IN THE SUPREME COURT OF MISSOURI

MISSOURI DIVISION OF FINANCE,	)	
	)	
Appellant,	)	
v.	)	Case No. SC 92152
	)	
ROY GAROZZO,	)	
	)	
Respondent.	)	
	)	

Appeal from the Circuit Court of St. Louis County, Missouri
related to Petition for Review of Agency Action
Case No. 10SL-CC04997
Hon. Joseph L. Walsh
Division 17

RESPONDENT'S REPLY BRIEF

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SUMMARY OF REBUTTAL

The undisputed facts and findings of the Residential Mortgage Board compel the conclusion that Mo. Rev. Stat. § 443.713(2)(a) is unconstitutional as applied to Respondent Roy Garozzo ("Mr. Garozzo"). In his Initial Brief, Mr. Garozzo pointed out that he was denied a mortgage loan originator's license for conduct that: (1) occurred prior to the enactment of Section 443.713(2)(a); (2) was fully adjudicated prior to the enactment of the statute; (3) resulted in no conviction; and (4) is not related to the subject matter of the license. The Division of Finance (the "Division") does not dispute these points. Further, there is a specific finding by the administrative body that reviewed the Division's decision that Mr. Garozzo's guilty plea was "wholly unrelated to his professional services as a mortgage loan originator." (Mo. Mortgage Bd. Finding, 16 ¶ 11, A26.) The Division, appropriately, has not challenged that finding. In fact, the Division asks the Court to affirm the Residential Mortgage Board's decision. (Division Br., at 28.) That makes this case different from other potential challenges to Section 443.713(a)(2) where similar findings have not been made.

Particularly in light of that undisputed and undisputable finding, Section 443.713(2)(a) is unconstitutional. There are three constitutional infirmities, although only one is necessary to affirm the judgment of the trial court.

Section 443.713(2)(a) is a bill of attainder because it is directed at a specific group and is punitive. When a statute denies Mr. Garozzo the ability to engage in his profession for reasons unrelated to his services, there cannot be a legitimate nonpunitive purpose.

The statute is also an unconstitutional retrospective law because it imposes new obligations and creates new disabilities for Mr. Garozzo: he faces the choice of obtaining a license (which has been denied by the State), giving up his career as a mortgage loan originator, or being subject to fines and penalties.

Finally, Mr. Garozzo's due process rights are violated because the statute that denies a license to Mr. Garozzo for reasons unrelated to his work as a mortgage loan originator has no rational relationship to a legitimate governmental purpose. Instead, it adds a punishment that never could have been anticipated.

Accordingly, the judgment of the trial court should be affirmed.

ARGUMENT

I. Section 443.713(2)(a) is an Unconstitutional Bill of Attainder (Reply in Further Support of Respondent's Point I and in Opposition to Appellant's Point III).

The parties concur that two elements need be established for Section 443.713(2)(a) to qualify as an unconstitutional bill of attainder: (1) it must single out a "specifically designated person or group"; and (2) it must inflict punishment on that person or group. Both of these elements are satisfied here.

A. Section 443.713(2)(a) Singles Out a Specifically Designated Group.

The Division first argues that Section 443.713(2)(a) does not meet the "specificity" requirement because the individuals falling within the specifically designated group targeted by the statute are subject to change through the passage of time (seven years) and by "volitionally" applying for a license. (Division Br., at 24.)[1]

This is a new approach by the Division raised for the first time in this Court. By contrast, at the trial court level, the Division conceded: "Arguably,

[1] This case could become moot after Mr. Garozzo moves out of the affected group. That would occur no earlier than seven years after the date of the of his guilty plea (December 11, 2013).

§443.713(2)(a) RSMo, **does** single out a 'designated person or group.'" (Resp. Br., at 4, cited in Trial Court Op. at 8, A8)(emphasis added).

