SC94285

IN THE SUPREME COURT OF MISSOURI

NATALIE A. VOWELL,

Plaintiff-Appellant,

v.

JASON KANDER, in his official capacity as Missouri Secretary of State,

Defendant-Respondent.

APPEAL FROM THE NINETEENTH CIRCUIT COURT OF COLE COUNTY
The Honorable Jon Beetem, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

David E. Roland, MBE #60548
14779 Audrain Co. Rd. 815
Mexico, Missouri 65265
Phone: (314) 604-6621
Fax: (314) 720-0989
Email: libertyandjustice@gmail.com

Attorney for Petitioner-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CONSTITUTIONAL PROVISIONS

ARGUMENT

I. The Secretary Misrepresented Or Denied The Existence Of Facts Established In Vowell's Petition, While Also Asserting Facts Not In Evidence.

The most egregious denial of a fact established by Vowell's Petition comes on page 30 of the Secretary's Substitute Brief, where he argued there is no evidence that Vowell chose not to register to vote as a form of political protest. This directly contradicted Vowell's statements in paragraphs 6 and 7 of her Petition: "Ever since she moved to St. Louis, Vowell has been frustrated by the political status quo. She believed the system to be so dominated by entrenched interests and stacked against ordinary citizens that voting was just a waste of time. Vowell expressed her frustration with the political status quo by choosing not to register to vote." (LF at 5). It also ignored Vowell's allegation in paragraph 36 of her Petition that by leaving her off the ballot the Secretary would be "penalizing Vowell for her expressive decision to protest a political system she believed to be broken by refraining from registering to vote." (LF at 10-11). The Secretary had an opportunity to contest these facts at the trial level, but he chose not to; they are conclusively established for the purpose of this case.

The Secretary's brief also asserted falsehoods related to the foundation of Vowell's lawsuit. The Secretary claimed that Vowell "had the opportunity to seek administrative review pursuant to § 536.150," but instead "pursued the present action *to appeal the finding of disqualification*." Substitute Brief of Respondent at 29. Neither claim is true. As an

initial matter, Vowell has never suggested that this action is an "appeal" of a finding by the Secretary. To the contrary, her action challenges (1) the Secretary's authority unilaterally to render any judgment about Vowell's qualifications, and (2) the constitutionality of Missouri's durational voter registration requirement. Furthermore, as Vowell noted on page 20 of her Substitute Brief, she could only have filed an action based on Section 536.150 if she had waited for the Secretary to make a final determination. *See Dore & Associates Contracting, Inc. v. Mo. Dept. of Labor & Indus. Relations Com'n*, 810 S.W.2d 72, 75-76 (Mo. App. W.D. 1990) ("Finality" found when there is "terminal, complete resolution;" no finality "while it remains tentative, provisional, or contingent, subject to recall, revision or reconsideration"). The Secretary's May 6 letter in no way constituted a final determination; it merely informed Vowell that the Secretary intended to *make* a final determination. (LF at 14). The Secretary did eventually provide notice of his final determination on May 23, 2014 – two days *after* the trial court rendered its judgment in this case. Although not part of the official record because the Secretary did not issue the letter until after the trial court had already rendered a judgment, Vowell is providing true and correct copy of this notice in an attached appendix for the Court's reference. Appellant's Substitute Reply Brief Appendix. Thus, the only way Vowell could have pursued an action under section 536.150 would have been to wait for the Secretary to issue his final decision, and in this case that would have delayed any possible judicial resolution of her challenge by at least another ten days. Given that the Court of Appeals below rendered its opinion on June 19, 2014 – only five days before the statutory deadline for

adding a candidate's name to the August 5, 2014, primary election ballot – an additional ten day delay likely would have been fatal to Vowell's effort to secure her rightful place on the ballot. Thus, contrary to the Secretary's assertion, she had no realistic opportunity to pursue a claim under section 536.150.

