IN THE SUPREME COURT OF MISSOURI

Case Nos. SC85846 & SC85845

SHAWN C. BROWN,

Appellant,

v.

RHONDA F. SHAW, et al.,

Respondents.

Appeal from the Circuit Court of St. Charles County
Case No. 04CV124604
Honorable Lucy D. Rauch

REPLY BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

(Replies to Attorney General's Brief, pp. 8-10; Shaw's Brief, p. 10 and Point IV, pp. 50-55)

Respondents Shaw and Nixon assert that this Court has no jurisdiction in this matter. Respondents are wrong. This Court's jurisdiction is determined by the Missouri Constitution and not by statute. However, a correct understanding of Section 115.125.2, RSMo demonstrates that Respondents' reliance upon that provision is misplaced.

This Court has jurisdiction in this case. Regarding SC85846, the Court's jurisdiction is vested by Article V, Section 3, Missouri Constitution; regarding SC85845, jurisdiction is vested by Article V, Section 4, Missouri Constitution. These constitutional provisions admit of no legislative authority to grant, deny or restrict the powers of the Court, and the Separation of Powers Doctrine enshrined in Article II, Section 1, prohibits any such exercise of legislative authority. See *State ex rel. Wabash Ry. Co. v. Shain*, 106 S.W.2d 898, 900 (Mo. 1937).

Further, the alleged bar to jurisdiction in Section 115.125.2 violates constitutional rights of Brown. While the Respondents may question the "fundamental" nature of the right to access the ballot, and may seek to denigrate the value of this right, access to ballot is a right granted to citizens by Article I, Section 25, Missouri Constitution. Respondents are governmental administrative officers whose decisions affect this right. Brown seeks review of the decisions of these governmental administrative officers by mandamus as provided in Chapter 536, RSMo. Brown's right to review is guaranteed by Article V, Section 18, Missouri

Constitution. Any statute, such as Section 115.125.2, RSMo, which purports to cut off this constitutionally guaranteed right of judicial review is plainly unconstitutional. *Chastain v. Chastain*, 932 S.W.2d 396, 400 (Mo. banc 1996).

However, Respondents have misapplied Section 115.125 in this case. Respondents argue for an unconstitutional interpretation and application of Section 115.125.2 by taking out of context an amendment to Section 115.125, which added the following clarification:

> No court shall have authority to order an individual or issue be placed on the ballot less than six weeks before the date of the election, except as provided in sections 115.361 [death of incumbent or only candidate] and 115.379 [death of only candidate to fill a vacancy].

A.L. 2003, H.B. 511, amending Section 115.125.2, RSMo.

When read in isolation, the foregoing amendment does appear to divest the authority of the constitutional courts. However, read in context, the provision has a much narrower focus. Section 115.125, RSMo, is within a subsection titled "Elections, When Held - Notice, How Given." The entire subsection addresses requirements placed upon election authorities. No provision purports to place requirements or restrictions on Brown. Section 115.125.1 establishes requirements for notifications and time limits for the conduct of political subdivision elections. Section 115.125.2, RSMo, provides further instructions:

> Except as provided for in sections 115.247 [correction of printing errors] and 115.359 [withdrawal of candidacy], if there is

> no additional cost for the printing or reprinting of ballots or if the political subdivision or special district calling for the election agrees to pay any printing or reprinting costs, a political subdivision or special district may, at any time after certification required in subsection 1 of this section, but no later than 5:00 p.m. on the sixth Tuesday before the election, `be permitted to make late notification to the election authority pursuant to court order, which, except for good cause shown by the election authority in opposition thereto, shall be freely given upon application by the political subdivision or special district to the circuit court of the area of such subdivision or district. No court shall have the authority to order an individual or issue be placed on the ballot less than six weeks before the date of the election, except as provided in sections 115.361 and 115.379.

Section 115.125.2, RSMo, as amended 2003. (Emphasis supplied).

Subsection 2 focuses on political subdivisions requesting a reprinting of the ballot after the time of certification. Political subdivisions must, prior to 5:00 p.m. on the sixth Tuesday before the election, request such changes of a Circuit Court. Prior to 2003, Section 115.125 was unclear when a change was requested before the deadline but not granted until after. The 2003 amendment clarified this issue. Regardless of when a political subdivision applies to a court for changes it wants to the ballot, changes under Section 115.125 should not be ordered

by a court after the deadline.

This amended statute does not apply to the case at hand. The city has not requested a change to the ballot. The statute applies only to political subdivisions. The statute should not be construed to now affect a candidate's access both the ballot and the courts.

Shaw's reliance (Brief, page 10) on *State ex rel. Referendum Petition Committee Regarding Ordinance No. 4639 v. Laskey*, 932 S.W.2d 392 (Mo. banc 1996) provides no support. That case predates the amendment at issue here and simply confirms that Section 115.125 deals solely with actions of political subdivisions.