Regardless, this new argument fails because there is no requirement that a "specifically designated group" remain static. The Division does not, and could not, cite any precedent in support of its argument. In fact, the United States Supreme Court has recognized that fluid groups *do* qualify under a bill of attainder analysis. For example, in *U.S. v. Brown*, 381 U.S. 437 (1965), the Court found that a statute making it a crime for a member of the Communist Party to serve as an officer or employee of a labor union violated the prohibition against bills of attainder. Clearly, the membership of the Communist Party may change over time: new members may "volitionally" come in, and others may go out. In addition, new people are elected to leadership positions within the Party and others leave such positions. The group of individuals targeted by the statute in *Brown* was not static, but was still viewed as targeted by a bill of attainder by the Supreme Court.

The *Brown* Court further noted that "inescapability" is not a prerequisite to finding a bill of attainder, stating:

> Such an absolute rule would have flown in the face of explicit precedent, *Cummings v. Missouri*, 4 Wall. 277, 324 as well as the historical background of the constitutional prohibition. A number

> of ante-Constitution bills of attainder inflicted their deprivations upon named or described persons or groups, but offered them the option of avoiding the deprivations, *e.g.*, by swearing allegiance to the existing government.

Brown, 381 U.S. at 457 n.32. The Division's insinuation that members of the group targeted by Section 443.713(2)(a) can simply "escape" the group "by allowing time to pass before submitting an application" does not render the statute constitutional. (Division Br., at 24.)

Likewise, the changing group of people targeted by Section 443.713(2)(a) is sufficiently specific to satisfy the test for determining a bill of attainder. As a result, this Court should reject the Division's argument and find the specificity element of an unconstitutional bill of attainder is met here.

B. Section 443.713(2)(a) Inflicts Punishment on a Specifically Designated Group.

The Division of Finance argues that to defeat Mr. Garozzo's bill of attainder claim it "need only *advance* a nonpunitive legislative purpose to avoid a challenge on bill of attainder grounds." (Division Br., at 27)(emphasis in original). However, this Court has set forth a much more rigorous standard than the Division asserts. As quoted by the Division in its Brief, per *Bunker*, 782 S.W.2d at 387, a court considers whether a challenged statute **"viewed in light of the severity of**

burdens it imposes" can "reasonably be said to advance a nonpunitive legislative purpose." (Division Br., at 25)(emphasis added). In this regard, "[j]ust because there is a nonpunitive purpose, the legitimacy of a law creating a class subject to a legislatively imposed punishment is not established." *Bunker*, 782 S.W.2d at 386.

The Division ignores the severity of the burden that Section 443.713(2)(a) imposes on Mr. Garozzo and other similarly situated individuals, and fails to consider whether, **in light of these burdens**, Section 443.713(a)(2) can "reasonably" be viewed as advancing a nonpunitive legislative purpose. In evaluating whether a statute, viewed in a light of the severity of burdens it imposes, can reasonably be said to advance a nonpunitive legislative purpose, courts are instructed to take a "functional approach". *Bunker*, 782 S.W.2d at 387. As stated by this Court:

> Generally, legislation intended to prevent future danger, rather than to punish past action, is not an unconstitutional bill of attainder. However if the function of the statute does not advance the intended purpose and the statute operates only as a punishment of specific persons or a class, the act is a bill of attainder.

Id. (internal citations omitted).

The Division has not established the existence of a nonpunitive purpose for Section 443.713(a)(2) that outweighs the burden placed on Mr. Garozzo by the

statute. As indicated in the Division's Brief, no formal legislative history pertaining to the enactment of the Missouri SAFE Act – much less the specific provision included in Section 443.713(a)(2) – exists. (Division Br., at 26 n.2.)

In the absence of such history, the Division claims that the general goals of the *federal* SAFE Act are "to enhance consumer protection, reduce fraud, provide for a comprehensive licensing and supervisory database, and provide for increased accountability and tracking of loan originators." (Division Br., at 25.) These alleged goals are not functionally advanced by Section 443.713(a)(2).

First, contrary to the Division's claim, no "consumer protection" purpose is advanced by Section 443.713(a)(2). In *Bunker*, the State similarly claimed that the permit restrictions had the legitimate, nonpunitive purpose of protecting "the health and lives of Missouri citizens" and the environment from harm. This Court rejected this claim, finding that "[i]f the legislative purpose was to deny permits to those of 'bad character' or those who were 'blatant violators,'" the class described in the statute totally missed the mark. *Bunker*, 782 S.W.2d at 388.

