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FILE NO. 2009-SC-000341-D
(Court of Appeals File No. 2008-CA-001249)

STACIE L. COOK — APPELLANT

V. — Appeal from Russell Circuit Court
Action No. 06-CI-00275

LISHA POPPLEWELL, IN HER CAPACITY AS COUNTY CLERK OF RUSSELL COUNTY, KENTUCKY, AND RUSSELL COUNTY, KENTUCKY — APPELLEES

BRIEF FOR APPELLANT

Respectfully submitted by:

James E. Keller
Joseph H. Miller
Huston B. Combs
GESS MATTINGLY & ATCHISON, PSC
201 West Short Street
Lexington, Kentucky 40502
Telephone: (859) 252-9000
ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Brief for Appellant was served on this 12th day of March, 2010, by first class mail, upon the following: Hon. Janet L. Stumbo, First Commonwealth Bank Building, 311 North Arnold Avenue, Suite 502, Prestonsburg, KY 41653; Hon. Jeff S. Taylor, 401 Frederica Street, Suite A-102, Owensboro, KY 42303; Hon. David C. Buckingham, 2010 Gatesborough Circle, Murray, KY 42071; Hon. Vernon Miniard, Jr., Wayne County Judicial Center, 125 West Columbia Avenue, P.O. Box 727, Monticello, Kentucky 42633; Hon. Vernon Miniard, Jr., Wayne County Judicial Center, 125 West Columbia Avenue, P.O. Box 727, Monticello, Kentucky 42633; and, Winter R. Huff, Esq., Law Offices of John G. Prather P.S.C., P.O. Box 616, Somerset, Kentucky 42502-0616.

Attorney for Appellant

INTRODUCTION

Appellant appeals from the May 15, 2009 Opinion of the Court of Appeals, which affirmed the Russell Circuit Court's summary judgment that Appellant's political candidacy was not entitled to constitutional protection.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant, Stacie L. Cook, respectfully asserts that oral argument will assist in the presentation of the legal issues to the Court in this case of first impression in Kentucky and, therefore, requests that the Court schedule an oral argument.

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STATEMENT OF THE CASE

The material facts and legal issues presented by this case are straightforward. In 2004, Bridget Popplewell, who was then the Russell County Clerk, hired Appellant, Stacie L. Cook ("Stacie"), as a Deputy Russell County Clerk. After Bridget Popplewell retired mid-term, her sister, Appellee, Lisha Popplewell ("Popplewell"), who along with Stacie was a deputy clerk, was appointed to serve out the remainder of her sister's term, which expired at the end of 2006.

In order to keep her recently acquired position as Clerk, Popplewell intended to run in 2006 for the full-term position. Stacie, however, also intended to run for Clerk. When Popplewell learned of Stacie's intended rival candidacy, Popplewell summarily fired Stacie—who, like all other deputy clerks, was an at-will employee—on August 16, 2005. Stacie contends that her rival candidacy was the sole reason for her firing. Popplewell contends that she did not terminate Stacie for her rival candidacy but that she instead fired Stacie for poor work performance.[1] Regardless of Popplewell's contention, Stacie's allegation that Popplewell discharged her because of her rival candidacy must be taken as true in reviewing the underlying summary judgment of the trial court. *Remote Services, Inc. v. FDR Corp.*, 764 S.W.2d 80, 83 (Ky. 1989) ("This case was decided on a

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[1] After her discharge, Stacie filed for unemployment compensation. Popplewell protested Stacie's claim for unemployment compensation, alleging that she discharged Stacie for poor work performance. Stacie contended that she was discharged because of her rival candidacy. After an evidentiary hearing at which both Popplewell and Stacie testified and at which both were represented by counsel, the referee found that "*[Popplewell] discharged [Stacie] for reasons other than misconduct connected with the work and [Stacie] is not disqualified [from receiving unemployment compensation].*" Referee Decision, Appendix Tab #3 (emphasis added). [RA 26-27].

summary judgment and therefore all of the allegations of the complaint must be taken as true.").