Shaw also argues that this Court has no jurisdiction in Brown's mandamus action, SC85845, because of a failure to join Judge Rauch, the trial judge below. Shaw cites no authority for this proposition. Relator's action before this Court is an original Petition in Mandamus. It requests no relief against Judge Rauch. Shaw's argument lacks merit.

Shaw further asserts (Brief, p. 10; Point V) that both Judge Rauch and St. Peters are indispensable or necessary parties. This is unsupportable. Judge Rauch is obviously not a necessary party in this appeal; and St. Peters, to the extent it is "necessary," has been joined in the proceeding by the action against City Clerk Shaw. See *Buford v. Runyon*, 160 F.3d 1199, 1201, n.3 (8th Cir. 1998); *Cf. Lia v. Broadway/Olive Redevelopment Corporation*, 647 S.W.2d 189, 191 (Mo. App. E.D. 1983) (city not a necessary party to an action challenging an ordinance which delegates its enforcement to another entity).

STATEMENT OF FACTS

It is necessary to correct Shaw's Statement of Facts. At Brief, page 11, Shaw asserts "Brown had previously run for City Alderman in 2003" and "signed a similar form [Declaration of Candidacy] at that time." This mischaracterizes the testimony. Brown could not state what was on the form he signed. He was not given a copy of that form. No such "similar form" was produced in evidence. While it may be that "Brown has no reason to believe the form he signed for the 2003 aldermanic race was different in content from the 2004 mayoral declaration of candidacy," this opinion is irrelevant.

On Brief, page 12, Shaw asserts January 21, 2004 as the date she was informed by County Collector Walker that Brown's 2003 city taxes were shown unpaid. This date was disputed at trial. Respondent Shaw did not testify and Walker asserted she did not recall the specific date. (Tr. 104, 105.) Shaw's citation to L.F. 151 through 155 refers to an Affidavit of Shaw which was excluded from evidence. (Tr. 118-121.) Reliance upon such "non-evidence" permeates Shaw's Brief at pages 12-13. Such assertions should be stricken.

On Shaw's Brief, page 16. Shaw lists a "chronology of significant dates." While the dates indicated appear correct Shaw's characterizations accompanying those dates are unsupported and violate Rule 84.04(c) and (f). For example, Shaw states in October 2002 "tax bills for city real estate taxes were mailed to Shawn Brown's residential address by the Office of the St. Charles County Collector." This assertion is unsupported by any evidence. As correctly noted by Respondent Chrismer, Brief, page 10, "the Collector testified that 150,000 to 160,000 tax bills are sent out. [Tr. 114] The office relies on the Post Office to return those

that are not delivered. [Tr. 114] The Collector's Office cannot verify who actually receives a tax bill except if someone sends in a payment for the tax bill. [Tr. 114]" Such consistent misstatement of the facts by Shaw permeates the "chronology" and Shaw continues to rely upon her Affidavit, which was excluded from evidence. Brown suggests that the Court strike the inappropriate argument under Shaw's "chronology of significant dates."

ARGUMENT

I.

SECTION 115.346, RSMo, DID NOT APPLY UNDER THE CIRCUMSTANCES TO WORK A FORFEITURE OF BROWN'S CANDIDACY BECAUSE BROWN'S LATE PAYMENT OF CITY REAL PROPERTY TAXES WAS WITHOUT FAULT ON HIS PART. APPLICATION OF SECTION 115.346 WITHOUT REGARD FOR BROWN'S LACK OF FAULT VIOLATES ARTICLE I, SECTION 25, MO. CONST.

(Replies to Attorney General's Brief, Points I and II, pp. 12-19; Shaw's Brief, Points I and II, pp. 24-36)

Both Shaw (Point IA, pp. 24-29) and Nixon (Point II, pp. 14-19) argue, in spite of precedent to the contrary, a strict policy of candidate disqualification without fault for non-payment of taxes is required. Both Respondents seek to distinguish this case from *State ex rel. Haller v. Arnold*, 210 S.W. 374 (Mo. banc 1919), and *State ex rel. Neu v. Waechter*, 58 S.W.2d 971 (Mo. banc 1933), which specifically reject Respondents' interpretation and refuse to reach Respondents' harsh result. Respondents' own arguments demonstrate the correctness of Appellant's position and show that *Haller* and *Neu* are controlling.

Respondents attempt to distinguish these cases from the present case by reinterpreting the holdings. Respondents assert that these cases narrowly hold that only persons denied access to the ballot because they were unable to pay candidate filing fees due to the

unavailability or misconduct of the authorities are allowed ballot access. This interpretation is wrong.

In *State ex rel. Haller v. Arnold*, *supra*, the Court eloquently cast the issue as the constitutionality, under the then version of Article I, Section 25, of a statute requiring that any person filing for election "shall pay the sum of money required to the City Treasurer, take a receipt therefore and file said receipt with his certificate of nomination." *Haller* at 375. Like the statute here at issue, the required payment in *Haller* was mandatory. While the issue in the case dealt with payment of fees, the Court's decision swept broadly as a basis for constitutional analysis of barriers to access to ballot.