The Secretary also repeatedly claimed the existence of a system or process through which his office evaluates the qualifications of every candidate, but the record is devoid of any evidence that such a system actually exists. Despite his insistence that Section 115.387 obligates his office to evaluate *all* of the factors that might disqualify a would-be candidate for office, the Secretary acknowledged before the trial court and before the Court of Appeals that his office lacks the *ability* to evaluate all of those factors. (Tr. at 33; *Vowell v. Kander*, No. WD77591, 2014 WL 2766670, *11 fn4 (Mo. App. W.D. June 19, 2014)). Additionally, there is nothing in the record establishing what information the Secretary does have available or what "process" (assuming it actually has any "process" at all) his office uses to evaluate candidates' qualifications. There is no indication as to how such an evaluation would be made, when it would be made, or who would make it. The record is clear that such a process is not established by statute or regulation, and the Secretary "has asserted complete discretion to decide for himself who will be permitted to appear on a primary ballot." (LF at 9). Thus, given that there are no formal guidelines related to the Secretary's alleged "process," this Court should take with a grain of salt anything the Secretary asserts about even the existence of such an alleged "process."

The Secretary also attempted to mislead the Court by asserting what it implies is a statement of fact – that Vowell "admits that she is not qualified as a candidate." Substitute Brief of Respondent at 7. This is, of course, not true. Vowell admitted that on the date of the relevant election she will only have been registered to vote for sixteen months, rather than the twenty-four months required by Article III, section 4 – but her contention has always been that the twenty-four month voter registration requirement is unconstitutional and, therefore, she meets all *legitimate* qualifications to serve in the office for which she is seeking election. Thus, although the Secretary seems intent on leading the Court to believe that Vowell has made an admission that forecloses her legal challenges, all the Secretary really did is make conclusory, unsupported assertions that beg one of the very questions this Court is called upon to decide. *See, e.g.*, Substitute Brief of Respondent at 12 (claiming that it is an "undisputed fact" that Vowell cannot be seated in the 2015 General Assembly).

II. The Secretary Nonsensically Argued That No One Can Ever Have Standing To Challenge The Durational Voter Registration Requirement.

The Secretary took the frankly absurd position that Missouri's durational voter registration requirement is completely beyond constitutional scrutiny. It is black-letter law that only those adversely affected by a legal provision have standing to challenge the constitutionality of that provision. *Brehm v. Bacon Tp.*, 426 S.W.3d 1, 5 (Mo. banc 2014). And yet the Secretary argued that Vowell cannot challenge the constitutionality of Missouri's durational voter registration requirement *precisely because* it penalizes her for violating her constitutional rights. Substitute Brief of Respondent at 12. So, according to

the Secretary, the durational voter registration requirement is either insulated from constitutional challenge because would-be challengers are *not* adversely affected by the requirement, or, as in Vowell's case, the requirement is insulated from constitutional challenge because she *is* adversely affected by it. Vowell will politely refer to this argument as "nonsense."

III. The Secretary Belabored Points of Law That Are Not At Issue.

The Secretary spent a significant part of his brief arguing points of law that simply are not in dispute. Although the Secretary appears to have overlooked it,[1] Vowell conceded on page 37 of her Substitute Brief that Missouri courts have long held that for someone to be a "qualified voter" they must have actually registered to vote. The constitutional issue in this case has never hinged on whether Vowell will have been a qualified voter for twenty-four months at the time of this November's general election, but rather whether the durational voter registration requirement can survive the appropriate level of scrutiny required given the fact that this requirement penalizes the exercise of rights protected under the First and Fourteenth Amendments. And yet the Secretary devoted the entirety of section I(A) of his Substitute Brief to "proving" a point not at all in dispute.

Additionally, despite the fact that Vowell never made any indication in her notice of appeal, her briefs and argument before the Court of Appeals, or her Substitute Brief before

[1] See Substitute Brief of Respondent at 1.

this Court that she was pursing a procedural due process claim as part of this appeal, the Secretary's Substitute Brief dedicated six paragraphs to arguing this uncontested point. Substitute Brief of Respondent at 27-29. Similarly, although Vowell expressly stated in her own Substitute Brief that she was not asserting a constitutionally-protected, fundamental "right to be a candidate," the Secretary's brief seemed to presume that this is her primary constitutional argument. See Substitute Brief of Respondent at 23, 29. The Secretary's arguments on these points are utterly irrelevant to the issues Vowell has appealed and this Court should disregard them.

IV. The Secretary Misrepresented Vowell's Argument Regarding § 115.387.

The Secretary's brief suggested that Vowell endorses the idea that section 115.387 gives the Secretary at least partial authority to "consider some statutory qualifications" and, presumably, to make his own determinations about whether a candidate satisfies these qualifications. Substitute Brief of Respondent at 14. This is completely incorrect. As Vowell's Substitute Brief showed at pages 27 and 28, certain statutes give *other* government entities the power to evaluate and pass judgment on candidates' qualifications. Section 115.387 merely reflects the fact that once a statutorily-authorized entity, such as the Department of Revenue or the courts, have rendered *their* judgments that a candidate is not entitled to be voted for, the Secretary should exclude the disqualified candidate from the ballot.