Stacie subsequently filed this action against Popplewell in her official capacity and against Russell County, Kentucky. Stacie alleged, *inter alia*, that her discharge for her rival candidacy violated the Constitution of the Commonwealth of Kentucky and the First and Fourteenth Amendments of the United States Constitution "on the basis that her rights of freedom of speech, freedom of expression, freedom to seek public office, freedom of association, the exercise of political franchise, the exercise of political patronage, the right of enjoying life and liberty, and the right of freely communicating thoughts and opinions were violated." [RA 7-14]. Stacie asserted her claims for violations of her rights under the First and Fourteenth Amendments under 42 U.S.C. § 1983.

After completion of discovery, Popplewell and Russell County, Kentucky (collectively "the Appellees"), filed a motion for summary judgment. [RA 135-41]. After finding that the Sixth Circuit's holding in *Carver v. Dennis*, 104 F.3d 847 (6th Cir. 1997) was controlling, the trial court granted the motion after concluding that, regardless of whether Popplewell terminated Stacie solely for her rival candidacy, Stacie could not succeed on her claim because candidacy for a political office is not a fundamental constitutional right and that Stacie therefore "failed to state a claim or cause of action against either of [the Appellants]." [RA 225]. The trial court also concluded that Popplewell was entitled to sovereign immunity since she was sued in her official capacity. [RA 226]. Stacie subsequently appealed.

Although noting that the trial court was not bound to follow the Sixth Circuit's holding in *Carver*, the Court of Appeals nonetheless held that Popplewell's firing of

Stacie solely for her rival candidacy did not violate either the First or Fourteenth Amendments of the United States Constitution and therefore affirmed the trial court's summary judgment in favor of the Appellants. Slip Op. at 19. The Court of Appeals declined to rule on Popplewell's defense of sovereign immunity because its "determination on the merits of the § 1983 action" rendered the issue moot. Slip Op. at 20. Stacie sought and was granted discretionary review by this Court.

ARGUMENT

This appeal presents two concise issues, both of which are solely questions of law. The first issue poses a question of first impression for this Court:

> Popplewell, the incumbent county clerk, fired Stacie, a deputy clerk, because of her rival candidacy. Did Popplewell's firing of Stacie violate her rights under the United States Constitution? Because Stacie's candidacy was afforded protection under both the First and Fourteenth Amendments, her firing violated her rights under the Constitution and is a violation of § 1983.

This Court has addressed the second issue presented by this appeal, and Stacie submits that the issue was correctly decided by this Court:

> Stacie sued Popplewell in her capacity as county clerk for her unlawful firing. Was Popplewell therefore entitled to sovereign immunity? Because Popplewell was sued only in her official capacity, she was not entitled to immunity.

A. Kentucky Public Employees Who Seek Public Office Are Afforded Constitutional Protection From Being Fired For Their Candidacy.

Although this Court has not addressed the issue of whether constitutional protection is afforded to public employees seeking political candidacy, the Kentucky Court of Appeals has held that the public employees who seek public office are entitled to constitutional protection under both the First and Fourteenth Amendments. *Allen v. Board of Ed. of Jefferson County*, 584 S.W.2d 408 (Ky. App. 1979). In *Allen*, public school teachers who were running for the legislature were involuntarily suspended during

their candidacies pursuant to school board policy. The *Allen* Court invalidated the school board policy after finding that it penalized public employees for seeking political office and, therefore, violated both the First and Fourteenth Amendments.

