IN THE
SUPREME COURT OF MISSOURI

HENRY RIZZO, et al.,	)	
	)	
Respondents,	)	
	)	
v.	)	**Case No. SC87550**
	)	
	)	
STATE OF MISSOURI, et al.,	)	
	)	
Appellants.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Richard G. Callahan, Judge

Opening Brief of Appellants State of Missouri and Attorney General

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Jurisdictional Statement

The issue in this case is whether MO. REV. STAT. §115.348 (Cum. Supp. 2005), violates the equal protection clauses of the United States and Missouri Constitutions. The trial court held that it does. Because this case involves the validity of a statute, this Court has exclusive appellate jurisdiction. MO. CONST. art. V, § 3.

Statement of Facts

In 2005, the Missouri General Assembly passed and the Governor signed House Bill 58, which included §115.348. LF 435; App. 3. Section 115.348 provides: "No person shall qualify as a candidate for elective office in the State of Missouri who has been found guilty of or pled guilty to a felony or misdemeanor under the federal laws of the United States of America." App. 1. The plaintiffs below, including Henry Rizzo, who wishes to run for elective office, challenged the constitutional validity of the law on several bases. LF 1-26, 435-436; App. 3-4.

Section 115.348 affects Mr. Rizzo, because in March 1991, he was found guilty of the offense of providing a false statement to a financial institution, a misdemeanor offense under the laws of the United States. LF 37, 434; App. 2. Under §115.348, Rizzo is disqualified from running for any public office in Missouri. LF 435; App. 3. Presently, Mr. Rizzo is a member of the Jackson County Legislature and has filed, but has not yet been certified, as a candidate for re-election in the August 2006 election. LF 36.

The lower court conducted a trial on the merits on March 9, 2006. The evidence consisted in relevant part of the parties' stipulation of facts, including exhibits. LF 35-433. On March 13, 2006, the trial court held that §115.348 violates the equal protection clauses of the United States and Missouri Constitutions, because it lacks any rational basis. LF 438-441; App. 6-9.

Invoking MO. REV. STAT. §1.140 (2000), the trial court severed §115.348 from House Bill 58, holding that the statute is not central to and inseparably connected with House Bill 58. LF 442; App. 10. The court denied the plaintiffs' remaining claims as moot. LF 454; App. 4.

Point Relied On

The trial court erred in holding that §115.348 violates the equal protection clauses of the United States and Missouri Constitutions, because such a violation requires, as a threshold, that a classification have 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 federal felonies and misdemeanors are disqualified as candidates for elective office, §115.348 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 crimes from running for public office.

Bullock v. Carter, 405 U.S. 134 (1972)

City of St. Louis v. Liberman, 547 S.W.2d 452 (Mo. banc 1977)

Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955)

Mo.Rev.Stat. §115.348 (Cum. Supp. 2005)

Argument

The trial court erred in holding that §115.348 violates the equal protection clauses of the United States and Missouri Constitutions, because such a violation requires, as a threshold, that a classification have 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 federal felonies and misdemeanors are disqualified as candidates for elective office, §115.348 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 crimes from running for public office.

Standard of Review and Presumption of Constitutionality

Statutory and constitutional interpretations are issues of law that this Court reviews de novo. *Barker v. Barker*, 98 S.W.3d 532, 534 (Mo. banc 2003), and *Farmer v. Kinder*, 89 S.W.3d 447, 449 (Mo. banc 2002).

The legislative power of the General Assembly is "plenary and residual." *Penner v. King*, 695 S.W.2d 887, 889 (Mo. banc 1985), *citing State ex rel. Holekamp v. Holekamp Lumber Co*., 340 S.W.2d 678 (Mo. banc 1960). Thus, the legislature, "vested in its representative capacity with all the primary powers of

the people ... has the power to enact any law not prohibited by the federal or state constitution." *Three Rivers Junior College Dist. of Poplar Bluff v. Statler*, 421 S.W.2d 235, 237-238 (Mo. banc 1967).

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). *See also Penner*, 695 S.W.2d at 889 (court "obligated" to uphold legislative enactment unless unconstitutionality is "clearly demonstrated"). Thus, this Court'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) (same); and *Hammerschmidt*, 877 S.W.2d at 102 (same).

