IN THE MISSOURI SUPREME COURT

No. SC94954

STATE OF MISSOURI,

Appellant,

v.

PIERRE CLAY,

Respondent.

On Appeal from Circuit Court for the City of St. Louis

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MISSOURI FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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AUTHORITY TO FILE

Amicus files this brief with the consent of both parties.

STATEMENT OF JURISDICTION

Amicus adopts the jurisdictional statement as set forth in Respondent's brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide. The ACLU of Missouri Foundation is an affiliate of the national ACLU. The ACLU of Missouri has more than 4,500 members. In furtherance of its mission, the ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of all rights guaranteed by the federal and state constitutions.

STATEMENT OF FACTS

Amicus adopts the statement of facts as set forth in Respondent's brief.

Argument

The federal constitution provides the floor, not the ceiling, for the liberty that is guaranteed to citizens against state governments. Even prior to the adoption of the Fourteenth Amendment—that is, before the Bill of Rights was incorporated to the States—the framers of Missouri's Constitution and the voters of this State chose to enact a constitutional provision insuring an individual's right to keep and bear arms. Missouri has never mirrored the language of the Second Amendment.

A statute will "'be held unconstitutional [if] it clearly contravenes a constitutional provision.'" *State v. Harris*, 414 S.W. 3d 447, 449 (Mo. banc 2013) (quoting *State v. Mixon*, 391 S.W.3d 881, 883 (Mo. banc 2012)). "'[I]f a statute conflicts with a constitutional provision or provisions, this Court must hold the statute invalid.'" *Weinschenk v. State*, 203 S.W.3d 201, 210 (Mo. banc 2006) (quoting *State v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002)). Section 571.070.1(1) contravenes article I, § 23 of the Missouri Constitution as applied to nonviolent former felons, like Clay, and there is insufficient evidence in the record supporting an application of the statute to nonviolent former felons that can withstand strict scrutiny; therefore, the trial court's dismissal of Count I against Clay for unlawful possession of a firearm should be affirmed.[1]

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[1] All statutory references are to Missouri Revised Statutes (2000), as updated, unless otherwise noted.

A. The State of Missouri can and did expand the fundamental right to keep and bear arms beyond what is provided by the Federal Constitution.

While the Missouri Constitution has always included a provision protecting the right to keep and bear arms, the Supreme Court of the United States has now held that the Second Amendment protects an individual's right to possess a gun. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (holding "that the Second Amendment conferred an individual right to keep and bear arms"); *see also McDonald v. City of Chicago*, 561 U.S. 742, 790 (2010) (noting that, in *Heller*, the Court "held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense"). Additionally, the Court has held that the right to keep and bear arms is fundamental and applies equally to the States as it does to the Federal Government. *McDonald*, 561 U.S. at 749, 791 (holdling "that the Second Amendment right is fully applicable to the States" and "that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*"). Thus, the Court has affirmed that, "the right to keep and bear arms is fundamental to *our* scheme of ordered liberty." *Id.* at 767.

In support of its finding that the right to keep and bear arms is fundamental and applies to all states, the Court noted that this right had been "widely protected by state constitutions at the time when the Fourteenth Amendment was ratified." *Id.* at 777. "In 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms." *Id.* (citing Missouri's 1865 Constitution, and noting that, in 1868, Missouri was one of 22 states that already had a constitutional

provision explicitly protecting the individual right to keep and bear arms).[2] Thus, Missouri has long "recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government." *Id.* As the Court recognized further, "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id.* at 778.

Missouri provided greater protection to this right than the Second Amendment was understood to provide prior to *Heller*.[3] Even so, post-*Heller*, article I, § 23 of the

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[2] Missouri's recognition of this fundamental right dates back to its first state constitution. "The 1820 version stated: 'That the people have the right peaceably to assemble for their common good, and to apply to those vested with powers of government for redress of grievances by petition or remonstrance; and that their righto bear arms in defense of themselves and of the State cannot be questioned.'" David B. Kopel, *What State Constitutions Teach about the Second Amendment*, 29. N. KY. L. REV. 823, 837 (2002) (quoting Mo. Const. of 1820, art. XIII, § 3).