Reference to sections 115.342 and 115.526 is also useful for the purpose of demonstrating that when the General Assembly designates power to evaluate and pass

judgment on a candidates' qualifications, it makes its intentions clear. For example, section 115.342.3 details how the Department of Revenue's review of a candidate's tax records is to proceed: (1) someone must file a complaint with the Department of Revenue alleging a tax delinquency; (2) the Department of Revenue investigates to verify the complaint; (3) if the Department of Revenue determines that the complaint is justified, the Department informs both the Secretary and the candidate; (4) the candidate is given thirty days to remedy any uncontested delinquencies; and (5) if the candidate fails to pay the amount required by the Department of Revenue, they are disqualified from participating in the election and – based on the *Department of Revenue*'s determination – the Secretary should not certify the candidate for the ballot. The General Assembly's assignment of authority is unambiguous and detailed. Similarly, as Vowell described in pages 15 to 17 of her Substitute Brief, the General Assembly left no ambiguity whatsoever in section 115.526 when it assigned the courts authority to review other allegations that candidates should be disqualified from running for office. If, as the Secretary contends, the General Assembly intended to convey to the Secretary the expansive authority he claims to evaluate and pass judgment on candidates' qualifications, the General Assembly clearly knew how to make its intentions known. That the General Assembly *did not* take a similar approach in section

115.387 demonstrates that it had no such intention and this Court should soundly reject the Secretary's unauthorized power-grab.[2]

V. The Secretary Failed To Justify The Durational Voter Registration Requirement Under Any Standard Of Scrutiny.

Mystifyingly, the Secretary made almost no effort to support any of his assertions regarding the constitutional claims Vowell is pursuing on this appeal. The Secretary complained that in her Petition Vowell only identified the constitutional provisions she claims were violated and that her Petition did not explicitly identify Article III, section 4 of the Missouri Constitution when Vowell outlined the facts demonstrating the constitutional violations she intended to challenge. Substitute Brief of Respondent at 21. But, as the Secretary conceded at oral argument before the Court of Appeals, this Court has *never* held that one alleging a constitutional violation must in their Petition limit the scope of their challenge by identifying the specific legal provisions that led to the violation, and the Secretary did not cite any authority for this proposition. The Secretary's argument

---

[2] The Court should note that, although he tried to persuade the Court that it only needs to endorse *part* of the authority the Secretary asserts, the Secretary's Substitute Brief completely confirmed Vowell's description of the vast, unfettered authority the Secretary has claimed. The language of section 115.387 does not permit the Court to endorse part of the Secretary's claimed authority without effectively endorsing all of it.

is entirely unsupported and unprecedented, and the Secretary has given this Court no reason to take it seriously.

Elsewhere in the Secretary's Substitute Brief, he attempted to persuade the Court that Vowell has not presented any legitimate constitutional arguments. In doing so, the Secretary cited two cases for the proposition that "the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" Ironically, in *both* of the cited cases the courts struck down the restrictions at issue because they unjustifiably burdened the plaintiffs' constitutional rights.

In *Bullock v. Carter*, 405 U.S. 134 (1972), the U.S. Supreme Court noted that a requirement that candidates pay a large filing fee "in every practical sense precluded [the plaintiff] from seeking the nomination of their chosen party, no matter how qualified they might be, no matter how broad or enthusiastic their popular support."[3] Addressing the plaintiff's Equal Protection claim, the court held that it made no difference that all

[3] Importantly, the filing fee the court was considering *only* applied to party primaries. Under the scheme at issue in *Bullock* a candidate could still access the ballot through alternative means. *Id*. at 146-47. This is not true of Missouri's durational voter registration requirement, which penalizes citizens' speech by completely excluding would-be candidates such as Vowell from running for the state legislature not only for the duration of a political protest, but for two years afterward.

candidates were subject to the exact same requirement. The requirement created two classes of persons and gave one group an opportunity not open to the other. Because the restriction impacted both the rights of the candidate to run for office and the rights of the voters to choose the candidate to represent them, the court held that the proper approach was to apply close scrutiny such that the restriction would only be upheld if "reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster."[4] *Id.* at 144. The court noted that "even under conventional standards of review… the criterion for differing treatment must bear some relevance to the object of the legislation" and that the government had failed to show that the restriction at issue was *necessary* for accomplishing the government's asserted interests, even if the restriction might theoretically be *related* to accomplishing the government's asserted interests. *Id.* at 145-47.

