NO. 21-1360

IN THE

# Supreme Court of the United States

MIKE KOWALL, ET AL.,

*Petitioners,*

v.

JOCELYN BENSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## REPLY BRIEF FOR PETITIONERS


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To diminish the obvious split in authority over how courts analyze candidate restrictions, Respondent Secretary Benson and amicus U.S. Term Limits each create a strawman question presented, then spend pages explaining why the Court should not grant review of their imaginary question.

Start with Secretary Benson. She essentially concedes that there is a substantial split of authority regarding the standard for reviewing candidacy restrictions. So instead, she argues that term limits are candidate *qualifications*, not restrictions. That argument is both wrong and irrelevant. To begin, term limits have nothing to do with whether a candidate is qualified by age, citizenship, place of residence, and the like. Such limits only do one thing—restrict candidates who have previously been elected to the same office. Term limits are just as much "a restriction" as a law that punishes a member of the civil service from running for office, or one that imposes a waiting period after public service before declaring a run for public office.

More important, there is no functional difference between the two. Secretary Benson does not explain why it should matter whether a law prohibits candidacy for life after serving three terms in the House or prohibits candidacy until two years have elapsed since a person previously held certain civil-service positions. And she cites no authority suggesting there is a difference, either. Accordingly, the trenchant split of authority remains.

As for amicus U.S. Term Limits, it pretends that Petitioners are making a structural objection over which this Court lacks jurisdiction, like cases involving partisan gerrymandering, or how many representatives should be included in a state legislative chamber. By labeling term limits "structural," U.S. Term Limits can argue that this case presents a nonjusticiable question under the Guarantee Clause. But Petitioners are not testing Michigan's governmental structure; they're challenging candidate restrictions that prevent them *individually* from running for office. Again, the split of authority remains.

And that split is not only deep and mature, it involves an issue of substantial importance—the government's ability to restrict who appears on the ballot. As the petition explains, and Secretary Benson and U.S. Term Limits do not rebut, the holding below allows states in the Sixth Circuit to prohibit all candidates older than 30, or all those with a net worth exceeding $25,000. Such a result cannot possibly be what the Constitution allows. And to be clear, Petitioners are not claiming a fundamental right to candidacy. They are taking the reasonable position that the First and Fourteenth Amendments do not give government officials unfettered discretion to restrict a particular candidate's expression and association.

Finally, there's the matter of the ballot measure that Michigan voters will consider this November to reform Michigan's shortest, harshest-in-the-nation term limits. Michigan voters frequently reject ballot measures. So, unless and until they actually adopt this particular proposal, Petitioners' claim is not moot.

For all these reasons, certiorari is warranted.

## REPLY ARGUMENT

As the petition explains, the right to run for public office is one of the quintessential forms of political expression in our country, and it implicates two, fundamental, First Amendment freedoms: individual expression and freedom of association. That is why five circuits and four state courts of last resort have all subjected laws that infringe these freedoms to heightened scrutiny, in stark conflict with the rational-basis review that the Sixth Circuit panel applied here. Pet.20–29. Respondent does not diminish the nature of that conflict nor its importance.

### I. Secretary Benson draws a false and meaningless distinction between candidate qualifications and candidate restrictions.

Secretary Benson's primary argument in opposition to certiorari is that cases involving candidacy restrictions "have nothing to do with candidates' qualifications for office." Opp.11. But that is a meaningless distinction that does not make a difference.

Secretary Benson provides no test for determining whether a law prohibiting ballot access is a candidacy "restriction" or instead a "qualification." As a result, it's not at all clear which label to assign to term limits. After all, prohibiting someone from being on the ballot simply because of a position they once held sounds much like "laws barring civil servants from office," laws which Secretary Benson categorically labels "restrictions." And in *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779 (1995), this Court used the terms interchangeably, referring to state power to set "qualifications" for office synonymously with state-imposed, ballot-access "restrictions."

Qualitatively, term limits are much more like laws barring civil servants from office, or laws requiring a gap after leaving certain offices before running for public office, than to laws that impose age or citizenship requirements. When a candidate has experience serving in the office for which she is running, that experience makes her more "qualified" for the position, not less. A state-imposed term limit is not a statement about "qualifications" at all, but rather a policy choice that "exclude[s] candidates from the ballot without reference to the candidates' support in the electoral process." *Thornton*, 514 U.S. at 835. So, the most accurate characterization of term limits is that they are candidate restrictions, and Secretary Benson does not contest that there is a split of authority over how to evaluate such restrictions.

But no matter. When it comes to assessing the free-expression and free-association rights of candidates and voters, there is no difference based on whether a state labels a particular ballot bar as a "restriction" or a "qualification." Either way, constitutional rights are being infringed. Either way, some degree of heightened scrutiny should apply.

