STATE OF MINNESOTA
IN SUPREME COURT
Case File No. A24-1022

Michelle MacDonald

Petitioner,

PETITIONER'S BRIEF RESPONDING THIS COURT'S JULY 16 ORDER

vs.

Steve Simon,
Minnesota Secretary of State,
Respondent.

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The addendum to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(h)(3).

I. INTRODUCTION

Election laws are found in Minn. Stat. 204B. That part of the Minnesota Constitution that deals with qualifications of judges of the supreme court, the court of appeals and the district court reads:

Article VI, Judiciary, Section 5 of the Minnesota Constitution provides: "Qualifications. *Judges of the supreme court, the court of appeals and the district court shall be learned in the law.*"

The constitutional qualification for Judge of the Supreme Court and District Court in the Minnesota Constitution is that he/she be learned in the law.

However, in the general provisions of Election Administration Law, Chapter 204 B, there exists a provision, captioned 'proof of eligibility" with the Affidavit of Candidacy, subdivision 8 of Minn. Stat. 204B.06 provides:

> Subd. 8.Proof of eligibility.
>
> A candidate for judicial office or for the office of county attorney shall submit with the affidavit of candidacy proof that the candidate is licensed to practice law in this state. Proof means providing a copy of a current attorney license.

The Minnesota Constitution recognizes a fundamental state constitutional right to candidacy as found in Article VII, Sec. 6 of the Minnesota Constitution, Eligibility to hold office which provides that "*Every person who by the provisions of this article is entitled to vote at any election and is 21 years of age is eligible for any office elective by the people in the district wherein he has resided 30 days previous to the election, except as otherwise provided in this constitution, or the constitution and law of the United States.*"

It has been held with respect to a similar election law that the requirement of being "duly admitted to practice law in the state of Minnesota", the equivalent of the eligibility requirement in Minn. Stat. 204B.06 subd 8 requiring a "copy of a current law license" or being a licensed attorney in Minnesota is unconstitutional as determined in State ex rel Boedigheimer v. Welter, 208 Minn. 338 (Minn.1940)

To be eligible for Judicial office pursuant to MN Stat. 204B.06 (8), of the Supreme Court and District Court, the candidate must provide proof that he/she is licensed to practice law in Minnesota, even though pursuant to Rule 3.11 of the Code of Judicial conduct Judges in Minnesota are prohibited from practicing law, the rule states "a judge shall not practice law. Because of MN Stat. 402B.06(8) ---- and only because of that provision, all sitting Judges in Minnesota are required to have and maintain a current Minnesota law license. This means that a This means that a Judges can be subject to discipline and could automatically forfeits his or her office if they do not maintain a license

to practice law in Minnesota, and can lack the authority to hear a case. See State v. Irby, 848 N.W.2d 515 (Minn. 2014).

Candidates, who desire to go into the profession of being a judicial office can graduate from law school, pass the bar, and be eligible for judicial office of Supreme Court or District Court immediately upon obtaining their authorization/license to practice law. On the other hand, a lawyer that graduates from law school, takes and passes the bar and chooses not to obtain their authorization/license to practice law, even though an attorney-at-law, are ineligible for judicial office. These attorneys-at-law are eligible for judicial office because they have an authorization/license to practice law in Minnesota. An attorney at law, the first day they obtain their Minnesota law license/authorization can qualify for judicial office in Minnesota, while a seasoned attorney who is not licensed in Minnesota is disqualified by the statute. The provision of the statute precludes attorneys-at-law from qualifying to be a judge, even though they have satisfied the constitutional qualification of being learned in the law and legally trained, if they do not have a license to practice law in Minnesota.

Because of the eligibility requirement contained in the election administration statute ---------and only because of MN Statute 402B.06 (8)----- a candidate for judge ---- or a judge without a Minnesota law license---- is ineligible to be a judge or run for judicial office, even though they are attorneys-at-law and meet the constitutional qualification of being learned in the law, established by Article 6, Section 5 of the Minnesota constitution.

