

**IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO**

RACHEL SCHWERDTFEGER,)
459 East Schreyer Place)
Columbus, OH 43214)

EMMA NELL WARNER-MESNARD,)
142 West Pacemont Road)
Columbus, OH 43202)

JOSEPH ELISAR,)
119 South Ardmore Road)
Columbus, OH 43209)

CHRISTIAN BUSH,)
624 Glenridge Place)
Columbus, OH 43214)

BRIAN BUSH,)
624 Glenridge Place)
Columbus, OH 43214)

ALICE WEAVER KOENINGER,)
3207 Raleigh Drive)
Toledo, OH 43606)

ZACKARY EMERSON WALKER,)
2101 Deer Crossing Drive)
Kent, OH 44240)

SPENCER JAMES GARVER,)
7563 Sharrington Drive)
Columbus, OH 43235)

GEORGE BLAKE PEARON,)
6916 Lakebrook Boulevard)
Columbus, OH 43235)

Plaintiffs,)

v.)

JON HUSTED, in his official capacity as)
the Secretary of State for the State of Ohio,)
Office of the Ohio Secretary of State)

Case No.

Judge

VERIFIED COMPLAINT

180 East Broad Street)
Columbus, OH 43215)
)
Defendant,)
)

**VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND
TEMPORARY AND PERMANENT INJUNCTIVE RELIEF**

Plaintiffs, by and through their counsel of record, for their Verified Complaint against Defendant Ohio Secretary of State Jon Husted, allege as follows:

INTRODUCTION

1. Plaintiffs are U.S. citizens and residents of Ohio who are all 17 years old, have registered to vote in this state, and will be 18 years old on or before November 8, 2016, the date of the 2016 presidential election.

2. This action seeks to enforce OHIO REV. CODE § 3503.011, which expressly grants them a right to vote in Ohio’s primary elections.

3. Plaintiffs seek a declaratory judgment that a rule in the Ohio Election Official Manual violates OHIO REV. CODE § 3503.011, and injunctive relief to ensure they can vote in Ohio’s 2016 presidential primary election.

PARTIES

4. Plaintiff Rachel Schwerdtfeger is a 17-year-old United States citizen and registered voter. She has been a resident of Franklin County, Ohio for more than 30 days. Her birthday is August 22, 1998, and she will be 18 years old on August 22, 2016, before the general election on November 8, 2016. She is a senior at Whetstone High School in Clintonville. She has never been incarcerated for a felony conviction, declared incompetent for voting purposes by a probate court, or permanently disenfranchised for

violations of election laws. Rachel wants to vote in Ohio's 2016 presidential primary and to have her vote counted. She has previously participated in the "Youth at the Booth" program run by the Franklin County Board of Elections, which involves 17- and 18-year olds in working at polling locations on election days. On November 3, 2015, she worked as a machine judge, taking voters' "Authority To Vote" slips and preparing their ballots at the Ocali-Glenmont School Polling Place in Columbus Precinct 19-G. *See Ex. 3.*

5. Plaintiff Emma Nell Warner-Mesnard is a 17-year-old U.S. citizen and registered voter. She has been a resident of Franklin County, Ohio for more than 30 days. Her birthday is June 2, 1998, and she will be 18 years old on June 2, 2016, before the general election on November 8, 2016. She has never been incarcerated for a felony conviction, declared incompetent for voting purposes by a probate court, or permanently disenfranchised for violations of election laws. She is a junior at Columbus Alternative High School. On March 7, 2016, Emma went to the Franklin County Early Vote Center, 1700 Morse Road, Columbus OH, 43229, to vote in the presidential primary. The poll worker said that because of her age she needed to fill out a paper ballot that would be segregated from other ballots. Emma did not vote on the machines as others were doing. After she filled out the ballot, the poll worker placed it in a white envelope with red letters saying "17 Year Old Voter." The poll worker was not sure whether Emma's vote for the presidential primary would be counted. Emma wants to ensure that her vote in the 2016 presidential primary is counted. *See Ex. 4.*

6. Plaintiff Joseph Elisar is a 17-year-old United States citizen and registered voter. He has been a resident of Franklin County, Ohio for more than 30 days. His birthday is August 12, 1998, and he will be 18 years old on August 12, 2016, before the

general election on November 8, 2016. He has never been incarcerated for a felony conviction, declared incompetent for voting purposes by a probate court, or permanently disenfranchised for violations of election laws. He is a junior at Bexley High School. He wants to vote in Ohio's 2016 presidential primary and to have his vote counted.