[3] Indeed, when the Missouri Constitution was first adopted, the federal constitution did not limit Missouri officials *in any way* from restricting the right of Missourians to keep and bear arms. At that point, the Second Amendment limited only the federal government. The citizens of Missouri had other ideas, and included limitations on Missouri's officials' ability to interfere with gun ownership in their founding document.

Missouri Constitution was amended in 2014, it stated: "That the right of every citizen to keep and bear arms in defense of his home, person, and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the waring of concealed weapons." As amended, article I, § 23 of the Missouri Constitution now states:

> That the right of every citizen to keep and bear arms, ammunition, and accessorites typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those ajudiciated by a court to be a danger to self or others as a result of a mental disorder or mental infirmity.

In contrast, the Second Amendment to the Constitution of the United States simply states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." While both the Second Amendment and article I, § 23 of the Missouri Constitution protect an individual's right to keep and bear arms, the text of the provisions have notable differences and the Missouri Constitution is broader than its federal counterpart.

"Provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions." *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996); *see also Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006). And, like the right to vote at issue in *Weinschenk*, the right to keep and bear arms is "at the core of Missouri's constitution and, hence, receive[s] state constitutional protections even more extensive than those provided by the federal constitution." 203 S.W.3d at 201, 204. Thus, while "analysis of a section of the federal constitution is 'strongly persuasive in construing the like section of our state constitution,'" analyzing a comparable federal amendment to interpret a state amendment is done when the state and federal provisions are "nearly identical." *Doe*, 194 S.W.3d at 841; *see also Dotson v. Kander*, -- S.W.3d --, No. SC 94482, 2015 WL 4036160, at *8 (Mo. banc June 30, 2015) (Fischer, J., concurring) (noting that, "although Missouri constitutional provisions could be interpreted more expansively than comparable provisions of the United States Constitution, this Court, uniformly, predictably, and preferably, in my view, interprets the Missouri mirror image constitutional provisions in lockstep with the United States Constitution"). The Missouri and federal provisions related to the right to keep and bear arms are not remotely mirror images of each other. *Cf. Rushing*, 935 S.W.2d at 34 (noting that "the construction given to the Fourth Amendment of the federal constitution by the Supreme Court of the United States is strongly persuasive in construing the like section of our state constitution" because the two sections "are coextensive"). Article I, § 23 of the Missouri Constitution, by its very terms, is markedly different from and much more expansive than its federal counterpart. As such, while the construction given to the

Second Amendment is helpful, the interpretation of article I, § 23 of the Missouri Constitition must be interpreted based upon the language in the Missouri Constitution and not its federal counterpart.

"The rules applicable to construction of statutes are applicable to the construction of constitutional provisions; the latter are given broader construction due to their more permanent character." *Buechner v. Bond*, 650 S.W.2d 611, 612 (Mo. banc 1983). "Words used in constitutional provisions must be viewed in context; their use is presumed intended, and not meaningless surplusage." *Id.* at 613. "Every word in a constitutuional provision is presumed to have effect and meaning." *Id.* "The words used in constitutional provisions are interpreted as to give effect to their plain, ordinary and natural meaning." *Id.* "The plain, ordinary, and natural meaning of words is that meaning which people commonly understood the words to have when the provision was adopted." *Id.* "The commonly understood meaning of words is derived from the dictionary." *Id.* Words in a constitutional amendment will be "[r]ead in proper grammatical context" and words that are "plain and unambiguous" will be interpreted as they are written. *Brooks v. State*, 128 S.W.3d 844, 847 (Mo. banc 2004). Therefore, while "[t]he first rule of construction of a constitutional amendment is to give effec to its intent and purpose," such intent and purpose should not be determined *post hoc*, and, "[w]here language . . . is clear and unambiguous there is no room for construction." *Cmty. Fed. Sav. & Loan Ass'n v. Dir. of Revenue*, 752 S.W.2d 794, 798 (Mo. banc 1988).