Put another way, attorneys at law are not qualified as learned in the law unless they have their Minnesota law license as proof of eligibility for judicial office due to the existence of MN Statute 402B.06 (8). [1]

This Court should take seriously the call to declare the statutory provision found in MN Stat. 204B.06 (8) unconstitutional; abandon the long held belief that a license to practice law in the state of Minnesota is required of Judges; and embrace that attorneys at law qualify as learned in the law as provided in the Minnesota Constitution, without compromise.

II. STANDARD OF REVIEW

Constitutional challenges are questions of law, which this court reviews de novo.

State v. Bussmann, 741 N.W.2d 79, 82 (Minn. 2007). Hamilton v. Comm 'r of Pub. Safety, 600 N.W.2d 720, 722 (Minn. 1999).

Notably, Minnesota's constitution recognizes a fundamental right to candidacy for those eligible to vote, over 21 years of age, and satisfy a residency requirement. Article VII, § 6 of the Minnesota Constitution.

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[1] The United States Supreme Court held that "The practice of law" cannot be licensed by any state in *Schware v. Board of Examiners*, 353 U.S. 232, 238- 239 (1957). Schware provided that, " A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection. Id at 239. For a detailed explanation of how the attorney registration system translates as a "license", see Moulton v. Simon, 883 N.W.2d 819, 825-827 (Minn. 2016)

Because Minnesota recognizes a fundamental state constitutional right to candidacy, this court needs to conduct a strict scrutiny analysis of all candidate ballot access regulations. Under strict scrutiny, the state bears the burden of proving that the challenged statute is the least restrictive, narrowly tailored, means possible to achieve a compelling governmental objective. MINN. STAT 204B.06, subd §8 is subject to strict scrutiny.

Strict judicial scrutiny means that the *state bears the burden of proving* that such deprivations are narrowly tailored to a compelling state interest. *Carey v. Population Servs.*, 431 US 678,688(1977).

Statutes that restrict a fundamental right or affect a suspect class are not presumed to be constitutional. *State v. Castellano*, 506 N.W.2d 641 (Minn. 1993); *Rio Vista Non-Profit Housing Corp. v. Ramsey County*, 335 N.W.2d 242 (Minn. 1983).

III ARGUMENT

A. Threshold Dispositive Issue. The threshold question to this Court is the constitutionality of MN Stat. 204B.06 ELECTION ADMINISTRATION, specifically, subdivision 8, of the statute which requires " proof of eligibility" to qualify for judicial office. Specifically, the statute in question Minn. Stat. § 204 B. 06, subd. 8, Proof of Eligibility, provides that "a candidate for judicial office or for the office of county attorney shall submit with the affidavit of candidacy *proof that the candidate is*

licensed to practice in this state. Proof means providing a copy of a current attorney license."

Consideration of the constitutionality of 204B.06 subd 8 must begin, as with all questions concerning eligibility for public office, with Article VII, Section 6 of the Minnesota Constitution which provides:

"Every person who by the provisions of this article is entitled to vote at any election and is 21 years of age is eligible for any office elective by the people in the district wherein he has resided 30 days previous to the election, except as otherwise provided in this constitution, or the constitution and law of the United States."

Since Article VII, Section 6, specifies that its eligibility standards shall apply "except as otherwise provided in this constitution," the additional constitutional qualifications for the office of Judge set forth in Article VI Judiciary, Section 5, Qualifications, are applicable which provide:

Sec. 5. Qualifications; compensation.

