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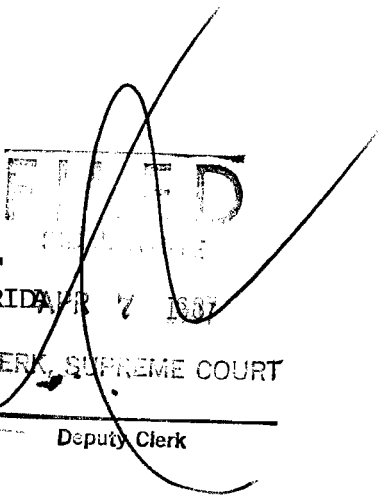

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

PALM HARBOR SPECIAL
FIRE CONTROL DISTRICT

Appellant,

v.

CELESTINE KELLY,

Appellee. /

CASE NO. 70, 119

DCA-2 NO. 86-1150

ANSWER BRIEF OF APPELLEE
CELESTINE KELLY

On Appeal From A Final Order of the
Second District Court of Appeal of Florida

Submitted by:

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I. STATEMENT OF THE CASE AND OF THE FACTS[1]

In December, 1985, the Appellee, Celestine Kelly, (hereinafter "Kelly")[2] filed a Business Agent Application with the Division of Labor, Employment, and Training of the Department of Labor and Employment Security (hereinafter "the Department") (R. 28).[3] On or about January 3, 1986, the Florida Public Employer Labor Relations Association (hereinafter "the Association") and the City of Largo, Florida (hereinafter "the City"), sent a letter of protest to the Department claiming that a business agent's license should not be issued to Kelly (R. 29-30). On or about January 9, 1986, a representative of "several public sector clients" sent a letter of protest to the Department objecting to a business agent's license being issued to Celestine Kelly based on the fact that he is not a citizen of the United States (R. 32-33).

On or about February 3, 1986, the Association and City requested information concerning those persons who had been granted business agent licenses and who were not citizens of the United States (R. 35-36). In response, the Department advised that it had not requested citizenship status since 1981 due to the passage of Florida Statutes, Section 455.10 (1979) (R. 37).

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[1]The Appellee rejects the Appellant's statement of the case and of the facts as being incomplete in certain material respects. The Appellee will therefore provide its own statement of the case and of the facts.

[2]Kelly was an applicant at the administrative stage of this proceeding, the Appellee in the Second District Court of Appeal, and the Appellee before this Court.

[3]Florida Statutes, Section 447.04(2)(a) (1985) requires that every person desiring to act as a business agent obtain a license or permit to do so.

On or about February 24, 1986, a Notice of Hearing was issued pursuant to Florida Statutes, Sections 120.57, 120.60, and 447.04, (1983). The issue to be determined was:

> Whether Section 447.04(1)(a), Florida Statutes prohibits the issuance of a business agent's license to Celestine Kelly because he is not a citizen of the United States; or whether a license can be issued under the authority of Section 455.10, Florida Statutes.

(R.42). The said hearing was conducted on March 13, 1986 (R. 1-26). Kelly, Palm Harbor Special Fire Control District (hereinafter "the District"),[4] and the City were represented (R. 2). Subsequently, briefs were filed on behalf of Kelly and the District (R. 44-89).

On April 8, 1986, the Hearing Officer issued a Recommended Order recommending that a business agent's license be issued to Celestine Kelly (R. 98-104). After the issuance of the Recommended Order the City of Tallahassee and the Association sought to intervene in these proceedings (R. 90-97). On April 24, 1986, the District filed Exceptions to the Recommended Order (R. 105-117).

On May 6, 1986, the Director of the Department issued a Final Administrative Order in this matter. The order concluded that the Kelly should be granted a business agent's license irrespective of his not being a citizen of the United States. The order relied on a 1979 amendment to Florida Statutes, Section 455.10, wherein the legislature revisited the issue of citizenship requirements and, therefore, left Section 455.10 as the most recent expression of legislative intent (R. 120-126).

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[4]The District was the Appellant in the Second District Court of Appeal and the Appellant before this Court.

On May 16, 1986, the District filed its Notice of Appeal (R. 127-128). On July 19, 1986, the District served its initial brief (R.132-163). By letter dated August 11, 1986, the Department advised the Court of Appeals that it would not be filing a brief. On August 26, 1986, Kelly filed his Answer Brief. On September 19, 1986, the District filed its Reply Brief (R.209-228).

On January 23, 1987, the Second District Court of Appeals affirmed the decision of the Department which had issued a business agent's license to Kelly (R.231-249).

First, the Court of Appeals agreed with the Department and Kelly that the 1979 enactment of Section 455.10, which provides that

> No person shall be disqualified from practicing an occupation or profession regulated by the state solely because he is not a United States citizen.

was the last substantive expression of legislative intent on the subject covered by that statute (R.237). However, the Court of Appeals concluded that the more specific statute, Section 447.04(1)(a), controls over the more general statute, Section 455.10 (R.238).

Second, having found that Section 447.01(1)(a) controls, the Court of Appeals held that the citizenship requirement of that section violates the equal protection clause (R.243-249).

On February 19, 1987, the District filed a Notice of Appeal invoking the jurisdiction of this Court. Art. V, §3(b)(1), Fla. Const.

II. STATEMENT OF THE ISSUES

A. Did the Court of Appeals err in concluding that Florida Statutes, Section 447.04(1)(a) (1977), which prohibits non-citizens

from becoming business agents, controls over Florida Statutes, Section 455.10 (1979), which provides that "No person shall be disqualified from practicing an occupation or profession regulated by the State solely because he is not a United States citizen"?

B. If Florida Statutes, Section 447.04(1)(a) (1977) was not repealed by Florida Statutes, Section 455.10 (1979) and still purports to exclude aliens from engaging in the occupation of business agent, does Florida Statutes, Section 447.04(1)(a) violate the equal protection clause of the Fourteenth Amendment to the United States Constitution?

