No. SC94285

IN THE
MISSOURI SUPREME COURT

Natalie A. Vowell,

Appellant,

v.

Jason Kander, in his official capacity as Missouri Secretary of State,

Respondent.

Appeal from the Circuit Court of Cole County, Missouri
on Post-Opinion Transfer from Court of Appeals – Western District

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Substitute Brief of American Civil Liberties Union of Missouri, Angelo Stege, and Heather Coil in Support of Appellant as *Amici Curiae*

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Authority to File

Amici file this brief with the consent of the parties and pursuant to Mo. R. Civ. P. 84.05 (f) (2).

Jurisdictional Statement

Amici adopt the jurisdictional statement as set forth in Appellant's brief filed with the Court in this case.

Statement of Facts

In addition to the following brief statement of facts, Amici adopt the statement of facts as set forth in Appellant's brief filed with the Court in this case.[1]

In the underlying lawsuit, Vowell's petition asserted that she had been a resident of St. Louis, Missouri since 2010, that she had lived in the 78th Missouri House District since 2011, and that she was frustrated with the political status quo. (LF 4-5). As an expression of this frustration, Vowell chose not to register to vote until, in July 2013, she registered after deciding that the political situation could be improved if the status quo was challenged. (LF 5). Thereafter, in March 2014, Vowell filed a declaration of candidacy with the Missouri Secretary of State seeking election as representative for the 78th Missouri House District. (LF 5). Her

[1] Amici cite to the record on appeal provided by the Appellant. The transcript is cited to as Tr., and the legal file is cited to as LF.

declaration of candidacy was accepted without objection, and Vowell was listed as a candidate on the Secretary's website. (LF 5).

On May 6, 2014, however, despite already accepting Vowell's declaration of candidacy, the Secretary's office mailed a letter to Vowell claiming that she was not qualified to serve as a state representative because she did not appear to meet the state's voter registration requirement. (LF 6-7, 14). The letter went on to state that a candidate's qualification requirements are set forth in the Missouri Constitution, Article III, Section 4, and, if Vowell did not provide documentation by May 14, 2014, showing that she was registered to vote for two years before the November 2014 election, then her name would not be certified for the ballot. (LF 14). The Secretary's office cited no authority that permitted it to adjudicate a candidate's qualifications after a declaration of candidacy had been filed and accepted. (LF 7, 14). On May 13, 2014, Vowell filed the underlying lawsuit seeking a declaratory judgment and injunctive relief, as well as a motion for temporary restraining order and preliminary injunction. (LF 4, 16). The trial court held a hearing on May 16, 2014, and on May 21, 2014, the court dismissed Vowell's claims. (Tr. 1; LF 22-24). This appeal follows.

Missouri's primary election will be held on August 5, 2014. It is undisputed that no opponent has challenged Vowell's qualifications under section 115.526.[2]

Interests of Amici Curiae

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Missouri is the ACLU's affiliate in the State of Missouri, which has more than 4,500 members.

The ACLU of Missouri filed an amicus brief this case in the Court of Appeals. The ACLU of Missouri has often participated as amicus curiae or as direct counsel in cases involving voting rights in Missouri. For example, *Day v. Robinwood West Community Improvement District*, 693 F. Supp. 2d 996 (E.D. Mo. 2010), challenged the statutory voting procedures for community improvement districts; *Prye v. Carnahan*, No. 04-4248-CV-C-ODS (W.D. Mo.), challenged the exclusion of persons under guardianship from the voting rolls; *Jackson County, Missouri v. State*, No. 06AC-CC00587 (Cir. Ct. Cole Co.), challenged a statute limiting the types of identification that could be accepted by local election officials; and *Aziz v. Mayer*, 11AC-CC00439 (Cir. Ct. Cole Co.), challenged the

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

summary statement of a legislatively referred proposed constitutional amendment that would have authorized the legislature to impose significant burdens on the right to vote. Moreover, ACLU affiliates across the county have challenged voter-registration requirements that serve as a prerequisite for participation in the political process, particularly those state laws that limit who may circulate a petition.

Angelo Stege and Heather Coil are registered voters of the 78th Missouri House District who plan to participate in the Democratic Primary Election on August 5, 2014. These individual voters want to have a choice of candidates, but, if the Secretary's actions in this case are sustained, they will not have a choice because only the incumbent candidate will appear on the primary ballot.

