

# WADING THROUGH THE “MORASS”: THE ELEVENTH CIRCUIT RECOGNIZES A RIGHT TO CANDIDACY IN *RANDALL V. SCOTT*

**Abstract:** On June 30, 2010, the U.S. Court of Appeals for the Eleventh Circuit in *Randall v. Scott* held that the First Amendment affords protection to an individual based on the mere basis of that individual’s political candidacy. In so doing, the *Randall* court departed from other federal circuit courts, which had approached the issue by way of analogy to the First Amendment freedoms of speech and association. This Comment concludes that the Eleventh Circuit’s novel approach, although well intentioned, is only tenuously grounded in Supreme Court precedent.

## INTRODUCTION

“Precedent in the area of constitutional protection for candidacy can best be described as a legal morass,” opined the U.S. Court of Appeals for the Eleventh Circuit in its 2010 decision, *Randall v. Scott*.<sup>1</sup> *Randall* tackles a question that has split the circuits: does the First Amendment protect a public employee who is fired for announcing his candidacy for elective office?<sup>2</sup> Charting new ground, the Eleventh Circuit held that the First Amendment affords protection to an individual based on the mere fact of that individual’s political candidacy.<sup>3</sup>

Part I of this Comment summarizes the Eleventh Circuit’s *Randall* decision.<sup>4</sup> Part II examines the limited Supreme Court precedent on First Amendment protections for political candidacy and surveys the contradictory approaches that other circuits have taken in addressing the issue.<sup>5</sup> Part III then evaluates the Eleventh Circuit’s novel approach, concluding that the *Randall* method, although well intentioned, is tenuously grounded in Supreme Court precedent.<sup>6</sup>

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<sup>1</sup> 610 F.3d 701, 710 (11th Cir. 2010).

<sup>2</sup> *Id.* at 705–10.

<sup>3</sup> *Id.* at 714.

<sup>4</sup> See *infra* notes 7–32 and accompanying text.

<sup>5</sup> See *infra* notes 33–74 and accompanying text.

<sup>6</sup> See *infra* notes 75–92 and accompanying text.

I. THE ELEVENTH CIRCUIT'S DECISION IN *RANDALL V. SCOTT*

In 2007, Earl Randall was the chief of staff to Jewel Scott, the District Attorney of Clayton County, Georgia.<sup>7</sup> In late September, Randall declared his intent to run for chairman of the Clayton County Board of Commissioners.<sup>8</sup> Within days, Jewel Scott informed Randall that her husband, Lee Scott, intended to run for chairman as well and that he was angered by Randall's candidacy, believing that it would split voters who wanted to vote against the incumbent candidate.<sup>9</sup> In the months that followed, Lee Scott allegedly pressured his wife to fire Randall unless he backed out of the race.<sup>10</sup> Jewel Scott told Randall that he was "making life difficult" for her and warned him that if he stayed in the race he might lose his job.<sup>11</sup> In December, five days after receiving an invitation to a fundraiser for Randall's campaign, Jewel Scott fired him.<sup>12</sup>

Randall brought an action in Georgia state court asserting a First Amendment retaliation claim pursuant to 42 U.S.C. § 1983 against Jewel Scott in her individual and official capacities.<sup>13</sup> Scott removed the case to federal court and filed a motion to dismiss, arguing that Randall's complaint failed to state a First Amendment violation and, alternatively, that she was immune from suit.<sup>14</sup> The district court granted Scott's motion to dismiss.<sup>15</sup> The court reasoned that, under a heightened pleading standard applicable to § 1983 claims, "the mere fact that Randall decided to run for political office and held an event in connection with his candidacy is not enough to trigger First Amendment protection."<sup>16</sup> Randall appealed to the U.S. Court of Appeals for the Eleventh Circuit.<sup>17</sup>

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<sup>7</sup> *Randall v. Scott*, 610 F.3d 701, 703 (11th Cir. 2010).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 704.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *Randall*, 610 F.3d at 704. Randall also brought a tortious interference claim against Lee Scott, which the district court dismissed without prejudice. Order Granting Motion to Dismiss at 1, *Randall v. Scott*, No. 1:08-cv-2910-TCB (N.D. Ga. May 20, 2009), ECF No. 18. Ultimately, neither Randall nor Scott won the election; the incumbent, Eldrin Bell, was re-elected. See Bill Rankin, *Court Revives Lawsuit Against Former DA*, ATLANTA J.-CONST., July 1, 2010, at B3.