III. SUMMARY OF THE ARGUMENT

The Department issued a license to Kelly, irrespective of his non-citizenship, based on the amendments to Florida Statutes, Section 455.10 (1979), which specifically provides that "No person shall be disqualified from practicing an occupation or profession regulated by the State solely because he is not a United States citizen." The Department concluded that Section 455.10 had repealed by implication the citizenship requirement contained in Section 447.04(1)(a) (1977). The District appealed. The Court of Appeals held that Section 455.10 did not repeal Section 447.04(1)(a), but further held that the citizenship restriction in Section 447.04(1)(a) violated the equal protection clause. The District appeals again. Kelly would respectfully submit that this Court should affirm the Department's decision to issue a license to Kelly either on statutory grounds or constitutional grounds.

First, it is well-established that this Court need not reach the constitutional inquiry, if it can affirm the decision of the

Department on other grounds. Kelly would submit that the Department correctly concluded that Section 455.10 (1979) impliedly repealed the citizenship requirement of section 447.04(1)(a). Amendment by implication is supported by the fact that Section 455.10 is the last expression of legislative intent on the subject of citizenship restrictions; Section 455.10 is not only the last but is also a comprehensive treatment of the subject in which the legislature strictly prohibited the State from restricting employment based on citizenship; the Department has interpreted Section 455.10 as having impliedly repealed Section 447.04(1)(a) since 1981 with no response from the legislature. Therefore, the Court should avoid the constitutional issue and conclude that Section 447.04(1)(a) has been impliedly repealed.

Second, if this Court were to affirm the Court of Appeals decision that Section 447.04(1)(a) was not impliedly repealed by Section 455.10, then the Court should affirm the Court of Appeals decision finding that Section 447.04(1)(a) violates the equal protection clause by denying aliens the opportunity to pursue the occupation of business agent. It is well-established that a State law which discriminates on the basis of alienage is inherently suspect and subject to strict judicial scrutiny. The District has not even attempted to argue that Section 447.04(1)(a) could withstand strict scrutiny which requires proof of advancing a compelling State interest by the least restrictive means available. Rather the District argues that the State's discrimination based on alienage falls within the narrow political function exception to the rule of strict scrutiny. Kelly would submit that the political functions exception is not applicable because it

fails both prongs of the political function exception to strict scrutiny. Section 447.04(1)(a) is both overinclusive as found by the Court of Appeals and is applied to a private occupation, which does not participate directly in the formulation, execution, or review of broad public policy and does not perform functions which go to the heart of representative government.

IV. ARGUMENT

For reasons which follow, it is respectfully submitted that the Final Administrative Order of the Department, granting a business agent's license to Kelly irrespective of the fact that he is not a citizen of the United States, should be affirmed.

A. The Court of Appeals Erred in Concluding That the Restriction on the Licensing of Business Agents Based on Citizenship Contained in Section 447.04(1)(a) (1977) Controls Over the Prohibition on the Restriction From Practicing an Occupation Based on Citizenship Contained in Section 455.10 (1979).

In late 1985, Kelly applied for a business agent's license pursuant to Florida Statutes, Section 447.04(2)(a) (1983) (R.28). The District objected to the issuance of a business agent's license to Kelly solely because Kelly is not a United States citizen (R. 32-33). Pursuant to the procedures set forth in Florida Statutes, Section 447.04 (2)(b) (1983), and Florida Statutes, Chapter 120 (1983), a hearing was held to consider the objection posed by the District (R. 42).

The decision as to whether a business agent's license should be issued focused on the conflict between Florida Statutes, Section 447.04 (1)(a) (1977) and Section 455.10 (1979).

> 447.04 Business Agents; licenses, permits etc.-
> (1) No person shall be granted a license or a permit to act as a business agent in the state:
> (a) Who is not a citizen of the United States.
> (b) Who has been convicted of a felony and has not had his civil rights restored.
> (c) Who is not a person of good moral character.
>
> 445.10 Restriction on requirement of citizenship. - No person shall be disqualified from practicing an occupation or profession regulated by the state solely because he is not a United States citizen.

Faced with this conflict, the Final Administrative Order provided that a license should be issued even though Kelly is not a citizen of the United States. The Order was based on a careful review of the history of the two statutes and the conclusion that the Florida legislature revisited the issue of citizenship requirements in 1979 and Section 455.10 (1979) controlled as the most recent expression of legislative intent.

The Court of Appeals agreed that section 455.10 was the last substantive expression of legislative intent on the subject of citizenship, but held that the citizenship restriction of Section 447.04(1)(a) (1977) was a specific statute which should govern over Section 455.10 (1979). Having held that Section 447.04(1)(a) controls, the Court of Appeals further held that the citizenship restriction of Section 447.04(1)(a) violated the equal protection clause.

Of course, the Court of Appeals' ultimate conclusion, holding that Section 447.04(1)(a) is unconstitutional, was necessitated by its initial conclusion that Section 447.04(1)(a) (1977) was not repealed by the legislature's later, broad, and unambiguous pronouncement that

> No person shall be disqualified from practicing an occupation or profession regulated by the state solely because he is not a United States citizen.

§455.10, Fla. Stat. (enacted in 1979).

It is well-established that the Supreme Court will not determine the alleged invalidity of a statute where the matter may be disposed of on other grounds. Oldham v. Rooks, 361 So.2d 140, 141 (Fla. 1978); Peoples v. State, 287 So.2d 63, 66 (Fla. 1973); Williston Highlands Development Corp. v. Hogue, 277 So.2d 260, 261 (Fla. 1973). In this case, the Court can affirm the Department's decision, granting a business agent's license to Kelly, and avoid concluding that Section 447.04(1)(a) violates the equal protection clause by finding, as the Department did, that Section 447.04(1)(a) (1977) was repealed by implication by Section 455.10 (1979). As will be shown below, there are substantial reasons to support such a decision.

1. The 1979 Enactment of Section 445.10 Is the Last Substantive Expression of Legislative Intent on the Subject of Restricting Persons From Practicing Occupations Based on Citizenship.

Prior to 1977, Section 447.04(1)(a) read:

> 447.04 Business agents; licenses, permits etc. -
> (1) No person shall be granted a license or a permit to act as a business agent in the state:
> (a) Who has not been a citizen of and has not resided in the United States for a period of more than 5 years next prior to making application for such license or permit.
> (b) Who has been convicted of a felony and has not had his civil rights restored.
> (c) Who is not a person of good moral character.