See Ex. 5.

7. Plaintiff Christian Bush is a 17-year-old United States citizen and registered voter. He has been a resident of Franklin County, Ohio for more than 30 days. His birthday is October 14, 1998, and he will be 18 years old on October 18, 2016, before the general election on November 8, 2016. He has never been incarcerated for a felony conviction, declared incompetent for voting purposes by a probate court, or permanently disenfranchised for violations of election laws. He is a junior at Thomas Worthington High School. He wants to vote in Ohio's 2016 presidential primary and to have his vote counted. *See Ex. 6.*

8. Plaintiff Brian Bush is a 17-year-old United States citizen and registered voter. He has been a resident of Franklin County, Ohio for more than 30 days. His birthday is October 14, 1998, and he will be 18 years old on October 14, 2016, before the general election on November 8, 2016. He has never been incarcerated for a felony conviction, declared incompetent for voting purposes by a probate court, or permanently disenfranchised for violations of election laws. He is a junior at Thomas Worthington High School. He wants to vote in Ohio's 2016 presidential primary and to have his vote counted. *See Ex. 7.*

9. Plaintiff Alice Weaver Koeninger is a 17-year-old United States citizen and registered voter. She has been a resident of Lucas County, Ohio for more than 30

days. Her birthday is March 16, 1998, and she will be 18 years old on March 16, 2016, before the general election on November 8, 2016. She has never been incarcerated for a felony conviction, declared incompetent for voting purposes by a probate court, or permanently disenfranchised for violations of election laws. She is a senior at Notre Dame Academy. She wants to vote in Ohio's 2016 presidential primary and to have her vote counted. *See* Ex. 8.

10. Plaintiff Zackary Emerson Walker is a 17-year-old United States citizen and registered voter. He has been a resident of Portage County, Ohio for more than 30 days. His birthday is April 17, 1998, and he will be 18 years old on April 17, 2016, before the general election on November 8, 2016. He has never been incarcerated for a felony conviction, declared incompetent for voting purposes by a probate court, or permanently disenfranchised for violations of election laws. He is a senior at Roosevelt High School. He wants to vote in Ohio's 2016 presidential primary and to have his vote counted. *See* Ex. 9.

11. Plaintiff Spencer James Garver is a 17-year-old United States citizen and registered voter. He has been a resident of Franklin County, Ohio for more than 30 days. His birthday is October 24, 1998, and he will be 18 years old on October 24, 2016, before the general election on November 8, 2016. He has never been incarcerated for a felony conviction, declared incompetent for voting purposes by a probate court, or permanently disenfranchised for violations of election laws. He is a junior at Worthington Kilbourne High School. He wants to vote in Ohio's 2016 presidential primary and to have his vote counted. *See* Ex. 10.

12. Plaintiff George Blake Pearson is a 17-year-old United States citizen and registered voter. He has been a resident of Franklin County, Ohio for more than 30 days. His birthday is October 6, 1998, and he will be 18 years old on October 6, 2016, before the general election on November 8, 2016. He has never been incarcerated for a felony conviction, declared incompetent for voting purposes by a probate court, or permanently disenfranchised for violations of election laws. He is a junior at Worthington Kilbourne High School. He wants to vote in Ohio's 2016 presidential primary and to have his vote counted. *See* Ex. 11.

13. Defendant Jon Husted is the Secretary of State for the State of Ohio, the state's chief election official, OHIO REV. CODE § 3501.04, and is sued in his official capacity only. The Ohio Secretary of State is charged with supervising the administration of the election laws statewide and compelling local election officials to observe the requirements of existing state and federal law, including “[i]ssu[ing] instructions by directives and advisories . . . to members of the boards as to the proper methods of conducting elections” and “[p]repar[ing] rules and instructions for the conduct of elections.” *Id.* § 3501.05.

JURISDICTION AND VENUE

14. Plaintiffs Rachel Schwerdtfeger, Emma Nell Warner-Mesnard, Joseph Elisar, Christian Bush, Brian Bush, Spencer James Garver and George Black Pearson all seek to cast a ballot in the 2016 presidential primary in Franklin County, Ohio.