> The affirmative of the question stated [i.e., the payment and receipt is an absolute requirement] and presented by the facts here at issue would in our opinion and in the light of the language of the above section be too narrow a view to take of the meaning of that section. Such a view would inevitably restrict and circumscribe the right of a citizen to be a candidate for office within such limits and hedge the privilege about [sic] with such conditions as materially to impinge upon the guarantee of the constitution that 'all elections shall be free and open'. Section 9, Article II, Constitution 1875... Clearly, the language used imports and requires the filing of this receipt...and [we] concede that it requires, ...the filing of the receipt contemporaneously with the

> filing of the certificate of nomination; but, as forecast, the application of such latter iron-bound rule in all cases would so far work a hardship and a denial of free and open elections as to impinge upon constitutional rights.

Haller at 376.

When measured by these worthy judicial pronouncements, the present case becomes identical to *Haller*. In *Haller* as here, Petitioner "endeavored to pay" the required payment -- in *Haller* by attempting to locate the Treasurer whom he could not find, and in the present case by payment of all real property taxes to a mortgage company which had a legal obligation to remit those taxes to the appropriate collecting official. In *Haller*, it was found that the candidate intended to pay and made no attempt to evade the obligation; the same is true of Brown, who dutifully paid his taxes into escrow based upon the assurance that the mortgage company would timely remit. In *Haller*, it was found that the candidate did not make the appropriate official unavailable or unlocateable; just as Brown did not control or reasonably anticipate the non-payment of his taxes by his mortgage company. In *Haller*, the candidate promptly pursued his efforts to make payment and to register; Brown similarly immediately paid (or, more accurately, paid again) his taxes. As in *Haller*, no governmental interest in administration or efficiency of the electoral system was impaired by the delay. Contrary to Respondents' contention the Court's opinion and holding appears to anticipate the very case now before this Court: For in no "<u>case like this, where the proposed candidate is in no wise at fault</u>...ought he be deprived of the privilege of running for public office by the mere

adventitious facts..." *Haller* at 376. (Emphasis supplied).

Respondents also seek to change the inquiry from whether a candidate is without fault under Article I, Section 25, to a rebuttal of a strawman argument that "the election authority has no burden to prove the candidate was at fault for missing payment deadlines." (Shaw's Brief, p. 24.) It was Appellant's burden to show he was not at fault for the non-payment of taxes. Appellant carried that burden. Respondents attempted to rebut that case by imputing fault to Brown. Such effort was unsuccessful. However, no burden was ever placed upon Respondents to show fault. The Court should not be distracted by this false issue.

The *Haller* decision was followed in *State ex rel. Neu v. Waechter*, 58 S.W.2d 971 (Mo. banc 1933). The Court in *Neu* quoted extensively from *Haller*, even expressing surprise that such clear authority had not been followed by the Election Commission in the case. *Neu* at 973. Relator had failed to file with his declaration a statutorily required receipt from the Treasurer of the Republican City Central Committee. *Id.* In spite of the clear statutory requirement, the Court applied the "fault" concept of *Haller* in concluding that filing of a receipt is not necessary, "at least where the candidate is not at fault, and that any other construction of the statute would be violative of the constitutional guarantee that 'all elections shall be free and open,'" under then Article I, Section 25. *Id.* The Court in *Neu* engaged in a comparison of the facts between the *Neu* and *Haller* cases, both of which are indistinguishable from the facts of the present case. See *State ex rel. Neu v. Waechter*, *supra* at 973-974. Respondents' attempt to distinguish these cases, on the basis of small factual variations, should be rejected.

Respondent Shaw argues that the Court in *Haller* "relied" on *Nance v. Kearby*, 158 S.W.2d 629 (Mo. 1913). See *Haller, supra* at 376. This is an overstatement, but the suggestion at page 25 of Shaw's Brief that the resulting focus of *Haller* is only on the actions of the election officials is simply false. The *Haller* Court, in rejecting an interpretation and result such as advocated by Respondents, stated only that

> the fair, just and equitable construction by this court of the election laws and machinery of this state in the analogous cases of *Nance v. Kearby* and *State ex rel. v. Seibel*, ruled by this Court in opinions by Lamm, C.J. requires such a construction [i.e., fair, just and equitable] of this statute at our hands.

Haller at 376 (internal citations omitted). The holding of *Haller* focuses on the fault of the candidate and not on the conduct of the election official.

