No. SC96024

In the Supreme Court of Missouri

JACK ALPERT,

Appellant,

v.

STATE OF MISSOURI, et al.

Respondents.

Appeal from the Circuit Court of Johnson County
17th Judicial Circuit
The Honorable William B. Collins, Judge

APPELLANT'S BRIEF

RON RIBAUDO
Mo. Bar No. 53833
The Ribaudo Law Firm
361C Quail View Drive
Ballwin, MO 63021
phone: (636) 485-8252
facsimile: (866) 499-3491
ron@ribaudolaw.com

Counsel for Appellant

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JURISDICTIONAL STATEMENT

This Court has exclusive appellate jurisdiction over Jack B. Alpert's appeal of the judgment of the Circuit Court of Johnson County, entered on October 3, 2016. Article V, section 3 of the Missouri Constitution states: "The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death." Mr. Alpert filed a declaratory judgment action against the State of Missouri, the Prosecuting Attorney for Johnson County (Robert W. Russell), and the Attorney General for Missouri (then Chris Koster), claiming that Section 571.070, by prohibiting him from keeping and bearing arms, as he lawfully did under federal and state law from 1983 to 2008 (when Section 571.070 was amended), directly violates his rights under the Second Amendment to the U.S. Constitution and article I, section 23 of the Missouri Constitution. Mr. Alpert raised both a facial and an as-applied challenge to Section 571.070. The deprivation of his constitutional rights, according to Mr. Alpert, not only interfered with his ability to defend himself and his family, but also interfered with his ability to earn a living operating his business, The Missouri Bullet Company.

Because Mr. Alpert "asserts that a state statute" – that is, Section 571.070 – "directly violates the constitution either facially or as applied," this Court has exclusive appellate jurisdiction. *McNeal v. McNeal-Sydnor*, 472 S.W.3d 194, 195 (Mo. banc 2015).

Unlike prior challenges to Section 571.070 entertained by this Court, Mr. Alpert's challenge is not limited to article I, section 23; it is also based on the Second

Amendment, supported by an extensive record, absent from prior cases. According to Mr. Alpert, this record establishes that the risk posed by him keeping and bearing arms is either less than or equal to the risk posed by a law-abiding citizen keeping and bearing arms. That was the conclusion reached by the U.S. Attorney General in 1983, when it restored Mr. Alpert's gun rights – a conclusion never made by a state or federal government about the prior challengers of Section 571.070. Hence, Mr. Alpert has "plausible claims . . . made in good faith," permitting this Court to entertain this appeal. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 52 (Mo. banc 1999).

STATEMENT OF FACTS

In the wrong hands, a firearm can be deadly. That is why both federal and state law generally prohibits felons, and many others, from possessing firearms. Jack Bradford Alpert, however, is one of the last persons whose possession of firearms you would think the law would prohibit.

Mr. Alpert is 65 years old, dying of stage four renal cancer. (LF 254, 392). He is married. (LF 259). A lifelong resident of Missouri, along with his wife, Mr. Alpert is a pillar of his community. (LF 259). His business, The Missouri Bullet Company (MBC), which is located in Johnson County, is one of the largest and most successful cast bullet manufacturers in the United States. (LF 261). MBC employs 10 full-time employees, who are provided health insurance and an employer-sponsored IRA; it grosses $2 million per year. (LF 261). MBC spends about $150,000 per year in postage – an expenditure that helped saved the Kingsville Post Office from having to close. (LF 261). MBC makes significant charitable donations to the community, in particular to the Johnson County 4-H Junior Shooting Sports Program, Camp Valor's wounded veteran program, and the Holden Police Department, for which it helped purchase a drug dog. (LF 261).

In the 1960s, Mr. Alpert was a member of the Sedalia Rod & Gun Club; he enjoyed hunting and recreational shooting on weekends. (LF 254, 381). Mr. Alpert was also a hippie, an advocate of peace and nonviolence. (LF 254, 381). In the last two years of high school, he held down a full-time job working at his family's restaurant. (LF 3254, 81). After graduating in 1969, Mr. Alpert moved to Kansas City, where he joined a commune. (LF 254, 381).

Being a hippie, Mr. Alpert did dabble with drugs – youthful, isolated indiscretions that have led to his current predicament.

In 1970, Mr. Alpert, then 18 years old, was caught with Benzedrine tablets worth $25, causing him to be charged in the Circuit Court of Pettis County, Missouri, with one charge of possession of a controlled substance, in violation of Section 195.200. (LF 255). Mr. Alpert pleaded guilty, and was sentenced to three years imprisonment. (LF 255). After serving seven months, Mr. Alpert was paroled, after which he completed his sentence without a hitch. (LF 255). While on parole, Mr. Alpert enrolled at Longview Community College. (LF 255-56). Two semesters later, he was admitted to the University of Missouri at Columbia, where he majored in psychology. (LF 255-56).

In 1975, then 23 years old, Mr. Alpert was charged with possession of a small quantity of methamphetamines in U.S. District. (LF 256). While his federal case was pending, Mr. Alpert, who had been on the dean's list for his last three semesters, graduated with honors from the University of Missouri at Kansas City, receiving a B.A. degree. (LF 256).