During the 1977 legislative session, that section was amended twice within one week. On May 27, 1977, the legislature amended Section 447.04(1)(a) eliminating the citizenship requirement for the

issuance of a license to a business agent while maintaining a residency requirement. (House Bill No. 962, Chapter 77-116, Laws of Florida). On June 2, 1977, however, Section 447.04(1)(a) was once again amended reinstating a citizenship requirement for a business agent's license. (Senate Bill No. 393, Chapter 77-184, Laws of Florida). Since 1977, Section 447.04(1)(a) has remained unchanged and reads as follows:

> 447.04 Business agents; licenses, permits. -
> (1) No person shall be granted a license or a permit to act as a business agent in the state:
> (a) Who is not a citizen of the United States.
> (b) Who has been convicted of a felony and has not had his civil rights restored.
> (c) Who is not a person of good moral character.

§447.01(1)(a), Fla. Stat. (1985).

While 447.04(1)(a) (1977) has remained unchanged since 1977, the legislature in 1979 revised Chapter 455. First, Chapter 455 has two parts: Part I entitled "General Provisions" and Part II entitled "Regulation by Department of Professional Regulation." Several provisions in Part I were transferred to Part II, clearly evincing an intent for those specific provisions to apply to those professions regulated by the Department of Professional Regulation.

Second and significantly, Section 445.012 providing for the "restriction on requirement of citizenship" remained in Part I, General Provisions, and was not transferred to Part II, Regulation by the Department of Professional Regulation. Section 455.012 was renumbered (to Section 455.10) and a significant portion of the section was eliminated. Florida Statutes, Section 455.10 (1979) now declared in clear and unequivocal language that:

> No person shall be disqualified from practicing an occupation or profession regulated by the state solely because he is not a United States citizen.

As noted above, the Department had to decide whether to issue a license to Kelly irrespective of the fact that Kelly was not a citizen of the United States. This determination depended on a resolution of the conflict between Florida Statutes, Section 447.04(1)(a) (1977) and Section 455.10 (1979).

In resolving this conflict, the well-established rule of statutory construction, that the last legislative act or expression governs, was applied. There is ample authority to support the application of the last expression of the legislative will in the case of conflicting statutes. State v. Dunmann, 427 So.2d 166 (Fla. 1983); Oldham v. Rooks, 361 So.2d 140 (Fla. 1978); Askew v. Schuster, 331 So.2d 297 (Fla. 1976); Albury v Jacksonville Beach, 295 So.2d 197 (Fla. 1974); State v. Board of Public Instruction, 113 So.2d 368 (Fla. 1959); State ex rel Charlotte County v. Webb, 49 So.2d 93 (Fla. 1950); see Douglass v. Sepe, 421 So.2d 27 (Fla. 3d DCA 1982); Kiesel v. Graham, 388 So.2d 594 (Fla. 1st DCA 1980); Cable-Vision Inc. v. Freeman, 324 So.2d 149 (Fla. 3d DCA 1975), appeal dismissed, 336 So.2d 1180 (Fla. 1976), appeal dismissed, 429 U.S. 1032, 97 S.Ct. 723, So.L.Ed.2d 743 (1977).

In this case, Florida Statutes, Section 455.10 (1979), being the last expression of legislative will on citizenship as a restriction on the procurement of a license to engage in a lawful occupation regulated by the State, should prevail over Florida Statutes, Section 447.04(1)(a) (1977) which prohibits the issuance of licenses to non-citizens business agents.

The Court of Appeals agreed with the Department and Kelly

> that the 1979 enactment of Section 445.10 was the last substantive expression of legislative intent on the subject covered by that statute.

(R. 237). However, the Court of Appeals went on to conclude that Section 447.04(1)(a) (1977) and Section 445.10 can be harmonized because the former applies specifically to the licensing of labor organization business agents while the latter applies generally to licensing. The Court of Appeals primarily relied on its decision in Parker v. Baker, No. 85-2900 (Fla. 2d DCA Oct. 16, 1986) [11 FLW 2223].

Kelly would submit that Parker v. Baker is distinguishable. In that case, on the one hand, a local law provided that a person holding a position with the county must take a leave of absence when that person completes his qualification as a political candidate in any election for certain positions. On the other hand, a general statute provided that no individual was required to resign unless such an individual was seeking to qualify for public office which is currently held by his boss. The individual involved argued that the local law prevailed over the general statute and was the last legislative enactment. The Parker court concluded that neither principle applied because the local law did not address the specific issue of whether an individual could be forced to resign when he ran against his boss, while the general law specifically addressed that issue. Therefore, the general statute controlled over the local law because the former required a person to resign when running against his boss while the latter did not address that subject.

In the case at bar, both Section 447.01(1)(a) (1977) and Section

455.10 (1979) specifically address the issue of citizenship. In fact, the Court of Appeals specifically concluded that "the 1979 enactment of Section 455.10 was the last substantive expression of legislative intent on the subject covered by that statute." The subject covered by Section 455.10 is the restriction of practicing an occupation based on citizenship. Therefore, Section 455.10 specifically deals with the issue addressed by Section 447.04(1)(a), Parker is inapposite, and Section 455.10 as the last expression of legislative intent on the subject of citizenship restriction should control. See State v. Dunmann, 427 So.2d 166 (Fla. 1983); Oldham v. Rooks, 361 So.2d 140 (Fla. 1978).

2. Section 455.10 (1979) was a Comprehensive Revision of the Subject Matter of Restricting Employment Based on Citizenship.

As noted in the review of the 1979 amendments to Section 445.012, the legislature revisited the issue of citizenship requirements. As a result, every former restriction based on non-citizenship was eliminated from Chapter 455, Part I. The legislature expressed its will in clear and unequivocal terms: "No person shall be disqualified from practicing an occupation or profession regulated by the state solely because he is not a United States citizen." §455.10, Fla. Stat. (1979). Moreover, although other provisions in Chapter 455, Part I were transferred to Chapter 455, Part II, Regulation by Department of Professional Regulation, the clear and unequivocal ban on restricting employment based on citizenship remained in Chapter 455, Part I, General Provisions. This clearly evinces an intention not to limit the ban to the occupations regulated by the Department of Professional Regulation.

