definition of "primary election" in the Ohio Revised Code. For example, O.R.C. 3501.01(E)(1) makes clear that a ballot at a "primary election" can do one of two things, "nominating persons . . . for election to offices" or "electing persons . . . as delegates and alternates to the conventions of political parties. O.R.C. 3501.01(E)(1). Plaintiffs ignore the word "electing," and the fact that it is distinct in election law from "nominating." Plaintiffs also ignore the provisions of the Ohio Constitution and Revised Code that make clear that "delegates . . . to the national conventions of political parties" must be "chosen by direct vote," not by nomination. Ohio Const. art. V, § 7.

As the above analysis demonstrates, Secretary Husted's 2015 directives, which are consistent with the directives from Secretaries Blackwell and Brunner before him, do not infringe on any right of the Plaintiffs to warrant injunctive relief—because Plaintiffs do not enjoy the right they seek to protect with their requested injunction.

(b) *The canon of constitutional avoidance weighs against a finding that 17 years old have a statutory right to vote in presidential primary election, and absent such a right, Plaintiffs' claims fail.*

Assuming for the sake of argument that the Court were to find that that O.R.C. 3503.011 was susceptible to competing interpretations, the canon of constitutional avoidance weighs against adopting Plaintiffs' proposed interpretation here. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

Plaintiffs' request for injunctive relief makes clear the constitutional problems that would arise were the Court to adopt their interpretation of O.R.C. 3503.011. According to them, O.R.C. 3503.011 gives 17 year-olds the right to vote in presidential primary elections; the Secretary's directive prohibits them from voting in such elections; and therefore the Secretary's actions violate the 14th and 26th Amendments. A finding in Plaintiffs' favor on the question of statutory interpretation necessarily raises constitutional issues that this Court would need to resolve. As a matter of judicial restraint, it is appropriate to apply the canon of constitutional avoidance and find that Plaintiffs have no statutory right to vote in presidential primary elections. *See Clark*, 543 U.S. at 381. Plaintiffs' request for injunctive relief should be denied accordingly.

(c) *Plaintiffs' claims fail on their individual merits.*

First, Plaintiffs argue that the Secretary's directive violates the Fourteenth Amendment's equal protection clause and due process clause. Although seemingly not cited in Plaintiffs'

Motion, a three-judge panel of this Court has previously rejected similar arguments in *Gaunt v. Brown*, an opinion that was subsequently affirmed by the United States Supreme Court. 341 F. Supp. 1187 (S.D. Ohio) aff'd, 409 U.S. 809 (1972). *See also Bumppo v. Kentucky Bd. of Elections*, 845 F.2d 325 (6th Cir. 1988) (Table decision) (citing *Gaunt* and finding no constitutional violation as a result of denying people under the age of 18 the right to vote). As the court in *Gaunt* explained, the critical function of line-drawing for purposes of setting the appropriate age for voting is a function "for the States":

> I do not think an argument [that the denial of the vote is invidious discrimination] can be convincingly made with regard to age. Age limit on voting necessarily must be arbitrary. There is no single specific day in the life of all citizens in which it can rationally be said that they are suddenly informed members of the electorate though they were not so one day before. It is a problem in drawing lines and I think the clear meaning . . . of the Constitution is that these lines are for the States to draw.

341 F. Supp. at 1189–90. "[I]n setting a minimum age limit within constitutional limits a State simply exercises the power reserved to it and is immune from the impact of the Equal Protection Clause." *Id.* at 1190.

Here, the Secretary's directive is consistent with the State of Ohio's minimum age limit for voting in presidential primary elections as set forth in the Ohio Constitution and Ohio Revised Code. *See supra* Section IV(C)(1)(a). Plaintiffs have suffered no due process or equal protection violation as a result. *See Gaunt*, 341 F. Supp. at 1189–91.

Second, Plaintiffs contend that the Secretary's directive violates the Twenty-Sixth Amendment to the United States Constitution "[b]y denying the right to vote to individuals who have been expressly designated as 18 years of age (for voting purposes) under the Ohio Revised Code." Pls.' Mot. at 26. Plaintiff's novel theory of the Twenty-Sixth Amendment relies on an equally novel theory of constitutional interpretation: According to Plaintiffs, state law can alter

the meaning of an otherwise unambiguous provision of the United States Constitution. *See id.* at 25. ("The U.S. Constitution is silent on the meaning or interpretation of the term 'eighteen years of age' as used in the Twenty-Sixth Amendment. The determination of which voters legally qualify as 'eighteen years of age or older' for purposes of Twenty-Sixth Amendment voting rights is a matter of state law."). Curiously, Plaintiffs cite no authority in support of this assertion.

