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**SC95678**

**IN THE SUPREME COURT OF MISSOURI**

**JOSHUA PETERS,**

***Contestant-Respondent,***

**v.**

**RACHEL JOHNS,**

***Contestee-Appellant.***

**APPEAL FROM THE TWENTY-SECOND CIRCUIT COURT**
**ST. LOUIS CITY**
**The Honorable Julian Bush, Judge**

# APPELLANT'S BRIEF

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## INTRODUCTION AND SUMMARY

Article III, section 4 of the Missouri Constitution and section 21.080, RSMo., state that a citizen may only serve in the Missouri House of Representatives if (1) they are at least twenty-four years old, (2) they have resided in the district they intend to represent for at least one year immediately preceding their election, and (3) they have been a qualified voter for at least two years immediately preceding their election.[1] It is exceedingly easy to get one's name on the State's list of qualified voters if one wishes to do so—indeed, registering to vote is incredibly easy as long as the registrant is (1) at least eighteen years old, (2) an American citizen, (3) a resident of Missouri, and (4) has not been convicted of certain crimes. Becoming a registered voter requires no special skill, knowledge, character, or experience, and once a person is registered, they need not do, learn, or accomplish anything in order to remain registered. Being a registered voter indicates little more than that one has the ***option*** of casting a ballot in Missouri elections, even if that option is never exercised.

The Appellant, Rachel Johns, qualified to register to vote well before November 8, 2014, but she had personal reasons for not wanting to do so. To Johns, voting seemed to be a hollow exercise because she felt that the political system itself was broken. Particularly in the summer of 2014, as she observed first-hand the official response to the

[1] Throughout this brief Johns will refer to this third element as "the Durational Voter Registration Requirement."

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protests that erupted after Michael Brown was killed in Ferguson, Missouri, Johns felt registering to vote would mean endorsing a system that had continued to fail her community—and she could not in good conscience provide such an endorsement. In the meantime, however, Johns was heavily involved in trying to advance her community's interests through local political activism. Those efforts resulted in her meeting a politician who helped restore her faith that electoral politics could be a viable avenue for effecting positive change for her community. Thus, on February 4, 2015, Johns ended her protest and registered to vote. About a year later, she declared her candidacy to challenge her district's incumbent State Representative for a seat in the General Assembly.

Respondent Joshua Peters initiated this lawsuit, contending that because Johns did not register to vote until after November 8, 2014, their neighbors in State House District 76 must not be permitted even to consider voting for Johns to replace him. The Durational Voter Registration Requirement affords no flexibility, so even if ***every single voter*** in the 76th District decided they would prefer to have Johns replace Peters as their representative, the law would deny the voters that choice. And, because Johns is the only candidate other than the incumbent vying to represent State House District 76, if Johns is excluded from the ballot the voters go through the 2016 election cycle without having the opportunity to cast a meaningful vote for any candidate other than Respondent Peters.

Johns responded to Peters' lawsuit by arguing that the Durational Voter Registration Requirement is unconstitutional as applied in this case, unjustifiably penalizing her for having engaged in a political protest within the protections of the First

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Amendment and also denying voters' rights to cast a meaningful vote for anyone other than Respondent Peters. Because the Durational Voter Registration Requirement heavily burdens Johns' constitutional rights and because the Respondents cannot justify those burdens by identifying a compelling government interest advanced by the challenged restriction, this Court must rule that the Durational Voter Registration Requirement is unconstitutional as applied in this case.

## JURISDICTIONAL STATEMENT

This is an appeal of a judgment of the St. Louis City Circuit Court, entered on April 28, 2016, in which the trial court concluded that Johns does not satisfy the two-year Durational Voter Registration Requirement ("the Durational Voter Registration Requirement") and that, according to section 21.080, RSMo.,[2] and Article III, section 4 of the Missouri Constitution, she is not eligible to serve in the Missouri House of Representatives. Johns' sole contention in this case is that, as applied to her under these circumstances, the Durational Voter Registration Requirement violates the First and Fourteenth Amendments to the U.S. Constitution. Because this case involves a challenge to the validity of a state statute and a provision of the Missouri Constitution, Article V, section 3 of the Missouri Constitution gives this Court exclusive jurisdiction to hear and rule upon the appeal.

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[2] All statutory references are to Missouri Revised Statutes (2000), as updated, unless otherwise noted.

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## STATEMENT OF FACTS

In the summer of 2014, Rachel Johns was disillusioned with Missouri's political system. L.F. at 12. Particularly in the wake of Michael Brown's killing in Ferguson, Missouri, and the following protests (in which she was an active participant), she believed the political system to be broken. *Id.* Although Johns qualified to register to vote, she believed that doing so would effectively endorse an unacceptable political status quo, so instead she chose to express her dissatisfaction with the political system by declining to register to vote. *Id*. at 12, 61. Despite her expressive choice not to register to vote, Johns was directly engaged with matters of policy relating to her community, not only participating in protests in Ferguson, Missouri, but also actively working to persuade the St. Louis City Board of Aldermen to approve a Civilian Oversight Board for the St. Louis Metropolitan Police Department. *Id*. at 12.

In November 2014, Johns moved into the 27th Ward in St. Louis City and met Alderman Chris Carter, who inspired her to believe that the political system might not be irredeemably broken after all; with Alderman Carter's encouragement, Johns decided to try to make a difference by playing an active role in the political process – which led her to register to vote on February 4, 2015. *Id.* at 12-13. One year later, believing that she would be a better representative for her neighbors than Joshua Peters (the incumbent and one of the Respondents in this case), Johns declared her candidacy for the office of State Representative for State House District 76. *Id*. at 13. Johns is the only candidate other than Peters who is running to represent the 76th District; if Johns is removed from the ballot the voters of this district will not have any choice at all as to who will represent

them in the Missouri House of Representatives because Respondent Peters will be the only candidate listed on the ballot. *Id*. at 13-14. Johns also notes that as a registered voter in State House District 76 she has standing to assert constitutional protections for her own voting rights, as well as on behalf of the other voters in State House District 76. *Id*.

The Respondents do not dispute that as of November 8, 2016, the date of the relevant general election, Johns will be at least 24 years old, will have been a resident of the St. Louis area for more than two years, and will have lived at a location designated as part of State House District 76 for more than one year. *Id*. at 5-10. The Respondents also have not disputed that, but for her expressive decision to protest the political system by declining to register to vote, Johns could have registered to vote prior to November 8, 2014. The sole basis for Respondent Peters' lawsuit is that as of November 8, 2016, Johns will have been a registered voter for one year, nine months, and four days, rather than the full two years mandated by the Durational Voter Registration Requirement. *Id*. at 6.