It appears, then, that Florida Statutes Section 455.10 (1979) was a comprehensive revision of the subject matter of the regulation of citizenship requirements and was designed to embrace all regulations concerning the issuance of license based on citizenship. When a complete revision of a subject matter is attempted by the legislature, earlier acts dealing with the same subject are impliedly repealed unless an intent to the contrary is manifested. State v. Dunmann, 472 So.2d 166, 168 (Fla. 1983); Oldham v. Rooks, 361 So.2d 140 (Fla. 1978); Debolt v. Department of Health and Rehabilitative Services, 427 So.2d 221 (Fla. 1st DCA 1983).

In the instant case, the legislature has significantly and substantially revised Section 455.10 and has not manifested any intent that it not be broad and all encompassing. "[T]he implied repeal rule is particularly applicable in this case in which a specific statute ... [§447.04(1)(a), Fla. Stat. (1977)] ... conflicts with a general statute [§455.10, Fla. Stat. (1979)] that expresses legislative intent to revise the law of Florida ...." Debolt, 427 So.2d at 225.

The Courts of Appeals rejected Kelly's argument that a general statute, such as Section 455.10, which comprehensively revisits the subject matter of a specific statute, such as Section 447.04(1)(a), impliedly repeals the latter in the following words:

> In its 1979 enactment of Section 455.10 the legislature did not revisit the subject specifically covered by Section 447.04(1)(a) nor did it include words like "notwithstanding any other laws to the contrary."

Kelly would respectfully submit that the analysis of the Court of Appeals is faulty. First, as argued above, Section 455.10, in broadly and unambiguously providing that "[n]o person shall be disqualified

from practicing an occupation or profession regulated by the state solely because he is not a United States citizen," did revisit the subject specifically covered by Section 447.04(1)(a), i.e., disqualifying a person from practicing an occupation solely on the basis of citizenship. The Court of Appeals' conclusion that Section 455.10 and Section 447.01(1)(a) deal with different subjects, would as a practical matter eliminate the application of the doctrine of amendment by implication. Although amendment by implication is not favored in the eyes of the courts, the doctrine can and will be invoked in appropriate circumstances. State v. Dunmann, 427 So.2d 166 (Fla. 1983); Oldham v. Rooks, 361 So.2d 140 (Fla. 1978); State v. Board of Public Instruction, 113 So.2d 368 (Fla. 1959). Second, in applying the doctrine of amendment by implication, a repealing clause is not necessary. Routh v. Richards, 138 So. 69 (Fla. 1931); Auglin v. Mayo, 88 So.2d 918, 921 (Fla. 1956).[5]

3. The Department's Construction of the Statute is Entitled to Great Weight.

A reviewing court must defer to an agency's interpretation of an operable statute as long as that interpretation is consistent with legislative intent. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987 (Fla. 1985); Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), cert. denied, 104 S.Ct. 1673 (1984); State ex

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[5]Kelly would also point out that in the first legislative session following the legislature's amendment to Section 455.10 (1979), the legislature specifically amended Section 943.13(2) to provide that citizenship shall be a requirement for employment as a law enforcement officer "notwithstanding any laws of the state to the contrary." If the 1979 amendment to section 455.10 was not intended by the legislature to be a comprehensive revision to the subject of restrictions based on citizenship, the legislature would have had no reason to amend Section 943.13(2) in 1980.

rel Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823 (Fla. 1973); Department of Transportation v. Florida Coalition of Rail Passengers, Inc., 466 So.2d 403 (Fla. 1st DCA 1985); Gershanik v. Department of Professional Regulation, Board of Medical Examiners, 458 So.2d 302 (Fla. 3d DCA 1984).

In the present case, the Department is charged with processing applications, conducting investigations, and making decisions as to whether to issue business agent licenses. §447.04, Fla. Stat. (1985). The Department has interpreted the 1979 amendments to Section 455 as providing for a blanket prohibition on any citizenship requirement for entry into a particular occupation. This construction is due a great deal of weight, especially since it is supported by reasonable and astute inferences made from the legislative history of Florida Statutes, Section 447.04(1)(a) and Section 455.10 (R. 98-104; R. 120-126).

Furthermore, the Department has interpreted Section 455.10 as prohibiting restrictions on citizenship under Section 447.04(1)(a) since 1981 (R. 37).[6] A long-standing statutory interpretation made by officials charged with the administration of a statute should be given a

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[6]The Department's decision to cease requesting citizenship questions in 1981 was reasonable in light of the following. First, the broad and comprehensive ban on restrictions based on citizenship as expressed in Florida Statutes, Section 455.10 (1979). Second, the legislature saw fit to specifically protect citizenship requirements for police officers in Florida Statutes, Section 943.13(2) (1980) while not similarly enacting protection for the citizenship requirement for business agents in Florida Statutes, Section 447.04(1)(a) (1977). Third, in 1980, the Florida Supreme Court specifically held that a statutory limitation to become a notary public based on citizenship violates the equal protection clause of the fourteenth amendment of the Constitution of the United States. Graham v. Ramani, 383 So.2d 634 (Fla. 1980). Therefore, the Department's decision to cease requesting citizenship questions in 1981 was entirely reasonable in light of the demonstrated legislative and judicial concern with discrimination against aliens.

substantial amount of weight. See Southeast Volusia Hospital District v. National Union of Hospital and Health Care Employees, 429 So.2d 1232 (Fla. 5th DCA 1983). Moreover, the legislature has taken no action to amend either Section 447 or Section 455.10 despite the fact that the Department has not even requested citizenship question for approximately six years.

In sum, the Department's construction and interpretation of the statutes in question should be upheld. The Department's construction and interpretation of the statutes in question is wholly supported by reasonable and astute analysis of the legislative history.

