
SC #91632

IN THE SUPREME COURT OF MISSOURI

**STATE OF MISSOURI, ex. inf. TERESA HENSLEY,
PROSECUTING ATTORNEY,**

Respondent,

v.

HERSCHEL L. YOUNG,

Appellant.

**APPEAL FROM THE CIRCUIT COURT OF CASS COUNTY, MISSOURI
The Honorable Jacqueline Cook**

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal arises from the Judgment ousting Cass County Presiding Commissioner, Herschel L. Young, in a Quo Warranto action brought by Cass County Prosecuting Attorney Teresa Hensley.

Mr. Young's appeal raises the questions of whether Mo. Rev. Stat. § 115.350 violates Article I, Section 13 of the Missouri Constitution's Prohibition Against Retrospective Laws and the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Missouri Constitution. These questions involve the validity of a statute of this state and construction of the Constitution of the United States and of the State of Missouri. Thus, pursuant to Article V, Section 3 of the Constitution of Missouri, this appeal falls within the exclusive appellate jurisdiction of the Supreme Court of Missouri.

STATEMENT OF FACTS

Herschel L. Young is the Presiding Commissioner of Cass County, Missouri. Legal File (hereinafter “L.F.”) at 6. The office of Presiding Commissioner of Cass County is dedicated to the fiscal and operational management of the County and is an elected public office. L.F. at 7. On March 16, 2010, Mr. Young declared his candidacy for the said office by filing a Declaration of Candidacy with the County Clerk. L.F. at 7. On November 2, 2010, the voters of Cass County, Missouri, elected Mr. Young Presiding Commissioner of the county by a majority vote. L.F. at 6, 8. Prior to this, Mr. Young ran for Lake Annette, Missouri, Alderman in 2007 and 2009. L.F. at 262. He won both elections and served in the said capacity. L.F. at 262. No Quo Warranto was ever filed against Mr. Young while he was Alderman of Lake Annette, Missouri. L.F. at 262.

On June of 1995, Mr. Young had pled guilty to the Class C felony of assault in the second degree in the Circuit Court of Cass County, Missouri. L.F. at 8. Mr. Young was sentenced to a year in the Missouri Department of Corrections, the execution of his sentence was suspended, and he was placed on three years supervised probation. L.F. at 8. A certified record of this Sentence and Judgment of Mr. Young’s conviction exists within the Circuit Court of Cass County, Missouri. L.F. at 8, 262. However, Mr. Young’s conviction was not recorded with the Missouri State Highway Patrol in 1995 and still remains absent on his criminal record. L.F. at 8, 262.

In accordance with Mo. Rev. Stat. § 49.020, Mr. Young “enter[ed] upon the duties of his office on the first day of January immediately after his election” as the Cass County Presiding Commissioner. On January 3, 2011, Teresa Hensley, the Prosecuting

Attorney of Cass County, Missouri, brought a Petition for Quo Warranto against Mr. Young alleging that pursuant to Mo. Rev. Stat. § 115.350, Mr. Young did not qualify to be a candidate for elective public office in Missouri due to his 1995 felony conviction, and thus cannot legally hold his current office. L.F. at 6-10. Mr. Young raised constitutional challenges to Mo. Rev. Stat. § 115.350. L.F. at 26, 40, 54.

On February 18, 2011, the trial court entered its Judgment dismissing all of Mr. Young's arguments, granting Teresa Hensley's Petition for Quo Warranto, and ordering Mr. Young's ouster from the office of Presiding Commissioner of Cass County, Missouri. L.F. at 169. On February 28, 2011, Mr. Young filed Motion for Stay Pending Appeal. L.F. at 192. Mr. Young also filed a Motion to Open and Amend Judgment on March 1, 2011, asking the trial court to include certain additional undisputed facts in the Judgment's Stipulated Facts section. L.F. at 198. On March 4, 2011, the trial court granted in part and denied in part Mr. Young's Motion to Open and Amend Judgment. L.F. at 208. Mr. Young's Motion for Stay Pending Appeal was granted on March 10, 2011, and bond was set at five thousand dollars (\$5,000.00). L.F. at 233. Mr. Young posted bond on March 17, 2011, L.F. at 236, and now appeals.

POINTS RELIED ON

- I. The Trial Court Erred in Entering Its Judgment Ousting Herschel L. Young from the Position of Cass County Presiding Commissioner in Reliance Upon Mo. Rev. Stat. § 115.350 Because Mo. Rev. Stat. § 115.350 Violates Article I, Section 13 of the Missouri Constitution’s Prohibition Against Laws Retrospective in Operation in That Applying § 115.350 to Mr. Young Creates a New Duty, Obligation or Disability as to His 1995 Felony Conviction of Second Degree Assault**

F.R. v. St. Charles County Sheriff’s Dept., 301 S.W.3d 56, 62 (Mo. banc 2010).

Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm’n, 702 S.W.2d 77
(Mo. banc 1985).

Mo. Real Estate Comm’n v. Rayford, 307 S.W.3d 686 (Mo. Ct. App. W.D. 2010).

State ex rel. Koster v. Olive, 282 S.W.3d 842 (Mo. banc 2009).

- II. The Trial Court Erred in Entering Its Judgment Granting the Quo Warranto Ousting Herschel L. Young from the Position of Cass County Presiding Commissioner in Reliance Upon Mo. Rev. Stat. § 115.350 Because a Quo Warranto is Not an Election Contest in That Mo. Rev. Stat. § 115.350 Only Challenges Mr. Young’s Qualifications to Be a Candidate for Elective Office, Not His Qualifications to Hold Office, and No Other Missouri Statute Disqualifies Mr. Young from Holding the Office of Presiding Commissioner**
MO. REV. STAT. § 115.026 (2010).

MO. REV. STAT. § 561.021 (2010).

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 Erred in Entering Its Judgment Ousting Herschel L. Young from the Position of Cass County Presiding Commissioner in Reliance Upon Mo. Rev. Stat. § 115.350 Because Mo. Rev. Stat. § 115.350 Violates 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 Treats Similarly Situated Persons Differently by Preventing a Person from Running for Office Who Commits a Felony Under the Laws of Missouri but Allowing Persons Who Commit a Felony Under the Laws of Other States or the Laws of the United States to Run for Office

Carrington v. Rash, 380 U.S. 89 (1965).

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

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

Craig v. Boren, 429 U.S. 190 (1977).

STANDARD OF REVIEW

The interpretation of the constitutionality of a statute is a question of law, and thus appellate review is *de novo*. *Nelson v. Crane*, 187 S.W.3d 868, 869 (Mo. banc 2006); *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo. banc 2007). This Court also reviews a trial court's interpretation of the Missouri Constitution *de novo*. *StopAquila.org v. City of Peculiar*, 208 S.W.3d 608, 611 (Mo. banc 2006).

ARGUMENT

I. The Trial Court Erred in Entering Its Judgment Ousting Herschel L. Young from the Position of Cass County Presiding Commissioner in Reliance Upon Mo. Rev. Stat. § 115.350 Because Mo. Rev. Stat. § 115.350 Violates Article I, Section 13 of the Missouri Constitution’s Prohibition Against Laws Retrospective in Operation in That Applying § 115.350 to Mr. Young Creates a New Duty, Obligation or Disability as to His 1995 Felony Conviction of Second Degree Assault

A. Article I, Section 13’s Prohibition against Laws Retrospective in Operation is Deeply Rooted in Missouri’s Bill of Rights and Case Law

Article I, Section 13 of the 1945 Constitution of the State of Missouri forbids enactment of a law that is “retrospective in its operation.” “The prohibition against a law retrospective in its operation has been a part of the Missouri Constitution from its 1820 beginning. For the most recent 100 years, [Missouri’s Supreme] Court consistently has held that a retrospective law ‘is one which 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)).

To invoke the Missouri Constitution’s prohibition against retroactive laws, the law in question “must give to something already done a different effect from that which it had when it transpired.” *Squaw*, 138 S.W. at 16. In *Doe v. Philips*, the Supreme Court of Missouri (hereinafter “this Honorable Court” or “this Court”) recognized that “[t]his

provision has no analogue in the United States Constitution and is contained in the constitutions of only a handful of other states.” 194 S.W.3d 833, 850 (Mo. banc 2006).

Just law year, in *F.R. v. St. Charles County Sheriff's Dept.*—which is consolidated with *State v. Raynor*—this Honorable Court considered whether Mo. Rev. Stat. §§ 556.147 and 589.426, enacted after Mr. F.R.’s and Mr. Raynor’s convictions of sex offenses, imposed new obligations, duties, or disabilities on the pair. 301 S.W.3d 56, 61 (Mo. banc. 2010).

Mo. Rev. Stat. § 566.147 (hereinafter “School Residency law”) prohibited persons convicted of sex offenses from residing within 1,000 feet of certain schools and day-care centers.¹ Mo. Rev. Stat. § 589.426 (hereinafter “Halloween law”) required registered sex offenders to put up a sign and forbade them from going outdoors, turning on outdoor lights, and handing out candy on Halloween.²

¹ Mo. Rev. Stat. § 566.147.1 states: “Any person who, since July 1, 1979, has been or hereafter has pleaded guilty or nolo contendere to, or been convicted of, or been found guilty of . . .” a sex crime “shall not reside within one thousand feet of any public school . . . or any private school giving instruction in a grade or grades not higher than the twelfth grade, or child-care facility . . . which is in existence at the time the individual begins to reside at the location.”