In reaching its holding, the *Allen* Court made several rulings that are relevant to the present case. First, *Allen* held that the teachers "were exercising their rights of free speech and association" by running for the Legislature and that "[t]hese rights are protected by the First Amendment to the United States Constitution and may not be abridged without proof of compelling state interest." [2] *Id.* at 409. Second, citing two opinions of the United States Supreme Court, the Court of Appeals stated that "[p]olitical belief and association constitute the core of those activities protected by the First Amendment" and that "[t]he First Amendment protects political association as well as political expression." *Id.* (citing *Elrod v. Burns*, 427 U.S. 347, 356, 96 S.Ct. 2673, 2681, 49 L.Ed.2d 547 (1976) and *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976).

Although *Allen* has not been overruled, the Court of Appeals declined to follow the *Allen* holding in ruling on Stacie's First Amendment claim because "[the Kentucky Supreme Court] has held that there is no right of candidacy under the First Amendment." Slip Op. at 14. Stacie submits that this Court should follow the principles announced in *Allen*: public employees are "exercising their rights of free speech" and association by running for public office, and their candidacies are therefore protected by the First Amendment to the United States Constitution and may not be abridged without proof of

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[2] An analogous statement was made in the concurring opinion in this case: "I can think of no other act that conveys pure political speech than that of filing for public office. It is the essence of that which is protected by the First Amendment." Slip Op. at 21 (Stumbo, J., concurring).

compelling state interest. *Id.* at 409. These principles were valid when they were adopted by the Court of Appeals more than 30 years ago, they remain valid today, and they will be valid tomorrow.

B. *Carver* Is Not Determinative Of Whether Stacie's Candidacy Was Constitutionally Protected.

Carver is the 800-pound gorilla in this case. Admittedly, *Carver* holds that political candidacy is not a fundamental right:

> "In sum, we hold that no reading of the First Amendment required Dennis to retain Carver after Carver announced her intention to run against Dennis for Dennis's office. To hold otherwise, on the facts of this case, would be to read out of the entire line of relevant Supreme Court precedent the factual requirements of political belief, expression and affiliation, partisan political activity, or expression of opinion, and to read into that precedent a fundamental right to candidacy.

Carver, 104 F.3d at 853. The trial court relied almost exclusively on *Carver* in granting summary judgment against Stacie. In fact, the trial court stated that "[*Carver*] remains the applicable law and binding precedent…." [RA 225]. The Court of Appeals, however, agreed with Stacie that *Carver* is not binding on Kentucky state courts. Slip Op. at 7. Nevertheless, the Court of Appeals found *Carver* persuasive, followed its holdings, and affirmed the summary judgment of the trial court.[3]

For several reasons, this Court should not so blindly follow *Carver*. First, as contended by Stacie and as recognized by the Court of Appeals, *Carver* is not binding on Kentucky state courts. *See Commonwealth Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc.*, 177 S.W.3d 718, 725 (Ky. 2005)

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[3] While it is not clear, it appears that the Court of Appeals relied upon *Carver* in affirming the trial court's ruling on both Stacie's First and Fourteenth Amendments claims.

("Decisions of the lower federal courts are not conclusive as to state courts."). Second, *Carver* assumed that the United States Supreme Court would hold that the right to run for political office is not afforded any constitutional protection by the First Amendment. But, the Supreme Court has not yet definitively decided whether political candidacy is a fundamental right, much less whether political candidacy is afforded any constitutional protection and therefore subject to either a lesser standard of review (i.e., a "rational basis" analysis or "heightened scrutiny" analysis). *See, e.g., Steven Lee Enterprises v. Varney*, 36 S.W.3d 391, 394 (Ky. 2000) (discussing the three levels of scrutiny). Based on the holdings of other courts,[4] Stacie submits that the Sixth Circuit in *Carver* reached the wrong result and may have incorrectly predicted the Supreme Court's future ruling on this issue. Third, as noted by the Court of Appeals, "[v]arious federal courts have questioned the wisdom of *Carver.*" Slip Op. at 19. This Court should also question *Carver*'s wisdom. Fourth, read literally, *Carver* denies public employees seeking public office any First Amendment rights, even the right to conduct addressing a matter of public concern. As stated by the Court in *Deemer v. Durell*, 110 F.Supp.2d 1177, 1781 (S.D.Iowa 1999):

