IN THE
SUPREME COURT OF MISSOURI

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

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

Reply Brief and Cross-Appeal Respondents' Brief of Appellants State of Missouri and Attorney General

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Statement of Facts

Response to Respondents/Cross-Appellants' Statement of Facts

We clarify two issues.

Respondents/cross-appellants (plaintiffs) make a pair of factual assertions regarding a legislative motivation behind §115.348.[1] The first is that "Rizzo and Senator Callahan had many political difference in the past, including substantial political differences at the time §115.348 was passed." Respondents/Cross-Appellants' Brief at 13-14. The second is that "[a]fter passage of HB 58, Rizzo had a conversation with Sen. Callahan wherein Sen. Callahan told him that §115.348 would eliminate him from office." *Id.* at 14. The testimony is not in evidence.

When the plaintiffs offered such testimony regarding such "facts" at trial, the appellants/cross-respondents (defendants) objected on the bases of relevance and hearsay, Tr. 16-18, and the trial court ultimately sustained the objections and rejected the testimony, Tr. 36-37. The plaintiffs' cross-appeal

[1] All citations are to RSMo, 2000, except for those referring to §115.348, which are to RSMo, Cum. Supp. 2005.

does not challenge that evidentiary ruling. As such, it is improper for the plaintiffs to raise such "facts" here.

The other issue relates to the manner in which §115.348 was enacted. At trial, Mr. Rizzo testified that §115.348 was added to House Bill 58 in such a manner to avoid public scrutiny of the provision. Tr. 18. He further testified that it was never introduced as a stand-alone bill during the 2005 legislative session, and that if it had, he would have had the opportunity to testify against it and "tell [his] side of it[.]" Tr. 16-18 and 34. But a stand-alone bill (Senate Bill 542) containing §115.348 in the same form as it appears in House Bill 58 was in fact introduced, received a public hearing in committee, and was voted out "do pass." The Court may take judicial notice of these documents**,** but for judicial convenience, the State provided the introduced version of the bill and List of Actions to the trial court by way of a post-trial letter brief, and attaches them in the Appendix, App. 3-4.

Argument

Reply Brief in Support of the State's Appeal

The State has appealed the Circuit Court's decision that §115.348 violates principles of equal protection and is, therefore, void and of no effect. In response, Respondents and Cross-Appellants Rizzo, Runnels, and Castles ("Mr. Rizzo") filed a brief in opposition to the State's appeal, as well as in support of their cross-appeal alleging multiple procedural defects in the passage of House Bill 58, which contains §115.348. In Section I below, the State offers suggestions in reply to Mr. Rizzo's respondents' brief. And in Sections II through VIII, we respond to Mr. Rizzo's cross-appellants' brief.

I. Section 115.348 does not violate federal or state constitutional principles of equal protection.

In its opening brief, the State highlighted the extraordinary burden that Mr. Rizzo must meet for a court to strike down §115.348, a burden made all the heavier when the argument against it is substantive, *i.e.*, equal protection, and the challenge is brought prior to the statute taking effect and without a specific set of facts under which the statute may operate in a discriminatory manner. Thus, it is important for the Court to note that Mr. Rizzo, for all the personal harm and indignity he would bring to the lawsuit, is not alleging that the §115.348 is unconstitutionally discriminatory as applied to himself. Instead, Mr. Rizzo brings a challenge that the statute is so discriminatory on its face that no set of facts

exist in which it can constitutionally be applied. Such a challenge requires an extraordinary showing. *Police Retirement System of St. Louis v. City of St. Louis*, 763 S.W.2d 298, 302 (Mo. App. 1998) ("party challenging the constitutionality of the statute has the burden of proving that the statute denies equal protection and the legislation will not be set aside if any set of facts may be conceived to justify it" (emphasis added)).

A. Section 115.348 does not itself create a classification.

The threshold element in any equal protection analysis is whether the statute in question draws a classification and treats similarly situated people differently. *Arnold v. City of Columbia*, 197 F.3d 1217, 1220 (8th Cir. 1999). Mr. Rizzo failed to make this showing. Section 115.348 does one thing, and one thing only: it prohibits federal criminals of all kinds from running for state or county offices in Missouri. It does not distinguish between categories of federal criminals. It does not distinguish between the offices for which such criminals are barred from running. It does not distinguish between incumbents or newcomers. It does not distinguish between individuals in this state to whom this prohibition applies. The statute applies to everyone in Missouri: it prohibits anyone who has been convicted of any federal crime, and it protects the ballot for all offices. A more inclusive effort to bar federal criminals from the State's election process cannot be imagined.

Mr. Rizzo resists this obvious reading of the statute. Instead, he carefully highlights the classification that he believes the statute draws. He concludes: "Thus, on the face of [115.348], it creates a classification of persons who, solely by virtue of the fact that they have been convicted of crimes classified as felonies or misdemeanors under the laws of the United States, are ineligible to be candidates for elective office." Respondents' Brief at 21. If the Court will take Mr. Rizzo at his word, and review only the classification he says is created by §115.348, then the State will accept Mr. Rizzo's identification of this classification for purposes of this argument.

This is because such a classification cannot possibly be found to violate equal protection. The class (federal criminals) is not constitutionally protected, the treatment (exclusion from seeking office) interferes with no fundamental rights, and the two are plainly related to the legitimate state interest of keeping criminals from running for office. This legitimate state interest can be expanded upon and explained, *see infra*, but such exposition is not necessary because keeping federal criminals from seeking office is, by itself, a legitimate state interest.