To be sure, the government will often be able to satisfy heightened scrutiny when courts evaluate ballot restrictions or qualifications. For example, in *Commonwealth ex rel. Toole* v. *Yanoshak*, 346 A.2d 304 (Pa. 1975), the Supreme Court of Pennsylvania applied heightened scrutiny yet held there was a "compelling state interest" in protecting the government from official misconduct resulting from certain officers "being in the position of auditing their own books." *Id.* at 306; see Pet.26. And in *Claussen* v. *Pence*, 826 F.3d 381 (7th Cir. 2016), the Seventh Circuit upheld a law prohibiting individuals from

simultaneously holding elected office and being employed as civil servants in the same unit of Indiana government. *Id.* at 387; see Pet.27. No doubt a state could also justify a law requiring that a candidate live in the district she seeks to represent.

But in other instances, the opposite will be true. See Pet.20–29 (discussing *Mancuso* v. *Taft*, 476 F.2d 187 (1st Cir. 1973), *Minielly* v. *State of Oregon*, 411 P.2d 69 (Or. 1966), *State ex rel. Piccirillo* v. *City of Follansbee*, 233 S.E.2d 419 (W. Va. 1977), *Bolin* v. *State of Minn. Dep't of Pub. Safety*, 313 N.W.2d 381 (Minn. 1981), and *Peeper* v. *Callaway Cnty. Ambulance Dist.*, 122 F.3d 618 (8th Cir. 1997), all of which applied heightened scrutiny and struck down ballot qualifications/restrictions).

Secretary Benson has no principled way to distinguish any of these cases other than to say they "did not involve term limits." Opp.12. And her attacks on Petitioners' reliance on these authorities are misguided. For example, Petitioners did not cite these cases in their Sixth Circuit briefing, see Opp.12, because the district court applied the *Anderson-Burdick* sliding-scale to evaluate the propriety of Michigan's term limits, Pet.App.20a–22a. The primary problem in the district court's analysis—and thus the focus of Petitioners' direct appeal—was that the district court wrongly considered it "not severe" for a state to banish a candidate from the ballot for life after serving only six years in a particular office. Pet.App.20a. The Sixth Circuit's decision was the first in this litigation to apply mere rational-basis review to a ballot prohibition, necessarily changing the focus of the petition for certiorari.

Secretary Benson says the First Circuit's decision in *Mancuso* is obsolete after *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973), and *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1972). But those cases had nothing to do with keeping individuals off the ballot because of who they are. They were conduct-based prohibitions, "barring civil servants from partisan political activity." Opp.13. And even in that context, this Court applied heightened scrutiny, requiring an "important" government interest that outweighed the employees' First Amendment rights. *Letter Carriers*, 413 U.S. at 564.

Indeed, the First Circuit's post-*Letter Carriers* decision in *Magill* v. *Lynch*, 560 F.2d 22 (1st Cir. 1977), Opp.13, continued to recognize that *Mancuso*'s approach "may still be viable for citizens who are not government employees." 560 F.2d at 27. And even as to government employees, the First Circuit in *Magill* said it could not "be more precise than the Third Circuit in characterizing [the *Letter Carriers*] approach as 'some sort of "balancing" process.'" *Id.* (citing *Alderman* v. *Philadelphia Hous. Auth.*, 496 F.2d 164, 171 n.45 (3d Cir. 1974)). That balancing allows the government to limit public-employee campaigning only "if the limits substantially serve government interests that are 'important' enough to outweigh the employees' First Amendment rights." *Id.* (quoting *Letter Carriers*, 413 U.S. at 564). So even in the context of public employees' campaign conduct, heightened scrutiny applies. Contra Opp.12–13. The Fifth Circuit's analysis in *Philips* v. *City of Dallas*, 781 F.3d 772 (5th Cir. 2015), is the same, Pet.23; contra Opp.13–14, as is the Oregon Supreme Court's in *Minielly* v. *State of Oregon*, 411 P.2d 69 (Or. 1966), Pet.24; contra Opp.15.

Next, Secretary Benson brushes aside the Supreme Court of Appeals of West Virginia's decision in *State ex rel. Piccirillo* v. *City of Follansbee*, 233 S.E.2d 419 (W. Va. 1977), as not premised on "the United States Constitution." Opp.15. But *Piccirillo* "recognized that the right to become a candidate for office" is "entitled to constitutional protection under the Equal Protection Clause and *federal* First Amendment concepts of freedom of association and expression." 233 S.E.2d at 423 (emphasis added, citing *State ex rel. Maloney* v. *McCartney*, 223 S.E.2d 607 (W. Va. 1976)). And it cited *Mancuso*, *Thompson* v. *Mellon*, 507 P.2d 628 (Cal. 1973), and *Gangemi* v. *Rosengard*, 207 A.2d 665 (N.J. 1965), as "[o]ther courts [that] have also concluded that the right to run for office is a fundamental right," further exacerbating the split of authority that the petition highlights here.

The Secretary claims that the Minnesota Supreme Court's decision to apply heightened scrutiny to a resign-to-run law in *Bolin* v. *Minnesota*, 313 N.W.2d 381 (Minn. 1981), is "readily distinguishable from this case." Opp.16–17. But she doesn't explain why. There, the Minnesota Supreme Court struck down the ballot restriction under heightened scrutiny because the policy was "not the least restrictive means available to accomplish the state's goal." Pet.26 (quoting 313 N.W.2d at 383–84).

