IN THE SUPREME COURT OF MISSOURI

SHAWN C. BROWN,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC85846
	)	
RHONDA F. SHAW, et al.,	)	
	)	
Respondents.	)	

and

STATE OF MISSOURI ex rel., SHAWN C. BROWN,	)	
	)	
Relator,	)	
	)	
vs.	)	No. SC85845
	)	
RHONDA F. SHAW, City Clerk, and RICH CHRISMER, Director of Elections	)	
	)	
Respondent.	)	

RESPONDENT RHONDA SHAW'S CONSOLIDATED BRIEF IN OPPOSITION TO RELATOR'S PETITION FOR WRIT OF MANDAMUS AND APPEAL OF THE JUDGMENT OF THE CIRCUIT COURT OF ST. CHARLES COUNTY

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JURISDICTIONAL STATEMENT

Respondent Shaw previously filed her "Motion to Transfer Appeal to the Eastern District of the Missouri Court of Appeals" ("Motion to Transfer") in SC85846 which asserted that the appeal in that case was not one "involving the validity of a statute or provision of the constitution of this state. . . ." (emphasis added), that the appeal was not one within the exclusive jurisdiction of this Court under Article V, § 3, of the Missouri Constitution and that the appeal should therefore be transmitted to the Missouri Court of Appeals. The Motion to Transfer was denied. At the time the Motion to Transfer was filed, the Court had before it the Appellant's assertions that immediate actions were required. We would respectfully suggest that the jurisdictional issue be reconsidered, and we here incorporate by reference the contents of the Motion to Transfer. The analysis which we made took a closer analysis of the 1976 amendment of § 3 of Article V to point out that the "validity" test then substituted for the "construction" and "application" of the Constitution dichotomy that had developed is much more restrictive than has been generally realized and does not place the appeal in SC85846 within the exclusive jurisdiction of this Court.

With respect to the original case in mandamus, SC85845, if this Court did not have jurisdiction of the appeal, then the original mandamus action should be in the Court of Appeals under the provisions of Rule 84.22(b) and not in this Court.

We respectfully assert, as well, that this Court does not have jurisdiction of the original mandamus action, SC85845, because of the failure to join as a respondent the Honorable Lucy D. Rauch because of the Judgment which she entered which has not been modified as well as the failure to join as a respondent the City of St. Peters because the lawfulness of § 105.035 of the Code of the City of St. Peters is involved. Respondent Shaw respectfully asserts that Judge Rauch and the City of St. Peters are indispensable or necessary parties in the original mandamus case, and that because they were not joined, the Relator cannot secure relief in the original mandamus case.

Even if the Court had jurisdiction when the original mandamus action and the Notice of Appeal were filed and received by this Court on February 23, 2004, the Court lost jurisdiction to grant to the Relator/Appellant any relief at midnight on February 23 because of the provisions of § 115.125.2, RSMo, specifying that "no court shall have authority to order an individual . . . be placed on the ballot less than six weeks before the date of the election. . . . (emphasis added). Action on or after Thursday, February 24, would be "less than six weeks before" the election on Tuesday, April 6. The provisions of § 115.125 have been construed by this Court to be "mandatory" and jurisdictional. *See*, *State ex rel. Referendum Petition Committee Regarding Ordinance #4639 v. Laskey*, 932 S.W.2d 392 (Mo. banc 1996).

Respondent Shaw respectfully submits that the Alternative Writ of Mandamus in SC85845 should be vacated, that Respondent Chrismer should be directed to remove the name of Relator/Appellant from the April 6 ballot as a candidate for mayor of St. Peters, that the Petition in SC85845 should be dismissed, and that the appeal in SC85845 should either be transferred to the Eastern District of the Missouri Court of Appeals or dismissed as moot.

STATEMENT OF FACTS

On December 16, 2003, Shawn C. Brown ("Brown") signed and submitted to the City of St. Peters ("City") his "Notice of Intention to Run for Elective Office" (hereinafter, the "Declaration of Candidacy") for the office of Mayor of the City of St. Peters, Missouri. On the Declaration of Candidacy, Brown swore he held the necessary qualifications for the office of City Mayor. The Declaration of Candidacy quoted the language of § 115.346, RSMo, (2000):

> *Notwithstanding any other provisions of law to the contrary, no person shall be certified as a candidate for a municipal office, nor shall such person's name appear on the ballot as a candidate for such office, who shall be in arrears for any unpaid city taxes or municipal user fees on the last day to file a declaration of candidacy for the office.*

The Declaration of Candidacy also specified that the last day to file a Declaration of Candidacy was January 20, 2004. LF 118. The Declaration of Candidacy is set forth in the Appendix to Appellant's Brief at A-55. The form was handed to Brown for his review and signature, and he had the opportunity to read it at that time. Tr. P. 82, L. 18 – P. 84, L. 16. Brown admits he "probably had plenty of time to read it." Tr. P. 84, L. 14-15. Brown had previously run for City Alderman in 2003, and had signed a similar form at that time. Tr. P. 83, L. 24 – P. 84, L.1. 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. Tr. P. 84, L. 2 – P. 85, L. 1.

Prior to the close of business on January 20, 2004, Brown did not inquire with his mortgage company whether his City taxes were paid. Tr. P. 85, L. 20 – P. 86, L.1. Brown also did not check with the County or City Collector offices to determine whether he was in arrears on any City taxes. Tr. P. 85, L. 7-19.

On January 21, 2004, Respondent Rhonda F. Shaw, City Clerk for the City of St. Peters ("Shaw"), was informed by Barbara Walker, the St. Charles County Collector, that as of the end of the day on January 20, 2004, Brown had not paid his 2003 City taxes. LF 152, 154-155. Pursuant to §94.300, those taxes were delinquent as of January 1, 2004.

As required by §115.346, Shaw did not submit the name of Shawn C. Brown on the list of certified candidates to appear on the ballot for the position of Mayor. LF 152, Paragraph 9.

Brown concedes his City taxes were unpaid as of the end of the day on January 20, 2004, and remained unpaid until January 27, 2004. Tr. P. 87, L. 25 – P. 88, L. 9. He did not refuse to pay his taxes because of any political, religious, or philosophical opposition to the taxes. He did not refuse or fail to pay the taxes because of any political party affiliation. Tr. P. 90, L. 3-15. Brown recognizes that if elected to the office of Mayor, one of his jobs would be enforcement of City tax laws. Tr. P. 88, L. 15-23.

Shaw checked the status of the payment of City taxes with County Collector Walker on January 21, 2004, after the Collector's office had time to process and book payments received the previous day. LF 151, Paragraphs 4-7. As of January 21, 2004, only Brown, and another candidate for City Alderman, Thomas Brown (who filed at 4:44 p.m. on January 20; LF 158) were in arrears on their City taxes.

Brown argued at the trial court that Shaw was aware he was in arrears and had checked his tax status with County Collector Walker prior to January 20, but failed to inform Brown of the arrearage. *See* Tr. P. 110, L. 10-19. Brown offered no authority by which Shaw was permitted or required to convey such information to Brown. Although Shaw was informed by the City Collector during the week of January 12 that all persons who had filed Notices of Intention to Run for Elective Office had paid all city taxes, except for Shawn C. Brown, Shaw "[a]t no time prior to the morning of January 21, 2004, [spoke] with the County Collector or any other person in her office regarding the status of payment of city taxes by Shawn C. Brown or any other candidate." LF 152, Paragraph 7. Shaw also "did not communicate to any candidate who had filed a Notice of Intention to run for Elective Office about the status of their payment of City taxes prior to the close of filing on January 20, 2004." LF 152, Paragraph 8.

The alleged conversation between Shaw and County Collector Walker was not confirmed by Walker, who only recalled that the call from Shaw was "close to" (Tr. P. 104, L. 14-16), or "in the range of" (Tr. P. 107, L. 13-15) the January 20 filing deadline. County Collector Walker agreed that since Shaw checked on both Shawn Brown and Thomas Brown (who did not file for the office of City Alderman until 4:44 p.m. on January 20) at the time of that call, the call must have occurred sometime after 4:44 p.m. on Tuesday, January 20. Tr. P. 105, L. 17 – P. 106, L. 12. In fact, Collector Walker's letter in response to Shaw's inquiry regarding Candidates Shawn Brown and

Thomas Brown was faxed to Shaw's office at 2:54 p.m. on Wednesday, January 21. Tr. P. 115, L. 4 – P. 116, L. 12; LF 154-155.