Therefore, under Mr. Rizzo's own statement of the classification drawn by §115.348, his claim lacks any merit and the analysis need not proceed any further.

B. Mr. Rizzo has failed to established a basis for heightened scrutiny and, thus, Section 115.348 need further a legitimate state interest to be valid.

After determining whether a classification exists, this Court has routinely moved to the question of "whether the challenged classification operated against a suspect class or impinges upon a fundamental right." *State v. Pike*, 162 S.W.3d 464, 470 (Mo. banc 2005). If so, some heightened level of scrutiny will be applied, but if not, the minimal "rational basis" is all that the State must establish to defeat Mr. Rizzo's claim. Mr. Rizzo does not even attempt to clothe the class of federal criminals with the knight's armor of "suspect" or "protected" class status. Instead, his argument depends entirely on his contention that §115.348 impinges on several fundamental rights: (1) his own right to run for

office; (2) his own right to vote for himself; (3) his co-plaintiffs' right to vote for Mr. Rizzo.[2]

Mr. Rizzo, however, cites no case in which the right to run for office, or the right to vote for a particular individual as candidate rather than the franchise in general has ever been held to be a fundamental right. Mr. Rizzo readily admits that the United States Supreme Court, in *Clements v. Fashing*, 457 U.S. 957 (1982), held that the right to run for office is not a fundamental right. Respondents' Brief at 24. But, Mr. Rizzo claims that his right to run for his office

[2] The trial court did not rule that the statute violates any of his co-plaintiffs' rights. And in their cross-appellant's brief, Mr. Rizzo, Ms. Runnels, and Ms. Castles make no argument in this regard. Therefore, they have waived any appeal of such point. If the Court considers the argument as preserved by their inclusion of a section in their Respondents' Brief, it lacks merit, as we discuss herein.

is somehow different. He tries to liken his situation to that of Mr. Antonio or others who have challenged candidacy waiting periods, or potential candidates who have successfully challenged ballot restrictions that were unduly discriminatory against poor candidates or candidates of small parties. *Clements*, at 967-968.

But nowhere in *Clements* or in any of the cases that Mr. Rizzo offers is there a hint of a suggestion of a possibility that a convicted federal criminal's right to run for office is in anyway fundamental or protected. Similarly, Mr. Rizzo offers no support for the proposition that his "right" to vote for a convicted federal criminal, or that of his co-plaintiffs is fundamental or protected. Instead, every case cited in Respondents' Brief involved some fundamentally-secured right, such as the right to vote in general, or the right to travel from state-to-state as affected by reasonable waiting periods for candidates who have no individually invalidating behavior in their past. *See Clements*, at 970-972; *Antonio v. Kirkpatrick*, 579 F.2d 1147, 1149-50 (8th Cir. 1978) (10-year residency requirement to be a candidate for State Auditor subject to rational basis review only).

Accordingly, Mr. Rizzo has failed to establish any basis for this Court to apply a heightened level of scrutiny to §115.348. Instead, as with most claims of equal protection, the Court need merely satisfy itself that the statutory prohibition

against federal criminals running for state or county offices is rationally related to some legitimate state interest.

C. Section 115.348's prohibition against federal criminals running for office is rationally related to a legitimate state interest, and is not less so merely because restrictions for other criminals have not yet been extended this far.

Recall that, when trying to establish that §115.348 draws a classification, *i.e*., treats similarly situated individuals differently, Mr. Rizzo plainly stated that this section "creates a classification of persons who, solely by virtue of the fact that they have been convicted of crimes classified as felonies or misdemeanors under the laws of the United States, are ineligible to be candidates for elective office." Respondents' Brief at 21. But Mr. Rizzo abandons this reading when the question comes around to whether a rational basis exists upon which a reasonable legislator could decide that the enactment in questions will further – perhaps not completely or perfectly, but will at least further – a legitimate state interest. The reason for Mr. Rizzo's shift is that a rational basis for a statute that keeps criminals – perhaps not all criminals or the perfect subset of criminals, but at least criminals – from running for office is sound public policy.

Mr. Rizzo abandons the plain meaning of §115.348, and now argues that "the issue is how §115.348 treats those with federal convictions . . . differently from persons convicted of state misdemeanors (or felonies) for the purpose of the

right to run for elective office." Respondents' Brief at 23. He continues to pursue this approach throughout his argument. *See* Respondents' Brief at 33 ("§561.021.2, RSMo specifically addresses the rights of a person convicted of felonies to hold public office, and is directly at odds with §115.348"), and at 33 ("Appellants have failed to articulate valid state interests to be advanced by excluding from elective office people convicted only of federal court misdemeanors and those convicted of other misdemeanors"), and at 34 ("Section 115.348 deprives [Mr. Rizzo] of [his right to run for office], . . . by treating him differently from all other persons convicted of state misdemeanors").