And the Secretary criticizes the Supreme Court of Pennsylvania's analysis in *Commonwealth ex rel. Toole* v. *Yanoshak*, 346 A.2d 304 (Pa. 1975), as "abbreviated." She does not explain away the heightened scrutiny—a "compelling state interest"—that the court applied to "a restriction on holding political office." Pet.26 (quoting 346 A.2d at 306).

Next, the Secretary turns to the circuits that have applied *Anderson-Burdick* sliding scale scrutiny to candidacy restrictions. Opp.18–22. To be sure, neither the Seventh nor Eighth Circuits addressed a term-limits policy. Opp.18. But the Seventh Circuit used *Anderson-Burdick* to assess the constitutionality of a candidate's qualification—a law prohibiting individuals from simultaneously holding elected office and being employed as civil servants in the same unit of government—because the policy "affected" candidate access to the ballot and "implicated" voters' First and Fourteenth Amendment rights. *Claussen*, 826 F.3d at 385–86.

And the Eighth Circuit, addressing a mere participation rule, not a restriction that kept the plaintiff off the ballot entirely, applied *Anderson-Burdick* because the First and Fourteenth Amendment rights implicated by the plaintiff's claim were analogous to the rights at stake "for restrictions on candidacy." *Peeper* v. *Callaway Cnty. Ambulance Dist.*, 122 F.3d 619, 622–23 (8th Cir. 1997).

Finally, the Secretary agrees that the Ninth Circuit applied an *Anderson-Burdick* analysis in a term-limits case, *Bates* v. *Jones*, 131 F.3d 843 (9th Cir. 1997), whereas the Sixth Circuit below applied mere rational basis. Opp.20–22 (acknowledging the courts used "a different approach").

In sum, once Secretary Benson's confusing nomenclature is stripped away, her opposition brief concedes the deep and mature split of authority that the petition identifies. That acknowledged split warrants this Court's immediate review.

## II. U.S. Term Limits is wrong to say this case involves a "structural" issue.

Amicus U.S. Term Limits urges this Court to deny the petition for a different reason—that the petition supposedly challenges "the structure of Michigan's republican government," which is "nonjusticiable." USTermLimits.Br.6–13. U.S. Term Limits is wrong. The bulk of the decisions it invokes—involving the ballot-initiative structures, amendment procedures, and the numbers and shapes of state legislative districts, see USTermLimits.Br.8–13—involved actual political "structures." Such challenges are "more properly grounded in the Guarantee Clause of Article IV, § 4, *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2506 (2019), because they involve complaints about statewide structures and processes.

But that's not true of term limits. As candidacy restrictions, term limits prevent *individuals* from running for office. Accordingly, such restrictions implicate First and Fourteenth Amendment rights, not Guarantee Clause rights, and are justiciable. Otherwise, the government could claim that every regulation is an unassailable "structure" of government, including laws that prohibit citizens of certain races or ethnicities from applying for government positions, or laws that prohibit citizens from exercising free-speech rights. That has never been the law.

As for *Moore* v. *McCartney*, 425 U.S. 946 (1976), USTermLimits.Br.7, the Sixth Circuit panel correctly rejected that case as a jurisdictional bar. Pet.App.4a. This Court's order dismissing that appeal for want of a "substantial federal question" did not indicate a lack of federal court jurisdiction, as Secretary Benson explained below. BensonCA6SupplBr.1–7.

And this Court's order in *Moore* addressed an amorphous, ill-founded equal-protection claim, not the First and Fourteenth Amendment ballot-access question presented here. Pet'rs.CA6SupplBr.2–5. There is nothing in *Moore* suggesting that candidacy restrictions are never challengeable because they are a structural feature of state government.

## III. The possibility of a future ballot initiative does not moot this case.

As an additional reason for denying the petition, the Secretary points to an upcoming ballot proposal that, if adopted, would amend and lengthen Michigan's constitutionally imposed term limits. Opp.27. But whether Michigan voters will adopt the proposal is highly speculative. In 2012, for example, several million Michigan citizens considered five proposed constitutional amendments and turned down every single one. Two failed by more than a million votes.

That reality is fatal to the Secretary's argument. If, "in the course of litigation[,] a court finds that it can no longer provide a plaintiff with any effectual relief, the case generally is moot." *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 796 (2021). But as things stand now, this Court *can* grant Petitioners effectual relief. Accordingly, it is appropriate for the Court to grant the petition to resolve the split of authority over what test to apply to candidate restrictions. If, after Petitioners have filed their initial brief, Michigan citizens on November 8, 2022, approve the ballot proposal, then Petitioners will dismiss the petition as moot. But until then, the controversy remains, and the case is ripe for this Court's resolution.

* * *

If rational-basis review applies to every candidate restriction—as the Sixth Circuit held—then Michigan could prohibit attorneys and doctors from running for public office because those professionals are historically overrepresented among government officials, Pet.3, a reality that Secretary Benson does not contest. The Court should grant the petition and hold that candidates and voters have First and Fourteenth Amendment rights such that some candidate restrictions "are too low and too strict to survive" scrutiny. Pet.4. Because Michigan's shortest, harshest-in-the-nation term limits fit that description, the Court should hold them invalid.

## CONCLUSION

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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