Judges of the supreme court, the court of appeals and the district court shall be learned in the law. The qualifications of all other judges and judicial officers shall be prescribed by law. The compensation of all judges shall be prescribed by the legislature and shall not be diminished during their term of office.

b. MINN. STAT. 204B.06 (8) VIOLATES ARTICLE VII, ELECTIVE FRANCHISE, SECTION 6 , ELIGIBILITY TO HOLD OFFICE A.5-A.6 AND ARTICLE VI, JUDICIARY, SECTION 5, QUALIFICATIONS OF THE MINNESOTA CONSTITUION A.4-A5

If Petitioner, or any attorney at law that does not have a Minnesota law license, is precluded from running for Judicial Office, it can only be because Minn. Stat. 240.06B (8) creates an additional qualification for the office, i.e., that the person must have a

license to practice law in Minnesota. If not, the person is not deemed learned in the law. This additional qualification directly contradicts the guarantee of universal eligibility found at Article VII, Section 6.

Petitioner asserts a provision akin to MN Stat. 204B.06 of Chapter 204 B, Election Administration, already had been determined to be unconstitutional as written, and as applied to a sitting Judge. The seminal case that determined that requiring a license to practice law in Minnesota is unconstitutional is State ex rel Boedigheimer v. Welter, 208 Minn. 338 (Minn.1940). In Boedigheimer, the Minnesota Supreme Court citing Article VI, Section 5, and Article 7, Section 6 held:

The Supreme Court is without power to increase the qualifications of judges prescribed by the Constitution, notwithstanding that it is important that judges of all courts of record be persons " learned in the law." Const. art. 6, § 6; art. 7, § 7. [2]

Boedigheimer further provided that:

To be eligible to the office of municipal judge of the village of Perham a person need not be an attorney at law. That part of Ex.Sess.Laws, 1933-1934, c. 35, § 3, requiring the municipal judge to be ' a person learned in the law *and* duly admitted to practice as an attorney in this State', is violative of Article, 7, § 7, of the State Constitution, and therefore unconstitutional. (emphasis added) State ex rel Boedigheimer v. Welter, 208 Minn. 338, 339 (Minn.1940)[3] Id at 339.

While ruling unconstitutional the requirement to be "duly admitted to practice as an attorney in this State [Minnesota]" the Boedigheimer Supreme Court agreed that learned in the law is synonymous with an attorney-at-law. But the attorney-at-law need not be

[2] Now Article VI section 5 and Article VII, section 6.
[3] Article, 7, § 7 is now Article VII, section 6

"duly admitted to practice as an attorney in" Minnesota to qualify as being learned in the law. Being an attorney at law was sufficient. With respect to the unconstitutionality, the Boedigheimer Supreme Court reviewed the two provisions of the Minnesota Constitution in conjunction with each other to determine that to require a judge to be learned in the law *and* duly admitted to practice as an attorney in this state violated then Article 7, section 7 , (now article VII section 6) Eligibility to hold office, which is a constitutional right.

With regard to the language "except as otherwise provided" in Article VI, section 5, the constitutional qualification for Judge of the Supreme Court and District Court in the Minnesota Constitution is that he/she be learned in the law. The Constitution and law of the United States, the federal constitution, sets forth no specific requirements for Judge. Federally, members of Congress typically recommend potential nominees, and the Department of Justice, which reviews nominees' qualifications, have developed their own informal criteria.

The qualifications to run for office, as far as the founders were concerned, and pursuant to the Minnesota Constitution, was designed to make it easy for citizens qualify for office. If you are over 21, if you can vote in any election, and if you live in the district where you're running for 30 days, you qualify for office. One need not be any more qualified than as provided in Article VII, section 6 to file an affidavit of candidacy to run

in an election as explained in Minneapolis Term Limits Coalition v. Keefe, 535 NW 2d 306 (Minn. 1995)

In Keefe, a Supreme Court ruled that an amendment to the Minneapolis city charter limiting the terms of local elected officials violated Article VII, Section 6 of the Minnesota Constitution, Eligibility to hold office, using the similar reasoning as in Boedigheimer. In Keefe, the Supreme Court was considering whether an amendment to the Minneapolis city charter limiting the terms of local elected officials would violate Article VII, Section 6 of the Minnesota Constitution. The Supreme Court's grappled with the language of Article VII, Section 6 that says "except as otherwise provided in this constitution, or the constitution and law of the United States" The Keefe court cited Pavlak v. Growe 284 N.W.2d 174, 176 (Minn.1979), interpreting Article VII, section 6 as establishing a universal eligibility for public office referring to Article VII, Section 6. The Court stated:

"This constitutional provision forcefully presents an important democratic principle--that all citizens meeting minimal, unchanging requirements are eligible for the elective positions that control their government....The opinions of this court in applying Article VII, Section 6, have consistently held that, as a guarantee of universal eligibility for public office, its standards may not be made more restrictive by legislative action unless expressly authorized by another constitutional provision." Id at 309

In describing the constitutional provision in Article VII, section 6 as a "guarantee of universal eligibility", the Keefe court rejected the plaintiff's argument that home rule charter cities have been delegated broad power by the legislature and are constitutionally authorized to impose eligibility requirements for local officials. Plaintiffs' assertion that the Article VII, section 6 guarantee of universal eligibility "except as otherwise provided in

this constitution " was merely a constitutional floor and leaves room for the enactment of additional eligibility requirements" was unequivocally rejected in Keefe.

In disagreeing with Plaintiffs' line of reasoning, the Keefe Supreme Court noted a critical distinction exists between a "qualification" for office and an "eligibility requirement" for office, stating that a "qualification" is an element of performance requiring a particular ability on the part of the person seeking the position, such as physical agility or the attainment of a particular level of education. Id. The Supreme Court went on to state: "Eligibility requirements, on the other hand, have nothing to do with one's ability to perform the duties of the office in question, and include the age and residency requirements established in Article VII, section 6:

"Clearly, a term limit such as that proposed by plaintiffs is an eligibility requirement because it has nothing to do with the particular person's ability to perform the job; rather, it is a restriction based on a factor unrelated to job performance. " Id.

In applying this distinction to the present case, Article VI, Section 5 of the Minnesota Constitution does not authorize the legislature to establish qualifications or eligibility for judges of the Supreme Court and District court or establish eligibility requirements for judicial officers of the Supreme Court and District court. "A copy of a current law licence" and "proof that the candidate is licensed to practice [in Minnesota] is explicitly an eligibility requirement, as set forth in subdivision 8 of MN Stat. 204B.06 as requiring "proof of *eligibility*". A license to practice law in Minnesota and a copy of a current law

license is an eligibility requirement and violates Article VI, section 5 as an exception to the guarantee of universal eligibility under Article VII, Section 6.

As determined in Boedigheimer, to require a Minnesota law license to hold judicial office is unconstitutional.

In *State ex rel. Jack v. Schmahl,* 125 Minn. 533, 147 N.W. 425, 426., a layman desired his name to be placed on the ballot as a candidate for district court judge, and the court pointed out that our Constitution (article 6, sec 6 at the time) qualifications for "the judges of the Supreme and district courts shall be men learned in the law". In Schmal, the court ruled that the framers of the Constitution "used the last five words quoted ["men learned in the law"] in the sense of attorneys at law" determining that this view has since been "uniformly accepted," and ordered the secretary of state refrain from certifying his name as a nominee or candidate for Judge. [147 N.W. 426]

Boedigheimer agreed with the Schmal court that "men learned in the law" could be synonymous with an attorney at law, but determined that to require a Judge to be "duly admitted to practice as an attorney in Minnesota" is unconstitutional as a restriction in conjunction with the universal constitutional requirements to run for office found in Article VII, Section 6 of the Minnesota Constitution.

The qualifications for eligibility to an elective office are prescribed by the Constitution and it is beyond the power of the legislature either to

restrict or to enlarge the right given by the Constitution. Hoffman v. Downs, 145 Minn. 465, 177 N.W. 669 (Minn. 1920). A statute that conflicts with article 7, § 6, of the Constitution and is void.