² Mo. Rev. Stat. § 589.426 states:

1. Any person required to register as a sexual offender under sections 589.400 to 589.425 shall be required on October thirty-first of each year to:

Mr. F.R. was convicted in 1999 of five sex crimes against a child including forcible rape, incest, forcible sodomy, first-degree statutory rape, and first-degree statutory sodomy. *F.R.*, 301 S.W.3d at 66. In 2004, while Mr. F.R. was serving time in prison, the state legislature passed the School Residency law. *Id.* In 2008, when Mr. F.R. was released from prison, he desired to reside with his fiancé, who lived near a school in O’Fallon, Missouri. *Id.*

Before moving in, Mr. F.R. contacted the St. Charles County Sheriff’s Department and was told that his fiancé’s home was further than 1,000 feet from the school. *Id.* After Mr. F.R. moved to O’Fallon, Missouri, a flyer was circulated stating “look who is living in your neighborhood.” *Id.* at 60. The sheriff re-measured the distance between the fiancé’s home and school and discovered that the home was actually 913.34 feet from the

(1) Avoid all Halloween-related contact with children;

(2) Remain inside his or her residence between the hours of 5 p.m. and 10:30 p.m. unless required to be elsewhere for just cause, including but not limited to employment or medical emergencies;

(3) Post a sign at his or her residence stating, “No candy or treats at this residence”; and

(4) Leave all outside residential lighting off during the evening hours after 5 p.m.

2. Any person required to register as a sexual offender under sections 589.400 to 589.425 who violates the provisions of subsection 1 of this section shall be guilty of a class A misdemeanor.

school property line. *F.R.*, 301 S.W.3d at 60. Mr. F.R. then moved to a motel and was not prosecuted. *Id.* He filed a declaratory judgment attacking the constitutional validity of § 566.147, arguing that it applied retrospectively to him. *Id.*

Mr. Raynor was convicted out-of-state in 1990 for committing indecent liberties with a minor younger than age 14. *Id.* at 60. In October, 2008, Mr. Raynor was living in Mexico, Audrain County, Missouri, where on Halloween evening, Mexico police checked local registered sex offenders for compliance with the Halloween law. *Id.* The police observed a woman handing out candy from Mr. Raynor's house. *Id.* The woman told the police that Mr. Raynor was inside the house and that both of them believed that Mr. Raynor was not violating the Halloween law in that Mr. Raynor was not handing out candy, only she was. Nevertheless, Mexico police determined Mr. Raynor was in violation of the Halloween law and charged him with a Class A misdemeanor. *Id.*

This Court could have resolved these recent companion cases with reasoning that altogether avoided the weighty and thorny constitutional issue of whether the two new sex-offender laws ran afoul of Article I, Section 13. This Court, for instance, could have decided that Mr. F.R. could remain living within 1,000 feet of a school if he were already living within 1,000 feet of a school at the time of the statute's effective date but had to comply with the 1,000 feet requirement prospectively if and when he chose to move elsewhere.

Alternatively, the Court could have simply decided the case on the factual grounds that the sheriff's mode of re-measurement was wrong. Yet, because of this Court's high

esteem for the Bill of Rights’ ban on laws retrospective in operation, the Court addressed the constitutional issue with principled directness.

With regard to Mr. F.R., this Court observed that “[t]he obligation or duty imposed on [Mr.] F.R. [was] that before moving to a new residence, [he] had to [discover] whether the residence [was] within 1,000 feet of a school or day-care facility. If, as it turn[ed] out, the new residence [was] within 1,000 feet of such a facility, he must move.” *F.R.*, 301 S.W.3d at 63. This Court then noted that the School Residency law imposed a new obligation or duty on Mr. F.R. years after his conviction that he had to perform or else be subject to criminal penalty. *Id.*

This Court further ruled that the retrospective nature of the School Residency law was most readily apparent when considering that if Mr. F.R. moved to a residence within the prohibited zone, “an essential element of a [new] felony charge against [him]...[would be] the conviction that predate[d] the school residency law. The existence of this one fact impose[d] the obligation.” *Id.* This Court continued by stating that “unquestionably, the new law gives a legal effect to the prior conviction—it would be used to convict F.R. of a new crime. In fact, the prior conviction is the *sole* basis for the restriction that would result in a criminal charge.” *Id.* (emphasis in original).

With regard to Mr. Raynor, it was ruled that the Halloween law “impose[d] four obligations or duties on a sex offender on Halloween night: (1) avoid contact with children; (2) remain inside his residence; (3) post a sign on his door; and (4) leave his light off.” *F.R.*, 301 S.W.3d at 64. This Court again mentioned that these obligations or duties were imposed years after Mr. Raynor’s conviction. *Id.*

Even so, Mr. Raynor’s failure to comply subjected him to a new criminal penalty. *Id.* Using similar reasoning in Mr. F.R.’s case, this Court observed that an essential element of a new misdemeanor charge against Mr. Raynor under the Halloween law was that he was “a person required to register as a sexual offender” It noted that “Raynor would not be required to register as a sex offender unless he was convicted of a sexual offense.” *Id.* As with the School Residency law, the Halloween law “g[ave] a legal effect to the prior conviction—it would be used to convict Raynor of a new crime [and] the *sole* reason for these requirements is Raynor’s prior sex offense conviction.” *Id.*

Under both circumstances, this Court held that §§ 566.147 and 589.426 were unconstitutional as applied to Mr. F.R. and Mr. Raynor as “the obligations and duties imposed after the fact of their criminal convictions and based solely on those prior convictions, violate F.R.’s and Raynor’s rights under Article I, Section 13.” *Id.* at 66. In so holding, this Court distinguished the retroactive effect of the School Residency law and Halloween law from “the ordinary regulatory actions that may take into account past conduct or past conditions in providing current or prospective regulation.” *Id.* at 63.

This Court distinguished its holding in *F.R.* from *Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm'n*, 702 S.W.2d 77 (Mo. banc 1985). In *Jerry-Russell Bliss, Inc.*, this Court had permitted prior waste management practices to be considered in denying an applicant’s license to transport hazardous waste. In *F.R.*, this Court said that unlike the hazardous waste regulation, the School Residency law and Halloween law are the “sole reason for the new duty, obligation or disability” and the new laws changed

the legal effect of Mr. F.R.'s and Mr. Raynor's earlier convictions. *F.R.*, 301 S.W.3d at 64.

Similarly, this Court distinguished its holding in *F.R.* from *State ex rel. Koster v. Olive*, 282 S.W.3d 842 (Mo. banc 2009). In *Olive*, this Court had permitted the State to require existing dam owners to obtain permits by stating that “[t]he duty imposed to obtain a registration permit is based on the current existence, operation and safety of the dam and is distinguishable from the application of the registration requirements in *Phillips* to a single past criminal act.” *Id.* at 848.

Differentiating *F.R.* from *Olive*, this Court stated that “it is not the past action that is the *sole* reason for the requirement; it is the present situation and need for present protection that justifies the requirement even for pre-existing structures.” *Id.* at 64-65. The Court emphasized that dam-owners “can divest themselves of property or decide not to operate dams if they do not want to be subjected to regulations pursuant to the government’s police power.” *Id.* at 65. Mr. F.R. and Mr. Raynor, however, “c[ould] take no action that would result in them no longer being sex offenders and subject to subsequent laws that result from that classification.” *Id.*

Finally, the dissent argued that “F.R. and Raynor are continuing dangers to children and that [the] Court’s analysis should be the same as in *Olive*.” *Id.* This argument was rejected by this Court, explaining that the while the dam is “a known source of present and future danger,” the requirements imposed on Mr. F.R. and Mr. Raynor are not based on any allegation or evidence of current dangerousness. *Id.* Further, this Court reasoned that “F.R. and Raynor served their time . . . , received the punishment

available at the time of their convictions, [and] are under the same obligations as all other persons to obey the law” *Id.*

B. Applying this Court’s Case Law to the Facts of Herschel L. Young’s Case Leads to the Certain Conclusion that Mo. Rev. Stat. § 115.350 as Applied to Mr. Young Violates the Missouri Constitution

F.R. is dispositive in Mr. Young’s case. Just as in *F.R.*, the effective date of Mo. Rev. Stat. § 115.350 (hereinafter “Candidacy Abstention law”) predates his conviction and thus necessitates an analysis per Article I, Section 13, of the Missouri Constitution. The question then becomes whether the Candidacy Abstention law “creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past.” *F.R.*, 301 S.W.3d at 61. The answer here is indeed in the affirmative. Just like the School Residency law and Halloween law, the Candidacy Abstention law imposes a new obligation, duty, or disability on Mr. Young by requiring him to abstain from running for elective office and, purportedly, by extension, from holding office.

Of great concern to this Honorable Court was that Mr. *F.R.*’s and Mr. Raynor’s prior convictions constituted the “*sole* basis for the restriction that would result in a criminal charge.” *Id.* at 63 (emphasis in original). In fact, the words *sole* or *solely* appear no less than 10 times in the opinion. Here, Mr. Young’s prior conviction similarly would constitute the sole basis for the prohibition of his candidacy and holding office. Further,

violation of the prohibition subjects Mr. Young to potential criminal charges and removal from office.

Just as this Court found that the School Residency law and Halloween law gave new legal effect to prior convictions—because the prior convictions could be used to convict Mr. F.R. and Mr. Raynor of new crimes which did not exist at the time of their convictions—the Candidacy Abstention law, too, gives new legal effect to Mr. Young’s 1995 conviction. His previous felony conviction would be an essential element of felony charges connected with the exercise of the right of suffrage against Mr. Young and the Cass County Clerk who certified Mr. Young’s election results under Mo. Rev. Stat. §§ 115.631(1)³ and 115.631(14).⁴

³ “If an individual willfully and falsely makes any. . .statement required to be made. . . such individual shall be guilty of a class C felony.” R.S.Mo. § 115.631(1). The statutory declaration of candidacy requires each prospective candidate to swear “that if nominated and elected he or she will qualify.” R.S.Mo. § 115.349.3. Mo. Rev. Stat § 115.350 states: “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,” and was effective January 1, 2007.

