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 REPLY BRIEF

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I. Johns Has Preserved All of Her Constitutional Arguments.

Johns has preserved all of the constitutional arguments she made in her initial brief. The long-standing test for evaluating the preservation of constitutional questions requires a party to (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the question throughout for appellate review. *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004).

Johns' Answer to the Respondent's Petition asserted as an affirmative defense that the proposed enforcement against her of § 21.080, RSMo., and Article III, section 4 of the Missouri Constitution would violate rights that the First and Fourteenth Amendments to the U.S. Constitution secure to Johns and to other voters in State House District 76. L.F. at 13-14. Her Answer stated the facts necessary to illustrate the alleged violations of those rights. L.F. at 12-14. In her filings before the trial court Johns expressly addressed the principles of Equal Protection – which are embedded in the Fourteenth Amendment – noting this Court's own precedent stating that the Equal Protection clause requires the application of strict scrutiny in this case (L.F. at 39), citing similar cases that were resolved on the basis of Equal Protection concerns (L.F. at 35, 51-53), and emphasizing that a prior Missouri case addressing the Durational Voter Registration Requirement was flawed because it failed adequately to address the violation of the candidate's right to Equal Protection of the laws. L.F. at 54-56. On appeal, Johns accounted for the

possibility that this Court might entirely discount her First Amendment claims by arguing as a fallback position that she should prevail even if the Fourteenth Amendment's guarantee of Equal Protection was the sole source of rights at issue in this case, rather than just one element of an *Anderson* evaluation. L.F. at 20-24; 32-33. Thus, Johns did indeed (1) raise the relevant constitutional issues at the soonest reasonable opportunity, (2) designate specifically the constitutional amendments she claims to be violated, (3) state the facts showing the violation, and (4) preserve the question throughout for appellate review.

If this Court should somehow determine that Johns did not properly preserve her constitutional arguments, Johns urges the Court to recognize an equitable exception to the general rule. Under Missouri law, election-related cases are heard on an extraordinarily accelerated timeline. Whereas ordinary litigants may have months or even years in which to notice oversights or omissions in pleadings, litigants in election cases have no such luxury. The law requires the contestee in an election case to file an answer within four days of the contestant filing the initial petition. § 115.533, RSMo. In this case, the Respondent set a hearing on his Motion for Judgment on the Pleadings for April 18, just eleven days after Johns filed her Answer. L.F. at 3-4. The constitutional issues raised by cases such as this one are necessarily complex and, in the rush to complete filings, parties may not provide the detail or precision of language that would otherwise be preferable. As long as none of the parties can show any particular prejudice that has resulted from an imprecisely-described constitutional right or some other type of argument, there is no justification for precluding the party from pressing that right or argument on appeal.

Given that Johns has regularly addressed the Fourteenth Amendment and Equal Protection throughout this litigation, she has adequately preserved her arguments in this regard and neither the Respondent nor the Intervenor can claim to be prejudiced in any way by the expansion of her argument on appeal. This Court should proceed to evaluate whether the Durational Voter Registration Requirement, as applied in this case, violates rights secured under the First and Fourteenth Amendments, including the right to Equal Protection of the laws.

II. Both the Intervenor and the Respondent Misrepresent the Standard of Review.

Perhaps understandably, the Intervenor and the Respondent fixate on statements courts have made about the appropriate standard of review where fundamental rights are not heavily burdened, emphasizing that a lower standard of scrutiny will generally apply in such cases. This is true as a general proposition, but it misleadingly implies that courts may ***never*** rule laws unconstitutional under this lower standard and it offers no insight at all as to the circumstances in which courts might strike down restrictive laws even in light of this lower standard of review. The irony, however, is that many of the cases the Intervenor and Respondent cite are prime examples of circumstances under which courts have struck down restrictions on citizens' participation in the political process. The Intervenor cites *Bullock v. Carter*, 405 U.S. 134 (1972), for the proposition that close scrutiny is not required in every case where there is a barrier to a candidate's access to the ballot, but in that case the Supreme Court held that heightened scrutiny was appropriate in part because the restriction at issue precluded office seekers from seeking

their party's nomination, "no matter how qualified they might be, and no matter how broad their support." *Id.* at 143. The Intervenor also cited *Peeper v. Callaway Cnty. Ambulance Dist.*, 122 F.3d 619 (8th Cir. 1997), for the idea that "[i]f no fundamental right is implicated, traditional equal protection principles apply." In that case, of course, the Court was considering "an individual's right to be a candidate for public office under the First and Fourteenth Amendments" and, ***applying rational basis scrutiny***, the Court held unconstitutional the restrictions at issue in that case.[1] *Id.* at 623. Similarly, although the Intervenor cites *Anderson v. Celebrezze*, 460 U.S. 780 (1983), as though the case supports his position, the fact of the matter is that in *Anderson* the U.S. Supreme Court ***struck down*** an election-related restriction after rejecting the three interests the government had asserted in support of that restriction. *Id.* at 796-806.