County Collector Walker is responsible for sending out tax bills for St. Peters' residents. Tr. P. 98, L. 12-18. Shaw's Trial Exhibit A was a "tax statement, unpaid tax bill that [the Collector's Office] would send out to anyone that requested a statement." Tr. P. 99, L. 8-13. LF 161. Under the Collector's ordinary practices and procedures the bill would have been mailed to "the address shown of 108 Golden Harvest Court" (which was Brown's residential address) during the first week of October 2003. Tr. P. 99, L. 14 – P. 100, L. 18; Tr. P. 87, L. 20-22. The tax bill sent to that address indicated it was delinquent after December 31, 2003. Tr. P. 100, L. 19-22.

Mr. Brown does not pay bills that come to him or his wife. Those bills are paid by Mr. Brown's wife. Tr. 75. Mr. Brown did not indicate in his testimony that tax bills for 2003 were not in fact received in the mail at his home.

According to County Collector Walker the 2002 Brown tax bill would also have been sent to the same St. Peters residence address. Both the 2002 and 2003 tax receipts show that the bills were paid "by check" without indicating they were paid by any lender. If the tax bills had been "paid by a party other than the property owner, we [the Collector's Office] would have put a notation in the comments." Tr. P. 102, L. 8-25. County Collector Walker concluded that the 2002 and 2003 tax bills were paid by "a check from the tax payer." Tr. P. 103, l. 2 – P. 104, L. 4.

After paying his City property taxes on January 27, 2004, Brown filed for and was accepted as a write in candidate for the office of City Mayor. Tr. P. 95, L. 1-13; LF 156.

Brown filed his Petition for declaratory judgment and injunctive relief against only Defendant Shaw in the Circuit Court of St. Charles County on January 30, 2004. He made no attempt to advance the matter on the trial or hearing docket at that time. Supp. LF 1 (Minute Entries).

On February 10 Brown filed his motion seeking an expedited hearing of this matter. Brown filed his First Amended Petition on February 11, adding Rich Chrismer, St. Charles County Director of Elections, as a party defendant. On February 11, the Attorney General's Office, filed its motion to intervene (Supp. LF 1-2), and then filed its Motion for Judgment on the Pleadings on February 18. Supp. LF 3.

Brown's motion to advance the hearing of this matter on the Circuit Court docket was argued on February 17. At that February 17 hearing Brown filed his Second Amended Petition, <u>adding</u> a new Mandamus Claim. Supp. LF 2-3.

The matter was scheduled, and heard by the Honorable Judge Lucy Rauch, Division 3, on February 19. After the hearing and consideration of the submissions, Judge Rauch typed an Order dated February 19 containing the findings and determinations that she wanted included in a final judgment and directed the Assistant Attorney General to prepare a Judgment containing her findings and determinations. Supp. LF 30. Thereafter, Judge Rauch entered Judgment on February 20, 2004, granting the Attorney General's motion for judgment on the pleadings, and denying and dismissing Brown's petition for mandamus, declaratory judgment and injunctive relief. Shaw's motion to dismiss was denied as moot in light of the Circuit Court order and judgment. LF 163-164.

Brown filed his Notice of Appeal in the Circuit Court, and his separate Petition for Writ of Mandamus in this Court on February 23, 2004. LF 166. This Court entered its Preliminary and Alternate Writ of Mandamus on February 24, the sixth Tuesday before the City municipal election scheduled for April 6, 2004.

CHRONOLOGY OF SIGNIFICANT DATES

Late 2002 or early 2003: Shawn Brown files his Notice of Intention to Run for Elective Office (St. Peters Alderman) for the 2003 Municipal elections. Tr. P. 83, L. 24 – P. 84, L. 1.

October 2003: Tax bills for City Real Estate taxes were mailed to Shawn Brown's residential address by the office of the St. Charles County Collector. *See* Tr. P. 99. L. 14 – P. 100, L. 18; Tr. P. 102, L. 8-25; LF 161.

December 16, 2003: Shawn Brown files his Notice of Intention to run for St. Peters Mayor in the April 6, 2004, election. LF 118.

December 31, 2003: City and County taxes "Delinquent" after this date. LF 161; Tr. P. 100, L. 19-22.

December 16, 2003 – January 20, 2004: Shawn Brown takes no action and makes no inquiries with the City Collector, County Collector, or his own Mortgage Company to determine whether he is in arrears on any City taxes. Tr. P. 85, L. 7 – P. 86, L. 1.

Week of January 12, 2004: Shaw learns from the City Collector that all persons who had filed as candidates for municipal office at the time, except for Shawn Brown, had paid their 2003 City taxes. LF 151.

January 20, 2004: Last date to file a declaration of candidacy for the office of Mayor for the April 6, 2004, municipal elections. LF 118.

January 21, 2004: Shaw inquires with County Collector's office whether Shawn Brown had paid all delinquent City taxes by the end of the day on January 20, 2004, and is informed orally and by fax letter that Shawn Brown had not paid their delinquent 2003 County and City taxes. LF 151-152, 154-155.

January 27, 2004: Shawn Brown pays his delinquent city taxes. Tr. 73-74; LF 122.

January 27, 2004: Brown files his Declaration of Intent to run for St. Peters City Mayor as a Write-In Candidate. LF 156.

January 30, 2004: Brown files his Circuit Court Petition for Declaratory Judgment and Injunctive Relief against Defendant Shaw only. Supp LF 1. Petition does not contain mandamus claim. Supp. LF 6-15.

February 10, 2004: Brown files his motion seeking to advance the hearing of his Petition on the Circuit Court docket. Supp. LF 1.

February 11, 2004: Brown files his First Amended Petition adding Defendant Rich Chrismer, St. Charles County Director of Elections. Supp. LF. 2. First Amended Petition does not contain mandamus claim. Supp. LF 16-28.

February 13, 2004: Missouri Attorney General's Office files its Motion to Intervene. Supp. LF 2.

February 17, 2004: Hearing on Brown's Motion to advance the Circuit Court matter on the trial docket – Matter set for hearing on February 25, 2004. Supp. LF 2. Brown files his Second Amended Petition, adding a mandamus Claim. Supp. LF 3.

February 28, 2004: St. Charles County Counselor JoAnne Leykum files motion requesting that hearing be reset for February 23 or earlier. The matter is then reset by the Circuit Court for hearing on February19.

February 19, 2004: Bench trial in the Circuit Court before the Honorable Lucy Rauch on Plaintiff's Second Amended Petition. Judge Rauch prepares and faxes to counsel her typed Order making determinations and findings and directing that Assistant Attorney General prepare the form of judgment containing determinations and findings set forth in the Order by 4:00 p.m. on February 20. Supp. LF 4, 29-30. A copy of the Order is set forth in the Appendix to this Brief.

February 20, 2004: Circuit Court Judgment denying and dismissing Brown's Petition for mandamus, declaratory judgment and injunctive relief, granting Attorney General's Motion for Judgment of the Pleadings; and denying Shaw's Motion to Dismiss as moot in light of the foregoing orders and judgments. LF 163-164. See copy of Judgment at A1-3 of the Appendix to Appellant's Brief.

Midnight February 23, 2004: Any Court Order to add a candidate to the ballot must be entered not later than this date; to wit; "six weeks before the date of the election" ("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." Section 115.125.2, RSMo; *See* also § 1.040, RSMo).

February 24, 2004: This Court enters its preliminary/alternate writ of mandamus to add Shawn Brown to the municipal ballot, and adopts a scheduling order for briefing and argument of the merits of the Appeal of the Circuit Court Judgment and Brown's Petition for Writ of mandamus.

POINTS RELIED ON

RESPONSES TO POINTS RAISED BY APPELLANT

I. THE CIRCUIT COURT JUDGMENT SHOULD BE AFFIRMED AND RELATOR'S PETITION FOR WRIT OF MANDAMUS DENIED BECAUSE (1) RESPONDENTS ARE NOT REQUIRED TO PROVE THAT BROWN WAS "AT FAULT" FOR HIS UNTIMELY PAYMENT OF CITY TAXES, AND (2) IF FAULT IS REQUIRED, THEN BROWN'S FAULT IS ADEQUATELY ESTABLISHED.

A. RESPONDENTS ARE NOT REQUIRED TO ESTABLISH "FAULT" ON BROWN'S PART IN HIS UNTIMELY PAYMENT OF CITY TAXES.

State ex rel. Townsend v. Bell, 195 S.W.2d 737 (Mo. banc 1946)

B. IF "FAULT" ON BROWN'S PART IS REQUIRED FOR ENFORCEMENT OF §115.346, THEN BROWN'S FAULT WAS ADEQUATELY ESTABLISHED AT TRIAL.

Section 115.346, RSMo

State ex inf. Mitchell v. Health, 132 S.W.2d 1001 (Mo. 1939).