"It is the duty of this Court to be faithful to the constitution." *Jefferson Cnty. Fire Prot. Districts Ass'n v. Blunt*, 205 S.W.3d 866, 872 (Mo. banc 2006). "'[I]t cannot

ascribe to it a meaning that is contrary to that clearly intended by the drafters.'" *Id.* (quoting *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002)). "'Rather, a court must undertake to ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted." *Id.* (quoting *Farmer*, 89 S.W.3d at 452).

It has been noted by one judge on this Court that, "[t]he stated purpose of [amending article I, § 23] was to make sure the Missouri protection of the right to bear arms matches the federal protection currently recognized in *Heller* and *McDonald*, should the Supreme Court of the United States later reinterpret the Second Amendment in a manner not originally intended." *Dotson*, 2015 WL 4036160, at *8 (Fischer, J., concurring). This was not likely the purpose given the recognition by the Supreme Court of the United States that Missouri's constitution already long ago provided the expanded individual right discovered in *Heller*. *See McDonald*, 561 U.S. at 777. However, even assuming, *arguendo*, that this was a purpose of the amendment, the language of the amendment is much more expansive that would be required to serve this limited purpose. For example, in order to protect the right to keep and bear arms as a fundamental right of an individual, the amendment did not need to specifically state that the right was unalienable and subject to strict scrutiny. Had the language of the amendment not been amended at all from its previous version, Missouri courts, because of the holdings in *Heller* and *McDonald*, would have recognized the right as fundamental for all individuals and applied strict scrutiny to any restriction impinging upon it because that is what the Court's decisions now require. But the amendment to the Missouri Constitution did not

stop with the specific language related to the right being fundamental and strict scrutiny applying to any restriction of the right (as all fundamental rights require), it went on to specifically note that, "[n]othing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted *violent* felons or those ajudiciated by a court to be a danger to self or others as a result of a mental disorder or mental infirmity." Mo. Const. art. I, § 23 (emphasis added). This language constitutes an expansion of the right to keep and bear arms in Missouri.

Therefore, while the *Heller* Court mentioned in dicta that, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms[,]" *Heller*, 554 U.S. at 626-27; *see also Dotson*, 2015 WL 4036160, at *7 (Fischer, J., concurring) (noting that, "*Heller* does not 'cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill'" (quoting *Heller*, 554 U.S. at 626-27)), the Court's dicta does not eliminate Missouri's ability to expand the right to keep and bear arms as it applies to the citizens of Missouri. Therefore, while Missouri could have amended its constitution to state that the right to keep and bear arms would not eliminate the legislature's power to restrict *all* former felons from possessing a gun or directing that a former felony (violent or not) could not be a basis for restricting gun possession, it did neither. Instead, the amendment clearly and unambiguously specifies that it is not be construed to prevent laws limiting the rights of *violent* felons from possessing firearms, making Missouri's right to keep and

bear arms more expansive than its federal counterpart that contains no such language. Moreover, the language in the recently amended article I, § 23 is not ambiguous or unclear. Because the words are readily understood using their plain and ordinary meaning, this Court need not apply any principles of construction beyond interpreting the unambiguous language as it appears to give effect to the voters' intent.

The term "violent" is defined as: "[o]f, relating to, or characterized by strong physical force"; "[r]esulting from extreme or intense force"; and "[v]ehemently or passionately threatening[.]" BLACK'S LAW DICTIONARY 1801 (10th ed. 2014). "Violent offense" is defined as: "[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon." *Id.* at 1252 (referencing the terms "violent felony" and "violent felony offense"). A "violent crime" is defined as: "[a] crime that has an element the use, attempted use, threatened use, or substantial risk of use of physical force against the person or property of another." *Id.* at 453. Thus, the term violent has specific meaning that must be taken into account when interpreting the validity of § 571.070.1 under the recently amended Missouri Constitution article I, § 23.