15. Defendant Jon Husted, the Ohio Secretary of State, works and resides in Franklin County, Ohio.

16. Jurisdiction and venue are proper in this Court because Plaintiffs' rights to vote will be denied in this county, absent relief, and Defendant Secretary of State Husted works and resides in this county.

17. This Court has jurisdiction to issue a declaratory judgment, OHIO REV. CODE §§ 2721.01-2721.15, and a temporary restraining order and permanent injunctive relief, OHIO REV. CODE § 2727.03.

18. Plaintiffs seek an award of reasonable attorneys' fees and costs pursuant to OHIO REV. CODE § 2335.39.

FACTUAL ALLEGATIONS

19. Ohio's presidential primary election is scheduled to take place on March 15, 2016. Early voting is underway. In addition to the presidential primary, eligible Ohio voters are also voting on a variety of primary contests for federal, state, and local offices. *See* Ex. 2-B.

20. OHIO REV. CODE § 3513.12 sets forth the procedure for selecting delegates to the party conventions: "At a presidential primary election, which shall be held on the second Tuesday after the first Monday in March in the year 2016, and similarly in every fourth year thereafter, delegates and alternates to the national conventions of the different major political parties shall be chosen by direct vote of the electors as provided in this chapter." An alternative method for selecting delegates and alternates to the national conventions is set forth in OHIO REV. CODE § 3513.121. The political parties have discretion to choose between the methods.

21. The Ohio Election Code defines a "primary" or "primary election" to include "an election held for the purpose of nominating persons as candidates of political

parties for election to offices” and to choose “delegates and alternates to the conventions of political parties.” OHIO REV. CODE § 3501.01(E)(1). The substance of this definition has not changed over the last century. The 1929 version of the same statute also included “choosing delegates to a party convention” and “nominating candidates to be voted for at an election.” OHIO REV. CODE § 4785-3 (1929).

22. In 1980, the Ohio General Assembly enacted OHIO REV. CODE § 3503.011, which provides: “At a primary election every qualified elector who is or will be on the day of the next general election eighteen or more years of age, and who is a member of or is affiliated with the political party whose primary election ballot he desires to vote, shall be entitled to vote such ballot at the primary election.”

23. In 1993, the Ohio Election Code was amended to add a definition for “presidential primary election.” 1993 S 150 (eff. Dec. 29, 1993). The term was defined to mean:

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. *Unless otherwise specified, presidential primary elections are included in references to primary elections.* In years in which a presidential primary election is held, all primary elections shall be held on the second Tuesday after the first Monday in March except as otherwise authorized by a municipal or county charter.

OHIO REV. CODE § 3501.01(E)(2) (emphasis added). In 1993, the General Assembly was fully aware that OHIO REV. CODE § 3503.011 (enacted 13 years prior) had given some 17-year-olds the right to vote in presidential primary elections. When the Legislature adopted the above language, it reaffirmed the decision to extend the right to vote in primary elections, including presidential primaries, to 17-year-olds who would turn 18 by the general election. More than two decades have passed since the above definition was

enacted, and the General Assembly has never varied from the default rule that “presidential primary elections are included in references to primary elections.” OHIO REV. CODE § 3501.01(E)(2).

24. On December 15, 2015, the office of Defendant Ohio Secretary of State Jon Husted promulgated a revised edition of the Ohio Election Official Manual (“the Manual”). The Manual sets forth a rule on 17-year-olds voting in primaries which is at odds with decades of implementation of OHIO REV. CODE § 3503.011. First, the Manual explains the effect and intent of OHIO REV. CODE § 3503.011:

Ohio law allows a 17-year-old voter who will be 18 years of age on or before the date of the next general election to vote in the primary election solely on the nomination of candidates. This is because the 17-year-old voter will be eligible to vote for the nominees at the November general election.

Ex. 2-A (excerpt of Ohio Election Official Manual).¹ Second, the Manual now states: “In presidential primary elections, a 17-year-old voter is not permitted to vote for presidential delegates, because delegates are elected and not nominated.” *Id.*

25. The Ohio Secretary of State website’s page entitled “Frequently Asked Questions” sets forth the qualifications to register and vote in Ohio. The second qualification listed is described as follows: “You will be at least 18 years old on or before the day of the next general election. (If you will be 18 on or before the general election, you may vote in the primary election to nominate candidates, but you cannot vote on issues or party central committees until you are 18).”² See Ex. 2-C. Therefore, even as of the date of this Complaint, the Ohio Secretary of State’s office is still representing to

¹ Ohio Election Official Manual 7-6 (last updated Dec. 15, 2015), *available at* <http://www.sos.state.oh.us/SOS/Upload/elections/EOresources/general/2015EOM.pdf>.

