UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RANDY SMITH, as next friend of MALIK TREVON SMITH, a minor, et al.	
Plaintiffs	Case No. 2:16-cv-212
v.	Judge Smith
JON HUSTED	**ORAL ARGUMENT REQUESTED**
Defendant.	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. LACHES DOES NOT BAR INJUNCTIVE RELIEF

"Although laches precludes a plaintiff from recovering damages, it does not bar injunctive relief." *Kellogg Co. v. Exxon Corp.*, 209 F.3d 562, 568 (6th Cir. 2000); *See also TWM Mfg. Co., Inc. v. Dura Corp.*, 592 F.2d 346, 349-50 (6th Cir. 1979); *Tandy Corp. v. Malone & Hyde, Inc.*, 769 F.2d 362, 366 n.2 (6th Cir. 1985). Defendant must therefore demonstrate that Plaintiffs engaged in conduct "that amounted to an assurance to the defendant . . . that plaintiff[s]" would not assert their rights. *Id.* at 569. Defendant offers no evidence in this regarding and cannot make the required showing. The reason for this distinction in the application of laches is that where injunctive relief is appropriate the harm is ongoing and should be corrected.[1]

[1] This court considered the precise laches argument Defendant advances in a recent case involving voting rights, and took a very common sense approach to the doctrine. *Ray v. Franklin County Board of Elections* involved a directive issued by the Secretary of State regarding proper procedures for providing absentee voters the ability to correct errors in their ballots. Case No. 2:08-cv-1086, p. 3 (S.D. Ohio, Nov. 17, 2008) (Smith, J.). Regarding the Board of Elections' laches argument, the court stated:

> Defendant Brunner notes Directive 2008-109 was issued on November 3, 2008 and Plaintiff did not file this action until November 15, 2008. Plaintiff, however, was not advised that there was a problem with her absentee ballot until November 11, 2008.

II. PULLMAN ABSTENTION DOES NOT BAR TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF

"Abstention under *Railroad Commission of Texas v. Pullman Co.*, 32 U.S. 496 (1941), is appropriate **only where state law is unclear** and a clarification of that law would preclude the need to adjudicate the federal question." *Hunter v. Hamilton Cty. Bd. of Elections*, Case Nos. 10-4481, 11-3059, 11-3060 (6th Cir., Jan. 27, 2011). Here, the state in law in question, far from being unclear, is extremely clear. O.R.C. §3503.011 expressly allows Threshold Voters to vote the primary election ballot of the political party he or she desires to vote. Further, O.R.C. §3501.01(E)(1) expressly defines "primary elections" to include "election[s] held for the purpose of nominating persons as candidates of political parties . . . or as delegates and alternates to the conventions of political parties." Presidential primary races are never mentioned in the statutes, but such races are part of each party's primary election ballot that Threshold Voters are expressly permitted to vote in accordance with the controlling statutes. There is nothing unclear to be interpreted.

However, even assuming, *arguendo*, that *Pullman* abstention should be applied, it has no bearing on the plaintiff's request for temporary and preliminary injunctive relief. In *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F. Supp.2d 684 (W.D.Pa. 2003), the court held:

> Notwithstanding a decision to abstain on the merits, this court is still obliged to consider plaintiff's request for preliminary relief. *See New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d 868, 887 (3rd Cir. 1981) (holding that when a case is not to be dismissed under *Younger*, but instead the *Pullman* abstention doctrine applies, "a motion for preliminary injunctive relief . . .

Id. at p. 6. That is precisely the situation here, except that Defendant in this case did not issue a formal Directive. Instead, Defendant buried his position on Threshold Voters on the 314th page of a 596 page "Election Official Manual," which is directed to Ohio election officials, not voters. (http://www.sos.state.oh.us/SOS/Upload/elections/EOresources/general/2015EOM.pdf). The plaintiff in *Ray* filed her lawsuit very shortly after she was advised there was a problem with her ballot. The plaintiffs here did the same. The plaintiffs learned of the Defendant's executive proclamation about 17 year olds "just days before the primary." Ball Decl. ¶ 5; see also Boyle Decl. ¶ 6; Wolfe Decl. ¶ 6; Galloway Decl. ¶ 7; Schubert Decl. ¶ 6.