4. Summary

The Court need not even reach the question of whether Section 447.01(1)(a) violates the equal protection clause by concluding that the citizenship restriction in Section 447.01(1)(a) was repealed by implication by Section 455.10 (1979) which broadly and unambiguously announced the legislative policy that "[n]o person shall be disqualified from practicing an occupation or profession regulated by the state solely because he is not a United States citizen." This interpretation is supported by the fact that Section 455.10 (1979) is the last substantive expression of legislative intent on the subject of citizenship restrictions, that Section 455.10 (1979) is a comprehensive legislative expression of intent on the subject of citizenship restrictions, and that the Department has so interpreted Section 455.10 (1979) for approximately six years and the legislature has taken no action to alter that interpretation. The evil that the legislature sought to correct in enacting Section 455.10 (1979) was the elimination of invidious, unconstitutional discrimination against

non-citizens. The Court should give full effect to that enactment.

B. If Florida Statutes, Section 447.04(1)(a) Is Not Void As Having Been Repealed, Then It Is Invalid As Violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

1. The Doctrinal Formulation of the Equal Protection Test.

The United States Supreme Court long ago recognized that resident aliens fall within the ambit of the Equal Protection Clause of the Fourteenth Amendment, Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), and that a state cannot prohibit aliens from engaging in lawful occupations. Id. A state law which discriminates on the basis of alienage is inherently suspect and subject to strict and close judicial scrutiny. Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). Such heightened review is essential because aliens are a "prime example of a discrete and insular minority". 403 U.S. at 372, 91 S.Ct. at 1852, 29 L.Ed.2d at 542. Therefore, "only rarely are statutes sustained in the face of strict scrutiny". Bernal v. Fainter, 467 U.S. 216, 218 n.5, 104 S.Ct. 2312, 81 L.Ed.2d 175, (1984). To survive strict scrutiny, a law must further a compelling state interest by the least restrictive means available. Id.

A narrow exception to the principle that discrimination based on alienage requires strict scrutiny has been carved out. This exception, applicable solely to political functions, permits the state to exclude aliens from government occupations inextricably and intimately tied to the process of democratic self-government. Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973). The rationale for the political function exception is grounded in the

notion that a state should be given a certain amount of leeway to determine its own form of government. This discretion can be used to circumscribe the right to govern to those who are citizens. Stated another way, "some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government". Ambach v. Norwick, 441 U.S. 68, 73-74, 99 S.Ct. 1589, 1593, 60 L.Ed. 2d 49, 54-55 (1979). In this circumstance, the standard of review has been lowered when examining a state law which restricts a primarily political function.

A two-part test has been developed as a method of determining whether a restriction on alienage falls within the scope of the political function exception. Cabell v. Chavez-Salido, 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed. 2d 677 (1982). First, the specificity of the classification is evaluated in terms of its reach. A classification which is substantially overinclusive or underinclusive undermines the state's assertion that the classification serves legitimate ends. Second, although the classification satisfies the first prong of the test, it can only be applied to

> "persons holding state elective or important non-elective executive, legislative, and judicial positions"; those officers who "participate directly in the formulation, execution, or review of broad public policy" and hence "perform functions that go to the heart of representative government."

454 U.S. at 440, 102 S.Ct. at 740, 70 L.Ed.2d at 685 (quoting Sugarman v. Dougall, 413 U.S. 634, 647, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853, 863 (1973)) (emphasis added).

The two prongs of the test must be satisfied independently and separately from each other. The test purports to distinguish restric-

tions on alienage which serve political purposes from economic or other possible interests of the state.

2. The State's Discrimination Against Aliens Becoming Business Agents Cannot Withstand Strict Scrutiny And Does Not Fall Within The Narrow Political Function Exception To The Rule Of Strict Scrutiny

As demonstrated above, a State law which discriminates on the basis of alienage must withstand strict scrutiny. In this case, the District does not argue that Section 447.04(1)(a) advances a compelling state interest by the least restrictive means available which must be shown to meet strict scrutiny. Therefore, unless the District can establish that Section 447.04(1)(a) falls within the narrow political function exception to the strict scrutiny rule, Section 447.04(1)(a) must be declared invalid as being violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Kelly will demonstrate that Section 447.04(1)(a) which purports to discriminate against aliens becoming business agents, does not fall within the narrow political function exception.

a. The Court of Appeals Correctly Concluded That Section 447.04(1)(a) Fails to First Prong of the Political Function Exception Test

As noted above, in order to determine whether the political function exception exists:

> First, the specificity of the classification will be examined: a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends.

Cabell, 454 U.S. at 440, 102 S.Ct. at 740.

The Court of Appeals held that Section 447.04(1)(a) failed the first prong of the test because it applies to both business agents for private employee labor organizations and business agents for public

employee labor organizations. Thus, Section 447.04(1)(a) is overinclusive as "it indiscriminately also imposes a citizenship requirement upon occupations - business agents for private labor organizations - as to which there is no justification under the second prong for doing so." (R. 247; R. 245-249 generally).

On appeal, the District argues that the Court of Appeals erred because it "failed to test the statute in the context of the facts in the case at bar" and this "Court should construe the §447.04(1)(a) as being only applicable to public labor organization business agents to whom the statute section can be constitutionally applied." (Initial Brief of Appellant, p. 11 and pp. 13-14, pp. 11-18 generally). The District's argument must fail for at least three reasons.

First, the District's argument that Section 447.04(1)(a) should apply only to business agents for public employee labor organizations flies in the face of this Court's prior decisions. This Court has already held that Section 447.04 applies to business agents of private employee labor organizations at least insofar as their functions have no relation to collective bargaining. See State v. Smith, 123 So.2d 700, 703 (Fla. 1960), cert. denied, 371 U.S. 947 (1963). Therefore, as the Court of Appeals held, and contrary to the District's argument on appeal, Section 447.04 is not restricted to the business agents of public employee labor organizations.