In October 1976, Mr. Alpert pleaded guilty. (LF 257). The Federal Bureau of Prisons strongly recommended that Mr. Alpert be released on probation (LF 257) – then (and now) the most common disposition of nonviolent drug offenses in the federal courts (LF 204 n.1). Despite noting that Mr. Alpert was highly intelligent, U.S. District Judge Elmo Hunter rejected the BOP's recommendation, and sentenced Mr. Alpert to two years imprisonment. (LF 257). While in prison, Mr. Alpert was admitted to the graduate program at the University of Missouri at Kansas City. (LF 257). After 10 months in

prison, Mr. Alpert was paroled. (LF 257). He then started attending graduate school full-time, and consistently made the dean's list, all while working three part-time jobs, at the Personal Computer Center in Overland Park, Kansas, at the Department of Psychiatry of the Kansas University Medical Center, and at the Wyandotte Mental Health Clinic as a research assistant in a federally-funded study of sexual abuse of children. (LF 257). Mr. Alpert was released from parole a year early. (LF 257).

In 1978, the 27-year-old Mr. Alpert formed his own computer sales and service company, which stayed in business until 1993. (LF 258, 382-83).

Five years later, Mr. Alpert applied to the U.S. Attorney General to have the federal disabilities, including the federal prohibition on possessing firearms, restored, pursuant to 18 U.S.C. §925(c). (LF 258). The Attorney General referred the matter to the Bureau of Alcohol, Tobacco & Firearms (ATF), which, after a background check and six-week investigation, granted Mr. Alpert's application. (LF 258-59, 385). ATF found that, if allowed to possess firearms, Mr. Alpert would not "act in a manner dangerous to public safety" and that granting his application "would not be contrary to the public interest." 18 U.S.C. §925(c).

In 1986, Mr. Alpert applied to ATF for a Federal Firearms License, Class 01 (FFL01 license), a three-year, renewable license that permits one to deal firearms. (LF 259). ATF issued the license. (LF 259). Mr. Alpert then began buying and selling firearms. (LF 259).

In 1999, Mr. Alpert, through self-study, became a Microsoft Certified System Engineer, and started working for Computer Source in Lenexa, Kansas. (LF 259). He was

then deployed to the Board of Public Utilities in Kansas City, Kansas, as a network engineer. (LF 259). Later, he became a Consulting Senior Engineer. (LF 259).

In 2007, Mr. Alpert founded MBC with his wife. (LF 259). Its rapid growth led Mr. Alpert to quit his computer job, so that he could dedicate himself full-time to MBC. (LF 260). In 2010, Mr. Alpert decided to expand MBC's operations to include manufacturing ammunition; he spent over $62,000 getting an automated Camdex and Dillon loading machinery, a building dedicated to manufacturing ammunition, and the raw materials necessary to manufacture ammunition. (LF 260).

However, when he sought to renew is FFL01 license, ATF told him that, because of the Missouri General Assembly's amendment, in 2008, of Section 571.070, he could no longer possess or own firearms, and so must surrender his FFL01 license. (LF 260). Having lost his FFL01 license, Mr. Alpert no longer could test any ammunition (LF 262). The same year Mr. Alpert lost his FFL01 license, MBC applied for, and was granted, an Federal Firearms License, Class 06, from ATF, a license that allows MBC to manufacture ammunition. (LF 262). Three years later, the license was renewed. (LF 262). The FFL06 license does not allow Mr. Alpert to possess or own any firearms, even if just to test ammunition. (LF 262, 383-84).

From 1983 to 2008, neither federal nor Missouri law prohibited Mr. Alpert from possessing firearms, which he did without incident. (LF 263, 269-70). Mr. Alpert wishes to possess firearms for purposes of self-defense, recreation (e.g., target shooting), business (i.e., testing ammunition for MBC), and education (i.e., teaching gun safety courses). (LF 263).

Two of the firearms that Mr. Alpert would like to possess are family heirlooms, which his father gave him. (LF 263-64). In World War II, Mr. Alpert's father, a decorated member of the Fifth Army, helped drive the German army across the Po River. (LF 264). From the cache of weapons abandoned by the fleeing Germans, Mr. Alpert's father brought home a Karabiner 98 Mauser and a Belgian Browning pistol. (LF 264). The pistol had been personally confiscated from a Nazi SS officer. (LF 264).

Another firearm Mr. Alpert wishes to possess is an M1 Garand rifle, the kind of rifle that his father might well have used in World War II. (LF 264). It was awarded to Mr. Alpert in 1993 because of his participation in Civilian Marksmanship Program (CMP), a century-old, federally-chartered 501(c)(3) corporation dedicated to training and educating U.S. citizens about the responsible uses of firearms through training in gun safety and marksmanship. (LF 264-65, 384). In order to get the M1 Garand, Mr. Alpert had to be a U.S. citizen in good standing, capable of owning firearms, and among the ranks of expert hi-power rifle shooters. (LF 264-65, 384). Before 2008, Alpert had used the M1 Garand at the Pioneer Rifle Gun Club, of which he was a longstanding member. (LF 265, 384). A rated marksman, Mr. Alpert had competed in monthly high-power rifle competitions. (LF 265, 384).

Throughout his life, Mr. Alpert has participated in, provided, and received significant training in gun safety, enough to qualify as a gun-safety instructor. (LF 266). With this knowledge, Mr. Alpert has provided public-service courses to women who want to learn how to safely handle firearms and use them in self-defense. (LF 266).

Never has Mr. Alpert committed a dangerous or violent crime. (LF 268-69). With the exception of his nonviolent drug offenses from 1970 and 1975 – offenses that are over 40 years old – Mr. Alpert has not committed *any* crimes.