⁴ Mo. Rev. Stat § 115.631(14) states: The following offenses. . . shall be class one election offenses and are deemed felonies connected with the exercise of the right of suffrage. Conviction for any of these offenses shall be punished by imprisonment of not

Additionally, Mr. Young's 1995 conviction is an *essential element* of and the *sole basis* for his disability under the Candidacy Abstention law and, by extension, Prosecutor Hensley's purported authority to seek Mr. Young's ouster. The Candidacy Abstention law has certainly changed the legal effect of Mr. Young's 1995 conviction. Prior to that law's passage, Prosecutor Hensley would have had no legal justification to seek Mr. Young's ouster.

Unlike the Hazardous Waste Management Commission's allowable denial of an applicant's license to transport hazardous waste based upon the applicant's prior waste management practices in *Jerry-Russell Bliss*, Mr. Young's prior conviction is not merely a consideration in deciding whether he is qualified to hold elective office. Instead, the Candidacy Abstention law is the "sole reason for the new duty, obligation or disability..." *F.R.*, 301 S.W.3d at 64.

Unlike the regulation imposed on existing dams-owners in *Olive*, the Candidacy Abstention law's restrictions on Mr. Young are not based on any allegation or evidence of his current dangerousness. To the contrary, the Candidacy Abstention law here places

more than five years or by fine of not less than two thousand five hundred dollars but not more than ten thousand dollars or by both such imprisonment and fine:

On the part of any person whose duty it is to grant certificates of election, or in any manner declare the result of an election, granting a certificate to a person the person knows is not entitled to receive the certificate

restrictions on Mr. Young *solely* based on the fact that Mr. Young was convicted of a felony over 15 years ago, despite the fact that Mr. Young has not been convicted of any felony after the law’s 2007 effective date. L.F. at 8.

Moreover, just as “F.R. and Raynor can take no action that would result in them no longer being sex offenders and subject to subsequent laws that result from that classification,” Mr. Young can take no action that would result in him no longer being a felon and “subject to subsequent laws that result from that classification.” *Id.* at 65.

The Candidacy Abstention law also cannot be said to impose an obligation only on the State in the sense that *F.R.*’s hypothetical law—prohibiting the school board from “hir[ing] as a guidance counselor anyone who was previously convicted of X...”—only imposed a duty on the school board. *See F.R.*, 301 S.W.3d at 62. Here, the Candidacy Abstention law clearly imposes a new duty, obligation, or disability *on* Mr. Young, not the State, by requiring him to abstain from seeking elective office.

Mo. Rev. Stat. § 115.349.3 requires each prospective candidate to swear “that if nominated and elected he or she will qualify.” This is an act from which Mr. Young must abstain—if the Candidacy Abstention law is permitted to apply retrospectively—or else subject himself to criminal penalty and ouster if elected. If the “regulatory consequence” of the Candidacy Abstention law is only on the State, Mr. Young would not be subject to criminal penalty for noncompliance.

Setting aside potential for criminal penalties for noncompliance, the Candidacy Abstention law also imposes a civil obligation, duty, or disability retrospectively in violation of Article I, Section 13 of the Missouri Constitution. This Court reiterated in

F.R. that the “imposition of a civil obligation also would violate the constitutional provision” contained in Article I, Section 13. *Id.* at 63. Here, the trial court’s Judgment ousting Mr. Young and requiring him to vacate the office of Presiding Commissioner certainly imposes a new civil obligation on Mr. Young based solely on his pre-statute conviction. *Id.*

The *only* reason Mr. Young could be said to have “no legal right” to hold elective office is if the Candidacy Abstention law gave “new legal effect” to his 1995 conviction. *Id.* This law does indeed give new legal effect to Mr. Young’s past 1995 conviction because it purports to forever bar Mr. Young of his legal right to hold elective office.

If the Candidacy Abstention law had not been enacted in 2007, no one could argue that Mr. Young “has no legal right” to hold his current office. To the contrary, Mr. Young would have every legal right known to Missouri law to hold his current office. This fact alone demonstrates that the Candidacy Abstention law clearly “give[s] to something already done a different effect from that which it had when it transpired” and is in clear violation of Article I, Section 13. *Squaw*, 138 S.W. at 16.

Finally, just as this Court found that there was no empirical evidence that “F.R. and Raynor are continuing dangers to children,” there is no allegation or evidence that Mr. Young is currently unfit for office. Just as “F.R. and Raynor served their time..., received the punishment available at the time of their convictions, [and] are under the same obligations as all other persons to obey the law,” Mr. Young served his sentence, received his punishment, and is under the same obligations as every other office holder to

obey the current laws. Moreover, Mr. Young fully paid his debt to society nearly an entire decade before the Candidacy Abstention law was ever enacted.

Thus, based upon the above-discussed reasons, it becomes evident that the Candidacy Abstention law changes the legal effect of Mr. Young's 1995 conviction and imposes a new obligation, duty, or disability on him, based solely on said conviction, thereby applying retrospectively in violation of Article I, Section 13 of the Missouri Constitution.

C. The Trial Court's Ruling on the Retrospective Issue in Mr. Young's Case was a Marked Departure from this Court's Recent F.R. Decision

i) Mo. Rev. Stat. § 115.350 Imposes a Duty, Obligation, or Disability on Mr. Young, not the State.

In its Amended Judgment, the trial court relied on dicta from *Mo. Real Estate Comm'n v. Rayford*, 307 S.W.3d 686 (Mo. Ct. App. W.D. 2010), not *F.R. L.F.* at 220-24. The statute at issue in *Rayford* provided that “a broker or salesperson’s license shall be revoked, or *in the case of an applicant, shall not be issued*, if the licensee or applicant has pleaded guilty to, entered a plea of nolo contendere to, or been found guilty of...[a]ny dangerous felony as defined under section 556.061, RSMo.” Mo. Rev. Stat. § 339.100.5 (emphasis added).

In dicta, *Rayford* states that prior cases decided by this Honorable Court would not prohibit the application of Section 339.100.5 “to bar an *applicant* with an antecedent qualifying criminal offense from being denied a real estate license, as in such a case the

past conduct is being looked at ‘as a basis for future decision-making by the state, in regard to things such as the issuance of a license.’” 307 S.W.3d at 695 (emphasis in original).

Rayford’s dicta, however, is not applicable here because Mo. Rev. Stat. § 339.100.5 only imposed a duty on the State, and, as *F.R.* explained, when the regulatory burden of a statute is entirely on the State, the statute is not retrospective. *F.R.*, 301 S.W.3d at 62 (stating “[I]f 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”).

The dicta in *Rayford* also relies on the fact that Mo. Rev. Stat. § 339.100.5 solely imposes a duty or obligation on the Real Estate Commission. That statute only regulated the agency’s ability to issue licenses, not the convict’s ability to apply for them. The dicta analysis in *Rayford* would be different had the statute instead prohibited a prospective licensee with a prior conviction from applying for a license. If the statute, for instance, prohibited a prospective licensee with a prior conviction from applying for a license, the Western District surely would have found that the regulatory burden of the new duty, obligation, or disability was being placed unconstitutionally on the prospective applicant, not the agency.

F.R. described this same concept in terms of classifying an obligation as a disability or a “legal” disability by stating that “if a law said everyone previously convicted of X shall pay the school district \$500, it would be retrospective.” 301 S.W.3d at 62. The reasoning was that the person would be penalized in an additional amount for

the previous conviction. *Id.* On the other hand, if the law stated “the school board shall not hire as a guidance counselor anyone who previously was convicted of X,” that law would not be retrospective because the obligation would be on the school board. *Id.* This Court further reasoned that this would also not be a disability because “the regulatory consequence is on the school board; [although] [i]n a sense, it is a disability to the convict, [] there is no “legal” disability because the law is not requiring him to do anything, for example to pay a fine.” *Id.*

Whether one calls it a duty, obligation, or disability, this Court has required that a statute mandate an individual to *do something* or *not do something* new in order to implicate the retrospective law prohibition. Here, Candidacy Abstention law does mandate Mr. Young to do something: abstain from filing a declaration of candidacy (the form for which is statutorily mandated and requires the candidate to swear to his qualifications) and holding office and step down and surrender office if elected. This is exactly the same kind of obligation, duty, or disability on an individual imposed by the School Residency law in *F.R.* in that a sex offender was required to abstain from living within 1,000 feet of a school and move should his current residence lie within 1,000 feet of a school. As such, *F.R.*’s main holding should guide this Court’s decision rather than *Rayford*’s dicta.

- ii) The Trial Court’s Conception of a New Obligation, Duty, or Disability is Too Narrow

In the Amended Judgment, the trial court reasoned: “Applying the reasoning of the aforementioned cases, the Court finds that § 115.350 does not impose any new obligation, duty or disability. Mr. Young is not obligated or required under duty to run for office.”