Argument

I. Natalie Vowell has Standing to assert her claims.

Whether a petitioner has standing to assert a claim is a question of law reviewed de novo. *Borges v. Mo. Pub. Entity Risk Mgmt. Fund*, 358 S.W.3d 177, 180 (Mo. App. W.D. 2012). When reviewing a trial court's dismissal of a petition for lack of standing, this Court will "allow the pleadings their broadest intendment, treat all facts alleged as true and construe the allegations favorably to appellant." *Phillips v. Mo. Dep't. of Soc. Servs. Child Support*, 723 S.W.2d 2, 4 (Mo. banc 1987); *see also Borges*, 358 S.W.3d at 180 (noting that a reviewing court "consider[s] the petition along with any other non-contested facts to determine whether the petition should be dismissed due to [petitioner's] lack of standing"). To have standing, a petitioner must state a claim "invok[ing] substantive principles of law which entitle [the petitioner] to some relief." *Phillips*, 723 S.W.2d at 4 (finding that two children of a man whose wages were garnished to pay child support of a third child lacked standing because the two children were not parties, nor involved in, "the original . . . trial and judgment to which th[e] garnishment proceeding [was] ancillary"). Here, Petitioner-Appellant, Vowell, has standing to raise the claims asserted below; therefore, the trial court erred in dismissing Vowell's petition.

As the party seeking relief, it is Vowell's burden to establish that she has standing to maintain her lawsuit against Jason Kander, in his official capacity as Missouri's Secretary of State. *Borges*, 358 S.W.3d at 181. "'The requirement that a party have standing to bring an action is a component of the general requirement of justiciability.'" *Phillips*, 723 S.W.2d at 4 (quoting *Harrison v. Monroe Cnty.*, 716 S.W.2d 263, 265 (Mo. banc 1986)); *see also Mo. Health Care Ass'n v. Att'y Gen. of the State of Mo.*, 953 S.W.2d 617, 620 (Mo. banc 1997) (noting that "[a] declaratory judgment action requires a justiciable controversy"). "In an action for declaratory judgment or one of injunctive relief, the criteri[on] for standing is whether the plaintiff has a legally protectable interest at stake." *Phillips*, 723 S.W.2d at 4. "'A legally protect[a]ble interest contemplates a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, immediate or prospective.'" *Phillips*, 723 S.W.2d at 4 (quoting *Absher v. Cooper*, 495 S.W.2d 696, 698 (Mo. App. 1973)). Moreover, "'[a] legally protectable interest exists if the plaintiff is directly and adversely affected by the action in question.'" *Borges*, 358 S.W.3d at 181 (quoting *Mo. Ass'n of Nurse Anesthetists, Inc. v. State Bd. of Registration for the Healing Arts*, 343 S.W.3d 348, 354 (Mo. banc 2011)). To demonstrate that a justiciable controversy exists in a declaratory judgment action, in addition to the requirement that the plaintiff have a legally protectable interest, a petitioner must demonstrate that "'a substantial controversy

exists between parties with genuinely adverse interests, and that controversy is ripe for judicial determination.'" *Id.* (quoting *Roach Law Firm v. Beilenson*, 224 S.W.3d 57, 60 (Mo. App. E.D. 2007)); *see also Mo. Health Care Ass'n*, 953 S.W.2d at 620.

Because Vowell is the person whose name would appear on the ballot, or not, she has standing to challenge both the process by which she was removed from the ballot and the eligibility requirement. The Supreme Court found that candidates who could not meet California's signature requirements to appear on the ballot "have ample standing to challenge the signature requirement." *Storer v. Brown*, 415 U.S. 724, 738 fn.9 (1974). Similarly, Vowell has standing here.

Furthermore, a legally protectable interest entitled to due process can be conferred by statute. For instance, a state creates a legally protectable right to the initiative process where "state law has created in [citizens] an interest substantial enough to rise to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997). Reliance on such legitimate claims of entitlement "must not be arbitrarily undermined." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). They are not created by the federal Constitution, but rather "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain

benefits and that support claims of entitlement to those benefits." *Id.* Here, as the Court of Appeals recognized, "official candidacy for public office is most certainly a protectable, legal interest." *Vowell v. Kander*, No. WD77591, 2014 WL 2766670, *3 (Mo. App. W.D. June 19, 2014). Once such a right of access to the ballot is conferred, it must be conferred consistently with the United States Constitution. *See Meyer v. Grant*, 486 U.S. 414, 420 (1988).