<sup>14</sup> *Randall*, 610 F.3d at 704.

<sup>15</sup> Order Granting Motion to Dismiss, *supra* note 13, at 1.

<sup>16</sup> *Id.* at 14.

<sup>17</sup> *Randall*, 610 F.3d at 705.

On June 30, 2010, a three-judge panel of the Eleventh Circuit issued its opinion in *Randall v. Scott*.<sup>18</sup> The panel held that the district court erred in applying a heightened pleading standard to Randall's § 1983 complaint and remanded the case.<sup>19</sup> Because the lower court "[made] explicit" that Scott's motion to dismiss would have been granted under any pleading standard, the panel then addressed the First Amendment question as well.<sup>20</sup>

The panel concluded that, contrary to the district court's analysis, the "mere fact" of Randall's political candidacy *did* trigger sufficient First Amendment protection to overcome Scott's motion to dismiss.<sup>21</sup> Although there was no U.S. Supreme Court or Eleventh Circuit precedent squarely analogous to Randall's situation, the court stated that "every case addressing the issue has found at least some constitutional protection" for candidacy.<sup>22</sup> At the Supreme Court level, several cases had addressed restrictions on ballot access (such as large filing fees) and explained that "[f]ar from recognizing candidacy as a fundamental right, we have held that the existence of barriers to a candidate's access to the ballot does not of itself compel close scrutiny."<sup>23</sup> Nevertheless, the *Randall* court opined, these cases still suggested that "political candidacy is entitled to at least a modicum of constitutional protection."<sup>24</sup>

Within the Eleventh Circuit, all relevant precedent involved public employee plaintiffs discharged for supporting a candidate running for office—not employees discharged for their own pursuit of elective office.<sup>25</sup> Those cases applied the Supreme Court's *Elrod-Branti* standard, which asks the court to balance a discharged employee's First Amendment right to support a candidate with the state's interest in office loyalty.<sup>26</sup> Each of those cases, the *Randall* court observed,

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<sup>18</sup> See generally *id.*

<sup>19</sup> *Id.* at 705–10.

<sup>20</sup> *Id.* at 710, 710–14.

<sup>21</sup> See *id.* at 704, 710.

<sup>22</sup> *Id.* at 713.

<sup>23</sup> *Randall*, 610 F.3d at 711 (quoting *Clements v. Fashing*, 457 U.S. 957, 963 (1982)) (alteration in original) (internal quotation marks omitted); see, e.g., *Bullock v. Carter* 405 U.S. 134, 142–43 (1972).

<sup>24</sup> See *Randall*, 610 F.3d at 712.

<sup>25</sup> See *id.* at 712–13 (discussing *Epps v. Watson*, 492 F.3d 1240, 1242 (11th Cir. 2007); *Terry v. Cook*, 866 F.2d 373, 377–78 (11th Cir. 1989)).

<sup>26</sup> See *Epps*, 492 F.3d at 1242, 1244 (applying balancing test to dismissal of tax commissioner clerk for supporting newly elected commissioner's opponent, where clerk was not in decision-making role); *Terry*, 866 F.2d at 377–78 (applying *Elrod-Branti* balancing test to dismissal of public employees who were replaced by persons supporting newly elected sheriff, and reasoning that the "determination . . . depends on the actual responsibilities of

“found that the discharged employee had *some* constitutional protection.”<sup>27</sup>

The *Randall* court co-opted the *Elrod-Branti* balancing test for Earl Randall’s situation, reasoning that the analysis is “no different for a restriction on candidacy than [for] a restriction on candidate support.”<sup>28</sup>

A plaintiff’s candidacy cannot be burdened because a state official wishes to discourage that candidacy without a whisper of valid state interest. An interest in candidacy, and expression of political views without interference from state officials who wish to discourage that interest and expression, lies at the core of values protected by the First Amendment.<sup>29</sup>