In *F.R.*, this Court said: “In Raynor’s case, Section 589.426 imposes four obligations or duties on a sex offender on Halloween night: (1) *avoid* contact with children; (2) *remain* inside his residence; (3) post a sign on his door; and (4) *leave* his light off.” *F.R.*, 301 S.W.3d at 63 (emphasis added). The words *avoid*, *remain*, and *leave* all involve deliberate “self-denial from an action or practice.” This Court, without hesitation, has stated: “These are obligations or duties....” *Id.*

The words *avoid*, *remain*, and *leave* further encompass the idea of restraint as demonstrated in *F.R.* The very idea of abstention involves affirmatively and deliberately holding one’s self back. The definition of “abstain” says “to refrain deliberately and often with an effort of self-denial from an action or practice.” Merriam-Webster Dictionary (2011).

Each of the *F.R.* issues exists in Mr. Young’s case. He faces a legal disability because Mo. Rev. Stat. § 115.350 requires him to abstain from filing a declaration of candidacy for public office. If Mo. Rev. Stat. § 115.350 is allowed to apply retrospectively, Mr. Young cannot attest that he will qualify if elected as required by Mo. Rev. Stat. § 115.349.3. This court emphasized this same kind of disability in *F.R.*, where the school residency law stated that a sex offender must abstain from living within 1,000 feet of a school.

Second, the statute penalizes Mr. Young for his previous conviction and changes the “legal effect” of his earlier conviction. In fact, Mo. Rev. Stat. § 115.350 is the sole reason for Mr. Young’s new duty. Purportedly, Mr. Young’s antecedent conviction now bars him from running for public office in the State of Missouri. Mr. Young’s failure to perform his new duty and to observe his new obligation carries with it the prospect of new criminal liability.

Third, Mo. Rev. Stat. § 115.350 does not merely relate to prior facts or transactions. Rather, the entire legal effect of Mr. Young’s prior conviction is changed by Mo. Rev. Stat. § 115.350. Because of this statute, he is again being punished for a crime for which he long ago paid his debt to society. Finally, Mr. Young is being burdened with additional civil prohibitions.

iii) Mo. Rev. Stat. § 115.350’s Application to Mr. Young is Not Prospective Only

In its Amended Judgment, the trial court also reasoned: “Arguably, if Respondent Young had held office when § 115.350 had been passed, he could not have been removed from office. However, application of the law would have precluded any effort to seek re-election at the conclusion of such a term.”

The trial court’s reasoning is directly at odds with the facts and holding of *F.R.* “*F.R.* moved to the residence at issue *after* the 1,000-foot distance prohibition was enacted.” *F.R.*, 301 S.W.3d at 70 (emphasis in original). Similarly, Mr. Young ran for Cass County Presiding Commissioner *after* Mo. Rev. Stat. § 115.350 was enacted. L.F. at

7. Had this Court shared the trial court's interpretation of the retrospective law prohibition in *F.R.*, it would have held that the School Residency law constitutionally forbids sex offenders from moving to a *new* residence within 1,000 feet of a school after the School Residency law was enacted. There is functionally no difference between a sex offender moving to a new residence after the School Residency law was enacted and Mr. Young running for a different elective office after Mo. Rev. Stat. § 115.350 was enacted.

Had this Court, in *F.R.*, shared the trial court's analysis of this issue, it could have held that *F.R.*, a sex-offender, could remain living within 1,000 feet of a school if he were already living within 1,000 feet of a school at the time of the statute's effective date but had to comply with the 1,000 feet requirement prospectively if he chose to move elsewhere. Yet this Court did not choose to do so.

In *F.R.*, this Court acknowledged that it "may be difficult...to distinguish the retroactive effect of [the School Residency] law from the ordinary regulatory actions that may take into account past conduct or past conditions in providing current or prospective regulation." Yet, this Court never indicated that the School Residency law was deemed to apply prospectively to sex offenders who moved to a *new* residence within 1,000 feet of a school after the School Residency law was enacted. Instead, this Court consistently described the School Residency law as retrospective and held that it violated the constitutional prohibition against retrospective laws. Therefore, the trial court's suggestion that Mo. Rev. Stat. § 115.350 applies to Mr. Young prospectively is directly at odds with *F.R.* and must be rejected.

iv) Consequences to Mr. Young are Extremely Significant While
Consequences in *F.R.* were Minor

As the dissent in *F.R.* noted, “the Halloween restrictions imposed on Raynor, which last only five and a half hours on one day a year, should be upheld as collateral consequences.” 301 S.W.3d at 70. Similarly, the consequences on Mr. F.R.—of not allowing him to move within 1,000 feet of a school—were relatively minor in comparison to Mr. Young’s situation.

The consequences of Mo. Rev. Stat. § 115.350 on Mr. Young are significant. It is a much weightier duty, obligation, or disability against a Missouri citizen to impose retrospectively a life-time ban against running for and holding elective office than it is to prohibit convicted sex offenders—and particularly a child rapist like Mr. F.R.—from living near a school or handing out candy on Halloween.

Simply put, the statutory burden imposed on Mr. Young is monumental compared to the burdens in the *F.R.* case. Further, and respectfully, applying Mo. Rev. Stat. § 115.350 retrospectively against Mr. Young but not the child molesters in *F.R.* would not only be unfair but also arbitrary. As this Honorable Court is willing to protect the constitutional rights of registered sex offenders, then certainly this Court will not stand idle while Mr. Young’s constitutional rights are infringed upon by a retrospective application of Mo. Rev. Stat. § 115.350.

II. The Trial Court Erred in Entering Its Judgment Granting the Quo Warranto Ousting Herschel L. Young from the Position of Cass County Presiding Commissioner in Reliance Upon Mo. Rev. Stat. § 115.350 Because a Quo Warranto is Not an Election Contest in That Mo. Rev. Stat. § 115.350 Only Challenges Mr. Young’s Qualifications to Be a Candidate for Elective Office, Not His Qualifications to Hold Office, and No Other Missouri Statute Disqualifies Mr. Young from Holding the Office of Presiding Commissioner

A. *Quo Warranto Determines the Officeholder’s Legal Right to “Hold” Office, Not his Qualifications for Candidacy or to “Run” for Office*

A number of Quo Warranto cases reference the phrases “qualifies to be elected” and “legally elected.” *State on Inf. of McKittrick v. Wiley*, 160 S.W.2d 677 (Mo. 1942); *State ex rel. Crow v. Page*, 41 S.W. 963 (Mo. 1897) (relying on *State ex rel. Thomas v. Williams*, 12 S.W. 905 (Mo. 1889); *State ex rel. Dearing v. Berkeley*, 41 S.W. 732 (Mo. 1897)); *State ex rel. Weed v. Meek*, 31 S.W. 913 (Mo. 1895). Each of these cases emphasize that the phrases “qualifications to be elected” and “legally elected” have nothing to do with qualifications of candidacy and actually mean that an elected public office holder qualifies to *hold* the office at the very moment he or she is elected. The nature of a Quo Warranto is not to determine whether the person elected is qualified to be a candidate. “The primary and fundamental question in a proceeding by quo warranto, is whether the defendant is legally entitled to hold the office....” *Wiley*, 160 S.W.2d at 684.

This Court has stated that a Quo Warranto “is directed against [the officeholder’s] right to hold the office.” (quoting *State ex. info. McKittrick v. Wymore*, 119 S.W.2d 941,

943 (Mo. 1938)). In *State ex rel. Crow v. Page*, the respondent had failed to pay his taxes until *after the date on which he claims to have been elected* to the office of city marshal. 41 S.W. 963 (Mo. 1897). As a result, he was ousted. In *State ex rel. Thomas v. Williams*, the relator was held ineligible to the office of marshal because he violated the applicable statute requiring him to not be in arrears to the city for taxes at the time of his election. 12 S.W. 905, 908-11 (Mo. 1889). In *State ex rel. Dearing v. Berkeley*, this Court decided whether the respondent—who had been ousted by the circuit court of Jefferson County—was “entitled...to hold, exercise, and enjoy the office of city attorney of the city of Desoto, Missouri...having failed to pay his delinquent city taxes until nine o’clock a. m. on the day of the election....” 41 S.W. 732 (Mo. 1897). It ruled that the defendant paid his delinquent city taxes in time to *render him eligible to the office* of city attorney because at the time those taxes were paid, the election was still in progress and was not over until the close of the polls on that day. *Id.*

In *Crow*, *Thomas*, and *Dearing*, the payment of taxes was a qualification to hold office, not a qualification to be a candidate. The qualification was determinable at the end of the election—not a moment sooner. If the qualification was determinable before the end of the election, it could have been a qualification for candidacy. If *it would be possible* that a qualification would not be determinable until after the election, then it is a

qualification to hold office and can be the subject of a Quo Warranto action.⁵ We condition the statement saying *it would be possible* because a candidate may in actuality satisfy a qualification to hold office any time before the end of the election or he or she could very well wait until just before the election is over to satisfy the qualification. The fact that the candidate can wait until just before the election ends demonstrates that the qualification is merely a prerequisite to holding office.

Payment of taxes prevented neither Page, nor Williams, nor Berkeley from having their names listed on the ballots as candidates. More importantly, none of them were ousted—or not ousted—based on whether they *qualified as a candidate by paying their taxes* as would be required to support Prosecutor Hensley’s theory that a *qualification to be elected* equates to a *qualification to be a candidate*.

At the time their respective elections started, Page, Williams, and Berkeley were all candidates because each had his name on the ballot, could have received votes, and could have been elected. The only question was whether they were legally elected. To be legally elected equated to qualifying to hold office at the moment Page, Williams, and Berkeley were elected.

Had the court considered the payment of taxes to be a “qualification of candidacy,” non-payment of taxes would have served to deny Page, Williams, and

⁵ A possible exception may exist when the statute qualifying one to hold office fixes the date of determination—i.e., sets a deadline—prior to the conclusion of the election.