In June 2015, Mr. Alpert filed a petition for declaratory judgment in the Circuit Court of Johnson County, claiming that Section 571.070, as applied to him, violates both article I, section 23 of the Missouri constitution and the Second Amendment to the U.S. Constitution. (LF 4-28). The petition named as defendants the Prosecuting Attorney for Johnson County, Robert Russell; the Attorney General of Missouri, (then) Christopher Koster; and the State of Missouri. (LF 4, 16). To simplify matters, these parties will be collectively referred to as "the State."

Cross-motions for summary judgment were filed. (LF 49-251, 354-76). In support of Mr. Alpert's motion, he attached, as exhibits to the statement of uncontroverted material facts, an affidavit from Mr. Alpert as well as extensive social science research. (LF 70-202). In response, the State never contended that any of this research (however presented) would have been inadmissible at trial, let alone questioned its reliability or applicability to Mr. Alpert. (*See* LF 252-79). Instead, the State characterized the research and many of the facts the research was cited to establish as "not material." (LF 254, 256-58, 260-63, 265, 270-79). Never did the State deny that Mr. Alpert's possession of firearms posed no greater risk to public safety than the risk posed by an average law-abiding citizen; it conceded the point (though declaring it "not material."). (LF 278, 391, 392).

The State's motion for summary judgment did not list paragraph-by-paragraph the facts that it deemed to be the uncontroverted material facts. Its statement of facts stated simply stated: "Respondents have previously admitted all the uncontroverted material facts in the December 8, 2015, Response to Petitioner's Statement of Material Facts." (LF 356). The State presented no evidence in support of its motion for summary judgment.

On October 3, 2016, the Circuit Court granted the State's motion for summary judgment, and so entered judgment in favor of the State. (LF 394-406). Mr. Alpert filed his notice of appeal on November 7, 2016. (LF 406-20).

POINT RELIED ON

The trial court erred by granting Respondents' motion for summary judgment on Mr. Alpert's claim that, as applied to him, Section 571.070 violates the Second Amendment to the U.S. Constitution (as well as article I, section 23 of the Missouri constitution), because Respondents were not entitled to judgment as a matter of law – Mr. Alpert was – in that (1) Section 571.070 is not narrowly tailored, but both underinclusive and overinclusive (i.e., inapplicable to persons whose risk to public safety from possessing firearms is *greater* than that of persons like Mr. Alpert, yet applicable to groups of persons like Mr. Alpert whose risk to public safety from possessing firearms is *less* than that of an average, law-abiding citizen); (2) precedent from other jurisdictions holds that persons like Mr. Alpert have a constitutional right to keep and bear arms, despite their prior felonies; (3) Section 571.070 is not a "longstanding" prohibition on felons possessing firearms, as the term is used in *District of Columbia v. Heller*, 554 U.S. 570 (2008); and (4) this Court's precedent does not bar Mr. Alpert's challenge.

District of Columbia v. Heller, 554 U.S. 570 (2008)

Binderup v. Holder, Slip Opinion, Case Nos. 14-4549 & 14-4550 (3rd Cir. Sept 7. 2016)

Britt v. State, 681 S.E.2d 320 (N.C. 2009)

Mo. const. art. I, §23

U.S. const., Second Amendment

ARGUMENT

The trial court erred by granting Respondents' motion for summary judgment on Mr. Alpert's claim that, as applied to him, Section 571.070 violates the Second Amendment to the U.S. Constitution (as well as article I, section 23 of the Missouri constitution), because Respondents were not entitled to judgment as a matter of law – Mr. Alpert was – in that (1) Section 571.070 is not narrowly tailored, but both underinclusive and overinclusive (i.e., inapplicable to persons whose risk to public safety from possessing firearms is *greater* than that of persons like Mr. Alpert, yet applicable to groups of persons like Mr. Alpert whose risk to public safety from possessing firearms is *less* than that of an average, law-abiding citizen); (2) precedent from other jurisdictions holds that persons like Mr. Alpert have a constitutional right to keep and bear arms, despite their prior felonies; (3) Section 571.070 is not a "longstanding" prohibition on felons possessing firearms, as the term is used in *District of Columbia v. Heller*, 554 U.S. 570 (2008); and (4) this Court's precedent does not bar Mr. Alpert's challenge.

A. STANDARD OF REVIEW

The grant of a motion for summary judgment is reviewed *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is appropriate only when there is "no genuine issue as to any material fact" and the undisputed material facts establish that "the moving party is entitled to judgment as a matter of law." Rule 74.04(c)(6). In ruling on motion for summary judgment, the record is viewed in the light most favorable to the non-moving

party, who is afforded all reasonable inferences that may be drawn from the evidence. *ITT Commercial*, 854 S.W.2d at 376.

B. LEGAL BACKGROUND

1. Constitutional Provisions

a. The Second Amendment

The Second Amendment to the U.S. Constitution 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." In 2008, the U.S. Supreme Court held, in *District of Columbia v. Heller*, 554 U. S. 570 (2008), "that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald v. Chicago*, 561 U. S. 742, 780 (2010). Two years later, the Court held that the Second Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment, and hence binds the states. *Id*. at 777-78.

b. Article I, §23 of the Missouri Constitution

Unlike the Second Amendment, the Missouri constitution has always been understood to protect an individual right to bear arms. *Cf. U.S. v. Miller*, 307 U.S. 174 (1939). Article XIII of the Missouri Constitution of 1820 stated: "That the people have . . . the right to bear arms, in defense of themselves and of the state, cannot be questioned." Article I, section 8 of the Missouri Constitution of 1865 likewise stated that "[the people's] right to bear arms in defense of themselves, and of the lawful authority of the state, cannot be questioned." To the same effect is Article II, section 17 of the Missouri Constitution of 1875, which declares that "the right of no citizen to keep and bear arms in

defense of his home, person and property, or in aid of the civil power, where thereto legally summoned, shall be called in question[.]" And pre-*Heller*, article I, section 23 of the Missouri 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[.]" *State v. Richard*, 298 S.W.3d 529, 531 (Mo. banc 2009).