C. THE CIRCUIT COURT PROPERLY APPLIED SECTION 115.346 TO THE CITY OF ST. PETERS AND THIS ELECTION.

Section 115.346, RSMo

Section 79.250, RSMo

Section 71.005, RSMo

D. BROWN IS PERSONALLY RESPONSIBLE FOR CITY TAX PAYMENTS.

Section 137.075, RSMo

State on inf. Bellamy, Pros. Att., ex rel. Harris v. Menegali, 270 S.W. 101 (Mo. 1925)

In re Estate of Armack, 561 S.W.2d 109 (Mo. 1978)

II. THE JUDGMENT OF THE CIRCUIT COURT UPHOLDING THE CONSTITUTIONALITY OF SECTION 115.346, RSMo, SHOULD BE AFFIRMED IN THAT THE OPEN ELECTIONS PROVISIONS OF ARTICLE I, SECTION 25 OF THE MISSOURI CONSTITUTION ARE NOT VIOLATED BY THE REQUIREMENT OF SECTION 115.346, RSMo, THAT A CANDIDATE BE CURRENT ON HIS CITY TAX OBLIGATIONS ON THE LAST DAY TO FILE A DECLARATION OF CANDIDACY FOR MUNICIPAL OFFICE.

Article I, Section 25, Missouri Constitution

Priesler v. Calcaterra, 243 S.W.2d 62 (Mo. 1951)

State ex rel. McElroy v. Anderson, 813 S.W.2d 128 (Mo. App. E.D. 1991)

III. THE JUDGMENT OF THE TRIAL COURT UPHOLDING THE CONSTITUTIONALITY OF SECTION 115.346, RSMo, SHOULD BE AFFIRMED IN THAT THE TRIAL COURT CORRECTLY APPLIED THE RATIONAL BASIS STANDARD AND PROPERLY DETERMINED THAT SECTION 115.346, RSMo, DID NOT VIOLATE THE EQUAL PROTECTION PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED

STATES CONSTITUTION OR OF ARTICLE I, SECTION 2, OF THE MISSOURI CONSTITUTION

A. RATIONAL BASIS IS THE APPROPRIATE TEST.

Corrigan v. City of Newaygo, 55 F.3d 1211 (6th Cir. 1995)

Asher v. Lombardi, 877 S.W.2d 628 (Mo. banc 1994)

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

B. SECTIONS 115.346, 71.005 AND CITY CODE SECTION 105.035 DO NOT OFFEND EQUAL PROTECTION STANDARDS.

IV. WITHOUT CONSIDERATION OF ANY CONSTITUTIONAL ISSUES, NO RELIEF CAN BE GRANTED TO APPELLANT BROWN BECAUSE OF THE PROVISIONS OF SECTION 115.125.2, RSMo.

Section 115.125.2, RSMo

State ex rel. Referendum Petitioners Committee Regarding Ordinance #4639 v. Laskey, 932 S.W.2d 392 (Mo. banc 1996)

Corrigan v. City of Newaygo, 55 F.3d 1211 (6th Cir. 1995), cert. denied 516 U.S. 1211 (1995)

Stiles v. Blunt, 916 F.2d 260 (8th Cir. 1990)

State ex inf. Mitchell ex rel. Goodman v. Heath, 132 S.W.2d 1001 (Mo. 1939)

Linton v. Missouri Veterinary Med. Bd., 988 S.W.2d 513 (Mo. banc 1999)

V. APPELLANT IS ALSO PRECLUDED FROM HAVING HIS NAME PLACED ON THE BALLOT BECAUSE OF THE PROVISIONS OF SECTION 71.005, RSMo, AND SECTION 105.035 OF THE CITY CODE OF ST. PETERS

STILL CONSTITUTE A BAR TO SUCH PLACEMENT INASMUCH AS THE APPELLANT'S POINTS DO NOT ADDRESS THE CONSTITUTIONALITY OF THOSE SECTIONS AND BECAUSE THE CITY OF ST. PETERS IS AN INDISPENSIBLE OR NECESSARY PARTY AND HAS NOT BEEN JOINED AS A PARTY IN THE ST. CHARLES COUNTY CIRCUIT COURT OR IN THE ORIGINAL PROCEEDINGS IN THIS COURT

Section 71.005, RSMo

Section 105.035, City Code of St. Peters

Supreme Court Rule 84.04

ARGUMENT

RESPONSES TO POINTS RAISED BY APPELLANT

I. THE CIRCUIT COURT JUDGMENT SHOULD BE AFFIRMED AND RELATOR'S PETITION FOR WRIT OF MANDAMUS DENIED BECAUSE (1) RESPONDENTS ARE NOT REQUIRED TO PROVE THAT BROWN WAS "AT FAULT" FOR HIS UNTIMELY PAYMENT OF CITY TAXES, AND (2) IF FAULT IS REQUIRED, THEN BROWN'S FAULT IS ADEQUATELY ESTABLISHED.

A. RESPONDENTS ARE NOT REQUIRED TO ESTABLISH "FAULT" ON BROWN'S PART IN HIS UNTIMELY PAYMENT OF CITY TAXES.

Standards of Review. This Court's review of the trial court's decision is governed by the rule in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The reviewing court will affirm the trial court's judgment unless "there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." 536 S.W.2d at 32. Since the record before this Court in the original mandamus action is substantially the same, the same deference on the facts and the law determinations are applicable as on appeal. Issues of law in the original case which were not before the trial court are for original determination by this Court. The same standards of review apply with respect to <u>each</u> of the Points presented and will not be subsequently repeated in this Brief.

Appellant's reliance on *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), is misplaced.

These cases held that persons denied access to the ballot because they were unable to pay candidate filing fees due to the unavailability of the collecting authority excused late payment. *See*, *Haller*, 210 S.W. at 376; *Neu*, 58 S.W.2d at 973. However, *Haller* and *Neu* do not impose a burden on election authorities to prove the candidate was at fault for missing the payment deadlines for filing fees. *Haller* and *Neu* only excused late payment when the candidate attempted to make timely payment, but the election authority made it impossible for the candidate to comply, despite his honest and reasonable efforts.

The *Haller* Court relied on *Nance v. Kearby,* 158 S.W.2d 629 (Mo. 1913), and focused on the actions of the election official, and not the fault, or lack thereof, of the candidate. *Nance* at 633. The Court observed:

> "That which arises from carelessness to-day may be from a corrupt motive to-morrow, and thus the officer is enabled, by some trivial act or omission, to serve some sinister purpose, and to have an election avoided, and at the same time to turn but little chance of the fraudulent intent being proved against him."

This interpretation was advanced in *State ex rel. Townsend v. Bell*, 195 S.W.2d 737 (Mo. banc 1946). *Townsend* quashed a writ to compel respondent to place relator's name on the ballot. *Id*, at 738. The *Townsend* facts are similar to those of *Haller* and *Neu* in that relator attempted to file a declaration for candidacy and filing fee on the last day to file, but found no one at the county offices to accept his declaration. *Id*, at 737. This Court distinguished *Haller* and *Nance*, by noting that the deputy county clerk was available at her home to accept relator's declaration, but relator failed to make any effort to file his declaration with her within the statutory time frame. *See Id*, at 738. Thus, due to no fault on the clerk's part, the relator failed to tender his declaration on time, and was not placed on the ballot. *Id*.

The controlling question in *Haller*, *Neu* and *Townsend* is whether the clerk was at fault for the candidate's nonpayment. *See*, *Haller*, 210 S.W. at 376; *Neu*, 58 S.W.2d at 972. There is no evidence that Brown (1) attempted to pay his City taxes before the deadline, or (2) that Shaw or any other authority failed or refused to receive taxes that Brown attempted to tender.

Brown has offered no suggestion that it was impossible for him to make payment by the January 20, 2004, deadline due to the fault of any City or County authority. After learning of his delinquency, Brown did not even attempt to tender payment before midnight on January 20, 2004.

B. IF "FAULT" ON BROWN'S PART IS REQUIRED FOR ENFORCEMENT OF §115.346, THEN BROWN'S FAULT WAS ADEQUATELY ESTABLISHED AT TRIAL.

Brown reviewed and signed a Declaration of Candidacy which advised him of the § 115.346 requirement and the January 20 deadline. Tr. P. 82, L. 18 - P. 84, L. 16; LF 118. County Collector Walker advised that a tax bill would have been sent to Brown at his resident address in October, 2003. Tr. P. 99, L. 14 – P. 110, L. 18. Brown's wife handles and pays the bills which Brown and his wife receive. Tr. 75. She was not called to testify. Brown did not testify that the tax bills were not received. Indeed, one bill was received and was paid. The other tax bill was not paid. That bill advised Brown of the delinquency date for the taxes. Tr. P. 100, L. 19-22; LF 161. Even if, *arguendo*, Brown did not actually receive the tax bill, he is charged with notice and duty to timely pay his taxes, as discussed below. Moreover, 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 within the statutory time frame. Tr. P. 85, L. 20 – P. 86, L. 1. The foregoing grounds serve as sufficient evidence of "fault" on Brown's part to distinguish this case from *Haller* and *Nance*, especially in light of the fact that Brown made no attempt at all to comply with § 115.346 on a timely basis, despite legal and actual notice of its requirements.