Respondents' reliance on *State ex rel. Townsend v. Bell*, 195 S.W.2d 737 (Mo. banc 1946) is misplaced. Contrary to Shaw's assertion, the *Townsend* facts are not similar to those of *Haller* and *Neu*, or to the facts of this case. Moreover, like *Haller* and *Neu*, *Townsend* focused <u>not</u> on the conduct of election officials but on the facts concerning the candidate. The Court set forth extensively the facts showing that the candidate in that case made no effort to file his candidacy until 9:00 p.m. of the last day for filing, April 30, 1946. *Townsend* at 737. As might be expected, the appropriate official was not available at his office at 9:00 p.m. Importantly, the candidate knew that the Deputy County Clerk was available a short distance away, but he made no effort to file with her before midnight April 30. The Court noted that

although the official's office was open the next day, May 1, 1946, and although the candidate was in and out of that office at various times during that day, he made no further effort to file his declaration or to pay his filing fee. On May 2, 1946, the candidate attempted to have the Deputy County Clerk accept his declaration, but it was not until May 17, 1946, that the candidate finally paid his filing fee and received a receipt. *Id.* The Court specifically excluded any consideration of the candidate's complaint that the Treasurer's Office was not open between 9:00 p.m. and midnight on April 30, when he tried to file his declaration and pay his fee. Instead, the Court focused on the candidate. Knowing that the office was closed and that the Deputy Clerk was available at home, it was the candidate's duty to pursue that filing and payment option. The "unavailability" of the Treasurer was immaterial. *State ex rel. Townsend v. Bell*, 195 S.W.2d at 738.

There is no principled distinction between the *Haller* and *Neu* cases and this case. Those cases are controlling on the issue of the necessity that the candidate be found at fault. No authority cited supports Respondents' "absolute disqualification" theory of ballot access. Such strict application of disqualification statutes is unwise and unnecessary; and under this Court's precedents, instructed by Article I, Section 25, Missouri Constitution, such strict application is unconstitutional.

At Brief, page 26, Shaw asserts that there is no evidence that Brown attempted to pay his city taxes before the deadline or that Shaw failed or refused to receive taxes that Brown attempted to tender. This is an inaccurate statement. Shaw was not even authorized to receive tax payments, and all of the evidence is that Brown not only attempted to pay his taxes but in

a real financial sense did pay his taxes to his mortgage escrow account. Brown did everything he could to pay his taxes. Respondents' suggestion that all candidates must check with the tax collector (not just at registration of their candidacy, but much later at the close of filing for other candidates), or visit his mortgage lender to personally supervise payment of his taxes is absurd and obviously not required or anticipated by Section 115.346, RSMo. The *Haller* and *Neu* concepts of fairness are not limited to misconduct by public officials by outright refusals to accept, or being unavailable to accept, payments of taxes and fees. It is unnecessary for Brown to prove any fault on the part of any official in order to demonstrate there was no fault on his own part. The protections afforded by Article I, Section 25 guaranteeing free and open elections, protects the rights of any citizen to become a candidate for public office without regard to fault or misconduct on the part of public officials. *Preisler v. Calcaterra*, 243 S.W.2d 62, 64 (Mo. banc 1951) citing *Neu* and *Haller*, as well as *State ex rel. Preisler v. Woodward*, 105 S.W.2d 912 (Mo. 1937).

At page 15 of his Brief, the Attorney General seeks to narrow this Court's authorities in *Haller* and *Neu*, posing yet a new standard not heretofore found in the case law, requiring a showing that a candidate's efforts were either directly or indirectly "thwarted by officials." No case has identified official "thwarting" as a component of an analysis of the absence of fault on the part of a candidate. Respondents contend that Brown must show that he personally attempted to pay his city taxes and that the Collector personally refused to accept his offer of payment in order to fit within the holdings of *Haller* and *Neu*. To condition the constitutional guarantee of free and open elections and the right to access the ballot on a demonstration of

official misconduct renders Article I, Section 25 meaningless. Free and open elections have never been defined as simply those where the government conducting the election is free from evil intent and misconduct.

Respondent Attorney General also seeks to distinguish *Haller* and *Neu* on the basis that the nature of the fees at issue in those cases were different than in these cases. Respondent asserts that there is a "critical distinction" between fees and taxes, but the distinction is unexplained (Attorney General's Brief, page 16) and seems rather curious in light of the fact that Section 115.346, RSMo requires payment of both taxes and fees by candidates. There is no principled basis upon which to distinguish between taxes and fees under the disqualification statute, Section 115.346, or under the constitutional principles announced in *Haller* and *Neu*. The constitutional guarantee of the right of access to the ballot cannot turn on whether a disqualification in violation of Article I, Section 25 is for non-payment of taxes without fault, or non-payment of fees without fault.

Finally, Attorney General Nixon's attempt to distinguish *Haller* and *Neu* and the requirement of free and open elections by alleging that the constitutional guarantee applies only to "eligible" people lacks any basis. The cited authority, *Preisler v. City of St. Louis*, 322 S.W.2d 748, 753 (Mo. 1959) (Attorney General's Brief, page 16) makes no determination of what such an "eligible person" is, but simply repeats the consistent assertion of the Courts that

> every eligible person has the right under the constitutional guarantee of free and open elections to become a candidate for office...and that restricting that constitutional right in such a

> manner as to effectively deny or improperly impede it is a violation of the guarantee.

