SC95678

IN THE SUPREME COURT OF MISSOURI

JOSHUA PETERS,

Respondent,

v.

RACHEL M. JOHNS,

Appellant.

Appeal from the 22nd Judicial Circuit, St. Louis City, Missouri
The Honorable Julian L. Bush, Judge

BRIEF OF INTERVENOR ATTORNEY GENERAL OF MISSOURI

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STATEMENT OF FACTS

Appellant Rachel Johns and Respondent Joshua Peters timely filed as candidates for state representative for the 76th District in the November 2016 election, seeking the Democratic Party nomination to be decided in the August primary. Appellant's Appendix at A1.

As what she now describes as an "expressive act of protest," Johns had not registered to vote before February 4, 2015.

Peters filed suit pursuant to § 115.526, seeking to bar Johns from the primary election ballot. *Id.* He cited the requirement in Art. III, § 4 of the Missouri Constitution that to serve as a member of the house of representatives, a person, the "next day before the day of his election shall have been a qualified voter for two years," and § 21.080, RSMo. Johns responded by asserting that the constitutional and statutory requirements are invalid because they conflict with the First and Fourteenth Amendments to the Constitution of the United States. *Id.* at 2.

The circuit court rejected that argument, upholding the constitutional and statutory requirements. *Id.* at 5.

ARGUMENT

I. Under the Missouri Constitution, to qualify as a candidate for the Missouri House of Representatives, Appellant Johns must have been a registered voter for two years—and she was not.

This appeal addresses the meaning (addressed here in I), and validity under the Constitution of the United States (addressed in II), of the requirement in the Missouri Constitution that members of the Missouri House of Representatives have been "qualified voters" for two years before taking office:

> Each representative shall be twenty-four years of age, and *next before the day of his election shall have been a qualified voter for two years* and a resident of the county or district which he is chosen to represent for one year, if such county or district shall have been so long established, and if not, then of the county or district from which the same shall have been taken.

Mo. Const. Art. III, § 4 (emphasis added).[1] The Constitution does not define "qualified voter."

As early as 1878 (three years after the term "qualified voter" was used multiple times in the 1875 Constitution, and 67 years before it was included in the current Constitution), this Court described registering to vote as "the final, *qualifying* act" that enabled a citizen to vote. *State ex rel. Woodson v.*

[1] A statute, § 21.080, RSMo, also cited below by Peters in his election contest petition and mentioned by the circuit court, similarly requires that "[e]ach representative shall … next before the day of his election shall have been a voter for two years." But "where the constitution lays down specific eligibility requirements for a particular constitutional office the constitutional specification in that regard is exclusive, and the legislature (except where expressly authorized to do so) has no power to require additional or different qualifications for such constitutional office. *Labor's Educ. & Political Club-Indep. v. Danforth*, 561 S.W.2d 339, 343 (Mo. banc 1977). Hence the Court should consider the statute (which requires one to have been "a voter") to merely restate the constitutional requirement ("qualified voter").

Brassfield, 67 Mo. 331, 337 (1878) (emphasis added).[2] That and subsequent precedents justified a later declaration by the Missouri Court of Appeals that "[t]he term 'qualified voter' has been defined in Missouri for many years. 'A qualified voter is one that, in addition to other qualifications, must be registered where such is required as a condition for voting.'" *State ex rel. Mason v. Cnty. Legislature*, 75 S.W.3d 884, 887 (Mo. App. W.D. 2002) (quoting *State ex rel. Burke v. Campbell*, 542 S.W.2d 355, 357 (Mo. App. E.D. 1976)). *See also State ex rel. Woodson,* 67 Mo. at 337 ("[N]o matter if a citizen possessed every other qualification, if not registered, he was not a qualified voter.").

That interpretation of the word "qualified" was later endorsed by the Eastern District of the Court of Appeals:

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[2] The Court was considering a statute enacted while the 1865 Missouri Constitution "provided for 'a complete and uniform registration, by election districts, of the names of the qualified voters in this State, which registration shall be evidence of the qualification of all registered voters to vote at any election thereafter held.'" 67 Mo. at 336. The 1875 Constitution limited the authority of the General Assembly to require voter registration. *See* Mo. Const. Art. VII, § 5 (RSMo. 1939).

> If we accept intervenor's position that one may be a qualified voter although not registered to vote and carry the argument to its logical conclusion, such would permit a person to present himself as qualified to represent a district in the General Assembly though not qualified to vote in local elections. We do not believe the framers of Article III, Section 4, intended that one not qualified to vote in his own election might serve as State Representative and no such strained construction will be placed on this provision.