Respondent Peters initiated this case on April 1, 2016, seeking to disqualify his only opponent in the upcoming election to serve State House District 76 in the Missouri House of Representatives. *Id*. at 5-10. The parties filed Cross-Motions for Judgment on the Pleadings and, after hearing arguments from the parties, Judge Julian Bush issued his judgment in favor of Peters on April 28, 2016. *Id*. at 61-65. Johns filed her notice of appeal later that same day. *Id*. at 69-70. Almost immediately after the judgment was announced, Peters filed a Motion for Temporary Restraining Order, asking Judge Bush to prohibit Johns from "making explicit or implicit representations that she is a candidate



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for state representative, soliciting campaign contributions, or making campaign expenditures." *Id*. at 66-68. Judge Bush denied that motion on April 29, 2016. *Id*. at 1.

## POINT RELIED ON

***The Trial Court Erred* in Ruling That the Durational Voter Registration Requirement Precludes Johns From Being Elected to the Missouri House of Representatives, *Because* the First and Fourteenth Amendments to the U.S. Constitution Prohibit the Enforcement of the Durational Voter Registration Requirement, *In That* it Would Unjustifiably Penalize Johns' Freedom of Speech, Deny Her the Equal Protection of the Law, and Deny Voters' Rights to Cast Their Votes Effectively.**

*Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999)

*Dunn v. Blumstein*, 405 U.S. 330 (1972)

*Quinn v. Millsap*, 491 U.S. 95 (1989)

*Henderson v. Fort Worth Ind. Sch. Dist.*, 526 F.2d 286 (1976)

## STANDARD OF REVIEW

The constitutionality of a statute is a question of law, the review of which is *de novo*. *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo. banc 2007). "When a case is submitted on stipulated facts, the only question before this Court is whether the circuit court drew the proper legal conclusions from those facts." *State v. Young*, 362 S.W.2d 386, 390 (Mo. banc 2012).

As a general rule, statutes are presumed to be valid. *State v. Richard*, 298 S.W.3d



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529, 531 (Mo. banc 2009). But where, as in this case, a law restricts or penalizes rights protected by the First Amendment, the U.S. Supreme Court has held that ***the government*** bears the burden of justifying that restriction or penalty. *McCutcheon v. Federal Election Commission*, 134 S.Ct. 1434, 1452 (2014); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000). Additionally, this Court has held that the Fourteenth Amendment's Equal Protection Clause requires the application of strict scrutiny to a legal provision that denies "the right to run for public office based on the particular office sought" and that ***the government*** bears the burden of justifying its restriction. *Labor's Educational and Political Club-Independent v. Danforth*, 561 S.W.2d 339, 348 (Mo. banc 1977); *see also Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 (Mo. banc 1992) (strict scrutiny requires court to "adopt an attitude of active and critical analysis," requiring the government to bear the burden of proving that the regulation is justified).

Because a regulation restricting a fundamental right is presumptively invalid, it "will be declared unconstitutional unless it is 'narrowly tailored to serve a compelling governmental interest.'" *Ocello v. Koster*, 354 S.W.3d 187, 200 (Mo. banc 2011). When rights protected by the First Amendment are restricted, the government must establish that the liberty-restricting means employed to serve that government interest "are the least restrictive appropriate to the task." *Pollard v. Bd. of Police Comm'rs*, 665 S.W.2d 333, 340 (Mo. banc 1984) (citations omitted).



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## ARGUMENT

### I. Overview of Different Types of Candidacy Restrictions.

Below is an overview of four of the most common types of qualifications that governments impose on citizens wishing to serve in public office: (1) a simple residency requirement, (2) a durational residency requirement, (3) a simple voter registration requirement, and (4) a durational voter registration requirement.

#### A. Simple Residency Requirement

Of the four types of qualifications addressed her, a simple residency requirement is the easiest to comply with. Many jurisdictions require those who would serve a given community in elective office to establish their residence among the constituents they will represent. When a person resides within a community, they almost necessarily interact with the other people who live and work there. As he or she builds relationships there, it becomes more likely that the resident will understand the interests, concerns, and aspirations of their neighbors. Conventional wisdom suggests that a public official who lives among their constituents will be more attentive and helpful to a community than a public official who lives somewhere else. Johns takes the position that a simple residency requirement is a relatively light burden to place on an elected official and that, therefore, such a requirement would almost always be constitutional.

#### B. Durational Residency Requirement

A durational residency requirement is a larger burden to impose on a would-be government official. An aspiring public servant who wishes to serve a jurisdiction with a durational residency requirement must anticipate – sometimes years in advance – which

town, county, or district holds the most promise for a future career in public service. The difficulty of predicting where one might find a welcoming constituency is compounded by the fact that legislative district boundaries change periodically, meaning that even if a would-be politician puts intense effort into building strong relationships with people in one particular community, the redistricting process may unexpectedly cut her off from the potential constituency she had been cultivating. *See, e.g., Wright-Jones v. Nasheed*, 368 S.W.3d 157, 158 (Mo. banc 2012). Of course, the shorter a durational residency requirement is, the less of a challenge it will represent to the public official and, presumably, the more reasonable the requirement will be.

Courts have indeed demonstrated a willingness to strike down as unconstitutional durational residency requirements that are unreasonably extensive. In 1978, for example, the Eighth Circuit Court of Appeals issued its opinion in *Antonio v. Kirkpatrick*, 579 F.2d 1147 (8th Cir. 1978), in which a citizen wishing to run for State Auditor challenged the validity of Missouri's ten-year durational residency requirements for serving in that office. The challenger contended that the restriction violated the Equal Protection Clause of the Fourteenth Amendment. In response, the government argued that the restriction was justified because the state had a legitimate (but not "compelling") interest in ensuring that candidates would be bona fide residents of the state and would have lived here long enough "to demonstrate their interest as citizens in the welfare and problems of the state." *Id*. at 1150. Applying ***rational basis*** scrutiny (not heightened scrutiny), the Eighth Circuit agreed that the government's asserted interest might justify the general concept of a durational residency requirement, but the Court nevertheless ruled that the requirement



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violated the Equal Protection Clause because it was "so restrictive as to erase any rational relationship to the legitimate state interest of having qualified and knowledgeable candidates." *Id*.

### C. Simple Voter Registration Requirement

A simple voter registration requirement is a marginally heavier burden on would-be candidates than a simple residency requirement, in large part because registering to vote almost necessarily requires the voter to first establish residency in the target jurisdiction. Becoming a registered voter also usually requires a candidate to take some affirmative action to ensure that the registration takes place, but under most circumstances it would not be especially difficult for a would-be candidate to comply with a simple voter registration requirement.