On August 5, 2014, the citizens of Missouri amended article I, section 23. It now reads (with additions in bold, and deletions crossed out) as follows:

> That the right of every citizen to keep and bear arms, ***ammunition***, ***and accessories 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~~; but this shall not justify the wearing of concealed weapons~~. **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 adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.**

Dotson v. Kander, 464 S.W.3d 190, 196 (Mo. banc 2015).

There were five pertinent textual additions. First, it expressly protects the right to keep ammunition and accessories typical to the normal function of one's firearms. Second, it expressly provides that the right to keep and bear arms applies to the defense of a citizen's family, and not just one's home, person, or property. Third, it makes the rights it protects "unalienable," as the Declaration of Independence describes the right to life, liberty, and the pursuit of happiness. Fourth, it forbids any interpretation of itself that prevents the legislature from passing "general laws which limit the rights of ***convicted violent*** felons or those adjudicated by a court to be a ***danger*** to self or others as result of a mental disorder or mental infirmity" (emphasis added). And fifth, it specifies that any restrictions on the right to keep and bear arms are subject to "strict scrutiny."

2. Strict Scrutiny

Like article I, section 23, the Second Amendment subjects restrictions on the right to keep and bear arms to strict scrutiny. *Friedman v. City of Highland Park*, 784 F.3d 406, 418 (7th Cir. 2015); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 775 F.3d 308, 327-28 (6th Cir. 2015) (explaining, among other things, why intermediate scrutiny is inconsistent with *Heller*'s rejection of interest balancing); *see generally Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("classifications affecting fundamental rights are given the most exacting scrutiny"); *see also State v. McCoy*, 468 S.W.3d 892, 893-94 (Mo. banc 2015) (per curiam). "'Strict scrutiny' is a legal phrase of art grounded in decisions of the Supreme Court of the United States." *Dotson*, 464 S.W.3d at 197. Accordingly, it must be

understood in its "technical sense," as used in "statutes and judicial proceedings." *American Federation of Teachers v. Ledbetter*, 387 S.W.3d 360, 364 (Mo. banc 2012).[1]

Strict scrutiny is a "demanding standard," *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2738 (2011) – the "most rigorous and exacting standard of constitutional review." *Dotson*, 464 S.W.3d at 197. It places a "heavy burden of justification . . . on the State." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). There is a "strong presumption" that a statute subject to strict scrutiny is invalid, with the judicial "thumb on the scales" in favor of the constitution right restricted by the statute. *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004); *Miller v. Johnson*, 515 U.S. 900, 920-21 (1995); *see also Ocello v. Koster*, 354 S.W.3d 187, 200 (Mo. banc 2011) ("[U]nder strict scrutiny, legislation is presumptively invalid[.]").[2]

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[1] *See also* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS §6 (West 2012) ("'[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 537 (1947)); *Henry v. U.S.*, 251 U.S. 393, 395 (1920) (Holmes, J.) ("The law uses familiar legal expressions in their familiar legal sense.").

[2] Whether strict scrutiny under *Missouri law* legislation is presumed invalid – on which *compare Ocello*, 354 S.W.3d at 200 (Mo. banc 2011); *Witte v. Director of Revenue*, 829 S.W.2d 436, 439, 439 n.2 (Mo. banc 1992) (noting an "exception" to the

Heller did not displace the presumption of invalidity. One, *Heller* did not specify the level of scrutiny it was applying, let alone embrace strict scrutiny and then announce a *sui generis* exception to the ordinary strict scrutiny review. (The author of *Heller*, Antonin Scalia, it must be kept in mind, was a skeptic about tiers of scrutiny. *U.S. v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting). A purported originalist, Scalia thought tiers of scrutiny an improper (judge-made) "thumb on the scale" of justice. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAGAZINE (Oct. 6, 2013).) Two, *Heller* expressly rejected rational basis review, the only level of scrutiny that presumes the constitutionality of a challenged statute. *Heller*, 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws [e.g., of the Due Process Clause] and would have no effect.").

To survive strict scrutiny, a statute must be "narrowly tailored," that is, "least restrictive means" to achieve a "compelling state interest." *Republican Party of Minn. v.*

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general presumption of validity when "fundamental rights" are stake) *with McCoy*, 468 S.W.3d at 897 (holding that the right to bear arms is a fundamental right, but then saying, without mentioning *Ocello* or *Witte*, that it is "clear that laws regulating the right to bear arms are not 'presumptively invalid.'") – and whether it places the burden on the State to prove the legislation valid ultimately do not matter. When evaluating federal constitutional challenges, such as Mr. Alpert's, it must apply the version of strict scrutiny mandated by the U.S. Supreme Court.