² Ohio Secretary of State Website, Frequently Asked Questions, *available at* <http://www.sos.state.oh.us/sos/elections/Voters/FAQ/voterEligibility.aspx#qualifications> (last visited Mar. 7, 2016).

the public that 17-year-olds may cast a ballot in Ohio's 2016 presidential primary, causing voter confusion.

26. "Primary elections" are defined to include "delegates and alternates to the conventions of political parties," OHIO REV. CODE § 3501.01(E)(1), and presidential primary elections are included in the use of the term "primary election" in OHIO REV. CODE § 3503.011. OHIO REV. CODE § 3501.01(E)(2) ("Unless otherwise specified, presidential primary elections are included in references to primary elections."). Had the General Assembly intended a different outcome, it could have amended the definition of a "primary election" in 1980, when OHIO REV. CODE § 3503.011 was enacted, or excluded the "presidential primary election" from the scope of OHIO REV. CODE § 3503.011 when that definition was adopted in 1993. It did neither.

27. Defendant Secretary of State Husted's revised Ohio Election Official Manual therefore flatly contradicts the unambiguous terms of OHIO REV. CODE § 3503.011. On information and belief, some of Ohio's county boards of elections are aware of the rule and enforcing it. Some county boards of elections are segregating 17-year-olds' ballots and informing them that their votes in the presidential primary may not count.

28. Not only does the revised Manual contradict the plain terms of OHIO REV. CODE § 3503.011, but it also contradicts the Supreme Court of Ohio's decision in *State ex rel. Webber v. Felton*, 77 Ohio St. 554 (1908). That case considered whether the Ohio Constitution's voting eligibility clause, Article V, Section 1 applied to presidential primary elections:

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.

The Supreme Court of Ohio reasoned that: “[A] primary election held merely to name the candidates of a political party is not an election within the meaning of [Article V, Section 1] of the Constitution. That section refers to an election of officers, and not to the nomination of candidates.” *Webber*, 77 Ohio St. at 578. Accordingly, since a presidential primary is held for “the nomination of candidates,” the Court held that Article V, Section 1 of the Ohio Constitution simply did not apply to and regulate a presidential primary.

29. Following *Webber*, the term “primary election” is a bit of a misnomer because its purpose is to nominate candidates for the general election. No one assumes a public office following a true primary election; rather, they win the right to contest the general election as a political party’s nominee. A presidential primary election is no different. Based on the votes cast by those voting in a presidential primary, delegates are selected to serve at a national convention, at which the party delegates in turn select a presidential nominee. *See* OHIO REV. CODE § 3513.12. The names of delegates corresponding to each presidential candidate do not appear on the primary election ballot; the names that do appear belong to the candidates themselves who are vying for the party’s ultimate nomination for the general election.³ Additionally, such delegates do not assume any public office; they merely serve as surrogates for the voters at a one-time

³ The reverse situation existed in *Webber*, where presidential candidates’ names were *not* on the ballot and delegates’ and alternates’ names were included. Even then, the Supreme Court of Ohio still reached the conclusion that presidential primaries were nominations, not elections. 77 Ohio St. at 560.

convention to elect that party's nominee for that electoral cycle. Simply because the nomination occurs in two steps does not make it any less a nomination under *Webber*.

30. The Ohio Secretary of State may not promulgate rules and regulations that violate the Ohio Constitution and/or the Supreme Court of Ohio's constitutional decisions. Furthermore, directives of the Ohio Secretary of State's office cannot contravene the unambiguous terms of a duly enacted statute. *State, ex rel. De Boe, v. Indus. Comm'n*, 161 Ohio St. 67, 69 (1954) ("It is well established that where by statutory authority an administrative agency . . . promulgates rules and regulations governing its activities and procedure, such rules are valid and enforceable unless they are unreasonable or in conflict with statutory enactments covering the same subject matter.").