> ought to be considered without regard to the separate question of whether a *Pullman* stay of final hearing is appropriate"); *Chez Sez [III] Corp. [v. Township of Union]*, 945 F.2d [628,] at 634 n.4 [(3rd Cir. 1991), *cert. denied*, 503 U.S. 907 (1992)].

Id. at 704.

Here, the short period of time remaining before the primary election and the ongoing early and absentee voting also support pressing forward. Even if a decision is reached in the pending state court proceeding that is relevant to the issues before this Court, the time period for an appeal of that decision before the election is extremely short. An alternative outcome on appeal could once again necessitate consideration of the issues presented in this case. Accordingly, Plaintiffs respectfully suggest that proceeding expeditiously on parallel tracks with respect to temporary and preliminary injunctive relief is the only way to assure that the Plaintiffs have the potential for a meaningful remedy should they prevail.

III. NOTWITHSTANDING ALL OF THE DEFENDANT'S DUPLICITY AND DISTRACTION, HE CONCEDES HE IS THE FIRST SECRETARY OF STATE TO ISSUE THE DIRECTIVE THAT 17 YEAR OLDS CANNOT VOTE IN PRESIDENTIAL PRIMARY ELECTIONS

The Defendant goes to great length to try to leave the Court with the impression that the Defendant has done nothing to change the Secretary of State's position regarding whether Threshold Voters can vote in presidential primaries. However, when all the distraction is stripped away, even the Defendant concedes that he was the first Secretary of State to put out a directive explicitly stating that 17 year olds could not vote in presidential primary elections. (*See* Def's Brf. at 13.) Though he tries to minimize it, this was significant change with respect to the rights of Threshold Voters and the instruction to election officials. Although the transcript is not available, when pressed on this issue at oral argument in the state court case, the Defendant conceded this change.

IV. DEFENDANT'S ASSERTED INTERPRETATION THAT THE OHIO CONSTITUTION DOES NOT PERMIT PERSONS UNDER THE AGE OF 18 TO VOTE DOES NOT SUPPORT HIS POSITION HERE

Defendant argues that Article V of the Ohio Constitution limits those who can vote in Ohio to persons 18 years of age or older (while conclusively acknowledging extension of the right to 17 year old primary voters who will be 18 on the date of the general election). There are at least three fatal flaws to this argument: (1) the Ohio Constitution does not say that – it merely assures that those persons 18 years of age or older are entitled to vote[2]; (2) if only persons eighteen or older are permitted to vote, then the Ohio voting laws that the Defendant purports to interpret in his 2015 Election Officials Manual would be unconstitutional under the Ohio Constitution, a theory that the courts of Ohio expressly rejected in the 2002 Decision previously attached by Plaintiffs (Beehler Decl., Exh. 1, pp. 3-4 ¶¶ 16-19; and (3) the Defendant's own interpretation of law permits 17 year old Threshold Voters to vote in primary elections for offices other than the President of the United States. This argument by the Defendants appears to be a desperate attempt to justify an interpretation that distinguishes the election of delegates for the presidential primary from the primary nomination of other candidates. Again, such an argument is flawed, because O.R.C. § 3503.011 and 3501.01(E)(1) expressly allow Threshold voters to vote in elections, including allowing voting in a primary election to elect delegates to a party nominating convention. *Id.*

IV. THE *GAUNT* DECISION IS INAPPOSITE HERE

This Court's decision in *Gaunt v. Brown*, 341 F.Supp. 1187 (S.D. Ohio 1972), *aff'd* 409 U.S. 809 (1972), addressed a previous version of Ohio law that made the eligibility to vote in primary elections subject to the requirement that the voter is 18 years of age on the date of such primary. In that case, the plaintiff challenged the constitutionality of the state statute, arguing that