Nowhere does Mr. Rizzo cite any support for his implied contention that a plaintiff can challenge a new enactment by combing the entirety of the Revised Statutes of Missouri in search of statutes that he can characterize as inconsistent. The short answer to this long and indulgent argument is that Mr. Rizzo is a federal convict, having plead guilty to a federal misdemeanor in the midst of trial for more than a dozen felony counts of fraud and check kiting. Section 115.348 specifically addresses federal misdemeanants, and provides that they may not run for public office. Section 561.021, on the other hand, says nothing about federal misdemeanants and, though it may prohibit Mr. Rizzo from holding the office he currently holds due to his conviction of a crime involving dishonesty (lying to a bank officer, *see* §561.021.1(2)), Section 561.021 says nothing at all about who may run for election. The section upon which Mr. Rizzo places so

much emphasis is limited to outlining the circumstances under which certain elected or appointed officials may be ousted from office. This may be practically related to the right to run for office, perhaps, but it is not the same. In short, Mr. Rizzo's attempt to leverage §561.021 into some kind of "evidence" that the statute under attack, §115.348, is irrational must fail.

Instead, the law is well-settled that Mr. Rizzo cannot import a statute and a chapter that were not taken up by the General Assembly in order to create the appearance of a conflict and then argue that the conflict demonstrates that the General Assembly acted irrationally. Under Missouri law, a "person in the position of the [plaintiff] is not normally permitted to assert unconstitutionality simply because others are exempted from a statutory disability which applies to him." *State ex inf. Gavin v. Gill*, 688 S.W.2d 370, 372 (Mo. banc 1985). The only question before the Court, and the only question to which Mr. Rizzo may address himself, is "whether the measure under attack was debatably calculated to reach the targeted evil." *Mid-State Distr. Co. v. City of Columbia*, 617 S.W.2d 419 (Mo. App. 1981).

Moreover, the law is well-established that to pass equal protection muster the classification does not need to be perfect, nor the governmental interest perfectly and completed sated; the law only fails when it "has no reasonable basis and is purely arbitrary." *Pike*, 162 S.W.3d at 470. Nor does the fact that the legislation should have been, or might have been, or might yet be, broader

and more inclusive mean that the initial step in the right direction by the General Assembly is irrational. *City of St. Louis v. Liberman*, 547 S.W.2d 452, 458 (Mo. banc 1977). The General Assembly is entitled to work "one step at a time," *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955), and it "need not run the risk of losing an entire [legislative] scheme simply because it failed through inadvertence or otherwise, to cover every evil that might conceivably have been attacked," *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 808-09 (1969).

D. Conclusion

Section 115.348 represents a substantial step toward the legitimate public purpose of keeping criminals – those who have demonstrated their inability to conform their actions to the same law they would like to make or administer – off our ballots and out of our elections. This step, which applies to all federal criminals of all kinds, may not be the perfect remedy and it may not be the entire remedy, but it simply cannot be said that it is irrational.

Mr. Rizzo spends many pages and much effort trying to spin hypothetical situations that may arise in the future with other would-be politicians in which §115.348 might appear to be unwise or imperfect.[3] But this Court's job is not to

[3] No such argument is available to Mr. Rizzo on his facts, however, because the only irrational result would be if the General Assembly were not permitted to find a way to keep an individual who has been convicted and jailed

strike down potentially unwise or imperfect work of the Legislative Branch, but rather to confine that drastic remedy to provisions that "clearly and undoubtedly contravene the constitution," and those that "plainly and palpably affront the fundamental law embodied in the constitution." *Etling v. Westport Heating & Cooling Svs, Inc.*, 92 S.W.3d 771, 773 (Mo. banc 2003).

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for the federal offense of lying to a bank officer regarding monetary transactions from seeking election to an office that establishes and oversees a budget of tens of millions of dollars.

II. The addition of §115.348 to H.B. 58 did not change the original purpose of the bill, and, accordingly, did not violate Art III. §21 of the Missouri Constitution.

[responds to cross-appellants' Point I]

Mr. Rizzo argues that the addition of §115.348 to House Bill 58 violated Article III, §21 of the Missouri Constitution because it "change[d the] original purpose" of the bill. Cross-Appellants' Brief at 42. In support, he details the number of new sections and pages added to the bill at various stages in the legislative process, categorizes each of the 165 subsections in the final bill, and identifies each of the 54 chapters of the Revised Statutes of Missouri affected by the final bill. Cross-Appellants' Brief at 43-48. While interesting, and perhaps illustrative of the complex legislative process in Missouri, Mr. Rizzo's argument makes no attempt to show how the addition of §115.348 changed the original purpose of the bill, and for that reason, fails to establish an Article III, §21 violation. The trial court's finding on this claim must not be disturbed.

Article III, §21 of the Missouri Constitution provides that "no bill shall be so amended in its passage through either house as to change its original purpose." A procedural challenge under this constitutional provision is disfavored and is successful only where an act "clearly and undoubtedly" is given an amendment that is "not germane" to the "original purpose" of legislation. *Stroh Brewery Co. v.*

State, 954 S.W.2d 323, 325-26 (Mo. banc. 1997) (internal quotations omitted). The "'original purpose' of a bill is its general purpose, not the mere details through which and by which that purpose is manifested and effectuated." *McEuen v. Missouri Board of Education*, 120 S.W.3d 207, 210 (Mo. banc 2003) (internal quotations omitted).

This Court has made clear that Article III, §21 does not categorically prohibit "[e]xtensions or limitations of a bill's scope – even new matter." *Missouri State Med. Ass'n v. Missouri Dept. of Health*, 39 S.W.3d 837, 840 (Mo. banc 2001). Likewise, the Court has said that §21 was never intended to "inhibit the normal legislative processes in which bills are combined and additions necessary to comply with the legislative intent are made." *Blue Cross Hosp. Service, Inc. of Missouri v. Frappier,* 681 S.W.2d 925, 929 (Mo. banc 1984).

