

Summary of SC95678, Joshua Peters, The Missouri Attorney General v. Rachel Johns

Appeal from the St. Louis circuit court, Judge Julian L. Bush

Argued and submitted May 19, 2016; opinion issued May 20, 2016

Attorneys: Johns was represented by David E. Roland of the Freedom Center of Missouri in Mexico, Missouri, (314) 604-6621. Peters was represented by Matthew B. Vianello of Jacobson Press & Fields PC in Clayton, (314) 899-9789. The attorney general was represented by Solicitor General James R. Layton of the attorney general's office in Jefferson City, (573) 751-3321.

The American Civil Liberties Union of Missouri Foundation, which filed a brief as a friend of the Court, was represented by Anthony E. Rothert and Jessica M. Steffan of the foundation in St. Louis, (314) 652-3114, and Gillian R. Wilcox of the foundation in Kansas City, (816) 470-9933.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A challenger for state representative appeals the circuit court's judgment that the state constitution's two-year durational voter registration requirement for the office of state representative is not unconstitutional and, therefore, that she is not qualified to be a candidate for the office because she did not register to vote within the two-year period preceding the November 2016 general election. In a 4-3 decision written by Judge Mary R. Russell, the Supreme Court of Missouri affirms the judgment. The term "qualified voter" in the state constitutional provision means a registered voter. There is no basis in the record that the challenger's failure to register to vote constituted symbolic speech sufficient to invoke First Amendment protection. The durational voter registration requirement also does not violate either the challenger's constitutional rights of access to the ballot as a candidate or the voting rights of the voters in her district. The burdens imposed are nondiscriminatory and temporary, and rational basis review applies. The durational voter registration requirement is rationally related to and a reasonable method of furthering the state's legitimate interests in regulating the fairness of elections and ensuring that state representative candidates demonstrate sufficient seriousness about the electoral systems and social and civic engagement. As such, it is not unconstitutional. Because the challenger failed to raise it specifically in the circuit court, she did not preserve her argument that the registration requirement violates equal protection.

Judge Laura Denvir Stith dissents. She would hold that Missouri's two-year voter registration requirement to run for state representative places a substantial burden on the First and Fourteenth amendment rights of the challenger and voters and, therefore, is invalid. She also would hold that the requirement is invalid even under a rational basis test because the burden it imposes bears no rational relationship to the interests the state seeks to further.

Facts: Article III, section 4 of the state constitution requires that a candidate for state representative be a qualified voter for two years before the general election at which the candidate seeks to be elected. Rachel Johns filed a declaration of candidacy to challenge incumbent Joshua Peters in the primary election for state representative for the 76th district. The

general election for the seat is scheduled for November 2016. Peters filed a petition in the circuit court seeking to disqualify Johns as a candidate, asserting she cannot meet the two-year durational voter registration requirement because she did not register to vote until February 2015. Although Johns agreed she does not meet the two-year requirement, she argued the requirement is unconstitutional as applied to her under the First and Fourteenth amendments to the federal constitution. Johns and Peters filed cross-motions for judgment on the pleadings. The circuit court determined that the voter registration requirement did not violate the constitution and granted judgment in Peters' favor. Johns appeals.

AFFIRMED.

Court en banc holds: (1) The term “qualified voter” in article III, section 4 means a registered voter. This term first appeared in the state’s 1875 constitution. Under that constitution, “qualified voter” was used two ways – to describe the qualifications to hold legislative and judicial offices as well as to describe who elected those and other officials. At that time, voter registration was not listed as a requirement because only the most populous areas required registration. That a “qualified voter” in an election is one who is registered to vote when and where registration is required is apparent under the current constitution, adopted in 1945. Because there is no question that, today, registration is required everywhere in the state to vote in a general election, the term “qualified voter” is synonymous with “registered voter” when used in the constitution to describe the electorate. And there is no indication that the drafters of the constitution intended the term “qualified voter” to mean something different when used as a qualification to hold office.

(2) Because she did not raise it specifically in the circuit court, Johns did not preserve her argument that the voter registration requirement violates the equal protection clause of the federal constitution by creating an unjustified classification between long-term registered voters and recently registered voters. Her general citation in her circuit court pleadings to the Fourteenth Amendment is not sufficient. That amendment contains several provisions, including the due process clause and the equal protection clause. In light of her First Amendment claims, it is evident from her pleadings that Johns cited to the Fourteenth Amendment as a means of applying the First Amendment to the state through the due process clause. Because Johns failed to raise an equal protection challenge with any specificity at the earliest opportunity, it is waived.

(3) Johns’ failure to register to vote does not invoke First Amendment protection of political speech. Johns does not assert that intentionally failing to register to vote is literally “speech” as one commonly might understand that term. Rather, she claims it is an act of political expression to bring it under the United States Supreme Court’s analysis of “symbolic speech.” Specifically, she asserts she intentionally did not register to vote because doing so “would mean endorsing a system that had continued to fail her community.” The Supreme Court’s 1999 decision in *Buckley v. American Constitutional Law Foundation Inc.* does not help Johns because it engages in no analysis of whether an intentional failure to vote constitutes “symbolic speech.” While some conduct may be sufficiently expressive to be protected under the First Amendment, the Supreme Court has rejected the view that conduct can be labeled “speech” because the person engaging in the conduct thereby intends to express an idea. Rather, the Supreme Court has held that First Amendment protection extends only to conduct that is “inherently expressive,” possessing sufficient communicative elements to bring the First Amendment into play. While the

Court does not doubt the sincerity of Johns' motivations both in abstaining from political involvement and now seeking an active role in government, the record is devoid of any communicative elements accompanying Johns' conduct to activate First Amendment protections. As such, there is no basis under the First Amendment to hold that Johns' failure to register as an act of protest was any different from anyone else's failure to register simply out of neglect or indifference. Her challenge to article III, section 4 on this basis, therefore, fails.