Because Scott fired Randall for purely personal reasons, the state had no interest in preventing Randall’s political candidacy.<sup>30</sup> And, as the Eleventh Circuit determined, Randall’s decision to run for office deserved some degree of First Amendment protection.<sup>31</sup> Applying the balancing test, the panel reversed the district court’s dismissal of Randall’s complaint.<sup>32</sup>

## II. CONTEXTUALIZING *RANDALL*

Given the First Amendment’s apparent silence on political candidacy, it is not surprising that courts have yet to develop a uniform approach to the issue.<sup>33</sup> The U.S. Supreme Court has never addressed the political candidacy question directly, but its jurisprudence regarding elections and ballot access implies that political candidacy announcements do not receive First Amendment protection.<sup>34</sup> Nonetheless, when facing arguments for the extension of First Amendment protections to political candidacy, most federal courts have turned not to Su-

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each position and the relationship of each to the sheriff”); *see also* *Branti v. Finkel*, 445 U.S. 507, 517 (1980); *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

<sup>27</sup> *Randall*, 610 F.3d at 713.

<sup>28</sup> *See id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 714.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See* U.S. CONST. amend. I. *Compare* *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (refusing to “recogniz[e] candidacy as a fundamental right”), *with* *Randall v. Scott*, 610 F.3d 701, 713 (11th Cir. 2010) (“An interest in candidacy . . . lies at the core of values protected by the First Amendment.”).

<sup>34</sup> *See* *Clements*, 457 U.S. at 963; *Bullock v. Carter*, 405 U.S. 134, 142–43 (1972).

preme Court jurisprudence, but instead to the freedoms of expression and association found in the First Amendment.<sup>35</sup>

A. *Supreme Court Precedent: The Viewpoint-Neutral Cases*

Two cases form the backbone of the U.S. Supreme Court's political candidacy jurisprudence: *Bullock v. Carter*, a 1972 case, and *Clements v. Fashing*, a 1982 case.<sup>36</sup> Each addressed the constitutionality of Texas statutes that restricted political candidacy rights, but were viewpoint-neutral because they applied to all persons holding a certain position rather than to a discrete individual or group's speech.<sup>37</sup> Considering a challenge to the large filing fees required as a condition to having one's name on the ballot, the Court in *Bullock* held that there is no "fundamental status to candidacy" and that the "existence of such barriers does not of itself compel close scrutiny."<sup>38</sup> But because "the rights of voters and the rights of candidates do not lend themselves to neat separation," and because the statute had such a substantial impact on the class of voters most likely to choose a candidate who could not afford the ballot fee, the Court struck down the statute on equal protection grounds.<sup>39</sup>

Ten years later, in *Clements*, the Court affirmed the *Bullock* principle that there is no fundamental right to candidacy and upheld a provision of the Texas Constitution that required state officeholders to resign if they wished to run for another elective office.<sup>40</sup> The restriction on candidacy was minimal, the Court reasoned, and therefore did not have the same substantial impact on voters that invalidated the filing fee statute in *Bullock*.<sup>41</sup> *Bullock* and *Clements* each dealt with a viewpoint-neutral statute—not retaliatory action, as in *Randall*—and neither explicitly precluded First Amendment protections for political candidacy.<sup>42</sup> Neither case, however, supports the proposition that candidacy enjoys per se constitutional protection.<sup>43</sup>

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<sup>35</sup> See, e.g., *Jantzen v. Hawkins*, 188 F.3d 1247, 1256–58 (10th Cir. 1999); *Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir. 1977).

<sup>36</sup> See generally *Clements*, 457 U.S. 957; *Bullock*, 405 U.S. 134.

<sup>37</sup> See generally *Clements*, 457 U.S. 957; *Bullock*, 405 U.S. 134; *Randall*, 610 F.3d 701.

<sup>38</sup> *Bullock*, 405 U.S. at 142–43.

<sup>39</sup> See *id.* at 144–45, 149.

<sup>40</sup> See *Clements*, 457 U.S. at 960, 963, 972–73 (quoting *Bullock*, 405 U.S. at 142–43).

<sup>41</sup> See *id.* at 971–72; *Bullock*, 405 U.S. at 144.