That said, the ease with which one can register to vote and maintain one's status as a registered voter calls into question why a government might impose such a requirement. Unlike a residency requirement, which at least arguably promotes a public official's ability to serve a community by encouraging regular interaction with their constituents, it is not clear that merely requiring an aspiring politician to register to vote would serve the public interest in any predictable way. As noted above, the fact that a person is registered to vote in Missouri merely confirms that they are a U.S. Citizen over the age of 18 who resides in the state and has not been convicted of certain crimes. Being a registered voter does not indicate anything about that person's intelligence, character, experience, or even their relative knowledge of or participation in Missouri's political system. Many people who are registered to vote in Missouri simply choose not to vote in any given election. In



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regard to the 2014 General Election, for example, Missouri's Secretary of State reported that only 35.23 percent of registered voters actually cast a ballot—meaning that the average registered Missouri voter was nearly twice as likely ***not*** to have voted than to have participated in that election. *See* "Kander Announces Election Day Voter Turnout," Press Release, Missouri Secretary of State's Office (Nov. 5, 2014), available online at http://www.sos.mo.gov/default.aspx?PageId=5519.

Furthermore, as the facts of the instant case demonstrate, there are some citizens who for one reason or another do not want to register to vote. Some who eschew registration might simply be apathetic. But for others, like Rachel Johns, the decision not to register could be full of purpose and a distinctive political meaning. For those people, the choice not to register to vote by no means indicates that they are disinterested in politics, and imposing simple voter registration requirement before one can participate in different types of political activities raises all sorts of constitutional concerns.

This was the case in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), in which a Colorado law only permitted registered voters to circulate initiative petitions. This restriction (which was a simple voter registration requirement) was challenged by a number of plaintiffs who, just like Johns prior to February 4, 2015, chose not to register to vote as "a form of private and public protest" because "they don't believe that the political process is responsive to their needs." *Id*. at 196. The plaintiffs contended that their choice not to register to vote should not prevent them from engaging in other types of political activities, such as circulating petitions. The *Buckley* majority agreed, holding that Colorado's simple voter registration

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requirement for petition circulators was unconstitutional because it unjustifiably penalized these citizens for engaging in a form of expressive political protest protected by the First Amendment.

**D. Durational Voter Registration Requirement**

A durational voter registration requirement such as the one at issue in this case is the most burdensome of these different types of candidacy restrictions because it embodies all the characteristics of the other three types of restrictions combined. As difficult as it is to identify what legitimate government interest might be served by imposing a simple voter registration requirement on would-be candidates for office, that challenge is amplified when it comes to the imposition of a durational voter registration requirement.

Presumably, the qualifications a government places on who may serve in a given public office are intended either to mitigate concerns about specific undesirable qualities or to ensure specific desirable qualities. Thus, because a person's age is a generally reliable proxy for their level of experience and/or maturity, it is common to attach minimum age requirements to public offices that require a certain level of discernment. Similarly, certain government jobs can only best be performed by candidates with particular training—which is why most states require judges to be trained in the law. The closer the relationship between the qualification the government has chosen and the attribute it is intended to encourage or discourage, the easier it will be for the government to justify the qualification in the face of a constitutional challenge. The problem with imposing voter registration as a qualification for participation in the political process is

that a person's status as a registered voter cannot be used as a reliable predictor of any particular attribute.

A set of hypothetical situations should help illustrate this point. Imagine two next-door neighbors who are similar in all important demographic respects, including age, gender, religion, occupation, hobbies, etc. If one neighbor had lived in that community for ten years and the other had only lived in the community for ten months, one could reliably predict that the longer-term resident is probably much more familiar than is the shorter-term resident with the area and those who live there. But now consider if these same very-similar people each moved into their respective houses the same week ten years ago, with the only major difference between the two being that one quickly registered to vote and the other, for reasons of their own, did not. Assuming these two individuals went to similar schools, work in similar offices, visit similar websites, watch similar television shows, and have similar friends, there would be no reasonable basis for predicting that the registered voter would be more knowledgeable, compassionate, or invested in their community than the neighbor who did not register to vote.

The reason that voter registration status has little predictive value is that registering to vote requires very little effort and no special knowledge or experience, and keeping one's name on the list requires no effort, special knowledge, or experience at all. Consequently, the length of time that a person has been registered to vote says nothing useful about that person's relative ability to understand or promote their neighbors' interests. For this reason (as will be explained below) each of the three state supreme courts and the one federal circuit court that have assessed constitutional challenges to



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durational voter registration requirements similar to the one at issue in this case have ruled those requirements to be unconstitutional. This Court should do the same.

## II. *The Trial Court Erred* in Ruling That the Durational Voter Registration Requirement Precludes Johns From Being Elected to the Missouri House Of Representatives, *Because* the First and Fourteenth Amendments to the U.S. Constitution Prohibit the Enforcement of the Durational Voter Registration Requirement, *In That* It Would Unjustifiably Penalize Johns' Freedom of Speech, Deny Her the Equal Protection of the Laws, and Deny Voters' Rights to Cast Their Votes Effectively.

The enforcement of the Durational Voter Registration Requirement in this case would deny Johns any opportunity whatsoever to be listed on a 2016 ballot as a candidate to represent State House District 76. This means not only that the district's voters cannot cast a meaningful ballot in her favor, it means that in the 2016 election the district's voters will have no choice at all among candidates to represent them in the Missouri House of Representatives. This is because the incumbent, Respondent Peters, would be the only name listed on the ballot for the voters' consideration. As Johns is herself a qualified voter of State House District 76, she may seek redress from this Court not only for the unique constitutional injuries the Durational Voter Registration Requirement is causing her, but also for the injury the Durational Voter Registration Requirement is threatening to the constitutional rights of all of the voters in State House District 76. *McLain v. Meier*, 851 F.2d 1045, 1048 (8th Cir. 1988) (candidate for office was also a voter and therefore had standing to challenge alleged infringements on voters' rights); *see*

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*also Dunn v. Blumstein*, 405 U.S. 330, 332 n2 (1973) (single voter acting *pro se* permitted to assert constitutional rights on behalf of entire class of voters affected by challenged election law).