State ex rel. Burke 542 S.W.2d at 358.

This Court has not addressed the question. But that registration is required for a person to be a "qualified voter" seems evident from Art. VIII, § 2. By contrast to its predecessor in the 1875 Constitution, which limited voting to "male citizen[s]" (and to a male who "may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote"), that section gives the right to vote to "[a]ll citizens of the United States." But it also recognizes a registration requirement:

> All citizens of the United States, … over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote are entitled to vote at all elections by the people, *if the election is one for which registration is required if they are registered within the time prescribed by law*, or if the election is one for which registration is not required, if they have been residents of the political subdivision in which they offer to vote for thirty days next preceding the election for which they offer to vote….

Art. VIII, § 2 (emphasis added).

To read the term, "qualified voter" in Art. III, § 4, to require registration is not just consistent with Art. VIII, § 2 as it exists today, but also with its use prior to adoption of the 1945 Constitution.

The 1875 Constitution used "qualified voter" in two ways.

First, it used the term to define qualifications for office—the use at issue here. Thus members of the house of representatives were required, just as they are today, to "have been a qualified voter of this State two years." Art. IV, § 4. Senators were required to "have been a qualified voter of this State

three years." Art. IV, § 6. And circuit judges must have been "a qualified voter of this State for three years." Art. VI, § 26.

But more often, "qualified voter" was used to describe who actually elects those and other officials—and those who decide whether to allow the State to borrow money:

- "The House of Representatives shall consist of members to be chosen every second year by the qualified voters of the several counties ...". Art. IV, § 2.
- "When any county shall be entitled to more than one Representative, the county court shall cause such county to be subdivided into districts …, in each of which the qualified voters shall elect one Representative …." Art. IV, § 3.
- "The Senate shall consist of thirty-four members, to be chosen by the qualified voters of their respective districts …." Art. IV, § 5.
- "The supreme court, shall consist of five judges … elected by the qualified voters [of the state]." Art. VI, § 5.
- "The judges of the circuit courts shall be elected by the qualified voters of each circuit …." Art. VI, § 25.

- St. Louis court of appeals judges "shall be elected by the qualified voters of the counties and of the city …." "Amendment of 1884," 1939 RSMo at 123c.
- Kansas City court of appeals judges "shall be elected by the qualified voters of the counties …." *Id.*
- "… the General Assembly may submit an act providing for the loan, or for the contracting of the liability …, to the qualified voters of the State" … Art. IV, § 44.

In each instance, it is apparent that when it said "qualified voter," the 1875 Constitution was speaking of persons who on election day could actually appear at the polls and vote. The same must be true of "qualified voter" as a qualification to hold office.

Whether "qualified voter" meant that the person had to be registered in advance depended on where the person lived. Under the original 1875 Constitution, the General Assembly could require registration only in the largest counties and cities. *See* Art. VIII, § 5. When the voters were asked to adopt a new constitution in 1945, the existing constitution still allowed registration only in some locations, as modified in an amendment proposed by the 1922 constitutional convention and adopted in 1924:

> The General Assembly shall provide by law for the registration of voters in counties having a population

> of more than one hundred thousand and in cities having a population of more than ten thousand, but not otherwise.

Mo. Const. Art. VIII, § 5 (RSMo 1939). So immediately prior to adoption of the 1945 Constitution, "qualified voters" included only registered voters in larger counties and cities where the General Assembly had provided for registration, but was not limited to registered voters in counties and cities where no registration was required.

When voters in 1945 looked at the proposed new constitution, they saw the continued use of "qualified voter" to define qualifications for legislative and judicial office. *See* Art. III, § 4 (house of representatives), § 6 (senators); Art. V, § 25 (appellate and circuit court judges) (Official Manual, 1945, at 151-52 and 165). And they saw its continued use to define who would elect senators (Art. III, § 6) and, with slight variation—"qualified electors"—who could approve state debt (Art. III, § 37) (Official Manual, 1945, at 152 and 155).

The ACLU, appearing as amicus, cites another part of the pre-1945 Constitution: Art. IX, § 26 (now Art. VI, § 30(a); also adopted in 1924 as proposed by the 1922 convention). That section uses the term—apparently for the first time in a Missouri constitutional provision—"registered voters." It applied, of course, only to a county and a city where the General Assembly

could require (and had required, *see* § 11982, RSMo 1939, and §§ 11983-11992, RSMo. Supp. 1941) voter registration. Registration meant that there were lists of voters, making it logical to check the signatures required for a consolidation vote against those lists. But the presence of "registered voter" in that specific provision cannot fairly be read to mean that the voters in 1924 or 1945 changed the meaning of "qualified voter" when that term was used to define either qualifications for office nor who would vote for legislators or judges or to approve debt.