The Twenty-Sixth Amendment states: "The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age." U.S. Const. amend. XXVI. "[T]here is no controlling caselaw from the Sixth Circuit or the Supreme Court regarding the proper interpretation of the Twenty-Sixth Amendment or the standard to be used in deciding claims for Twenty-Sixth Amendment violations based on an alleged abridgment or denial of the right to vote." *Nashville Student Org. Comm. v. Hargett*, No. 3:15-CV-00210, — F.3d —, 2015 WL 9307284, at *6 (M.D. Tenn. Dec. 21, 2015).

In the absence of any controlling authority, basic constitutional principles and common sense demonstrate that Plaintiffs' Twenty-Sixth Amendment claim fails. State law cannot alter the meaning of the United States Constitution, U.S. Const. art. VI, cl. 2, and "eighteen years old" means "eighteen years old." Plaintiffs' argument to the contrary is therefore without merit, and their request for injunctive relief should be denied.

Fourth, Section 2 of the Voting Rights Act, originally enacted in 1965, provides that no State may "impos[e] or appl[y]" any voting practice that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a). Section 2 claims under the Voting Rights Act cannot be decided on such a limited record and accelerated

briefing schedule as was required here by Plaintiffs' prejudicial delay in bringing suit, *see supra*. Plaintiffs' Section 2 claim alleges vote denial. The vote denial language of Section 2 prohibits states from imposing voting practices that cause minority voters to be disproportionately excluded from the political process, even if the disproportionate exclusion is not motivated by a racial purpose. *See* 52 U.S.C. § 10301. Thus, to make out a claim, Plaintiffs would need to put on substantial evidence—not just a demographic survey—of the disproportionate impacts of Secretary Husted's interpretation on minority voting. Expert testimony would likely be necessary, and the Secretary would need an equal opportunity to rebut that evidence. None of this is possible on account of Plaintiffs' decision to delay the filing of their case until one week before Ohio's primary election.

2. Plaintiffs will not suffer irreparable harm in the absence of an injunction.

The Plaintiffs have not demonstrated that they would suffer irreparable harm absent the issuance of an injunction here. "[A] plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). Consequently, in cases alleging constitutional violations, the irreparable harm inquiry "largely depend[s] on the constitutionality of the state action." *American Civil Liberties Union Fund of Michigan v. Livingston Cnty.*, 796 F.3d 636, 642 (6th Cir. 2015) (citation and internal quotation marks omitted). If a court finds that a plaintiff is unlikely to succeed on the merits of a constitutional claim, the "argument that he is entitled to a presumption of irreparable harm based on the alleged constitutional violation is without merit." *Overstreet*, 305 F.3d at 578.

As demonstrated above, the Plaintiffs are unlikely to succeed on their constitutional claims. Therefore, they cannot demonstrate irreparable harm here. *See id.* Moreover, "[t]he [P]laintiffs' failure to act earlier in pursuing these claims significantly undermines their

assertions of irreparable harm in the absence of the injunction." *Serv. Employees Int'l Union Local 1*, 698 F.3d at 346. This factor, too, weighs against the issuance of an injunction here.

3. An injunction will substantially harm the public interest, the State of Ohio, and the Secretary.

"Neither the voters nor the public interest is served by a TRO [or an injunction] before an imminent election." *State ex rel. Applegate v. Franklin Cty. Bd. of Elections*, No. C2-08-092, 2008 WL 341300, at *6 (S.D. Ohio Feb. 6, 2008) (citing *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006)). "States are primarily responsible for regulating federal, state, and local elections, and have a strong interest in their ability to enforce state election law requirements." *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011) (internal citations and quotation marks omitted). Similarly, there is a "strong public interest in permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote" and "in smooth and effective administration of the voting laws that militates against changing the rules in the middle of the submission of absentee ballots." *Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) (internal citations omitted).