Likewise, the Division's argument that Section 443.713(a)(2) "protects consumers from those guilty of felonious conduct" misses the mark in this case. (Division Br., at 26.) Mr. Garozzo is not guilty of felonious conduct: he has not been convicted of a felony. He is no more "guilty" by reason of his plea than a person whose conviction is reversed or guilty plea withdrawn. *See* Mo. S. Ct. R.

29.07(d) (allowing withdrawal of a guilty plea). When the Division contends that the statute protects consumers from persons who are **not** like Mr. Garozzo (guilty of a felony), the Division implicitly acknowledges that there is no nonpunitive "consumer protection" purpose applicable to Mr. Garozzo.

Further, the Residential Mortgage Board made the factual findings that Mr. Garozzo's guilty plea is "wholly unrelated to his professional services as a mortgage loan originator," and that Mr. Garozzo has been praised by his employer, colleagues, and clients for his work as a mortgage loan originator. (Mo. Mortgage Bd. Findings, L.F. 16 ¶¶ 11-14, A26.) This Court must accept these factual findings. *See Klein v. Mo. Dep't of Health and Senior Services*, 226 S.W.3d 162, 164 (Mo. 2007) (in reviewing an agency decision, an appellate court "will defer to the agency's factual findings"). The Division decided not to challenge these findings, which was appropriate given the fact that it could not have shown that the findings were unsupported by competent and substantial evidence. *Id.* (indicating proper standard to be applied by Missouri Supreme Court in reviewing agency action previously appealed to circuit court is whether the agency's decision was "supported by competent and substantial evidence upon the whole record and otherwise authorized by law"). While the Division claims that Mr. Garozzo complains of "not perfect congruity" between the affected group and the purported consumer protection purpose of Section 443.713(2)(a), the Residential Mortgage

Board's unchallenged findings show that there is no congruity whatsoever, between this alleged goal and the burdensome impact of Section 443.713(a)(2). (Division Br., at 27.)

Second, the purported goal of "reducing fraud" (Division Br., at 25) is not rationally related to or functionally advanced by the prohibitions in Section 443.713(2)(a) that prevent Mr. Garozzo – who is not alleged to have committed a crime of fraud or dishonesty - from obtaining a mortgage loan originator's license. In fact, this goal is specifically targeted by a separate prohibition within the same statute, which imposes a lifetime ban against issuing licenses to individuals who have pled guilty or *nolo contendere* to a felony "if such felony involved an act of fraud, dishonesty, or a breach of trust, or money laundering." *See* Mo. Rev. Stat. § 443.713(2)(b). An individual who has shown a proclivity to defraud the public does not fall under and is not targeted by Section 443.713(a)(2).

Third, contrary to the Division's suggestion, Section 443.713(a)(2) and its federal counterpart do not address the establishment of or participation in a licensing or supervisory database, or ongoing accountability and tracking for licensed individuals. (Division Br., at 25, 26.) These goals are also addressed in separate sections of the federal and Missouri SAFE Acts. *See, e.g.*, 12 U.S.C. §§ 5106, 5108 (addressing establishment of National Mortgage Licensing System and Registry ("NMSLR") or alternative database, if necessary); Mo. Rev. Stat. §

443.711 (addressing collection and maintenance of records as part of NMSLR database). As such, these cannot serve as the nonpunitive legislative purposes justifying Section 443.713(a)(2).

Fourth, the Division argues that the enactment of the Missouri SAFE Act was motivated by the State's desire prevent the federal government from stepping in and regulating the licensing and supervision of mortgage loan originators. (Division Br., at 26.) Again, there is no formal legislative history supporting this argument.[2] Nor does such a purpose outweigh what functions as a severe punishment for a plea that is "wholly unrelated to his professional services as a mortgage loan originator." (Mo. Mortgage Bd. Finding, L.F. 16 ¶ 11, A26.)