<sup>42</sup> See *Clements*, 457 U.S. at 963; *Bullock*, 405 U.S. at 142–43.

<sup>43</sup> See *Clements*, 457 U.S. at 963; *Bullock*, 405 U.S. at 142–43.

## B. *The Expression/Association Framework*

Many lower federal courts considering whether to extend First Amendment protections to announcements of political candidacy have applied the Supreme Court's expression and association frameworks.<sup>44</sup> The district court in *Randall* was among them.<sup>45</sup> Indeed, the court split Earl Randall's arguments for potential First Amendment protection into two categories: "(1) political patronage—whether he was subjected to an adverse employment action based on his political beliefs or party affiliation, and (2) employee expression—whether he was subjected to an adverse action based on his political speech."<sup>46</sup> This framework, according to an earlier Eleventh Circuit case, adequately encompassed the variety of situations in which the exercise of a First Amendment right may be the basis for a public employee's discharge.<sup>47</sup> It also accurately reflected the case law in other jurisdictions.<sup>48</sup>

### 1. The Expression Cases

The freedom of expression cases typically involve public employees who have been subjected to adverse employment actions based on political speech.<sup>49</sup> In 1968 in *Pickering v. Board of Education*, for example, the U.S. Supreme Court "unequivocally rejected" the notion that public employees could be compelled to give up their rights, as citizens, to comment on matters of public interest.<sup>50</sup> *Pickering* created a balancing test "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>51</sup>

Plaintiffs in several federal circuit courts have successfully argued that political candidacy falls within the ambit of *Pickering*.<sup>52</sup> The U.S. Courts of Appeals for the Fifth, Seventh, and Tenth Circuits have each

<sup>44</sup> See, e.g., *Jantzen*, 188 F.3d at 1256–58; *Newcomb*, 558 F.2d at 828.

<sup>45</sup> See Order Granting Motion to Dismiss, *supra* note 13, at 8–16.

<sup>46</sup> *Randall*, 610 F.3d at 714; Order Granting Motion to Dismiss, *supra* note 13, at 8.

<sup>47</sup> See *Terry*, 866 F.2d at 375; Order Granting Motion to Dismiss, *supra* note 13, at 8.

<sup>48</sup> See *Terry*, 866 F.2d at 375; *Jantzen*, 188 F.3d at 1256–58; *Newcomb*, 558 F.2d at 828.

<sup>49</sup> See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Jantzen*, 188 F.3d at 1256–58; *Newcomb*, 558 F.2d at 828.

<sup>50</sup> 391 U.S. at 568; see also *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) ("The First Amendment protects a public employee's right . . . to speak as a citizen addressing matters of public concern."); *Connick v. Myers*, 461 U.S. 138, 142 (1983) (reaffirming the *Pickering* test).

<sup>51</sup> 391 U.S. at 568.

<sup>52</sup> See, e.g., *Jantzen*, 188 F.3d at 1257; *Newcomb*, 558 F.2d at 828–29.

determined that the declaration of candidacy is a form of protected expression, at least in certain circumstances.<sup>53</sup> In the 1999 case of *Jantzen v. Hawkins*, for example, the Tenth Circuit held that a deputy sheriff's candidacy against his boss constituted "political speech" that "undoubtedly relat[ed] to matters of public concern" and therefore commanded application of the *Pickering* balancing test.<sup>54</sup> Similarly, in the 1977 case of *Newcomb v. Brennan*, the Seventh Circuit considered the case of a deputy city attorney who was dismissed when he announced his candidacy for Congress against the wishes of his supervisor.<sup>55</sup> The *Newcomb* court ruled that the plaintiff's interest in running for office is not entitled to constitutional protection per se, but nonetheless decided that, because the employee had been fired based on "the content of a communicative act," he was therefore protected by the First Amendment.<sup>56</sup>