Preisler at 753 (citations omitted). The Attorney General's proposal to define "eligible persons" who have rights under the Constitution as those who are not ineligible under Section 115.346 is circular argument, which does not aid analysis.

On page 17 of the Attorney General's Brief, he attempts to divide constitutional analysis under Article I, Section 25 into "eligibility requirements" and "qualification requirements" based upon this Court's decision in *Labor's Educational and Political Club v. Danforth*, 561 S.W.2d 339 (Mo. banc 1977). That case did not involve Article I, Section 25. That case involved the question of whether the legislature had created additional eligibility requirements than those established under the Missouri Constitution. Like the Respondent's assertion that only "eligible" people have a constitutionally guaranteed right to access the ballot, his reliance on *Labor's Educational and Political Club* does not give guidance for this case. Similarly, reliance upon *State ex rel. McElroy v. Anderson*, 813 S.W.2d 128 (Mo. App. E.D. 1991) is unhelpful. The distinction between qualifications and eligibility, based upon the residency requirement in that case, has no value in judging the disqualification statute here.

Attorney General's Brief, page 18 argues that individuals who are in arrears on taxes or fees are not "eligible for candidacy." Brown was not declared ineligible for candidacy; he was refused a place on the ballot. Section 115.346 does <u>not</u> declare anyone "ineligible" for candidacy. Instead, it prevents eligible persons from having their names appear on the ballot. Section 115.346, RSMo, is not a "qualifications provision," nor is it an "eligibility

requirement," but it is purely a disqualification provision from the written election ballot, based upon an event which may or may not occur and which the candidate may or may not have any control over. Section 115.346 certainly does work a forfeiture of Brown's right to access the election ballot, which he otherwise certainly would have in the absence of that provision. Such disqualification provision is entirely unlike the durational residency age restriction and other requirements used "to narrow the field of prospective candidates." The Attorney General ultimately seeks to support his theory of the emptiness the Article I, Section 25 guarantee by asserting that Missouri Courts "have not struck down other candidate eligibility requirements" such as age, residency or voter registration under that provision. This is also misleading. The courts, starting with *Haller* and *Neu*, and continuing through the more recent case of *Jackson County Board of Election Commissioners v. Paluka*, 13 S.W.3d 684 (Mo. App. W.D. 2000), have refused to disqualify otherwise eligible candidates for failure to make payments or file forms. The Attorney General seeks to turn the preference of the courts to interpret statutes consistent with constitutional requirements into support for an argument for abandoning those requirements. Such a convolution does not serve the Court's role in judging the constitutional reasonableness of election regulations.

At page 26 of Shaw's Brief, having argued that "fault" is immaterial to enforcement of Section 115.346, RSMo, Shaw argues that Shawn Brown was at fault. She asserts Brown reviewed and signed his declaration of candidacy which contained reference to Section 115.346. As the evidence shows, Brown was not "advised" by having reviewed and signed that declaration, and did not grasp any requirement he faced - - not on December 16, 2003, when

he signed the declaration and certainly not on January 20, 2004, when filing closed. The evidence, apparently accepted by the Court below and found in favor of Brown, established that Brown was not aware of any requirement imposed on him in the future by Section 115.346; that he would not pay particular attention to that provision because at the time of signing he knew he was not "in arrears" on any taxes or fees; and that because, like millions of Americans who have paid taxes into escrow with a mortgage company, he was unlikely to have concern about being in arrears for taxes more than a month after signing the declaration.

Shaw further asserts that "County Collector Walker advised that a tax bill would have been sent to Brown at his address in October, 2003." (Brief, page 26). However, she omits the testimony of the County Collector that this is simply the policy and procedure in administering approximately 160,000 tax bills each year. Brown did testify that his wife "handles and pays the bills" but did not testify that only his wife sees the mail. The mail includes more than bills, and Brown testified to not receiving a tax bill from the County Collector. Mr. Brown's wife was present and capable of testifying were it necessary, but the unobjected to testimony of Shawn Brown that both he and his wife never saw a tax bill, and were surprised when he was advised of the non-payment, is undisputed. Shaw asserts that "Brown did not testify that the tax bills were not received." Brown's testimony and the facts, however, established that the tax bill, if mailed, was lost in the mail and was not received by the Browns. The fact that the personal property tax bill was received and was paid immediately by Brown's wife indicates not only the Browns' proclivity for timely payment of all taxes, but further supports the loss of the real property tax bill in the mail. The fact that the tax bill which was

not received by Brown advised Brown of the delinquency date is immaterial. Respondent Shaw is grasping at arguments for fault.