Here, the general purpose of the introduced version of House Bill 58 embraces all matters relating to political subdivisions.[4] *See* L.F. 40-48 (introduced version of House Bill 58). Section 115.348 is self-evidently "germane" to this purpose because it sets qualifications for candidates for public office in Missouri, including office-holders in political subdivisions like Jackson

[4] Section 70.120.3, RSMo 2000, defines the term "political subdivision" as "any agency or unit of this state which is now, or hereafter shall be, authorized to levy taxes or empowered to cause taxes to be levied[.]"

County. And so, the addition of §115.348 did not "clearly and undoubtedly" violate Article III, §21. *Cf. C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 327 (Mo. banc 2000) (provision regulating billboards was "germane" to bill relating to transportation, because billboards could have impact on highways). Accordingly, the trial court's judgment that §115.348 did not change the original purpose of House Bill 58 must be sustained.

III. House Bill 58 does not contain multiple subjects, and accordingly, does not violate Article III, § 23 of the Missouri Constitution. [responds to cross-appellants' Point II]

Mr. Rizzo raises another disfavored procedural challenge – one based on Article III, §23's single subject clause.[5] Cross-Appellants' Brief at 50. In support,

[5] Count IV of the First Amended Petition contains Mr. Rizzo's Article III, § 23 claim. L.F. 18-20 (First Amended Petition). Nowhere in that count, or anywhere else in the petition, did Mr. Rizzo raise a "clear title" claim. For that reason, the Court need not address it here. *See City of St. Louis v. Missouri Comm'n on Human Rights*, 517 S.W.2d 65, 71 (Mo. banc 1974) (constitutional questions not raised in petition not properly before trial court). Nonetheless, if this Court were to decide to reach this issue, the title "related to political subdivisions" withstands this challenge. In cases where the title "does not describe most, if not all, legislation enacted" or "include nearly every activity the

Mr. Rizzo provides the Court with some single-subject boilerplate, parrots the standard for evaluating such claims, but makes no effort to apply that standard to the case at bar. *See* Cross-Appellants' Brief at 50-52. In that §115.348 is related to the subject of the bill, the trial court's finding that House Bill 58 withstands a single subject challenge must be affirmed.

The test for whether a bill violates the Article III, §23's single subject clause is whether the challenged provision "fairly relates to the same subject, has a natural connection therewith or is a means to accomplish the law's purpose." *City of St. Charles*, 165 S.W.3d at 151, *citing Fust v. Attorney General*, 947 S.W.2d 424, 428 (Mo. banc 1997). Put another way, "the subject of a bill, within the meaning of article III, section 23 'includes all matters that fall within or reasonably relate to the general core purpose of the proposed legislation.'" *Id., citing Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994). The enacted bill is the only version relevant to the single subject requirement, and the bill's title is the first place to look to determine its subject. *Missouri State*

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state undertakes," the Court has systematically rejected clear-title challenges. *See, e.g., Missouri State Med. Ass'n*, 39 S.W.3d at 841 (no clear title violation in bill entitled "relating health services"); *Corvera Abatement Tech. v. Air Conservation Comm'n*, 73 S.W.2d 851, 861-62 (Mo. banc 1998) (no violation in bill entitled "relating to environmental control").

Med. Ass'n v. Missouri Dept. of Health, 39 S.W.3d 837, 840 (Mo. banc 2001). The party asserting a single subject claim is required to establish constitutional provision had been "clearly and undoubtably" violated. *City of St. Charles v. State of Missouri*, 165 S.W.3d 149, 150 (Mo. banc 2005).

The *City of St. Charles* case is the most recent Supreme Court analysis of such a claim. There, the challenged provision prohibited tax increment financing ("TIF") of certain developments in a flood plane, and was contained in a bill with the title "related to emergency services." This Court noted that "in the abstract there seems to be no connection at all between emergency services and tax increment financing . . . ." *City of St. Charles*, 165 S.W.3d at 151-52. However, because the goal of the TIF provision was to limit development in potentially dangerous areas so as to ensure adequate emergency services elsewhere, the provision did indeed "fairly relate" to emergency services." *Id.* at 152.

Similarly, in *State Medical Association,* this Court upheld the final version of a bill that mandated insurance coverage for early cancer detection, and also (1) made HIV-related information confidential; (2) mandated insurance for mental illness and chemical dependency; (3) established a health insurance advisory committee, among other things. 39 S.W. 3d at 839. The Court held that, despite the number of chapters involved, the bill covered the single subject of "health services." *Id.* at 841.

Here, §115.348 (the challenged provision in House Bill 58) is far less attenuated from the subject of House Bill 58 than was the case in the two cases discussed above. The fact that Respondent Rizzo is challenging this statute because it prohibits him from running for an office (chair of the county legislature) of a political subdivision (Jackson County) underscores the fact that such statute "fairly relates" to political subdivisions, the subject of House Bill 58. Indeed, qualifications of county legislators go to the very core of political subdivision law. For that reason, the finding below that House Bill 58 does not have multiple subjects should be affirmed.