[2] Article V of the Ohio Constitution – like the 26th Amendment to the United States Constitution -- does not contain any limitation against granting voting rights to persons less than 18 years of age.

it was unconstitutional to arbitrarily draw the cut-off age for primary voting at 18. The plaintiff asserted that because the primary was tied to the general election, voters who were seventeen at the time of the primary, but who would be 18 at the time of the general election, should also be allowed to vote in the primary. This Court held that the 26th Amendment does not grant the right to vote to 18 year olds, it simply bans age qualifications for persons 18 and older. *Id.* at 1191. This Court also rejected the notion that the Equal Protection Clause required that a state draw the age cut-off for primary voting at a particular age below 18.

The fundamental differences between *Gaunt* and the current case are these. First, there was no unequal treatment in *Gaunt*. Persons 18years old and older on the date of a primary could vote in the primary, and persons younger than 18were not granted any right to vote at all. As the *Gaunt* Court noted, to argue that the mere setting of an age for voting constitutes discriminatory or unequal treatment as compared to a person who is one day younger would mean that no matter what age was picked as a cut-off, it would be discriminatory to some group of people. The Constitution therefore does not prevent a state from drawing this line.

The Constitution does, however, apply once a state draws the line. The current case involves such a line, created by the State's enfranchisement of a new electorate through the Threshold Voter Law. For purposes of primary elections, the Threshold Voter Law creates eligibility not by a person's age on the date of the primary, but by their age on the date of the general election that follows such primary. The Threshold Voter Law confers a new political right upon Ohio citizens. Once conferred, the federal Constitution guarantees that such right may not be administered arbitrarily or discriminatorily. This is consistent with the holding in *Gaunt* – a right once granted must be administered in compliance with federal constitutional standards, even where there is no constitutional right to the grant itself. The Equal Protection claim in the instant

case is based upon the fact that Threshold Voters have been granted the right to vote since 1981, including the right to vote in primaries, but are now arbitrarily and discriminatorily being excluded from voting in presidential primary races by a statutory reinterpretation promoted by the Defendant.

V. PLAINTIFFS HAVE CREATED A SUFFICIENT INFERENCE OF DISCRIMINATION IN SUPPORT OF THEIR VOTING RIGHTS ACT CLAIM

Defendant's only response to Plaintiff's Voting Rights Act claim is that "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." (Def's Brf. at 35.) However, the current request before the Court is one for temporary and preliminary injunctive relief. The affidavit evidence submitted by the Plaintiffs is sufficient to create the necessary *prima facie* inference – unrebutted by the Defendant – to grant the requested relief. Notably, the United States Court of Appeals for the Sixth Circuit and Supreme Court rely upon the same type of statistical and demographic information that is offered here in connection with their recognition of disparate impact of certain voting practices. *See, e.g., Obama for America v. Husted*, 697 F.3d 423, 431-432 (6th Cir. 2012); *Bush v. Gore*, 531 U.S. 98, 103 (2000) (citing information from a newspaper and online news service for inferences relevant to expedited decision).

VI. ORAL ARGUMENT

Lastly, given the short time frame to prepare briefs and respond to complex arguments, Plaintiffs respectfully renew request for oral argument with respect to their motion for temporary and preliminary injunctive relief.

VII. CONCLUSION

The Plaintiffs' argument ends where it began. The right to vote is critical and is of paramount importance. Unequal, arbitrary and discriminatory treatment of voters should not be

tolerated. While a request for expedited emergency relief always places practical strains on the litigants, their attorneys and the Court, this is no reason to deny relief. Like the right to vote, the right to recourse from our judicial system is fundamental to civilized and intelligent resolution of disputes. For all of these reasons, the Plaintiffs respectfully request that their motion for injunctive relief be granted, and that Plaintiffs and other Threshold Voters be permitted to participate in the ongoing voting for the presidential primary election.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Reply Brief is being served electronically on all counsel via the Court's ECF system, this 11th day of March, 2016.

/s/ Robert G. Cohen
Robert G. Cohen