Additionally, Brown is charged with the affirmative duty to inquire about his City taxes and tender timely payment, regardless of notice. Pursuant to an agreement dated May 12, 1994, St. Charles County is responsible for collection of the City's real property taxes. St. Charles County is a first class charter county. Pursuant to the authority granted to first class charter counties under RSMo § 141.160, St. Charles County elected to operate under the provisions of Chapter 140, RSMo, in its collection of delinquent taxes. *See* St. Charles County Charter § 140.010. There is no provision in Chapter 140, RSMo, requiring the Collector of a first class charter county to mail real estate tax bills to taxpayers in his county. *Ewing v. Lockhart*, 641 S.W.2d 835, 836 (Mo.App. E.D. 1982).

In *Ewing*, the Eastern District of the Court of Appeals upheld a tax sale in St. Louis County although the property owner had not received the tax bills for the property because of mailing address error on the tax bill. *Id*. The court noted:

> "[O]f significance is [RSMo] § 52.230 requiring collectors of first class counties *not having a charter form of government* to mail tax notices at least fifteen days before delinquency and to mail receipts for taxes paid by mail. However, § 52.240 states: 'The failure of the taxpayer to receive the notice provided in § 52.230 in no case relieves a taxpayer of any tax liability imposed on him by law.'"

Id. (emphasis in original). Because failure to pay cannot be defended for lack of notice under the statutory scheme, there must be "a legal duty to inquire about and pay…taxes without any notice." *Id*. Furthermore, the Missouri Supreme Court in *State ex inf. Mitchell v. Heath*, 132 S.W. 2d 1001, 1005 (Mo. 1939) analyzed a similar eligibility requirement for school directors and concluded that although the County Assessor failed to include the candidate on that year's tax assessment , that oversight "did not relieve him of his obligation to pay the…taxes." .

Brown does not assert he was given incorrect information by the County or City Collector's offices concerning his taxes. *See, Brewen v. Leachman*, 657 S.W.2d 698, 702 (Mo.App. E.D. 1983); *Rottjakob v. Leachman*, 521 S.W.2d 397, 400 (Mo.banc 1975). Thus, with or without receipt of a tax bill, Brown was obliged to inquire and to tender timely payment of his City taxes.

Second, Brown's ambiguous argument that he was not in arrears because his mortgage holder "enjoyed" a "thirty-day grace period" misconstrues 24 C.F.R. § 3500.17(k). No provision of 24 C.F.R. § 3500.17(k) extends a grace period to Brown or his mortgage company for late payment of City taxes.

As a RESPA regulation, 24 C.F.R. § 3500.17(k) regulates the relationship between mortgage and escrow companies. *See Tamaiolo v. Mallinoff*, 281 F.3d 1, 3 (1st Cir. 2002). In fact, the First Circuit Court of Appeals held that RESPA "does not regulate municipalities." *Id*. In *Tamaiolo*, the First Circuit stated that the provisions of 24 C.F.R. § 3500.17(k)(3) (regulating situations in which a financial institution must make installment or lump sum payments on city taxes, subject to the services offered by the taxing jurisdiction) could not be interpreted to require a city to offer the option of making payments in installments or in an annual lump sum. *Id*.

Further, Brown's claim of a grace period for payment of City taxes is contrary to § 443.453, RSMo, which provides:

> Financial institutions…which are mortgage servicers, shall pay property tax obligations which they service from escrow accounts, as defined in Title 24, Part 3500, § 17, Code of Federal Regulations, in one annual payment before the first day of January of the year following the year for which the tax is levied.

This statute directs mortgage companies making real property tax payments on behalf of borrowers to make those payments in the same manner as the property owner pursuant to § 94.300, RSMo. No federal or state law or regulation excuses Brown's late payment in this case, or overrides § 115.346, RSMo.

C. THE CIRCUIT COURT PROPERLY APPLIED SECTION 115.346 TO THE CITY OF ST. PETERS AND THIS ELECTION

Brown's argument based on the location of § 115.346, RSMo, in the Revised Statute books lacks merit.

Section 115.346 states that it applies "notwithstanding any other provisions of law to the contrary." It also specifically applies to "candidate[s] for a municipal office." Notably, § 115.346 was adopted by the legislature as a new "Section 4" in House Bill 676 which was enacted in 1999. The renumbering of "Section 4" to be "Section 115.346" of the Revised Statutes was by the Revisor of Statutes. Consequently, the arguments of Appellant/Relator re the placement of this section at a particular place in the revised statutes are totally without merit.

Appellant apparently contends that § 115.346 is rendered ambiguous when its introductory clause, "Notwithstanding any other provisions of law to the contrary," is construed with § 115.305, RSMo. When interpreting a statute, the ultimate guide is the intent of the legislature. In ascertaining that, it is appropriate for this Court to consider the statute's history, surrounding circumstances, and examine the problem in society to which the legislation was addressed.

It is clear § 115.346, RSMo was adopted as an extension of § 79.250, RSMo. For over 100 years, Missouri has required that "No person shall be elected or appointed to any [city] office who shall at the time be in arrears for unpaid city taxes. . . ." See Historical and Statutory Notes following § 79.250 in Vernon's Annotated Missouri Statutes tracing these provisions back to their enactment in 1895. *Laws of Missouri, 1895*, p. 65.

Section 79.250 was considered by the Eastern District of the Missouri Court of Appeals in *In re Williams,* 943 S.W.2d 244 (Mo. App. E.D. 1997). The *Williams* Court interpreted § 79.250's prohibition against a candidate's assumption of office when he "shall *at the time* be in arrears for any unpaid city taxes." *Williams* concluded that "at the time" meant when the poles closed on Election Day. Two years later, a statute which was assigned by the Revisor of Statutes, § 115.346, RSMo, was enacted as an apparent legislative response to that interpretation of § 79.250.

There is no repugnancy between § 115.346 and § 79.250. The two statutes should be read together and harmonized "with a view to giving effect to a consistent legislative policy." *See*, *State ex rel. Equality Sav. & Bldg. Ass'n v. Brown*, 68 S.W.2d 55, 787-88 (Mo. 1934). Section 115.346 addresses certification for the ballot if that person is in arrears for city taxes on the last day to file a Declaration for Candidacy. A potential candidate can thereafter pay his taxes, and qualify to participate as a write-in candidate. Also, taxes may become delinquent between the Declaration date and election date. Thus, § 79.250 also prohibits a candidate from taking office if he is in arrears when the polls close.

Furthermore, in 2002 the Missouri Legislature enacted § 71.005, RSMo, which specifies that "no person shall be a candidate for municipal office unless such person complies with the provisions of § 115.346, RSMo, regarding payment of municipal taxes or user fees." Although Brown did not challenge the enforceability or constitutionality of § 79.250 (See LF 2 (Second Amended Petition)), these statutes trace the persistent legislative interest in, inter alia, assuring timely payment of municipal taxes and fees, expediting the collection of same, and assuring that those in arrears for municipal taxes or user fees are current in their obligations when certified for the printed ballot and elected to office.

Brown urges this court to disregard the clear language of § 115.346 and render it a meaningless statute. A statute should be interpreted as a whole so as to effectuate the legislative intent. *Bray v. Brooks*, 41 S.W.3d 7, 13 (Mo. App. W.D. 2001) citing *State ex inf. Miller v. St. Louis Trust Co.*, 74 S.W.2d 348, 357 (Mo. 1934). "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning." *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). "Construction of statutes should avoid unreasonable or absurd results." *Taylor v. McNeal*, 523 S.W.2d 148, 152 (Mo. App. 1975). "Furthermore, the legislature is presumed not to have intended a meaningless act." *City of Willow Springs v. Missouri State Librarian*, 596 S.W.2d 441, 444 (Mo. banc 1980). Brown's proposed interpretation of § 115.346 is inconsistent with its legislative history, its own very specific language, and would render the statute meaningless.