IV. Section 115.348 does not violate Article III, §28 [responds to cross-appellants' Point III]

Mr. Rizzo's argument that §115.348 improperly amended §561.021.2, in violation of Article III, §28 of the Missouri Constitution lacks merit.[6] Section

[6] This claim may not properly be before the Court. Below, Mr. Rizzo moved for leave to amend the First Amended Petition, on March 7, 2006, to add this claim. LF 446 (docket). The State's attorneys told him they would not oppose the motion. But his motion was never taken up and granted by the trial court, and the amendment containing the claim was never filed (apart from the language appearing in the motion for leave). Even if the amendment was made by operation of Rule 55.33(b), the amendment containing the claim does not appear in the Legal File.

115.348 does not amend §561.021.2. More importantly, for purposes of this claim, he misses the point of Article III, section 28.

The provision reads:

> No act shall be revived or reenacted unless it shall be set forth at length as if it were an original act. No act shall be amended by providing that words be stricken out or inserted, but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended.

Mo. Const. art. III, §28.

This provision is a procedural limitation, which requires that a "complete section [be set forth] so that no further search will be required *to determine the provisions of such section as amended*." *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 326-327 (Mo. banc 2000)(emphasis added). It is designed to avoid confusion and the inconvenience that would come from fragmented statutory amendments, and to ensure that legislators are aware of the content and effect of the amended law." *Id* (citations omitted). Thus, whether a new or amended statute "has consequences for other statutes does not bring it into conflict with" Article III, §28. *Id.* at 330, *citing Boyd-Richardson v. Leachman*, 615 S.W.2d 46, 53 (Mo. banc 1981).

And as a procedural limitation, its use "to attack the constitutionality of statutes is not favored." 12 S.W.3d at 327 (citation omitted). Thus, a court must "interpret procedural limitations liberally and will uphold the constitutionality of a statute against such an attack unless the act *clearly and undoubtedly* violates the constitutional limitation." *Id*. (emphasis in original), *citing Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994).

Mr. Rizzo's claim, then, that §115.348 has consequences for another statute, §561.021, is not only a disfavored procedural challenge, the claim does not even fall within the sphere that Article III, §28 regulates.

Mr. Rizzo cites *State ex rel. McNary v. Stussie*, 518 S.W.2d 630 (Mo. banc 1974), in passing, Cross-Appellants' Brief at 53, but that case only highlights the flaw in their argument. In *Stussie*, a bill was enacted that would have the Missouri revisor of statutes comb through the entirety of the statutes and substitute one phrase for another. *Id.* at 630. The bill did not specify by number the statutes that were to be changed. *Id*. Instead, the bill provided that an age limitation appearing in Missouri statutes would be "deemed" changed:

> [W]henever the term 'twenty-one years of age' is used as a limiting or qualifying factor [in the Missouri Revised statutes] it shall be deemed to mean 'eighteen years of age', and the revisor of statutes is hereby authorized to

> make the appropriate changes in the Revised Statutes
>
> of Missouri as they are revised, reenacted or reprinted.

Id. at 631. The Court held that the bill violated Art. III, §28. The word "deemed" did not suffice to amend the phrase in all statutes, and was as violative of Article III, §28 as if the act had specifically used the word "substitute." *Id*. at 636.

Since *Stussie*, the Missouri Supreme Court has repeatedly rejected Article III, §28 challenges, holding that regardless of whether a bill has consequences on existing statutes, it will not run afoul of Article III, §28 where it does not purport to strike out or substitute words in other, existing statutes. *C.C. Dillon,* 12 S.W.3d at 330; *Century 21-Mabel O. Pettus, Inc. v. City of Jennings*, 700 S.W.2d 809, 811-812 (Mo. banc 1985); and *Boyd-Richardson v. Leachman*, 615 S.W.2d 46, 53 (Mo. banc 1981). *See also Klingsmith v. Mo. Dep't of Consumer Affairs*, 693 S.W.2d 226, 231 (Mo. App. W.D. 1985)(same).

This Court should similarly reject Mr. Rizzo's challenge. Section 115.348 does not purport to strike out or substitute words contained in §561.021.2.

Nor could it. The two statutes of course address two different matters, qualification for candidacy (§115.348), and qualification to hold office (§561.021.2). Even if they overlapped, in that both provide for "disqualifications," §115.348 simply provides a new disqualification, which is within the state's authority to establish. Indeed, §561.021.1 – which plaintiff does not challenge – provides that a person holding public office shall forfeit his office upon sentencing

if, among other reasons, "(3) the constitution or a statute other than the code so provides." In short, §§115.348 and 561.021.2 are consistent and complementary.

Mr. Rizzo does characterize §561.021.2 as "an earlier, long established provision." Cross-Appellants' Brief at 53. If he intends to invoke the doctrine of repeal or amendment by implication, it is unavailing. The Court in *Stussie* prefaced its Article III, §28 discussion by noting that the doctrine of repeal or amendment by implication "[was] not pertinent." *Id.* at 635-636. In other words, analyses of that doctrine and Article III, §28 do not overlap. Even so, it is not a doctrine that aids Mr. Rizzo. Repeal by implication is not favored, and Missouri courts have long held that they will therefore attempt to reconcile inconsistent statutes, and that if the statutes cannot be reconciled, the later-enacted statute will control. *E.g., State ex rel. George B. Peck Co. v. Brown,* 105 S.W.2d 909 (1937); *Holoman v. Harris,* 585 S.W.2d 530, 534 (Mo. App. W.D. 1979). Thus even if §115.348 and §561.021.2 were repugnant (which they are not), and even if they could not be reconciled (which they can), §115.348 – as the later-enacted statute – would control.