(4) Article III, section 4 does not violate Johns' own constitutional rights of access to the ballot as a candidate or the voting rights of the voters in her district. It is not the nature of the burdened right itself, however, but rather the severity of the burden that determines the level of scrutiny to be applied. If the burden is severe, then strict scrutiny applies, under which an election regulation will be upheld if it is narrowly tailored to serve a compelling state interest. If the burden is *de minimis*, rational basis review applies, under which reasonable, nondiscriminatory restrictions on voters' constitutional rights generally are justified by the state's important regulatory interests.

(a) The durational voter registration requirement does not violate Johns' constitutional rights to access the ballot. The right to run for office is not a fundamental right, and the burden imposed on her candidacy is not severe. She now is registered to vote and, absent some change in her status, she will be eligible to run for office in the 2018 general election. The durational voter requirement, therefore, results in a temporary burden as it delays – but does not prevent – her candidacy. It is well-settled that such a delay is a slight burden. The durational voter requirement also is nondiscriminatory. It applies to any potential candidate for state representative, regardless of economic status or political affiliation. Accordingly, rational basis review applies. States have a legitimate, even compelling, interest in protecting the integrity of their electoral systems from frivolous candidacies, ensuring that election processes are efficient and avoiding voter confusion caused by an overcrowded ballot. These concerns repeatedly have been recognized as sufficient to justify reasonable restrictions on access to the ballot, and the state need not make a showing of their actual existence in each particular case. The state also argues the durational voter registration requirement promotes the state's interest in encouraging candidates to show a level of commitment to the electoral process and exhibit meaningful social engagement and interest in Missouri civic affairs. The two-year voter registration requirement is a reasonable and minimally intrusive method of addressing these legitimate interests by ensuring that a prospective legislator has taken the minimal steps necessary to be entitled to participate in the electoral process.

(b) The durational voter registration requirement also does not violate the voting rights of the voters in the 76th district. Although the right to vote is fundamental, a durational voter registration requirement does not limit one's ability to cast a vote. The Supreme Court never has held that removing one candidate from the ballot constituted a severe burden on voter choice, noting instead that voters do not have a constitutional right to support a specific candidate. Given that this case concerns only Johns' inability to seek the office of state representative in 2016, it cannot be said that her removal from the ballot adversely affects the democratic election process or the voters' participation therein. The burden on voters is *de minimis*. The registration requirement is nondiscriminatory and does not impact the right of voters to vote – it only temporarily

delays their ability to vote for Johns. As such, rational basis review applies, and the state's justification for the requirement's burden on voting rights is the same as on Johns herself. The durational voter registration requirement is rationally related to and a reasonable method of furthering the state's legitimate interests in regulating the fairness of elections and ensuring that state representative candidates demonstrate sufficient seriousness about the electoral systems and social and civic engagement.

Dissenting opinion by Judge Stith: The author would hold that, under the United States Supreme Court's 1983 decision in *Anderson v. Celebrezze*, this Court must weigh the burden imposed on Johns' right to run for public office and the rights of voters to vote for a candidate of their choice against the legitimacy and strength of the state's interests. In evaluating those interests, this Court must consider the extent to which the state's interests make it necessary to burden Johns' and voters' rights. Only after it weighs these factors can this Court determine whether strict scrutiny or rational basis applies.

Weighing these factors, the two-year voter registration requirement places a substantial burden on Johns and voters by prohibiting Johns from running for state representative in the 2016 election simply because she did not register to vote by the 2014 election. Although the majority classifies this restriction as a "temporary" burden, the Fifth Circuit's 1976 decision in *Henderson v. Ft. Worth Independent School District* held – in invalidating a three-year registration requirement – that although this burden may be temporary, it is nonetheless substantial as it imposes an "absolute" ban on running in the upcoming election for any potential candidate who has not been registered to vote for the duration required. The state and the incumbent here justify Missouri's registration requirement by claiming that the state has an interest in producing serious and committed candidates who have established a stake in their communities. But the relationship between voter registration and civic engagement is weak at best. There is no evidence that voter registration is necessary to produce committed and involved candidates for state representative or that those who have been registered to vote for two years are any more qualified and involved than those who have not. The burden placed on Johns and voters far outweighs Missouri's interest in requiring candidates for state representative to be registered to vote for two years. This means this Court should apply strict scrutiny and – as the state conceded at oral argument – if strict scrutiny is applied, the two-year registration requirement is invalid because it is not narrowly tailored to serve any compelling state interest. Furthermore, even if this Court were to find that the burden the requirement imposes is not substantial, the registration requirement fails under a rational basis test because it is not rationally related to the governmental interest identified.