Finally, the Division implies that Section 443.713(a)(2) should be viewed as *per se* nonpunitive simply because it is a licensing statute. (Division Br., at 25.) This flies in the face of the *Bunker* Court's pronouncement that the true function of

[2] The "Summary" of the Committee version of HB 382 cited by the Division is not persuasive authority in deciphering the purpose behind Section 443.713(a)(2). Mr. Garozzo has located no Missouri case that cited to a "Summary" of a bill as evidence of the legislative intent This is not surprising given the fact that the Summary was likely prepared by a staff member and should no more be cited than the summaries prepared for this Court's opinions. Morevover, Section 443.713(a)(2) is not referenced in the Summary.

a statute must be examined in view of its purported purpose. The Division cites two distinguishable cases – *Duncan v. Mo. Bd. for Architects, Professional Engineers and Land Surveyors*, 744 S.W. 2d 524 (Mo. Ct. App. 1988) and *State ex rel. Lentine v. State Bd. of Health*, 65 S.W.2d 943 (Mo. 1933) – neither of which involves a bill of attainder challenge to a licensing statute. Instead, these cases involve vagueness challenges in proceedings pertaining to the revocation of engineering certificates and medical licenses, respectively.

In sum, Section 443.713(a)(2) functionally punishes Mr. Garozzo and others like him for past pleas rather than protecting the public. The Division has proposed no reasonably advanced nonpunitive legislative purpose for Section 443.713(a)(2) that comes close to outweighing the heavy burden that is imposed on Mr. Garozzo and other similarly situated individuals by Section 443.713(a)(2). Simply put, where Section 443.713(a)(2) is applied, those affected lose their livelihood for up to seven years. This occurs despite the fact that no real consumer protection or fraud reduction goals are met, no administrative databases are set up, and no other legitimate goals are accomplished by doing so. It also occurs in an industry whose lifeblood is ongoing customer referrals, which are cut-off by the licensing ban. This pain is inflicted based on a plea that is "wholly unrelated to his professional services as a mortgage loan originator." (Mo. Mortgage Bd.

Finding, L.F. 16 ¶ 11, A26.) This sort of enhanced punishment is precisely that barred by the federal and Missouri Constitutions.

II. Section 443.713(2)(a) is an Unconstitutional Retrospective Law (Reply in Further Support of Respondent's Point II and in Opposition to Appellant's Point II).

Section 443.713(2)(a) is an unconstitutional retrospective law because it creates a new obligation, imposes a new duty, and/or imposes a new disability on Mr. Garozzo with respect to his December 2006 plea.

The Division spends nearly two pages arguing that Mr. Garozzo has no "vested right" in continuing to work as a mortgage loan originator. (Division Br., at 18-19.) However, this argument attacks a straw man: there is no dispute that the existence of a vested right is *not* a prerequisite to establishing the existence of a retrospective law. *See State v. Young*, 362 S.W. 3d 386, 391 (Mo. 2012), ("A vested right is not needed to invoke the constitutional principles contained in *article I, section 13. F.R. v. St. Charles County Sheriff's Dept.,* 301 S.W.3d 56, 63 (Mo. banc 2010). The vested rights reference is a disjunctive option…").

When it comes to the issue that Mr. Garozzo covered in his Initial Brief, the Division makes arguments contrary to Missouri case law that are inconsistent with the record here. It is undisputed that Mr. Garozzo's suspended-imposition-of-sentence in 2006 had no impact on Mr. Garozzo's ability to continue serving as a

mortgage loan originator until the 2009 Missouri statute at issue became effective in 2010. The statute clearly imposed a new obligation and duty (requiring Mr. Garozzo to affirmatively obtain a mortgage loan originator's license, or to give up his career) and a new disability (imposing fines and penalties on Mr. Garozzo if he does not obtain a license or give up his career).

In arguing the contrary, the Division cites three cases: *Mo. Real Estate Comm'n v. Rayford,* 307 S.W.3d 686 (Mo. Ct. App. W.D. 2010), *F.R. v. St. Charles County Sheriff's Dep't,* 301 S.W.3d 56 (Mo. 2010), and *Young*. First, the Division erroneously argues that dicta in *Rayford* states that a law is not retrospective when it bars an applicant from obtaining a license under a newly imposed state licensing scheme. (Division Br., at 20, citing *Rayford* at 307 S.W.3d at 695.) In addition to being mere dicta (because a licensing scheme was in place at the time of the criminal charge), the dicta was more limited than the Division claims.