In the underlying case, Vowell sought declaratory judgment, injunctive relief, and a temporary restraining order against Jason Kander, in his official capacity as Missouri's Secretary of State. Vowell's petition asserted that, under the procedure set forth in section 115.526, the legislature had granted the judiciary with exclusive authority to adjudicate a candidate's qualifications before a general election. (LF 5-6). Vowell further asserted that no Missouri statute authorizes the Secretary's office to adjudicate the qualifications of a person who has filed a declaration of candidacy seeking a seat in the state legislature, nor does the Secretary's office have the power to exclude a candidate from a ballot whose qualifications have not been challenged pursuant to the requirements of section 115.526. (LF 5-12).Vowell also asserted that, even if Missouri law did allow the Secretary's office to independently adjudicate a candidate's qualifications to appear on the ballot, she was not afforded due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution because she did not have

a hearing or any mechanism to appeal the Secretary's decision regarding her qualifications to appear on the ballot. (LF 9-10).

A court hearing was held three days after Vowell filed her petition on May 16, 2014. (Tr. 1; LF 1). At the hearing, the parties noted that the facts were not in dispute and agreed that the court could consider the matter before it as a motion for judgment on the pleadings. (Tr. 3). The State argued that Vowell lacked standing because she did not meet the constitutional "qualified voter" requirement necessary to be a candidate appearing on a ballot in that "[b]y her own admission [that she first registered to vote in July 2013, Vowell] is not qualified and cannot be a qualified candidate at the time of the general election." (Tr. 10). In addition to arguing that the Secretary lacked authority to determine a candidate's qualifications to appear on the ballot after that person's declaration of candidacy had been accepted and that the Secretary's actions violated her due process rights, Vowell also raised a constitutional challenge to the registration and qualified voter requirements. (Tr. 3-10, 20-24, 26-27, 29).[3]

[3] Vowell also requested that, if there were any question regarding whether a constitutional challenge to the registration and qualified voter requirements was properly raised and preserved for review, she be granted leave to amend her petition. (Tr. 29, 35). In making this request, Vowell noted that the hearing was

Vowell has standing to (1) challenge the Secretary's claimed authority to make a decision that a candidate does not meet the requirements to appear on a ballot as a candidate for election after the declaration of candidacy has been accepted, (2) assert that her due process rights were violated by the Secretary's actions, and (3) challenge the constitutionality of the registration and qualified voter requirements. Contrary to the State's argument to the trial court, Vowell's standing in this case is not dependent upon whether she is ultimately determined to satisfy the requirements for office. Vowell submitted her declaration for candidacy, and the Secretary accepted it. Thereafter, the Secretary made a determination related to her qualifications and sent her a letter indicating that, if she did not provide documentation that she had been a registered voter for two years before the November 2014 election, her name would not be certified for the ballot.

Because Vowell has standing in her own right, it is unnecessary for this Court to consider third-party standing. Nevertheless, because Vowell advances a claim that the registration requirement violates the First Amendment, she has standing to advance a challenge to the statute on behalf of third parties not before the court. As the Missouri Supreme Court has explained, "[u]sually, a person lacks standing to attack the validity of a statute on grounds of how it applies to someone

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being held just two days after the petition was filed. (Tr. 29). At that point, Vowell had an unqualified right to amend her petition. Mo. R. Civ. P. 55.33(a).

else. But challenges based upon the First Amendment are sometimes an exception." *State v. Moore*, 90 S.W.3d 64, 66 (Mo. banc 2002) (internal citations omitted). First Amendment overbreadth claims, like Vowell's, are an exception to the traditional prudential standing requirement that a party cannot raise the rights of third parties not before the court. *See Get Outdoors II, LLC v. San Diego*, 506 F.3d 886, 891 (9th Cir. 2007); *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 349-50 (6th Cir. 2007); *CAMP Legal Def. Fund, Inc. v. Atlanta*, 451 F.3d 1257, 1270 (11th Cir. 2006).

The ability of parties before a court to advance overbreadth claims on behalf of third parties is essential to the continued protection of First Amendment rights. Parties such as Appellant may bring overbreadth claims on behalf of third parties because the threat of enforcement of an overbroad law will chill the constitutionally protected speech of others not before the court. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989); *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). If third-party claims were not permitted in this context, rather than taking on the burden of vindicating rights in litigation, people might instead refrain from constitutionally protected activities altogether. *See New York v. Ferber*, 458 U.S. 747, 768 (1982). In addition to harming the individual

refraining from protected speech, an overbroad law also harms "society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119.

For the purpose of Vowell's claims in the underlying lawsuit, it does not matter whether she actually satisfies the requirements set forth to appear as a candidate on a ballot in the primary or general election. What matters is that her declaration of candidacy was filed with and accepted by the Secretary, that there is a statutory process in place for challenging her qualifications that was not followed, and that she claims the process must be followed. Moreover, Vowell alleges that her constitutional right to due process was violated by the Secretary's actions and that the registration and qualified voter requirements are unconstitutional.