As this Court has observed, the state 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 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 (same). 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) (citations omitted). 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); *Missouri Libertarian*

Party, 88 S.W.3d at 447; *Linton*, 988 S.W.2d at 515; *Carmack*, 945 S.W.2d at 959; and *Hammerschmidt*, 877 S.W.2d at 102.

Plaintiffs have not – and cannot – meet this heavy burden, and their claim that Section 115.348 violates the equal protection clauses of the United States and Missouri Constitution should be denied.

I. Section 115.348 does not create a classification, and therefore does not implicate equal protection at all.

To prove an equal protection violation, the plaintiffs are required, as a threshold matter, to demonstrate that they were treated differently from others similarly situated to them. *Arnold v. City of Columbia*, 197 F.3d 1217, 1220 (8th Cir. 1999). Mr. Rizzo and his co-plaintiffs did not make this showing to the Circuit Court, and cannot make it here. Section 115.348 does not, on its face, establish a classification. By its plain language, it applies to all federal crimes, both felonies and misdemeanors. Indeed, Mr. Rizzo does not claim to have been treated differently from persons convicted of federal felonies.

In order to establish a "classification," Plaintiffs have to go outside the four corners of §115.348, outside House Bill 58, and outside of Chapter 115 altogether. The nearest thing Plaintiffs have offered to a classification is that, under § 561.021, Plaintiffs argue that felons are treated differently from misdemeanants. Procedurally, this argument is not worthy of this Court's time because a party challenging a statute on equal protection grounds must

demonstrate that the challenged statute draws an impermissible classification – not that the challenged statute operates differently from some other, older statute.

Substantively, Plaintiffs' argument regarding §561.021 is even worse. This section provides that any public office holder – elective or appointive – shall FORFEIT his office upon being sentenced for a felony (under Missouri law, other states' laws, or federal laws), and may not hold any other public office – elective or appointive – until his sentence and/or probation are completed. Thus, §561.021 has no direct impact on who can be a candidate. Instead it is concerned solely with holding office – and specifically extends its reach to appointive officers. Moreover, §561.021.1(2) specifically states that anyone convicted of any crime (state, federal, felony or misdemeanor) forfeits office and cannot hold office again if the crime concerned misconduct in office or, as in Mr. Rizzo's case, dishonesty. Finally, §561.021.1(3) contains a catch-all provision that puts convicts on notice that any conviction of any crime (state, federal, misdemeanor or felony) will result in the forfeit their office and a permanent prohibition against ever holding or running for any other office if "[t]he constitution or a statute other than the [criminal] code so provides." Section 115.348 is just such a statute.

Even if plaintiffs' theory that §115.348 treated federal misdemeanants differently from the way some other statute treated state misdemeanants, there is

nothing in the record – apart from Mr. Rizzo's assertion – that persons convicted of federal crimes are similarly situated to persons convicted of state crimes. On this basis alone, this Court can and should reject plaintiffs' equal protection challenge. *See City of St. Louis v. Liberman*, 547 S.W.2d 452 (Mo. banc 1977). *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*. Similarly, in *Cooper v. Mo. Bd. of Probation and Parole*, 866 S.W.2d 135, 137 (Mo. banc 1993), the Court held that the plaintiffs, inmates who were denied parole, had not shown they were similarly situated to other inmates who were granted parole, where the plaintiffs did not put on evidence of the seriousness of the crimes of the parolees. In other words, the plaintiffs did not show that they were similarly situated to the persons with whom they wished to be compared. *Id*.

Accordingly, §115.348 does not create a classification of any kind, and therefore never even invokes the equal protection clauses of the federal and state constitutions. On its face, it deals only with federal criminals, and it treats them all the same. Plaintiffs cannot go out and search through the Revised Statutes of Missouri trying to find a statute that treats state criminals differently – and even if

they could, §561.012 is not such a statute. Plaintiffs argument is analogous to the General Assembly having passed a statute regulating deer hunting – which treats all "deer hunters" the same – only to have a plaintiff attack the statute by pointing to a different, older statute that regulates turkey hunting – which treats all "turkey hunters" the same – and arguing that the deer hunting statute violates equal protection because the "hunters" in the dear hunting statute are treated differently than "hunters" are treated in the turkey hunting statute. The analogy, admittedly hard to follow, is no harder to follow than plantiffs' argument, and plantiffs' equal protection claim should be rejected for failure to make the very threshold, evidentiary showing that the statute in question makes a classification and treats similarly people in dissimilar ways.