> To find that the very act of throwing one's hat into the ring is itself "conduct addressing a matter of public concern" is not equivalent to finding a fundamental right to candidacy. The protected speech on matters of public concern must be weighed against the employer's right to an efficiently functioning office. The comment in *Carver* that "[t]he First Amendment does not require that an official ... nourish the viper in the nest" is absolutely accurate. Under a *Pickering* balancing, the employee's First Amendment rights would yield to the efficient workings of government. **It does not stand to reason that the employee should be found to have no First Amendment right at all.**

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4 See cases cited *infra* p. 8.

(emphasis added). This Court should not hold otherwise.

And, finally, the *Carver* Court narrowly limited the applicability of its decision to the facts of the case before it,[5] and *Carver* is dissimilar to the present case in two very significant respects: (i) in *Carver*, the clerk's office was only a two-person office, whereas, the Russell County Clerk's Office has several employees and (ii) in *Carver,* the clerk and deputy worked together in the same and only office, whereas, Popplewell worked in the main office (Jamestown) and seldom visited the satellite office (Russell Springs) where Stacie worked exclusively. Thus, even to the extent that *Carver* is considered persuasive by this Court, *Carver* should be limited to its facts (i.e., a two-person office in which the clerk and her deputy worked closely together). There was no "viper in the nest" in this case. Stacie and Popplewell worked at offices in different cities and had very little contact with each other. Thus, Stacie's candidacy did not affect "the efficient workings" of the clerk's office, and Popplewell has not claimed otherwise.

Carver has been aptly described by the first Chief Judge of the Kentucky Court of Appeals, a respected Kentucky jurist, and a current Judge of United States Court of Appeals for the Sixth Circuit as being "like a stray cat that hangs around the door and infests the house with fleas" and that "continues to plague this Court's jurisprudence."

[5] As stated by the Sixth Circuit, "the issue before us is whether Carver, a deputy county clerk who was an at—will employee in a two-person office-the other person being the county clerk herself—had a First Amendment right to run against the incumbent clerk in the next election and still retain her job." *Carver,* 104 F.3d at 849. The *Carver* Court concluded as follows: "In sum, we hold that no reading of the First Amendment required Dennis to retain Carver after Carver announced her intention to run against Dennis for Dennis's office. To hold otherwise, *on the facts of this case*, would be to read out of the entire line of relevant Supreme Court precedent the factual requirements of political belief, expression and affiliation, partisan political activity, or expression of opinion, and to read into that precedent a fundamental right to candidacy." *Id.* at 853 (emphasis added).

Greenwell v. Parsley, 541 F.3d 401, 405 (6th Cir. 2008) (Martin, J., concurring). Judge Martin has noted that *Carver* is erroneously based on *Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) and *Clements v. Fashing,* 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982)], which are "two decisions that do not support [*Carver's*] final conclusion." *Greenwell*, 541 F.3d at 405. He states that "[i]n *Bullock,* the Supreme Court held simply that states have no obligation to permit a person's name to appear on the ballot," and "[w]hile *Clements v. Fashing* did uphold a law prohibiting certain elected officials from running for the state legislature, that decision expressly distinguished cases where a civil servant is the candidate." *Id.* (internal citations omitted).