The Durational Voter Registration Requirement, as applied in this case, impermissibly burdens a range of rights secured to Johns and to other voters under the First and Fourteenth Amendments of the U.S. Constitution. "The First Amendment protects the right to participate in political activity and to seek and hold public office[.]" *State ex rel. Gavin v. Gill*, 688 S.W.2d 370, 371 (Mo. banc 1985)). Although an individual's right to a place on an election ballot is not, by itself, considered to be fundamental, the U.S. Supreme Court has stated that such a right *is* entitled to constitutional protection "and is intertwined with the rights of voters." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). A government restriction on a political candidacy implicates a fundamental right where "the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). "Restrictions on access to the ballot burden… the right of individuals to associate for the advancement of political beliefs[] and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[3] *Ill. State Bd. of Elections v. Socialist*

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[3] This Court has held that the Missouri Constitution's protections for the right to vote are more extensive than those afforded under the U.S. Constitution. *Weinschenk v. State*, 203 S.W.3d 201, 212 (Mo. banc 2006). Johns acknowledges, however, that provisions of the

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*Workers Party*, 440 U.S. 173, 184 (1979). Laws effecting a citizen's ability to serve in public office are also "subject to the constraints of the Equal Protection Clause." *Quinn v. Millsap*, 491 U.S. 95, 106 (1989); *Peeper v. Callaway Cnty. Ambulance Dist.*, 122 F.3d 619, 622 (8th Cir. 1997). "An individual's right to be a candidate for public office under the First and Fourteenth Amendments is nearly identical to one's right to hold that office." *Id*.

**A. This Court Should Apply Strict Scrutiny to the Durational Voter Registration Requirement Under the U.S. Supreme Court's *Anderson* Analysis Because it Heavily Burdens Johns' Constitutional Rights.**

The U.S. Supreme Court has announced a standard to guide courts that are considering constitutional challenges to specific restrictions on citizens' involvement in elections:

> [The Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden

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Missouri Constitution should, if possible, be interpreted not to conflict with each other. Because the Durational Voter Registration Requirement is part of the Missouri Constitution, she is only asserting voting rights consistent with the guarantees of the U.S. Constitution.

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> imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. *Anderson*, 460 U.S. at 789.

In *Anderson*, the U.S. Supreme Court observed that these election-related cases involve an array of overlapping constitutional rights (or "interwoven strands of liberty") protected under the First and Fourteenth Amendments, and that these rights do not lend themselves to separate assessment. *Id.* at 786-88. Consequently, when a plaintiff asserts that government restrictions on participation in the political process violate the First and Fourteenth Amendment, courts consider the claim as a whole and the degree of judicial scrutiny applied depends upon whether the government demonstrates that the restriction on the citizens' rights is justifiable in light of the government interest asserted. *Id*. at 789.

The U.S. Supreme Court has found election-related rights to be heavily burdened in numerous cases in which the candidate still had some way to access the ballot. For example, the Supreme Court found certain filing fees to constitute a heavy burden on election-related rights, even though it was still theoretically possible for the candidate to attain the ballot by paying those fees, because failure to pay the fees was "an absolute, not alternative, condition, and failure to meet it [was] a disqualification from running for office." *Lubin*, 415 U.S. at 718; *see also Bullock v. Carter*, 405 U.S. 134, 143 (1972) (rights heavily burdened where many office seekers "are in every practical sense

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precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad their support."). The Court has held that a candidate filing date for a political campaign was extremely burdensome because it would totally exclude a candidate from a campaign after a certain date, even though the candidate might (with some difficulty) have complied with the law's requirements prior to that date. *Anderson*, 460 U.S. at 792. The Court has also deemed unnecessarily burdensome signature requirements for ballot access that, although a party or candidate might be able to meet them, were "plainly not the least restrictive means of protecting the state's objectives." *Socialist Workers Party*, 440 U.S. at 186. And, importantly, the Supreme Court held that an election law that imposed a twenty-three month delay on a citizen's ability to exercise certain election-related rights was an exceptionally heavy burden. *Kusper v. Pontikes*, 414 U.S. 51, 61 (1973). Where an election-related restriction imposes burdens of this magnitude, the restriction can only survive if the government asserts a specific, compelling state interest and shows that the restriction is narrowly tailored to serve that interest.

In the instant case, the Durational Voter Registration Requirement severely burdens all of the constitutional rights noted above in Section II, by completely excluding Johns from consideration as a candidate to represent State House District 76. Unlike the restrictions the U.S Supreme Court identified in *Lubin, Bullock, Anderson, Socialist Workers Party*, and *Kusper*, the restriction at issue in this case leaves Johns no way whatsoever to attain a 2016 ballot for her chosen political race, meaning her First and Fourteenth Amendment rights are at least as heavily burdened as were the rights at issue

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in each of those other cases. The U.S. Supreme Court specifically found in *Kusper* that the burdens a state law imposed on voters, which included a twenty-three month delay in a citizen's ability to exercise election-related rights and which also absolutely prevented that citizen from participating in the 1972 Democratic primary, "cannot be justified upon a mere showing of a legitimate state interest," but rather required the government to demonstrate "precision of regulation" such that the restriction at issue would not "unnecessarily restrict constitutionally protected liberty." *Kusper* at 59. The Durational Voter Registration Requirement at issue in this case is even more burdensome than the law at issue in *Kusper*, preventing a Johns from running for the Missouri House of Representatives until twenty-four months have elapsed since she registered to vote. The Durational Voter Registration Requirement also severely burdens the rights of voters in State House District 76 for the purposes of the 2016 election because they will only have the option of casting their votes for one candidate—Respondent Peters—at a time when at least one other candidate is "clamoring for a place on the ballot." *Lubin* at 716.

Due to the severity of the burdens the Durational Voter Registration Requirement imposes on these constitutional rights, this Court may only uphold the restriction if the Respondents show that it is "narrowly drawn to advance a state interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). In other words, if the Respondents cannot explain why the government has a compelling interest in keeping Johns off the ballot, and thereby denying the 76th District's voters the opportunity to vote for anyone other than

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Respondent Peters, this Court should rule that the Durational Voter Registration Requirement cannot constitutionally be applied to Johns.

**B. Even if This Court Utilizes a Standard Equal Protection Analysis, the Durational Voter Registration Requirement is Subject to Strict Scrutiny.**

Johns asserts that the Durational Voter Registration Requirement violates her Fourteenth Amendment right to Equal Protection of the laws. It does this by creating a legal distinction between (1) long-term registered voters (those who will have been registered to vote in Missouri for at least the two years immediately preceding the next general election) and (2) recently registered voters (those who registered to vote less than two years immediately preceding the next general election). Persons in the former group are eligible to seek election to the Missouri House of Representatives, while persons in the latter group are totally excluded from doing so. When a citizen alleges that a law treats one group of people differently from another, courts must determine if those classifications improperly deny citizens the equal protection of the laws. The government may not deny to some the privilege of holding public office that is granted to others on the basis of distinctions that violate federal constitutional guarantees. *Turner v. Fouche*, 396 U.S. 346, 362 (1970) (striking down requirement that citizens must own property in order to qualify for a certain public office).