Vowell hopes to run as a candidate for public office and, as such, she has a legally protectable interest in seeking to have her name appear on the ballot and in assuring that the Secretary respects the statutory process and constitutional requirements governing whether her name appears on a ballot as well as the authority of the legislature to make qualification decisions without interference from the executive branch. A substantial controversy exists in that Vowell seeks to have her name on the ballot, and the Secretary has taken the position that his office has independent authority, outside of the statutory provisions regulating how a candidate's qualifications are challenged, to determine if a candidate is qualified to

be certified for a ballot after the declaration of candidacy has been accepted. The interests of the parties are clearly adverse and the controversy is ripe for judicial determination. The primary election is to be held on August 5, 2014. Regardless of whether the undisputed facts support a finding that Vowell was not a registered voter for two years before the November 2014 election, Vowell has standing to raise the claims in her petition and, at a minimum, this case should be reversed with instructions to the trial court. Upon remand, this Court must note the limited role of the judiciary in the process related to candidate eligibility and provide instructions accordingly. However, remand is not appropriate because outright reversal is required.

II. The phrase "qualified voter" in Article III, section 4 of the Missouri Constitution should be construed as meaning any individual who possesses the constitutional qualifications to vote, it should not be construed as a substitute definition for an individual who is a "registered voter."

This Court should construe the phrase "qualified voter" in Article III, section 4, of the Missouri Constitution as meaning one who possesses the qualifications to vote, not as a substitute for the phrase "registered voter." "The constitution defines the qualifications of voters, making no reference to registration as one of them." *State ex rel. Harrison v. Frazier*, 11 S.W. 973 (Mo. 1889).[4]

The Missouri Constitution requires that a state representative "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

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[4] All citizens over the age of eighteen who reside in Missouri are qualified to vote, "[p]rovided … no person who has a guardian of his or her estate or person by reason of mental incapacity, appointed by a court of competent jurisdiction and no person who is involuntarily confined in a mental institution pursuant to an adjudication of a court of competent jurisdiction shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting." Mo. Const., art. VIII, § 2.

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. The core of the Secretary's position in this case is that Vowell has not been a "qualified voter" for the requisite period of time because, during a portion of that time, she was not registered to vote. The existence of any dispute regarding Vowell's qualifications as a candidate for election is premised on the notion that the term "qualified voter" in this constitutional provision means a person who is not only qualified to vote but also registered to vote.

This Court has never directly addressed whether the phrase "qualified voter" as it appears in Article III, section 4, of the Missouri Constitution requires that an individual be not only eligible to vote but also registered to vote. Both the Western and Eastern Districts of the Missouri Court of Appeals have so construed the phrase. *See State ex rel. Burke v. Campbell*, 542 S.W.2d 355, 358 (Mo. App. E.D. 1976); *see also State ex rel. Mason v. Cnty. Legislature*, 75 S.W.3d 884, 887 (Mo. App. W.D. 2002) (relying on *Burke* for proposition that "the term 'qualified voter' … is synonymous with 'registered voter.'"); *Steinmetz v. Smith*, 613 S.W.2d 157,

158 (Mo. App. E.D. 1981). These cases were erroneously decided and should be overruled.[5]

In interpreting Article III, section 4, this Court has explained that "[w]ords used in constitutional provisions are interpreted to give effect to their plain, ordinary, and natural meaning." *Gray v. Taylor*, 368 S.W.3d 154, 156 (Mo. banc 2012) (citing *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. banc 1983)). Had the drafters of the Missouri Constitution intended to limit eligibility to run for state representative to individuals who had been registered to vote for a full two years prior to the election, they could have crafted language to that effect. Indeed, the

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[5] The lower appellate courts relied on decisions of this Court that arose in the context of petitions. *See Scott v. Kirkpatrick*, 513 S.W.2d 442, 444 (Mo. banc 1974) (interpreting the phrase 'qualified voter' appearing in Section 126.151 as making registration a prerequisite for signers of initiative petitions); *State ex rel. Woodson v. Brassfield*, 67 Mo. 331, 337 (1878) (holding that one not registered, though otherwise qualified would not be considered a qualified voter). Each of those cases involved statutory construction, not construction of a constitutional provision, and neither case would limit voters' choices of who will represent them. This Court need not revisit those cases to determine the meaning of "qualified voter" in Article III, section 4; however, for the reasons explained here, they were likely incorrect.

phrase "registered voter" appears elsewhere in the constitution. *See* Mo. Const., art. VI, § 30(a) (requiring petition proposing exercise of powers to be "signed by registered voters"); Mo. Const. art. XIII, § 3 (requiring members of Citizens' Commission on Compensation for Elected Officials to be "registered voters").[6] The phrase "registered voter" would have appeared in Article III, section 4, as well, were it the drafters' intent.