The Missouri Constitution now directly conflicts with section 571.070.1's restriction of the possession of firearms for *all* convicted felons. In its expansion of the fundamental right to keep and bear arms, article I, § 23 has made it clear that the amendment will not limit the legislature's ability to restrict the right as it applies to convicted violent felons only. It makes no mention of nonviolent felons. But had the amendment been intended to allow § 571.070.1 to apply to *all* former felons, then the

word "violent" is surplusage. The words in an amendment matter and cannot be viewed as meaningless surplusage. *Buechner*, 650 S.W.2d at 612. Such surplusage would be inexplicable, especially given that the drafters were aware that § 571.070.1 is applied to violent *and* nonviolent former felons.

Thus, regardless of whether § 571.070.1 was constitutional as applied to nonviolent former felons *before* the amendment to article I, § 23, it must now be interpreted in light of the new language that Missouri's voters decided to include in their Constitution.

B. Strict scrutiny must be applied to any law impinging on a person's fundamental right to keep and bear arms under article I, § 23 of the Missouri Constitution.

When a statute "impinges upon a fundamental right explicitly or implicitly protected by the Constitution," it is "subject to strict scrutiny." *Weinschenk*, 203 S.W.3d at 210-11; *see also State v. Young*, 362 S.W.3d 386, 397 (Mo. banc 2012) (noting that "'[f]undamental rights include the rights to free speech, to vote, to freedom of interstate travel, and other basic liberties'" (quoting *Etling v. Westport Heating & Cooling Servs.*, Inc., 92 S.W.3d 771, 774 (Mo. banc 2003))). "In order to survive strict scrutiny, a limitation on a fundamental right must serve compelling state interests and must be narrowly tailored to meet those interests." *Weinschenk*, 203 S.W.3d at 211. And, while the burden is on the party challenging a statute to show that it "clearly and undoubtedly violates the constitution," *Young*, 362 S.W.3d at 390, the burden is on the State to show that a statute satisfies strict scrutiny. *Republican Party of Minn. v. White*, 416 F.3d 738,

749 (8th Cir. 2005) (noting that the "strict scrutiny test requires the state to show that the law that burdens the protected right advances a compelling state interests and is narrowly tailored to serve that interest").

In recognizing that the right to keep and bear arms is a fundamental right of the individual applicable to all States, the Supreme Court also noted that, "[u]nder our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the states and thus *limits* (but by no means eliminates) their ability to devise solutions to societal problems that suit local needs and values." *McDonald*, 561 U.S. at 784-85. Thus, while the Court also noted that incorporation of the right to keep and bear arms "does not imperil every law regulating firearms," the argument "that the scope of the Second amendment right should be determined by judicial interest balancing" was "expressly rejected." *McDonald*, 561 U.S. at 785-86. Strict scrutiny applies to any law restricting an individual's right to keep and bear arms in Missouri.

Moreover, just as the Missouri Supreme Court rejected the argument that a more "flexible" test should be applied to voting restrictions, *Weinschenk*, 203 S.W.3d at 216, any test less than strict scrutiny should also be rejected here when analyzing laws impinging on an individual's fundament right to keep and bear arms, both because a fundamental right is at issue and the Missouri Constitution specifically requires that strict scrutiny be applied. It is undisputed that the right to keep in bear arms is fundamental. And, as this Court has noted, strict scrutiny "is used when legislation affects a fundamental right." *Dotson*, 2015 WL 4036160, at *4. "Considered the 'most rigorous

and exacting standard of constitutional review,' strict scrutiny is generally satisfied only if the law at issue is 'narrowly tailored to achieve a compelling interest.'" *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 920 (1995)).

Here, the constitutionality of § 571.070.1 as it applies to individuals formerly convicted of nonviolent felonies is challenged under the Missouri Constitution. As such, not only does article I, § 23 specifically state that strict scrutiny applies, but strict scrutiny must be applied because the right at issue is indisputably fundamental. It is of no consequence that neither this Court nor the Supreme Court of the United States has explicitly stated that all restrictions on the right to keep and bear arms be examined under strict scrutiny. *See Dotson*, 2015 WL 4036160, at *4. Therefore, this Court's earlier observation that, "there is no settled analysis as to how strict scrutiny applies to laws affecting the fundamental right to bear arms, which has historically been interpreted to have accepted limitations[,]" *id.*, overlooks the requirement that strict scrutiny apply to any restriction on a right deemed to be fundamental.