Courts are not to consider these equal protection arguments in a vacuum. To the contrary, they must question whether the classification made by a challenged regulation impinges upon a fundamental right and, if so, the Court must apply heightened scrutiny. For example, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), the U.S. Supreme Court

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considered a Tennessee statute that imposed a durational residency requirement on would-be voters. The majority held that durational residency laws divide the population into two classes, old residents and new residents, and discriminate against the latter group by "totally denying them the opportunity to vote." *Id*. at 334-35. The Court noted that this differential treatment impacted not only citizens' right to vote, but also their fundamental right to travel, which is secured under the Fourteenth Amendment. *Id*. at 338-42. Because Tennessee's statute treated citizens differently in a way that related to their exercise of fundamental rights, the Court put "a heavy burden of justification on the State" and required the government to show that the restriction was narrowly tailored to address the state's asserted interests. Upon finding that "the record [was] totally devoid of any evidence that durational residence requirements are in fact necessary," *id*. at 346, the Court ruled the durational residency requirement unconstitutional. *Id.* at 360. *See also Williams v. Rhodes*, 393 U.S. 23 (1968) (relying on Equal Protection Clause to strike down election law because state failed to show compelling interest sufficient to justify differential treatment that impacted First Amendment rights).

As Johns has noted, the Durational Voter Registration Requirement challenged in this case imposes a penalty on her because of her exercise of First Amendment rights. Her situation is similar to that faced by the plaintiffs in *Blumstein* and *Buckley*. In *Blumstein*, Tennessee's durational residency requirement was not intended to keep people from traveling among the states—but because the ***effect*** of the requirement was to impose a political penalty on those who were exercising fundamental rights protected by the Fourteenth Amendment, the U.S. Supreme Court applied strict scrutiny and ruled that the

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requirement was unconstitutional. Similarly, the simple voter registration requirement in *Buckley* was not intended to punish those who conscientiously objected to registering to vote—but because the ***effect*** of the requirement was to impose a political penalty on those who were exercising fundamental rights protected by the First Amendment, the U.S. Supreme Court applied strict scrutiny and ruled that the requirement was unconstitutional. Likewise in the instant case, the Durational Voter Registration Requirement was likely not intended to punish citizens who, like Johns, chose not to register to vote as an act of political expression, but because the ***effect*** of the requirement is to penalize Johns for exercising fundamental rights protected by the First Amendment, this Court must apply strict scrutiny an rule that the Durational Voter Registration Requirement is unconstitutional as applied in this case.

Furthermore, if the Court deems that its own rulings should control its analysis of this case, the Court's decision in *Labor's Educational and Political Club-Independent v. Danforth*, 561 S.W.2d 339 (Mo. banc 1977), is the applicable precedent. The *Danforth* Court applied the First and Fourteenth Amendments, and specifically the Equal Protection Clause, to strike down several restrictions on citizens' rights to participate in the political process. In deciding *Danforth*, this Court held that "a law denying the right to run for office based on the particular office sought… requires strict scrutiny," adding that strict scrutiny was required because a "limitation on the right to run for public office has a real and appreciable impact on the right to vote by denying the electorate of a possible candidate for an appreciable period of time[, and] it infringes on the candidate's freedoms of expression and association[.]" *Id.* at 348. *See also Weinschenk v. State*, 203

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S.W.3d 201 (Mo. banc 2006) (applying strict scrutiny to strike down statute that violated Equal Protection Clause and also infringed upon fundamental right to vote).

Missouri does not impose a Durational Voter Registration Requirement for all public offices – in fact, there is no Durational Voter Registration Requirement for any of the statewide executive offices, including Secretary of State.[4] So even though the Durational Voter Registration Requirement might currently prohibit Johns from serving in the state legislature, the requirement would not have prevented her from running for and serving in other public offices. In other words, the Durational Voter Registration Requirement "denies the right to run for office based on the office sought," and in *Danforth* this Court held that the Fourteenth Amendment requires such a restriction to be subjected to strict scrutiny, under which the restriction will only be preserved if the government demonstrates it is necessary to achieve a "compelling interest." *Id.* Thus, whether this Court employs the *Anderson* analysis that seems to be required by the U.S. Supreme Court, the standard Equal Protection analysis prescribed in other U.S. Supreme Court cases, or whether it applies the standard of review this Court announced in

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[4] Several executive officers do have a durational *residency* requirement, although the Eighth Circuit held that the durational residency requirement violated the Fourteenth Amendment, at least as applied to the office of State Auditor. *See Antonio v. Kirkpatrick*, 579 F.2d 1147 (8th Cir. 1978). A *residency* requirement is less burdensome than a *voter registration* requirement.

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*Danforth*, the result is that the Respondents can only prevail in regard to Johns' constitutional challenge if they identify a compelling state interest that is served by the Durational Voter Registration Requirement *and* if they show that the Durational Voter Registration Requirement is the least restrictive means of accomplishing that interest. Because the Respondents cannot make such a showing, this Court must rule that the Durational Voter Registration Requirement is unconstitutional as applied in the instant case.

### C. <u>The Durational Voter Registration Requirement Cannot Survive Strict Scrutiny.</u>

Once a party challenging the constitutional validity of a restriction on participation in the political process has identified the ways in which the challenged restriction burdens their rights and the severity of that burden, *Anderson* next requires the government to put forward the precise interests that it believes would justify the burden that restriction. The Court then "must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it ***necessary*** to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789 (emphasis added).

#### 1. The Respondents Cannot Assert a Governmental Interest Sufficiently Compelling to Justify the Burden on Johns' Constitutional Rights.

For the sake of being thorough, Johns will attempt to address not only those interests Respondent Peters raised in the trial court below, but also all of the interests that government parties have asserted in cases dealing with similar durational voter registration requirements. Those alleged interests have included: (1) "assur[ing] the

public that the candidate has a sufficient interest in or understanding of public affairs";[5] (2) "ensur[ing] that only persons who are 'thoroughly informed' and have 'a deep seated awareness of'" the jurisdiction will serve in office;[6] (3) preventing "the proliferation of frivolous candidacies";[7] (4) securing a ballot composed of candidates sufficiently knowledgeable and qualified to handle the duties of a particular office;[8] and (5) ensuring that lawbreakers are not impermissibly interfering with the political process.[9] Respondent Peters has added to this list (6) "regulating the number of candidates on the ballot." The various assertions regarding the government interest advanced by durational residency requirements have all previously been rejected by courts considering this precise issue. Johns will address each of the above in turn.

***"Ensuring That Candidates Understand Their Constituents and/or Public Affairs"***

The first two of the interests addressed above are very similar, the idea being that if a political candidate is going to represent a part of the state in the legislature there may be a legitimate government interest in ensuring that he or she is familiar with the needs

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[5] *Gangemi v. Rosengard*, 207 A.2d 665, 669 (N.J. 1965).

[6] *Bd. of Supervisors of Elections of Prince George's County v. Goodsell*, 396 A.2d 1033, 1039 (Md. 1979).