The Intervenor and the Respondent cite a hodgepodge of federal circuit court cases in their efforts to bolster their position, but they almost entirely ignore the bevy of U.S. Supreme Court and federal circuit court cases Johns has cited in which restrictive laws

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[1] Mystifyingly, the Intervenor cites *Peeper* for the idea that "the United States Supreme Court has upheld restrictions on candidacy." Intervenor Br. at 20. Although it is undisputed that the U.S. Supreme Court has upheld some restrictions on candidacy, *Peeper* is an excellent example of a court properly applying the rational-basis test to strike down election-related restrictions because the restrictions were not rationally related to the government's asserted interests. *Id.* at 624.

could not survive even the lowest-level of constitutional scrutiny. *See, e.g., Quinn v. Millsap*, 491 U.S. 95 (1989) (applying rational basis test to strike down Missouri constitutional provision requiring property ownership to serve on government board); *Turner v. Fouche*, 396 U.S. 346 (1970) (applying rational basis test to strike down property ownership requirement for school board members); *Peeper*, 122 F.3d 619 (8th Cir. 1997) (applying rational basis test to strike down restrictions applicable to ambulance board member); *Antonio v. Kirkpatrick*, 579 F.2d 1147 (8th Cir. 1978) (applying rational basis test to strike down durational residency requirement for state auditor); *see also American Party of Texas v. White*, 415 U.S. 767 (1974) (applying rational basis test to strike down restrictions on access to absentee ballots); *Green Party of Tennessee v. Hargett*, 791 F.3d 684 (6th Cir. 2015) (applying rational basis scrutiny to strike down ballot-access requirement that imposed different burdens on political parties); *Deibler v. Rehoboth Beach*, 790 F.2d 328 (3rd Cir. 1986) (applying rational basis test to strike down requirement that candidates for city commissioner must be current on tax payments). The silence of Johns' opponents in this regard speaks volumes.

III. The Respondent Stipulated That Johns' Choice Not to Register to Vote was an Expressive Act of Protest.

Both the Respondent and the Intervenor try to cast doubt on whether Johns' choice not to vote was truly an expressive act of protest. *See* Resp. Br. at 1; Intervenor Br. at 1. This fact is definitively established and cannot be questioned or challenged by either the Respondent or the Intervenor.

In Johns' initial pleading in this matter, she asserted:

1. Prior to February 4, 2015, Johns declined to register to vote in Missouri ***as an expressive act of protest*** against a political system that she believed did not adequately represent her interests and that did not produce candidates worthy of her vote.

2. Despite her ***expressive choice not to register to vote***, Johns was a political activist long before February 4, 2015, including engaging in protests in response to the August 2014 killing of Michael Brown in Ferguson, Missouri, and actively working to persuade the St. Louis City Board of Aldermen to approve a Civilian Oversight Board for the St. Louis Metropolitan Police Department.

L.F. at 12.

If the Respondent wished to contest this fact, he had the opportunity to do so. Instead, he voluntarily ***stipulated*** to the truth of Johns' statements. L.F. at 59. Having expressly admitted these allegations, he cannot be permitted to dispute them on appeal.

The Intervenor is also bound by the record established below. Judge Bush expressly invited the Attorney General to come into this case at the trial level. L.F. at 60. The Attorney General chose not to do so at that time and, having declined the opportunity to challenge Johns' assertions before the trial court, the Intervenor cannot now argue that Johns was required to show evidence regarding facts and/or a point of law that the Respondent ***did not contest***.

The opposing parties' failure to dispute that Johns' decision not to register to vote was an expressive act of protest is critical and it would be extraordinarily prejudicial for this Court to allow the opposing parties to challenge the sufficiency of the evidence

regarding the expressive nature of Johns' protest. Had they disputed this point in the trial court, Johns would have been able to present evidence to demonstrate the expressive element of her decision, including proof that she explained the nature of her protest to others. Because the Respondent specifically accepted the truth of Johns' allegation, thereby relieving Johns of any need to put supporting evidence in the record, the Respondent and the Intervenor must be estopped from complaining about a lack of evidence in this regard.

IV. The Respondent Inaccurately Represented the U.S. Supreme Court's Decision in *Buckley*.

In his brief the Respondent claimed that the majority opinion in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), did not assess whether refusing to vote is expressive conduct protected by the First Amendment. Resp. Br. at 2-3. It is correct to state that *one* type of speech addressed in *Buckley* was the exclusion of citizens from petition circulation, but the Respondent improperly disregarded the conversation among the justices that emphasizes the majority's conclusion in regard to the First Amendment implications of a refusal to register to vote. Respondent's interpretation of that case would be news to Justice Ginsburg, Justice O'Connor, and Chief Justice Rehnquist, who each offered commentary specific to this issue.