Moreover, while it is not unheard of for fundamental rights to be limited in ways that pass constitutional muster, any such restrictions on a fundamental right must still satisfy strict scrutiny to be upheld. *See Dennis v. United States*, 341 U.S. 494, 503 (1951) (noting that, "[a]n analysis of the leading cases in [the Supreme Court of the United States] which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations); *White*, 416 F.3d at 749

(noting that, "[p]olitical speech-speech at the core of the First Amendment-is highly protected[, and a]lthough not beyond restraint, strict scrutiny is applied to any regulation that would curtail it").

Here, because the voters have expanded the State's constitutional protection of the right to keep and bear arms beyond its federal counterpart, this Court need not look to federal case law for answers related to the level of scrutiny to be applied, much less speculate on any acceptable limitations to the fundamental right not yet announced. In fact, this Court has expressly acknowledged that strict scrutiny *should* apply to any challenge brought under the Missouri Constitution. *See Dotson*, 2015 WL 4036160, at *4 n.5 (noting that, although article I, § 23 specifies that strict scrutiny applies to any restriction of a person's right to keep and bear arms, "that standard would already have been applicable to cases where the legislation was challenged based on article I, section 23 of the Missouri Constitution after *McDonald*"). And, strict scrutiny is a familiar test that this Court applies to claims that a fundamental right is being unconstitutionally restricted. *See Etling*, 92 S.W.3d at 774 (noting that restrictions impinging on fundamental rights are "subject to strict scrutiny and this Court must determine whether it is necessary to accomplish a compelling state interest[,]" and indicating that this standard applies to fundamental rights including "the rights to free speech, to vote, to freedom of interstate travel, and other basic liberties").

As noted, Missouri's Constitution has always protected the right to keep and bear arms; thus, Missouri cannot deny that this fundamental right is a basic liberty afforded to Missouri citizens requiring the application of strict scrutiny. Moreover, the Supreme

Court made clear in *Heller*, and reiterated in *McDonald*, that the right to keep and bear arms "is 'deeply rooted in this Nation's history and tradition.'" *McDonald*, 561 U.S. at 768 (quoting *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997)). The *McDonald* Court noted further that, "[e]vidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental." *Id.* at 776-77. Thus, the *McDonald* Court concluded: "In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id.* at 778. And, while the guarantee of this fundamental right that "is fully binding on the states" does not eliminate a state's "ability to devise solutions to social problems that suit local needs and values[,]" *Id.* at 784-85, that does not mean that strict scrutiny does not apply to restrictions upon that right.

Based on the barren evidentiary record, the state has not offered evidence showing that the application of § 571.070.1 to nonviolent former felons can survive strict scrutiny analysis. Where a statute restricts a fundamental right, the burden of proof is on the government, as the proponent of the restrictions. *See Phelps-Roper v. Koster*, 713 F.3d 942, 949 (8th Cir. 2013). The government's burden to produce evidence is not satisfied by mere speculation or conjecture; it must offer evidence establishing that the problem it identifies is real and that the restriction will alleviate that problem to a material degree. *See Edenfield v. Fane,* 507 U.S. 761, 770-71 (1993); *see also United States v. Playboy Entm't Group*, 529 U.S. 803 (2000). Thus, while the state might have a compelling interest in preventing crime and promoting public safety, it has not demonstrated that a

law prohibiting *all* former felons, including nonviolent ones, is necessary to further that interest.

Conclusion

Section 571.070.1 directly contravenes Missouri Constitution, article I, § 23, as applied to nonviolent offenders. The right to keep and bear arms is a fundamental right and any restriction on that right is subject to strict scrutiny. Section 571.070.1 cannot pass this standard of review as applied to nonviolent former felons. Therefore, the dismissal of Count I against Clay for his alleged unlawful possession of a firearm should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 4,898 words, as determined using the word-count feature of Microsoft Office Word 2013. The undersigned further certifies that the electronic file has been scanned and was found to be virus-free.

/s/ Anthony E. Rothert

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this brief was filed and served by operation of electronic filing system on all counsel of record on September 18, 2015.

/s/ Anthony E. Rothert