In fact, the portion of *Rayford* cited by the Division actually cites to a decision finding a sexual predator registration statute an unconstitutional retrospective law because it included the duty to affirmatively register. *Rayford,* 307 S.W.3d at 695 (citing *Doe v. Phillips*, 194 S.W.3d 833, 852 (Mo. banc 2006)).

In the wake of the Missouri SAFE Act, Mr. Garozzo, now has an affirmative duty or obligation to either obtain a license to continue his long-standing career

and maintain the *status quo* (which the Division has prevented) **or** take affirmative steps to give up his career as a mortgage loan originator. Alternatively, if he continues to practice as a mortgage loan originator without a license, he faces civil fines and penalties under the Missouri SAFE Act (i.e. a new disability). These are real retrospective effects prohibited by the Missouri Constitution. Moreover, this Court recently noted that constitutional questions regarding a new applicant for a license are different when the entire licensing scheme is first enacted. *Gurley v. Mo. Bd. of Private Investigator Examiners*, 361 S.W. 3d 406, 413 (Mo. banc 2012) (holding that it was not necessary to decide the "different issue" when the State initially enacts a licensing requirement).

The Division next cites *Young*, which is also distinguishable. *Young* involved an individual seeking political office for the first time, not an individual seeking a license to continue a career he started years ago. Young pled guilty to felonies in 1987 and 1995, receiving probation for the first and a conviction for the second. In 2007, a statute barring felons from holding public office in Missouri was enacted. In 2010, Young was elected Cass County's presiding commissioner. Following his election, his right to hold office was challenged under the 2007 statute based on his 1995 conviction.

Young claimed that he suffered a "new disability" because the statute in question imposed upon him "an affirmative obligation…to refrain from running for

and holding an elective office." *Id.* at *6. The Court disagreed, finding that the 2007 statute was not a retrospective law because Young had no affirmative obligation to take any action to comply with the statute by virtue of his conviction.

This is not the case here. As discussed above, Mr. Garozzo cannot simultaneously comply with the provisions of the Missouri SAFE Act *and* take no affirmative action by virtue of his guilty plea. Instead, in light of the provisions of the Act and the Division's refusal to issue him a license thereunder, he must cease and desist practicing his profession or face penalties and fines because of his plea. This is an unconstitutional, retrospective outcome.

The Division finally attempts to analogize Mr. Garozzo's situation to a hypothetical appearing in dicta in the *F.R.* case in an effort to support the notion that the Missouri SAFE Act imposes a duty on the Division alone. That hypothetical suggests that a law that bars a school board from hiring a convicted felon would not violate the constitution because it only imposes a duty on the school board to act, and not the convict. *F.R.*, 301 S.W.3d at 62. By contrast, the *F.R.* Court postulated that forcing a felon to affirmatively pay a fine to a school district would be retrospective. *Id.*

The current situation is not akin to a government entity being told not to hire an individual and the individual not having any duties or responsibilities associated with the entity's actions. While the Missouri SAFE Act sets forth certain

requirements for licensure that the Division claims it must follow, the Act also imposes affirmative duties, obligations, and responsibilities on applicants like Mr. Garozzo who fall within the seven-year prohibition to obtain a license (which the Act prevents), stop working in their chosen profession, or face fines and penalties. In other words, simply maintaining the *status quo* is not an option for Mr. Garozzo.

In sum, it is clear that the legal effect of Mr. Garozzo's guilty plea has changed as the result of the passage of the Missouri SAFE Act. That effect is to present Mr. Garozzo with a Catch-22: affirmatively take steps to stop earning a living, or face penalties and fines from the State. Thus, as applied to Mr. Garozzo, Section 443.713(a)(2) indeed creates a new obligation, imposes a new duty, and/or imposes a new disability on Mr. Garozzo in violation of the Missouri Constitution.