As the Constitution was drafted, however, the phrase "qualified voter" in Article III, section 4, is clearly and unambiguously not the same as "registered voter." Where "[t]he language of this clause is susceptible to a clear and unambiguous interpretation based only on the plain and ordinary meaning of the words[, a] court may not add words by implication when the plain language is clear

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[6] The legislature also understands that "qualified voters" and "registered voters" are not synonymous. The Community Improvement District Act, for instance, defines "qualified voters" for purposes of director elections to include not only "registered voters" but also "owners of real property[.]" § 67.1401, RSMo. Specifically, a person who is not registered to vote is nonetheless a qualified voter if he or she owns non-exempt property in a Missouri Community Improvement District. *Id*. That registration to vote is not synonymous with being qualified to vote is also demonstrated by the fact that the qualifications of a registered voter may be investigated. § 115.191, RSMo.

and unambiguous." *Wright-Jones v. Nasheed*, 368 S.W.3d 157, 159 (Mo. banc 2012) (citing *State ex rel. Young v. Wood,* 254 S.W.3d 871, 873 (Mo. banc 2008)). "Qualified voter" in Article III, section 4, means what the framers said qualifies one—i.e., makes one eligible—to vote: being a citizen, over the age of eighteen, legally competent, not involuntarily confined to a mental institution, and not excluded from voting because of conviction of a felony or crime related to the right of suffrage. Mo. Const. art. VIII, § 2.

The Eastern District went astray in *Burke* by substituting its own policy judgment for the clear and unambiguous language of Article III, section 4. The *Burke* court speculated that the framers could not have intended that a candidate not registered to vote in his or her own election might serve as a state representative. *Burke* 542 S.W.2d at 358. Absent from *Burke* is any explanation from the court as to why the framers could not have simply intended to permit voters to make a choice to elect a person who was eligible to vote, but not registered to vote, in his or her own election.[7] Contrary to *Burke*'s speculation,

[7] Vowell has described her reasons for not registering to vote sooner. They do not change that she was qualified to vote long before she registered. Nor should her decision disqualify her from office. One of Missouri's favorite sons, General of the Army Omar N. Bradley, refused to "vote in elections, considering this decision part of [his] duty" under his conception of military professionalism. Eric A.

there is nothing in the language of Article III, section 4, or any contemporaneous authority, to suggest that the framers sought to limit the choices of voters in this manner. Voters are capable of deciding for themselves whether to vote for someone who, while constitutionally eligible to vote, has not registered to vote.[8]

Hollister, *The Professional Military Ethic and Political Dissent: Has the Line Moved?,* The Association of the United States Army's Institute of Landwarfare National Security Affairs Paper No. 83, August 2011, at 2. Had Bradley returned home to Randolph County after retiring from the Army in 1953 and decided to run for state representative –perhaps answering a calling like his friend and colleague Dwight Eisenhower–he would not be able to do so if "qualified voter" is construed to require registration in Article III, section 4. This is not a result the drafters intended. Certainly, Bradley's neighbors might have chosen to be represented by him despite his principled decision not register to vote.

[8] The logic of *Burke* is faulty in other respects as well. If "qualified voter" means that an individual must be registered to vote in the election for the office he or she seeks, then a requirement of being a "qualified voter" in the context of Article III, section 4, would mean that a person running for election must be registered to vote in the district he or she seeks to represent for two years prior to the election; however, the provision itself has only a one-year residency

But *Burke* should not have attempted to divine the framers intent in the first place because the provision is clear and unambiguous. *Burke* made a policy choice, which is the provenance of framers and the people, not the courts.

Other states have refused to interpret the phrase "qualified voter" in their own laws as including only those individuals who are registered to vote. The Iowa Supreme Court noted "that one may be a qualified voter although not registered, and that one may not vote unless registered even though a qualified voter. We think it is generally recognized that, as said in 20 C. J. 81, 'registration is a regulation of the exercise of the right of suffrage and not a qualification for such right.'" *Piuser v. Sioux City*, 262 N.W. 551, 554 (Iowa 1935) (citations omitted). The Supreme Court of Pennsylvania explained:

> We cannot agree with the contention which was earnestly advocated before us, and which was also the opinion of the court below, that registration is an essential qualification of an elector. . . . Registration may be and usually is prerequisite to voting; but it is not a qualification for the exercise of the franchise. No attorney is permitted to argue before the bar of this court

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requirement. The constitutional requisite "interest" in the district's affairs is established by the residency requirement, not the qualification to vote.