Second, the District's entire argument, that this "Court should construe Section 447.04(1)(a) as being only applicable to public labor organization business agents" (Initial Brief of Appellant, p. 13), stands the first prong of the political function exception test on its head. One of the primary purposes of the first prong of the political

function exception test is to examine the classification to which the citizenship restriction applies in order to determine whether the classifications undercut the government's claim that the restriction serves legitimate political ends. The simple fact is that the state intended to apply, has applied, and is applying Section 447.04(1)(a) to business agents of private employee labor organizations. That fact undercuts any claim that the restriction serves legitimate political ends.

Third, even if this Court were to now restrict the application of Section 447.04(1)(a) to the business agents of public employee labor organizations, as the District argues, Section 447.04(1)(a) is still overinclusive. The District argues that the state can legitimately place citizenship restrictions on the business agents of labor organizations of fire fighters, peace officers, police officers, and public school teachers because the State can legitimately place citizenship restrictions on those occupations.[7] However, in applying the citizenship requirement to the business agents of public employee labor organizations, the citizenship restriction would be placed on the business agents of public employee labor organizations which represent occupations upon which citizenship requirements could not be imposed.

Public employee labor organizations represent a host of occupations other than firefighters, police officers, peace officers, and public teachers. E.g. Carpenters Local Union 1194 v. Santa Rosa County Board of County Commissioners, 12 FPER ¶17352 (1986)(blue

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[7]Kelly disagrees with the District's "agency" theory. See IV B 2 b below.

collar employees: operational service employees); Citrus, Cannery, Food Processing and Allied Workers, Local 173 v. Manatee County Mosquito Control District, 12 FPER §17340 (1986)(surveyors, inspectors, sprayers, mechanics, pilots, office clericals, custodians); CWA v. Alachua County Library District, 12 FPER §17335 (1986)(library assistant, staff assistant, library page, account clerk); LIUNA, Local 678 v. City of Melbourne, 12 FPER §17321 (1986)(blue collar employees: custodians, maintenance, ...); Kubiak v. Canaveral Port Authority, 12 FPER 17214 (1986)(blue collar unit of employees including janitors and parking lot attendants). Therefore, the District's argument that the State can restrict the business agents of public employee labor organizations on the theory that those occupations can be restricted to citizens, must fail as being overinclusive. Sugarman v. Dougal, 412 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973).

For the reasons stated in the decision of the Court of appeals and those above, Kelly would respectfully submit that Section 447.04(1)(a) which disqualifies non-citizens from the occupation of business agent is overinclusive under the first prong of the political function exception test. Therefore, strict judicial scrutiny should apply.

b. The Citizenship Restriction Contained in Section 447.04(1)(a) Also Fails the Second Prong of the Political Function Exemption Test

The Court of Appeals, having found that Section 44704(1)(a) fails the first prong of the political function exceptions test, never addressed the second prong. Kelly would submit that the citizenship restriction fails the second prong as well.

The second tier of the political function exception test determines, through various inquiries, whether the occupation sought to be

restricted based on alienage is truly political. Returning to the second prong of the test as expressed in Sugarman, 413 U.S. at 637, 93 S.Ct. at 2850 and reaffirmed in Cabell,45 U.S. at 439, 102 S.Ct. at 740, it appears that at least three inquiries are in order. First, the exception only includes "persons holding state elective or important non-elective executive, legislative, and judicial positions." Therefore, the test itself recognizes that a state may restrict only public employment. Second, the public positions must involve officers who "participate directly in the formulation, execution or review of broad public policy." Third, the functions must "go to the heart of representative government." The State's restriction based on alienage cannot fall into the political function exception because the occupation of business agents is not a public position; business agents do not participate directly in the formulation, execution or review of broad public policy; and the function of business agents does not go to the heart of representative government.

First, it is abundantly clear that the state may only restrict public positions or occupations based on alienage. The three United States Supreme Court cases which have upheld restrictions based on alienage all involved state or public employees working in public positions. Cabell v. Chavez-Salido, 454 U.S. 432 102 S.Ct. 735, 70 L.Ed.2d 677 (1982) (finding probation officers to fall within exception); Ambach v. Norwick, 441 U.S. 68 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979) (public school teachers fulfill basic government function)[8];

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[8]In Ambach, Justice Powell, made it absolutely clear that the public functions exception only applies to public employment. "[T]he Court also has recognized a greater degree of latitude for the States when aliens were sought to be excluded from public employment." 441 U.S. at 71, 99 S.Ct. at 1592. "The exclusion of aliens from governmental positions would not invite as demanding scrutiny from this Court. 441

Foley v. Connelie, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978) (policemen fall within the contours of the political functions exception).

Further support for an interpretation of the political function exception as applying only to public employment can be found in Examining Board of Engineers, Architects and Surveyors v. Flores De Otero, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976) (invalidating a state law that excluded aliens from practicing civil engineering) and In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973) (nullifying state law excluding aliens for membership in the state bar). The distinction between the right to pursue a private occupation and the right to access to public employment was set forth in clear and unambiguous terms in In re Griffiths:

> Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy.

413 U.S. at 729, 93 S.Ct. at 2858, 37 L.Ed.2d at 919.

The Supreme Court has not approved a state restriction for private occupations based on alienage. Furthermore, a host of lower federal and state courts have invalidated just such restrictions. See Szeto

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U.S. at 75, 99 S.Ct. at 1593. "New York's citizenship requirement is limited to a governmental function because it only applies to teachers employed by and acting as agents of the State." 441 U.S. at 75, n.6, 99 S.Ct. at 1594, n.6.

v. Louisiana State Board of Dentistry, 508 F. Supp. 268 (E.D. La. 1981) (statute prohibiting aliens from being licensed to practice dentistry found invalid); Kulkarni v. Nyquist, 446 F. Supp. 1269 (N.D. N.Y. 1977) (law imposing citizenship requirement for the licensing of civil engineers and physical therapists held unconstitutional); Surmeli v. New York, 412 F. Supp. 394 (S.D.N.Y. 1976) (termination of a physician's license based on lack of citizenship found unconstitutional); Sundram v. Niagara Falls, 77 Misc. 2d 1002, 357 N.Y.S. 2d 943 (1973) (ordinance prohibiting the issuance of a taxicab driver's license based on noncitizenship denied equal protection); Wong v. Hohnstrom, 405 F.Supp. 727 (D. Minn. 1975) (requirement of citizenship for pharmacists held unconstitutional); Arias v. Examining Board of Refrigeration and Air Conditioning Technicians, 353 F. Supp. 857 (D.P.R. 1972) (limiting of refrigeration and air-conditioning technicians' license to citizens found unconstitutional); see also, Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S. Ct. 1138, 92 L. Ed. 1478 (1948) (finding a denial of equal protection where a statute barred non-citizens from obtaining commercial fishing licenses). Hence, there is overwhelming evidence suggesting that private occupations cannot be restricted by the state based on alienage.