At page 27 of her Brief, Shaw argues that even if Brown did not receive the tax bill, he is still charged with the duty to pay the tax. Brown does not disagree. However, Shaw's assertion that Brown is at fault because "Brown made no inquiry of his mortgage company, the County Collector, City Collector or any other authority as to whether his city taxes had been paid" is ludicrous. If this is Shaw's idea of a "reasonable eligibility requirement or restriction," it is no wonder that such a vast number of unwary individuals fall prey to Section 115.346 each election cycle. No reasonable person, on reading Section 115.346, would assume that he or she had these additional responsibilities. Section 115.346, by its terms, creates no such affirmative duty to inquire about taxes. Citing *Ewing v. Lockhart*, 641 S.W.2d 835 (Mo. App. E.D. 1982), Shaw argues that failure of Brown to receive notice (i.e., the tax bill) does not relieve him of any tax liability imposed on him by law. Brown has never requested any relief from liability for taxes. To the contrary, he accepts the liability imposed upon him by law to pay taxes. Shaw's argument misses the point. The question here is not Brown's liability for taxes, but whether he was at fault for an arrearage on January 20, 2004.

At page 28-29 of her Brief, Shaw argues the obligation of Brown's mortgage company. Shaw's argument again misses the point: Brown paid taxes, pursuant to a binding contract with his mortgage company, into an escrow account which was <u>required by law</u> to be paid by that mortgage company in a timely fashion on Brown's behalf. The mortgage company did not do so. Brown does not make this point in order to avoid his responsibility for payment of taxes,

but to emphasize the high level of assurance he had that his mortgage company would make such tax payments. Brown was not careless and was not at fault. He could not control the mechanism which led to a failure to pay taxes within a twenty day window which he did not know was closing. He is not seeking to avoid the liability for any tax, but rather to avoid the unreasonable collateral impediment created by Section 115.346, RSMo.

At Brief, page 30, Shaw argues that the Circuit Court properly applied Section 115.346, despite the uncertainty of its applicability created by its location within Chapter 115, RSMo, and the provisions of Section 115.250, RSMo, which supplant Section 115.346. Shaw argues that inclusion in Section 115.346 of the words "not withstanding any other provision of law to the contrary" cures all problems and ambiguities with the application of this section to fourth class cities. As demonstrated, simply saying it does not make it so. (Appellant's Brief, pp. 24-28.) Shaw does not present any authority to support her argument concerning the applicability of Section 115.346, and presents no response to the case law and rules of statutory construction cited by Appellant. Moreover, despite Shaw's assertion (Brief, pp. 30-32), no legislative history concerning Section 79.250, RSMo indicates its repeal by implication based on Section 115.346. Its location within Chapter 115, and the specific directives of Section 115.305, RSMo, simply do not permit Shaw's construction.

Finally, Shaw argues at page 32-34 of her Brief that Brown should be responsible for city tax payments and consequent forfeiture of rights, regardless of the technical legal requirements determining who the taxpayer is in a rather complicated tax collection scheme. What Shaw's analysis of that scheme demonstrates is the ambiguity created by Section

115.346, when dropped willy nilly into a taxation scheme never intended to guarantee the certainty that this election disqualification statute assumes exists. Brown is technically not the taxpayer, whether Shaw likes that result or not. *State on inf. Bellamy, Pros. Atty., ex rel. Harris v. Menengali*, 270 S.W.101 (Mo. 1925), cited by Shaw at Brief page 33, is not on point. It involved a tax assessed for tangible personal property (cows, pigs, horses and automobiles) and not the statutory scheme for real property taxes at issue in this case. Respondent Shaw has failed to address, much less rebut, the legal analysis set forth in Appellant's Brief, page 29-31.

II.

SECTION 115.346, RSMo, IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED UNDER THE EQUAL PROTECTION CLAUSES OF THE MISSOURI AND UNITED STATES CONSTITUTIONS. STRICT SCRUTINY APPLIES AND SECTION 115.346 DOES NOT INVOLVE A COMPELLING STATE INTEREST, DOES NOT ADOPT THE LEAST RESTRICTIVE MEANS AND IS NOT NARROWLY TAILORED TO CARRY OUTS ITS INTERESTS. ADDITIONALLY, SECTION 115.346 IS NOT RATIONALLY RELATED TO THE INTERESTS IT PURPORTS TO FURTHER.

(Replies to Attorney General's Brief, Point III, pp. 20-47;

Shaw's Brief, Point III, pp. 36-50)

Respondents argue that the rational basis test, rather than strict scrutiny analysis of ballot access cases is required. Not one of the Missouri cases cited by the Respondents supports that assertion. This is a case involving the issue of access to the election ballot by an otherwise qualified and eligible candidate who becomes disqualified by operation of events he has no fault for and over which he has no control. Cases declaring no "fundamental right to run for public office" are not determinative of the right of access to the election ballot in this case. Therefore, Respondents' reliance upon such cases as *Asher v. Lombardi,* 877 S.W.2d 628 (Mo. banc 1994) is entirely misplaced. That case involved <u>not</u> an election law but the state merit system law which offered a choice to a prospective candidate: Asher was free to run for

office, but not as a state employee under the merit system. Brown is given no such choice. Under Respondent's interpretation, his name will not appear on the ballot under the disqualification provision at all, and no choice he could have or can make changes that result. The constitutional right of access to the ballot is a constitutional right guaranteed by Article I, Section 25, Missouri Constitution. *Preisler v. City of St. Louis*, 322 S.W.2d 748, 753 (Mo. 1959); *Preisler v. Calcaterra*, 243 S.W.2d 62, 64 (Mo. banc 1951); *Preisler v. Woodward*, 105 S.W.2d 912, 915 (Mo. 1937); *State ex rel. Neu v. Waechter*, 58 S.W.2d 971, 973 (Mo. banc 1933); *State ex rel. Haller v. Arnold*, 210 S.W. 374, 376 (Mo. banc 1919). Analysis of statutes which abridge such clearly established constitutional rights should not be conducted

under cases such as those cited by Respondents that involve no protected rights at all.[1]