Judge Martin also stated that *Carver* is "in opposition with as many as six other circuits, which have held that firings based on one's political candidacy do violate the First Amendment." *Id.* (citing *Finkelstein v. Bergna,* 924 F.2d 1449 (9th Cir. 1991), *cert. denied,* 502 U.S. 818, 112 S.Ct. 75, 116 L.Ed.2d 49 (1991); *Stiles v. Blunt,* 912 F.2d 260 (8th Cir. 1990) (recognizing the right to run for public office), *cert. denied,* 499 U.S. 919, 111 S.Ct. 1307, 113 L.Ed.2d 241 (1991); *Flinn v. Gordon,* 775 F.2d 1551, 1554 (11th Cir. 1985) ("[H]e certainly had a constitutional right to run for office and to hold office once elected...."), *cert. denied,* 476 U.S. 1116, 106 S.Ct. 1972, 90 L.Ed.2d 656 (1986); *Washington v. Finlay,* 664 F.2d 913, 927-28 (4th Cir.1981) (recognizing "[t]he [F]irst [A]mendment's protection of the freedom of association and of the rights to run for office, have one's name on the ballot, and present one's views to the electorate"), *cert. denied,* 457 U.S. 1120, 102 S.Ct. 2933, 73 L.Ed.2d 1333 (1982); *Newcomb v. Brennan,* 558 F.2d 825, 829 (7th Cir. 1977) (holding that the "plaintiff's interest in running for Congress and thereby expressing his political views without interference from state

officials ... lies at the core of the values protected by the First Amendment"), *cert. denied,* 434 U.S. 968, 98 S.Ct. 513, 54 L.Ed.2d 455 (1977); *Magill v. Lynch,* 560 F.2d 22, 27 (1st Cir. 1977) ("It appears that the government may place limits on campaigning by public employees if the limits substantially serve government interests that are important enough to outweigh the employees' First Amendment rights."), *cert. denied,* 434 U.S. 1063, 98 S.Ct. 1236, 55 L.Ed.2d 763 (1978)).

Although the Court of Appeals believed that these cases are "not as supportive of Cook's argument as she claims,"[6] the totality of the cases cited by Judge Martin do lend support to her contention that *Carver*, which literally denies any First Amendment rights to a public employee's candidacy, is in palpable tension with other circuits since the cited cases recognize a constitutionally protected interest in candidacy in certain circumstances. Even the Court of Appeals acknowledged that "[v]arious federal courts have questioned the wisdom of *Carver*." Slip Op. at 19.

In addition to the cases cited by Judge Martin, many other federal cases conclude that political candidacy is a constitutionally protected right. For example, in *Click v. Copeland*, 970 F.2d 106, 109 (5th Cir. 1992), the Fifth Circuit stated that if a sheriff threatened to fire a deputy for announcing his rival candidacy, "this alone would implicate [the deputy's] First Amendment rights." Additionally, and more pertinent to the present case, the *Click* Court found that the conduct of running for elected office addressed matters of public concern and concluded "that [the sheriff] was required to engage in *McBee-Pickering-Connick*[7] balancing before taking disciplinary action against

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6 Slip Op. at 9.

7 The *McBee-Pickering-Connick* balancing test requires a court, when evaluating employer actions taken in alleged retaliation of protected conduct, "to balance the First

[the deputies] because of their political activity." *Id.* at 112. Similarly, in *Jantzen v. Hawkins*, 188 F.3d 1247, 1257 (10th Cir. 1999), the Tenth Circuit held that a deputy sheriff who was fired immediately after announcing his candidacy against the incumbent sheriff met the first prong of the *Pickering-Connick* test, stating that the deputy's "political speech—his candidacy for office—undoubtedly relates to matters of public concern."

Regardless of the number of circuits that are in tension with *Carver*—whether it is two or eight—the decisions are sufficient to illustrate that this Court should question *Carver*'s wisdom and not blindly allow it to "infest" Kentucky's jurisprudence. Instead, Stacie submits that this Court should adopt the reasoning and holdings of other courts—including the *Allen* Court which was presided over by then Chief Judge Martin—that have addressed this issue and bestowed constitutional protection on public employees seeking elective office. With constitutional protection, the government employer will then be required to engage in the *Pickering-Connick* balancing test before restricting an at-will employee's candidacy for elective office.