The ACLU does not cite another variation found in the pre-1945 constitution and retained today. When the people adopted the proposal of the 1922 convention to maintain the initiative, rather than "qualified" or "registered," they used a third term, "legal voter":

> …The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters in each of at least two-thirds of the congressional districts in the State shall be required to propose any measure by such petition …. [Referendum] either by the petitions signed by five per cent of the *legal voters* in each of at least two-thirds of the congressional districts in the state ….

Art. IV, § 57 (emphasis added). That term is still used in Art. III, § 50.[3]

We do not know why the 1922 convention did not use the by-then traditional term "qualified voter," nor why the 1943-44 convention retained or the people enacted both the terms "legal voter" and "qualified voter." Frankly, the only logical meaning for "legal voter" was and is the same as for "qualified voter": those who are entitled to vote when they appear at the polls—which today, for all Missouri cities and counties, those who are registered to vote.

Ultimately, "qualified voter," "legal voter," and "registered voter" as now used in the current Missouri Constitution are synonyms. They are all used to identify not who could register to vote, but who, if they appear at the polls, will be entitled to vote. In other words, "qualified voters," "[i]f the election is one for which registration is required" (and today, all are), are those who "are registered within the time prescribed by law" (Art. VIII, § 2).

Johns will not have been a registered for two years by the date of the November 2016 general election. *See* Appellant's App. at A1. Therefore, she

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[3] The ACLU also cites the use of "registered voter" in Art. XIII, § 3 of the current constitution—the provision for the Citizens Commission on Compensation for Elected Officials. But the people, by adopting that section in 1994, could not have implicitly changed the meaning of "qualified voter" already found elsewhere in the constitution.

will not have been a "qualified voter" for two years as required by the Missouri Constitution, Article III, § 4. So under Missouri law, she cannot be a candidate for the House of Representatives for the August primary or the November general election—though she can run for future terms and even in special elections as early as next year, now that she is registered to vote.

II. Requiring Johns to delay her candidacy until she has been registered to vote for two years does not violate her rights under the U.S. Constitution.

To avoid the certain result of applying Missouri law, Johns asks this Court to hold that Missouri law is invalid on federal constitutional grounds—*i.e.*, that the durational registration requirement in Art. III, § 4 of the Missouri Constitution violates the U.S. Constitution. It does not.

A. Johns' conduct—not registering to vote—is not entitled to First Amendment protection.

Johns asserts two claims tied to First Amendment rights. In (A), we address her claim that her right to free speech was violated by the State imposing a sanction (disqualification to run for the house of representative this year) because of her "speech." In (B), we turn to the right to vote—or to run for office—derived from the First and Fourteenth Amendments.

In asserting a free speech claim, Johns "face[s] a threshold problem. As the party invoking the First Amendment's protection, [she has] the burden to prove that it applies." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013). Johns attempts to meet that burden by saying that she did not register to vote because to do so "would mean endorsing a system that had continued to fail her community," App. Br. at 2, and that not registering to vote constituted "speech" protected by the First Amendment. But she fails at the threshold, for merely not registering to vote—and on this record, there is nothing more—is not protected speech.

Though the question of what conduct constitutes protected speech has not been addressed recently in Missouri, it has been very recently addressed in New York—applying, of course, the federal constitutional law that Johns uses to make her claim. *Matter of Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016). The New York court described the "threshold inquiry":

> In assessing a claim of compelled expressive conduct, the threshold inquiry is whether the conduct allegedly compelled was sufficiently expressive so as to trigger the protections of the First Amendment (*see Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 294 n. 5, 104 S.Ct. 3065, 82 L.Ed.2d 221 [1984]; *Catholic Charities of Diocese of Albany v.*

> *Serio*, 28 A.D.3d 115, 129, 808 N.Y.S.2d 447 [2006], affd. 7 N.Y.3d 510, 825 N.Y.S.2d 653, 859 N.E.2d 459 [2006]). Conduct is considered inherently expressive when there is " '[a]n intent to convey a particularized message' " and there is a likelihood that the intended " 'message [will] be understood by those who view[ ] it' " (*Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 [1989], quoting *Spence v. Washington*, 418 U.S. 405, 410–411, 94 S.Ct. 2727, 41 L.Ed.2d 842 [1974]).