[1] Respondent Attorney General notes at page 21 of his Brief that in pleading this current matter, a typographical error occurred with regard to citation of constitutional sections. Paragraph 31 of Plaintiff's Second Amended Petition for Mandamus, Declaratory Judgment and Injunctive Relief, alleges violation of Article I, Sections 8, 10 and 25 of the Missouri Constitution. Clearly, the reference to Article I, Section 8 is a typographical error. No allegation under that section is made and paragraph 31f specifically asserts denial of equal protection of the laws. No party has been prejudiced by this typographical error, as evidenced from the Briefs filed in the trial court and this Court which focus substantially on

equal protection analysis. Under the circumstances of this case, the constitutional issue of equal protection of the laws, Article I, Section 2, Missouri Constitution, was sufficiently raised, was before the trial court and was presented and ruled on.

Respondents agree that "the right of a person to seek public office is one of the nebulous areas where strict scrutiny is sometimes applied and sometimes not." *Labor's Educational and Political Club v. Danforth*, 561 S.W.2d 339, 347 (Mo. banc 1977). Constitutional analysis of this "area" has stretched from rational basis scrutiny where no protected right was at stake (*Asher v. Lombardi*, 877 S.W.2d 628 (Mo. banc 1994)) to application of the strict scrutiny test to regulations involving the right of access to and disqualification from the ballot (*State ex rel. Coker Garcia v. Blunt*, 849 S.W.2d 81, 85 (Mo. App. W.D. 1993); *Jackson County Board of Election Commissioners v. Paluka*, 13 S.W.3d 684 (Mo. App. W.D. 2000)). Depending upon the nature of the case within the "area of the right to run for public office," the case law instructs that some statutory barriers to candidacy are analyzed under the rational basis test while others, including access to ballot and disqualification from ballot cases, are subject to strict scrutiny review. No other conclusion can be reached from any careful reading of the authorities. (Shaw Brief, page 37-39; Attorney General's Brief, page 22-23.)

At the Attorney General's Brief, page 23, he suggests that strict scrutiny of this ballot access claim would be "an extension to the list of fundamental rights." No such "extension" is necessary because the right of access to ballot is already constitutionally guaranteed by Article I, Section 25, Missouri Constitution. The Attorney General's case law, *Batek v. Curators of University of Missouri*, 920 S.W.2d 895 (Mo. banc 1996) is not to the contrary. While the Court in that case rejected the argument that victims of medical malpractice are members of a suspect class, *Id.* at 898, the courts have uniformly used elevated scrutiny in right

to ballot access cases. Contrary to the Attorney General's assertion, no "free form right to be a candidate" is requested here. Brown has not complained about not "being" a candidate (he is a candidate), but has complained about the denial of his right to have his name placed upon the official ballot like all the other candidates. The Attorney General's argument (page 24) that acceptance of the strict scrutiny standard for access to ballot/disqualification statute cases will call into question all age, residency and other qualification requirements is without merit. Such issues are entirely unaffected. Strict scrutiny is the appropriate standard to be employed in analyzing this matter.

In apparent acknowledgment that the only Missouri Courts to have considered the ballot access issues presented here have applied strict scrutiny and interpreted the statutes with sensitivity for constitutional rights, the Attorney General argues that the United States Supreme Court and the Missouri Supreme Court have recently required a standard of minimum scrutiny, once again relying upon *Asher v. Lombardi*, 877 S.W.2d 628 (Mo. banc 1994), and *Clements v. Fashing*, 457 U.S. 957 (1982). As previously noted, (pages 30-31, supra) those cases have nothing to do with the ballot access issue presented here. Asher's claim was that employment dismissal restricted his opportunity to participate in the political process, *Id.* at 630, and the Court's conclusion that the "right to run for office is not a 'fundamental right'" created no new standard, nor does it appear the Court intended to do so. Reliance upon *State ex inf. McKittrick v. Kirby*, 163 S.W.2d 990, 995 (Mo. banc 1942), indicates the Court was following rather long established principles. The decision in *Clements* was fractured, with Justice Stevens casting the deciding vote in a concurring opinion which hinged on lack of a federal interest.