C. The Kentucky Supreme Court Has Not Held That A Public Employee's Candidacy Is Not Constitutionally Protected.

The Court of Appeals cited three cases from this Court to support its holding that there is no right to candidacy under the First Amendment: *Chapman v. Gorman*, 839 S.W.2d 232 (Ky. 1992), *Commonwealth ex rel. Stumbo v. Crutchfield*, 157 S.W.3d 621 (Ky. 2005), and *Yonts v. Commonwealth ex rel. Armstrong*, 700 S.W.2d 407 (Ky. 1985).

Amendment values implicated by those activities against the possible disruptive effect on governmental provision of services within the specific context of each case." *McBee v. Jim Hogg County*, 730 F.2d 1009, 1016-17 (5th Cir. 1984); *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968); *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983).

Chapman and *Crutchfield* were decided in the context of constitutional challenges to anti-nepotism statutes, and *Yonts* was a challenge to a resign-to-run statute. Thus, each case involved a statute that was viewpoint-neutral, advanced a governmental interest (rather than a partisan interest), and was applied equally to all affected individuals. In the present case, Stacie was not fired because she ran for office generally or because she ran for clerk. Rather, she was fired because she ran for the position held by the incumbent Popplewell.

Moreover, in *Chapman, Crutchfield,* and *Yonts*, this Court applied a rational basis test in reviewing the validity of the statute that was being challenged. *Chapman*, 839 S.W.2d at 240 ("The structure of [the anti-nepotism statute] thus bears a rational relationship to eliminating nepotism, and therefore passes constitutional muster."); *Crutchfield*, 157 S.W.3d at 624 ("Therefore, a rational basis test is the appropriate constitutional standard."); *Yonts*, 700 S.W.2d at 409 ("Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end."). In *Chapman*, this Court also applied the balancing test described by the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). *Champan*, 839 S.W.2d at 239 ("Therefore, under the *Anderson* balancing test, we find no substantial infringement of appellants' or voters' First Amendment rights, necessitating our invalidating the challenged statutes."). Thus, in *Chapman, Crutchfield,* and *Yonts*, this Court recognized some level of constitutional protection for candidacy; otherwise, there was no reason to engage in a rational basis analysis and certainly not a need to apply the *Anderson* balancing test, which examined whether there was a "substantial infringement" of

appellants' First Amendment rights that would necessitate invalidating the challenged statutes." *Chapman*, 839 S.W.2d at 239.

This Court should now recognize that a Kentucky public employee's candidacy is constitutionally protected as a fundamental right, or at least afforded some degree of protection under the United States and Kentucky Constitutions.

D. Stacie's Candidacy Was Afforded Constitutional Protection Under Both The First and Fourteenth Amendments.

1. Stacie's Candidacy Had First Amendment Protection.

In addition to the Kentucky Court of Appeals, several other courts have recognized First Amendment protection for a public employee's candidacy. In *Mancuso v. Taft*, 476 F.2d 187, 195 (1st Cir. 1973), the First Circuit examined "whether the interest of the individual in running for public office is an interest protected by the First Amendment, so that any law which significantly infringes that interest must be given strict review." The First Circuit first noted that the Supreme Court has never directly decided this point but then stated that the Supreme Court in *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) "strongly suggests that the activity of seeking public office is among those protected by the First Amendment." *Mancuso*, 476 F.2d at 195. But, the First Circuit also recognized that "two state supreme courts have found, in facially invalidating flat bans on public employee candidacies challenged by deputy sheriffs, that the right to run for office is a First Amendment right." *Id.* (citing *Minielly v. State*, 242 Or. 490, 411 P.2d 69 (1966); *Kinnear v. City and County of San Francisco*, 61 Cal.2d 341, 38 Cal. Rptr. 631, 392 P.2d 391 (1964)). The First Circuit then came to the same conclusion, noting that "[t]he right to run for public office touches on two

fundamental freedoms: freedom of individual expression and freedom of association." *Mancuso*, 476 F.2d at 195.