137 A.D.3d at 41.

A U.S. district court has also recently summarized what First Amendment free speech law requires—which, again, is more than mere conduct:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Even when the American flag—the "very purpose [of which] is to serve as a symbol of our

> country"—is involved, the Supreme Court does not "automatically conclud[e]" that the conduct is expressive. *Texas v. Johnson*, 491 U.S. 397, 405, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). "Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred." *Id*. And when "[t]he expressive component of ... actions is not created by the conduct itself but by the speech that accompanies it[,] [t]he fact that such explanatory speech is necessary is strong evidence that the conduct at issue ... is not so inherently expressive that it warrants protection under O'Brien." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006).

Students for Life USA v. Waldrop, No. CV 14-0157-WS-B, 2016 WL 707028, at *7 (S.D. Ala. Feb. 22, 2016).

The court in *Waldrop* observed that the plaintiffs before it had "offer[ed] no evidence that the cadets intended by their conduct to 'express an idea' to begin with." *Id.* The court then identified various kinds of conduct

that are, without something more, not sufficiently expressive as to merit First Amendment protection:

> Even had it done so, practicing military maneuvers is simply part of what ROTC cadets do, and in that context it carries no more inherent expressive content for purposes of First Amendment analysis than does a surgeon's wielding of a scalpel or a student's walking to class.

Students for Life USA v. Waldrop, 2016 WL 707028, at *7. The court concluded that "[a]ny expressive content would have to be conveyed, as in *Rumsfeld*, by explanatory speech, and the plaintiff identifies none." *Id.*

The "threshold inquiry" here, too, must be whether Johns' failure to register to vote has sufficient "expressive content." It does not. It, too, is common–like a student walking to class or a surgeon wielding a scalpel. To merit First Amendment protection, it would have to be accompanied by "explanatory speech."

Johns failed below, and fails on appeal, to even allege that she used any "explanatory speech" that would transform her act (or more accurately, failure to act) into the communication of any message to anyone. The record includes no evidence regarding any "explanatory speech" that would differentiate her from others who could not, decided not, or simply neglected

to register to vote. To paraphrase a recent adaption of the U.S. Supreme Court's language by the U.S. Court of Appeals for the Tenth Circuit: Johns' action, not registering to vote, would have been constitutionally protected only if Johns was intending to convey a particularized message and someone—she never tells us who or how—was likely to understand that message. *Meyers v. E. Oklahoma Cnty. Tech. Ctr.*, 776 F.3d 1201, 1207-08 (10th Cir. 2015), citing *Texas v. Johnson*, 491 U.S. at 404. Without that, she failed to bear her burden to prove that the First Amendment applies. *Voting for Am. Inc.*, 732 F.3d at 388.

B. Barring Johns from running this year does not violate her voting and associational rights because the State has not imposed a substantial burden on her or on other voters.

Independent of her claim that the State is impermissibly punishing her for "speech," Johns claims that the two-year durational registration requirement violates voting and associational rights derived from the First and Fourteenth Amendments. The first, critical question there is what level of scrutiny to apply. The Eighth Circuit observed that the question is not always susceptible to an easy answer:

> In considering a challenge to a ballot access statute, we are reminded "[b]allot access statutes are not susceptible of easy analysis, nor is the appropriate standard of review always easy to discern." .... Although several cases address ballot access issues, no opinion from either the United States Supreme Court or the Eighth Circuit has clearly defined the appropriate standard for reviewing these constitutional challenges. Instead, each provides for a case-by-case assessment of the burdens and interests affected by a disputed statute, focusing on the statute as part of a ballot access scheme in its totality.

Libertarian Party of N. Dakota v. Jaeger, 659 F.3d 687, 693 (8th Cir. 2011) (citations omitted).

In reviewing candidacy restrictions, the existence of barriers to a candidate's access to the ballot "does not of itself compel close scrutiny." *Bullock v. Carter,* 405 U.S. 134, 143 (1972). *See also Peeper v. Callaway Co. Ambulance Dist.*, 122 F.3d 619, 622 (8th Cir. 1997).