White, 536 U.S. 765, 775 (2002); *Bernal v. Fainter*, 467 U.S. 216, 219 (1984); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632 (1969). By contrast, under rational basis review, a "legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

The "least restrictive means" test has numerous components. To begin with, the "ultimate burden of demonstrating," with a "strong basis in the evidence," that a statutory restriction is necessary to achieve the compelling state interest rests on the state. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420, 2421 (2013); *accord White*, 536 U.S. at 775. Second, the statute must not be underinclusive. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* (internal quotation marks omitted). The statute must "regulate activities that pose substantially the same threats to the government's purportedly compelling interest as the conduct that the government prohibits." Richard H. Fallon, Jr., *Strict Judicial Scrutiny,* 54 UCLA L. REV. 1267, 1327 (June 2007). The statute cannot be overinclusive. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-23 (1991); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792-95 (1978). In sum, "[a] narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other

regulation that could advance the interest as well with less infringement of [the constitutional right] (is the least-restrictive alternative)." *Republican Party of Minnesota v. White*, 416 F.3d 738, 751 (8th Cir.2005) (en banc).

3. Statutory Provisions

a. Missouri Statutes

Before 1981, Missouri did not prohibit any class of felons from possessing firearms. (Since 1927, though, it has always had a statute prohibiting armed criminal action, which originally prohibited the mere possession of a firearm during the commission of a felony. *State v. Kane*, 629 S.W.2d 372, 374 (Mo. banc 1982).) In 1981, the General Assembly enacted its first such prohibition, Section 571.070. Until 2008, it stated:

> 1. A person commits the crime of unlawful possession of a concealable firearm if he has any concealable firearm in his possession and:
>
> (1) He has pled guilty to or has been convicted of a dangerous felony, as defined in section 556.061, RSMo, or of an attempt to commit a dangerous felony, or of a crime under the laws of any state or of the United States which, if committed within this state, would be a dangerous felony, or confined therefor in this state or elsewhere during the five-year period immediately preceding the date of such possession; or

> (2) He is a fugitive from justice, is habitually in an intoxicated or drugged condition, or is currently adjudged mentally incompetent.

By its terms, Section 571.070 originally prohibited (1) the possession of (2) concealable firearms (not all firearms) by a person who (3) either pleaded guilty to or was convicted of committing a (4) dangerous felony (not any felony) within (5) five years of such possession. *State v. Wishom*, 725 S.W.2d 627 (Mo. App. 1987); Robert H. Dierker, *Possession of Weapons by Certain Persons*, 32 MISSOURI PRACTICE §41.8 (2d ed. 2004). The term "dangerous felony" has never included any drug offenses, but rather crimes such as kidnapping, arson, murder, assault, and forcible rape.[3]

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[3]The current definition, the most expansive one to date, defines a "dangerous felony" as:

> the felonies of arson in the first degree, assault in the first degree, attempted rape in the first degree if physical injury results, attempted forcible rape if physical injury results, attempted sodomy in the first degree if physical injury results, attempted forcible sodomy if physical injury results, rape in the first degree, forcible rape, sodomy in the first degree, forcible sodomy, assault in the second degree if the victim of such assault is a special victim as defined in subdivision (14) of section 565.002, kidnapping in the first degree, kidnapping, murder in the second degree, assault of a law enforcement officer in the first degree, domestic assault in

In 2008, Section 571.070 was amended; it now reads:

1. A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and:

   (1) Such person has been convicted of a felony under the laws of this state, or of a crime under the laws of any state or of the United States which, if committed within this state, would be a felony; or

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the first degree, elder abuse in the first degree, robbery in the first degree, statutory rape in the first degree when the victim is a child less than twelve years of age at the time of the commission of the act giving rise to the offense, statutory sodomy in the first degree when the victim is a child less than twelve years of age at the time of the commission of the act giving rise to the offense, child molestation in the first or second degree, abuse of a child if the child dies as a result of injuries sustained from conduct chargeable under section 568.060, child kidnapping, parental kidnapping committed by detaining or concealing the whereabouts of the child for not less than one hundred twenty days under section 565.153, and an 'intoxication-related traffic offense' or 'intoxication-related boating offense' if the person is found to be a 'habitual offender' or 'habitual boating offender' as such terms are defined in section 577.001[.]

MO. REV. STAT. §556.061(19).

(2) Such person is a fugitive from justice, is habitually in an intoxicated or drugged condition, or is currently adjudged mentally incompetent.

By its terms, Section 571.070 now criminalizes (1) the possession of (2) any (non-antique) firearm (not just any *concealable* firearm) by a person who (3) was convicted (i.e., did not receive a suspended imposition of sentence, *Yale v. City of Independence*, 846 S.W.2d 193, 194, 195 (Mo. banc 1993)) of (4) any felony (not just a dangerous felony) at (5) any time (not just within five years of such possession).

The impetus to expand Section 571.070 arose from a traffic stop made in Cape Girardeau. Adam E. Hanna, *Falling Through the Cracks: Missouri Amends Its Felon Firearm Possession Statute*, 74 MO. L. REV. 361, 361 (Spring 2009). A felon from Illinois who had been convicted of sexual abuse and failing to register as a sex offender was arrested in Cape Girardeau in September 2007. *Id*. He had been "driving with a loaded gun, a magazine of ammunition, and a stun gun in his vehicle." *Id*. Section 571.070 did not apply to him. In response to this case, the General Assembly amended Section 571.070 to cover *all* convicted felons. The purpose of the amendment, according to Michael Gibbons, President Pro Tem of the Senate and a key backer, was to enact "better protections . . . to prevent *dangerous felons* from falling through the cracks when it comes to firearm possession[.]" *Id*. (quoting Letter from Michael R. Gibbons to H. Morley Swingle, Prosecutor of Cape Girardeau County) (emphasis added). In short, the amendment was a broad net cast by the General Assembly to ensure the capture of all dangerous felons.