D. BROWN IS PERSONALLY RESPONSIBLE FOR CITY TAX PAYMENTS

Chapter 137 of the Missouri Revised Statutes governs the assessment and levy of property taxes. Section § 137.075, RSMo, states, "Every *person* owning or holding real property…on the first day of January, including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year." (italics added). The City of St. Peters, as a fourth class city, has specific authority to assess and enforce City property taxes in the manner prescribed in §§ 94.190 to 94.330. Pursuant to § 94.310, "The enforcement of all taxes authorized by §§ 94.190 to 94.330 shall be made in the same manner as is provided by law for the collection and enforcement of the payment of state and county taxes." Brown admits that <u>Shawn C. Brown</u> and Rhonda R. Brown are the registered taxpayers for the St. Peters property taxes that became delinquent on January 1, 2004.

Brown asserts that he personally was not in arrears for payment of the taxes because they were owed by an artificial entity; his marital or joint tenancy with Rhonda R. Brown. Brown does not deny that he is <u>an owner</u> of the subject property. The Supreme Court case of *In re Estate of Armack*, 561 S.W.2d 109 (Mo. 1978), held that, in an estate by the entirety, it was proper to tax them as a joint tenancy, and <u>each spouse was to be taxed at a one-half interest in the property</u>. *Id*. at 112. Therefore, applying this analysis to City property taxes, Brown is responsible for at least half the tax obligation, if not jointly liable for the entire obligation.

Further, in *State on inf. Bellamy, Pros. Atty., ex rel. Harris v. Menengali*, 270 S.W. 101, l.c. 102-3 (Mo. 1925), this Court held that an owner of joint property, whose taxes were paid exclusively by her husband, still qualified as a candidate for School Board Director despite a statute requiring that person to be a taxpayer "who shall have paid a state and county tax within one year next preceding…her…election." This Court determined that the candidate met the taxpayer qualifications despite the fact that her husband actually paid the taxes on their joint property. *Id*. The court reasoned that, "If a person owns an interest in property and pays a tax thereon, he pays his tax regardless of…to whom the property is assessed." *Id*. quoting, *State ex rel. Circuit Attorney v. Macklin*, 41 Mo. App. 335, 343 (St. L. 1890).

Menengali is a double edged sword. If a person may qualify for candidacy because tax payments were made by another on jointly owned property, then the converse must also be true when the payments are not made by either joint tenant.

Additionally, any contrary argument would violate Brown's property rights. One recourse for collection of delinquent property taxes is the seizure and sale of the property. § 94.310, RSMo. Hypothetically, if this recourse were utilized to relieve Brown's tax debt, Brown would expect to recover at least half of any surplus funds received for the sale of the property. Brown is and was at all relevant times an owner of St. Peters residential property, and should not be permitted to dodge his tax obligations by hiding behind his marital interest.

II. THE JUDGMENT OF THE CIRCUIT COURT UPHOLDING THE CONSTITUTIONALITY OF SECTION 115.346, RSMo, SHOULD BE AFFIRMED IN THAT THE OPEN ELECTIONS PROVISIONS OF ARTICLE I, SECTION 25 OF THE MISSOURI CONSTITUTION ARE NOT VIOLATED BY THE REQUIREMENT OF SECTION 115.346, RSMo, THAT A CANDIDATE BE

CURRENT ON HIS CITY TAX OBLIGATIONS ON THE LAST DAY TO FILE A DECLARATION OF CANDIDACY FOR MUNICIPAL OFFICE[1]

Article I, § 25 of the Missouri Constitution provides that "all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The guaranty of "free and open elections" means "that every qualified voter may freely exercise the right to cast his vote without restraint or coercion of any kind and that his vote, when cast, shall have the same influence as that of any other voter." *Preisler v. Calcaterra*, 243 S.W.2d 62, 64 (Mo. 1951). The restriction of Section 115.346 on candidate eligibility does not restrain a voter from voting or diminish the strength of a vote. Moreover, Brown will be permitted to participate in the April 6 election as a write-in candidate, is campaigning for the office of Mayor on that basis, and any qualified voter will be permitted to cast a vote for Brown.

The guaranty of free and open elections "protects the right of any eligible citizen to become a candidate for public office." *Preisler*, 243 S.W.2d at 64 (emphasis added).

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[1] This Point II responds to Appellant's Point II. Appellant's Point II does not preserve any contention that the provisions of § 71.005, RSMo, and St. Peters Code § 105.035 which incorporate the provisions of § 115.346, RSMo, are unconstitutional. Therefore § 71.005, RSMo, and St. Peters Code § 105.035 continue to preclude relief for Appellant/Relator even if, *arguendo*, § 115.346, RSMo, would be held to be unconstitutional.

Clearly, the restriction in § 115.346 that only individuals who are not in arrears on city taxes or municipal user fees may be candidates for municipal office is an "eligibility" requirement. Cf., *State ex rel. McElroy v. Anderson*, 813 S.W.2d 128, 129 (Mo. App. E.D. 1991) (holding that a durational residency requirement for county prosecuting attorney is an eligibility requirement and not a qualification). Because Brown's January 20 tax arrearage only made him "ineligible" for ballot certification under § 115.346, the protection of Article I, § 25 was not violated. Id.

III. THE JUDGMENT OF THE TRIAL COURT UPHOLDING THE CONSTITUTIONALITY OF SECTION 115.346, RSMo, SHOULD BE AFFIRMED IN THAT THE TRIAL COURT CORRECTLY APPLIED THE RATIONAL BASIS STANDARD AND PROPERLY DETERMINED THAT SECTION 115.346, RSMo, DID NOT VIOLATE THE EQUAL PROTECTION PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION OR OF ARTICLE I, SECTION 2, OF THE MISSOURI CONSTITUTION.[2]

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[2] This Point III responds to Appellant's Point III. Appellant's Point III does not preserve any contention that the provisions of § 71.005, RSMo, and St. Peters Code § 105.035 which incorporate the provisions of § 115.346, RSMo, are unconstitutional. Therefore, § 71.005, RSMo, and St. Peters Code § 105.035 continue to preclude relief for Appellant/Relator even if, *arguendo*, § 115.346, RSMo, would be held to be unconstitutional.

A. <u>RATIONAL BASIS IS THE APPROPRIATE TEST</u>

Brown's claim that § 115.346, RSMo, is an unconstitutional regulation of ballot access does not warrant strict scrutiny. Brown's reliance on *Jackson County Board of Election Commissioners v. Paluka*, 13 S.W.2d 684 (Mo.App. W.D. 2000), is misplaced.

First, the court in *Paluka* <u>never reached the constitutional issue</u>, but specifically based its decision on the interpretation and application of the statute. *Id*. at 689.

Second, the appropriate equal protection analysis is the reasonable basis standard because § 115.346 does not involve a ballot access restriction that warrants heightened scrutiny. Section 115.346 must be presumed constitutional, and must not be invalidated unless it "plainly and palpably affronts fundamental law embodied in the constitution." *Linton v. Missouri Veterinary Med. Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999) (*quoting Consol. Sch. Dist.v. Jackson County*, 936 S.W.2d 102, 103 (Mo. banc 1996)).

In response to Equal Protection challenges, Missouri courts have applied the rational basis test unless the classification at issue involves a fundamental right or a suspect class. *Stewart v. Dir. of Revenue,* 702 S.W.2d 472, 474-75 (Mo. banc 1986). The United States and Missouri Supreme Courts agree there is no fundamental right to hold public office. *Bullock v.* Carter, 405 U.S. 134 (1972); *Asher v. Lombardi*, 877 S.W.2d 628, 630 (Mo. banc 1994) <u>citing</u> *Clements v. Fashing*, 457 U.S. 957, 963 (1982). Thus the desire to run for office does not compel a heightened standard of review under the equal protection clause.

The claim that § 115.346, RSMo, regulates access to the ballot does not necessarily subject it to heightened scrutiny. *See, Burdick v. Takushi*, 504 U.S. 428, 433

(1992). Rather, laws governing ballot access are subject to heightened scrutiny only when they address certain problematic classifications, which is <u>not</u> involved in the present situation.

The United States Supreme Court has applied heightened equal protection scrutiny in two types of ballot access cases: (1) those dealing with classifications based on wealth, and (2) those involving classifications that burden "new or small political parties or independent candidates." *Clements v. Fashing*, 457 U.S. 957, 964-65 (1982) (plurality opinion). Other courts have followed this approach. *See, Golden v. Clark*, 564 N.E.2d 611 (N.Y.1990); *see also, O'Connor v. Nevada*, 27 F.3d 357 (9th Cir. 1994) (indicating that heightened scrutiny is appropriate for ballot restrictions that involve wealth or economic status or that are based on a candidate's association with a political party). All courts addressing laws requiring candidates to be non-delinquent on their taxes have concluded this is <u>not</u> a classification based on wealth. *See, Corrigan v. City of Newaygo*, 55 F.3d 1211 (6th Cir. 1995); *Deibler v. Rehoboth Beach*, 790 F.2d 328 (3rd Cir. 1986).