[7] *Id.*

[8] *Henderson v. Ft. Worth Independent School Dist.*, 526 F.2d 286, 292 (5th Cir. 1976).

[9] *Buckley*, 525 U.S. at 197.



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and concerns of their constituents. Johns contends that this cannot be considered even a legitimate government interest, much less a substantial or compelling one.

The fundamental principle of democracy is that voters must be trusted to choose their own leaders. "[T]he right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Absent any evidence to suggest that voters have a difficult time evaluating candidates' merits without the government's assistance, there is simply no reason to assume that the very voters who bear the ultimate responsibility for selecting their legislative representatives cannot be trusted to decide for themselves who would do the best job on their behalf. Even if the Court were to assume for a moment that voters need the government's assistance to prevent them from electing candidates who might lack a certain level of familiarity with the district they hope to represent, the record offers no reason to believe that this particular "problem" might be solved by requiring candidates to have been registered to vote somewhere in Missouri (because the durational voter registration requirement is tied to the state, not the district to be represented) for the two years immediately preceding the relevant election.

Additionally, Johns challenges the notion that the government has a legitimate interest in preventing voters from choosing relative newcomers to represent them in the legislature. The State of New York, in particular, has a storied history of electing to Congress politicians that had never spent much time in that state prior to their election; the Court might take judicial notice of the fact that Hillary Clinton, for example, had lived exclusively in Washington, D.C., and Arkansas for decades before the people of



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New York elected her to serve as their Senator. Johns contends that if the voters of a jurisdiction believe that a relative newcomer to that jurisdiction would best represent their interests in the legislature, the government has no real, legitimate reason to deny the voters their choice.

***"Avoiding a Proliferation of Frivolous Candidacies"***

Respondent Peters' argued before the trial court that the Durational Voter Registration Requirement might help "ensure that… State Representative candidates are serious." As an initial matter, a candidate's "seriousness" would be very difficult to quantify. And even if it were possible clearly define this idea of "seriousness" or to draw objective conclusions about the relative "seriousness" of any given candidate, that topic is one that should properly be discussed and debated among the voters themselves. Even beyond the fact that merely being registered to vote in no way indicates that the registered person has actually participated in elections, there remains the critical question of what, if anything, a person's eligibility to cast a ballot in an election says about one's ability to represent one's community in the legislature.

Johns will acknowledge that there may be some voters who would prefer not to have to search through a number of candidates they deem to be "unserious" in order to find the one person they want to vote for – but there are three immediate problems. First, for every candidate that one voter may think a lunatic, ten other people may consider that same candidate to be the second-coming of Abraham Lincoln—a point amply illustrated by the public response to the various controversial Republican and Democratic candidates who participated in this year's U.S. Presidential campaign. Second, this

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nation's history has seen any number of relative newcomers, eccentrics, or "fringe" political candidates blossom into competent, and sometimes beloved, leaders.[10] And then, of course, there is the absolute lack of evidence in the record to suggest either that "frivolous candidates" are actually threatening to interfere with Missourians' ability to choose legislators or that one might be able to identify "frivolous candidates" by some innate aversion to registering to vote. The lack of any evidence precludes the Court from taking any such contention seriously, much less accepting the idea that imagined or hypothetical dangers of "frivolous candidates" could somehow justify a very real and severe restriction on the constitutional rights burdened by the Durational Voter Registration Requirement.

***"Ensuring Knowledge or Skills Necessary to Perform Official Duties"***

As for the fourth potential government interest, ensuring that candidates for a particular office have knowledge, skills, and experience that are necessary if the candidate is to adequately perform their duties, there are certainly some offices where specialized knowledge might be valuable. For example, it might be entirely reasonable if the Missouri Constitution were to require all candidates for the office of the Attorney General to be lawyers admitted to the state bar, because that requirement would be

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[10] Ronald Reagan, for example, was once derided as a "fringe" candidate, but in 1984 he ended up winning one of the most lopsided Presidential elections in U.S. history.

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directly related to the responsibilities of the office.[11] Ensuring that candidates for certain offices have the knowledge, skills, and experience necessary for them to adequately discharge their duties might indeed be a legitimate state interest, but there is no evidence in the record to suggest that state legislators need a particular set of knowledge, skills, or experience in order to adequately perform their duties. Even if the record contained such evidence, nothing in the record suggests that being registered to vote in Missouri for the two years next preceding the date of election to the House of Representatives might make one more or less likely to have those skills.

***"Ensuring That Lawbreakers Are Not Unlawfully Interfering in Missouri's Political Process"***

Regarding the next potential interest, ensuring that lawbreakers are not unlawfully interfering in Missouri's political process, concerns about voter fraud are commonly invoked as a justification for requiring would-be voters to register before participating in an election. But even if it was to be assumed that requiring candidates for the state legislature to register to vote might somehow prevent them from breaking laws or hiding convictions that would otherwise escape notice,[12] Respondent Peters would still have to

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[11] To the best of Johns' knowledge Missouri law has no such requirement for the state's Attorney General, nor does Missouri law appear to impose a durational voter registration requirement for citizens who wish to run for Attorney General.

[12] There is no evidence in the record to suggest that this is true.

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explain why requiring a candidate to have been registered to vote for the two years immediately preceding their election to the Missouri House of Representatives would justify the resultant infringement upon would-be candidates' constitutional rights. When Colorado tried to invoke this interest as justification for its simple (non-durational) voter registration requirement for petition circulators, the U.S. Supreme Court struck down the requirement as unjustified, ruling that any legitimate interest the state might have in policing lawbreakers could be more effectively addressed by the far-less-burdensome requirement for petition circulators to submit an affidavit identifying their address. *Buckley*, 525 U.S. at 196. This Court should also recognize that, particularly when there is no evidence that lawbreakers are currently posing a significant threat to the Missouri political process by positioning themselves as candidates for office, it would be manifestly unreasonable for the government to rely on this asserted potential interest to justify the impingement on fundamental rights caused by the Durational Voter Registration Requirement.

***"Regulating the Number of Candidates on the Ballot"***

Regarding Respondent Peters' asserted governmental interest in "regulating the number of candidates on the ballot," Johns wishes to put a spotlight on the irony of this particular argument. In the instant case, Johns is the only candidate who has stepped up to challenge Respondent Peters. If this Court rules that the actual purpose of the Durational Voter Registration Requirement is to limit the number of candidates on the ballot, then it will certainly have done its job in that there will be only one name listed on the ballot for the voters of State House District 76 to consider.

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Of course, there is no evidence at all that Missouri's ballots are so cluttered with candidates that voters are struggling to understand the choices before them. There is no indication that any particular evil related to some unidentified, "excessive" number of candidates is currently damaging or threatening the stability of Missouri's electoral system. And, consequently, there is absolutely no reason for this Court to believe that this asserted interest is even legitimate in this context, must less that it is sufficiently compelling that Johns must be excluded from consideration as a candidate or that the voters should be denied any alternative but to vote for the incumbent.