> without being formally admitted; yet no one would contend that the mere motion for admission constitutes a qualification for practice. The same reasoning applies to registration for voting.

Petition of Sullivan, 160 A. 853, 854 (Penn. 1932). The Minnesota Supreme Court, quoting *Sullivan*, agreed and stated that "[m]any other cases could be cited in support of the same view." *Eastwood v. Donovan*, 105 N.W.2d 686, 688 (Minn. 1960). Those cases would include one from the Supreme Court of Tennessee and the Supreme Court of Washington. *See Trammell v. Griffin*, 207 S.W. 726, 727 (Tenn. 1918) (holding "the word 'voter' is used to describe a person entitled to register, and not a person actually registered. Indeed, . . . persons are referred to as 'qualified voters' before registration"); *Hindman v. Boyd*, 84 P. 609, 613 (Wash. 1906) (holding that "registration is not an element entering into the definition of a qualified voter[; moreover,] registration laws cannot be justly regarded as adding a new qualification to those prescribed by the Constitution, but that they are merely reasonable and convenient regulations prescribing the mode of exercising the right to vote.").

This Court should construe the phrase "qualified voter" in Article III, section 4, as meaning one who possesses the qualifications to vote, and is therefore eligible to vote, not as a substitute for the phrase "registered voter." "Statutes that regulate

access to the ballot are to be construed, if possible, to prevent disqualification of candidates." *State ex rel. Brown v. Shaw*, 129 S.W.3d 372, 374 (Mo. banc 2004) (citing *State ex inf. Mitchell v. Heath*, 132 S.W.2d 1001, 1004 (Mo. 1939)). Construing qualified voter to mean someone qualified to be a voter rather than adding the requirement that they be registered is what the framers intended. Moreover, if there is any question about the intent of the framers, then this Court should interpret the provision in a way to expand—rather than restrict—the choices of voters. Finally, as explained in Point III, there are serious constitutional issues that arise with the Secretary's interpretation. This Court has repeatedly held that any laws are "to be construed so as to render [them] constitutional, if this is possible." *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985). This rule of interpretation furthers a core principle of judicial restraint: "A court will avoid the decision of a constitutional question if the case can be fully determined without reaching it." *Id.*

For these reasons, this Court should hold that Vowell is a "qualified voter" as that phrase is used in Article III, section 4, and, thus, her name should be placed on the ballot because the choice whether to select her in the August 5 primary belongs to the voters of the district, not the Secretary.

III. The Secretary's actions and court dismissal of the case deprived voters of their right to vote; the separation of powers prohibited the Secretary from independently determining a candidate's qualifications in the manner undertaken; and the candidate eligibility requirements are likely unconstitutional.

The Secretary's actions in this case, together with the trial court's disposition of Appellant's challenges, deprive voters of any choice in the primary election for state representative for the 78th Missouri House District. Those actions also usurp from the legislature its exclusive authority to judge the qualification of its members.[9] Appellant is likely eligible for the office she seeks because the

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[9] Certainly, the legislature might provide a mechanism, with sufficient procedural safeguards, to delegate its authority to judge the qualifications of its members. As this Court noted in *State v. Young*, 362 S.W.3d 386 (Mo. banc 2012), the legislature has done so in section 115.526. However, when the legislature delegates this authority it provides extensive due process protection to insure that a disqualification decision is not made arbitrarily or without adequate notice and the opportunity to be heard before a neutral judge. There is no such due process protection in the statute that the Secretary claims gives him unilateral authority to remove Vowell from the ballot, which strongly suggests that the legislature did not intend to provide him the power he seeks to exercise.

Secretary's interpretation of the eligibility requirements is probably unconstitutional. But, in any event, the unilateral removal of a candidate from the ballot based on a questionable interpretation of the eligibility requirements, after the time has passed for any other candidate to seek the office, strips the voters of any meaningful right to vote.

