

IN THE SUPREME COURT OF MISSOURI

ROY GAROZZO,)	
)	
Respondent,)	
)	
v.)	SC92152
)	
MISSOURI DIVISION OF FINANCE,)	
)	
Appellant.)	

**Appeal from the St. Louis County Circuit Court, Division 17
The Honorable Joseph L. Walsh, III**

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This case is an appeal from the judgment of the St. Louis County Circuit Court, on a Petition for Review of Agency Action, finding §443.713(2)(a) ¹ unconstitutional on the grounds that the law was passed by the Missouri Legislature in violation of: 1) the prohibition against retrospective laws set forth in Article I, § 13 of the Missouri Constitution; 2) the due process clauses of the United States and Missouri Constitutions; and 3) the prohibition against enactment of bills of attainder set forth in the United States and Missouri Constitutions. Following a timely notice of appeal, Respondent filed the initial brief consistent with Rule 84.05(e). As this matter involves the constitutionality of a state law, this case is within the exclusive jurisdiction of the Missouri Supreme Court pursuant to Art V, § 3 Mo. Const.

¹ All references to the Missouri Revised Statutes are to the 2011 Cumulative Supplement unless otherwise specified.

STATEMENT OF FACTS

A. Introduction.

On December 11, 2006, Roy Garozzo (Garozzo), pled guilty to the Class C felony of possession of a controlled substance in the Circuit Court of the City of St. Louis. (*LF15, Stipulated Finding of Fact No. 6.*) In exchange for his plea of guilt, Garozzo received a suspended imposition of sentence and successfully completed the terms of his probation. (*LF15.*)

Garozzo has worked as a mortgage loan originator (MLO²) since November of 1985. (*LF15.*)

B. Background of individual mortgage loan originator licensing.

In 2008 Congress enacted the federal Secure and Fair Enforcement Mortgage Licensing Act of 2008 (SAFE Act), providing for the licensure of loan originators. The purposes of SAFE Act are set forth at 12 U.S.C §5101, providing in relevant part:

In order to increase uniformity, reduce regulatory burden, enhance consumer protection, and reduce fraud, the States. . .are hereby encouraged to establish a Nationwide Mortgage Licensing System and Registry for the residential mortgage industry that accomplishes all of the following objectives:

² “‘Mortgage loan originator’, [is] an individual who for compensation or gain or in the expectation of compensation or gain takes a residential mortgage loan application, or offers or negotiates terms of a residential mortgage loan....” §443.703. 1(20).

(1) Provides uniform license applications and reporting requirements for State-licensed loan originators.

(2) Provides a comprehensive licensing and supervisory database.

* * *

(4) Provides increased accountability and tracking of loan originators.

* * *

(6) Enhances consumer protections and supports anti-fraud measures.

(7) Provides consumers with easily accessible information, offered at no charge, utilizing electronic media, including the Internet, regarding the employment history of, and publicly adjudicated disciplinary and enforcement actions against, loan originators.

* * *

(9) Facilitates responsible behavior in the subprime mortgage market place and provides comprehensive training and examination requirements related to subprime mortgage lending.

Appellant's Appendix (AA), A6-A7

The SAFE Act also provided that should a state fail to adopt a licensing and registration law for loan originators that complied with the minimum standards specified in the Act, the federal government would establish a licensing system in that state. 12 U.S.C. §5107(a). AA, A12-A15

In response to the passage of the federal SAFE Act, Missouri, passed the Missouri Secure and Fair Enforcement for Mortgage Licensing Act ("Missouri SAFE Act")

(codified at §§443.701-443.893), which complied with a federal standard that prohibited the licensing authority from issuing a license to an applicant for an MLO's license who had pled guilty to a felony within seven years preceding the date of the application.

Missouri's SAFE Act additionally mandates that "[n]o individual. . . shall engage in the business of a mortgage loan originator concerning any dwelling located in Missouri without first obtaining and maintaining a license. . . ." Section 443.706.1. The Division of Finance is responsible for administering the licensing law. Section 443.703.1(6).