Thus, § 115.346 does not implicate either type of ballot access restriction that warrants heightened scrutiny. Although this Court applied strict scrutiny in the context of a campaign finance and disclosure law, "denying the right to run for public office based on the particular office sought," but noted that "[u]nfortunately, 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 Educ. and Political Club v. Danforth*, 561 S.W.2d 339, 347, 349 (Mo. 1977). Significantly, since the *Labor's Educational and Political Club* decision, the Missouri Supreme Court has held that running for public office is <u>not</u> a fundamental right. *See*, *Asher v. Lombardi*, 877 S.W.2d 628, 630 (Mo. banc 1994), *citing Clements v. Fashing*, 457 U.S. 957, 963 (1982). Thus, this Court should not apply heightened scrutiny to restrictions of § 115.346 on candidacy, but should apply the reasonable basis test. This rational basis test provides that a law does not violate equal protection if there is a "plausible policy reason for the classification." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

B. SECTIONS 115.346, 71.005 AND CITY CODE SECTION 105.035 DO NOT OFFEND EQUAL PROTECTION STANDARDS

RSMo §§ 115.346 and 71.005, and § 105.035 of the St. Peters City Code, afford Brown equal protection of the laws. The rational basis standard dictates that a classification will survive if "the state's purpose in creating the classification is legitimate and 'if any statement of facts reasonably may be conceived to justify the means chosen to accomplish that purpose.'" *Linton v. Missouri Veterinary Med. Bd.*, 988 S.W.2d 513, 515-16 (Mo. banc 1999) (*quoting Missourians for Tax Justice Educ. Project v. Holden,* 959 S.W.2d 100, 103-04 (Mo. banc 1998), *quoting McGowan v. Maryland*, 366 U.S. 420, 426 (1961)). Under the rational basis test, this Court will not determine whether the Legislature should have chosen a different way to accomplish its goal. *Id.* at 516. If the Legislature's determination is debatable, the presumption is in favor of validity. *Id* at 515-16.

Section 115.346, RSMo, enacted in 1999 as § 4 of House Bill 676, specifically provides:

> "**Notwithstanding any other provisions of law to the contrary, no person shall** be certified as a **candidate for municipal office, nor shall such person's name appear on the ballot as** a candidate for such office, **who shall be in arrears for any unpaid city taxes** or municipal user fees **on the last day to file a declaration of candidacy for office**." (emphasis added).

It is clear beyond cavil that Brown falls within the ambit of this statute. Consequently, only if a court decided that the statute was unconstitutional as applied to Brown could the name of Mr. Brown properly be placed on the ballot.

Judge Rauch in her personally written Order issued on February 19 and her formal Order and Judgment on February 20 found that the standard of review of Mr. Brown's equal protection challenge is "**rational basis.**" Supp. LF 29-30; see copy in Appendix to this Brief.

1. <u>COUNSEL FOR BROWN HAS ADMITTED SECTION 115.346 PROBABLY SURVIVES RATIONAL BASIS SCRUTINY</u>

In oral arguments before Judge Rauch on February 18, counsel for Mr. Brown conceded that if the "rational basis" standard, rather than a "strict scrutiny" standard was applied, then Mr. Brown would **not** be entitled to relief:

> "MR. DEUTSCH: * * * And its unlikely that the Court is going to be able to find the **rational basis** is the appropriate test, but if you do, **I would concede**, although no court has, that that **<u>would</u>**

probably save this unconstitutional provision, so that is really what is before the Court." Tr. 122-123, emphasis added.

2. RATIONAL BASIS REVIEW IS APPROPRIATE

In *Corrigan v. City of Newaygo*, 55 F.3d 1211 (6th Cir. 1995), cert. denied 516 U.S. 1211 (1995), the most recent federal appellate court case to issue on the matter of payment of taxes being a prerequisite to a person being placed on the ballot, applied the **rational basis test** and **upheld the statute (ordinance)** in question. *See also*, the following **Eighth Circuit** cases **applying a rational basis** standard of review with respect to an equal protection challenge to state constitution or statutes by a person in order to be a candidate for public office:

- *Antonio v. Kirkpatrick*, 579 F.2d 1147 (8th Cir. 1978) (state auditor residency requirement; per Gibson, Floyd, J.)
- *Stiles v. Blunt*, 912 F.2d 260 (8th Cir. 1990) (minimum age for state representative; per McMillan, J.)

Clearly, the rational basis test for an equal protection challenge should be applied and when it is, the statutory tax payment requirements before the close of filing must be upheld.

3. SECTION 115.346, RSMo, SERVES AT LEAST THREE RATIONAL GOVERNMENT INTERESTS

Section 115.346, RSMo, passes the reasonable basis test because it is a reasonable way for the State to achieve at least three legitimate goals, to-wit: (1) enforcement of local tax codes and collection of overdue taxes; (2) having its cities and municipalities governed by law-abiding people; and (3) decreasing public cynicism towards local government and its officials.

(A) <u>SECTION 115.346, RSMo, ASSISTS WITH THE ENFORCEMENT OF TAX LAWS</u>

First, the Missouri Constitution gives local political subdivisions, such as cities, the authority to tax, "under power granted to them by the general assembly for county, municipal, and other corporate purposes." Article X, § 1, Missouri Constitution. It is in the interest of the State that its municipalities be sustained by the taxes and fees paid by their citizens. As stated by Justice Holmes, "[t]axes are what we pay for civilized society." *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue,* 275 U.S. 87, l.c. 100 (1927) (Holmes, J., dissenting). Cf., *Ploch v. City of St. Louis*, 138 S.W.2d 1020, 1024 (Mo. 1940) ("[A]ll cities, towns and villages have for many years been authorized to license, tax and regulate the occupation of merchants."). The provisions in § 115.346, RSMo, serve that interest. It does so in the same manner as a statute applied in *Corrigan v. City of Newaygo,* 55 F.3d 1211 (6th Cir. 1995), cert. denied 516 U.S. 1211 (1995). There, the Sixth Circuit upheld a city ordinance that prohibited city residents who were delinquent on their local taxes or water and sewer fees from having their names placed on the ballot for local office. *Id*. at 1212.

The *Corrigan* Court applied the rational basis test to the ordinance and concluded the city had shown the ordinance was rationally related to its legitimate interests. The ordinance served the city's goal of enforcing its economic tax regime. *Id.* at 1216. Not only did it punish those individuals who did not fulfill their financial obligations to the city, but it provided an incentive for elective candidates to pay their taxes. *Id.*

Corrigan noted that the Supreme Court has recognized the interests of government entities in administering the tax system as so significant as to outweigh a person's religious objection to paying taxes under the fundamental right analysis required by the Free Exercise Clause. *Id.* at 1217 (*citing United States v. Lee*, 455 U.S. 252 (1982)). The Sixth Circuit concluded that the ballot eligibility ordinance was "rationally related to the administration of the tax system" and did not violate Appellants' equal protection rights. *Id.*

Further, the only other United States Circuit Court of Appeals to issue an opinion on a similar ballot access restriction did not discuss the City's interest in administering the tax system. *See, Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3rd Cir. 1986), discussed further, *infra*. The only case to apply *Deibler*, and disagree with *Corrigan,* was a United States District Court in Texas. *See, Hunt v. City of Longview, 932 F. Supp. 828,840-41 (*E.D. Tex. 1995) *aff'd without opinion at* 95 F.3d 49 (5th Cir. 1996). In *Hunt*, however, the court struck down a City Charter requirement that required the Mayor or any Councilman to forfeit his office if he was in arrears in payment of taxes or other liabilities due to the City. *Id*. at 832. Of import, both the *Hunt* and *Deibler* Courts agreed that the rational basis test was the appropriate standard. *Hunt* is readily distinguishable in that the City Charter provision required removal from office upon a single day of arrearage for payment of city taxes. *Id*. That is not the case under § 115.346. *Corrigan* is a more analogous and persuasive authority for the position that the restrictions of § 115.346 serve the City's interest in enforcing its tax regime.