Of course, the fact that the political function exception has never been applied to restrictions on private occupations based on citizenship removes the possibility of applying the political function exception in this case. Kelly is a business agent employed by the International Association of Fire Fighters. Kelly is not employed by the state or a political subdivision of the state. He is not a person holding a state elective or important non-elective executive, legisla-

tive, or judicial position. Therefore, the political function exception is not applicable and the state's restriction on the ability of the Appellee to pursue a private occupation must be governed by the strict scrutiny test.

The District does not adequately address the fact that Section 447.04(1)(a) is being applied to a private employment as opposed to public employment as in Cabell, Foley and Ambach. The District simply argues that the business agent is an agent of and "steps in the shoes" of persons who can have citizenship restrictions placed on them. (Initial Brief of Appellant, pp. 19-21). First, it is not at all clear that the state can place citizenship restrictions on firefighters. See Cabell 454 U.S. at 461-62, 102 S.Ct. at 751, 70 L.Ed.2d at 698 (Blackman J., dissenting). Second, even if citizenship requirements could be placed on firefighters, it is doubtful that the business agent representing them could be subject to such restrictions. The essence of the Supreme Court's decisions for police officers and teachers is the discretion that they exercise viz-a-viz the public. Furthermore, a bargaining agent exercises no more discretion over the public than does a labor attorney in representing the public employee union or the public employer in negotiations or grievance handling.

The fact that Section 447.04(1)(a) regulates private employment dooms the District's attempt to have the state apply the citizenship restriction to business agents under the political function exception.

Second, even assuming that this Court is willing to stretch the public function exception to cover private occupations such as business agents, further inquiry is in order. The Sugarman/Cabell test

allows alienage restrictions on public "officers who participate directly in the formulation, execution, or review of broad public policy..." Sugarman, supra. Aside from the fact that business agents are not public officers, business agents are employees of a union who negotiate collective bargaining agreements and handle grievances on behalf of employees. See §§447.203(14), 447.301(2), 447.401, Fla. Stat. (1985). It is obvious that in fulfilling these functions business agents do not "participate directly in the formulation, execution, or review of broad public policy."

A business agent does not directly participate in the formulation of broad public policy any more than an attorney does. In In re Griffiths, supra, the United States Supreme Court held that an alien cannot be restricted from becoming an attorney. A business agent cannot be seen as formulating public policy any more than an attorney. An attorney is an officer of every court in which he practices. In any given decision made by a judge, an attorney's influence often is a substantial factor. Yet, the Court has not seen fit to classify attorneys as falling within the political function exception. According to the "direct participation in the formulation of public policy" requirement, as construed in In re Griffiths, a business agent cannot be considered more directly involved in the formulation of public policy than an attorney. It is dubious whether he formulates public policy in any more than an attenuous manner. A business agent negotiates wages, hours, and terms and conditions of employment on behalf of employees. In fact, the Public Employees Relations Act specifically restricts and limits the ability of a collective bargaining representative to bargain about policy decisions.

> It is the right of the public employer to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations.

§447.209, Fla. Stat. (1985). Therefore, the ability of a collective bargaining representative and hence a business agent to have any impact on broad public policy is severely circumscribed by statute. As noted by the District, the public employer can refuse to even negotiate about matters contained in Section 447.209.

Aside from the limitations contained in Section 447.209, the Public Employees Relations Act places a host of other restrictions which limit the impact that a labor organization can have on public policy. For example, any agreement negotiated must be submitted for approval to the appropriate legislative body and to employees of the bargaining unit. §447.309(1). Furthermore, even after agreement, the legislative body does not have to appropriate funds sufficient to fund the agreement. §447.309(2).

With respect to grievance matters, the Public Employees Relations Act also imposes substantial restrictions on public sector labor organizations. Public employees have the right to present their own grievances to the public employer. §447.301(4). Public sector labor organizations also have a duty of fair representation to employees so that the organization cannot act arbitrarily, discriminatorily, or in bad faith in its representative capacity. E.g. Gow v. AFSCME, Local 1363, 4 FPER ¶4162 (1978). Dissatisfaction as with representation can be acted upon by rejecting a negotiated agreement, §447.309, or by petitioning to revoke the union's certification. §447.308.

The statute imposes severe limitations on the labor organization

and the business agent viz-a-viz the public employer and the public employees. It is doubtful whether a business agent could even be considered to "participate directly in the formulation, execution, or review of broad public policy." This is a second reason why the state's regulation of business agents based on alienage does not fall within the narrow political function exception to the rule of strict scrutiny.

The final inquiry under the Sugarman test is whether a business agent of a labor organization performs functions that go to the heart of representative government. The two issues emerging from that inquiry are: 1) whether the position involves the exercise of broad discretionary power, and, 2) the importance of the function as a factor in the concept of democratic self-government. Bernal v. Fainter, 467 U.S. 216, 104 S.Ct. 2312, 81 L.Ed.2d 175 (1984). A survey of the Supreme Court cases on point provide analogies as to whether a business agent's functions go to the heart of self-representative government.

In Foley, supra, the policeman's function was found to fall within the political exception. The Court proclaimed that policemen are "clothed with authority to exercise an almost infinite variety of discretionary powers." Foley, 435 U.S. at 297, 98 S.Ct. at 1071, 55 L.Ed.2d 293. The exercising of this discretion in the enforcement and execution of the law, made this important public responsibility a function which goes "to the heart of self-government." Likewise, in Cabell, supra, probation officers' exercise of the sovereign's coercive police powers over the community was seen as parallel to the duties of the policeman in Foley.