The U.S. Court of Appeals for the Sixth Circuit, in contrast, has repeatedly held that a declaration of candidacy does not constitute political expression demanding First Amendment protection.<sup>57</sup> In the 1997 case of *Carver v. Davis*, the Sixth Circuit considered the discharge of a deputy clerk because she announced her decision to run for her boss's office.<sup>58</sup> The court determined the announcement of candidacy to be "neutral in terms of the First Amendment" because it was separate from the plaintiff's political beliefs and was not an expression thereof.<sup>59</sup> Declining to apply *Pickering*, the court opined that "[t]he First Amendment does not require that an official . . . nourish the viper in the nest."<sup>60</sup> In 2008 in *Greenwell v. Parsley*, an en banc panel of the Sixth Circuit reaffirmed *Carver* on similar facts.<sup>61</sup>

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<sup>53</sup> See *Jantzen*, 188 F.3d at 1257; *Click v. Copeland*, 970 F.2d 106, 111–12 (5th Cir. 1992) (holding that deputy sheriff's pursuit of office against his employer was protected by the First Amendment); *Newcomb*, 558 F.2d at 828.

<sup>54</sup> *Jantzen*, 188 F.3d at 1257 (ultimately holding that the deputy's interest in expression did not outweigh the sheriff's interest in effective law enforcement under *Pickering*).

<sup>55</sup> See generally 558 F.2d 825.

<sup>56</sup> *Id.* at 828–29. The *Newcomb* court also stressed the ad hoc nature of the firing, distinguishing it from the viewpoint-neutral discrimination considered in *Bullock*. See *Bullock*, 405 U.S. at 137–44 (addressing constitutionality of Texas filing-fee scheme); *Newcomb*, 558 F.2d at 828.

<sup>57</sup> See *Greenwell v. Parsley*, 541 F.3d 401, 403–04 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 64 (2009); *Carver v. Davis*, 104 F.3d 847, 853 (6th Cir. 1997).

<sup>58</sup> See 104 F.3d at 848.

<sup>59</sup> *Id.* at 852; cf. *Murphy v. Cockrell*, 505 F.3d 446 (6th Cir. 2007) (determining that, although the "mere fact" of candidacy was not protected speech, subsequent speech within campaign was protected).

<sup>60</sup> *Carver*, 104 F.3d at 853.

<sup>61</sup> 541 F.3d at 402–03.

## 2. The Association Cases

Sometimes dubbed “political patronage” cases, freedom of association cases involve employees who have been subjected to adverse employment actions based on political beliefs or party affiliation.<sup>62</sup> The regime began with the 1976 decision by the U.S. Supreme Court in *Elrod v. Burns*, which made it unconstitutional to condition a public employee’s continued employment on providing support for a favored political party.<sup>63</sup> The *Elrod* standard, as refined by the Court in 1980 in *Branti v. Finkel*, requires the state authority to “demonstrate that party affiliation is an appropriate requirement for the effective performance of the office.”<sup>64</sup> If the state cannot demonstrate such an interest, then it may not take adverse actions against public employees.<sup>65</sup>

Attempts to extend associational protection to political candidacy have been fewer and less successful than those based on expression.<sup>66</sup> Some courts have latched onto the Supreme Court’s viewpoint-neutral cases that declined to recognize candidacy as a fundamental right.<sup>67</sup> Another relied on the logical argument that “[t]he right to political affiliation does not encompass the mere right to affiliate with oneself.”<sup>68</sup> On these grounds, the Tenth Circuit in *Jantzen* determined that, although a candidate’s right to free speech was implicated by his dismissal, his right to free association was not.<sup>69</sup> Conversely, in 2008 in *Jordan v. Ector County*, the U.S. Court of Appeals for the Fifth Circuit ruled that campaign activities, if not the declaration of candidacy itself, represented “outward signs” of political affiliation and brought a deputy clerk’s candidacy within the ambit of the First Amendment’s associational protections.<sup>70</sup>

## 3. The Eleventh Circuit’s Rejection of Expression and Association Frameworks

The district court in *Randall* ruled that, under either the expression or association framework, Earl Randall’s complaint required dis-

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<sup>62</sup> See *Elrod v. Burns*, 427 U.S. 347, 359 (1976).

<sup>63</sup> *Id.*

<sup>64</sup> *Branti v. Finkel*, 445 U.S. 507, 518 (1980); see *Elrod*, 427 U.S. at 363.

<sup>65</sup> See *Branti*, 445 U.S. at 518.