In a subsequent case, the First Circuit in *Magill v. Lynch*, 560 F.2d 22, 27 (1st Cir. 1977) again recognized an employee's First Amendment right to campaign but also noted that "[i]t appears that the government may place limits on campaigning by public employees if the limits substantially serve government interests that are important enough to outweigh the employees' First Amendment rights." The First Circuit then unequivocally concluded: "[c]andidacy is a First Amendment freedom." *Id.* at 29.

In *Finkelstein v. Bergna*, 924 F.2d 1449, 1453 (9th Cir. 1991) (*cert. denied*, 502 U.S. 818, 112 S.Ct. 75, 116 L.Ed.2d 49 (1991), the Ninth Circuit also recognized that political candidacy is protected by the First Amendment. *Contra N.A.A.C.P., Los Angeles Branch v. Jones*, 131 F.3d 1317, 1324 (9th Cir. 1997) ("Candidates do not have a fundamental right to run for public office.") The Ninth Circuit held that "[d]isciplinary action discouraging a candidate's bid for elective office represent[s] punishment by the state based on the content of a communicative act protected by the First Amendment." *Finkelstein*, 924 F.2d at 1453 (citation omitted). Although not in the context of a discharged employee, the Eleventh Circuit has similarly recognized a "constitutional right to run for office." *Flinn v. Gordon*, 775 F.2d 1551, 1554 (11th Cir. 1985). Likewise, the Fourth Circuit in *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981) acknowledged the First Amendment's "protection of the freedom of association and of the rights to run for office, have one's name on the ballot, and present one's views to the electorate."

As previously noted, the Fifth Circuit in *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992) concluded that the conduct of running for elected office by two deputy sheriffs who announced their rival candidacy addressed matters of public concern and "that [the sheriff] was required to engage in *McBee-Pickering-Connick* balancing before taking disciplinary action against [the deputies] because of their political activity." Also worth restating is the holding of the Tenth Circuit in *Jantzen v. Hawkins*, 188 F.3d 1247 (10th Cir. 1999). The *Jantzen* Court held that a deputy sheriff who was fired immediately after announcing his candidacy against the incumbent sheriff met the first prong of the *Pickering-Connick*: the deputy's "political speech-his candidacy for office-undoubtedly relates to matters of public concern." *Id.* at 1257.

The United States Supreme Court has held that "a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 1687 (U.S. 1983). Accordingly, if Stacie had supported another candidate against Popplewell, the First Amendment would without question protect such conduct. *See Murphy v. Cockrell*, 505 F.3d 446, 451 (6th Cir. 2007). Or, if Stacie had simply actively campaigned against Popplewell, but had not become a candidate herself, her conduct would again be protected under the First Amendment. *See Becton v. Thomas*, 48 F.Supp.2d 747 (W.D.Tenn. 1999).

In the present case, no government interest has been identified by the Appellants, the trial court, or the Court of Appeals that outweighs Stacie's First Amendment rights. In fact, Popplewell does not even contend in defense of Stacie's termination that Stacie's right to candidacy was outweighed by any government interest. Instead, Popplewell

merely contends Stacie's candidacy is altogether unprotected by the First Amendment. This position not only ignores the numerous holdings cited herein but also ignores the very core of the First Amendment and of a functioning democracy. As stated by Judge Stumbo in her concurring opinion: "I can think of no other act that conveys pure political speech than that of filing for public office. It is the essence of that which is protected by the First Amendment." Slip Op. at 21. Stacie agrees, and this Court should too. Even if this Court determines that the right to run for office is not a fundamental constitutional right, such a determination does not mean that the right to candidacy is not deserving of any constitutional protection.