The Article III, §28 challenge fails.

V. Section 115.348 does not infringe the right to vote or purport to amend the Missouri constitution. [responds to cross-appellants' Point IV]

Mr. Rizzo also contends that §115.348 contravenes his rights of suffrage protected by Article I, §25 and Article VIII, §2 of the Missouri Constitution and constitutes an impermissible attempt by the General Assembly to modify those constitutional protections in violation of Article XII. These arguments are wholly without merit.

The reason is simple: None of these arguments can be squared with the cited constitutional provisions. For example, Article I, §25, which is part of the state's bill of rights, guarantees the "free exercise of the right of suffrage" and provides that "all elections shall be free and open" to voters. It does not purport to limit the General Assembly's ability to establish qualifications for candidates for public office. Similarly, Article VIII, §2 is solely concerned with the qualifications and disqualifications of *voters*, and does not address candidates' qualifications. Finally, Article XII establishes procedures for amending the State's constitution. It does not pertain to statutes that, like §115.348, do not purport to change any constitutional provisions.

Mr. Rizzo cited no case law that supports his novel readings of Article I, §25 and Article VIII, §2. Indeed, accepting his arguments would require the Court to disregard a long line of precedent holding that "rules for interpreting statutes," including the plain-meaning rule, "apply with equal force to the constitution." *Spradlin v. City of Fulton*, 924 S.W.2d 259, 262 (Mo. banc 1996).

Accordingly, the trial court properly rejected the claim.

VI. Section 115.348 does not violate Article VI, § 18. [responds to cross-appellants' Point V]

Mr. Rizzo argues that §115.348 infringes on the Jackson County citizenry's right to establish qualifications for their elective officers, provided by Article VI, §18 of the Missouri Constitution to counties with charter forms of government. In the scant two pages that he spends on the issue, he does not identify, let alone discuss, any provision of the county charter that §115.348 allegedly infringes and the claim should fail on that basis alone.

It also fails on the merits. The "legislative power of Missouri's General Assembly ... is plenary" unless expressly limited. *Board of Educ. of City of St. Louis v. City of St. Louis*, 879 S.W.2d 530, 533 (Mo. banc 1991). And §115.348 does not fall within the only express limitation that Article VI places on the General Assembly's power to legislate with respect to charter counties. That limitation appears in §18(e), "Laws affecting charter counties – limitations," and prohibits only those laws which "provide for any ... office or employee of the county [other than judicial officers] or fix the salary of any of [the county's] officers or employees." The limitation on the General Assembly is, by its plain language, a narrow one.

Further textual support for the General Assembly's authority to regulate candidate qualification for elective office, including in charter counties, can be found in Article VI, §18(b). Section 18(b) expressly contemplates that charter

county officers will be subject to "state" "laws" that affect their "powers and duties": charters adopted by counties must contain a provision "for the exercise of all *powers and duties* of ... *county officers* prescribed by the constitution and *laws* of the *state.*" (Emphasis added.)

The debates over the 1945 Constitution, wherein the charter county provisions first appeared, also favor upholding §115.348. The debates show that Article VI, §18 was framed not to restrict the General Assembly, but to give larger counties – primarily St. Louis and Jackson County – an ability to deal legislatively with unique local problems without first obtaining authorization from the General Assembly.[7] One delegate complained that these home rule provisions would confer on these counties "home rule in name only, but not in fact."[8] As the

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[7] *See* Debates of the Missouri Constitution 1945 p. 2711 ("two main advantages" of Article VI, §18 were (1) "that it will allow the people in those counties ... to tackle their problems in their own way" and (2) relieve burden on General Assembly from having to pass so much special legislation dealing with the large urban communities in St. Louis County and Jackson County) (Statement of Mr. Bradshaw); *id,* p. 2746 (purpose of Article VI, § 18 to "give the county additional power ... to enact some local regulations") (Statement of Mr. Mayer).

[8] Debates of the Missouri Constitution 1945 p. 2734 (Statement of Mr. Heege).

delegate accurately observed, Article VI, §18 as proposed and ultimately adopted gives counties the right to set their "form of government" and "fix the salaries" of its officers, but leaves "the duties of [county] officers [to] still be prescribed by the General Assembly."[9]

Mr. Rizzo cites, without providing meaningful discussion, inapposite cases highlighting issues related to the power of charter cities. Cross-Appellants' Brief at 55-56. The charter city provisions were first adopted in the 1875 Constitution and were an outgrowth of concern that the General Assembly was interfering, "by special act, in the local affairs of every community." *Kansas City v. J.I. Threshing Machine Co.*, 87 S.W.2d 195, 199 (Mo. 1935). To alleviate this problem, the 1875 Constitution gave cities broad rights to frame and adopt their own governments, but required such charters to be "consistent with and subject to the Constitution and laws of the State." *Id., citing* Mo. Const. of 1875, Art. 9, §§ 16-17.

[9] *Id.* Other delegates likewise recognized that "the Legislature [could] change anything the county does" absent "any indirection" otherwise. *Id.*, p. 2779 (Statements of Messrs. Mayer and Ford).