(B) <u>CANDIDATES FOR MUNICPAL OFFICE SHOULD COMPLY WITH THE TAX LAWS</u>

Next, Missouri has a longstanding policy that requires candidates for local office to be current on their tax obligations. Since 1895 Missouri has required for a fourth class city[3] that "no person shall be elected or appointed to any [city] office who shall at that time be in arrears for unpaid city taxes." *Laws of Missouri, 1895*, p. 63. *See*, Historical and Statutory Notes in Vernon's Annotated Missouri Statutes following § 79.250. Other statutes and charter provisions have also required candidates for local office to be current on their taxes. *See*, *State ex rel. Thomas v. Williams*, 12 S.W. 905 (Mo. 1889) (final writ of mandamus seeking certificates of election denied; candidate had not paid tax arrearage "at the time of the election" as required by St. Louis Charter); *State of Missouri ex rel. Circuit Attorney v. Macklin*, 41 Mo. App. 335 (St. L. 1890) (quo warranto action testing whether St. Louis school board of directors had paid school taxes as required by 1887 statute; Court ousted director who had not paid as required by statute); *State ex rel. Crow v. Page*, 41 S.W. 963 (Mo. 1897) (city marshal of Rich Hill ousted because he had not paid taxes as required by what is now § 79.250 until after the date of the election); and *State ex rel. Selsor v. Grimshaw*, 762 S.W.2d 868 (Mo. App. E.D. 1989) (candidate for

[3] St. Peters is a fourth class city.

mayor of Kimmswick who had not paid taxes as required by § 79.250 until after the date of the election was not allowed to take office).

In construing a statute containing a statutory requirement that a candidate for a school board had paid taxes, this Court speaking through Judge (then Commissioner) Hyde in *State ex Inf. Mitchell ex rel. Goodman v. Heath*, 132 S.W.2d 1001, l.c. 1004 (Mo. 1939), found the purpose of such a statute to be:

> "The evident purpose of this requirement is to have such officers, who impose taxes on others and determine how they shall be spent, chosen from among those citizens who have been paying, and will likely continue to pay taxes."

Appellant/Relator seeks to be a candidate for mayor of a fourth class city. A mayor of a fourth class city is a part of the local legislative process inasmuch as all bills are to be presented to him to be signed or vetoed. § 79.140, RSMo. A mayor of a fourth class city presides over the Board of Aldermen. § 79.120, RSMo. A mayor of a fourth class city has the duty to "be active and vigilant in enforcing all laws and ordinances for the government of the city, and he shall cause all subordinate officers to be dealt with promptly for any neglect or violation of duty. . . ." § 79.200, RSMo.

The mayor of a fourth class city in Missouri is therefore involved in the enactment of taxes and the enforcement of the payment of taxes. It is rational to require that persons who seek to be a mayor with tax formulation and enforcement duties be required to have paid his taxes current by the close of filing for that office. Just as it is rational and lawful for governmental authorities to require even clerks who are involved in the collection of taxes to pay their taxes in a proper and timely manner as an example, it is even more important that the chief executive of a city to set an example. *See,* Ryeski, "Of Taxes and Duties: Taxing the System With Public Employees' Tax Obligations," 31 *Akron L. Rev.* 349 (1998), which collects cases where public employees have been disciplined or fired for not keeping their personal taxes in order. Ryeski in his introduction notes:

> "Governmental agencies, including and especially those involved in the taxation function, having compelling reasons to insist that individuals in their employ comply with the laws of the land, including the personal tax requirements."

Ryeski then points out that by requiring public employees to promptly pay their taxes, such fosters voluntary compliance by those persons who are obligated to pay the taxes. He also notes that:

> "Elected officials, who ostensibly serve as role models for their constituents, can also be said to have an enhanced duty to file their tax returns and otherwise comply with the tax laws." (p. 367).

And see also, *Rotolo v. Merit Systems Protection Board*, 636 F.2d 6, l.c. 8 (1st Cir. 1980), holding that a taxing agency did not act arbitrarily in discharging a clerical employee who had not properly paid her taxes, the Court reasoned:

> "If it became publicly known that the IRS knew of and tolerated tax evaders as employees, even in clerical positions, the resulting cynicism or disbelief in IRS' law enforcement

> effectiveness might logically reduce to some degree public compliance with the revenue laws. 'The IRS is rightly concerned with its image of honesty and integrity. Members of the public, who must turn square corners in tax matters, demand no less of revenue officials.'"

Section 115.346 also serves the legitimate state goal of requiring those people who make and enforce local laws to obey those laws.

The U.S. Supreme Court has recognized that each state may prescribe the qualifications of its officers. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). Requiring potential municipal candidates, under § 115.346, to be current in their tax obligations on a particular date is an appropriate qualification for local officials, which is reasonably related to the state goal of law-abiding lawmakers. As stated by this Court in the context of a public official who was convicted of federal crimes:

> "The public is entitled to the service of public officials who are of the highest character. It is of paramount importance to the public to have confidence in the honor and integrity of public officials. Society expects much from its public officials and rightly so."

State ex inf. Peach v. Goins, 575 S.W.2d 175, 183 (Mo. banc 1978).

Furthermore, Missouri has an interest in ensuring that its municipalities are governed by individuals who demonstrate a commitment to the municipality, and who are generally "good public citizens." An individual who timely pays taxes and user fees shows that he takes his public and civil obligations seriously. Brown does not challenge the propriety of the City tax at issue, and in fact recognizes that he will have enforcement responsibilities for City tax codes if elected as Mayor. Tr. P. 88, L. 15-23. Section 115.346 also promotes the laudable goal of assuring that municipal officials are spending money that comes, in part, from their own pockets, not just from the pockets of the anonymous public.

In *Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3rd Cir. 1986), the Third Circuit struck down a city charter's requirement that a candidate for city commission be a non-delinquent taxpayer on the basis that the requirement failed the rational basis test. The city asserted that non-delinquent taxpayers demonstrate a greater commitment to the well-being of the city. *Deibler*, 790 F.2d at 334. Judge Ziegler[4] rejected this argument because he determined that a person's failure to pay taxes could be the result of "economic, ideological, or other personal grounds" and that it did not reflect the person's commitment to city government. *Id.* at 334. Judge Ziegler's analysis will not stand up under "rational basis" scrutiny in Missouri, which requires only a minimal showing to justify the means used to accomplish the state's purpose. *Linton v. Missouri Veterinary Med. Bd.*, 988 S.W.2d 513, 515-16 (Mo. banc 1999); *See* Tr. 122-123. Moreover, Brown does not claim an inability to pay the taxes, or any moral, philosophical, religious or

[4] The decision was by a three judge panel. District Judge Ziegler, sitting by assignment, authored the opinion of the court. Judge Sloviter concurred in the result and offered a separate opinion; Judge Weis dissented.

political opposition to the taxes at issue. Tr. 90. Thus *Deibler's* analysis does not apply to this case. *Deibler* also did not consider whether the provision should be upheld as a rational means of enforcing City tax laws.

The Eighth Circuit rebuffed a similar challenge to Missouri's minimum age requirement for State Representatives. *Stiles v. Blunt*, 912 F.2d 260 (8th Cir. 1990). Just as some delinquent taxpayers may otherwise be good citizens, some individuals below the age of 24 may have the maturity and skills necessary to serve as state officeholders. Nonetheless, the Court concluded the age restriction was permissible: "Missouri's objective of ensuring that its lawmakers have some degree of maturity and life experience is constitutional and the minimum age requirement is a legitimate means of accomplishing this objective." *Id.* at 267.

The *Stiles* Court also observed that "the state's interest in maturity and experience entitles it to draw the line somewhere, and the line it has drawn is not unreasonable." *Id.* at 266 n.10. Similarly, it is reasonable for the Missouri General Assembly to use § 115.346 as a means of enforcing tax laws, drawing a payment line for delinquent taxes "somewhere," and ensuring that local public officials possess the character necessary for good governance.

(C) SECTION 115.346, RSMo, FORCES MORE PUBLIC RESPECT FOR MUNICIPAL OFFICIALS

Finally, Missouri seeks to encourage its citizens' respect for government. Permitting public officials to create tax and fee obligations for other people, while they are themselves careless in meeting their own obligations, may increases cynicism toward government and its officials. Missouri has a legitimate goal in fostering respect for local government officials, because this helps assure a more law-abiding citizenry. *Cf.*, *State v. Lock*, 259 S.W. 116, 124 (Mo. 1924) (observing that "[i]f courts and public officials, charged with its enforcement, violate the law of the land in their zeal to convict, it follows that the people, who look to their knowledge and integrity, will not respect the law."). Section 115.346, similar to the ordinance in *Deibler*, "may promote public respect for public officials and may reduce distrust. *Deibler v. City of Rehoboth Beach*, 790 F.2d 328, 341 (3rd Cir. 1986) (Weis, J., *dissenting*).

Because all cases analyzing laws similar to § 115.346 have applied a "rational basis" standard of review, and because § 115.346 helps Missouri accomplish several legitimate state goals, the Circuit Court judgment should be affirmed.