Section 571.070 does not, however, capture *all* dangerous felons. Rapists, robbers, arsonists, kidnappers, and the like are not covered, if they are put on probation. Nor does Section 571.070 prohibit *all* convicted felons from possessing firearms. If a convicted felon receives a pardon, or a limited pardon that specifically restores gun rights – even if the pardon is not predicated on actual innocence – the Section 571.070 does not apply. *Guastello v. Department of Liquor Control*, 536 S.W.2d 21 (Mo. banc 1976); *State v. Bachman*, 675 S.2d 41, 50-51 (Mo. App. 1984). Likewise, convicted felons from another state whose felonies are expunged (so long as the expungement obliterates the facts of conviction) are not covered, even if their felonies, had they been committed here, could not have been expunged. (LF 268) (citing *State ex rel. Curtis v. Crow*, 580 S.2d 753, 758 (Mo. banc 1979)). In a formal opinion, former Attorney General Chris Koster has acknowledged all of the foregoing limitations in the scope of Section 571.070. (LF 268).

b. Federal Statutes

18 U.S.C. §922(g) prohibits felons – "any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" – from possessing or receiving "any firearms or ammunition." Some felons are not covered, such as persons charged with federal or state crimes "pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." 18 U.S.C. §921(a)(20)(A). Also exempted are persons convicted of state offenses that the state classifies as misdemeanors punishable by a term of imprisonment for two years or less. *Id*.

Federal law has long recognized that not all felons jeopardize public safety or the public interest by keeping and bearing arms. Hence, 18 U.S.C. §925(c) includes a safety valve. It authorizes the U.S. Attorney General to lift the lifetime ban imposed by 18 U.S.C. §922 and eliminate any other disabilities imposed by federal law "with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms." 18 U.S.C. §925(c). Such a restoration is permitted when, to the Attorney General's "satisfaction . . . the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. §925(c).

4. <u>As-Applied & Facial Challenges</u>

There are two types of constitutional challenges – facial and as-applied. Michael C. Dorf, *Facial Challenges to State & Federal Statutes*, 46 STAN. L. REV. 236 (1994). A facial challenge is "'the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.'" *State v. Kerr*, 905 S.W.2d 514, 515 (Mo. banc 1995) (quoting *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)). In other words, a person to whom a statute properly applies cannot obtain relief based on arguments that a differently-situated person might present. *Salerno*, 481 U.S. at 741. That person must bring an as-applied challenge, which is not precluded by the failure of a facial challenge. *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 546 U. S. 410, 412 (2006). An as-applied challenge does not contend that a law is unconstitutional as written; it is "based on a developed factual record and the

application of a statute to a specific person[.]" *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 172 (4th Cir. 2009) (en banc); *accord Coyne v. Edwards*, 395 S.W.3d 509, 520 (Mo. banc 2013).

C. AS APPLIED TO MR. ALPERT, SECTION 571.070 VIOLATES THE SECOND AMENDMENT, AS WELLAS ART. I, §23 OF THE MISSOURI CONSTITUTION

Section 571.070 is like many statutes that "seek[] to minimize the risk of violence by trying to keep guns out of the hands of dangerous persons." Douglas Husak, OVERCRIMINALIZATION: THE LIMITS OF CRIMINAL LAW 171 (Oxford 2009); Hanna, *Falling Through the Cracks*, at p. 361. The tool it employs – a prohibition on *all* convicted felons possessing firearms – is not fine-tuned, for it makes

> no effort[] . . . to ensure that given individuals are indeed dangerous before they are barred from [possessing] guns. Instead, persons are disqualified on actuarial grounds – that is, because of their membership in designated groups. The difficulty with this policy is apparent. Most (and perhaps all) of the disqualified groups contain significant numbers of members who are not dangerous, and whose gun ownership would not create a substantial risk of harm – at least, no greater risk than that of the average person.

Id. at 171.

Usually, legislatures are free to employ such blunt tools; most legislation is subject to rational-basis review, *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam), which tolerates "an imperfect fit between means and ends," *Heller*, 509 U.S. at 321.

Here, though, Section 571.070 must pass strict scrutiny, which does require a tight fit between means and ends. That fit is lacking. Section 571.070 is both overinclusive and underinclusive. As applied to Mr. Alpert, Section 571.070 violates Mr. Alpert's Second Amendment (and article I, section 23) right to keep and bear arms.

1. Section 571.070 Is Underinclusive

Because Section 571.070 fails to prohibit kinds of firearm possession that causes an "appreciable damage" to public safety, *City of Hialeah*, 508 U.S. 520 at 547, Section 571.070 is underinclusive, substantially underinclusive.

First, Section 571.070 does not cover *any* misdemeanor offenders, not even those whose crimes or criminal backgrounds show that they pose a risk as grave, if not graver, to public safety than many a felon does. 95.8 percent of domestic partner homicides are preceded by a chronic history of domestic abuse and battering, Paige Hall Smith, *Partner Homicide in Context*, 2 HOMICIDE STUD. 400, 410, 411 (1998), which sometimes results in criminal charges. In practice, prosecutors will charge the perpetrators with misdemeanors "when similar acts against a stranger would be a felony[.]" This is necessary "to obtain even limited cooperation" from family members who often "are willing to forgive the aggressors in order to restore harmonious relations" or who "are so terrified that they doubt the ability of the police to protect their safety." *U.S. v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc). Permitting such domestic batters to possess a firearm poses a greater risk to the public than permitting Mr. Alpert to possess a firearm – something he legally did without incident for 25 years, despite his prior nonviolent felonies.