Berkeley from being candidates and being on the ballots and being entitled to receive votes. This Court never once said that Page, Williams, and Berkeley were not legally entitled to be candidates, be on the ballot, or receive votes. It was only interested in whether Page, Williams, and Berkeley were qualified to assume and continue to hold their offices by the end of the election.

Had Berkeley failed to pay his taxes before the close of the polls, he would not have been qualified to hold office at the time he was elected, and a Quo Warranto action could have properly ousted him from office. If Quo Warranto actions can oust an elected public official based solely upon inadequate qualifications to be a candidate, this Court would have ousted Berkeley from office because of his failure to pay his taxes *before filing his declaration of candidacy* or at least *before a single vote was cast in the election*. It could have said that Berkeley had no right to have his name listed on the ballot and was not entitled to have votes cast in his favor—i.e., be a candidate—because he did not pay his taxes before the election began. This Court did not so hold. Instead, this Court was satisfied that his taxes were paid before he took office. Payment of taxes was a qualification to hold office, not a qualification to be a candidate.

In *State on Inf. of McKittrick v. Wiley*, Mo. Rev. Stat. § 56.010, which gave rise to the Quo Warranto action, provided that the person who wins the general election must have lived in the county for twelve months in order to legally hold the office of prosecutor and relieve the sitting prosecutor. 160 S.W.2d 677, 687 (Mo. 1942). Nothing in Mo. Rev. Stat. § 56.010 prohibited a non-resident from running for office or being a candidate. Rather, it prevented a non-resident from eventually holding office by stating

that the sitting prosecutor is not relieved until a successor is elected who qualifies to hold the office.

This Court held that Wiley “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....” *Id.* Wiley “did not possess the requisite qualifications to...hold the office of Prosecuting Attorney...” once elected because—due to his insufficient residency—he was not qualified to succeed the sitting prosecutor and hold the office at the very moment he was elected. *Id.*

Wiley clearly demonstrates that this Court was not concerned about whether Wiley satisfied the residency requirement before filing his declaration of candidacy or getting his name on the ballot because no such qualification of candidacy existed. Even if it did, that would not be the proper subject of a Quo Warranto absent the candidate being unlawfully elected by virtue of his disqualification to hold office. Instead, Wiley was ousted because he did not meet the qualification to hold office at the very moment he was elected. Even if he later cured the residency disability, he was not lawfully elected because there was a period of time for which he did not qualify to hold the office. This Court could have stated that Wiley had no right to have his name placed on the ballot as a candidate or receive votes, but it did not because the residency statute was a qualification to hold office, not to run for office.

In *State ex rel. Weed v. Meek*, the statute in question required certain qualifications for the office of county school commissioner of public schools, including being at least twenty one years of age, a resident of the county when elected, for at least one year prior

to such election, and holding a certificate entitling one to teach in the public schools of such county. 31 S.W. 913, 915 (Mo. 1895). This Court ruled that because the defendant did not hold a certificate entitling him to teach in the public schools, he did not possess the requisite qualifications to be elected, and to hold the office by virtue thereof; and shows no legal right thereto. *Id.* (internal citations omitted). It reasoned that “the legislature must have intended that the qualification required in section 8028 must be possessed by the citizens in order to be eligible to the office.” *Id.*

Weed stands for the principle that where a statute legislates the *qualifications to hold office*, such qualifications to hold office are deemed *qualifications to be elected*. “[E]ligible to the office...” means eligible to hold the office. *Id.* Meek was ousted because he did not possess the qualifications to *hold* office—i.e., possess a teaching certificate—*immediately* upon being elected, not because he “did not qualify as a candidate.” *Weed*, 31 S.W. at 915. The Court concedes that at the time of the suit, Meek cured the disqualification—by acquiring a teaching certificate—and lawfully held office. *Id.* The basis for the ouster, however, was that for the time between the election and Meek’s acquisition of a teaching certificate, he was unqualified to hold office. But for his disqualification at the beginning of his office, Meek would not have been ousted. Despite the fact that Meek cured the disability from holding office by obtaining a teaching certificate, he did not possess all requisite qualifications at the moment he was elected. Thus, he did not qualify *to be elected*, though he was qualified to hold office at the time of the suit.

In *Weed*, this Court was uninterested in whether Meek possessed a teaching certificate prior to running for office, such that would have been the focus if the teaching certificate was deemed a “qualification of candidacy.” It was only interested in the fact that upon taking office, Meek did not possess a teaching certificate. In other words, the Court was uninterested in non-existent “qualification to be a candidate” because Meek could have obtained his teaching certificate the day of the election and still qualified to be elected and to hold office. The teaching certificate was a qualification to take office (i.e., be elected and hold office) not to seek office (i.e., be a candidate for office).

If Mr. Young had completed his probation the day after the election, these cases would support his ouster. No Missouri statute currently in effect, other than Mo. Rev. Stat. §115.350, uses the phrase “qualify as a candidate” or similar language. Another true candidacy qualification statute, Mo. Rev. Stat. §115.346, states: “[N]o person shall be certified as a candidate for municipal office, nor shall such person’s name appear on the ballot as a candidate for such office, who shall be in arrears for any unpaid city taxes or municipal user fees on the last day to file a declaration of candidacy for the office.” Unlike the tax payment statutes referenced above, this statute does not impact the right to hold office, but rather only the right to run for office. There is no reported case where Mo. Rev. Stat. §115.346 has ever served as a basis to oust an elective public officeholder. It is our contention that ouster by Quo Warranto would be impermissible in such a case.

As demonstrated above, the only inquiry in a Quo Warranto is whether the respondent “is legally entitled to hold the office . . .” at every moment after the election is

completed. The inquiry is not, and has never been, whether the office-holder qualifies to be a candidate.

Simply put, Prosecutor Hensley's case for ousting Mr. Young is no more than a plain ballot candidacy challenge that Mr. Young was not qualified to be a candidate for office. But Mr. Young was lawfully elected by the voters to the office of Presiding Commissioner of Cass County, Missouri. L.F. at 6. As pure qualifications of candidacy, although unsatisfied, are not the proper subject of a Quo Warranto, the trial court had no basis to enter judgment of Mr. Young's forfeiture of office and ouster.

B. Commissioner Young Qualifies to Hold Office Under Mo. Rev. Stat. § 561.021.2

Mo. Rev. Stat. § 561.021 clearly prevents the ouster of Mr. Young from office. The statute allows Missouri felons, whether in elective or appointive office, to be ineligible for public office only until the completion of their sentence or period of probation. Missouri courts have consistently emphasized that the right to hold public office is restored upon completion of the imposed sentence or period of probation. *Chandler v. Allen*, 108 S.W.3d 756, 762 (Mo. Ct. App. W.D. 2003); *See U.S. v. Meeks*, 987 F.2d 575, 578 (9th Cir. 1993). Here, upon completion of his probation, Mr. Young's right to hold public office was restored. He ran for election, was elected by the voters, was sworn in and is now seated as the presiding Commissioner of Cass County, Missouri. L.F. at 6. In other words, Mr. Young is currently *holding* public office. Pursuant to Mo. Rev. Stat. § 561.021, which is the actual statute pertaining to a felon's eligibility to *hold*

public office as opposed to Mo. Rev. Stat. § 115.350, which discusses the now moot issue of a felon's qualifications for candidacy, Mr. Young can and should hold his current position as the Presiding Commissioner.

Even given the clear and unambiguous language of Mo. Rev. Stat. § 561.021 allowing Mr. Young to keep his current position, Prosecutor Hensley nonetheless attempts to achieve her goal of ousting Mr. Young from *holding* public office indirectly by mistaken reliance on Mo. Rev. Stat. § 115.350, which legislates qualifications to be a candidate, not qualifications to hold office. She contends that failure to qualify as a *candidate* may lead to removal of individuals *holding* public office by virtue of Quo Warranto action.

Here, given Mo. Rev. Stat. § 561.021 and unlike many of the defendants in the above-mentioned cases, Mr. Young did possess the qualifications to *hold* office even with his prior felony conviction because he had completed his probation prior to his election. Prosecutor Hensley asks this Court to avoid this and focus strictly on Mr. Young's qualifications for *candidacy* for public office because Mo. Rev. Stat. § 115.350 is the only authority giving her even a slight hope of ousting Mr. Young. However, the cases discussed above cannot be used to bolster Prosecutor Hensley's interpretation of Quo Warranto, which equates qualifications for candidacy with qualifications to be elected.

Mo. Rev. Stat. §§ 115.350 and 561.021 can be harmonized by giving effect to both and preventing Mo. Rev. Stat. § 115.350—which is solely a candidacy qualification statute—from being used as a basis to challenge the right of an office-holder to be elected and hold public office. Unlike many of the respondents in the above-mentioned cases,

Mr. Young qualified to be elected because he qualified to hold the office based on Mo. Rev. Stat. § 561.021.3.

Unlike Prosecutor Hensley's contentions, Quo Warranto is applicable only when individuals unlawfully *hold* office, not when they are *candidates* for public office. None of the cases cited by Prosecutor Hensley change or affect this. As previously mentioned, Mr. Young ran for election, was freely elected, was sworn in and is now seated as the presiding Commissioner of Cass County, Missouri. The qualification for *candidacy* stage is over. Now, only Mo. Rev. Stat. § 561.021 is applicable since Mr. Young is *holding* office, and it allows him to keep his current position. Given these facts, the *candidacy* issue Prosecutor Hensley seeks to emphasize under Mo. Rev. Stat. § 115.350 has vanished.

C. *Mo. Rev. Stat. § 115.350 Must Be Reconciled with Mo. Rev. Stat. § 561.016*

Mo. Rev. Stat. § 115.350 does not comply with Mo. Rev. Stat. § 561.016⁶ without reconciliation. No statute, criminal code, or constitutional provision currently prohibits

⁶ 1. No person shall suffer any legal disqualification or disability because of a finding of guilt or conviction of a crime or the sentence on his conviction, unless the disqualification or disability involves the deprivation of a right or privilege which is

(1) Necessarily incident to execution of the sentence of the court; or

(2) Provided by the constitution or the code; or

Mr. Young from *holding* office due to his conviction. As such, under Mo. Rev. Stat. § 561.016, he is not disqualified from holding public office. In fact, the process for challenging Mr. Young’s qualifications for candidacy, as discussed *infra*, has passed.

Prosecutor Hensley argues that Mo. Rev. Stat. § 115.350 falls under Mo. Rev. Stat. § 561.016.1(3) believing that Mo. Rev. Stat. § 115.350’s “felony under the laws of this state,” sufficiently “defines the crime to which it applies.” To understand the requirements of Mo. Rev. Stat. § 561.016, one must understand some of the history behind The Criminal Code.

Prior to the enactment of The Criminal Code in 1979 (hereinafter the “Code”), “many resulting legal disabilities had no rational relationship to the nature of the conviction.” *Chandler*, 108 S.W.3d at 761. The Code implemented a paradigm shift in the classification of felons. Historically, all felons’ civil rights were suspended during the duration of their imprisonment and they were treated as “civilly dead” if they were given a life sentence. Mo. Rev, Stat. § 561.026, Summary Comment to 1973 Proposed Code.

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- (3) Provided by a statute other than the code, when the conviction is of a crime defined by such statute; or
 - (4) Provided by the judgment, order or regulation of a court, agency or official exercising a jurisdiction conferred by law, or by the statute defining such jurisdiction, when the commission of the crime or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived.

This approach created confusion and required a great deal of work to determine what the civil rights were and what statutory and common law exceptions existed to the suspension of civil rights. *Id.* The Code departed from this approach and began with the “premise that all persons are ‘civilly alive’ but may be deprived of certain privileges of citizenship because of conviction of crime.” *Id.* The legislature explained: “Under the Code approach, all disqualifications and disabilities which are not necessarily incident to the execution of the sentence must be expressly listed. By defining these disqualifications and disabilities and stating when they apply, much of the present confusion is avoided and a sounder basis for rehabilitation is created.” *Id.*

Among the prohibitions revisited by the legislature in the enactment of the Code is the right of felons to hold public office and participate in the political process. While Mr. Young cannot access the statutes which pre-dated the enactment of the Code in 1979, Comment to 1973 Proposed Code in Mo. Rev. Stat. § 561.021 states that under Subsection 2, a person is disqualified to hold public office until completion of his sentence for commission of a felony. The legislature’s comments suggest that prior to the enactment of the Code, felons were prohibited from holding elective public office even after completion of their sentence and that L.1977, S.B. No. 60 repealed those laws and replaced them with Mo. Rev. Stat. § 561.021, which restores these rights “[u]pon conclusion of the imposed sentence....” *Chandler*, 108 S.W.3d at 762. This inference is supported by Mo. Rev. Stat. § 561.026, Comment to 1973 Proposed Code, stating that “denying to convicted persons a place in the political process is more appropriate to the

concept of “civil death,” a concept repudiated by nearly every state today, and is inconsistent with the rehabilitative ideal.”

Mo. Rev. Stat. § 561.016.2 was enacted to ensure that if the legislature intended to create a disability or disqualification resulting from a conviction outside of the Code such as a disqualification from participating in the political process, the legislature should provide in such statute the definition of the crime or conduct that will deprive a person of a right or privilege. Mo. Rev. Stat. § 115.350’s blanket reference to “felony under the laws of this state,” may be appropriate if it were located in the Code; but, outside of the Code, listing the classification of crimes rather than “defining the crimes” does not sufficiently apprise the reader of the specific *conduct* which carries with it the consequence of the legal disqualification or disability as is the intention of the Code. Outside the Code, the statute containing the disability would have to define the specific conduct constituting a crime. A valid example of a disability statute outside the Code may read: One who is convicted of selling alcohol to a minor shall be ineligible to hold a liquor license. This example provides the forbidden conduct and the resulting disability.

Given that Mo. Rev. Stat. § 115.350 insufficiently defines forbidden conduct under Mo. Rev. Stat. § 561.016 to impose a disability or disqualification on a felon, we must consult the canons of construction to reconcile the two statutes that appear to be in conflict. “The primary rule of construction is that we endeavor to reconcile and harmonize statutes that appear to be in conflict if it is reasonably possible.” *Dover v. Stanley*, 652 S.W.2d 258, 263 (Mo. Ct. App. W.D. 1983) (superseded by statute on other grounds) (citing *S.W. Forest Indus. v. Loehr Employment, Etc.*, 543 S.W.2d 322, 323

(Mo. Ct. App. 1976)). Prosecutor Hensley does not propose a reconciliation of these statutes. Mr. Young argues that the statutes can be reconciled by limiting the effect of Mo. Rev. Stat. § 115.350 to “classifying” a candidate as “unqualified” if he has been convicted of or found guilty of or plead guilty to a felony under the laws of this state, but imposing no direct disability on said candidate as a consequence of that classification such that would forbid him from participating in an election as a candidate, having his name listed on the ballot, being elected to hold office, and holding office. If, at any time, such a candidate was required to swear—such as in an amended certificate of candidacy—that he qualifies as a candidate, he could not so swear.

This reconciliation gives legal effect to both statutes and does not create a conflict. This reconciliation is not repugnant to Mo. Rev. Stat. § 115.350 because the statute does not specifically list the disabilities to be excluded unlike Mo. Rev. Stat. § 115.346 stating: “[N]o person shall be certified as a candidate for municipal office, nor shall such person’s name appear on the ballot as a candidate for such office....” Upon such reconciliation, Mo. Rev. Stat. § 115.350 cannot support a challenge to Mr. Young’s qualifications to participate in the election or hold his current office.

D. Even if Quo Warranto Can Be Interpreted to Sanction the Ouster of an Unqualified Candidate, Such a Use of Quo Warranto Was Superseded by the Comprehensive Election Reform Act of 1977

The legislative intent behind and the procedures entailed in Mo. Rev. Stat. § 115.526 prohibit Prosecutor Hensley from challenging Mr. Young’s candidacy

qualification. The Missouri Court of Appeals, Western District, stated in *Clark et. al. v. City of Trenton* that the Comprehensive Election Act of 1977, in part, was obviously intended to provide “finality and conclusiveness” to elections, and, as a result, accelerated judicial procedures were incorporated to govern election contests. 591 S.W.2d 257, 259 (Mo. Ct. App. W.D. 1979). In *Clark*, the court emphasized that the contestants’ efforts to “verbally masquerade their cause of action as something other than an action to contest [] the city sales tax election is nothing more than a belated, but unsuccessful, effort to circumvent the time requirements [under the Act].” *Id.* The *Clark* Court continued by stressing that “the law would be naive if it failed to pierce this thinly disguised effort to bypass the admittedly stringent provisions of the [Act and that] the integrity of [] finality and conclusiveness of free elections would be fatally compromised if persons wishing to contest them could wait indefinitely [] to do so.” *Id.*

Mr. Young submits that the legislative intent behind our State’s current election laws is that while it may be undesirable to have a potentially unqualified person in office, the legislature believes it is a greater detriment to the interests of Missouri citizens and governmental efficiency to protract the determination of one’s ability to perform the functions of elected public office. Based on considerations of finality and conclusiveness, if Quo Warranto ever—as Prosecutor Hensley presupposes—authorized the ousting of an elected office-holder based purely on his lack of qualifications to be a candidate, the Legislature chose to curtail such actions by no longer allowing Quo Warranto actions to inquire into the candidacy qualifications of a person *holding* public office. Instead, the Legislature has assigned the task and responsibility of investigating and illuminating the

background of candidates to those candidates' political opponents within the specified statutory time-frame and encouraging all parties to move on with the State's business after elections.

Had the Legislature intended the Quo Warranto action of challenging a sitting official's candidacy qualifications, the Legislature would not have reduced the deadlines to challenge opponents in the Comprehensive Election Reform Act of 1977 and specifically in Mo. Rev. Stat. § 115.526. Clearly, the Legislature shortened the deadlines to deliver finality and conclusiveness to our State's elections. If it intended that an officeholder's qualifications for candidacy could be challenged during the officeholder's term in office, then it would not have restricted Mo. Rev. Stat. § 115.526 deadlines so dramatically. The Legislature disfavored elongated challenges to candidate qualifications and, in an effort to bring finality and conclusiveness, shortened the statutory deadlines accordingly. Therefore, Prosecutor Hensley's challenge to Mr. Young's qualifications to be a candidate is entirely at odds with Mo. Rev. Stat. § 115.526.

Since Quo Warranto actions that challenge the candidacy qualifications of sitting officials are repugnant to the aims of the Comprehensive Election Reform Act of 1977, we must again apply the canons of construction. In this case, the statutes cannot be reconciled harmoniously if Quo Warranto can be brought in the manner it has been brought in this case. Here, the appropriate canon of construction states: "Where the special statute is passed later, it is considered an exception or qualification of the prior general statute." *Dover*, 652 S.W.2d at 263 (Mo. Ct. App. W.D. 1983) (citing *State v. Bey*, 599 S.W.2d 243, 245-46 (Mo. Ct. App. 1980)).

The Quo Warranto statute, Mo. Rev. Stat. § 531.010, was the prior general statute. It was made effective in 1939 and addresses multiple bases for Quo Warranto actions. Mo. Rev. Stat. § 115.526 was later enacted and specifically addresses—in some detail—the procedure for challenging one’s candidacy. Consequently, Mo. Rev. Stat. § 115.526 should be read as a qualification to the prior enacted Mo. Rev. Stat. § 531.010 to the extent it is interpreted to sanction Quo Warranto inquiry into the candidacy qualifications of existing office-holders.

III. The Trial Court Erred in Entering Its Judgment Ousting Herschel L. Young from the Position of Cass County Presiding Commissioner in Reliance Upon Mo. Rev. Stat. § 115.350 Because Mo. Rev. Stat. § 115.350 Violates 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 Treats Similarly Situated Persons Differently by Preventing a Person from Running for Office Who Commits a Felony Under the Laws of Missouri but Allowing Persons Who Commit Felony Under the Laws of Other States or the Laws of the United States to Run for Office

A. Mo. Rev. Stat. § 115.350 Creates a Classification Subjecting It to Equal Protection Analysis

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution requires that all persons similarly situated be treated alike by laws and actions of the government. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Missouri’s equal protection clause provides the same protections as the United States Constitution. *In re Care and Treatment of Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007) (quoting *Bernat v. State*, 194 S.W.3d 863 (Mo. banc 2006)).

Mo. Rev. Stat. § 115.350 creates a classification which allows those convicted of a felony under the laws of any other state or of the United States to qualify to run for office in Missouri but—assuming a proper challenge to qualifications is made—denies persons convicted of a felony under the laws of Missouri from running for elective office in Missouri. In other words, Mo. Rev. Stat. § 115.350 disqualifies a candidate from running

for elective office in the State of Missouri *solely* because of his or her conviction *in* the State of Missouri. The fact that the statute treats such candidates differently from those convicted of a felony under the laws of any other state or under the laws of the United States clearly creates a classification that is subject to equal protection analysis.

Here, some 16 years ago, Mr. Young plead guilty to a Class C Felony charge of assault. This resulted from an altercation in which Mr. Young assaulted an individual who had spat on Mr. Young's wife. L.F. at 8. While we as a civilized society have no choice but to illegalize such conduct, Mr. Young's actions were far from dishonorable. Standing next to another potential candidate running for office in Missouri who has plead guilty to assaulting someone under all of same facts as in Mr. Young's situation, except that the assault occurred in a state other than Missouri, only Mr. Young is singled out and would be disqualified from running for elective office in Missouri.

Mo. Rev. Stat. § 115.350 treats Mr. Young differently from other similarly-situated candidates based on the location of felonious conduct. This treatment by the statute of persons who have plead guilty to a felony under the laws of Missouri differently from those pleading guilty to felonies under federal law and the laws of other states clearly establishes a classification for the purposes of equal protection analysis.

B. Mo. Rev. Stat. § 115.350 Violates Equal Protection under Either Strict Scrutiny or Rational Basis Scrutiny

In a plurality opinion in *Clements v. Fashing*, the Supreme Court of the United States emphasized that although candidacy is not recognized as a fundamental right,

decision in this area is a matter of degree, involving a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions. 457 U.S. 957, 962-64 (1982). “The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the ‘availability of political opportunity.’” *Id.*

The plurality further discussed the application of heightened scrutiny in two lines of cases: “ballot access cases involv[ing] classifications based on wealth,” and “classification schemes that impose burdens on new or small political parties or independent candidates.” *Id.* at 964. However, as the plurality explained, “[i]t does not automatically follow, of course, that we must apply traditional equal protection principles...merely because [] restrictions on candidacy do not fall into the two patterns just described.” *Id.* at 965. “Not all ballot access restrictions require ‘heightened’ equal protection scrutiny,” the plurality explained. *Id.* at 966. The Court has, for instance, “applied traditional equal protection principles to uphold a classification scheme that denied absentee ballots to inmates in jail awaiting trial.” *Id.* (citing *McDonald v. Board of Election Comm’rs*, 394 U.S. 802, 807-811 (1969)). To resolve the question, “it is necessary to examine the provisions in question in terms of the extent of the burdens that they place on [] candidacy....” *Id.* Additionally, “only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution.” *Id.* at 967.

In the event heightened scrutiny is necessitated, “[t]he application of strict scrutiny for purposes of equal protection challenges...involves a two-part analysis: the restriction must be necessary to serve a compelling state interest, and may not go beyond what the state’s interest actually requires.” *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006) (quoting *Manifold v. Blunt*, 863 F.2d 1368, 1373 (8th Cir.1988)).

In *Clements*, three officeholders seeking higher office challenged a Texas statute establishing waiting periods for persons seeking election to office while holding a different office. *Id.* at 961. The Supreme Court of the United State stated that the establishment of a “maximum ‘waiting period’ of two years for candidacy . . . places a *de minimis* burden on the political aspirations of a *current* officeholder,” and held that “this sort of insignificant interference with access to the ballot need only rest on a rational predicate in order to survive a challenge under the Equal Protection Clause.” *Id.* at 967-68. The Court further found sufficient rational predicates to conclude there was no violation of the Equal Protection Clause. *Id.* at 972-73.

In *Antonio v. Kirkpatrick*, a candidate for Missouri State Auditor brought suit challenging a ten-year durational residency requirement and sought to compel the Missouri Secretary of State to certify Antonio for the primary election. 579 F.2d 1147 (8th Cir. 1978). While the U.S. District Court applied strict scrutiny to strike down the overly-long residency requirement on equal protection grounds, the U.S. Court of Appeals for the Eighth Circuit determined the rational basis test was the proper standard—largely because the ten-year residency requirement on the position of State Auditor “[did] not irretrievably foreclose a person from running for office of State

Auditor,” and “a potential candidate for State Auditor can actively participate in the political process by running for other public offices during the ‘waiting period.’” *Id.* at 1149.

In *Coles v Ryan*, despite recognizing a legitimate State interest, the Illinois Court of Appeals found no rational basis supporting “a statutory distinction [which was] drawn between persons convicted of an infamous crime who seek to hold an office created by the legislature and those convicted of an infamous crime who seek to hold a constitutionally created office.” 414 N.E.2d 932, 936 (Ill. App. Ct. 1980). The *Coles* Court stated that “[p]lacing more burdensome requirements on restoration of eligibility for an office created by the legislature[—in this case, requiring a gubernatorial pardon—] is an arbitrary classification and does not rationally further any legitimate State interest. *Id.*

Unlike in *Clements* and *Antonio*, Mo. Rev. Stat. § 115.350 does not merely place a *de minimis* burden on Mr. Young’s political aspirations. In fact, there can be no greater burden on political candidacy than permanent disqualification. Mo. Rev. Stat. § 115.350 certainly purports to irretrievably foreclose Mr. Young’s future candidacy unlike the challenged statute in *Clements*. In applying rational basis scrutiny to other candidacy qualification provisions, courts have *heavily* focused on and cited the temporary consequences of challenged qualification provisions, as demonstrated in *Clements*, and *Antonio*. The permanency of Mo. Rev. Stat. § 115.350’s disqualification is the exact scenario contemplated by the United State Supreme Court for which it reserves heightened equal protection scrutiny. As such, strict scrutiny should be applied when

considering the constitutionality of Mo. Rev. Stat. § 115.350 as to potential violation of equal protection.

Under strict scrutiny, Mo. Rev. Stat. § 115.350 likely serves a compelling state interest but the statute's blanket disqualification of only candidates committing any felony in Missouri, regardless of the crime, severity, circumstances, or duration having passed since commission of said crime—all the while, qualifying candidates committing the same acts outside of Missouri and candidates committing more heinous federal crimes—hardly can be said to be narrowly tailored to further any state interest and is certainly “invidious, arbitrary, or irrational.” *Clements*, 457 U.S. at 967.

Even if the classification involved here does not give rise to heightened scrutiny, and rational basis is considered to be the appropriate level of scrutiny instead, Mo. Rev. Stat. § 115.350 still fails to defeat equal protection. Disqualification of candidates who have committed certain crimes “is a reasonable means of furthering the legitimate State interest in safeguarding the honesty and integrity of those who exercise governmental power.” *Coles*, 414 N.E.2d at 936. However, like in *Antonio*, the question here is whether the disqualification “so imposed violates constitutional standards as being arbitrary or so restrictive as to erase any rational relationship to the legitimate State interest....” *Antonio*, 579 F.2d at 1150.

Similar to the situation in *Coles*, a statutory distinction has been drawn in Missouri between candidates seeking elective office who have committed a felony in Missouri and candidates seeking elective office who have committed a felony in any other state or under the laws of the United States. Just as in *Coles*, certain candidates, such as Mr.

Young, would require a gubernatorial pardon to qualify to run for elective office while other candidates who committed the same acts as Mr. Young would not. Just as in *Coles*, this distinction amounts to an “arbitrary classification and does not rationally further any legitimate State interest.” *Coles*, 414 N.E.2d at 936.

Mr. Young does not contend that the legislature is without the power to restrict candidacy based upon certain prior criminal conduct. However, Mr. Young *does* contend that should the legislature wish to venture down such a path, it must do so in a manner that does not violate equal protection. The legislature was within its power to draft Mo. Rev. Stat. § 115.350 in a manner which did not violate equal protection. *See* Mo. Rev. Stat. § 561.021.2 (stating “a person who pleads guilty or nolo contendere or is *convicted under the laws of this state of a felony or under the laws of another jurisdiction of a crime which, if committed within this state, would be a felony*, shall be ineligible to hold any public office, elective or appointive, under the government of this state or any agency or political subdivision thereof, until the completion of his sentence or period of probation.” (emphasis added)).

Moreover, the legislature appears to have recognized the drafting deficiencies in Mo. Rev. Stat. § 115.350 in that a recent proposed amendment states:

115.350. No person shall qualify as a candidate for any elective public office in the state of Missouri, including any elective public office of any political subdivision of this state, who has:

(1) Been convicted of or found guilty of or pled guilty to a felony under the laws of this state;

(2) Been convicted of or found guilty of or pled guilty to any crime in any other jurisdiction that would be a felony if committed in this state;

(3) Been convicted of or found guilty of or pled guilty to any felony or misdemeanor under the federal laws of the United States of America;

(4) Been convicted of or found guilty of or pled guilty to any crime in this state or in any other jurisdiction that involves misconduct in public office or dishonesty.

2010 MO S.B. 580 (NS) (although even the proposed legislation likely violates equal protection with regard to disqualification based on federal misdemeanors).

Unlike the proposed legislation, Mo. Rev. Stat. § 115.350, as it now reads, deprives Mr. Young of his constitutionally protected right to participate in elections on an equal basis with other similarly-situated citizens and, in fact, treats him harsher than citizens who have committed more serious crimes. Had Mr. Young been convicted of a federal felony, he would still meet the qualifications to run for office in Missouri. Similarly, if Mr. Young had been convicted of a felony in Kansas, for instance, he would still meet the qualifications to run for office in Missouri.

Mr. Young, however, was convicted of a felony in Missouri and is disqualified from candidacy, in Missouri, for public office solely as a result of that conviction. While other candidates with federal felony convictions or felony convictions in a state other than Missouri running for the same exact public office in Missouri as Mr. Young are qualified under Mo. Rev. Stat. § 115.350, Mr. Young is invidiously given unequal treatment under the same statute.

C. *Mo. Rev. Stat. § 115.350's Violation of Equal Protection is Not Excused by a "One-step-at-a-time" Justification*

It should be noted that regardless of the level of scrutiny, 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). Initially, this phrase was understood to provide lawmakers considerable leeway when suspect classifications and fundamental rights were not at issue. *See City of St. Louis v. Liberman*, 547 S.W.2d 452 (Mo. banc 1977). However, although Missouri courts have relied upon *Williamson*, the Supreme Court of the United States in *Clements v. Fashing*, 457 U.S. 957 (1982), clarified the requirements for invoking *Williamson's* more-than-half-century-old legislative scheme.

In *Clements*, Justice Stevens in his concurring opinion and Justices Brennan, Marshall, Blackmun, and White in their dissenting opinion refused to subscribe to the plurality's "wholly fictional one-step-at-a-time justification." *Id.* at 981. The majority of justices agreed that such an assertion "is simply another way of stating that there need be no justification at all for treating two classes differently during the interval between the first step and the second step--an interval that, of course, may well last forever." *Id.* at 976.

Additionally, the nature and severity of the classification play a significant role in determining the degree to which the step-by-step rationale is an appropriate and believable justification for the differential treatment of classes not covered by the initial regulation. *See, e.g., Id.* at 976. (Justice Stevens emphasizing that while a one-step-at-a-

time approach is “unobjectionable in a case involving the differences between different public offices,” a separate standard [] would be necessary to evaluate state legislation that “treats different classes of persons differently”). Here, proceeding one-step-at-a-time would not absolve the legislature from its duty to enact regulations that treat similarly-situated persons equally for at least two reasons.

First, one can hardly imagine a logical justification for treating two classes of candidates differently, one being an “in-state felon” and the other being an “out-of-state felon” during the interval between the first and the second step. Mo. Rev. Stat. § 115.350 suggests that candidates with federal felonies or felonies in another state running for public office in Missouri are somehow different from those candidates with Missouri felonies running for public office in Missouri. The statute imposes a complete ban to public office on Missouri felons while leaving the doors completely open for those who commit the same acts in any other jurisdiction. On its face, this idea is “fictional” at best.

Second, the nature and severity of the classification here makes the application of the one-step-at-a-time rationale inappropriate and unrealistic for the differential treatment of classes. Here, if Mo. Rev. Stat. § 115.350 were based on real, historic differences between Missouri felons and “other” felons, then the statute might be considered to be a “temporary” step, pending the adoption of a more comprehensive solution to the concern of the legislature. That is not the case here, however. Unfortunately, Mo. Rev. Stat. § 115.350 simply and solely excludes candidates such as Mr. Young with Missouri felonies from running for public office in Missouri and leaves “other” felons unrestrained. An explanation here that the legislature is progressing one-step-at-a-time

and is thereby taking the first step toward its eventual goals is without merit because this potential “temporary” step does not assume a rational character for the reasonable time necessary to implement the next “step.”

Thus, Mo. Rev. Stat. § 115.350 fails to withstand either strict scrutiny or rational basis scrutiny because the classification created by the statute, as it now reads, is neither narrowly tailored to further a compelling state interest nor rationally related to a legitimate state interest. Furthermore, the statute cannot be considered to be a “step” in the adoption of a comprehensive solution to the “problem which seems most acute to the legislative mind” because any purported temporary step does not assume a rational character for the reasonable time necessary to implement the next step. Accordingly, Mo. Rev. Stat. § 115.350 must be struck down as unconstitutional for violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Missouri Constitution.

D. Mo. Rev. Stat. § 115.350 Creates an Additional Unequal Classification in that It Treats Missouri Felons who Run for Elective Public Offices Differently from Missouri Felons who are Appointed to Public Offices

Mo. Rev. Stat. § 561.021.2 disqualifies Missouri felons, whether they hold elective or appointive office, only until the completion of their sentence or period of probation. Missouri courts have consistently emphasized that the right to hold public office is restored upon completion of the imposed sentence or period of probation. *Chandler*, 108 S.W.3d at 762. Here, Mo. Rev. Stat. § 561.021, not only treats equally all

felons, including those from other jurisdictions, but also treats equally felons for both types of offices, elective and appointive.

Although the right to engage in political activities is not absolute, restrictions upon political activities of public office holders, such as those created by Mo. Rev. Stat. § 115.350 are constitutionally permissible only when the classification “serve[s] important governmental objectives,” and is “substantially related to achievement of those objectives.” *Craig v. Boren*, 429 U.S. 190 (1977). It is clear that disqualification of felons from either elective or appointive public offices is a reasonable means of safeguarding the honesty and integrity of public officials exercising governmental power.

However, no reasonable basis exists for distinguishing between elective public offices and appointive public offices even though both offices are equally important and fall under the historical umbrella of “offices of honor, trust, or profit.”⁷ In other words,

⁷ See V.A.M.S. 561.021 Comment to 1973 Proposed Code stating: “At present, there are various types of provisions in Chapters 556 to 564 RSMo which generally prohibit a person convicted of a felony from “holding any *office of honor, profit or trust within this state*” and these apparently require forfeiture of office.” (emphasis added); Mo. Rev. Stat. § 222.030 (1969) (repealed by The Criminal Code, effective January 1, 1979. S.B. 60, Laws 1977, pp. 658-59, 718) stating: “When any person shall be sentenced upon a conviction for any offense, and is thereby, according to the provisions of chapters 556 to 564, RSMo, disqualified to be sworn as a juror in any cause, or to vote at any

can a classification be upheld which allows Missouri felons to qualify for appointive public offices in Missouri, while preventing Missouri felons from qualifying for elective public offices in Missouri? How can a rule be justified which permits the differential treatment of Missouri felons for elective public offices when compared to Missouri felons for appointive public offices?

Merely to state these questions is to make the answers obvious. This is one of the respects in which Mo. Rev. Stat. § 115.350 fails. Placing a complete ban on Missouri felons from qualifying to hold elected public office (as Prosecutor Hensley argues Mo. Rev. Stat. § 115.350 operates) while completely allowing all other felons to qualify for appointive public office amounts to an arbitrary classification and does not rationally further any legitimate State interest when read within the context of Mo. Rev. Stat. § 561.021.

Mr. Young and the members of his class have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. *Anderson v. Martin*, 375 U.S. 399, 402, 404 (1964). “The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.” *Carrington v. Rash*, 380 U.S. 89, 91 (1965). Here, as Prosecutor Hensley hopes to apply it, Mo. Rev. Stat. § 115.350 flies in the face of state and federal constitutions’ equal protection prohibitions.

election, or to hold any *office of honor, profit or trust within this state*, such disabilities may be removed by a pardon by the governor, and not otherwise.” (emphasis added).

CONCLUSION

Because the statute the trial court relies upon to oust Herschel L. Young is unconstitutional as applied to him under Missouri's Bill of Rights and the Constitution of the United States, Mr. Young, duly elected with a mandate of fifty-four (54%) percent of Cass County voters, has every right to serve his fellow citizens as Presiding Commissioner of Cass County, Missouri.

Mr. Young respectfully submits that it is time to bring finality and conclusiveness to the November 2, 2010, elections. Mr. Young prays that this honorable Court reverse the Judgment of the trial court, uphold the will of the voters, and allow Mr. Young to begin working for the good of the people who freely elected him.

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 and contains 15,649 words.
4. The compact disc submitted herewith containing this brief has been scanned for viruses and is virus free.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of August 2011 that two (2) true and accurate copies of Appellant's Brief and a copy of the brief on compact disc were personally served on:

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