**2. The Durational Voter Registration Requirement is Not Narrowly Tailored to Fit Any Governmental Interest the Respondents Might Assert.**

When considering whether a restriction subject to strict scrutiny is "narrowly tailored" to address a particular government interest, the first question should be whether a less-restrictive alternative policy would reasonably address whatever interest is at issue. As Johns spelled out in Section I(D), a Durational Voter Registration Requirement burdens citizens' constitutional freedoms without reasonably suggesting, much less guaranteeing, that a person who satisfies that requirement will have any particular knowledge, skill, or experience that would not also be possessed by a similar citizen who has lived in Missouri for the same amount of time without ever having registered to vote. To the extent that the government wishes to make it more likely that candidates for political office are reasonably knowledgeable about this state and its people, that interest could adequately be addressed simply by converting the Durational Voter Registration

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Requirement to a durational residency requirement—although, as the Eighth Circuit held in *Antonio*, there are constitutional limits to that approach as well.

Because the Durational Voter Registration Requirement is not narrowly tailored to address any of the interests outlined in Section II(C)(1), this Court must hold that the Durational Voter Registration Requirement cannot satisfy the strict scrutiny required under either the *Anderson* analysis or under standard Equal Protection analysis. This Court should rule that the Durational Voter Registration Requirement is unconstitutional as applied in the instant case.

**D. The Durational Voter Registration Requirement Cannot Even Survive Rational Basis Scrutiny Under the Equal Protection Clause.**

Even where certain election-related laws have created legal distinctions among citizens *without* directly affecting fundamental rights, courts have regularly concluded that government proponents of these laws failed to provide sufficient justification for the restrictions to survive rational basis scrutiny. An apt example of this is the U.S. Supreme Court's decision in *Quinn v. Millsap*, 491 U.S. 95 (1989), in which a would-be public official challenged the constitutionality of Article VI, section 30 of the Missouri Constitution because it imposed a simple property ownership requirement as a condition of serving on a certain public board. Although the Supreme Court determined that the restriction did not implicate any fundamental constitutional right, the justices unanimously that under standard Equal Protection analysis the simple property ownership requirement could not survive rational basis review. *Id*. at 107. The State of Missouri had argued in defense of its constitutional provision that the property ownership requirement

was intended to ensure (1) that members of the public board had "first-hand knowledge of the value of good schools, sewer systems and the other problems and amenities of urban life," and (2) that board members would have "a tangible stake in the long term future of [the member's] area." *Id*. at 108. The Supreme Court disagreed, calling it "indefensible" to suggest "that someone otherwise qualified to sit on the board… must be removed from consideration just because he does not own real property." *Id*. Quoting an earlier decision, *Turner v. Fouche*, 396 U.S. 346 (1970), the Court suggested that while it might be reasonable to assume that those who own property are attached to their community, the government "may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold." *Id*.

The comparison to the instant case is obvious. Just as in *Quinn*, this case involves a provision of the Missouri Constitution that puts a restriction on who is permitted to serve in a specified political role. Just as in *Quinn*, the restriction seems rooted in an assumption that one class of citizens will be more knowledgeable or committed to their community than their neighbors who do not satisfy the qualifications established in the constitutional provision. And, just as in *Quinn*, it should be clear that neither this Court nor anyone else could reasonably conclude presume that a long-time Missouri resident who only relatively recently registered to vote somehow knows less or cares less about the state they call home. Just as in *Quinn*, this Court should rule that the constitutional provision imposing such an "indefensible" classification on Missouri citizens cannot survive even rational basis scrutiny.

**III. Not One Federal Appellate Court or State Supreme Court has Upheld a**



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**Similar Durational Voter Registration Requirement in a Contested Case.**

In every contested case that Johns has been able to identify in which a federal appellate court or state supreme court has evaluated the constitutionality of a durational voter registration requirement similar to the one found in the Durational Voter Registration Requirement, the courts have found the challenged durational voter registration requirement to be unconstitutional. This Court must do the same.

In 1965 the Supreme Court of New Jersey considered *Gangemi v. Rosengard*, 207 A.2d 665 (N.J. 1965), in which a candidate for mayor contested a Jersey City law requiring officials to have been registered to vote in the city for at least two years prior to their election. Mr. Gangemi immigrated to the U.S. as a small child and had lived in the city for fifty years, never realizing that he was not technically an American citizen. He had, in fact, previously been elected as mayor of Jersey City, but resigned when it was revealed that he was not a citizen. He quickly became a naturalized citizen and wished to once again run for mayor, but could not do so because he had not been registered to vote while he was waiting for his citizenship to be finalized. Gangemi challenged the constitutionality of the durational voter registration requirement and the New Jersey Supreme Court struck down the requirement because it was not related to any legitimate government interest. Specifically, the *Gangemi* Court drew a distinction between durational residency requirements, which might at least theoretically be constitutionally permissible, and the two-year voter registration requirement at issue in that case, which the Court described as "baffling." *Id*. at 172.

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In 1976 the federal Fifth Circuit Court of Appeals handed down its decision in *Henderson v. Ft. Worth Independent School Dist*., 526 F.2d 286 (5th Cir. 1976), a case involving a law that required candidates for the school board to have been qualified voters in the district for three years. Two would-be candidates did not meet this durational voter registration requirement and asserted that it violated their Fourteenth Amendment right to equal protection of the laws. The Fifth Circuit agreed, holding that the law created two classes of citizens – those not registered to vote or who had been registered to vote for a period of less than three years, and those who have been registered to vote for three years or more – and only permitted citizens in the latter group to run for school board. *Id*. at 290. Due to the burden imposed on rights protected by the Fourteenth Amendment, the court applied strict scrutiny to the restriction and ruled that even if the state had legitimate power "to prescribe reasonable citizenship, age, and residency requirements" on candidates for office, the durational voter registration requirement was not related to the government's purported interest in ensuring "a ballot composed of knowledgeable and qualified candidates for the increasingly complex job of school board member" and, thus, the durational voter registration requirement was unconstitutional. *Id*. at 292-93.

In 1977 the Florida Supreme Court decided *Treiman v. Malmquist*, 342 So.2d 972 (Fla. 1977), which involved a constitutional challenge to a Florida statute that required candidates for judicial office "to have been registered to vote in Florida in the last preceding general election." The court noted that the challenged restriction "effectively forecloses the candidacy of all of those otherwise qualified persons who, because of age,

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illness, residence or other reason, failed or were unable to register to vote in a time period somewhere in the past." *Id*. at 976. The court struck down the durational voter registration requirement, holding that it "does not serve any reasonable or legitimate state interest[; i]t does not in any way protect the integrity of the election process or purity of the ballot; it does not serve to keep the ballot within manageable limits; nor does it serve to assure orderly and effective elections[.]" *Id*.