The point of disagreement among these three justices was the extent to which excluding unregistered citizens from petition circulation placed a burden on speech protected by the First Amendment. Colorado had argued that, although petition

circulation was protected speech, it was only minimally burdened by the state's simple (not durational) voter registration requirement because anyone who wanted to comply with the requirement could do so quickly and easily. Justice O'Connor, concurring in part and dissenting in part, tended to agree with Colorado's perspective, distinguishing the First Amendment rights of those who wished to pay others to circulate petitions and discounting the argument that "the registration requirement burdens political speech because some otherwise-qualified circulators do not register to vote as a form of political protest." *Id.* at 219. Justice Ginsburg and those joining her majority opinion pointed out, however, that even if it is easy for many to register to vote, there was an *additional* burden on speech protected by the First Amendment for those whose decision not to register was a form of political protest. From the majority's perspective, Justice O'Connor's position was flawed because it did not account for this *additional* burden on expressive conduct protected by the First Amendment, which is why "the ease of registration misses the point." *Id*. at 196. Chief Justice Rehnquist, writing in dissent, derisively confirmed the majority's perspective that "the restriction of circulation to [registered] electors fails to pass scrutiny under the First Amendment because the decision not to register to vote 'implicates political thought and expression." *Id*. at 229. The Chief Justice disagreed with that conclusion, but he acknowledged that that, indeed, was the conclusion the majority had reached.

In response to the Respondent's citation of footnote 17 of the *Buckley* opinion, in which Justice Ginsburg acknowledged Justice O'Connor's position that "registration requirements for… candidates for office are 'classic' examples of permissible

regulation," Johns notes that this footnote is clearly addressing the context of a *simple* voter registration requirement such as the one the *Buckley* majority was ruling unconstitutional, not a *durational* voter registration requirement such as the one at issue in this matter. *See* App. Br. at 10-14. It might be that, in a different case, the government might be able to justify imposing a *simple* voter registration requirement for those who seek election to the state legislature. But those are not the facts of this case, and the government has not offered any reasonable explanation as to what legitimate (much less compelling) interest is served by requiring a candidate to have had her name on a list for two years before the voters may choose that person to represent them in the legislature.

V. The Propositions Respondent Cited from *Clements v. Fashing* Are Not On Point and Did Not Represent the Majority Opinion.

The Respondent ignores the multitude of cases the Appellant cited in which the U.S. Supreme Court struck down as unconstitutional various restrictions placed on citizens' participation in the political process. Instead, the Respondent relies heavily on statements from *Clements v. Fashing*, 457 U.S. 957 (1982), to support his contention that a two-year prohibition from seeking legislative office is a "*de minimus*" burden on the would-be candidate. Resp. Br. at 6-8. *Clements* holds little value for the Respondent. As an initial matter, Chief Justice Rehnquist divided his opinion in *Clements* into five parts, and only parts I, II, and V earned the support of a majority of the justices. Parts III and IV, which include all of the language and ideas Respondent relies upon as support, only had the support of ***four*** justices and so do not constitute the opinion of the Court and are

not binding authority. Even beyond that point, however, *Clements* dealt with a very different type of restriction.

There were two state constitutional provisions being contested in *Clements*: a "resign-to-run" law, which prevented government officials from seeking any other political office if they had one year or more remaining in the term for they office they currently held, and a provision prohibiting certain elected or appointed officials from serving in the legislature "during the term for which" they were elected or appointed to serve in their current office. Addressing the latter provision, the plurality noted that they were assessing only whether the restriction could be applied to a Justice of the Peace, then held that the restriction was justified because "the demands of a political campaign may tempt a Justice of the Peace to devote less than his full time and energies to the responsibilities of his office." *Id*. at 968. The plurality further emphasized that the state's interests were heightened in regard to "judicial officers," due to the potential that a judicial officer might be accused of making "a politically motivated decision." *Id*. Justice Stevens, in his concurrence, emphasized that he could not condone the plurality's reasoning, equating it with an ***incorrect*** conclusion that "there need be no justification at all for treating two classes differently[.]" *Id*. at 976. Stevens concurred in the result simply because the distinction at issue in that case involved the state's authority to require those who hold public office to serve their full terms. *Id.* at 974. The four justices joining the *Clements* dissent harshly—and correctly—criticized the so-called reasoning embraced by the four justices in the plurality, pointing out the irrationality of restricting a would-be candidate's ability to run for office based on the office being sought. *See id.* at

980-983. The dissent pointed out that "neither the State nor the plurality offers any justification for *differential* treatment of various classes of officeholders, and the search for justification makes clear that the classifications embodied in these provisions lack any meaningful relationship to the State's asserted or supposed interests." *Id.* at 978. The dissent also noted that, although not a "fundamental" right, "the right to seek public office" is indeed "a right protected by the First Amendment." *Id*. at 984 n7.