In *Peeper v. Callaway Co. Ambulance Dist.*, 122 F.3d 619 (8th Cir. 1997), the Eighth Circuit Court of Appeals considered a government board's resolution restricting one board member's participation as a member of the board. Applying the *Anderson* test, the court

[4] It is important to note that *Bullock* precedes by more than a decade the test the U.S. Supreme Court announced in *Anderson v. Celebrezze*, 460 U.S. 780 (1983); the *Anderson* test is now the appropriate framework for courts to apply when considering constitutional challenges to restrictions on citizens' participation in the political process.

held that the restriction could not even survive scrutiny under the rational basis test.[5] The government had asserted three interests that allegedly were served by the restriction (preventing use of information for personal gain, preventing appearance of impropriety, and promoting free flow of ideas among board members), but the court struck down the broad restriction on Peeper's participation as a board member – not because the restriction had *nothing* to do with the asserted interests, but because the restriction was far more expansive than reasonably necessary to accomplish those alleged interests. *Id.* at 624.

The Secretary also contends (without any citation or substantive argument) that Vowell's protest offers "no valid or realistic First Amendment claim." Substitute Brief of Respondent at 30. But the U.S. Supreme Court has long held that the First Amendment is implicated when government conditions citizens' participation in the political process on their willingness to cease engaging in constitutionally protected activity. In *McDaniel v. Paty*, 435 U.S. 618 (1978), the U.S. Supreme Court considered a provision of the Tennessee Constitution that prohibited anyone engaged in full-time religious ministry from serving as a legislator. A political opponent relied on this provision to challenge a Baptist

---

[5] This was the incorrect standard of scrutiny, given the fact that the court agreed that the restriction injured Peeper's First and Fourteenth Amendment rights. *Id*. at 623. Nonetheless, it is telling that the court held the restriction unconstitutional even uder the far more lenient rational basis test.

minister's qualifications to serve as a delegate to the state's constitutional convention, and the Tennessee Supreme Court ruled that the minister was, indeed, disqualified unless he relinquished his position as a minister. *Id*. at 621. Although the U.S. Supreme Court determined that the challenged restriction was "directed primarily at status, acts, and conduct," and not to matters of belief or the sort of preaching or proselytizing that might be undertaken by lay persons, the court applied strict scrutiny to Tennessee's restriction because "condition[ing] the availability of benefits, including access to the ballot, upon this appellant's willingness to… surrender[] his religiously impelled ministry effectively penalizes the free exercise of his constitutional liberties." *Id*. at 626. Tennessee was unable to advance a justification for this restriction sufficient to overcome the minister's right to hold elective office.

Similarly, in *Buckley v. American Constitutional Law Foundation, Inc*., 525 U.S. 182 (1999), the U.S. Supreme Court considered a First Amendment challenge to a Colorado law that imposed a range of restrictions on people who wanted to circulate initiative petitions. Among the challenged restrictions was a requirement that petition circulators must be registered voters.[6] Colorado acknowledged that the restriction burdened speech,

---

[6] This was a simple voter registration requirement, rather than a *durational* requirement. Although a simple registration requirement still burdens the First Amendment rights of those who protest the political system by refusing to register to vote, it is more easily

but argued that the burden was very light because "it is exceptionally easy to register to vote." *Id*. at 195. But Justice Ginsburg, writing for the majority, noted that "the ease of registration misses the point" because "the choice not to register implicates political thought and expression" in that for some would-be circulators the refusal to register is a form of protest "because they don't believe that the political process is responsive to their needs." *Id*. at 195-96. The Court struck down the simple voter registration requirement because the government had not shown that its interest in imposing the requirement justified the burden on citizens' rights, particularly when another, less-burdensome requirement was adequate to serve the government's asserted purpose. *Id*. at 197.

The record in the instant case demonstrates that Vowell's choice not to register to vote before July 2013 (even though she was otherwise qualified to do so) was intended to communicate her frustration with the political status quo, and that the durational voter registration requirement directly and severely penalizes her as a result of her protest. U.S. Supreme Court precedent demonstrates that citizens present a valid constitutional claim when they show that a state has restricted their ability to participate in the political process as a consequence of exercising rights protected by the First or Fourteenth Amendments.