In 1979 the Maryland Supreme Court considered *Bd. of Supervisors of Elections of Prince George's County v. Goodsell*, 396 A.2d 1033 (Md. 1979), a case in which a local election authority refused to certify the candidacy of a citizen who wished to run for county executive because the candidate could not satisfy the county charter's requirement that the county executive must a qualified voter in the county for "at least five years immediately preceding his election." A citizen who had lived in the county for six years, but only registered to vote two years before attempting to become a candidate for county executive, asserted that the durational voter registration requirement violated an array of constitutional provisions, including the Fourteenth Amendment's Equal Protection and Due Process clauses. The court ruled that, although the government might have a sufficient interest in imposing a durational ***residency*** requirement for those wishing to serve as county executive, a durational voter registration requirement was more burdensome and, therefore, more difficult to justify. Despite the government's claims that the durational voter registration requirement was "a measuring stick of an individual's commitment to [the] county" and that it would prevent "the proliferation of frivolous candidacies," the court emphasized that in a democracy it is the voters who should

determine whether a candidate is sufficiently serious or committed to the jurisdiction the candidate hopes to serve. *Id*. at 290. The court ruled that the durational voter registration requirement unjustifiably discriminated against county residents who had registered to vote for less than five years and that the restriction violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

In the trial court below, Respondent Peters attempted to bolster his position by citing *Thournin v. Meyer*, 909 F.2d 408 (10th Cir. 1990). That case, however, dealt with a different kind of durational voter registration requirement and so neither negates nor calls into question the reasoning in the above cases. The Colorado statutory scheme at issue in *Thournin* required all voters and candidates to identify themselves either as Republicans, Democrats, or "Unaffiliated." *Id.* at 409. In states that employ this sort of system, officials are frequently concerned that a person previously aligned with one of these groups might suddenly attempt to change their affiliation and seek elected office as a candidate for a group to which they are new—in other words, just to provide an example, a Republican who becomes frustrated with his or her party might try to defect and run for office as a Democrat or as an independent (or "unaffiliated") candidate. The statutes at issue in *Thournin* required a citizen to wait at least one year after formally declaring (or changing) her party affiliation to declare her candidacy for office as a member of the new political group she had joined; the government asserted that the primary purpose of these restrictions was "to protect ***the integrity of the party system***". *Id*. at 411 (emphasis added). Respondent Peters did not (and, indeed, could not) assert that similar interests might somehow justify the Durational Voter Registration



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Requirement at issue in the instant case. Consequently, *Thournin* is not analogous to the instant case and will not help this Court's analysis.

## IV. *State ex rel. Burke v. Campbell* Does Not Control the Outcome of This Case.

The constitutional issues Johns has raised in this case are a matter of first impression for this Court, but the Missouri Court of Appeals has previously touched on a similar (although not identical) question. In *State ex rel. Burke v. Campbell*, 542 S.W.2d 355, 357 (Mo. App. E.D. 1976), the Eastern District Court of Appeals considered a citizen's contention that the Durational Voter Registration Requirement violated his constitutionally-protected right to travel. John Lawler had lived and been registered to vote in Missouri for several years, but moved to and registered to vote in Oklahoma for a span of four months in 1974. He returned to Missouri shortly after the general elections were held in November of that year and, perhaps because there were no national or Missouri statewide elections held in 1975, Lawler did not reestablish his voter registration in Missouri until February 1976. Shortly thereafter he declared his candidacy for a seat in the state legislature. After Lawler's opponent in the primary election raised a timely challenge to the candidate's qualifications, the Court of Appeals determined that Lawler was disqualified and removed him from the ballot.

*Burke* is, of course, not binding on this Court, and its reasoning is neither persuasive nor particularly relevant to the issues Johns has raised for at least two reasons. First, the candidate whose qualifications were in dispute in that case focused his argument primarily on the proper definition of "qualified voter," presenting only a very superficial Equal Protection challenge to the validity of the durational voter registration



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requirement. The *Burke* majority responded to Lawler's Equal Protection challenge by failing to engage in ***any*** substantive analysis, which prompted Judge McMillan to pen a thoughtful partial dissent. McMillan's opinion correctly noted the existence of rights that the majority had overlooked, pointing out that "statutory and constitutional provisions which tend to limit the exercise of this right or exclude any citizen from participation in the election process must be strictly construed in favor of the right of voters to exercise their choice." *Id*. at 359. McMillan alluded to Missouri's deeply troubling history of using voter registration requirements as a way to disenfranchise unpopular groups and also pointed out that even if it might be reasonable to require citizens to register before voting in order to prevent fraud, the justifications for requiring voter registration have no bearing on a person's competence as an elected official. *Id*. at 360. Judge McMillan closed the opinion by agreeing that the candidate at issue in *Burke* was not eligible for office (she believed that Article III, section 4 imposed a two-year durational ***residency*** requirement that Lawler did not satisfy), but also suggesting that the candidate's Equal Protection claim warranted more careful consideration than the majority had given it. *Id*. As this brief has demonstrated, the Durational Voter Registration Requirement cannot survive under any properly-applied standard of judicial scrutiny. The *Burke* majority opinion in regard to the durational voter registration requirement for Missouri legislators was perfunctory and inadequate; it should not guide this Court's assessment of Johns' constitutional claims.

The other reason this Court should not follow the majority opinion in *Burke* is that this case raises a First Amendment challenge that was not at issue in the earlier case. As



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noted above, the proper standard of review the government to bear the burden of justifying the Durational Voter Registration Requirement's impositions on constitutional rights. Because the Respondents cannot carry this burden, this Court rule that the Durational Voter Registration Requirement is unconstitutional as applied in this case.

## CONCLUSION

The cases cited in this brief show that courts must take seriously the constitutional rights penalized and burdened by the Durational Voter Registration Requirement. Because Respondent Peters cannot demonstrate that the Durational Voter Registration Requirement is necessary to serve a sufficiently compelling government interest, this Court must rule it unconstitutional as applied in this case.

Respectfully submitted,

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## RULE 84.06(c) CERTIFICATION AND CERTIFICATE OF SERVICE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2013 and contains no more than 11,186 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 31,000 limit in the rules). The font is Times New Roman, double-spacing, 13-point type.

I hereby certify that I electronically filed the foregoing with the Clerk of the Missouri Supreme Court using the Electronic Filing System, and that a copy will be served by the Electronic Filing System upon those parties indicated by the Electronic Filing System.

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