VI. Contrary to Respondent's Suggestion, "Qualified" and "Registered" Are Not Necessarily Synonymous.

The Respondent suggests that the ACLU's failure to quote the entirety of Article VIII, section 2 of the Missouri Constitution, is intended to omit a requirement that, in Missouri elections, "a person must also be registered to be a qualified voter." Resp. Br. at 21-24. But, to the contrary, that section further buttresses the ACLU's contention that "qualified voter" and "registered voter" are not synonymous in Missouri law. Article VIII, section 2 recognizes that Missouri holds both elections "for which registration is required" and elections "for which registration is not required." Thus, "qualified" and "registered" are not entirely interchangeable adjectives.

VII. The Government Has No Legitimate Interest in Requiring a Would-Be Legislator to Have Her Name on a Meaningless List for the Two Years Immediately Prior to Her Election.

The Intervenor's stated on page 25 of his brief that Johns "cannot claim that the status of having registered to vote is meaningless." To the contrary, that is ***exactly*** what Johns is claiming. *See* App. Br. at 12-14. The Durational Voter Registration Requirement

boils down to nothing more than a requirement that one's name must have been on a particular list for a specified amount of time. The requirement is meaningless because getting one's name on that list requires no particular knowledge, maturity, skill, or experience, and because (at least in Missouri) once a person's name is on the list they do not have to do anything at all to keep their name there. A person's name being on that list says nothing meaningful about the person named, and it certainly does not ensure that the person named possesses any particular quality necessary to represent their friends and neighbors in the Missouri House of Representatives. That near-absolute lack of meaning is precisely why the Durational Voter Registration Requirement cannot survive any level of constitutional scrutiny.

Johns has already addressed most of the hypothetical government interests asserted by the Respondent. App. Br. at 24-31. She will not belabor her points here. But in addition to the set of alleged interests that Johns has already addressed in her initial brief, the Intervenor and Respondent have added the idea that the Durational Voter Registration Requirement "ensures that a would-be State Representative has taken the minimal affirmative steps necessary to participate as a voter in at least one, and specifically the most recent, general state election before running for office." Resp. Br. at 14; *see also* Intervenor Br. at 26. The facts of this case prove that section 21.080, RSMo., and Article III, section 4 of the Missouri Constitution do not do this at all, and so this asserted interest cannot be a legitimate justification for the restriction.

The most recent general election prior to the upcoming general election took place on November 4, 2014. This year's general election will take place on November 8, 2016.

Johns could have qualified to run in this year's general election even if she had registered four days after the 2014 election took place. More importantly, however, Missouri law requires would-be voters to register no later than "the fourth Wednesday prior to the election." § 115.135, RSMo. Thus, for a citizen to be eligible to vote in Missouri's November 4, 2014 General Election, state law would have required them to register to vote no later than or October 8, 2014, well beyond the two-year Durational Voter Registration Requirement. As the facts of this case show, contrary to the Intervenor's and Respondent's assertions, the Durational Voter Registration Requirement does not in any way ensure that a candidate eligible to serve in the Missouri House of Representatives has previously been eligible to participate as a voter in at least one state general election. Even if Johns conceded that the government had a legitimate interest in ensuring that someone's name was on a list, this requirement would still fall because the restriction at issue ***does not serve the alleged purpose***.

CONCLUSION

The State of Missouri ***cannot*** constitutionally deny Rachel Johns the opportunity to serve in the Missouri House of Representatives, nor can it deny Johns and the other voters of State House District 76 the opportunity to vote for someone other than the incumbent simply because Johns engaged in a political protest that meant her name was not placed on a list that says nothing at all meaningful about the personal qualities of those whose names are listed. The requirement Johns is challenging does indeed severely burden her fundamental rights secured under the First and Fourteenth Amendments, as well as the fundamental rights of the other voters of State House District 76.

Consequently, the Durational Voter Registration requirement should be subjected to strict scrutiny and ruled unconstitutional. But even if this Court deems that a less level of scrutiny should apply, Johns has offered numerous cases demonstrating that this requirement should not survive even rational-basis scrutiny. Johns respectfully asks this Court to rule that the Durational Voter Registration Requirement cannot constitutionally be applied to her, that she will be permitted to continue her candidacy to represent the voters of the 76th District, and that the voters will be free in the 2016 election to cast a meaningful ballot for someone other than the incumbent, Mr. Peters.

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 3,977 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 7,750 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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