The Hoffman court affirmed that:

"The qualifications or eligibility to an elective office are prescribed by the Constitution and it is beyond the power of the Legislature either to restrict or to enlarge the right given and defined by the Constitution. State ex rel. Knappen v. Clough, 23 Minn. 17;State ex rel. v. Holman, 58 Minn. 219, 59 N. W. 1006. " The constitutional provision prescribing the qualifications for eligibility to office applies to all elective offices-to those created by statute as well as to those created by the Constitution. State ex rel. v. Holman, 58 Minn. 219, 59 N. W. 1006.

In so far subdivision 8 of MN Stat. 204B.06 attempts to render a man or woman learned in the law ineligible as a judge or ineligible to run for Judge, the statute impairs the right secured to every elector by the constitutional provision in and cannot be sustained.

In Pavlak v. Growe, 284 N.W.2d 174 (Minn. 1979) , the House of Representatives voted that the Contestee, Robert Pavlak, committed acts in violation of the provisions of the Minnesota Election Law not excused by the provisions of Minnesota Statutes Section 210A.38. The case was about whether this statute disqualified him from candidacy.

The Pavlak court stated that the opinions of this court applying Article VII, Section 6, have consistently held that, as a guarantee of universal eligibility for public office, its standards may not be made more restrictive by legislative action unless expressly authorized by another constitutional provision. Id. In keeping with this interpretation, the Court struck down the legislation in Pavlak; struck down statutes requiring candidates for the office of at-large council member of the City of St. Paul to reside in particular sections of the city, State ex

rel. Childs v. Holman, 58 Minn. 219, 59 N.W. 1006 (1894); making county commissioners, surveyors, and treasurers ineligible for the office of county auditor, Hoffman v. Downs, 145 Minn. 465, 177 N.W. 669 (1920); requiring court commissioners to be learned in the law, State ex rel. Froehlich v. Ries, 168 Minn. 11, 209 N.W. 327 (1926); and requiring municipal judge of the village of Perham to be a person learned in the law and duly admitted to practice as an attorney in this state,State ex rel. Boedigheimer v. Welter, 208 Minn. 338, 293 N.W. 914 (1940).

It is undisputed that Mr. Pavlak meet these eligibility standards of Article VII, Section 6, that remains unchanged by Article IV, Section 6. In Pavlak, the Supreme Court reiterated that "In a democracy, and particularly in a jurisdiction with a constitutional provision akin to Article VII, Section 6, it is for the people, not a particular legislature, to decide if an election law violator should be returned to the office. Pavlak, 284 NW 2d at 179.

D. MINN STAT. 204B.06 (8) IS UNCONSTITUTIONAL AS APPLIED TO PETITIONER MICHELLE MACDONALD

i. No Disputed Material Facts. The material facts of this matter are not in dispute. The facts set forth in the Petition are not in dispute. The Petitioner is only disqualified as Judicial Officer of the Supreme Court because of section 8 of the MN STAT. 204B.06--- and only because of MN Stat. 204B.06. This Court may rule on the Petition as a matter of law with respect to the threshold issue of the constitutionality of the statute, and Petitioner's ballot access.

ii. Michelle MacDonald satisfied the constitutional requirements of Article 7, Section 6 as Eligible to Hold Office and the constitutional requirements of Article 6 section 5 for Judicial Office.

The facts as set forth in the Petitioner are not in dispute and are incorporated herein by reference. (See Petition pages 11-12, Michelle MacDonald's Background and Experience, and Exhibit 10, Michelle MacDonald Resume) Petitioner meets all the constitutional qualifications of Article VII, Section 6 to hold office which is her constitutional right. She also meets the constitutional qualifications of Article VI, Section 5 as learned in the law to hold judicial office. Michelle MacDonald is a registered voter in the State of Minnesota, she is over 21, and she has lived in Minnesota since 1986. Petitioner is qualified to hold the judicial office for which she has filed. She has been an attorney at law since 1986, practicing law from 1986 to 2021, and teaches law. She is duly admitted to practice in the United States Supreme Court. Her qualifications as learned in the law is an attorney at law since 1986.