<sup>66</sup> See, e.g., *Jordan v. Ector County*, 516 F.3d 290, 295 (5th Cir. 2008); *Jantzen*, 188 F.3d at 1252.

<sup>67</sup> See, e.g., *Carver*, 104 F.3d at 850–51; *Newcomb*, 558 F.2d at 828.

<sup>68</sup> *Jantzen*, 188 F.3d at 1252.

<sup>69</sup> See *id.*

<sup>70</sup> 516 F.3d at 298.



missal.<sup>71</sup> In rejecting that conclusion, the Eleventh Circuit also implicitly rejected the expression/association frameworks for political candidacy.<sup>72</sup> Randall's decision to run for office enjoyed constitutional protection in and of itself, irrespective of the status of that decision as protected speech or association.<sup>73</sup> That being the case, the Eleventh Circuit co-opted the *Elrod-Branti* test and applied it to Randall's case, holding that his termination had to be supported by a state interest of sufficient importance.<sup>74</sup>

### III. RANDALL AND THE THIRD PATH: POLITICAL CANDIDACY ANNOUNCEMENTS ENJOY FIRST AMENDMENT PROTECTION

#### A. *The Problematic Logic of the Third Path*

In rejecting the district court's expression/association approach, the Eleventh Circuit attempted to forge a third path: that of recognizing political candidacy as per se protected under the First Amendment.<sup>75</sup> Although that principle has been stated in other contexts, no court has recognized constitutional protection for candidacy in a case squarely similar to *Randall*.<sup>76</sup> The Eleventh Circuit thus broke new ground.<sup>77</sup> But the challenge of advancing the argument is evident in the Eleventh Circuit's somewhat tenuous grounding in authority.<sup>78</sup>

The Eleventh Circuit's use of Supreme Court authority regarding the lack of a "fundamental right" to candidacy, for example, is suspect.<sup>79</sup> Most cases cite the U.S. Supreme Court's 1972 decision, *Bullock v. Carter*, and the Court's 1982 decision, *Clements v. Fashing*, for the proposition that an individual has no constitutional interest in running for office.<sup>80</sup> *Randall* argues instead that the Supreme Court left the door slightly open for constitutional protection—that there is "at least a

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<sup>71</sup> Order Granting Motion to Dismiss, *supra* note 13, at 10.

<sup>72</sup> See *Randall*, 610 F.3d at 714.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.* at 711, 714; *Branti*, 445 U.S. at 507; *Elrod*, 427 U.S. at 363.

<sup>75</sup> See *Randall v. Scott*, 610 F.3d 701, 713 (11th Cir. 2010).

<sup>76</sup> See, e.g., *Flinn v. Gordon*, 775 F.2d 1551, 1554 (11th Cir. 1985) (noting in dicta that plaintiff "certainly had a constitutional right to run for office . . ."); *Magill v. Lynch*, 560 F.2d 22, 29 (1st Cir. 1977) ("Candidacy is a First Amendment freedom.").

<sup>77</sup> Compare *Randall*, 610 F.3d at 710–12, with *Clements v. Fashing*, 457 U.S. 957, 963 (1982), and *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir. 1977).

<sup>78</sup> See *Randall*, 610 F.3d at 710–12.

<sup>79</sup> See *Clements*, 457 U.S. at 963; *Bullock v. Carter* 405 U.S. 134, 142–43 (1972); *Randall*, 610 F.3d at 710–12.

<sup>80</sup> See, e.g., *Carver v. Davis*, 104 F.3d 847, 851 (6th Cir. 1997); *Newcomb*, 558 F.2d at 829.

modicum” of protection remaining between the lines of the Court’s seemingly damning language.<sup>81</sup> That argument may well be correct, but it does not ring with authority.<sup>82</sup> It is revealing that the Eleventh Circuit’s most powerful statement in support of a right to candidacy—that “an interest in candidacy . . . lies at the core of values protected by the First Amendment”—echoes the 1977 case *Newcomb v. Brennan*.<sup>83</sup> In *Newcomb*, the Seventh Circuit used nearly the exact same language in ruling that there was *no per se* protection for candidacy—only protection for the announcement of candidacy as a form of expression.<sup>84</sup>