In *Serv. Employees Int'l Union Local 1 v. Husted*, the Sixth Circuit considered a similar last minute request for an injunction that would have changed election procedures less than two weeks before the election. 698 F.3d at 345-46. The court found that an injunction under these circumstances was unwarranted, explaining that:

> the harm to Ohio, the Secretary, and the general public caused by issuance of this injunction easily outweighs any potential harm to the plaintiffs if their view of the law is eventually determined to be correct. The injunction, it should be noted, both requires the expedited issuance of new instructions to poll workers less than two weeks before the election and refuses enforcement of a presumptively constitutional policy regarding voter eligibility. Moreover, the inevitable result of the injunction's dramatic changes to Ohio's precinct voting system will be interference with orderly election administration and greater confusion among

> poll workers and voters. Early voting is already underway in Ohio. Changing election rules in this manner while voting is occurring disrupts the electoral process and threatens its fairness. These harms to the public and its elected government are significant ones.

Id.

So too here. Plaintiffs' proposed injunctive relief would interfere with orderly election administration, lead to greater confusion among poll workers and voters, and impose a substantial administrative burden on the Secretary and Ohio's 88 county boards of elections. *See* M. Damschroder Aff. ¶¶ 17-19.

Most significantly, by waiting to bring suit until one week before the primary election, Plaintiffs have ensured that this Court cannot craft a remedy that does not itself create an equal protection problem. More than 173,000 ballots have already been cast since early in-person and absentee voting began three weeks ago. *See* Secretary Husted Announces Early Voting Numbers (Mar. 8, 2016), *available at* http://www.sos.state.oh.us/sos/mediaCenter/2016/2016-03-08.aspx. Some number of those votes were cast by people, like Plaintiffs, who are 17 years old now, but who will be 18 by the time of the general election. *See, e.g.*, Herron Aff. ¶ 9 (noting that Delaware county has already received and processed at least one absentee ballot from a 17 year old). Although ballots filled out by 17-year olds are initially segregated from general population ballots and placed into sealed envelopes, *see* Ohio Election Official Manual ch. 4 § 1.01(F)(1), now that we are so close to the primary, counties have begun to open those envelopes to verify the ballot's compliance with the special rules applying to 17-year olds, *see, e.g.*, M. Damschroder Aff. ¶ 17. Once the ballot is verified to be compliant, *it is mixed in with all of the rest of the general population's ballots*. *See* M. Damschroder Aff. ¶ 17. After this point, it is no longer possible to distinguish the ballots of 17-year olds from those of the general population. *Id.* (noting that "[i]t cannot be retrieved or segregated"). And as the attached affidavits make

clear, this process has already begun, and 17-year olds' ballots have been opened and placed in with the general population's ballots. *See* Herron Aff. ¶ 9.

Accordingly, if Plaintiffs' remedy were granted and Plaintiffs were allowed to vote to elect delegates for the presidential candidates, this Court would create two separate classes of 17-year olds: those who voted prior to this Court's decision, and everyone else. This would raise an equal protection problem. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (holding that the right to vote is a fundamental right subject to strict scrutiny).

* * *

Plaintiffs cannot show a strong likelihood of success on the merits, and their requested relief would substantially harm 17-year olds who have already voted, the Secretary, Ohio's 88 county boards of elections, and the public. Therefore, Plaintiffs are not entitled to injunctive relief.

V. Conclusion

For the foregoing reasons, Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction should be denied, and Plaintiffs' Complaint dismissed.

Dated: March 11, 2016

/s/ Chad A. Readler
Chad A. Readler (0068394)
Trial Attorney
JONES DAY
325 John H. McConnell Blvd., Suite 600
P.O. Box 165017
Columbus, OH 43216.5017
Telephone: 614.469.3939
Facsimile: 614.461.4198
careadler@jonesday.com
mcushing@jonesday.com

Counsel for Defendant
Ohio Secretary of State Jon Husted

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Combined Memorandum in Support of Defendant's Motion to Dismiss Plaintiffs' Complaint, and in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, was served by e-mail this 11th day of March, 2016 upon the following counsel:

Robert G. Cohen
Jason Beehler
KEGLER BROWN HILL & RITTER
65 E. State Street, Suite 1800

Malcolm Seymour III
GARVEY SCHUBERT BARER
100 Wall St, 20th Floor
20th Floor
New York, NY 1005
mseymour@gsblaw.com

Counsel for Plaintiffs

/s/ Chad A. Readler
Chad A. Readler