---

satisfied than a durational requirement. Because a durational requirement creates a much greater burden on one protesting the political system, the government must do much more to justify the burden created by a durational registration requirement.

See, e.g., Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 449-50 (1974) (preventing citizens' access to the ballot or ability to run for office infringes interests "certainly as substantial as those in public employment, tax exemption, or the practice of law"); *Kusper v. Pontikes*, 414 U.S. 51 (1973) (finding substantial abridgement of constitutional rights where state law prohibited voting in one party's primary for 23 months after voting in another party's primary); *Bond v. Floyd*, 385 U.S. 116 (1966) (legislature could not deny candidate a seat on the basis that he had engaged in a political protest).

In his Substitute Brief the Secretary asserted only one interest allegedly served by the durational voter registration requirement for state legislators: "ensuring that office holders have an established stake in the administration of government and in the community they seek to represent."[7] Substitute Brief of Respondent at 28-29. But beyond this perfunctory statement the Secretary makes no effort whatsoever to explain why the Court should consider this alleged interest "legitimate," much less "substantial" or "compelling," nor does he offer any explanation as to why this interest requires the state to exclude from the state legislature citizens who registered to vote sixteen months before their election rather than twenty-four months before their election. The absence of *any* attempted justification

[7] Vowell anticipated that the Secretary might assert this sort of government interest and addressed it on pages 50 and 51 of her Substitute Brief; the Secretary did not respond to Vowell's arguments.

for this distinction demonstrates that it is purely arbitrary. The Secretary utterly failed his requirement, pursuant to the *Anderson* test, to show that the restriction he is attempting to defend is *necessary* for the accomplishment of the asserted interest.

Addressing a different component of the *Anderson* test, the Secretary argued that an absolute prohibition against a candidate's running to serve in the state legislature during one election cycle is not a significant burden on her constitutional rights because the candidate might be eligible to run in a future election cycle,[8] but the Secretary cited cases that do not support this assertion. In both *Labor's Educational and Political Club-Independent v. Danforth*, 561 S.W.2d 339 (Mo. banc 1977), and *Barham v. Moriarty*, 880 S.W.2d 373 (Mo. App. W.D. 1994), citizens wishing to run for office had a chance to take action that would have allowed them to be candidates in the current election cycle; Vowell had no such opportunity. Additionally, the U.S. Supreme Court has held that blocking a would-be candidate from running in a particular election is, in fact, a serious burden on the candidate's rights. See *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (striking down restriction on candidate's access to ballot even though candidate might be able to overcome restriction

[8] As Vowell has noted, she and other citizens like her would only be able to run for the state legislature in future elections if they refrain from engaging in future political protests or from temporarily moving across state lines. This creates the quintessential unconstitutional condition.

in future election cycles); *Bullock*, 405 U.S. at 146-47 (striking down restriction on access to primary election ballot, even though candidates could still be listed on general election ballot).

Thus, this Court has no alternative but to find that the durational voter registration requirement for state legislators cannot be justified under any level of scrutiny, much less the heightened scrutiny required under the applicable U.S. Supreme Court precedents and this Court's own precedents.

CONCLUSION

Vowell respectfully asks this Court to rule in her favor, reversing and vacating the judgment of the trial court and remanding for further proceedings consistent with the discussion above, including an instruction that Vowell's name shall remain on the August primary election ballot so that her constituents in the 78th Representative district may vote for her.

Respectfully submitted,

DAVID E. ROLAND, MBE #60548
14779 Audrain Co. Rd. 815
Mexico, Missouri 65265
Phone:(314) 604-6621
Fax: (314) 720-0989
Email: libertyandjustice@gmail.com

Attorney for Petitioner-Appellant

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that I electronically filed a true and correct copy of the foregoing via Missouri CaseNet on July 14, 2014, to:

James R. Layton
Jonathan M. Hensley
Attorney General's Office
Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
James.Layton@ago.mo.gov
Jonathan.Hensley@ago.mo.gov

Attorneys for Respondent

Anthony E. Rothert
Grant R. Doty
Gillian R. Wilcox
ACLU of Missouri Foundation
454 Whittier Street
St. Louis, Missouri 63108
trothert@aclu-mo.org
gdoty@aclu-mo.org
gwilcox@aclu-mo.org

Attorneys for Amici Curiae

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains no more than 3,860 words.

Respectfully submitted,

David E. Roland
Attorney for Petitioner-Appellant