### B. *A Right to Candidacy Moving Forward*

The Eleventh Circuit’s intention seems admirable: simply put, public employees like Earl Randall *should* be able to declare their candidacy for office without fear that their employer will terminate them without a good reason.<sup>85</sup> As long as the case law is unsettled (or settled against First Amendment protections, as in the Sixth Circuit), public employers may be able to fire any subordinate who seeks elective office, regardless of the state’s interest in preventing or punishing their candidacy.<sup>86</sup> As the *Randall* decision noted, the Supreme Court has recognized that “the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.”<sup>87</sup> If public employees can be fired for the mere fact of their candidacy without justification or repercussion, voters will be deprived of choices—often, the choice to vote for a candidate uniquely qualified for a position by virtue of having worked within that office.<sup>88</sup>

To ensure fairness to all public employees and to resolve jurisprudential conflict, the Supreme Court should decide whether political candidacy enjoys First Amendment protection.<sup>89</sup> The Court could

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<sup>81</sup> *Randall*, 610 F.3d at 712.

<sup>82</sup> See *Clements*, 457 U.S. at 963; *Bullock*, 405 U.S. at 142–43; *Randall*, 610 F.3d at 710–12.

<sup>83</sup> See *Randall*, 610 F.3d at 712; *Newcomb*, 558 F.2d at 829 (“[The] plaintiff’s interest in running for [elective office] and *thereby expressing his political views* . . . lies at the core of the values protected by the First Amendment.” (emphasis added)).

<sup>84</sup> See *Newcomb*, 558 F.2d at 829.

<sup>85</sup> See *Randall*, 610 F.3d at 713.

<sup>86</sup> See *Greenwell v. Parsley*, 541 F.3d 401, 403–04 (6th Cir. 2008); *Carver*, 104 F.3d at 853.

<sup>87</sup> *Randall*, 610 F.3d at 711 (quoting *Bullock*, 405 U.S. at 142–43).

<sup>88</sup> See *Bullock*, 405 U.S. at 144–45, 149.

<sup>89</sup> See generally *Randall*, 610 F.3d 701. The Supreme Court passed up an opportunity to address the issue by denying the *Greenwell* petition for certiorari in 2009. See generally *Greenwell*, 541 F.3d 401, *cert. denied*, 130 S. Ct. 64 (2009). The facts in *Greenwell*, however,

ground its reasoning in a characterization of a candidacy announcement as an act of speech, definitively placing such cases within the ambit of the *Pickering* balancing analysis.<sup>90</sup> Or, as in *Randall*, it could affirm the existence of a right to candidacy, in and of itself, and prescribe a balancing test to ensure that an official's actions are adequately grounded in legitimate state interests.<sup>91</sup> Either stance would be preferable to the current confusion.<sup>92</sup>

## CONCLUSION

As the Eleventh Circuit recognized in *Randall*, the traditional expression/association framework of First Amendment analysis provides insufficient protection for a public employee's interest in running for office. The application of that framework has resulted in open conflict among the circuits. The Eleventh Circuit's rejection of that approach, in favor of recognizing some constitutional protection for political candidacy per se, not only conflicts with other circuits, but is also in apparent tension with the Supreme Court's political candidacy jurisprudence. Until the Supreme Court resolves the issue, public employees may be unfairly and unconstitutionally punished for their participation in the political process.

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made it likely that the state would have prevailed in a balancing test even if the Court had recognized the plaintiff's First Amendment rights. See generally *id.* (considering sheriff's termination of deputy sheriff who intended to run against him in his bid for re-election). Earl Randall's situation was distinct because he was fired for personal reasons unrelated to the state's legitimate interest in office loyalty. See *Randall*, 610 F.3d at 714.

<sup>90</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Newcomb*, 558 F.2d at 829.

<sup>91</sup> See *Randall*, 610 F.3d at 713–14.

<sup>92</sup> See *Clements*, 457 U.S. at 963; *Randall*, 610 F.3d at 713; *Carver*, 104 F.3d at 853. Moreover, either stance would heed the Supreme Court's own admonition that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." See *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971).