III. Section 443.713(2)(a) Violates Mr. Garozzo's Due Process Rights (Reply in Further Support of Respondent's Point III and in Opposition to Appellant's Point I).

A. Section 443.713(2)(a) Violates Mr. Garozzo's Substantive Due Process Rights.

The Division errantly claims that Mr. Garozzo has misstated the substantive due process standard for this case. (Division Br., at 16 n.5.) The standard set forth in Mr. Garozzo's Initial Brief is the proper standard for evaluating a substantive due process claim in this context: whether the challenged governmental action is "rationally related to a legitimate state interest." *Doe*, 194 S.W. 3d at 844-845 (citing *In re Marriage of Woodson*, 92 S.W. 3d 780, 784 (Mo. banc 2003)).[3] A leading constitutional treatise makes the same point: "all laws challenged under the due process clause…must meet at least rational basis review" and that substantive due process is met under rational basis review "so long as the law is rationally

[3] The Division asserts that the quoted portion of *Woodson* sets forth the standard for equal protection review. (Division Br., at 16 n.5.) But *Doe* is a substantive due process case, and it cites the same portion of *Woodson* that is cited in Mr. Garozzo's Initial Brief. *Doe* and *Woodson* together establish that the "rational relationship" test applies to both due process and equal protection challenges.

related to a legitimate government purpose." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 540, 558 (4th ed. 2011).

The Division does not argue that Section 443.713(2)(a) meets the "rational relationship" test. Nor could it do so here given the unchallenged factual finding that

Mr. Garozzo's guilty plea is "wholly unrelated to his professional services as a mortgage loan originator." (Mo. Mortgage Bd. Finding, L.F. 16 ¶ 11, A26.)

Instead, the Division argues that Mr. Garozzo has not met the following test: "[T]he 'plaintiff must demonstrate *both* that the **official's conduct** was conscience-shocking, *and* that the **official** violated one or more fundamental rights that are deeply rooted in the Nation's history and tradition ….'" *Bromwell v. Nixon*, 361 S.W.3d 393, 400 (Mo. 2012)(bold-face added) (citing *Slusarchuk v. Hoff*, 346 F.3d 1178, 1181-82 (8th Cir. 2003)). However, this type of standard applies when there is an attack on an official's conduct, rather than a statute. *See, e.g., Baines v. Masiello,* 288 F. Supp. 2d 376, 388 (W.D.N.Y. 2003)(indicating that a substantive due process claim "based on allegedly abusive conduct by government officials…ordinarily requires evidence of conduct that can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense" but that a claim based on legislative action requires evidence that the action "is rationally-related to a legitimate state interest.") In *Bromwell*, the plaintiffs

alleged that "the action of State officials" in requiring certain filing fees for writs of habeas corpus violated fundamental liberty interests. *Bromwell*, 361 S.W.3d at 400. Likewise, the federal case on which *Bromwell* relied was brought against police officers who were engaged in a high-speed chase that resulted in injury and death. *Slusarchuk*, 346 F.3d at 1181-82.

The Division erroneously relies on the "conduct" substantive due process standard rather than the "rational relationship" substantive due process standard applicable in this context. The Missouri statute clearly and undeniably violates the standard to be used when a statute is challenged as violating substantive due process.[4]

B. Section 443.713(2)(a) Violates Mr. Garozzo's Procedural Due Process Rights.

The Division argues that without a license Mr. Garozzo has no constitutionally-protected property interest subject to procedural due process protections. (Division Br., at 13-14.) But the Missouri Supreme Court has held the opposite, stating that in **addition to** a property right in a license, "[t]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference" implicates interests protected by the due

[4] Also, *Bromwell* holds that the guarantees of the federal Fourteenth Amendment and Missouri due process clause are congruent. *Bromwell*, 361 S.W.3d at 400.

process clause. *Stone v. Mo. Dep't of Health & Senior Servs.*, 350 S.W. 3d 14, 27 (Mo. 2011) (*citing Jamison v. Dep't of Soc. Serv.*, 218 S.W.3d 399, 407 (Mo. banc 2007))(internal quotations omitted). It is unreasonable for the government to deprive Mr. Garozzo of the ability to follow a chosen, private-sector profession based on a guilty plea that is "wholly unrelated to his professional services as a mortgage loan originator." (Mo. Mortgage Bd. Finding, L.F. 16 ¶ 11, A26.)