II. If Section 115.348 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, Plaintiffs' claims are not equal protection claims, but merely some vague sense of unfairness in search of a constitutional theory. For the threshold reason that §115.348 draws no classification, this Court respectfully should end this case at that point. But, if the Court desires to extend its analysis, the State sets forth below compelling reasons why the applicable standard of

review is a "rational basis review" and that §115.348 has numerous rationale bases from which the Court may pick.

A. "Rational Basis," not "Strict Scrutiny" is the applicable test to be applied.

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 of 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, of course, is a right explicitly or implicitly guaranteed by the constitution such as the rights to free speech, to vote, to travel interstate, as well as other basic liberties. *Id*. Where a statute that creates a suspect classification, or impinges upon a fundamental right, Court's will apply a heightened scrutiny, demanding a closer

relationship between the a 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, Rizzo does not contend that §115.348 creates a "suspect classification" in applying only to persons with federal criminal records. 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).

Nor does §115.348 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 Paris Sch. Bd*., 709 F. Supp. 705, 709 (M.D. La. 1989) ("the right to hold public office is not a fundamental right."). Even though, from the perspective of the other two plaintiffs, 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.

B. Section 115.348 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, §115.348 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. Section 115.348 keeps all federal criminals off our ballots and out of our public offices. 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. End of analysis. Plaintiffs' claims fail.

To be sure, the state's interest can be elaborated upon, and extended. By preventing persons with criminal convictions from qualifying as candidates for public office, § 115.348 furthers at least the following interests: (1) it protects the integrity of the political process; (2) it protects the public from being governed by persons who have demonstrated an inability to adhere to the requirements of the law; (3) it serves to decrease public cynicism towards elected officials, and (4) (3) it serves to decrease public cynicism towards the electoral process.

Plaintiffs did not seriously contest these points. Instead, their arguments were largely confined to the contentions that, because legislature could have precluded a more expansive class of convicted criminals from qualifying as candidates for public office or, alternatively, a narrower class of convicted criminals from so qualifying, §115.348 should be declared invalid. *See* First Am. Pet. ¶ 56, b., f..

But even ignoring for the moment the lack of any evidentiary support for the federal-to-state comparison, Mr. Rizzo's argument unravels with a few tugs. For purposes of equal protection analysis, §115.348 rises or falls on its own – Mr. Rizzo cannot engraft a classification onto §115.348 by reference to other statutes. In *Liberman*, the 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 farther – 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 §115.348 is under-inclusive because it does not also cover state crimes, or because some other statute treats state crimes differently, is of no moment for purposes of equal protection analysis. Put another way, such comparison certainly does not suffice to create a classification where none exists for purposes

of an equal protection challenge. Any comparison of §115.348 to any other statute is simply completely irrelevant to equal protection analysis.

Moreover, 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). And 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).

The First Circuit has rejected a claim similar to Mr. Rizzo'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. The plaintiffs adduced extensive evidence that the ordinance will 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 ordinances 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. WD 1981) (emphasis added).

In *State ex inf. Gavin v. Gill*, 688 S.W.2d 370, 372 (Mo. banc 1985), the Court stated the issue in terms of standing, when it held that where, as with Mr. Rizzo in the present case, a "person in the position of [the challenger] is not normally permitted to assert unconstitutionality simply because others are exempted from a statutory disability which applies to him."

Similarly, this Court has held that a plaintiff 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). There, even 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.*

Plaintiffs' arguments, under any relevant precedent, do not and cannot prove that §115.348 constitutes an "abuse of legislative discretion beyond a reasonable doubt." *Winston*, 636 S.W.2d at 327. And so, the Court must settle this "issue ... on the side of validity" of the statute. *Id*.

Conclusion

The trial court's judgment should be reversed.

Respectfully submitted,

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

The undersigned hereby certifies that on this 14th day of March, 2006, the foregoing was e-mailed at 3:45 p.m. to all parties and mailed, postage prepaid, by 1st class mail on the same date to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 4,462 words.

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

_____
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Appendix

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115.348. 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 plead guilty to a felony or misdemeanor under the federal laws of the United States of America.