Her Minnesota law license is suspended, the circumstances of the suspension of her license are set forth in the Petition, pages 12 and 13, and in Exhibit 14, In the Supreme Court of the United States, Petition of Michelle MacDonald v. Office of Lawyers Professional Responsibility Board, Case no. 23-657. As a candidate for the judiciary, Ms. MacDonald asserted a First Amendment privilege to offer her opinions on issues and cases with which she disagreed pursuant to the United States Supreme Court decision of Republican Party of Minnesota v. White, 536 U.S. 765, 768 (2002) for which she was

suspended. She remains an attorney at law. Her suspension had nothing to do with her not being learned in the law. [4]

She is admitted in the United States Supreme Court (Exhibit 11 to Petition)

Minn. Stat. § 204 B. 06, subd. 8 Fails to Comply with the Minnesota Constitution. Pursuant to Minn. Stat. § 204B.44 this court must instruct respondent Secretary of State Steve Simon to place Petitioner, Michelle MacDonald as a candidate on the ballot for the 2024 general election for Judge pursuant to her Affidavit of Candidacy, and in order to grant the rights and privileges afforded by the Minnesota Constitution. Minn Sta. 204B.06, sub. 8, requiring proof of eligibility that a judicial candidate is licensed to practice law in the state of Minnesota, and a copy of a current law license is unconstitutional as written as detailed above, and as applied to Petitioner.

The law is facially unconstitutional requiring a higher level of scrutiny because it impacts fundamental rights of Petitioner. Petitioner further asserts that the law is unconstitutional as applied in the specific situation this case presents as to the Petitioner.

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[4] Supreme Court caselaw demonstrates how ballot access requirements must comport with principles of equal protection under the Fourteenth Amendment. The Fourteenth Amendment, Section 1 provides that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Generally, states enact ballot access requirements to prevent ballot overcrowding, voter confusion, election fraud, and to facilitate election administration. *See* Storer v. Brown, 415 U.S. 724 (1974)

iii Respondent Secretary of State should be instructed to place Petitioner on the ballot for the general election, November 5, 2024.

As the Petitioner complied with the Minnesota Constitution and state statutes governing her candidacy and ballot access, under a rational basis review, it is obvious that Minn. Stat. 204B.07, subd §8 requiring a threshold of a current law license in Minnesota is not rationally related to a legitimate governmental objective, including a legitimate interest in electoral integrity, orderly elections, limiting voter confusion, and supporting the finality and stability of the political process. The regulation cannot be justified on any of these grounds.

IV. CONCLUSION

MINN. STAT 204B.06, subd §8 is subject to strict scrutiny and the regulation is unable to satisfy this standard. This ballot access regulations found in Minn. Stat. 204B.06, subd §8 violates state constitutional protections to Petitioner. See Anderson v. Celebreeze, 460 U.S. 780, 789 (1983) (quoting Storer v. Brown, 415 U.S. 724, 735 (1974)).

It is apparent that the Minnesota Constitution was not intended to, and in fact does not eliminate from eligibility non-practicing attorneys at law to qualify and serve as a Judicial Officers who are learned in the law. The Secretary of State erred by its failure to accept the Affidavit of Candidacy of Petitioner Michelle MacDonald, and failed to comply with the Minnesota Constitution, Article VI, Judiciary, section 5, Qualifications and violated the

rights Petitioner Michelle MacDonald pursuant to Article VII, Sec. 6, eligibility to hold office.

The Secretary of State shall take all appropriate actions necessary to reflect Michelle MacDonald as a candidate for Judicial office, to appear on the ballot for the 2024 state general election for Associate Justice, Supreme Court 5.

Dated: July 30, 2024

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional 13-point font. The length of this brief is 4613 words. This brief was prepared using Microsoft Word.

/s/ Eric Anunobi
Eric Bond Anunobi

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