"If no fundamental right is implicated, traditional equal protection principles apply." *Peeper*, 122 F.3d at 622. And the right to run for public

office, unlike the right to vote, is not a fundamental right. *E.g. Stiles*, 912 F.2d at 265. Even appellant Johns concedes that "an individual's right to a place on an election ballot is not, by itself, considered to be fundamental." App. Br. at 15. That concession is compelled by this Court's observation, when someone sought ballot access:

> Mr. Edwards asserted in his answer that the right to ballot access is a fundamental right subject to strict scrutiny. He is incorrect. "A candidate's access to the ballot or the right to run for office is not a 'fundamental right.' " … And when a statute does not impinge upon a fundamental right, the challenger normally must demonstrate that the statute in question bears no rational relationship to a legitimate state interest.

Coyne v. Edwards, 395 S.W.3d 509, 517 (Mo. 2013), quoting *State v. Young*, 362 S.W.3d 386, 397 (Mo. banc 2012), and citing *Clements v. Fashing*, 457 U.S. 957 (1982).

Returning to the method of analysis used by the Eighth Circuit in *Libertarian Party*, we begin by noting that according to the U.S. Supreme Court, to determine whether to uphold restrictions on candidacy, courts first "consider the character and magnitude of the asserted injury to the rights

protected by the First and Fourteenth Amendments" caused by the challenged restriction. *See Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983); *Peeper*, 122 F.3d at 623; *Libertarian Party*, 659 F.3d at 693.

Applying that approach, the United States Supreme Court has upheld restrictions on candidacy. *See Anderson v. Celebrezze,* 460 U.S. at 789 (1983); *Peeper*, 122 F.3d at 623. Whether a court believes that the state "was unwise in not choosing means more precisely related to its primary purpose is irrelevant…"; it is sufficient for constitutional purposes that the state's reason at least arguably provides a rational basis for the restriction on candidacy. *Stiles v. Blunt*, 912 F.2d 260, 267 (8th Cir. 1990).

There are few cases—and no U.S. Supreme Court cases—addressing the "asserted injury" of a durational *registration* requirement. But durational *residency*, citizenship, and age requirements as conditions to holding office, both federal and state, have been imposed throughout the history of the country. *See State ex rel. Gralike v. Walsh*, 483 S.W.2d 70, 76 (Mo. banc 1972). Examples are found in the Constitution of the United States, which makes provisions of this character with respect to the President (Art. II, § 1), the Senate of the United States (Art. I, § 3), and the House of Representatives (Art. I, § 2). 483 S.W.2d at 76. The State of Missouri has such requirements with respect to the governor (Art. IV, § 3), state Senators

(Art. III, § 6), state Representatives (Art. III, § 4), and judges of the various courts (Art. V, § 25). 483 S.W.2d at 76.

This Court has upheld such restrictions. "Absent a controlling decision by the Supreme Court of the United States holding to the contrary, we hold that the equal protection clause of the Fourteenth Amendment does not eliminate the right of the State of Missouri to establish and enforce the one-year residency in the district requirement as a condition to serve as State Senator[…]." 483 S.W.2d at 76. *See also State ex rel. Burke*, 542 S.W.2d at 358 ("We find the reasoning of *Gralike*, that a state may establish and enforce reasonable requirements for officeholders, compelling […].")

The restriction at issue here is closely analogous to the durational voter residency requirement applied to aspiring candidates to state representative, and the Court's ruling in *Gralike* should guide the Court's actions here. "Absent a controlling decision by the Supreme Court of the United States holding to the contrary" – and there is none – this Court should affirm the court below.

That would be consistent with the result and rationale in *Stiles v. Blunt*. There the Eighth Circuit found that Missouri's minimum age requirement for candidacy does not run afoul of the rational relationship test though one year it kept a prospective candidate off of a ballot for State

Representative, even considering that the statewide offices of Secretary of State, Treasurer, and the Attorney General do not have minimum age requirements. 912 F.2d at 268. "In the absence of an unconstitutional objective or an impermissible means, a state's decision of whether or not to establish a minimum age requirement and what minimum age it designates are policy judgments for the legislature and voters." *Id*. The same should be said for the two-year registered voter requirement. Both types operate to delay, but not prevent, candidacy.

In arguing that this case is constitutionally different, Johns cites cases from a number of other jurisdictions. Only one of those actually involves a two-year registration period: *Gangemi v. Rosengard*, 207 A.2d 665 (N.J. 1965). That 51-year-old case was decided, however, on New Jersey state—not federal—constitutional grounds. And it addressed a peculiar scenario: a fifty-year resident who was not eligible to register to vote until too late to qualify under the two-year requirement. Johns, of course, was eligible to register. She simply chose not to.