The precise wording of the charter city provisions gave courts difficulty "in determining ... what control remains in the Legislature to add to, change, or take away the rights and powers provided for and exercised under [city] charters." *Id.* at 200. Ultimately, this Court concluded that "as to corporate functions, the city should have free hand in framing its charter, but that as to government functions, which though permission or delegation of the state, the city exercised, the state necessarily retained control" – a test that was difficult to apply. *Id. See also Grant v. City of Kansas City*, 431 S.W.2d 89, 92 (Mo. banc 1968)(remarking on difficult application of corporate/government test).

That difficulty was finally put to rest in 1971 with the adoption of Article VI, §19(a), which provides that charter cities "have all the powers which the general assembly of Missouri has power to confer upon any city, provided such powers are consistent with the constitution of this state *and are not limited or denied ... by statute*." Mo. Const., Art. VI, § 19(a) (emphasis added). Now, the rule is that any city "charter provision that conflicts with a state statute is void." *City of Springfield v. Goff*, 918 S.W.2d 786, 789 (Mo. banc 1996).

Charter counties were another issue. The framers of the 1945 Constitution did not believe that counties were as suitable to home rule as were cities,[10] and

[10] *See* Debates of the Missouri Constitution 1945, p. 2711 (distinguishing cities and counties because a "city is primarily a unit of local self-government"

they used different language in Article VI, § 18's charter county provision than the language used in the charter city provisions. And so, the Court concluded in the first case in which it interpreted Article VI, § 18 that prior cases were "of little help" in analyzing the county charter provisions because "the county charter provisions are wholly unlike others in the constitution" in that they "specifically provide what the county must do with respect to performing state and constitutional functions, and further states what the legislature cannot do." *State on inf. Dalton, ex rel. Shepley v. Gamble*, 280 S.W.2d 656, 659, 662 (Mo. banc 1955).[11]

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whereas counties act with the State "as a unit"; and noting that as a matter of logic, all cities, but not any counties should have home rule, but that an exception for heavily populated counties with atypical problems was appropriate) (Statement of Mr. Bradshaw).

[11] There are a few reported decisions involving charter counties that cite charter city cases. *See Hellman v. St. Louis County*, 302 S.W.2d 911, 916 (Mo. 1957); *Casper v. Hetlage*, 359 S.W.2d 781 (Mo. 1962); *State ex rel. Cole v. Mathews*, 274 S.W.2d 286, 292 (Mo. banc 1954); *Information Technologies, Inc. v. St. Louis*, 14 S.W.3d 60, 62 (Mo. App. E.D. 2000); and *State ex rel. St. Louis County v. Campbell*, 498 S.W.2d 833, 836 (Mo. App. St. Louis 1973). These citations, always used without explanation or analysis, are unsound and inconsistent with *Shepley v. Gamble* and basic principles of constitutional

interpretation. *Spradlin v. City of Fulton*, 924 S.W.2d 259, 262 (Mo. banc 1996) ("rules for interpreting statutes," including the plain-meaning rule, "apply with equal force to the constitution"); *Board of Educ. of City of St. Louis*, 879 S.W.2d 530, 533 (Mo. banc 1991) ("the legislative power of Missouri's General Assembly ... is plenary" unless expressly limited).

Given Mr. Rizzo's failure to identify any provision of the Jackson County charter with which §115.348 is at odds, and based on *Shepley* and the plain language of Article VI, §18, the Court should reject this challenge.

VII. Section 115.348 is not a special law and is not subject to special law notice requirements. [responds to cross-appellants' Points VI and VII]

Mr. Rizzo takes just over 2 pages of his brief and cites, but does not discuss, two cases, in claiming that § 115.348 is invalid as a special law under Article III, §40(30), and that it was therefore passed in violation of the special law notice requirements set forth in Article III, § 42. Cross-Appellants' Brief at 57-59. He complains that the statute was passed with him in mind. *Id.* at 57.[12] The arguments lack merit, because § 115.348 is not a special law.

Mr. Rizzo cites no case in which Article III, §40(30) has been applied to cover such a claim. Instead, Article III, § 40(30) provides that the General Assembly "shall not pass any local or special law ... where a general law can be made applicable." Since 1880, the rule in this State has been that a law "which

[12] As noted in the Response to Respondents/Cross-Appellants' Statement of Facts, the testimony that Mr. Rizzo cites did not come into evidence at trial. Regardless, the intent of any one legislator in passing a bill is plainly of little or no value where it was voted on by 199 others and signed by the governor.

relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and that classification does not depend on numbers." *School Dist. of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 221 (Mo. banc 1991), *quoting State ex rel. Lionberger v. Tolle*, 71 Mo. 645, 650 (1880). This is sometimes called the "rule of 'open-endedness.'" *Walters v. City of St. Louis*, 259 S.W.2d 377, 382 (Mo. banc 1953). Where a law's classification is based on "geography," "constitutional status," or a similar "immutable characteristic," such as a past census calculation, the law is considered special or local. *State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 921 (Mo. banc 1993).