The second way in which 571.070 is underinclusive is that it only applies to *convicted* felons. Felons who pleaded guilty in open court, but are placed on probation are not covered. *Yale,* 846 S.W.2d at 194, 195. (True, the condition of probation will doubtless include a prohibition on possessing firearms, but once the probation is completed the prohibition no longer applies.) If the commission of a felony necessarily increases a person's likelihood of committing a gun crime, *see McCoy*, 468 S.W.3d at 897, then why aren't *all* felons – or at least those whose underlying felony (e.g., rape, kidnapping, assault, etc.) involves violence or a significant risk thereof – covered by Section 571.070?

Granted, some of these folks will have been put on probation precisely because they are unlikely to reoffend, given their unique characteristics and backgrounds. Yet that reasoning applies in spades to Mr. Alpert. Despite his isolated 40-year-old nonviolent drug offenses, Mr. Alpert proved for 25 straight years that he could be trusted to possess a firearm. That is precisely what a co-equal sovereign concluded in 1983, after conducting a rigorous investigation into Mr. Alpert's background and criminal history. If placement on probation suffices to exempt a felon, no matter how dangerous the felon, from Section 571.070's lifetime ban, then *a fortiori* Mr. Alpert should be exempted, too.

2. <u>Section 571.070 is Overinclusive</u>

There are four respects in which Section 571.070 is overinclusive. First, it applies to *all* convicted felons – no matter how old the felon, no matter how dated the felony, no matter the nature of the felony. This results in Section 571.070 applying to individuals

whose risk from possessing firearms is negligible or, in any event, no greater than the risk posed by a law-abiding citizen.

Mr. Alpert is 65 years old. The elderly – and especially married, employed, well-educated elderly persons like Mr. Alpert – rarely commit crimes. (LF 270-74). In 2013, despite being 20.9 percent of the Missouri population, the elderly were only two percent of those arrested, and 2.5 percent of those arrested for weapons offenses. (LF 270). From 1993 to 2001, the absolute number of arrests of the elderly dropped from 207.6 to 125.3 per 100,000, whereas the same figures for teenagers (i.e., those age 13 to 19 years old) were 26,431 and 17,141, respectively. (LF 270-71). This means a teenager is 136 times more likely to commit a crime than an elderly person. Simply put, crime, in particular violent crime, is a "young man's game." *U.S. v. Presley*, 790 F.3d 699, 702 (7th Cir. 2015).

Consider, too, that recidivism rates "decline relatively consistently as age increases," (LF 272-74), even among hardened criminals – who commit the vast majority of their crimes in their youth (and very few in their dotage), Daniel S. Nagin, *Deterrence & Incapacitation*, in Michael Tonry, ed., THE HANDBOOK OF CRIME & PUNISHMENT 345 (Oxford 1998). Murder, rape, robbery, and other violent crimes in which a firearm is likely to be used are crimes that law-abiding adults – a phrase that sensibly applies to Mr. Alpert – virtually never commit. (LF 274-75) (citing Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder & Suicide?: A Review of International & Some Domestic Evidence*, 30 HARV. J. OF LAW & PUB. POLICY 649 (Jan. 2007)). And most

murderers know their victims as a result of prior illegal transactions (e.g., drug sales). Gary Kleck & Don B. Kates, ARMED: NEW PERSPECTIVES ON GUN CONTROL 236 (2001).

For 40-plus years since his last drug offense, Mr. Alpert has hewed to the straight and narrow, transforming himself from a peaceful hippie who made a few mistakes into one of the finest citizens of Johnson County. For 25 years – from 1983 to 2008, when Section 571.070 was amended – Mr. Alpert legally possessed firearms without incident. Given this longstanding desistance from wrongdoing, there is every reason to think his law-abiding behavior will continue unabated. Felons who avoid reoffending for seven to ten years after committing their last offense have a probability of reoffending no greater than that of a person without a criminal record. (LF 273-74).[4] For drug felons, the applicable desistance period is bit longer, between ten and fourteen years. (LF 273-74).

[4] Megan Kurlychek, Shawn Bushway, and Robert Brame, *Long-Term Crime Desistance & Recidivism Patterns*, 50:1 CRIMINOLOGY 71, 96 (February 2012); Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47:2 CRIMINOLOGY 327 (May 2009); Keith Soothill & Brian Francis, *When Do Ex-Offenders Become Like Non-Offenders?*, 48 HOWARD JOURNAL OF CRIMINAL JUSTICE 373 (2009); Megan C. Kurlychek, Robert Brame, and Shawn D. Bushway, *Enduring Risk: Old Criminal Records & Prediction of Future Criminal Involvement*, 53 Crime & Delinquency 64 (2007); Megan C. Kurlychek & Shawn D. Bushway, *Scarlet Letters & Recidivism: Does An Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUBLIC POLICY 483 (2006).

Moreover, "the longer one survives without recidivating, the better one gets at avoiding future criminal behavior." Kurlychek, 50:1 CRIMINOLOGY at 96. This "going straight" is a one-way street; there is no support for the phenomenon of "intermittency," whereby an "offender goes from an active rate of offending to a zero rate of offending back to a fully active criminal career." *Id*. at 99.