In describing other cases, Johns uses language and quotes in a way that obscure the considerable differences between those cases and this one.

For example, in her discussion of *Kusper v. Pontikes*, 414 U.S. 51 (1973) Johns describes—twice—the matter at issue as merely "election-related rights." App. Br. at 17, 18. But the key "election-related right" at issue in

Kusper was the right to vote in a particular election—a right that is consistently and easily distinguishable from the right to run for a particular office in a particular year.

Later, in discussing *Labor's Educational and Political Club-Independence v. Danforth*, 561 S.W.2d 339 (Mo. banc 1977), Johns correctly cites this Court's reference to "denying the electorate of a possible candidate for an appreciable period of time." App. Br. at 22, quoting 561 S.W.2d 348. Of course, she is claiming a parallel to this case. But she understandably does not highlight that the "appreciable period" at issue there was ten years—not the two years, just until the next election, that Johns and her alleged supporters must wait.

Had Johns registered to vote any time before the last legislative election, she would not be here today. Making her wait briefly–until the next election, special or general–is not a burden significant enough to require strict scrutiny. It is a brief, not an "appreciable period."

C. Johns' equal protection claim fails because she is unable to prove that the registration requirement lacks rational basis.

In addition to a stand-alone free speech claim and a claim based on the voting interests protected by the First and Fourteenth Amendments, Johns

may also be making a stand-alone equal protection claim. For the reasons stated in Respondent Peters' brief, such a claim, absent from Johns' Answer and cross-claims, is tardy here. But it would fail in any event.

Traditional equal protection principles dictate that state-imposed burdens that affect some citizens differently than others offend equal protection under the Fourteenth Amendment only if such a burden is "wholly irrelevant to the achievement of the [s]tate's [constitutional] objectives." *McGowan v. Maryland,* 366 U.S. 420, 425 (1961); *Peeper*, 122 F.3d at 622. Further, it is particularly appropriate to apply a deferential standard of review where the requirement does not result in an absolute prohibition, but merely postpones the opportunity to engage in the conduct at issue. *Stiles*, 912 F.2d at 265. And that is all that the durational registration requirement does.

It does not draw a distinction between similarly situated aspirants. It applies to all candidates for State Representative, whether running for the first time, or for re-election. With regard to registration, all potential candidates for this office are treated identically.

Johns' focus on the different privileges enjoyed by registered voters for at least two years and those not registered for at least two years misses the mark. Individuals who registered long ago to engage in elections and the

administration of government, and those who have not registered or have only done so recently, are simply not similarly situated. One group maintains the ability to speak through the ballot box; the other waived that opportunity.

Even if the Court believes that these two groups are similarly situated, the difference in their treatment bears a rational relationship to a legitimate governmental objective. The rational purpose for temporarily disqualifying candidates failing to meet the two-year voter registration requirement is to ensure that office holders have an established stake in the administration of government and in the community they seek to represent. To be disqualified, the candidate must lack (or must have lacked until recently) a qualification possessed by all of the voters upon whom the candidate would rely for election. The State can rationally conclude that the legislature is better served by someone who took the time necessary to at least become eligible to vote for who should serve the current term.

Johns—who bears the burden under rational basis review of proving there is no rational basis for the durational registration requirement—is unable to demonstrate that a requirement for durational registration serves no rational purpose. She cannot claim that the status of having registered to vote is meaningless. And she does not suggest an alternative. A requirement that candidates have voted in a prior election might serve the same purpose—but would actually be more problematic than using registration as

the test. After all, voting requires availability on a particular day (or knowing of unavailability in advance, so as to permit absentee voting, *see* § 115.277). Registration can be accomplished at any time—even by mail (§ 115.159). It is rational for a State that has determined it wants and needs some indication of formal civic involvement prior to candidacy to use registration as the required minimum.

Considering the question in the 1943-44 convention, the delegates could have chosen a shorter registration period. But as the Eighth Circuit has observed, every line of this sort is "necessarily arbitrary." *Libertarian Party of N. Dakota v. Jaeger*, 659 F.3d at 694. That does not make it invalid.

And two years is a rational choice. That means that a candidate in one election must have been eligible to vote in one—just one—prior election. Any shorter period would allow the candidacy of someone whose civic commitment never made them eligible to vote in the election where their neighbors chose the person the candidate seeks to replace.

CONCLUSION

For the reasons stated above, the Judgment entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri CaseNet on the 13th day of May, 2016, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 6,071 words.

/s/ *James R. Layton*
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