In Missouri, the right to vote is a fundamental right. *Weinschenk v. State*, 203 S.W.3d 201, 211-12 (Mo. banc 2006). Although this case is brought by a candidate who has been declared ineligible to have her name on the ballot after her declaration of candidacy was accepted by the Secretary, the effect of the Secretary's action harms voters—including Amici Stege and Coil. As the Supreme Court of the United States has observed, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972). This stems from the foundational democratic principle that voters have the freedom to associate with the candidate of their choice.[10]

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[10] The connection between the right to vote and candidate access to the ballot is further demonstrated by courts consistently recognizing that voters have standing to challenge unconstitutional statutory provisions that prevent candidates from appearing on the ballot. *See, e.g.*, *Belitskus v. Pizzingrilli,* 343 F.3d 632, 641

"In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Bullock*, 405 U.S. at 143.[11] When restrictions "do not impose a heavy burden on the right to vote, they will be upheld provided they are rationally related to a legitimate state interest." *Weinschenk*, 203 S.W.3d at 215-16. On the other hand, "[i]f the regulations place a heavy burden on the right to vote, . . . they [are] subject to strict scrutiny." *Id.* at 216.

A realistic examination of the process employed by the Secretary to remove Vowell from the primary ballot demonstrates that the impact on voters is severe.

(3d Cir. 2003); *Burdick v. Takushi*, 937 F.2d 415, 417-18 (9th Cir. 1991); *McLain v. Meier*, 851 F.2d 1045, 1048 (8th Cir. 1988); *Young v. Ill. State Bd. of Elections*, 116 F. Supp. 2d 977, 980 (N.D. Ill. 2000); *see also Miyazawa v. City of Cincinnati*, 45 F.3d 126, 128 (6th Cir. 1995) (recognizing the principle that a voter "unable to vote for his specific candidate of choice due to the subject law" has standing to challenge that law).

[11] Federal constitutional standards apply to Missouri elections of representatives to the state legislature because, in "an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 54 (1970).

Instead of a choice of candidates to represent the residents of the 78th Missouri House District, the Secretary's actions, taken unilaterally and without authority from the legislature, will impose a representative upon them. Indeed, "[t]he exclusion of candidates . . . burdens voters' freedom of association[.]" *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983). Although a state's law normally carries a presumption of constitutionality, "'when a regulation allegedly infringes on the exercise of first amendment rights, the [law]'s proponent bears the burden of establishing the [law]'s constitutionality.'" *Phelps-Roper v. Koster*, 713 F.3d 942, 949 (8th Cir. 2013) (quoting *Ass'n of Cmty. Orgs. for Reform Now v. City of Frontenac,* 714 F.2d 813, 817 (8th Cir.1983) and citing *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 816 (2000)). Thus, the Secretary, in response to a First Amendment challenge to the registration requirement, must "'demonstrate that the government's objectives will not be served sufficiently by means less restrictive of first amendment freedoms.'" *Id.* (quoting *Pursley v. City of Fayetteville, Ark.,* 820 F.2d 951, 956 (8th Cir. 1987) and citing *Casey v. City of Newport, R.I.,* 308 F.3d 106, 110-11 (1st Cir. 2002); *Hays Cnty. Guardian v. Supple,* 969 F.2d 111, 118 (5th Cir. 1992)). In this case, the Secretary has not advanced any argument that could satisfy this burden.

The two-year voter-registration requirement that courts have construed from Article III, section IV of the Missouri constitution is likely unconstitutional, either

on its face or as applied to Vowell, for other reasons as well. In the analogous case of a voter registration requirement for circulators of candidate nominating petitions, courts have unanimously held that such a requirement burdens First Amendment rights and, therefore, is subject to strict scrutiny. *See Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 194 (1999). The Supreme Court has recognized that a registration requirement in the circulator context "produces a speech diminution" by "limit[ing] the number of voices" participating in the conveyance of a political message. *Buckley*, 525 U.S. 194-95. Similarly, like a fee requirement, the regulation related to voter registration "creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose." *Bullock*, 405 U.S. at 143. Here, the registration requirement has the same effect as those found unconstitutional by the Supreme Court—by cutting persons like Vowell out of eligibility for office, the state limits voters' ability to choose from among their neighbors who will represent them in the legislature. Indeed, prohibiting voters in the 78th Missouri House District from selecting the candidate of their choice places the type of "heavy burden" on their right to vote that was described in *Weinschenk*.

That is not to say that the requirement is *per se* unconstitutional, but rather that registration requirements have been required to satisfy strict scrutiny. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1988) (subjecting

Connecticut's requirement that voters in any party primary be registered members of that party to strict scrutiny because it burdened the "associational rights of the Party and its members"). "This is consistent with the past decisions of Missouri courts, which have uniformly applied strict scrutiny to statutes impinging upon the right to vote." *Weinschenk*, 203 S.W.3d at 215.