In *Civilian Personnel Division v. Board of Police Commissioners*, 914 S.W.2d 23 (Mo. App. ED 1996), the court of appeals applied these principles and rejected a special law challenge directed at a rule that required all non-supervisory employees of the St. Louis board of police commissioners to be residents of the City of St. Louis within 90 days after appointment. The court found determinative two facts: that "the rule includ[ed] all who desire to be employed as non-supervisory citizen personnel of the Board" and that it "exclud[ed] no one who would seek such a position." *Id.* at 25. Because of these facts, the court concluded, the rule "includ[ed] all who are similarly situated" and did not "constitute[] a special law." *Id.*

Civilian Personnel's analysis applies with equal force to the cross-appellants' special law challenges here. Section 115.348, by its terms, applies to all who seek to qualify as candidates for public office in the State of Missouri. And it excludes no one who would seek to qualify as a candidate for public office in the State. As a result, §115.348 includes all "who are similarly situated" and does not constitute a special law.

Indeed, if §115.348 were to be deemed a special law, then so too would the many other state statutes that, like §115.348, prohibit general classes of persons from holding public office, exercising voting rights, or serving on a jury.[13] And the General Assembly would be rendered powerless to protect the public from persons subject to those laws whose past actions have demonstrated a lack of trustworthiness. Obviously, such a nonsensical result, unsupported by precedent or logic, should be rejected, and the trial court properly did so.

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[13] *See, e.g.,* §561.021.3 (forever disqualifying from holding public office any "person who pleads guilty or nolo contendere or is convicted under the laws of this state or another jurisdiction of a felony connected with the right of suffrage"); §561.026(2) (forever disqualifying from registering and voting any person who is convicted of "a felony or misdemeanor connected with the exercise of the right of suffrage"); §561.026(3) (forever disqualifying from jury service any person convicted of "any felony").

VIII. Section 115.348 does not operate retrospectively. [responds to cross-appellants' Point VIII]

Mr. Rizzo summarily argues that §115.348 violates the retrospective laws prohibition of Article I, § 13 of the Missouri Constitution. This argument is devoid of merit.

A statute operates retrospectively in violation of Article I, § 13 only "if it takes away or impairs a vested right or substantial right or imposes a new duty in respect to a past transaction." *Beatty v. State Tax Comm'n*, 912 S.W.2d 492, 496 (Mo. banc 1995). A "vested right" "must be something more than a mere expectation based upon an anticipated continuance of the existing law." *Fisher v. Reorganized School District*, 567 S.W.2d 647, 649 (Mo. banc 1978). "It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another." *Id.* In other words, a vested right is a right "which is absolute, complete, and unconditional, to the exercise of which no obstacle exists, and which is immediate and perfect in itself and not dependent upon a contingency." *State ex rel. Wayne County v. Hackman*, 272 Mo. 600, 199 S.W. 990, 991 (Mo. banc 1917) (internal citation omitted).

Thus, an "expectation based upon an anticipated continuance of the existing law" does not state a claim under Article I, §13. *Fisher v. Reorganized School Dist.,* 567 S.W.2d 647, 649 (Mo. banc 1978).

Here, the cross-appellants' Article I, §13 argument essentially turns on the contention that Mr. Rizzo has a vested right to seek reelection as Jackson County legislator once his current term expires. But no person has a vested right to hold public office. *State ex inf. Crow v. Evans*, 66 S.W. 355 (1902). In *Crow,* the plaintiff argued that he had a vested right to retain powers incident to a circuit clerk position for which he had been elected, despite a law that transferred those powers to the recorder of deeds. *Id.* at 358. This Court rejected the argument wholesale:

> A person in possession of a public office created by the legislature has no . . . vested interest or private property therein that it cannot modified or repealed by the legislature which created it. Such offices are not held by grant or contract, but are subject to such modifications and changes as the legislative branch of the government may deem it necessary or advisable to enact, unless inhibited by the constitution. This is the law of this state, and generally in the United States.

Id. at 358.

Here, of course, Mr. Rizzo's Article I, §13 claim is even more tenuous. In *Crow*, the plaintiff was challenging a law that prevented him from *keeping* certain "duties and emoluments" of an office for which he had already been elected. In

contrast, Mr. Rizzo is challenging a law that operates to prohibit him from qualifying as a candidate for positions to which he would seek to be elected in the future. When §115.348 went into effect in August 2005, Mr. Rizzo had not even applied to become a candidate for any such position.

And of course, there is no fundamental right to run for public office, *Asher v. Lombardi,* 877 S.W.2d 628, 630 (Mo. banc 1994), *citing Clements v. Fashing,* 457 U.S. 957, 963 (1982), or to vote for a particular candidate or even a particular class of candidates," *Citizens for Legislative Choice v. Miller,* 144 F.3d 916, 921 (6th Cir. 1998).

The most that Mr. Rizzo could be said to have had in August, 2005, was a desire to file as a candidate for re-election. LF 8 (First Am. Pet. ¶ 35), and that Ms. Runnels and Ms. Castles held a desire to support and vote for him, LF 9 (First Am. Pet. ¶ 43). This is merely the kind of "expectation based upon an anticipated continuance of the existing law" that the Missouri Supreme Court has repeatedly held is inadequate to state a claim under Article I, §13. *E.g., Fisher,* 567 S.W.2d at 649.

The trial court properly rejected this claim.

Conclusion

The trial court's judgment striking §115.348 as violative of equal protection guarantees should be reversed, and otherwise affirmed insofar as it rejected all other challenges to the validity of the law.

Respectfully submitted,

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

The undersigned hereby certifies that on this 31st day of March, 2006, the foregoing was e-mailed at 4:05 p.m. to all parties and mailed, postage prepaid, by first class mail on the same date to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 9,043 words.

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

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Assistant Attorney General

Appendix

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