

**No. 84501**

---

**IN THE  
MISSOURI SUPREME COURT**

---

**STEVE BURGESS, ET AL.,**

**Respondent,**

**v.**

**Hon. JEREMIAH W. NIXON,  
being the MISSOURI ATTORNEY GENERAL**

**Appellant.**

**Appeal from the St. Louis County Circuit Court  
The Honorable Bernhardt C. Drumm, Jr., Judge  
Case No. 02CC-000920**

---

**RESPONDENT'S BRIEF**

---

**TIMOTHY J. GALLAGHER**

**Timothy J. Gallagher  
Missouri Bar No. 37872  
1034 South Brentwood Boulevard  
Suite 1555  
St. Louis, Missouri 63117  
(314) 725-1780  
(314) 725-0101 (Facsimile)**

**ATTORNEYS FOR RESPONDENT  
STEVE BURGESS**

**TABLE OF CONTENTS**

Table of Contents . . . . . 1

Table of Authorities . . . . . 3

Statement of Facts . . . . . 6

Preliminary Statement . . . . . 8

Standard of Review . . . . . 8

Points Relied On . . . . .9

Argument

**I. The trial court did not err in reaching the constitutional issue of this case. . . . . 10**

**II. The trial court correctly declared Section 115.346 R.S.Mo. unconstitutional because the Statute violates the equal Protection clause of the Fourteenth Amendment of the United States Constitution. . . . . 12**

**A. Constitutional Standard of Review . . . . . 12**

**1. Strict or Heightened Scrutiny . . . . . 12**

**2. Reasonable Basis . . . . . 13**

**B. Applying Reasonable Basis to State’s claimed goals . . . 15**

**1. The law does not assist Cities in the enforcement**

	<b>of their local taxes and fees. . . . .</b>	<b>15</b>
<b>2.</b>	<b>The law does not ensure that law abiding people Govern Missouri cities. . . . .</b>	<b>16</b>
<b>3.</b>	<b>The law does not decrease public cynicism toward local government. . . . .</b>	<b>17</b>
<b>C.</b>	<b>Applying Heightened Scrutiny . . . . .</b>	<b>19</b>

## TABLE OF AUTHORITIES

<u>Clements v. Fashing</u> , 457 U.S. 957, 964-65 (1982) . . . . .	12 -13
<u>Corrigan v. City of Newaygo</u> , 55 F.3d 1211 (6th Cir. 1995) . . . . .	13, 14
<u>Deibler v. City of Rehoboth Beach</u> , 790 F.2d 328 (3d Cir.1986) . . . . .	13-14, 17
<u>Hunt v. City of Longview</u> , 932 F. Supp. 828 (E.D. TX 1995) . . . . .	13, 14, 17
<u>In re Williams</u> , 943 S.W.2d 244 (Mo.App. 1997) . . . . .	15
<u>Jackson County Bd. Of Election Commissioners v. Baluka</u> , 13 S.W. 3rd 684, 689 (Mo. App W.D. 2000) . . . . .	12
<u>State on inf. Bloebaum v. Broeker</u> , 11 S.W.2d 81 (Mo. App. 1928) . . . . .	10-11
<u>State ex rel. Selsor v. Grimshaw</u> , 726 S.W.2d 868 (Mo. App. E.D. 1989) . . . . .	11
<u>State ex rel. Thomas v. Williams</u> 12 S.W. 905, 99 Mo. 291 (Mo. 1889) . . . . .	11
<u>Watts v. Flenoy</u> , 938 S.W.2d 311 (Mo.App. 1997) . . . . .	15

**OTHER AUTHORITIES**

Mo. Const. art. VI, §19 . . . . . 6

§115.346 R.S.Mo. . . . . passim

Mo. R. Civ. P. 87.04 . . . . . 7

Mo. Const. art. V, §2 . . . . . 11

§139.100 R.S.Mo. . . . . 16

§140.100 R.S.Mo . . . . . 16

## **JURISDICTIONAL STATEMENT**

Respondent adopts Appellant's Jurisdictional Statement.

## STATEMENT OF FACTS

Respondent adopts Appellant's Statement of Facts with the following additions: Respondent Steve Burgess lived and worked in the "Wildwood" area before it was incorporated as a Third Class City in 1995. L.F. at 7 ¶1 and 31 ¶1. He has continuously operated a business known as Burgess Mantels and More located at 17249 Manchester Road, within the Incorporated city limits. L.F. 24, 28. When Wildwood first incorporated, in 1995, Burgess requested a business license and tendered the required fee of \$25.00. L.F. at 10 ¶15 and 33 ¶15. The City did not issue the business license because of alleged zoning violations L.F. 24- 29.

Pursuant to Article 6 §19 of the Missouri Constitution, the citizens of Wildwood adopted a charter form of government in November 1997. Burgess satisfied the requirements of the Wildwood City Charter to stand for election. L.F. at p. 9 ¶ 9, pp. 19 -23 and p. 32 ¶9. The trial court found that Burgess was not certified for the ballot due to the requirements of §115.346 R.S.Mo. L.F. 45.

The challenged statute, §115.346 R.S.Mo., was passed by the Missouri Legislature in 1999. In the short time since its enactment it has been used to keep several candidates off ballots and has been the subject of at least two other lawsuits besides this one: Osborn vs. City of Olivette, Case #4:2000cv00271

JCH, United States District Court, Eastern District of Missouri ( Filed 02/18/2000. Dismissed by Court on 10/10/2000 without reaching constitutional issues.) and City of Richmond Heights v. Gallagher, Case # 02CC-0497 E EQ, Twenty-First Judicial Circuit of Missouri, Saint Louis County (Filed 2/7/2002, judgment for candidate to remain on ballot 2/17/2002).

At the trial level, the Attorney General of Missouri was named as a Respondent to the alternative count for declaratory relief pursuant to Rule 87.04 of the Missouri Rules of Civil Procedure. L.F. at 8¶5. Originally, no answer was filed on behalf of the State of Missouri; however, the Attorney General's office was contacted and encouraged by the trial court to attend the hearing on March 19, 2002. L.F. at 44.

## **PRELIMINARY STATEMENT**

The trial court found that the City of Wildwood used an unconstitutional statute to prevent Steve Burgess from appearing on the ballot for municipal election. This Court should also find §115.346 to be unconstitutional.

## **STANDARD OF REVIEW**

Respondent adopts appellant's standard of review.

## **POINTS RELIED ON**

**POINT I: The trial court did not err in reaching the constitutional issues of this case.**

State on inf. Bloebaum v. Broeker, 11 S.W.2d 81 (Mo. App. 1928)

State ex rel. Thomas v. Williams, 12 S.W. 905, 99 Mo. 291 (Mo. 1889)

State ex rel. Selsor v. Grimshaw, 726 S.W.2d 868 (Mo. App. E.D. 1989)

**POINT II: The trial court correctly declared Section 115.346 R.S.Mo. unconstitutional because the Statute violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.**

Jackson County Bd. Of Election Commissioners v. Baluka,

13 S.W.3rd 684, 689 (Mo. App W.D. 2000)

Clements v. Fashing, 457 U.S. 957, 964-65 (1982)

Deibler v. City of Rehoboth Beach, 790 F.2d 328 (3d Cir. 1986)

Corrigan v. City of Newaygo, 55 F.3d 1211 (6th Cir. 1995)

Hunt v. City of Longview, 932 F. Supp. 828 (E.D. TX 1995)

## ARGUMENT

**POINT I: The trial court did not err in reaching the constitutional issues of this case.**

The first salvo of the State in defending §115.346 R.S.Mo. is to invite this court to remand this controversy to the Trial Court for another factual determination of the applicability of the law to respondent/ candidate Burgess' unresolved business license tax dispute with the City of Wildwood.

This is an interesting opening argument for a party that did not file an Answer in the Circuit Court. The record reflects that even though the State of Missouri was in default on the date of the hearing, the trial judge telephoned the Assistant Attorney General assigned to this, who “chose not to appear” at the scheduled hearing. L.F. at 44.

The State of Missouri failed to give the trial court the benefit of its legal arguments at the hearing, but now contends that this case could have been decided on alternate grounds. Citing State on inf. Bloebaum v. Broeker, 11 S.W.2d 81 (Mo. App. 1928), the State requests a remand for what it characterizes as an opportunity for the trial court to review “dispositive arguments not addressed below.” (App. Br. P14)

Far from being dispositive, review of older legal precedents will only make it more clear that this is an issue that must be addressed by this court on constitutional grounds. In the case of State on inf. Bloebaum v. Broeker, the St. Louis Court of Appeals in 1928 held that the failure on the part of the Mayor of St. Charles, “prior to this election, to have procured and paid for a license as a painting paper-hanging contractor for certain years” did not make him ineligible to hold his office. This ruling is in conflict with the last declaration of this court on the same issue. In State ex rel. Thomas v. Williams 12 S.W. 905, 99 Mo. 291 (Mo. 1889), it was held that failure on the part of Emil Thomas to have paid for a saloon license made him ineligible to serve as Marshall of the City of St. Louis in 1889. The Thomas v. Williams decision was in part based upon the antiquated legal reasoning that since restrictions could be placed upon voters for failure to pay taxes, so too could restrictions be places on candidates. *Id.* at 911.

Thomas v. Williams is still valid law and was followed to keep a winning candidate from assuming office as recently as 1989. See State ex rel. Selsor v. Grimshaw, 726 S.W.2d 868 (Mo. App. E.D. 1989). At the original hearing, as it would be on remand, the Circuit Court was controlled by this Court’s decision in Thomas v. Williams, the latest pronouncement on this issue by this Court. Article 5, §2 of the Missouri Constitution.

**POINT II: The trial court correctly declared Section 115.346 R.S.Mo. unconstitutional because the Statute violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.**

**A. Constitutional Standard of Review-**

**1. Strict or Heightened Scrutiny**

The last Missouri case that discussed restrictions to ballot access stated that any state law regulating access to the ballot must be shown by the state to be necessary to serve a compelling interest. Jackson County Bd. of Election Commissioners v Baluka, 13 S.W. 3rd 684, 689 (Mo. App W.D. 2000). Strict scrutiny should be applied to determine whether a regulation involving the right of access to the ballot is constitutional. Id. When there is a compelling interest, the state must utilize the least restrictive means in achieving its ends. Id. The Court of Appeals in Baluka stated those standards without applying them.

The Attorney General cites Clements v. Fashing , 457 U.S. 957, 964-65 (1982) for the proposition that heightened equal protection scrutiny should only be applied in two types of cases: 1) those dealing with classifications based on wealth, and 2) those involving classifications that burden "new or small political parties or independent candidates." To the extent that: 1) the ability to pay taxes may be the result of economic factors and 2) most (if not all) municipal elections

are non-partisan and therefore involve independent candidates, this Court may chose to apply a heightened equal protection scrutiny to this case.

## **2. Reasonable Basis**

The Attorney General argues that the "reasonable basis" test applies to this case. There is precedence for applying that test to this case found in three federal decisions that have ruled on similar issues: Deibler v. City of Rehoboth Beach, 790 F.2d 328 (3d Cir.1986), Corrigan v. City of Newaygo, 55 F.3d 1211 (6th Cir. 1995) and Hunt v. City of Longview, 932 F. Supp. 828 (E.D. TX 1995). These three cases involved City Charters or Ordinances that required candidates for, or holders of, Municipal offices to be current on their taxes. All three Courts applied the "reasonable basis" test in reaching different decisions.

In Deibler, the Third Circuit Court of Appeals considered whether a municipal charter that required candidates to be current in their tax payments violated the equal protection clause. Quoting such sources as James Madison in *The Federalist Papers*, the Court found the provision to be unconstitutional. The Court recognized that "[e]ach new qualification decreases a voter's choice and consequently harms democratic government. Analysis of equal protection and our understanding of the legitimate interests of society counsel that candidacy

conditioned upon the payment of taxes is inimical to democratic government." at 790 F.2d 337.

In Corrigan, the Sixth Circuit Court of Appeals upheld a City ordinance that prevented residents who were "delinquent on their local taxes or water and sewer fees from appearing on the ballot in elections for local offices." 55 F.3d at 1212. The Court accepted the reasoning that administration of the tax system by "encouraging citizens to pay taxes through a ballot access restriction" served as a "rational basis" for the law. *Id.* at 1217.

The District Court in Hunt faced a slightly different issue. In that case the Court was asked to decide the constitutionality of a provision in the City Charter that office holders not owe any liabilities to the City. The Court held that the provision violated the equal protection clause. Stating that "[k]eeping current with one's tax liabilities is not necessarily a mark of good citizenship." 932 F. Supp. at 841. The Court found that the tax payment provision did not "rationally relate" to a stated governmental interest. *Id.* Noting media coverage of the case, the Court deferred to the will of the voters and wrote that if the voters decide that they "do not wish to be represented by those who are delinquent in paying city taxes, they can do so at the ballot box." *Id.*

**B. Applying Reasonable basis to State's claimed goals**

The Attorney General attempts to legitimize §115.346 by advancing three goals:

- (1) To assist Cities in the enforcement of their local taxes and fees;
- (2) To ensure law abiding people govern Missouri cities;
- (3) To decrease public cynicism toward local government.

Respondent does not know of the legislative intent behind this Statute<sup>1</sup>, but even applying the "rational basis" test advocated by the Attorney General, the law is not rationally related to advancing the stated goals. For the reasons listed below, §115.346 is not reasonably related to accomplishing any of these goals.

**1. The law does not assist Cities in the enforcement of their local taxes and fees.**

The State of Missouri does not have a legitimate interest in forcing Burgess to pay a business license fee when the City of Wildwood never issued him a business license. The dispute centers around zoning issues, such as: installation of parking spaces, construction of a sidewalk, landscaping, construction of a trash enclosure and submittal of a stormwater plan. L.F. 26-27. All of these issues are

---

<sup>1</sup>It may have been in response to two recent disputes in Saint Louis County involving eligibility to run for office see: Watts v. Flenoy, 938 S.W.2d 311 (Mo.App. 1997), In re Williams, 943 S.W.2d 244 (Mo.App. 1997).

local in nature. The State of Missouri has no interest in local sidewalks, trash enclosures, etc.

If, however, the Court finds that the State of Missouri has a legitimate interest in making sure Burgess pays a yearly \$25.00 business license fee to the City of Wildwood, then the next issue is whether the Statute is rationally related to the State's interest in assisting in the enforcement of local taxes and fees.

There are many Statutes in place that provide the framework to Cities for imposing and collecting taxes and fees. As an example, Chapter 94 of the Revised Statutes of the State of Missouri, entitled "Taxation in Other Cities," includes many ways for cities to assess and collect taxes. As further example, §139.100 and §140.100 R.S.Mo. authorize the assessment of interest at 18% per annum and collection of penalties for delinquent taxes.

A lawsuit for collection of back taxes, assessment of interest and penalties are the type of statutes reasonably related to the goal of assisting Cities in the enforcement of their local taxes and fees. All taxpayers would be subject to those means of tax enforcement, but only a handful of taxpayers, who decide to run for office would be subjected to the "enforcement" power of §115.346. While running for public office may not be a fundamental right, it is an honorable form of participation that should be encouraged, not unreasonably restricted.

The ballot restriction of §115.346 is not reasonably designed to assist Cities in the enforcement of their local taxes and fees. It only serves to disqualify otherwise qualified candidates and discourages political participation by infringing upon the right of access to the ballot.

**2. The law does not ensure that law abiding people govern Missouri cities.**

There is no evidence that Respondent Burgess, or other potential candidates affected by this law,<sup>2</sup> are not law abiding citizen. Despite his zoning dispute with the City of Wildwood, he was found to be qualified by both the city and many registered voters in both 2000 and 2002.

"Keeping current with one's tax liabilities is not necessarily a mark of good citizenship." Hunt, 932 F. Supp. at 841. Burgess' zoning dispute does not bear on his "maturity, intelligence, knowledge of the community, ability to recognize and solve community problems." Deibler, 790 F.2d at 337.

**3. The law does not decrease public cynicism toward local government.**

The final justification advanced by the Attorney General is that the Statute helps to decrease public cynicism toward local government.

---

<sup>2</sup>The aforementioned case of City of Richmond Heights v. Gallagher, involved the undersigned who unintentionally failed to pay an \$84.45 personal property tax bill by the December 31, 2001 deadline.

Respondent, who was a challenger to an incumbent, submits that the exact opposite is true: enforcement of this statute fosters public cynicism towards local governments because it is being used as a legal technicality to prevent challengers to incumbent elected officials. In this case, the City Attorney for Wildwood sent a letter to Burgess that claimed this statute prevented the City from certifying him for the ballot due to the unresolved issue of his business license tax. L.F. 24. The City Attorney went on to claim "only the Council has the authority to waive or alter application of any tax." Id.

Respondent was in Wildwood before it was incorporated. He has continuously lived and worked in the City. He tendered a check for his business license in 1995. It was never cashed. He had a variety of contacts with the Planning and Zoning Department between 1995 and 2002. L.F. pp. 10 ¶17 and 33 ¶17. The City never prosecuted him for any of the alleged zoning violations. L.F. p. 11 ¶19, and 34 ¶19. He was certified as a candidate by the City and ran for office in 2000 losing by 27 votes. L.F. pp. 8-9 ¶8 and 32 ¶8.

Involvement in the political process and tax protest are two of the core values of our country. To exclude a willing candidate from the political process because of an unresolved zoning and tax issue is un-American. Enforcement of this law establishes an unnecessary impediment to involvement in representative

government at the local level. Enforcement of this law fosters a mistrust in local government.

In a year when the Missouri Republican party has nominated a convicted felon for State Auditor, the Attorney General's contention that the public would be cynical if someone like Steve Burgess is allowed on the ballot with unresolved zoning issues is absurd.

**C. Applying Heightened Scrutiny**

All of these goals can be accomplished by using less restrictive means that do not infringe upon access to the ballot.

**CONCLUSION**

For the reasons stated above, this court should affirm the trial court's declaration that §115.346 is unconstitutional.

Respectfully submitted,

FOX, GALLAGHER & FINLEY, L.L.P.

---

Timothy J. Gallagher  
Missouri Bar No. 37872

1034 South Brentwood Boulevard  
Suite 1555  
St. Louis, Missouri 63117  
Telephone: (314) 725-1780  
Telefax: (314) 725-0101

Attorneys for Respondent,  
Steve Burgess

**Certification of Service and of Compliance with Rule 84.06(b) and (c)**

The undersigned hereby certifies that on this 27th day of September, 2002, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, was hand delivered to:

Karen P. Hess  
Assistant Attorney General  
221 West High Street, 7th Floor  
Post Office Box 899  
Jefferson City, Missouri 65102

The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 3,815 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus free.

---

Timothy J. Gallagher