C. Procedural history.

On July 27, 2010, Garozzo submitted his MLO application to the Director of the Missouri Division of Finance ("Director"). (*LF 15.*) After reviewing Garozzo's application, the Director denied his application citing §443.713(2)(a) and Garozzo's 2006 guilty plea to the Class C felony of possession of a controlled substance. (*LF15.*) Section 443.713(2)(a) provides that the Director shall not issue an MLO originator license to an applicant that has been convicted of or pled guilty or *nolo contendere* to a felony within seven years period preceding the date of the application for licensing and registration. Garozzo was notified of his denial by letter and timely filed his notice of appeal. (*LF15.*)

A hearing before the Residential Mortgage Board ("Board") was held on October 13, 2010. (*LF15.*) The Director submitted evidence of Garozzo's plea. (*LF15, Stipulated Finding of Fact No. 6.*) Garozzo presented evidence that at no time has he been the subject of, or received any complaints about his services as an MLO originator, evidence that the Division does not dispute. (*LF15, Stipulated Finding of Fact No. 6,*

LF47-50.) Garozzo placed into evidence letters of recommendation from his employer, colleagues and former clients. (*LF33-34.*) Following the hearing, the Board affirmed the Director's denial of Garozzo's application (*LF15*) and noted in its Order:

§443.713 RSMo, prohibits the Commissioner from issuing a mortgage loan originator license to an applicant who has pled guilty to a felony during the seven-year period preceding the date of the application for licensing and registration.

(*LF17.*)

Subsequent to the Board's decision, Garozzo timely filed his Petition for Review with the St. Louis County Circuit Court and alleged that §443.713(2)(a) violated: 1) the prohibition against retrospective laws set forth in Mo. Const. Article I, §13; 2) the due process clauses of the United States and Missouri Constitutions; and 3) the prohibition against enactment of bills of attainder set forth in the United States and Missouri Constitutions. (*LF69-82.*) Thereafter, the Circuit Court granted Garozzo a stay of the Division of Finance's denial and ordered it to issue him a temporary MLO license. (*LF1, 88.*)

In a subsequent Order, the Circuit Court overturned the licensing decisions of the Director and Residential Mortgage Board on the basis that §443.713(2)(a) violated: 1) the prohibition against retrospective laws set forth in Mo. Const. Article I, §13; 2) the due process clauses of the United States and Missouri Constitutions; and 3) the prohibition against enactment of bills of attainder set forth in the United States and Missouri Constitutions. The Circuit Court further ordered the Division of Finance, without

conducting a severability analysis, to grant Garozzo a “permanent mortgage loan originator’s license.” (*LF83-107.*)

ARGUMENT

STANDARD OF REVIEW

As deciding issues of constitutionality is beyond the authority of an administrative agency, courts must review agency actions that present constitutional questions. *Fayne v. Department of Social Services*, 802 S.W.2d 565, 567 (Mo. App. 1991); *Duncan v. Missouri Board for Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524, 530–31 (Mo. App. 1988). An appellate court reviews the decision of the agency rather than the decision of the circuit court. *Stone v. Missouri Dept. of Health and Senior Services*, 350 S.W.3d 14, 19 (Mo. banc 2011). When the agency's decision involves a question of law, the Court reviews the question *de novo*. *Id.*

Statutes enjoy a strong presumption of constitutionality. *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc 2006). “A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision.” *Kansas City Premier Apartments, Inc. v. Missouri Real Estate Comm’n*, 344 S.W.3d 160, 166 (Mo. banc 2011). “The person challenging the statute’s validity bears the burden of proving the act clearly and undoubtedly violates the constitution.” *Id.* The court will “resolve all doubt in favor of the act's validity.... [and may] make every reasonable intendment to sustain the constitutionality of the statute.” *Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984) (citation omitted). The court does not address the constitutionality of statutes in isolation and construes the whole statute in light of a strong presumption of a statute's validity. *State v. Shaw*, 847 S.W.2d 768, 776 (Mo. banc 1993).

POINT I

Section 443.713(2) deprives Garozzo of neither procedural nor substantive due process. (Responding to Garozzo’s Point III.)

A. History of Mortgage Loan Originator Licensing in Missouri.

Prior to the passage of the federal SAFE Act, Missouri had not licensed MLOs. The SAFE Act was passed by Congress in response to the then recent mortgage crisis. It provided that should a state fail to adopt a licensing and registration law for residential MLOs that complied with the minimum standards specified in the federal law, the United States Department of Housing and Urban Development (HUD) “shall provide for the establishment and maintenance of a system for the licensing and registration . . . of loan originators operating in such State.”³ 12 U.S.C. §5107(a).

In response to the passage of the SAFE Act, the Missouri General Assembly enacted the Missouri SAFE Act in 2009. The Act limits who may be an MLO to those with a license, providing in relevant part that “[n]o individual. . . shall engage in the business of a mortgage loan originator concerning any dwelling located in Missouri without first obtaining and maintaining a license. . . .” §443.706.1.

³ The SAFE Act was amended by the “Dodd-Frank” Wall Street Reform and Consumer Protection Act, and the authority and duties delegated to HUD were transferred to the Consumer Financial Protection Bureau (CFPB) effective July 21, 2011, which is now charged with making certain that each state meets the minimum requirements established by the SAFE Act. 12 U.S.C. §5581(b)(7).

One of the federal SAFE Acts minimum standards for licensing (and the subject of this case) is set forth at 12 U.S.C. §5104(b), providing in pertinent part:

The minimum standards for licensing and registration as a State-licensed loan originator shall include the following:

* * *

(2) The applicant has not been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court—

(a) during the 7-year period preceding the date of the application for licensing and registration....

AA, A8-A11

To prevent federal licensure of MLOs in this state, Missouri enacted §443.713, mirroring the federal Act's minimum requirement regarding the licensing of felons:

The director shall not issue a mortgage loan originator license unless the director makes, at a minimum, the following findings:

* * *

(2) The applicant has not been convicted of or pled guilty or nolo contendere to a felony in a domestic, foreign, or military court:

(a) During the seven-year period preceding the date of the application for licensing and registration....

Garozzo challenges the constitutionality of Missouri's licensing requirement on multiple grounds.

B. Procedural Due Process.

Garozzo contends that the State “has deprived [him] of a property interest in his right to continue acting as a mortgage loan originator without procedural due process... [in that] he has had a *de facto* license to engage in his profession. . .[and] the State is taking away his livelihood in the same manner as the holder of a formal license through the denial of his application.” (*Garozzo’s Brief* 35.)

There is no such thing as a *de facto* professional license in Missouri. Prior to the enactment of the Missouri SAFE Act, MLOs were not licensed by the State. By issuance of a license, “the State bestows its seal of approval upon that person and certifies him to be not only a competent practitioner but a person of good moral character who will be honorable and reputable in his professional conduct.” *Wasem v. Missouri Dental Bd.*, 405 S.W.2d 492, 497 (Mo.App. 1966) (determining the appropriate level of discipline for a dentist) *citing State ex rel. Lentine v. State Board of Health*, 334 Mo. 220, 65 S.W.2d 943, 950 (1933) (“The license granted places the seal of the state’s approval upon the licentiate and certifies to the public that he possesses the[] requisites [of licensure].”). Garozzo’s creative labeling aside, business operators engaging in unlicensed activities lack any State imprimatur and do not have a *de facto* license.

It has been held that “once a license has been obtained, the licensee will generally acquire a property right sufficient to require substantive and procedural due process before the license can be impaired, suspended, or revoked.” *Missouri Real Estate Com’n v. Rayford*, 307 S.W.3d 686, 692 (Mo.App. 2010). However, Garozzo could not have

possessed any MLO license, *de facto* or otherwise, for the simple reason that no license existed or was required prior to the passage of the Missouri SAFE Act in 2009. Because Garozzo did not have a license, he had no protected property right in it.⁴ Therefore, any right that Garozzo had to procedural due process was triggered by the denial of his MLO license application, which allowed Garozzo to avail himself of the appeals process set forth in Chapter 536, §443.729.2, §443.816(2) and 20 CSR 1140-31.020, which he has done.

Garozzo further contends that had he “known at the time that entry of a guilty plea would not afford him the benefits generally associated with a suspended imposition of sentence, he might have contested the count against him and sought a resolution that would have allowed his continued employment as a mortgage loan originator.” (*Garozzo’s Brief* 36.)

Garozzo’s argument is erroneously premised on the proposition that he has a “right” for the law to remain unchanged. As this Court has properly noted, a “suspended imposition of sentence has a number of other collateral consequences.” *State v. Larson*, 79 S.W.3d 891, 894 n. 9 (Mo. 2002) (guilty pleas are used in determining prior, persistent and dangerous offenders, to impeach witnesses in criminal cases, to determine forfeiture of public offices, are required on certain job applications, and are the basis to

⁴ See also *Rampolla v. Banking Dept. of State of New York*, 916 N.Y.S.2d 492, 500 (N.Y.Sup. 2010), determining that a felon applicant for a MLO license under the New York SAFE Act had no property interest in a MLO license.

revoke certain permits). Garozzo had no reasonable expectation that the collateral consequences of his plea would remain forever unchanged, as one does not enjoy a “vested right to be free from [the] further collateral consequences of his prior guilty plea.” See *State v. Young*, 362 S.W. 3d 386, 391 (Mo. banc 2012) (upholding the ouster of a felon from public office though the same was not a disqualifier at the time of the guilty plea).

Garozzo also complains that he was not, and could not have been, fully informed of the possible ramifications of his guilty plea. (*Garozzo’s Brief* 36-37.) Clairvoyance is not required for an effective plea.

A court's duty in accepting a guilty plea is to determine whether the plea is voluntarily and freely made. . . .But a court is not required to . . . inform a defendant that the legislature may amend the law at some future date.

State v. Acton, 665 S.W.2d 618, 620-621 (Mo. banc 1984). The Division’s application of §443.713(2)(a) to Garozzo did not violate his constitutional right to procedural due process.

C. Substantive due process.

Garozzo’s brief asserts that his substantive due process rights were violated because the denial of his license was arbitrary, capricious, and irrational as no rational

relationship exists between §443.713(2)(a)'s denial of licensure to certain felons and a desire to prohibit bad actors from defrauding homebuyers. (*Garozzo's Brief* 33-34.⁵)

The foregoing misstates the substantive due process standard. This Court recently restated this standard:

To establish a violation of an individual's substantive due process rights, the 'plaintiff must demonstrate *both* that the official's conduct was conscience-shocking, *and* that the official violated one or more fundamental rights that are deeply rooted in the Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'

⁵ In support Garozzo cites the equal protection discussion contained *In re Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003), not the substantive due process discussion. To state a substantive due process claim, Garozzo had to "allege that a government action was sufficiently outrageous or truly irrational, that is, something more than ... arbitrary, capricious, or in violation of state law [s]ubstantive due process is concerned with violations of personal rights ... so severe ... so disproportionate to the need presented, and ... so inspired by malice or sadism rather than merely careless or unwise excess of zeal that it amounted to brutal and inhumane abuse of official power literally shocking to the conscience." *Christiansen v. West Branch Community School Dist.*, 674 F.3d 927, 937 (8th Cir. 2012). Applicant's First Amended Petition fails to state a substantive due process claim. (*LF77-78*, ¶48.)

Bromwell v. Nixon, 361 S.W.3d 393, 400 (Mo. banc 2012) (emphasis in original) (rejecting a claim that the Missouri Prisoner Litigation Reform Act violated substantive due process by requiring inmates to pay a partial filing fee, based on a percentage of their inmate accounts, to file a writ of habeas corpus). In no discovered case has a court's conscience been shocked by a state's temporary denial of license to one guilty of felonious conduct. This is particularly true when the statutory restriction on licensure is of limited duration. Even an examination of the decade-old case relied on by Garozzo provides only that substantive due process protects "fundamental rights and liberties that are 'deeply rooted in this Nation's history and traditions,' and 'implicit in the concept of ordered liberty.'" *In re Woodson*, 92 S.W.3d at 783, quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). There is no fundamental right – deeply rooted in American history and traditions, implicit in the concept of ordered liberty, or otherwise – for one who has pled guilty to felonious conduct to receive the state's seal of approval to engage in a licensed occupation. And it would be hyperbole to suggest "that neither liberty nor justice would exist" if Garozzo is denied a license. *Bromwell*, 361 S.W.3d at 400. The Supreme Court has indicated its reluctance "to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Washington*, 521 U.S. at 720. This Court should replicate that reluctance and hold that §443.713(2)(a) and the denial of Garozzo's application pursuant thereto does not violate the substantive due process clause found in either the Constitution of the United States or the Constitution of the State of Missouri.

POINT II.

Section 443.713(2) is not an invalid retrospective law. (Responding to Garozzo's Point II.)

Article I, §13 of the Constitution of Missouri provides that “no ... law ... retrospective in its operation ... can be enacted.” This Court in *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 62 (Mo. banc 2010), defined “retrospective laws” as ones “*which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past.*” (Emphasis in original.)

A. Section 443.713(2) does not impair a vested right.

Garozzo asserts that §443.713(2)(a) is an unconstitutional retrospective law because his “antecedent criminal proceeding became a *per se* basis for [him] to lose the right to serve as a mortgage loan originator that he had previously enjoyed.” (*Garozzo's Brief 31.*) Garozzo previously enjoyed no such right and Garozzo's argument is erroneously premised on the assumption that because he had been an MLO, he was entitled to continue in this occupation. Such an assertion ignores longstanding and recent precedent to the contrary.

Recently in *State v. Young*, 362 S.W.3d 386, 390 (Mo. banc 2012), this Court noted that a vested right “must be something more than a mere expectation based upon an anticipated continuance of existing law.” Rather, a vested right is one that has “become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another.”

Fisher v. Reorganized Sch. Dist. No. R-V, 567 S.W.2d 647, 649 (Mo. banc 1978). Garozzo's enjoyment of the previously existing state of affairs does not constitute a vested right.

To support his vested right claim, Garozzo cites *Missouri Real Estate Com'n v. Rayford*, 307 S.W.3d 686 (Mo. App. 2010). However, Garozzo's reliance on *Rayford* is misplaced. In fact, the *Rayford* decision resolves this matter in favor of the Division. The *Rayford* Court rejected the notion that a license was a vested right in clear language:

...we cannot conclude that a professional license of any kind represents a vested right... In short, no one who possesses a license has the right or ability to presume the license is "vested" or that the license has an "independent existence." Rather, the license remains subject to the laws and regulations which authorized its issuance in the first place, which is the antithesis of a vested right.

Id. at 691. If one does not have a vested right to a license – as the Court of Appeals held in *Rayford* – it is inconceivable that Garozzo enjoys a vested right in the *de facto* license he erroneously claims to hold. Garozzo has no vested right to secure a newly-created MLO license, nor a vested right to simply to continue in his previously unlicensed occupation.

B. Section 443.713(2) does not create a new obligation, impose a new duty, or attach a new disability on Garozzo with respect to transactions or considerations already past.

Garozzo further asserts that the passage of §443.713(2)(a), is an unconstitutional retrospective law because it imposes disabilities upon him in that if he “continues to engage in his profession without obtaining a license, he risks being fined or paying a civil penalty.” (*Garozzo’s Brief* 31.) In *Rayford*, relied upon by Garozzo, the Court of Appeals rejects this contention. Following his conviction, Rayford received a real estate license. Later §339.100.5 was signed into law, mandating that his existing license be revoked because of his previous conviction. The Court of Appeals held that §339.100.5 would be:

unconstitutionally retrospective if applied to mandate the revocation of a real estate license in force on the statute's effective date based solely on the antecedent criminal proceeding.

307 S.W.3d at 695. These are not the facts before the Court and *Rayford* was carefully limited to its facts. The *Rayford* Court explicitly said that its holding and the prohibition on the enactment of retrospective laws:

would not prohibit ... the application of section 339.100.5 to bar an *applicant* with an antecedent qualifying criminal offense from being denied a real estate license, as in such a case the past conduct is being looked at ‘as a basis for future decision-making by the state, in regard to things such as the issuance of a license.’

307 S.W.3d at 695 (emphasis in original). Such is the case here. As the Missouri SAFE Act created an entirely new licensing system for MLOs where none had previously existed, everyone seeking such a license is a first time applicant. The only new duty the

Act created was on the Division to deny Garozzo's licensing application. No new disability has been imposed on Garozzo; he was unqualified for licensure the moment the licensing scheme came into effect. Though the Missouri SAFE Act changes "the materiality of a past transaction with respect to the applicant, it does so only with respect to an application that post dates" the new law and, hence, "[i]n this regard, the application of [the new law] is prospective, not retrospective." *Rayford*, 307 S.W.3d at 696.

To the same effect is this Court's recent decision in *State v. Young*, 362 S.W. 3d 386 (Mo. banc 2012). Young pled guilty to the Class C felony of second degree assault, received a suspended execution of sentence, and successfully completed probation. *Id.* at 389. Thereafter a statute was enacted providing that no "person shall qualify as a candidate for elective public office in the state of Missouri who has been convicted of or found guilty of or pled guilty to a felony under the laws of this state." §115.350. Later still Young was elected Cass County presiding commissioner and a *quo warranto* action was filed seeking his removal from office pursuant to the new statute.

Young argued that the application of §115.350 to him created a new duty, obligation, or disability with respect to his 1995 felony conviction because it permanently foreclosed him from running for office and "imposed an affirmative obligation on him to refrain from running for and, by extension, from holding office." *Id.* at 391. The Young Court rejected the allegations, observing that the new law does not "impose any new obligation or duty on Young because he has no affirmative obligation to take any action whatsoever to comply with section 115.350." *Id.* It was Young's desire to run for and hold office, not the statute itself, which caused the new statute to impact him.

So too here it is Garozzo's desire to continue in the occupation of being a MLO that requires him to apply for the necessary license, not the Missouri SAFE Act. The requirement to file an MLO application and secure a license applies to everyone wishing to engage in the occupation, not just those like Garozzo who have pled guilty to a felony during the seven-year period preceding the date of the license application. Section 443.713(2)(a) does not impose any new obligation or duty on Garozzo because he has no affirmative obligation to take any action whatsoever to comply with the law's provisions. *See F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 62 (Mo. banc 2010) ("if a law said everyone previously convicted of X shall pay the school district \$500, it would be retrospective....But if the law said the school board shall not hire as a guidance counselor anyone who previously was convicted of X, it would not be retrospective because the obligation is on the school board. This also is not a disability because the regulatory consequence is on the school board. In a sense it is a disability to the convict, but there is no "legal" disability because the law is not requiring him to do anything, for example to pay a fine."). Section 443.713 mandates that it is the duty and obligation of the Director to not grant an MLO license to an individual who has pled guilty to a felony during the seven-year period preceding the date of the application for licensing. Therefore, the statutory disability is imposed upon the Director, not Garozzo. Under these circumstances, the Missouri SAFE Act cannot be found retrospective.

POINT III.

Section 443.713(2) does not create an impermissible bill of attainder.

(Responding to Garozzo’s Point I.)

Garozzo asserts that §443.713(2)(a) was enacted in violation of the prohibition against bills of attainder set forth in the United States and Missouri Constitutions. This Court has stated, “[o]nly the clearest proof will suffice to establish the unconstitutionality of a statute because it constitutes a bill of attainder.” *State ex rel. Bunker Recycling & Reclamation, Inc. v. Mehan*, 782 S.W.2d 381, 389 (Mo. banc 1990). Such proof is absent here.

Bills of attainder are generally described as “legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.” *Id.* at 385.

In order for Garozzo to prove that §443.713 is an unconstitutional bill of attainder, he must establish “that the statute singles out a ‘specifically designated person or group,’ **and**...that the act inflicts punishment on that person or group.” *Id.* at 386, *citing Selective Service System v. Minnesota Public Interest Research Group, et al*, 468 U.S. 841 (1984) (emphasis added). The *Bunker* decision referred to the first element as the “specificity element” and the second as the “punishment element.” *Bunker*, 782 S.W.2d at 386. Section 443.713(2)(a) meets neither element.

A. The Specificity Element.

While Garozzo argues that §443.713(2)(a) identifies a group, (those who have either pled guilty to or been convicted of a felony during the seven-year period preceding

the date of submission of an application for licensure), it has not classified affected individuals in an unconstitutional manner. *Bunker* clarifies the specificity requirement: “The specificity element of the definition of ‘bill of attainder’ is met by a statute singling out an individual, whether the individual is called by name or described in terms of past conduct which, because it is past conduct, operates only as a designation of particular persons.” *Bunker*, 782 S.W.2d at 387. In *Bunker*, the Court found that the statutory classification met the specificity requirement because the impacted group (the statutory definition was so narrow only a group of one came within the definition) was “determined entirely on past conduct and [had] no method of escaping....” *Id.* Under §443.713(2)(a) every person who pled guilty to a felony in the previous seven years will escape the identified group merely by allowing time to pass before submitting an application. Given the fact that the potentially impacted group has changed every day since the date of the statute’s enactment and that all applicants bring themselves within the group volitionally by filing an application, it is difficult to conclude that the legislation impacts a clearly specified group. Hence, the identity or numerosity of the impacted group is not forever fixed by the statute.

B. The Punishment Element.

However, even if §443.713(2)(a) meets the specificity requirement, “legislation directed at and burdensome to only a single individual or group does not by itself violate the Bill of Attainder Clause if there is a rational, nonpunitive basis for the legislation.” *Id.* To determine whether a statute imposes a constitutionally prohibited punishment, courts must examine: (1) whether the challenged statute falls within the historical

meaning of legislative punishment, (2) whether the statute, viewed in a light of the severity of burdens it imposes, can reasonably be said to advance a nonpunitive legislative purpose, and (3) whether the legislative record discloses an intent to punish. *Bunker*, 782 S.W.2d at 387. The Division acknowledges that the *Bunker* decision noted, “[b]arring a specific person or identifiable group from participating in a lawful, albeit regulated, business or profession is historically recognized as a punishment.” *Id.* However, the Court further stated:

The historical development of the concept of legislative punishment does not end the inquiry. The second inquiry applies a functional approach in which the court determines if a nonpunitive legislative purpose is advanced by the law. Generally, legislation intended to prevent future danger, rather than to punish past action, is not an unconstitutional bill of attainder.

Id. Therefore, if §443.713(2)(a) is found to advance a non-punitive legislative purpose, Garozzo’s bill of attainder claim fails.

Section 443.713 is a licensing statute. “The purpose behind licensing statutes is to protect the public rather than to punish the licensed professional.” *Duncan v. Missouri Bd. for Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524, 531-532 (Mo. App. 1988), citing *State ex rel. Lentine v. State Board of Health*, 334 Mo. 220, 65 S.W.2d 943 (1933).

The goals of the federal SAFE Act are to enhance consumer protection, reduce fraud, provide for a comprehensive licensing and supervisory database, and provide for increased accountability and tracking of loan originators. 12 U.S.C §5101. See also 154

Cong. Rec. S734-01 (daily ed. Feb. 6, 2008) (statement of Sen. Feinstein) (“The subprime mortgage crisis has threatened both the global economy and the American dream of home ownership. Accountability, professional standards, and oversight must be enhanced for everyone in the mortgage industry. This bill will make it so, and will help to ensure such a crisis never happens again.... This legislation does not assign blame, but rather provides a workable solution to protect homebuyers and begin to restore confidence in the American dream of homeownership.”). AA, A1-A2

To the statutorily-stated federal goals Missouri’s enactment adds a desire to have the state engage in licensing to avoid a federal take-over of this licensing activity.⁶ Section 443.713(2)(a) advances both the federal and state articulated nonpunitive legislative purposes because it protects consumers from those guilty of felonious conduct (who have – in the legislatively determined recency period – acted contrary to the law), allows participation in the database (enhancing accountability and tracking), and permits Missouri to perform this licensing activity (which the federal government would perform

⁶ While Missouri does not have formal legislative history, the Summary of the Committee version of the HB 382 (2009) specifies that the proponents of the bill, including Representative Cox (the bill sponsor) testified that the bill would allow easier access to licensing across states for mortgage brokers and would prevent federal regulation of the industry. See Summary of the Committee Version of the HB 382 (2009), <http://house.mo.gov/content.aspx?info=/bills091/bilsum/commit/sHB382C.htm> *3, AA, A3-A5. These are not punitive purposes.

had Missouri not acted and will perform should the circuit court's opinion be affirmed because Missouri's licensing scheme will be at variance with federal requirements).

The most that Garozzo can argue is that there is not perfect congruity between the group temporarily barred from licensure and the consumer protection aspect of the nonpunative legislative purposes that underlie the statute. But perfect congruity is not the test; the challenged legislation need only *advance* a nonpunitive legislative purpose to avoid a challenge on bill of attainder grounds. This is a test Missouri's SAFE Act easily meets. "[T]he guarantees against [bills of attainder] were not intended to preclude legislative definition of standards of qualification for public or professional employment." *Garner v. Board of Public Works of City of Los Angeles*, 341 U.S. 716, 722 (1951). Based on the above precedent, §443.713(2)(a) is not an unconstitutional bill of attainder forbidden by Art I, § 30 Mo. Const., or Article I, § 10 of the United States Constitution.

CONCLUSION

Because the Missouri SAFE Act does not violate the due process clauses, is not a bill of attainder, and is not retrospective in its application, the decisions of the Director of the Division of Finance and the Residential Mortgage Board denying Garozzo's MLO license should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this Brief of Respondents/Cross-Appellants is 6,027, exclusive of the cover, table of contents, table of authorities, signature block, and certificate of compliance and service.

The undersigned also certifies that on this 30th day of May, 2012, a copy of the foregoing was served via the Court's e-filing system and electronic mail on:

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