Nor is Mr. Garozzo arguing that there is a right for the law not to change. (*See* Division Br., 14-15.) Rather, the change should not strip Mr. Garozzo of the ability to continue to work in his chosen profession with a stellar record based on conduct that is unrelated to his services as a mortgage loan originator.

The result is particularly harsh because this change in the law was unforeseeable. Why would Mr. Garozzo, his defense counsel, or the court that accepted his plea advise him that the plea could jeopardize his ability to engage in his occupation even though the subject of the plea was unrelated to that profession? This is in sharp contrast to the situation in *State v. Acton*, 665 S.W.2d 618 (Mo. 1984), cited by the Division, where the defendant complained that a new statutory scheme enacted between his second and third guilty plea imposed additional, collateral consequences that he was not aware of at the time his third plea was entered. *Id.* at 619. In rejecting this claim, the Court found that the defendant was on notice based on the statutory scheme as it existed at the time of his earlier guilty

pleas that he could be subject to the future collateral consequence of a sentence enhancement (i.e. felony conviction). *Id.* at 620 ("[A]ppellant's claim that he was not on notice s to the consequences of his guilty plea is groundless. The same consequences would have attached to his earliest plea upon subsequent convictions as did attach under the new statute.").

The other "collateral consequences" cases cited by the Division - *Young* and *State v. Larson*, 79 S.W. 3d 891 (Mo. 2002) – are also irrelevant. In *Larson*, the Court considered whether the defendant should have been permitted to withdraw a guilty plea. In weighing whether a writ should be issued to avoid irreparable harm to the defendant, the Court noted that the defendant would be subject to "a number of punitive, collateral consequences" if his plea were allowed to stand. *Id.* at 894. In a related footnote, the Court listed a host of currently effective statutes that imposed collateral consequences on the defendant. *Id.* at 894 n.9. Notably, the Court did not consider whether the refusal to permit the defendant to withdraw his guilty plea violated his due process rights. Further, the Court did not consider whether the disabilities imposed by a statute enacted *after* the entry of a guilty plea was a reasonably foreseeable collateral consequence of entering such a plea. Likewise, in *Young*, the Court found no "vested right" in the law remaining unchanged as part of a *retrospective law* analysis – not a due process analysis. Due process requires notice and opportunity for a hearing before a property right

may be taken away – not the existence of a "vested right". *Weber v. The Fireman's Retirement Sys.*, 872 S.W.2d 477, 479 (Mo. 1994).

Moreover, additional scrutiny of a restriction is appropriate when a new licensing scheme is put into place to regulate what was previously a legal though unlicensed profession: it is a "different issue" where "the state initially enacts a licensing requirement for a given profession" and, among other things, the applicant "already has been practicing in the profession." *Gurley v. Mo. Bd. of Private Investigator Examiners*, 361 S.W. 3d 406, 414 (Mo. 2012)(refusing to rule on procedural due process challenge pertaining to the denial of new state license as moot where state's denial of license to applicant who had previously worked as private investigator was overturned by Administrative Hearing Commission).

Finally, the Division relies on a New York decision involving its "SAFE" Act. *Rampolla v. Banking Dept. of State of New York*, 916 N.Y.S.2d 492 (N.Y.Sup. 2010). There, the court considered an attack by a convicted felon on part of New York's SAFE Act barring licensure of persons whose criminal record included a felony involving fraud or dishonesty. Mr. Rampolla had been convicted of making a false statement on a loan application. *Id.* at 164. It is not surprising that a person **convicted** of **fraud** could not be licensed in a lending situation. This is in sharp contrast to Mr. Garozzo who was **not convicted** of any crime and

merely pled guilty (without conviction) in a matter wholly unrelated to his service as a mortgage loan originator.