ADDITIONAL ARGUMENTS

IV. WITHOUT CONSIDERATION OF ANY CONSTITUTIONAL ISSUES, NO RELIEF CAN BE GRANTED TO APPELLANT BROWN BECAUSE OF THE PROVISIONS OF SECTION 115.125.2, RSMo.

Brown did not press for an early adjudication in the St. Charles County Circuit Court. See time line between January 20 and February 20 set forth in the statement of facts. Brown did not arrive at this Court until Monday, February 23. Judge Rauch accommodated Brown's request for advanced consideration, as well as the St. Charles County Counselor's request for a hearing to be further advanced "to 2/23/04 or earlier." *See* Supp. LF 1-3. Appellant Relator cannot be heard to complain that it was too late for this

Court on February 24 to order his name be placed on the ballot for the office of mayor of the City of St. Peters at the April 6, 2004, election.

Subsection 1 of § 115.125, RSMo, requires that the "**agency or authority calling the election**" give a notice of election containing a sample ballot with the names of the candidates as provided in subsection 2 of § 115.127, RSMo, to the election authority "**not later than 5:00 p.m. on the tenth Tuesday prior to the election**." For the April 6 mayoral election in St. Peters, that would mean that such notice would have to be given by the City of St. Peters (the "agency or authority calling the election")[5] before 5:00 p.m. on Tuesday, January 27, 2004. Such notice was given, but it did not include the name of Mr. Brown. The only possible exception to this requirement is set forth in subsection 2 of § 115.125, RSMo:

> ". . . 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, 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**, before the election, be **permitted** to make late notification to the election authority **pursuant to court order**, which except for good

[5] The City of St. Peters was not a party in the circuit court action, and is not a party in the mandamus action in this Court.

> cause shown by the **election authority** in opposition thereto shall be freely granted **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 authority to order** an **individual** or issue **be placed** on a ballot **less than six weeks before the date of the election**, except as provided in sections 115.361 and 115.379."
>
> (emphasis added).

It is noted that –

- "The sixth Tuesday before the election" is February 24. Therefore, the deadline for faxing the amended election notice was **<u>Tuesday, February 24, at 5:00 p.m.</u>**
- A court, however, is without authority after midnight on **<u>Monday, February 23</u>** to enter the prerequisite court order which must be entered **<u>not "less than six weeks before the date of election</u>**." *See* § 1.040, RSMo, which required that in the computation of time, the first day is excluded and the last day is included. Only by including **<u>both days</u>** (April 6 and February 24) could it be asserted that action taken on February 24 would be timely. **<u>Consequently, no court order permitting or ordering an amendment of the notice to the election authority can be entered at any time on February 24 or any subsequent date.</u>**

The plain language of subsection 2 of § 115.125, RSMo, **only** allows a court order to be secured by a "**political subdivision** or special district" from a "**circuit court**" to allow a late notice of election to be given to the St. Charles County election authority between January 27 and February 24. Consequently –

- Any court action to place Appellant/Relator's name on the ballot at this late date must be by the "**political subdivision,**" i.e., the City of St. Peters, **not** by Mr. Brown.
- The City of St. Peters was **not** named as a party in either the circuit court action[6] or in the mandamus action in this Court. Consequently, relief **cannot** be afforded **at the request of Appellant/Relator Brown** to secure a court order directing the "**political subdivision**" City of St. Peters to go to Court and secure an order by 5:00 p.m. on February 24 to amend the notice of election.
- Any action to amend the notice of election pursuant to subsection 2 of § 115.125 must be by a "circuit court." Consequently, an original action in this Court will not lie against the St. Charles election authority to accept an amended notice.
- The original mandamus action in this Court is **not** against the Honorable Lucy D. Rauch directing that she, as the "circuit court," issue an order

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[6] The St. Charles County Circuit Court did <u>not</u> rule the motion to dismiss the action in that court for the failure to join the City of St. Peters which was alleged to be an indispensable party, Judge Rauch holding that issue to be <u>moot</u>.

> pursuant to subsection 2 of § 115.125, to provide for an amendment of the election notice to include Mr. Brown's name.

This Court in *State ex rel. Referendum Petitioners Committee Regarding Ordinance #4639 v. Laskey*, 932 S.W.2d 392 (Mo. banc 1996), held that a circuit court was without jurisdiction to place a referendum provision on the ballot later than allowed in § 115.125, and that –

> "The provisions of section 115.125 **are mandatory, not directory**. . . . The Respondent was without authority to order the measure added to the ballot." (emphasis added).

The provisions of § 115.125 being "mandatory," it is clear that –

- After January 27, 2004, only the City of St. Peters, which is not a party, (or at least in an action where the City of St. Peters is a party) can invoke the jurisdiction of a court to order an election notice to be amended to include an additional candidate's name.
- Any order to amend a notice of election must be made by a circuit court, not in an original action in an appellate court.
- Any amendment of the notice of election can only be given if a proper court order is obtained and the amended notice is received by the St. Charles County election authority **not later than 5:00 p.m.**, on February 24.

Consequently, **no** effective relief can be given to Appellant/Relator in either the appeal or the original mandamus action. Appellant/Relator cannot be heard to complain that no relief can be given at this juncture. The appeal record reflects that the action in

St. Charles County was filed on January 30, 2004. No expedited procedures were immediately sought. The City of St. Peters was never joined. Prompt and proper action simply were not taken.

V. APPELLANT IS ALSO PRECLUDED FROM HAVING HIS NAME PLACED ON THE BALLOT BECAUSE OF THE PROVISIONS OF SECTION 71.005, RSMo, AND SECTION 105.035 OF THE CITY CODE OF ST. PETERS STILL CONSTITUTE A BAR TO SUCH PLACEMENT INASMUCH AS THE APPELLANT'S POINTS DO NOT ADDRESS THE CONSTITUTIONALITY OF THOSE SECTIONS AND BECAUSE THE CITY OF ST. PETERS IS AN INDISPENSABLE OR NECESSARY PARTY AND HAS NOT BEEN JOINED AS A PARTY IN THE ST. CHARLES COUNTY CIRCUIT COURT OR IN THE ORIGINAL PROCEEDINGS IN THIS COURT

Appellant in his Second Amended Petition in Circuit Court also asserted that § 71.005, RSMo, and § 105.035 of the City Code of St. Peters also unconstitutionally precluded his being a candidate. See paras. 23, 29 and 38. Section 71.005 and § 105.035 imposes the same requirements as § 115.346, RSMo. Appellant in the Points in his Brief has not addressed the constitutionality of § 71.005 and § 105.035, and therefore has not preserved those issues for consideration. Therefore, § 71.005, RSMo, and § 105.035 of the City Code of St. Peters continue to be a bar to Appellant's name being properly placed on the ballot.

Relator did not join the City of St. Peters as a Defendant. Because of Supreme Court Rule 84.04, Mr. Brown was required to join the City of St. Peters. The City was an indispensable party and without joinder, jurisdiction did not exist with respect to any challenge to the ordinance. *Eastern Missouri Laborers' District Council v. City of St. Louis*, 951 S.W.2d 654 (Mo. App. E.D. 1997).

Judge Rauch did **not reach the issue** of whether St. Peters had to be joined as a party. Consequently, that issue remains for determination by the Circuit Court.

The City of St. Peters was not joined as a party in the original mandamus action in the Supreme Court. Furthermore, Brown in the original mandamus action here does not challenge the constitutionality of § 105.035 of the St. Peters City Code.

Because there has not been a joinder of the City of St. Peters in either action, the constitutionality of § 105.035 cannot be determined in either action. Additionally, the constitutionality of § 105.035 of the St. Peters City Code has not been raised in the mandamus action.

Therefore, this Court may not now grant relief to place Mr. Brown's name on the ballot because § 71.005, RSMo, and § 105.035 of the St. Peters City Code still stands as an impediment and because the City of St. Peters is not a party to either action.

CONCLUSION

For the above and foregoing reasons, (1) the Alternative Writ of Mandamus entered in SC85845 on February 24, 2004, should be quashed; (2) Respondent Chrismer as Director of Elections should be ordered to remove the name of Appellant/Relator from the April 6, 2004, ballot, and should be further directed to not certify any votes for Appellant/Relator other than proper write in votes; (3) the Petition in SC85845 should be dismissed; and (4) with respect to the appeal in SC85846 either the judgment below should be affirmed, the issues presented on appeal should be determined to be moot or the appeal should be transferred to the Eastern District of the Missouri Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH RULE 84.06

The undersigned certifies:

1. That this Brief complies with Rule 84.06; and

2. That this Brief contains 13,389 words according to the word count feature of Microsoft Word Version 1997 software with which it was prepared.

3. That the disks accompany this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.

4. That this Brief meets the standards set out in Mo. Civil Rule 55.03.

Alex Bartlett