31. Finally, in 2008, the Ohio Supreme Court construed OHIO REV. CODE § 3503.011 to mean exactly what it says, without exception:

Furthermore, R.C. 3503.011 specifies that a person who will not be 18 years old until the date of the next general election is *permitted to vote in the primary election* preceding the general election: "At a primary election every qualified elector who is or will be on the day of the next general election eighteen or more years of age, and who is a member of or is affiliated with the political party whose primary election ballot he desires to vote, shall be entitled to vote such ballot at the primary election."

State ex rel. Colvin v. Brunner, 120 Ohio St. 3d 110, 120 (2008) (emphasis added). The General Assembly never made an exception for any particular primary elections; nor has the Supreme Court of Ohio ever discovered such an exception or construed the language of this section as intended to carve out presidential primary elections. Defendant Husted is bound to follow the Ohio Election Code and the Supreme Court of Ohio's interpretation of the Ohio Constitution.

COUNT ONE
(Violation of OHIO REV. CODE § 3503.011; Ohio Declaratory Judgment Act, OHIO REV. CODE §§ 2721.01-2721.15)

32. The preceding and subsequent allegations are incorporated into Count One, as though fully set forth herein.

33. OHIO REV. CODE § 3503.011 guarantees 17-year-olds who will turn 18 on or before the November general election, the right to vote in Ohio's 2016 presidential primary.

34. Defendant Ohio Secretary of State Jon Husted has promulgated an Ohio Election Official Manual which instructs county Boards of Elections that 17-year-olds who will turn 18 on or before the date of the November general election are not eligible to cast a vote in Ohio's presidential primary.

35. Some Ohio county Boards of Elections are aware of the new prohibition on 17-year-olds voting in presidential primaries and are enforcing it.

36. Defendant's actions violate OHIO REV. CODE § 3503.011.

37. "It is well established that where by statutory authority an administrative agency . . . promulgates rules and regulations governing its activities and procedure, such rules are valid and enforceable unless they are unreasonable or in conflict with statutory enactments covering the same subject matter." *State, ex rel. De Boe, v. Indus. Comm'n*, 161 Ohio St. 67, 69 (1954).

38. Absent a declaratory judgment and a temporary restraining order, as well as permanent injunctive relief, the enforcement of the Ohio Election Official Manual rule will continue in violation of OHIO REV. CODE § 3503.011, and Defendant Husted and the county boards of elections under his direct supervision will therefore violate the voting

rights of 17-year-olds who will turn 18 on or before the November 8, 2016 general election.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- (1) Declare that the Ohio Election Official Manual's rule excluding from Ohio's 2016 presidential primary 17-year-olds who will be 18 on or before the November general election violates OHIO REV. CODE § 3503.011 and is therefore invalid;
- (2) Enter a temporary restraining order and preliminary injunction (*see* Ex. 1, Motion for Temporary Restraining Order and Preliminary Injunction), as well as a permanent injunction, enjoining the enforcement by Defendant Ohio Secretary of State Jon Husted, his officers, agents, employees, servants, attorneys and those persons in active concert or participation with him, of the Ohio Election Official Manual's rule forbidding any registered 17 year-old who will be 18 on or before the November 8, 2016 general election from voting in Ohio's 2016 presidential primary, in contravention of the clear terms of OHIO REV. CODE ANN. § 3503.011;
- (3) Order Defendant Secretary of State Husted to convey and/or communicate notice of this Court's judgment and order, along with a copy of the Court's judgment and order, to all of Ohio's county boards of elections, such that it is received by all of Ohio's county boards of elections by no later than 12:00 P.M. on Friday March 11, 2016, by email, and order that a physical copy shall

follow by United States Postal Service priority mail to be mailed by no later than 12:00 P.M. on Friday March 11, 2016;

- (4) Order Defendant Secretary of State Husted to direct the County Boards of Elections to count the presidential primary votes cast during the early voting period and on March 15, 2016, by 17-year-old voters who will turn 18 on or before the general election;
- (5) Award Plaintiffs their reasonable attorneys' fees and costs pursuant to OHIO REV. CODE § 2335.39; and
- (6) Award all such other relief that this Court deems just and proper.

Respectfully submitted,

/s/Rachel Bloomekatz_____

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**Application to be Admitted Pro Hac Vice to Practice Pending with the Supreme Court of Ohio*