Both cases are easily distinguishable in two respects. First, they both were concerned with occupations involving the execution of public policy. A business agent unquestionably does not engage in the execution of public policy. Second, and more importantly, a business agent does not exercise a broad range of discretion in the community while engaging in his function as negotiator for a labor union. His influence is limited to the willingness of a state official to be persuaded that a firefighter should get a few more dollars in fringe benefits as protection for his family. This hardly compares with a policeman and probation officer's power to arrest any person whom the officer decides has violated the law.

In Ambach, supra, the Court held that public schoolteachers lay within the compass of the public function exception: after noting that teachers maintained a great degree of responsibility and discretion in the inculcation of children, the Court explained the importance of education as a governmental function. "Public education, like the police function, 'fulfills a most fundamental obligation of government to its constituency.'" Ambach 441 U.S. 68, 76, 99 S.Ct. 1589, 1594, 60 L.Ed.2d 49, 56 (1979) (quoting Foley, supra, at 297, 98 S.Ct. at 1071, 55 L.Ed.2d at 293). Teachers engage in the formulation of students' attitudes and, by necessity, have wide discretion in their day-to-day contact with students.

Unlike a schoolteacher, a business agent does not come into contact with members of the general community on a day-to-day basis in the functions he performs. Nor does he develop attitudes of the community towards government or engage in a function as crucial as education. Therefore, the restriction upheld in Ambach cannot be properly

analogized to apply to business agents.

The cases which have struck down restrictions on alienage to engage in a certain occupation are more closely analogous to a business agent's function. In Flores de Otero, supra, the Court found that a flat ban excluding aliens from a civil engineering occupation violated the Equal Protection Clause. Certainly, the Court viewed a civil engineer much differently than a teacher or a policeman. Civil engineers exercise discretion in their occupation and come into contact with the public; but the relative importance of their function and the private nature of their position lead the Court to conclude that they did not come within the boundaries of the political function exception. Furthermore, in Sugarman, supra, the Court held that civil service occupations could not be restricted to only citizens. Civil servants generally did not formulate broad public policy directly involving matters of self-government. Earlier, in In re Griffiths, supra, a restriction on an alien's right to become an attorney was invalidated. The Court explained that the high responsibilities of an attorney "hardly involved matters of state policy or acts of such unique responsibility as to entrust them only to citizens." In re Griffiths, 413 U.S. at 724, 93 S.Ct. at 2856, 37 L.Ed.2d at 917. Similarly, business agents' duties and functions cannot be said to concern matters of state interest requiring the fulfillment thereof, to be limited to citizens.

In the most recent pronouncement in the area, the Court struck down a law restricting aliens from becoming notaries public. Bernal v. Fainter, 467 U.S. 216, 104 S.Ct. 2312, 81 L.Ed.2d 175 (1984).[9]

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[9]The Florida Supreme Court had prevously reached the same result. See Graham v. Ramani, 383 So.2d 634 (Fla. 1980).

The position of notary public was not seen as implicating responsibilities that go to the heart of representative government. Although they have power to acknowledge wills, take out-of-court depositions and administer oaths, notaries did not "exercise the state's monopoly of legitimate coercive force." Id. Nor were they invested with the wide discretion usually enjoyed by schoolteachers. Likewise, business agents do not exercise broad discretion over public policy in the performance of their functions as negotiators for public unions. Additionally, they in no shape, form or manner execute public policy that requires the routine exercise of authority over individuals. Therefore, business agents, like civil servants, engineers, attorneys and notaries public do not perform functions which go to the heart of representative government. Hence, by analogy to the series of applicable Supreme Court decisions, they do not perform functions truly political in nature.

In sum, the attempt to apply the narrow political function exception, to the rule that discrimination based on alienage triggers strict scrutiny, must fail. It fails every inquiry under second prong of the political function exception test: the occupation of business agent is a private employment occupation; the restrictions placed on a collective bargaining representative to even negotiate about policy decisions negate any possibility that a business agent could ever "participate directly in the formulation, execution, or review of broad public policy;" and the ability to bargain about wages, hours, and terms and conditions of employment can hardly be said to "go to the heart of representative government."

3. Summary

Kelly would respectfully submit that the citizenship restriction contained in Section 447.04(1)(a) passes neither the first prong of the political function exception test (as found by the Court of Appeals) nor the second prong. Therefore, strict judicial scrutiny is mandated.

> [A] state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny the law must advance a compeling State interest by the least restrictive means available.6/
>
> 6/ Only rarely are statutes sustained in the fact of strict scrutiny. As one commentator observed, strict scrutiny review is "strict" in theory but usually "fatal" in fact.

Bernal v. Fainter, 467 U.S. at 219, 104 S.Ct. at ____, 81 L.Ed.2d at 179-180.

It is quite clear that Section 447.04(1)(a) cannot withstand strict judicial scrutiny. In fact, the District has apparently conceded that this statute cannot withstand strict scrutiny as it has made no argument on this issue.

There is nothing in the record that establishes that resident aliens, as a class, are not suitable to be business agents. There are less restrictive alternatives for dealing with resident aliens who might not be suitable for the occupation. In fact, such alternatives are already provided for in Section 447.04(1)(b) and (c) (prohibiting the grant of a license to persons convicted of a felony or not of good moral character). Furthermore, a variety of restrictions are placed on collective bargaining representatives throughout Section 447, Part II.

The absence of a compelling state interest in restricting non-

citizens from engaging in a private occupation such as a business agent mandates a finding that Florida Statute, Section 447.04(1)(a) be struck down. "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131, (1915). See also Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948); Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Thus to preserve this freedom to engage in the occupation of business agent, the Court should find Section 447.04(1)(a) violates the Fourteenth Amendment of the United States Constitution.

V. CONCLUSION

Kelly would submit that the Final Administrative Order granting him a business agent's license should be affirmed, either because Section 447.04(1(a) was repealed by implication by Section 455.10 (1979) or because it violates the Equal Protection Clause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief of Appellee, Celestine Kelly, was mailed this 6th day of