Under strict scrutiny review, the government bears the burden of showing that a regulation "serves a compelling state interest and . . . is necessary and narrowly tailored to accomplish that interest." *Id.* at 216; *see also Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 409 (6th Cir. 1999). In the truncated proceedings below, the Secretary did not advance *any* government interest, much less a compelling one, nor show that the registration requirement was necessary and narrowly tailored.

Even if strict scrutiny were not required, the state would nonetheless need to demonstrate that its registration requirement is "rationally related to a legitimate state interest." *Weinschenk*, 203 S.W.3d at 216. On this record, the Secretary has not even done that. The government's interest in limiting whom its citizens may elect to represent them is necessarily narrow. Unlike the state interest in durational residency requirements, a candidate who has lived within a state and district but not registered to vote is familiar with the community and local issues. A requirement that one be registered to vote for two years does not promote a

candidate's stake in the interest of the community, particularly here, where the refusal to register is a statement of protest because of Vowell's frustration with local politics. The registration requirement is also different than an age requirement, which would ensure that candidates have some life experience and (perhaps) maturity. Finally, the two-year registration requirement is arbitrary in the absence of any indication why a shorter requirement would not serve any identifiable state interest equally as well. *See Day v. Robinwood W. Cmty. Improvement Dist.*, 693 F. Supp. 2d 996, 1007 (E.D. Mo. 2010) (finding Missouri's voter registration requirement for nonresident landowners in a Community Improvement District to be irrational and arbitrary). Certainly, voters might prefer a candidate who has a lengthy history of being registered to vote, but it is not apparent what interest the state has in imposing that choice upon voters.

The harm this case presents to voters is that it deprives them of a choice in the primary election while questions of eligibility and the constitutionality of the registration requirement are worked through the courts. Here, the Secretary has acted outside the power and procedures provided by the legislature and constitution, which allow such issues to be addressed without depriving voters of a meaningful right to vote.

First, "the people of this state have specifically made a 'textually demonstrable constitutional commitment' to its house of representatives power to

be the 'sole judge' of the qualifications of its own members. That fact is not debatable." *State on Info. of Danforth v. Banks*, 454 S.W.2d 498, 500 (Mo. banc 1970). The legislature itself can judge the qualifications of Vowell if she is elected and decline to seat her if it determines she is not qualified. It is not within the constitutional authority of the Secretary to preemptively supplant his judgment for that of the legislature. Because the "separation of powers [is] so fundamentally vital to our form of government," courts "have the duty and obligation to protect the right of the legislative department . . . to exercise those powers specifically delegated to it in the same manner we would a similar challenge to the powers of the judiciary." *Id.*

Certainly, the possibility that Vowell might not be seated is a matter the voters could consider. But, the possible result that Vowell is elected, then not seated, is nonetheless more protective of voters' rights than the Secretary's unilateral action removing her from consideration. If Vowell were elected but not seated, then a vacancy would occur and voters would have another election in which to choose a representative. *See* § 21.110, RSMo ("If the governor receives any resignation or notice of vacancy, . . . he shall, without delay, issue a writ of election to supply the vacancy."). If the Secretary's action is sustained, however, voters will have no choice and a representative will be imposed upon them.

Second, there is the statutory procedure for challenging a candidate's qualifications for office. *See* § 115.526, RSMo. The fact that the legislature has provided a mechanism for courts to review qualifications under limited circumstances further demonstrates that the legislature did not intend to share its authority with the Secretary. If the legislature wished to give the Secretary the power he exercised in this case, then it would have passed a statute saying so.[12]

There are serious questions about the constitutionality of the registration requirement upon which the trial court premised its resolution of this case. As a threshold matter, now that the time for the challenge procedure established by the legislature has passed, it is the province of the legislature—not the Secretary nor the courts—to make an initial determination of whether Vowell is qualified to serve should she be elected. Whichever way these questions are ultimately resolved, however, the voters of the 78th Missouri House District should not be deprived of the opportunity to cast a meaningful vote.

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[12] A third option, an action in the nature of *quo warranto* to adjudicate title to a public office should Vowell be elected, would likely not be available because of the separation of powers. *See Banks*, 454 S.W.2d at 501-02.

Conclusion

Based on the foregoing, Amici Curiae urge this Court to reverse and vacate the judgment of the circuit court and remand for further proceedings consistent with the discussion above, and with instructions that Vowell be certified to appear on the primary ballot.

Respectfully submitted,

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Certificate of Service and Compliance

The undersigned hereby certifies that on July 9, 2014, the foregoing amicus brief was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 8,053 words (excluding the cover, signature block, and this certificate of service and compliance), as determined using the word-count feature of Microsoft Office Word 2007. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert