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SC #91632

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IN THE SUPREME COURT OF MISSOURI

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STATE OF MISSOURI, ex inf. TERESA HENSLEY  
CASS COUNTY PROSECUTING ATTORNEY,

Respondent,

v.

HERSCHEL L. YOUNG,

Appellant.

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APPEAL FROM THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

The Honorable Jacqueline Cook

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RESPONDENT'S BRIEF

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POINTS RELIED ON

- I. The Trial Court Did Not Err in Granting the Quo Warranto and Ousting Herschel L. Young from the Office of Cass County Presiding Commissioner Because Herschel L. Young had no Right to Title of the Office in That Mo. Rev. Stat. §115.350 Establishes Candidacy Requirements and is not Retrospective in Operation.**

*Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006).

*F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56 (Mo. banc 2010).

*Missouri Real Est. Commission v. Rayford*, 307 S.W.3d 686

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- II. The Trial Court Did Not Err in Granting the Quo Warranto Ousting Herschel L. Young from the Position of Cass County Presiding Commissioner Because Herschel L. Young had no Right to Title of the Office in That Mo. Rev. Stat. §115.350 Establishes Candidacy Requirements that Disqualify Herschel L. Young from holding the Office of Cass County Presiding Commissioner.**

*Kasten v. Guth*, 395 S.W.2d 433 (Mo. 1965).

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*State on Inf. of McKittrick v. Wiley*, 160 S.W.2d 677 (Mo. 1942).

*State ex rel. Weed v. Meek*, 31 S.W. 913 (Mo. 1895).

**III. The Trial Court Did Not Err in Granting the Quo Warranto Ousting Herschel L. Young from the Position of Cass County Presiding Commissioner Because Mo. Rev. Stat. §115.350 Does Not Violate the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Missouri Constitution in That Mo. Rev. Stat. §115.350 Does not Create Any Classification; Does Not Impinge on a Fundamental Right or Involve a Suspect Classification; and Bears a Rational Relationship to the Legitimate State Interest in Disqualifying Individuals Convicted of Felonies from Running for Public Office.**

*Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

*Richardson v. Ramirez*, 418 U.S. 24 (1974).

*Silcox v. Silcox*, 6 S.W.3d 899 (Mo. banc 1999).

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ARGUMENT

**I. The Trial Court Did Not Err in Granting the Quo Warranto and Ousting Herschel L. Young from the Office of Cass County Presiding Commissioner Because Herschel L. Young had no Right to Title of the Office in That Mo. Rev. Stat. §115.350 Establishes Candidacy Requirements and is not Retrospective in Operation.**

**A. Article I, Section 13 of the Missouri Constitution and the Prohibition of Retrospective Laws**

Missouri Revised Statute Section 115.350 does not violate Article I, Section 13 of the Missouri Constitution as it applies to Appellant Herschel Young. Article I, Section 13 of the Missouri Constitution forbids enactment of a law that is “restrospective in its operation.” This provision has no analogue in the United States Constitution and is contained in the constitution of only a handful of other states. *Doe v. Phillips*, 194 S.W.3d 833, 849 (Mo. banc 2006). Missouri Courts have consistently held that a law is retrospective if it “creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past.” *F.R. v. St. Charles County Sheriff’s Dept.*, 301 S.W.3d 56, 61 (Mo. banc 2010) (quoting *Squaw Creek Drainage Dist. v. Turney*, 138 S.W. 12, 16 (Mo. 1911)).

Though the terms retroactive and retrospective are frequently interchanged, in fact they are not synonymous. “A law is ‘retroactive’ in its operation when it looks or acts backward from its effective date and is retrospective

‘if it has the same effect as to past transactions or considerations as to future ones....’ ”

*Missouri Real Est. Commn. v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. W.D. 2010) (quoting *State v. Thomaston*, 726 S.W.2d 448, (Mo. App. W.D. 1987). The analysis of whether a law is retrospective should be done “by dealing with the particular facts of a case rather than attempting broad pronouncements.” *F.R.*, 301 S.W.3d at 59. The only ground for asserting retrospective application of the statute cannot be that it applies to an object already in existence at the time of its enactment, if this “[w]ere a good objection, it would lead to startling results, for it could be as well claimed that no statute could be enacted imposing new duties upon or giving new privileges or rights to a person already born...” *Id.* at 64 (quoting *Squaw Creek Drainage District v. Turney*, 138 S.W. at 16 (Mo., 1911)).

In determining whether a law is “retrospective” in its operation, the law must take away or impair a vested or substantial right or impose a new duty, obligation, or disability. *Id.* at 62. In determining whether the law impairs a vested or substantial right, our Supreme Court noted that “a vested right . . . must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have 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.”

*Rayford*, 307 S.W.3d at 690 (quoting *Fisher v. Reorganized Sch. Dist. No. R-V of Grundy County*, 567 S.W.2d 647, 649 (Mo. banc 1978)). In determining whether the law imposes

a new duty, obligation or disability, the Court must determine whether a statute changes the legal effect by imposing an “affirmative obligation”. *Id.* at 693. “A statute which does not... impose a new or greater duty is not unconstitutionally retrospective merely because it relates to prior facts or transactions” *Id.* (quoting *State Bd. of Registration for Healing Arts v. Boston*, 72 S.W.3d 260, 265-66 (Mo.App. W.D. 2002)). “A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision. The person challenging the statute's validity bears the burden of proving the act clearly and undoubtedly violates the constitution.” *F.R.*, 301 S.W.3d at 61 (citing *Franklin County ex rel. Parks v. Franklin County Comm’n*, 269 S.W.3d 26, 29 (Mo. banc 2008)).

This Court has examined various cases that analyzed when a retroactive law should be deemed retrospective because it imposes a new duty, obligation or disability on a past transaction. In *Doe v. Phillips*, 194 S.W.3d at 833-853, this Court evaluated a challenge to “Megan’s Law” and an argument that application of the law was precluded by Article I, Section 13’s proscription against retrospective laws. In an opinion written by the Honorable Judge Stith, this Court concluded that the “bar on laws that operate retrospectively is violated by the imposition of an affirmative obligation.” *Id.* at 852. While this Court upheld much of the law, it did find that the affirmative duty to register was retrospective to persons who were convicted or pled guilty to sexual offenses prior to the laws effective date. *Id.* “The obligation to register by its nature imposes a new duty or obligation.” *Id.* In the opinion, Judge Stith noted that the registration requirement looked solely to past conduct and used that past conduct, not merely as a basis for future

decision making by the State, such as issuance of a license or to bar certain future conduct such as voting, but rather required the plaintiffs to fulfill a new obligation and imposed a new duty solely based upon their convictions prior to enactment. *Id.* This Court specifically rejected the argument that the plaintiffs in Doe “had a vested right in being free from further collateral consequences of their prior pleas of guilty.” *Id.* Judge Stith specifically stated that the plaintiffs in Doe “had no vested right in the law remaining unchanged.” *Id.* at 852.

In *Jerry-Russell Bliss v. Hazardous Waste*, 702 S.W.2d 77 (Mo. banc 1954), this Court found that an act prohibiting issuance of a hazardous waste management license to a habitual violator of past hazardous waste laws was not retrospective. The act only made past practices of the company “a consideration for the granting or denial of a hazardous waste transporter’s license.” *Id.* at 81.

This Court found in *La-Z-Boy Chair Co. v. Director of Economic Development*, 983 S.W.2d 523 (Mo. banc 1999) when presented with the argument that a company, which had a tax exemption when its new plant was built, had a vested right to a continued tax exemption, that no one has a vested right that the law will remain unchanged. *Id.* at 525. Similarly, in *Corvera Abatement Technologies, Inc. v. Air Conservation Commission*, 973 S.W.2d 851 (Mo. banc 1998) wherein questions were presented regarding the application of new asbestos abatement project regulations, this Court held that when the regulations were being applied only to acts that occurred after the amendment of the statute the law was not retrospective even if it permitted consideration of antecedent actions in making future decisions. *Id.* at 856.

Just last year, this Court struck down as retrospective laws, two laws that dealt with prior sexual offenders in *F.R. v. St. Charles County Sheriff's Dept.* One law divested a sexual offender from the ability to live within 1,000 feet of a school or daycare and imposed a duty to insure that future residence be greater than 1,000 feet of a school or daycare. The other law dealt with sexual offenders and Halloween, and imposed four new duties, including avoiding children, leaving lights off, remaining inside the house, and posting a sign on the door. *Id.* at 61-63. In deciding this case, the majority clarified what is a “disability” under Article I, Section 13 of the Missouri Constitution. The majority stated that

For instance, if a law said everyone previously convicted of X shall pay the school district \$500, it would be retrospective. The individual is being penalized in an additional amount for the previous conviction. 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.

*Id.* at 62. The majority found that the new laws were retrospective in application because they created new obligations and duties, and subjected the potential offender to criminal liability. *Id.*

Recently, the Missouri Court of Appeals, Western District dealt with the Missouri Constitution's prohibition against retrospective application of laws in *Missouri Real Estate Commission v. Rayford*, 307 S.W. 3d 685 (Mo. App. W. Dist., 2010). This case has similar facts to the present one before this Court. In this case, Kenneth Rayford ("Rayford") challenged a law which required his real estate license be revoked because he pled nolo contendere to a dangerous felony. The Western District concluded that the law acted retrospectively to him due to the fact that he already had a real estate license at the time of the enactment of the statute. *Id.* at 695. The Court indicated the law looked "solely at Rayford's past plea of nolo contendere and use[d] that conduct not as a basis for future decision-making by the state but to impose a new duty on Rayford to relinquish an existing license and/or a new disability on Rayford of *per se* ineligibility to continue to hold an existing license." *Id.* The Western District Court of Appeals continued the analysis by stating:

In reaching our conclusion we are mindful of, and emphasize, that the aforementioned litany of cases from the Supreme Court **would not** prohibit: (1) 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;" *Phillips*, 194 S.W.3d at 852; (2) the application of section 339.100.5 to permit consideration of an antecedent qualifying criminal offense along with other conduct occurring subsequent to the statute's

effective date in evaluating appropriate discipline, including suspension or revocation of a license; *See Barbieri v. Morris*, 315 S.W.2d 711, 714-15 (Mo. banc 1958) (amended statute which permitted antecedent traffic violations to be considered along with subsequent traffic violations to classify a driver as an habitual offender warranting revocation of a driver's license did not violate prohibition against retrospective laws because antecedent conduct was not sole basis for loss of license); or (3) the application of section 339.100.5 to license renewals, if the license expires following a defined period of time with no reasonable assurance the license will be summarily renewed subject only to timely re-application and/or payment of a required fee, as consideration of an antecedent criminal proceeding would then be in connection with a future licensing decision, consistent with *Bliss*. *See Phillips*, 194 S.W.3d at 850-51. In short, and as a result of our analysis, section 339.100.5 should be read: (i) to apply to all applicants for a real estate license including those with antecedent qualifying criminal offenses predating section 339.100.5's effective date, (ii) to apply to any licensee who pleads guilty to, or is found guilty of, a qualifying criminal offense subsequent to the effective date of section 339.100.5, (iii) but not to apply to any license in effect when section 339.100.5 was enacted if revocation of the license is sought based solely on the antecedent qualifying criminal offense.

*Id.* at 695-696. (emphasis in original). The Court expressed it was constitutionally permissible that a person who applied for a real estate license after the effective date of the law would be ineligible to obtain a license if the applicant had pleaded guilty to, or been found guilty of, one of the qualifying criminal offenses at any time prior to the application, even if the guilty determination predated the effective date of the statute. *Id.* at 696. The Court further concluded that;

Consideration of an antecedent event in connection with a *future* desire to secure licensure, even where the antecedent event would not previously have been a *per se* basis for ineligibility, is not a retrospective application of section 339.100.5. Moreover, an applicant has no entitlement to believe that the law with respect to eligibility requirements for licensure will always remain the same. Thus, though section 339.100.5 does, in fact, change the materiality of a past transaction with respect to an applicant, it does so only with respect to an application that post dates the effective date of section 339.100.5. In this regard, the application of section 339.100.5 is prospective, not retrospective.

*Id.* at 696. (emphasis in original) (citing *Boston*, 72 S.W.3d at 265-66 (applicant for a professional license could not complain that a statute imposing a limit on the number of times a licensing exam could be unsuccessfully taken-a limit already passed by the applicant-was retrospective)).

**B. Mo. Rev. Stat. §115.350 operated prospectively, not retrospectively to**

**Appellant Herschel Young**

The implication that Mo. Rev. Stat. §115.350 violates Article I, Section 13, lacks merit as it applies to Appellant Herschel Young because Mo. Rev. Stat. §115.350 operated prospectively, not retrospectively. This statute was enacted and took effect on January 1, 2007, setting forth new criteria for eligibility for candidacy to hold public office in the State of Missouri. At that point in time, Appellant Herschel Young had not applied for candidacy for the office of the Cass County Presiding Commissioner and thus, did not currently hold that public office. Appellant Herschel Young applied for this position by filing his declaration of candidacy on March 16, 2010, and was sworn into the office on December 30, 2010. Both of these acts occurred well after the passage and enactment of Mo. Rev. Stat. §115.350. The State is not prohibited from applying the statute to bar an applicant with an antecedent qualifying criminal offense. Appellant Herschel Young's only ground for asserting retrospective application of the statute is that it applies to an object already in existence at the time of its enactment, i.e., his prior felony conviction. To rule in this fashion, however, would be entering the slippery slope that no law could be enforced against a person already born. See *F.R. v. St. Charles County Sheriff's Dept.*, at 63 (quoting *Squaw Creek Drainage Dist. V. Turney*, at 16). In this case, the conduct is being looked at "as a basis for future decision-making by the state" in regard to what qualifications a public office holder should possess. *Rayford*, 307 S.W.3d at 695 (quoting *Phillips* 194 S.W.3d at 852). Consideration of the prior conviction in connection with a future desire to secure a public office, even where the prior conviction would not previously have been a per se basis for ineligibility, is not a retrospective application of Mo. Rev. Stat. §115.350.

Appellant Herschel Young has no vested right in the law remaining the same. Furthermore, candidates for public office have no entitlement to believe that the law with respect to eligibility requirements for the office will always remain the same. See *State ex rel. Hall v. Vaughn*, 483 S.W.2d 396, 397 (Mo. 1972). and *State ex rel. Voss v. Davis*, 418 S.W.2d 163, 167-168 (Mo. 1967). Thus, even though Mo. Rev. Stat. §115.350 does change the consequences of the prior conviction with respect to Appellant Herschel Young, it does so only with respect to his application for candidacy that post dates the effective date of Mo. Rev. Stat. §115.350. This case would be different had Appellant Herschel Young already been in office at the time Mo. Rev. Stat. §115.350 was enacted. If that were the case and Appellant Young already held the office, then enforcement of the law would be retrospective as applied to him. However, those are not the facts of this case. Appellant Herschel Young did not hold office at the time Mo. Rev. Stat. §115.350 was enacted, and therefore, the application of Mo. Rev. Stat. §115.350 is prospective, not retrospective.

**C. Appellant Herschel Young has no vested right in elected public office**

In order to prove that Mo. Rev. Stat. §115.350 operates retrospectively to Appellant Young, he must show that the law takes away or impairs a vested or substantial right or imposes a new duty, obligation, or disability. Appellant Herschel Young has no vested or substantial right in elected public office. Although a vested right is not needed

to invoke the constitutional principal of Article I, Section 13,<sup>1</sup> it is worth noting that Appellant Young does not have a vested right in elected public office. The ability to run for elected public office is not a vested right. This is due to the fact that no one has a title to the present or future enjoyment of public office. Missouri has long held that the right to public office is not a vested right or contractual right. See *Vaughn*, 483 S.W.2d at 397. Furthermore, the laws of the State of Missouri govern the eligibility requirements for elected public offices. This Court stated in *State ex rel. Voss v. Davis*, that a “public office is a public trust; it is a public agency solely for the good of the public, which, unless otherwise provided in the Constitution, may be abolished or regulated by statute.” *Davis*, 418 S.W.2d 167-68. These laws can be changed at any time, thereby changing the eligibility requirements. Candidates for public office have no entitlement to believe that the law with respect to eligibility requirements for the office will always remain the same. Appellant Herschel Young has nothing more than a mere expectation based upon an anticipated continuance of the existing law. As a result, Appellant Young does not have a vested or substantial right in seeking public office and may not use that basis to claim Mo. Rev. Stat. §115.350 violates Article I, Section 13 of the Missouri Constitution.

**D. Mo. Rev. Stat. §115.350 does not impose a new duty, obligation or disability on Appellant Herschel Young.**

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<sup>1</sup> See *F.R. v. St. Charles County Sheriff's Dept.* at 62. “The constitutional principal, as invoked here, does not require a showing of a vested right. The constitutional language does not limit its application to vested rights.”

Mo. Rev. Stat. §115.350 does not impose a new duty, obligation or disability on Appellant Herschel Young. In addition, the law does not require Appellant Young to take any affirmative step or action. The law is not written in such a fashion that it compels Appellant Young to do anything solely because he has a prior criminal conviction. In all of the other cases where the laws were found to be applied retrospectively, the Courts found that the law imposed an affirmative duty due to the prior conviction. For example, in the sex offender registration cases, there was an affirmative duty to seek out whether a house was within 1000 feet of a school or day care facility; and an affirmative duty to move if the house was within 1000 feet of a school or day care facility; an affirmative duty to put a sign in their yard, turn off their lights, and stay inside. In fact, these obligations applied even if the offender did nothing and thus, were solely related to their prior offense. In addition, there were criminal consequences imposed on the sex offenders for not taking the necessary actions. The statute in this case, Mo. Rev. Stat. §115.350, does not impose any affirmative duty on Appellant Young. Mo. Rev. Stat. §115.350 does not require Appellant Young to do anything. Mo. Rev. Stat. §115.350 simply states that a felon does not **qualify** for elective public office. The regulatory consequence of the law does not fall to Appellant Young; it is the duty of the other candidate, the election officials, and the State to enforce the candidacy qualification.

Mo. Rev. Stat. §115.350 also does not impose a legal disability on Appellant Young. This Court provided an example of what is not a retrospective application of a

“legal disability” in *F.R. v. St. Charles County Sheriff's Dept.* The example provided by this Court exactly fits the fact scenario that is currently before this Court.

For instance, if a law said everyone previously convicted of X shall pay the school district \$500, it would be retrospective. The individual is being penalized in an additional amount for the previous conviction. 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.

*F.R.*, 307 S.W.3d at 62. Just as the regulatory consequence is on the school board in the example, the regulatory consequence is on the election officials and/or the State in this case. It is a disability to Appellant Young as he cannot hold the office, but it is not a “legal” disability because the law does not require him to take any affirmative action.

In addition, if Appellant Young does nothing, there are no legal consequences. This is not to say, however, that Mo. Rev. Stat. §115.350 forces Appellant Young to do nothing. A plain reading of Mo. Rev. Stat. §115.350 shows that a Missouri felon does not qualify to be candidate for elective public office. Mo. Rev. Stat. §115.350 does not bar felons from application, but simply states they do not qualify as candidates.

In order to attempt to find an affirmative duty, Appellant Young cites to Mo. Rev. Stat. §115.631 as the basis for possible criminal consequences as a result of his running

for office. Appellant Young asserts that pursuant to Mo. Rev. Stat. §115.349, he has to sign an affirmation claiming he qualifies as a candidate. Appellant Young attempts to argue that this is the affirmative duty that Mo. Rev. Stat. §115.350 places on him. However, Appellant Young is mistaken for a couple of different reasons. First, Mo. Rev. Stat. §115.631 does not solely apply to him due to his past criminal conviction. Mo. Rev. Stat. §115.631 governs election offenses that could be violated through any number of reasons. Again, if Appellant Young does nothing, he could not violate Mo. Rev. Stat. §115.631. Second, Mo. Rev. Stat. §115.631 does not apply in this situation as a legal consequence to Appellant Young because it is not a “sole” consequence of his conviction, but rather a consequence of lying when he signed the oath. The exposure to Mo. Rev. Stat. §115.631 is the same for a non-felon who signs an affirmation of qualification for candidacy when he or she is not a resident of the proper county or of sufficient age for the office for which he or she is running. Appellant Young’s exposure to criminal consequences via Mo. Rev. Stat. §115.631 flows not from his status as a felon, but from his false affirmation that he was qualified to hold the office. Furthermore, any duty or obligation to sign an affirmation is placed on Appellant Young due to Mo. Rev. Stat. §115.349 not Mo. Rev. Stat. §115.350.

Mo. Rev. Stat. §115.350 does not impose a new duty, obligation or “legal” disability on Appellant Herschel Young. As such, Mo. Rev. Stat. §115.350 is not retrospective in operation as to Appellant Young, and the Trial Court’s Judgment granting ouster should be sustained.

**II. The Trial Court Did Not Err in Granting the Quo Warranto Ousting Herschel L. Young from the Position of Cass County Presiding Commissioner Because Herschel L. Young had no Right to Title of the Office in That Mo. Rev. Stat. § 115.350 Establishes Candidacy Requirements that Disqualify Herschel L. Young from holding the Office of Cass County Presiding Commissioner.**

**A. Quo Warranto**

There is no dispute that Appellant Herschel Young is a convicted felon under the laws of the State of Missouri. Furthermore, there is no dispute that Mo. Rev. Stat. §115.350 states 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.” Due to these two indisputable facts, the Trial Court was correct in granting the quo warranto ousting Appellant Young from the position of Cass County Presiding Commissioner, and its Judgment should be upheld.

“An information in the nature of quo warranto adjudicates title to a public office or state franchise for the purpose of protecting the public against usurpers.” *State ex inf. Graham v. Hurley*, 540 S.W.2d 20, 22 (Mo. 1976). “Quo warranto is the proper remedy to determine title to office”. *State ex inf. McKittrick v. Wymore*, 119 S.W.2d 941, 943 (Mo. 1938). A quo warranto “writ is not directed against the individual claiming the office. It is directed against his right to hold the office. It is not an action in the interest of any individual.” *Id.* The State of Missouri has codified quo warranto in Chapter 531, RSMo., and Rule 98 of the Missouri Rules of Civil Procedure. The power to determine

whether or not a quo warranto proceeding should be instituted is vested in the Attorney General or prosecuting attorney by Section 531.010 and Mo. S.Ct. R. 98.02.

A quo warranto was properly filed by the Cass County Prosecuting Attorney against Appellant Herschel Young to determine his title to the office of the Cass County Presiding Commissioner. Due to the two indisputable facts mentioned above: 1) that Appellant Young is a convicted felon in the State of Missouri, and 2) Mo. Rev. Stat. §115.350 clearly states that Missouri felons do not qualify to be candidates for elective public office in the State of Missouri, it is clear that Appellant Young was not a qualified candidate for the office of Cass County Presiding Commissioner. As a result, Appellant Young does not have title to that office. Therefore, the Trial Court was correct in granting the quo warranto ousting Appellant Young from the Position of Cass County Presiding Commissioner, and its Judgment should be upheld.

**B. Quo Warranto may inquire into candidacy qualification of elected public officeholders when candidate is elected yet unqualified.**

There is a longstanding history of Missouri case law that holds “[t]he election of a person to an office who does not possess the requisite qualifications gives him no right to hold the office.” *State ex rel. Snyder v. Alderman of Pierce City*, 3 S.W. 849 (Mo. 1887).<sup>2</sup> An inquiry into the successful candidate’s eligibility to hold office is a proper subject of

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<sup>2</sup> This case, and in particular this issue has been cited by cases including *Mansur v. Morris*, 196 S.W.2d 287 (Mo. 1946), *Weed v. Meek*, 31 S.W. 913, (Mo. 1895), and *State ex rel. Crow v. Vallins*, 41 S.W.887 (Mo. 1897).

inquiry by quo warranto.” *Kasten v. Guth*, 395 S.W.2d 433, 437 (Mo. 1965) (citing *Davenport v. Teeters*, 273 S.W.2d 506, 513 (Mo. App. S.D. 1954)). See also *State ex inf. Ryan v. Bond*, 546 S.W.2d 1 (Mo. 1976). Due to this basic premise, there have been numerous instances in Missouri law where failure to meet requisite qualifications has led to removal from office by virtue of a quo warranto action and judgment of ouster.

In 1942, this Court decided this very issue in *State on Inf. of McKittrick v. Wiley*, 160 S.W.2d 677, (Mo. 1942). In this case, Wiley was elected Prosecuting Attorney in DeKalb County. After Wiley undertook the oath of office as Prosecuting Attorney in DeKalb County, the Missouri Attorney General filed a quo warranto action against him on the grounds that he was not a resident of DeKalb County for the length of time specified by Missouri law while he was a candidate for Prosecuting Attorney. After a lengthy factual inquiry, this Court stated:

“We hold that respondent Wiley was not a bona fide resident of DeKalb County for twelve months immediately preceding the general election held on November 5, 1940. He, therefore, did not possess requisite qualifications to be elected and hold the office of Prosecuting Attorney of said county by virtue of said election and he has no legal right to said office against the inquiry of the State in this proceeding.”

*Id.* at 687. This Court ordered a judgment of ouster removing him from the position.

Missouri Courts have also found that candidates who fail to pay taxes before the election are disqualified from holding office. This Court, in a quo warranto action, *State ex rel. Crow v. Page*, 41 S.W. 963 (Mo. 1897), held that the marshal of the city of Rich

Hill failed to pay his taxes until after the date on which he was elected, which was a violation of Missouri law. As a result, judgment of ouster was ordered and the marshal was removed from office.<sup>3</sup>

Another case dealing with a candidate failing to meet the statutory requirements for office was *State ex rel. Weed v. Meek*, 31 S.W. 913, (Mo. 1895). In this case, defendant Meek was elected as the county school commissioner. A quo warranto was filed against the defendant alleging that he did not “hold a certificate authorizing and qualifying him to teach a public school[.]”*Id.* at 914. This Court examined the statute governing the qualifications for the office of county school commissioner and determined that there were three: residency, age, and holding a certificate entitling him to teach in the public schools of such county. *Id.* at 915. After examining the qualifications, this Court determined that the statute required the candidate to possess all three of the qualifications “when elected.” *Id.* Although the evidence showed that defendant Meek had obtained a certificate entitling him to teach at the time of the suit, he admitted that he did not have the certificate at the date of the election. This Court held that “[h]e did not, therefore, possess the requisite qualifications to be elected, and to hold the office by virtue thereof; and shows no legal right thereto against the inquiry of the state in this

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<sup>3</sup> Although this case is from 1897, it has been favorably cited to and the holding followed in the 1989 decision of *State ex rel. Selsor v. Grimshaw*, 762 S.W.2d 868 (Mo. App. E.D., 1989) and in the 1997 decision *In re Williams* 943 S.W.2d 244 (Mo. App. E.D., 1997).

proceeding” and affirmed the judgment of ouster. *Id.* (citing *Alderman of Pierce City*, 3 S.W. 849).

The cases outlined above consistently demonstrate that a failure to meet requisite qualifications by a candidate who is elected to public office cannot lawfully hold such office. These cases consistently hold this to be true even when the candidate remedies the disqualification after the election.

To be legally elected in the State of Missouri, one must be a qualified candidate. There is no dispute that Appellant Herschel Young has a felony conviction in the State of Missouri. There is also no dispute that Mo. Rev. Stat. §115.350 which prohibited individuals convicted of felonies in the State of Missouri from being a candidate for public office, was enacted prior to the 2010 general election. Whereas Appellant Young was not eligible or qualified for office, Appellant Young has no legal right to the office and therefore the Trial Court’s quo warranto Judgment granting Ouster was appropriate.

**C. Whether Respondent Young qualifies to hold office under Mo. Rev. Stat. §561.021.2 is not relevant as to whether he qualifies to hold office due to a disqualification under Mo. Rev. Stat. §115.350.**

Mo. Rev. Stat. §561.021.2 is not relevant to the present case. This is due to the fact that although Appellant Young may not be disqualified from holding office under that law (because he completed his sentence and/or probation), he is disqualified from being a candidate and by default, holding office, under Mo. Rev. Stat. §115.350. Eligibility to hold office under Mo. Rev. Stat. §561.021.2 does not eliminate Appellant Young’s obligation to qualify for candidacy pursuant to Mo. Rev. Stat. §115.350. Mo.

Rev. Stat. §561.021.2 does not give felons, Appellant Young included, per se eligibility to hold office regardless of any other qualifications to hold said office. The Trial Court's granting of the quo warranto Judgment was due to the fact that Appellant Young did not qualify to be a candidate for elective public office due to his prior felony conviction, and therefore under Missouri case law, he does not qualify to hold office. Therefore, Appellant Young's attempt to hold office is a usurpation of that office, and the quo warranto Judgment granting ouster issued by the Trial Court should be upheld.

**D. Mo. Rev. Stat. §115.350 does not conflict with Mo. Rev. Stat. §561.016,**

**RSMo.**

Mo. Rev. Stat. §115.350 is not in conflict with Mo. Rev. Stat. §561.016. Mo. Rev. Stat. §561.016 sets forth the manner in which the Missouri Legislature can apply a legal disqualification or disability to a person based on a finding of guilt. The subparagraphs contained in Mo. Rev. Stat. §561.016.1 "provide that a state constitution provision, code, or statute specifically disqualifying or restricting a convicted felons participation in civil life is excluded from §561.016.1." *Chandler v. Allen* at 761-62. Appellant Young's discussion of the comments and legislative history gleaned from *Chandler v. Allen*, 108S.W.3d 756 (Mo. App. W.D. 2003), only proves that it is within the Legislature's right to amend the law and historically has taken civil rights from felons. That is precisely what has occurred in Mo. Rev. Stat. §115.350 when the Missouri Legislature enacted it in 2006.

Appellant Young takes issue with the definition of the crime contained in Mo. Rev. Stat. §115.350. However, there is no other practical way to define all felonies under

the Missouri Revised Statutes. Appellant Young argues that the “conduct” should have been defined, but nothing in Mo. Rev. Stat. §561.016.3 states that conduct should be defined, and in fact, conduct is not even mentioned. It would be impractical to list and/or define **every** felony under the laws of the State of Missouri. Most felonies are found in the Criminal Code, however, there are numerous examples found in various locations throughout the Revised Statutes of Missouri.<sup>4</sup> The only logical way to define all felonies in the State of Missouri is to do exactly what the Legislature did in Mo. Rev. Stat. §115.350. Due to the fact that Mo. Rev. Stat. §115.350 follows the procedures specified in Mo. Rev. Stat. §561.016, Mo. Rev. Stat. §115.350 is not in conflict with Mo. Rev. Stat. §561.016.

**E. Quo Warranto was not superseded by the Comprehensive Election Reform Act of 1977.**

The quo warranto right to determine title to office was not superseded by the Comprehensive Election Reform Act of 1977. Prior to the passage of the Comprehensive Election Reform Act of 1977, the “eligibility of candidates [was] not a competent issue in an election contest[.]” *Kasten v. Guth*, 395 S.W.2d 433, 437 (Mo. 1965). An inquiry into a candidate’s “eligibility for the office would properly be by quo warranto.” *Id.* at 438. With the enactment of Mo. Rev. Stat. §115.526, the Missouri Legislature allowed for other candidates to challenge candidate qualifications in an election contest. Mo. Rev.

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<sup>4</sup> Some examples, just to name a few, include drug offenses located in Chapter 195, contraband in the jail located in Section 221, and election offenses in Chapter 115.

Stat. §115.526 states that “[a]ny candidate for nomination to an office at a primary election . . . and any candidate for election to an office at a general or special election” may challenge the qualifications of any other candidate.”

Although Appellant Young asserts that Mo. Rev. Stat. §115.526 is the **only** way to challenge a candidate’s qualifications under the law, he is mistaken. Upon examination, Mo. Rev. Stat. §115.526 deals with election challenges raised by the other contestant. Appellant Young is confusing an election contest with a quo warranto action whose purpose is to determine lawful title to the office. The present action is not an election contest as Respondent Teresa Hensley was not “[a]ny candidate for nomination to an office . . .” as stated in Mo. Rev. Stat. §115.526 against Appellant Young. Due to the fact that Respondent was not running against Appellant for the office of the Presiding Commissioner of Cass County, Respondent would not have standing to challenge under Mo. Rev. Stat. §115.526. However, there is no provision in Mo. Rev. Stat. §115.526 that states it is the only procedure to challenge a candidate’s qualifications. The enactment of Mo. Rev. Stat. §115.526 allowed other candidates to challenge candidate qualifications but in no way restricts the right of the Attorney General and prosecuting attorneys from determining right to title under quo warranto.

A quo warranto action is not, nor has it ever been, an election contest. A quo warranto “writ is not directed against the individual claiming the office. It is directed against his right to hold the office. It is not an action in the interest of any individual.” *Wymore*, 119 S.W.2d at 943. Respondent is not asserting that another candidate should be substituted for Appellant Young. Respondent is asserting that the Trial Court’s ruling

that found Appellant Young's right to hold the office void due to the fact that he was an ineligible candidate be upheld. Nothing in Mo. Rev. Stat. §115.526 discusses quo warranto nor the right of the Missouri Attorney General and/or the County Prosecuting Attorney to remove persons who unlawfully usurp public offices. Mo. Rev. Stat. §115.526 which deals with election contests, is not applicable to the present action which is a quo warranto right to determine title to office. For all of these reasons, the Comprehensive Election Reform Act of 1977 does not supersede the quo warranto right to determine title to office.

**F. Analysis of Mo. Rev. Stat. §57.010 as it relates to Mo. Rev. Stat. §561.016 and Mo. Rev. Stat. §561.021.**

“Not all disqualifications or disabilities that historically have resulted from conviction of a criminal felony statute are encompassed by section 561.016.” *Chandler v. Allen*, at 761. The same is true of Mo. Rev. Stat. §561.021.

[T]he General Assembly has provided that convicted felons will not suffer from ‘legal disqualification or disability’ as a result of their convictions, except as provided by state constitution, code, or statute. The legislature's grant of social reinstatement of convicted felons is not comprehensive, however. The General Assembly has continued to disqualify convicted felons by statute from enjoying several activities attendant to citizenship within our culture.

*Id.* at 762. (citing *Presley v. United States*, 851 F.2d 1052, 1053 (8th Cir.1988) and Mo. Rev. Stat. §561.016). Case law has pointed out that under Missouri law, “felons may not

serve as jurors, sheriffs, highway patrol officers, state fire investigators or employees, state lottery licensees or employees, or manage, conduct or operate bingo games.” *U.S. v. Akens*, 602 F.3d904, 908 (8<sup>th</sup> Cir. 2010). See also *Chandler v. Allen*, at 762, and *U.S. v. Brown*, 408 F.3d 1016, 1017, (8<sup>th</sup> Cir. 2005).

Of particular note is the exception that felons may not serve as sheriffs. This is interesting due to the fact that sheriffs are elected in the State of Missouri. The qualifications for the office of sheriff are found in Mo. Rev. Stat. §57.010 (2010). It states, in relevant part, “[n]o person shall be eligible for the office of sheriff who has been convicted of a felony.” See Mo. Rev. Stat. §57.010. Missouri cases have upheld this provision in Mo. Rev. Stat. §57.010. In *State ex inf. Peach v. Goins*, 575 S.W.2d 175 (Mo. 1978), this Court found that Mo. Rev. Stat. §57.010 “is not merely a qualifying statute relating to the qualifications for election to the office of sheriff but is also a disabling or disqualification statute and is applicable to a person who has been ‘convicted’ of a felony while in office.” *Id.* at 179.

In *Magruder v. Petre*, 690 S.W.2d 830 (Mo. App. W.D. 1985), the Missouri Court of Appeals, Western District, examined the issue of the apparent conflict between two statutory sections; that of the felony conviction disqualification of Mo. Rev. Stat. §57.010, and the restoration of citizenship rights and privileges provision of Mo. Rev. Stat. §549.111. Mo. Rev. Stat. §549.111 was repealed at the time the Court heard the case. The Court concluded that the felony conviction disqualification of Mo. Rev. Stat. §57.010 takes precedence over the other statute. *Id.* at 831. “It is reasonable to suppose that the legislature intended by the enactment of the later statute to except from the rights

and privileges of citizenship to which the convicted felon was restored upon discharge from bench parole that right or privilege to hold the office of county sheriff.” *Id.* at 832. (citing *Colabianchi v. Colabianchi*, 646 S.W.2d 61, 63 (Mo. banc 1983)). Although the Western District did state that the eligibility of the plaintiff in the case to serve as sheriff remains open due to the enactment of Chapter 561, indicating that the doctrine of repeal or amendment by implication might apply, the Court specifically did not address that issue. *Id.*

In fact, no court has ruled that Mo. Rev. Stat. §561.016 or Mo. Rev. Stat. §561.021 impliedly repeals the provision in Mo. Rev. Stat. §57.010 that prohibits felons from holding the office of sheriff. See *Chandler v. Allen*, at 762, *U.S. v. Brown*, at 1017.; and *U.S. v. Akens*, at 908. Mo. Rev. Stat. §57.010 simply states “[n]o person shall be eligible for the office of sheriff who has been convicted of a felony.” This provision is very similar to Mo. Rev. Stat. §115.350. Mo. Rev. Stat. §57.010, like Mo. Rev. Stat. §115.350, does not violate the provisions in Mo. Rev. Stat. §561.016 due to the fact that the disqualification is provided for in another statute. In fact, in a comparison between Mo. Rev. Stat. §57.010 and Mo. Rev. Stat. §115.350, Mo. Rev. Stat. §115.350 does a better job of “defining” the crime for which the disqualification would apply.

There is no exception to exclude the office of sheriff in Mo. Rev. Stat. §561.021. Yet Courts have consistently held that felons cannot run for nor hold the office of sheriff even though Mo. Rev. Stat. §561.021 supposedly restores their right to hold office after completion of their sentence. The only logical reason for this is that Mo. Rev. Stat. §561.021 does not provide that felons are automatically eligible for every office upon

completion of their sentence. Mo. Rev. Stat. §561.021 is simply a disqualification statute – disqualifying felons from holding office while serving their sentence or probation. A felon, after completion of his sentence, would still have to meet the eligibility requirements of the office for which he sought. In 2006, the Missouri Legislature enacted Mo. Rev. Stat. §115.350, which established that “[n]o 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.” Thus, just because a felon completed his/her sentence and is eligible to hold office, does not mean that the person would qualify to be a candidate for elective public office.

**III. The Trial Court Did Not Err in Granting the Quo Warranto Ousting Herschel L. Young from the Position of Cass County Presiding Commissioner Because Mo. Rev. Stat. §115.350 Does Not Violate the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Missouri Constitution in That Mo. Rev. Stat. §115.350 Does not Create Any Classification; Does Not Impinge on a Fundamental Right or Involve a Suspect Classification; and Bears a Rational Relationship to the Legitimate State Interest in Disqualifying Individuals Convicted of Felonies from Running for Public Office.**

Mo. Rev. Stat. §115.350 does not violate the equal protection clause of the United States Constitution and the Missouri Constitution because such a violation requires, as a threshold, that a classification has been made and, in the absence of the impingement of a fundamental right or involvement of a suspect class, the lack of a rational basis. In

providing that all persons convicted of Missouri felonies are disqualified as candidates for elective office, Mo. Rev. Stat. §115.350 does not create any classification; does not impinge on a fundamental right or involve a suspect classification; and bears a rational relationship to the legitimate state interest of disqualifying those individuals convicted of felonies from running for public office.

**A. Appellant Herschel Young lacks standing to challenge Mo. Rev. Stat.**

**§115.350**

Appellant Herschel Young lacks standing to raise the application of Mo. Rev. Stat. §115.350 under equal protection grounds to felons from other states. A litigant has standing to challenge the constitutionality of a statute only insofar as it adversely affects his own rights. *County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 154-55, (1979); *Silcox v. Silcox*, 6 S.W.3d 899, 902 (Mo. banc 1999). Generally, courts have prohibited litigants from raising the claims of third parties not before the court. *Barrows v. Jackson*, 346 U.S. 249, 259 (1953); *Stiles v. Blunt*, 912 F.2d 260, 265 (8<sup>th</sup> Cir. 1990).

Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court.

*Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

Appellant Herschel Young was convicted of a class C felony of Assault in the Second Degree in the Circuit Court of Cass County, Missouri, in case number CR393-

1032FX/17R039301032 on June 29, 1995. *See Supp. L.F.* 1-2. Appellant Herschel Young also pled guilty to the felony offense of Unauthorized Use of a Motor Vehicle in the District Court of Bell County, Texas on December 21, 1987. *See Supp. L.F.* 18-21.

Appellant Young has no standing to attack Mo. Rev. Stat. §115.350 under the basis of equal protection by claiming that it distinguishes Missouri felons and felons from other states. This is due to the fact that he has pled guilty to a felony in Missouri and in another state. If the law were as Appellant Young states that it should be, Appellant Young would still be disqualified from being a candidate for public office in the State of Missouri, due to having pled guilty to a felony in the State of Texas. Although Appellant Young received a “deferred adjudication” in the State of Texas case, he still pled guilty to a felony under the laws of that state. Mo. Rev. Stat. §115.350 does not state that a person is disqualified only when they were convicted of a felony, but rather uses the terms “who has been convicted of or found guilty of or pled guilty to a felony[.]” Due to the clear language of Mo. Rev. Stat. §115.350 even someone who pled guilty and received a “deferred adjudication” would still be disqualified. As a result, there is no adverse impact as to Appellant Young’s constitutional rights and therefore he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.<sup>5</sup>

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<sup>5</sup> The trial court Judgment by the Honorable Jacqueline Cook ruled that Appellant Young lacked standing to raise the application of Mo. Rev. Stat. §115.350 to felons from other

### **B. Mo. Rev. Stat. §115.350 is Presumed Constitutional**

Legislation is entitled to a strong presumption of constitutionality, *Missouri Libertarian Party v. Conger*, 88 S.W.3d 446, 447 (Mo. banc 2002), because the courts “ascribe to the General Assembly the same good and praiseworthy motivations as inform [the courts'] decision-making processes,” *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994). If the question of constitutionality is “fairly debatable,” this Court has long respected the legislature's province to make such determinations even if, in the Court's opinion, “the conclusion of the legislature is an erroneous one.” *Poole & Creber Market Co. v. Breshears*, 125 S.W.2d 23, 30-31 (Mo. 1939). Thus, the judiciary's long-standing recognition of the legislature's vital role in formulating law and policy requires it to resolve all doubts in favor of the challenged law's constitutionality. *See Wilson v. Washington County*, 247 S.W. 185, 187 (Mo. 1922) (“constitutional restrictions ought not to be held to apply if there exists any reasonable doubt in the judicial mind as to a conflict”). *See also Carmack v. Director, Missouri Dept. of Agriculture*, 945 S.W.2d 956, 959 (Mo. banc 1997); and *Hammerschmidt*, 877 S.W.2d at 102.

The Missouri Constitution “bridles” judicial decision-making with respect to a statute's constitutionality. *See Carmack*, 945 S.W.2d at 959. This canon of judicial restraint is deeply rooted in the constitutional “separation of powers” doctrine and the respect that separate, co-ordinate branches of state government owe each other. *See*

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states. However, even if this Court disagrees with the trial court, the same rationale stated in the Judgment, that of “rational basis” review should apply.

*Wilson*, 247 S.W. at 187 (courts must keep in mind that legislature has power to make laws, subject only to the Constitution); *Poole*, 125 S.W.2d at 30-31. This limitation on the judiciary serves

to channel the exercise of the court's discretion and encourage the judicial branch to avoid the temptation to substitute its preferred policies for those adopted by the elected representatives of the people.

*Spradlin v. City of Fulton*, 924 S.W.2d 259, 263 (Mo. banc 1996).

Accordingly, one who attacks a statute claiming that it violates the constitution “bears an extremely heavy burden.” *Linton v. Missouri Veterinary Medical Board*, 988 S.W.2d 513, 515 (Mo. banc 1999). To overcome this burden, the assailant must show that the legislation “clearly and undoubtedly contravenes the constitution” and “plainly and palpably affronts fundamental law embodied in the constitution.” *Etling v. Westport Heating & Cooling Svs., Inc.*, 92 S.W.3d 771, 773 (Mo. banc 2003).

Appellant Young has not - and cannot - meet this heavy burden, and therefore, his claim that Mo. Rev. Stat. §115.350 violates the equal protection clauses of the United States and Missouri Constitution should be denied.

**C. Mo. Rev. Stat. §115.350 does not create classifications**

To prove an equal protection violation, Appellant Young is required, as a threshold matter, to demonstrate that he was treated differently from others similarly situated to him. *Arnold v. City of Columbia*, 197 F.3d 1217, 1220 (8th Cir. 1999).

Mo. Rev. Stat. §115.350 does not, on its face, establish a classification. By its plain language, it applies to all felons under Missouri laws. In order to establish a

“classification,” Appellant Young has to go outside the four corners of Mo. Rev. Stat. §115.350. Appellant Young argues that Missouri felons are treated differently from those convicted of felonies in other states.

Simply stating that Missouri felons and other states’ felons are similarly situated is not enough to implicate equal protection. On this basis alone, this Court can and should reject plaintiffs’ equal protection challenge. *See State v. Ewing*, 518 S.W.2d 643 (Mo. 1975) and *City of St. Louis v. Liberman*, 547 S.W.2d 452 (Mo. banc 1977). *Ewing* concerned an equal protection challenge to a statute governing when patients committed to the Department of Mental Health were able to leave. The Court stated, “[t]here is no constitutional requirement that regulation must reach every class to which it might be applied – that the legislature must regulate all or none. It is not unconstitutional merely because it is not all-embracing and does not include all the evils within its reach.” *Ewing* at 648. The Court found that although the statute was under-inclusive, it did not violate equal protection because “[a]ll persons within those two subclasses (of the statute) are treated alike and with equality” *Ewing* at 647.

*Liberman* concerned an equal protection challenge to an ordinance that regulated pawn brokers; the challenger wished to compare pawn brokers to junk dealers, second-hand shops, and antique businesses. *Id.* at 458. But the Court suggested that the challenger’s mere assertion that such businesses were similarly situated did not make it so for purposes of an equal protection challenge. *Id.*

In this case, Appellant Young makes the assertion that all felons both in Missouri and in other states are similarly situated. This is simply is not the case. What constitutes

a felony in Missouri may or may not be a felony in another state. The reverse is also true. Each state governs itself with respect to not only what a felony is, but also how persons who plead guilty to criminal acts that constitute felonies are treated and what punishment is appropriate. The classification that Appellant Young makes of all felons is too narrow for there is no showing that Missouri felons and other felons are similarly situated persons. It should also be noted that notwithstanding the argument of Appellant Young's counsel in their brief, Missouri does restrict the right of a person who has been convicted of, or pled guilty to a misdemeanor or felony under the federal laws of the United States to qualify as a candidate for elected public office in the State of Missouri. *See* Mo. Rev. Stat. Section 115.348. Furthermore, all persons within Mo. Rev. Stat. §115.350 (Missouri felons) are treated alike and with equality.

**D. Even if Mo. Rev. Stat. §115.350 does create a classification, the statute does not impinge on a fundamental right or involve a suspect classification and is therefore only subject to rational basis review**

As noted above, Appellant Young lacks standing to claim that Missouri felons are being discriminated against in favor of other State's felons. If the Court desires to extend its analysis, then the applicable standard of review is a "rational basis review" and Mo. Rev. Stat. §115.350 has numerous rationale bases from which the Court may pick.

In reviewing equal protection claims under the United States and Missouri Constitutions, the first step (after determining that the statute under review actually does treat similarly situated people in dissimilar ways) is to determine the level of scrutiny the Court should apply. Thus, it is necessary to determine whether the challenged legislation

creates a suspect classification or impinges on a fundamental right. *Clements v. Fashing*, 457 U.S. 957, 963 (1982); *Casualty Reciprocal Exchange v. Missouri Employers Mut. Ins. Co.*, 956 S.W.2d 249, 256 (Mo. banc 1997). A suspect classification is one whose purpose or effect is to create minority classes, such as those based on race, national origin, or illegitimacy which, for historical reasons, require extraordinary protection in a government ordinarily run by the majority. *Mahoney v. Doerhoff Surgical Services*, 807 S.W.2d 503, 512 (Mo. banc 1991). A fundamental right is a right explicitly or implicitly guaranteed by the constitution such as the rights to free speech, to vote, to interstate travel, as well as other basic liberties. *Id.* Where a statute creates a suspect classification, or impinges upon a fundamental right, courts will apply a heightened scrutiny, demanding a closer relationship between the compelling governmental interest and the precision of the legislation meant to advance that interest.

Legislation that does not create a suspect classification or impinge on a fundamental right, on the other hand, will withstand scrutiny if the classification bears only a rational relationship to any legitimate state purpose. *Id.* The challenger “must prove abuse of legislative discretion beyond a reasonable doubt, and short of that, the issue must settle on the side of validity” of the statute. *Winston v. Reorganized School Dist.*, 636 S.W.2d 324, 327 (Mo. banc 1982). “Under rational basis review, it is improper for [a court] to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination.” *Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999).

In this case, Mo. Rev. Stat. §115.350 does not create a “suspect classification” in applying only to Missouri felons and there is no historical reason that would command extraordinary protection for such persons in a government by the majority. Indeed, there is a long history of state and federal legislation treating persons convicted of crimes differently than persons who obey the law. *Richardson v. Ramirez*, 418 U.S. 24, 43-53 (1974) (Disenfranchising convicted felons who have completed their sentences and paroles does not violate the equal protection clause).

Nor does Mo. Rev. Stat. §115.350 impinge on a “fundamental right,” because there is no fundamental right to run for elective office. *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972). *See also McCann v. Clerk*, 167 N.J. 311, 771 A.2d 1123, 1131 (2001) (“That there is no fundamental right to be a candidate for public office is well-settled.”); *Spooner v. West Baton Rouge Parish Sch. Bd.*, 709 F. Supp. 705, 709 (M.D. La. 1989) (“the right to hold public office is not a fundamental right.”). While there is a fundamental right to vote, no court has recognized a fundamental right to be able to vote for a particular individual. Therefore, the proper standard of review in this case is rational-basis review, not strict scrutiny.

**E. Mo. Rev. Stat. §115.350 withstands rational basis review because it bears a rational relationship to the legitimate state interest in disqualifying individuals convicted of crimes from running for public office**

Under rational-basis review, Mo. Rev. Stat. §115.350 must be upheld. This test, also referred to by the United States Supreme Court as “the lenient standard of rationality,” *Exxon Corp. v. Eagerton*, 103 S. Ct. 2296, 2308 (1983), should not be over-

thought. There is a legitimate state interest in keeping criminals off our ballots, and out of public offices. “A state has a valid interest in ensuring that the rules of its society are not made by those who have shown an unwillingness to abide by those rules.” *Texas Supporters of Workers World Party Presidential Candidates v. Strake*, 511 F. Supp. 149, 153 (S.D. Texas 1981). Mo. Rev. Stat. §115.350 keeps state felons off our ballots and out of our public offices of public trust. Therefore, a rational legislator could conclude (even if he or she is wrong) that the latter is a reasonable means of pursuing (in part, if not completely) the former.

To be sure, the state's interest can be elaborated upon, and extended. By preventing persons with Missouri felony convictions from qualifying as candidates for public office, Mo. Rev. Stat. §115.350 furthers at least the following interests:

- (1) it protects the public from being governed by persons who have demonstrated an inability to adhere to the requirements of the State's law that they would ultimately have to take an oath to uphold;
- (2) it protects the integrity of the political process;
- (3) it serves to decrease public cynicism towards elected officials; and
- (4) it serves to decrease public cynicism towards the electoral process.

Appellant Young's argument is largely confined to the contention that, because the legislature could have precluded a more expansive class of convicted criminals from qualifying as candidates for public office, Mo. Rev. Stat. §115.350 should be declared invalid. In *Lieberman*, this Court proceeded to perform rational basis review of the pawn broker ordinance, and held that it was “easy to perceive a reasonable basis for the

legislative decision to regulate pawnbrokers by means of this ordinance in order to aid law enforcement.” 547 S.W.2d at 458. That the ordinance went only so far - and no further - was not an equal protection violation: “[A] legislative classification assailed on equal protection grounds is not rendered arbitrary or invidious merely because it is under-inclusive.” *Id.*

So too, here, whether Mo. Rev. Stat. §115.350 is under-inclusive because it does not also cover felons under other states’ laws is of no consequence for purposes of equal protection analysis. Equal protection principles have never been construed so as to put lawmakers in a straightjacket when suspect classifications and fundamental rights are not at issue. On the contrary, courts have long recognized that such elected representatives are afforded considerable leeway under rational-basis review.

As the United States Supreme Court held more than half a century ago, a legislature may regulate “one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.” *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955). Moreover, a state “need not run the risk of losing an entire [legislative] scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.” *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 808-09 (1969). Finally, “[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others.” *Williamson*, 348 U.S. at 489.

This Court has recognized *Williamson*’s “one step at a time” legislative allowance. In *Adams Ford Belton, Inc. v. Mo. Motor Vehicle Comm’n*, the Court rejected an equal

protection challenge against an advertising regulation that applied only to certain motor vehicle dealers:

Assuming, without deciding, that the legislature could have empowered the Commission to regulate in-state advertisement by all dealers, licensed or unlicensed, this conclusion is not dispositive. The state may proceed step-by-step to ameliorate a perceived evil or it may perceive evils in the same field to be of different dimensions and proportions, requiring different remedies.

946 S.W.2d 199, 202 (Mo. banc 1997).

The First Circuit has also rejected a claim similar to Appellant Young's. In *Torres-Torres v. Puerto Rico*, 353 F.3d 79, 80 (1st Cir. 2003), the Court rejected an equal protection challenge to a law that disqualified persons from running for mayor, if they had been removed from public office for misconduct. The challenger (who had in fact been removed from public office for misconduct) complained that the statute violated his right of equal protection, because another statute prohibited persons convicted of misdemeanors from seeking or holding any elective office, but only for eight years. *Id.* at 84. Dispatching the equal protection challenge "require[d] little discussion." *Id.* The Court held that the legislature could rationally impose more stringent rules with respect to mayoral candidates than other officials, in light of the importance of the mayor's office in Puerto Rico. *Id.* Likewise, the legislature need not treat all officeholders equally - it "may regulate 'one step at a time, addressing itself to the phase of the problem which seems

most acute.’ ” *Id.*, quoting *Clements v. Fashing*, 457 U.S. 957, 969 (1982). The statute therefore passed constitutional muster. *Id.*

In 1981, the Missouri Court of Appeals for the Western District heard an equal protection challenge to the can and bottle deposit ordinance in Columbia, Missouri. The plaintiffs adduced extensive evidence that the ordinance would have little effect on the stated basis for the deposit - reducing litter in Columbia. The Court was not persuaded, nor could it have been:

[I]t was first of all, not the business of the trial court, nor is it our business to determine from the empirical evidence whether the Columbia ordinance would have the desired effect of reducing litter in the City of Columbia to any appreciable degree. We might have the opinion that the ordinance was not really an effective or efficient engine to achieve the desired end. But we cannot substitute our judicial judgment for the legislative judgment of the lawmaker in this case .... *We examine the evidence with only the question in mind, whether the measure under attack was debatably calculated to reach the targeted evil.*

*Mid-State Distr. Co. v. City of Columbia*, 617 S.W.2d 419 (Mo. App. W.D. 1981) (emphasis added).

Similarly, the Missouri Supreme Court has held that a party raising an equal protection claim bears the burden of showing more than just that the law may not go as far as would seem logical in correcting the targeted evil, so long as there is “any set of facts [that] reasonably can be conceived of which would sustain the laws in question, that

state of facts is assumed.” *Collins v. Director of Revenue*, 691 S.W.2d 246, 250 (Mo. banc 1985) (Superseded by regulation on other grounds). There, even with a statute that required expedited review and summary suspension of some drunk drivers, but admittedly not all drunk drivers, there “exists some ‘reasonable basis’ for the legislative classification; and though the classification may be arguably imperfect, it does not constitute an impermissible denial of equal protection. *Id.*”

#### **F. Strict Scrutiny Review Is Not Appropriate**

Appellant Young argues that because Mo. Rev. Stat. §115.350 stands to permanently foreclose Appellant Young’s right to run for public office, strict scrutiny analysis should apply. Appellant Young relies on *Antonio v. Kirkpatrick*, 579 F.2d 1147 (8<sup>th</sup> Cir. 1978), and *Clements v. Fashing*, 457 U.S. 957 (1982), for this assertion. Neither case supports such assertion.

In *Antonio*, the Eighth Circuit did note that the ten-year residency requirement at issue did not permanently foreclose the appellee’s ability to run for office, but such discussion was in reference to determining whether the residency requirement impinged a fundamental right (specifically the right of interstate travel or the right to vote). Appellant Young does not allege that Mo. Rev. Stat. §115.350 impinges on either such right, consequently, any further discussion of distinctions between the two cases is unnecessary.

In *Clements*, the United States Supreme Court discussed instances where it would apply a heightened standard of review for equal protection challenges of laws that restrict access to the ballot. *Clements* noted that the Court, in deciding the appropriate level of

review, would consider: (1) the facts and circumstances behind the law; (2) the interest the state seeks to protect by placing restrictions on candidacy; and (3) the nature of the interest of those who may be burdened by the restriction. 457 U.S. at 964.

Although it is true that the Court noted that the temporary burden on political candidacy in *Clements* was minimal (the laws at issue in *Clements* prevented certain office-holders from cutting short their term to run for another office, or required resignation if certain officeholder became a candidates for another office), this was not the sole basis for applying (what was in essence) rational-basis review. The Court also considered the state's interest, which was to keep dedicated public officials (who were not distracted by campaigning) in office.

The only situations that *Clements* references where the Court has applied a heightened standard of review included: (1) classifications based on wealth; and (2) classifications that impose burdens on new (or small) political parties or independent candidates. Obviously, the present case deals with neither situation. Given that the state has a legitimate and strong interest in keeping criminals off of ballots (and out of public offices) (see *Texas Supporters of Workers World Party Presidential Candidates v. Strake*, 511 F. Supp. 149, 153 (S.D. Texas 1981), it makes sense that courts have not applied the sort of heightened scrutiny that it applied to protect poor and powerless candidates (as noted in *Clements*). Appellant Young also fails to cite any case where a heightened standard was applied (for equal protection analysis) to a ballot restriction that involved keeping convicted felons off the ballot.

What is more, it should be noted that the analysis offered in *Coles v. Ryan*, which is a case on which Appellant Young relies, rejects application of strict scrutiny. 414 N.E.2d 932. In that case, the Illinois Appeals Court applied rational basis analysis to determine whether a statute that *permanently* foreclosed the appellant's right to run for elected office violated equal protection.

There is no evidence that felons from other states are flocking to Missouri to run for public office. Furthermore, the General Assembly may rationally perceive this not to be an issue. Appellant Young's argument, under any relevant precedent, does not and cannot prove that Mo. Rev. Stat. §115.350 constitutes an "abuse of legislative discretion beyond a reasonable doubt." *Winston*, 636 S.W.2d at 327. The Court must settle this "issue ... on the side of validity" of the statute. *Id.*<sup>6</sup>

**G. Mo. Rev. Stat. §115.350 does not create a classification that treats Missouri felons who run for public office differently than Missouri felons who attempt to be appointed to public office.**

A plain reading of Mo. Rev. Stat. §115.350 does not create a classification that treats felons who run for office differently than felons who attempt to be appointed to

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<sup>6</sup> Even if, *arguendo*, a higher standard should be used, the Trial Court found "that the basis for disqualifying statutes related to the holding of public office and felony convictions not only advances a substantial state interest, the protection of the 'purity of public office' but also serves the substantial state interest of ensuring the public trust in elected office." L.F. 218.

office. This is largely due to the purpose behind Mo. Rev. Stat. §115.350. Mo. Rev. Stat. §115.350 governs qualifications of candidacy for elective public office in the State of Missouri. This provision of the law has nothing to do with qualifications for appointment to public office. In fact, the chapter where this law is found, Chapter 115 of the Missouri Revised Statutes, deals with Election Authorities and Conduct of Elections. Respondent has not found a single provision in Chapter 115 that addresses the qualifications of appointments.

Other than mere suggestion and argument, Appellant Young has not shown that “elected” felons and “appointed” felons are similarly situated. Appellant Young seems to believe that since Mo. Rev. Stat. §115.350 is a disqualification statute, it alone has to disqualify all or none. There simply is no basis for this in the law. An obvious difference between “elected” persons and “appointed” persons exists in how they were selected for their position, and the accountability of their selection. An elected official is selected by the people after he or she places his or her name on the ballot. An appointed official is selected by an appointing authority that is able to conduct an interview and a background check before making the appointment.

Although Respondent has been unable to find a statute that disqualifies felons from appointment to public office in the State of Missouri, there are other statutes in Missouri that suggest felons would not qualify for appointments. Mo. Rev. Stat. §43.547 authorizes the Missouri State Highway Patrol to conduct name and fingerprint background investigations of gubernatorial appointees. Furthermore, Mo. Rev. Stat. §43.541 authorizes the release of criminal history information to the investigator of the

Missouri Senate. While neither of these statutes disqualify felons from being appointed to public office, it seems strange for them to exist if criminal history was not a consideration for appointment to office. Since gubernatorial appointees are often confirmed by the senate, the fact that both entities are able to access criminal history information is important. It seems possible that the Missouri Legislature has not attempted to restrict the executive branch's authority to appoint but has, instead, provided guidance and tools to ensure that felons are not appointed. However, even if a felon was appointed to public office, that felon would be subject to Mo. Rev. Stat. §115.350 when his or her term expired and would be unable to qualify in the next election as a candidate for that public office.

Even though Mo. Rev. Stat. §115.350 deals solely with qualifications of candidates for elective public office, if, *arguendo*, a classification between "elected" felons and "appointed" felons were to exist, such classification does not impinge a fundamental right or involve a suspect class. The difference in how "elected" officials and "appointed" officials are selected and the accountability in their selection would show that the Missouri Legislature's classification has a rational basis.

Mo. Rev. Stat. §115.350 does not create a classification that treats felons who run for office differently than felons who attempt to be appointed to office. Nothing in the plain language of that statute deals with appointments. Even if a classification exists, there is a rational reason to distinguish between "elected" officials and "appointed" officials. Therefore, Mo. Rev. Stat. §115.350 does not violate the equal protection clause

of the Missouri Constitution and United States Constitution and the Trial Court's quo warranto Judgment granting ouster of Appellant Young should be upheld.

## CONCLUSION

The Trial Court was correct in granting the quo warranto Judgment and ordering the ouster of Appellant Herschel L. Young. There is no dispute that Appellant Herschel L. Young is a convicted felon in the State of Missouri. There is also no dispute that Mo. Rev. Stat. §115.350 states 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.” Appellant Herschel Young did not qualify as a candidate for elective public office when he ran for the office of the Cass County Presiding Commissioner. A quo warranto was filed to determine Appellant Young’s title to office. Due to Appellant Young’s failure to meet the qualifications of the office, the Trial Court was correct in granting the quo warranto Judgment and ousting Appellant Young from the office of the Cass County Presiding Commissioner.

Mo. Rev. Stat. §115.350 does not violate Article I, Section 13 of the Missouri Constitution. Mo. Rev. Stat. §115.350 does not operate retrospectively to Appellant Young due to his prior criminal conviction because it does not impose a new duty, obligation, or “legal” disability on him. Mo. Rev. Stat. §115.350 does not require Appellant Young to do anything, nor does it require him to do nothing. The law simply states that Appellant Young does not qualify to be a candidate for elective public office due to his prior felony conviction.

Mo. Rev. Stat. §115.350 is very similar to Mo. Rev. Stat. §57.010. Both disqualify individuals from office based on a prior felony and neither is in conflict with Mo. Rev. Stat. §561.021. Furthermore, Mo. Rev. Stat. §115.350 is precisely what was

envisioned by the Missouri Legislature in Mo. Rev. Stat. §561.016. A quo warranto action to determine title to office is not an election contest. The right of the Attorney General and prosecuting attorney's to file a quo warranto was not superseded by Mo. Rev. Stat. §115.526 and that statute has no relevance in a quo warranto action.

Mo. Rev. Stat. §115.350 does not violate the equal protection clause of the United States Constitution or the Missouri Constitution. The law does not create a classification and does not impinge on a fundamental right or involve a suspect classification. Under rational basis review, Mo. Rev. Stat. §115.350 is related to the legitimate state interest in disqualifying felons from holding offices of public trust. Furthermore, Appellant Young lacks standing to challenge Mo. Rev. Stat. §115.350 as it relates to felons from other states due to the fact that he pled guilty to a felony in the State of Texas.

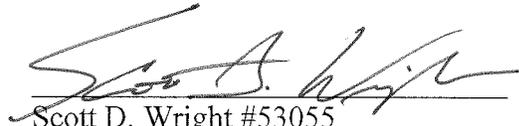
For all of the foregoing reasons, the Judgment of the Trial Court granting the quo warranto and ordering the ouster of Appellant Herschel L. Young from the office of the Cass County Presiding Commissioner should be upheld.

CERTIFICATION

The undersigned hereby certifies that:

1. This brief complies with Rule 55.03 of the Missouri Rules of Civil Procedure.
2. This brief complies with the limitations contained in Rule 84.06(b) of the Missouri Rules of Civil Procedure.
3. This brief was prepared with Microsoft Word in Times New Roman 13 point font and contains 12,986 words.
4. This brief was submitted to the Missouri Supreme Court through the Missouri e-Filing website.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Respondent's Brief was provided through the Missouri Supreme Court eFile system and was electronically mailed this 22<sup>nd</sup> day of September, 2011, to:

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