2. Stacie's Candidacy Was Protected As A "Liberty Interest" Under The Fourteenth Amendment.

In *Becton v. Thomas*, 48 F.Supp.2d 757, 758 (W.D.Tenn. 1999), a district court within the Sixth Circuit concluded that the First Amendment does provide some protection against retaliation for seeking political office and that "[a]lternatively, [the] right to run for public office is constitutionally protected as a liberty interest under the Fourteenth Amendment's Due Process Clause." And, after describing the liberty guaranteed by the Fourteenth Amendment, the *Becton* Court held that "[t]he freedom to run for political office ... qualif[ies] as a liberty interest protected by the Due Process Clause." *Id.* The *Becton* Court then stated that "[s]ince the freedom or opportunity to run for political office is a liberty interest under the Fourteenth Amendment's Due Process Clause, a state cannot deny or infringe that liberty interest unless it can offer a reasonable justification or rational basis for doing so." *Id.*

Also, as pointed out by the Court of Appeals, the Sixth Circuit in *Miller v. Lorain County Bd. of Elections*, 141 F.3d 252, 260 (6th Cir. 1998) acknowledged that "whether

an individual has a constitutionally protected interest in becoming a candidate for public office is not clear." In explaining this conclusion, the Sixth Circuit stated that "[i]t is difficult to define the contours of the right of candidacy" and that "[g]iven the integral relationship between candidacy and voters' rights under the First Amendment, *candidacy may involve some level of a protected property or liberty interest.*" *Id.* n. 8. (emphasis added).

Accordingly, Stacie asserts that her right to run for office is protected by the First Amendment, or, alternatively is protected by the Fourteenth Amendment as a constitutionally protected liberty interest.

E. Popplewell And Russell County Are Not Entitled To Sovereign Immunity.

Relying on *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001) and *Jefferson County Fiscal Court v. Peerce*, 132 S.W.3d 824 (Ky. 2004), the trial court ruled that "[Lisha Popplewell is] entitled to sovereign immunity." The trial court's ruling was based on the fact that the lawsuit was filed "only against Lisha Popplewell in her capacity as County Clerk of Russell County…." [RA 226].

The trial court misconstrued and thus misapplied both *Yanero* and *Peerce*. *Yanero* involved state law claims and not claims under 42 U.S.C. § 1983. *Yanero*, 65 S.W.3rd at 517. Therefore, *Yanero* is simply not applicable. And it is somewhat surprising that the trial court relied on *Peerce*, which unequivocally held that county officials, *who are sued in their official capacities*, and counties are not immunized by state law from actions against them under 42 U.S.C. § 1983. *Peerce*, 132 S.W.3d at 836-37. County officials sued in their individual capacities, however, may assert the defense

of qualified immunity. *Id.* For this reason, Stacie sued Popplewell in her official capacity only.

Stacie has expressly alleged that "[t]he actions of the [Popplewell] constitute improper and unlawful discharge in violation of the [Stacie's] Civil Rights pursuant to the First and Fourteenth Amendments of the United States Constitution and pursuant to 42 U.S.C. § 1983." Accordingly, Popplewell, in her official capacity, and Russell County do not have immunity from Stacie's § 1983 claims and are a proper parties to this action.

CONCLUSION

Stacie requests this Court to reverse the Opinion of the Court of Appeals and hold that Kentucky public employees who seek public office are afforded constitutional protection from being fired for their candidacy under both the First and Fourteenth Amendments, unless under the *Pickering* balancing test, the employee's First Amendment rights must yield to the efficient workings of government. Additionally, because the Appellants have only maintained that Stacie was fired for her poor work performance and have not contended that her candidacy was outweighed by any government interest, nor identified any such interest, Stacie requests that this Court reverse and remand only for the purpose of determining if Stacie was fired by Popplewell for her rival candidacy or for her poor work performance. Finally, Stacie requests this Court to reaffirm its prior holding that county officials, sued in their official capacities, and counties are not immunized by state law from actions against them under 42 U.S.C. § 1983.

Respectfully submitted by:

James E. Keller
Joseph H. Miller
Huston B. Combs
GESS MATTINGLY & ATCHISON, PSC
201 West Short Street
Lexington, Kentucky 40502
Telephone: (859) 252-9000
ATTORNEYS FOR APPELLANT