In sum, Mr. Garozzo asks this Court to find that changing the rules after a plea to impose a new sanction is an injustice barred by the due process clauses of the state and federal constitutions (in addition to the bill of attainder and retrospective law prohibitions discussed above). This is not a case of a private employer or person making a choice as to how to deal with a guilty plea. This is a case of the same governmental entity that accepted the plea (the State of Missouri) adding a new sanction more than three years after the plea. This Court has stated that the "obvious legislative purpose of the sentencing alternative of suspended imposition of sentence is to allow a defendant to avoid the stigma of a lifetime conviction and the punitive collateral consequences that follow." *Yale v. City of Independence*, 846 S.W.2d 193, 195 (Mo. banc 1993). The subsequent subversion of that purpose by legislature after his plea violates Mr. Garozzo's procedural due process rights.[5]

[5] Mr. Garozzo has not brought an action to withdraw his guilty plea. Missouri allows guilty pleas to be withdrawn to prevent manifest injustice, and also allows guilty pleas to be withdrawn "before sentence is imposed or when imposition of sentence is suspended." Mo. S. Ct. R. 29.07(d). This Rule would provide an additional option to Mr. Garozzo to obtain relief: seeking to withdraw his guilty

CONCLUSION

Section 443.713(a)(2) of the Missouri Revised Statutes violates the United States Constitution and/or the Missouri Constitution's prohibitions against bills of attainder, retrospective laws, and due process guarantees. As a result, the Court should affirm the trial court's ruling that Section 443.713(a)(2), as applied to Mr. Garozzo, is unconstitutional.

The "Conclusion" in the Division's Brief asks the Court to affirm the decisions of the Division and the Residential Mortgage Board, without referring to the circuit court judgment from which the Division's appeal was taken. (Division Br., at 28.) But when there is an appeal from a circuit court's review of an agency decision, this Court affirms or reverses the circuit judgment, not the agency decision. That is the case even when this Court "reviews" the agency decision.

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plea. However, a Missouri case has interpreted the phrase "when imposition of sentence is suspended" to mean at the moment of the decree that imposition of the sentence is suspended, meaning that a non-suspended plea can be withdrawn but an SIS plea cannot be withdrawn. *See State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158 (Mo. banc 2007). If the phrase "when imposition of sentence is suspended" were read to mean "in cases in which imposition of sentence is suspended," Mr. Garozzo could explore this avenue with the St. Louis City Circuit Court and/or the Prosecuting Attorney.

For instance, this Court has stated that it would "review the commission's decision—not the judgment of the circuit court," but the disposition of the case was that "[t]he circuit court's judgment affirming the commission's decision is reversed." *Psychcare Management, Inc. v. Dep't of Social Services*, 980 S.W.2d 311, 312, 314 (Mo. banc 1998). Of course, this rule also applies when this Court reviews the circuit court's review of an agency decision, which is the case when the only basis for reversing an agency's decision is the constitutionality of a regulation. For instance, in *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957, 959 (Mo. banc 1999), this Court reviewed the circuit court's judgment on constitutionality of a regulation and the disposition was directed to the trial court's judgment (reversing and remanding for proceedings not inconsistent with this opinion).

Accordingly, this Court should address, and affirm, the judgment of the trial court here.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Missouri Supreme Court Rule 84.06 (b) and (c), the undersigned certifies that the foregoing Respondent's Reply Brief complies with the type-volume limitations, using fourteen point double-spaced typeface in Times New Roman font, and based on the number of words of text in the Brief as determined by the word count of Microsoft Word, which is the word-processing system used to prepare the Brief. Based on the word count, the number of words in this Brief is 5,676, excluding the cover page, certificate of service, certificate of compliance, and signature block, which is less than the 7,750 word limit permitted by Rule 84.06 (b) for a reply brief required to be filed by Respondent pursuant to Rule 84.05 (e) and the Court's Order dated February 29, 2012.

/s/ Erwin O. Switzer

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Respondent's Reply Brief was served via the Court's electronic filing system on counsel for Appellant, this 26th day of June, 2012.

/s/ Erwin O. Switzer