Importantly, Justice Stevens did not join in the Court's plurality opinion that candidacy is not a fundamental right. 457 U.S. 976 (Stevens concurring). It would appear, contrary to the Attorney General's assertion at page 31-32, that the observation in *Labor's Educational and Political Club v. Danforth*, about the right to seek public office being one of the nebulous areas where strict scrutiny is sometimes applied and sometimes not, is still accurate.

Respondents present three interests which they suggest support the disqualification statute. Attorney General's Brief, page 32-41; Shaw's Brief, page 41-50. Examination indicates not a single case or authority supporting the rationality of disqualification without fault under Section 115.346. *Corrigan v. City of Newaygo*, 55 F.3d 1211 (6th Cir. 1995) found all of the interests propounded by Respondents here to be irrational, except use of disqualification to collect taxes from candidates. The unusual facts in *City of Newaygo* advise caution. The Court recognized that "we are faced with a less-than-clear line of Supreme Court precedent dealing with ballot access cases." (*Id.* at 1211.) And the facts showed that the disqualified candidates made no argument for their lack of fault. (One candidate simply did not have sufficient funds; the other, while asserting he did not know he had to pay the property taxes on land owned by him, offered no explanation. *Id.* at 1213.) The Court noted that this disqualification ordinance was adopted directly by the residents of the town in a local referendum election. *Corrigan* at 1214, n. 2. Where the people of the city themselves have declared their intentions, one might find at least some rationale and notification. But, the disqualification under Section 115.346 is imposed by state law, which hardly assures either wide acceptance of the proposition in St. Peters or knowledge of the existence of the

requirement. Once again, the absence of fault on the part of the taxpayer is not shown in any of the cases relied upon by the Respondents. They cannot constitute persuasive authority in this case where the arrearage on a tax was unknown to the candidate and occurred without any fault on his part.

Respondents' reliance on *Stiles v. Blunt*, 912 F.2d 260 (8th Cir. 1990), as a case rejecting a "similar challenge," is misplaced. Minimum age requirements, voter registration and residency requirements are all subject to the minimum scrutiny reserved for that area of "the right to run for office." This case is not about age requirements, residency or voter registration, but involves the disqualification of an otherwise eligible, and in fact declared and registered, candidate from the written election ballot.

Shaw, at Brief, page 49-50, suggests that Section 115.346 encourages respect for government. The facts of this case belie the contention. It cannot be argued that punishing a citizen with loss of ballot access for a tax arrearage, which he did not know of, was not careless in connection with, was not at fault for and concerning which he had done all he reasonably could to prevent, would encourage anything but cynicism for the government administering such punishment. Among the purported legitimate interests stated by Respondents, none are promoted by issuance of a ballot access death sentence to an innocent candidate.

III.

APPELLANT IS NOT PRECLUDED FROM BALLOT ACCESS UNDER SECTION 71.005, RSMo, AND SECTION 105.035 OF THE CITY CODE OF ST. PETERS FOR THE REASON THAT SECTION 115.346, RSMo DOES NOT APPLY TO PROHIBIT APPELLANT FROM HAVING HIS NAME PLACED ON THE BALLOT.

(Responds to Shaw's Brief, Point V, pp. 55-56)

Appellant has already replied to Shaw's assertion concerning the City of St. Peters as an indispensable or necessary party. (See p. 11, supra). Such argument is without merit. Further, Shaw's City Ordinance and Section 71.005 derive their authority entirely from Section 115.346, RSMo. If that ballot access disqualification statute is invalid or subject to an interpretation requiring fault, Section 71.005 and Ordinance 105.035 are irrelevant. It is unnecessary to attack these other measures when only the organic statute, Section 115.346, is at issue. Should the Court agree with Brown on his contentions concerning Section 115.346, RSMo, Section 71.005 and Ordinance Section 105.035 are no impediment.

CONCLUSION

For the reasons stated in the foregoing Reply, the Judgment of the Circuit Court should be reversed and the Court should enter judgment ordering Shaw to certify Shawn Brown as a candidate for Mayor of the City of St. Peters at the April 6, 2004 election; and directing Chrismer to place Brown's name first on the ballot for that election. This Court should make its Preliminary Writ of Mandamus in this case absolute.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 7,524 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 ½" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____
Counsel for Appellant/Relator

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above and foregoing Brief, along with the Brief on a 3 ½ inch computer disk, were served U.S. Mail, postage prepaid, on this 25th day of March, 2004, to V. Scott Williams and Randy Weber, City Attorney, Hazelwood and Weber, 200 North Third Street, St. Charles, Missouri 63301, Attorneys for Respondent Rhonda Shaw; via hand delivery to Alex Bartlett, Husch & Eppenberger, LLC, 235 East High Street, P.O. Box 1251, Jefferson City, Missouri 65102, Attorney for Respondent Rhonda Shaw; via hand delivery to Karen P. Hess, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, Attorney for Attorney General of the State of Missouri; and U.S. Mail, postage prepaid, to JoAnn Leykam, St. Charles County Counselor, 101 North Third Street, Room 216, St. Charles, Missouri 63301, Attorney for Respondent Chrismer.

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