There is a second way in which Section 571.070 is overinclusive: it does not include an exception for self-defense, one of the core rationales for the Second Amendment. Both Section 571.070 and the Second Amendment (as well as article I, section 23 of the Missouri constitution) aim to prevent crime – the former by disarming the dangerous, the latter by ensuring citizens have the tools of self-defense. Mr. Alpert is a sick old man, dying from renal cancer. (LF 391-92). He lives with his wife in the boondocks, far away from the police; so he has a heightened need for a firearm to protect himself and his wife. (LF 391). Prohibiting him from having a firearm makes his (constitutional and statutory) right to self-defense a nullity. Calling 911 and waiting for the police to arrive when a burglar breaks into his home will do him little good. (One is reminded of Anatole France's quip, "In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread."). The purpose of Section 571.070 is to protect life and limb, not to empower criminals to prey on the elderly.

State v. Shelby, 2 S.W. 468 (Mo. 1886) establishes that the lack of self-defense exception in Section 571.07 poses a problem. Shelby was convicted of carrying a deadly weapon (a pistol) while intoxicated. He argued that the law was unconstitutional because

it violated his right to keep and bear arms. This Court, applying "reasonable regulation" scrutiny, disagreed:

> The validity of the act of 1875 is made to stand upon the ground that the legislature may thus regulate the manner in which arms may be borne. If this may be done as to time and place, as is done by that act, no good reason is seen why the legislature may not do the same thing with reference to the condition of the person who carries such weapons. The mischief to be apprehended from an intoxicated person going abroad with fire-arms upon his person is equally as great as that to be feared from one who goes into an assemblage of persons with one of the prohibited instruments.

2 S.W. at 469. This Court emphasized that one feature of the law that made it constitutional was its inclusion of a broad self-defense exception – one not limited to actual employment in self-defense, but rather "allowing a good defense . . . if the defendant shall show that he has been threatened with great bodily harm, or had good reason to carry the same in the necessary defense of his person, home, or property." *Id*. Mr. Alpert has such a good reason: he is a sick old man who lives far away from the police.

The third way Section 571.070 is overbroad is that it is duplicative of other laws. Long before Missouri had a statute prohibiting felons from possessing firearms, it had a statute – and still has it – that prohibits armed criminal action, the commission of "any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon." MO. REV. STAT. §571.015. To be sure, a felon

might be emboldened to commit a crime if in possession of a firearm, whether the firearm is ever employed or not. not. Yet whatever incremental benefit from having a state-level prohibition is already provided by 18 U.S.C. §922, which has been on the books since 1968. Piling on an additional state-level punishment is unlikely to do much good – and, in some cases, such as Mr. Alpert's, some harm. "Criminals, especially ones engaged in dangerous activities . . . tend to have what economists call a 'high discount rate'—that is, they weight future consequences less heavily than a normal, sensible, law-abiding person would. . . . The length of a sentence therefore has less of a deterrent effect on such a person than the likelihood that he'll be caught, convicted, and imprisoned." *Presley*, 790 F.3d at 701.

The fourth, and final, way that Section 571.070 is underinclusive derives from its disparate treatment of similarly-situated felons. Section 571.070 exempts those whose convictions have been "obliterated," by pardon, expungement, or otherwise. (LF 268). But the obliteration is sometimes a poor proxy for ascertaining future risk from possessing a firearm. Pardons are sometimes issued not because of actual innocence, but because of injustices, such as a trial-court errors and disproportionate sentences, and sometimes even because of political favoritism. Chad Flanders, *Pardons and the Theory of the "Second Best*," 65 FLA. L. REV. 1559, 1574-1581 (Sep. 2013). In any event, the obliteration of the fact of conviction is a weaker proxy for gauging risk to public safety from firearm possession than a co-equal sovereign's express finding, made after a rigorous six-week investigation and background check of a felons: a finding not required by a full pardon or by a sister state's expungement of a felony. The difference in

treatment – restoration of gun rights for those whose risk to public safety from bearing firearms is an open question versus no restoration of gun rights for those whose risk to public safety has been expressly determined to be nonexistent or negligible – is arbitrary; there is no "rational relationship between the disparity of treatment[.]" *Heller*, 509 U.S. at 320.

3. Precedent from Other Jurisdictions Supports Mr. Alpert's Challenge

Since *Heller*, federal and state courts have recognized that, in limited circumstances, a successful as-applied challenge can be mounted to felon in possession statutes. *E.g., Tyler v. Hillsdale County Sheriff's Dep't*, 775 F.3d 308 (6th Cir. 2015); *U.S. v. Siegrist*, 595 Fed.Appx. 666 (8th Cir. 2015); *U.S. v. Moore*, 666 F.3d 313, 320 (4th Cir. 2012); *U.S. v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011); *U.S. v. Williams*, 616 F.3d 685, 693 (7th Cir. 2010); *U.S. v. Duckett*, 406 Fed. Appx. 185, 187 (9th Cir. 2010) (Ikuta, J., concurring); *U.S. v. McCane*, 573 F.3d 1037, 1049-50 (10th Cir. 2009) (Tymkovich, J., concurring). The Third Circuit Court of Appeals even specified how a convicted criminal could raise a successful as-applied challenge:

> [The challenger] must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections. For instance, a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen. Similarly, a court might find that a felon whose crime of conviction is decades-old poses no continuing threat to society.

Barton, 633 F.3d at 174.

Applying this test, two federal district courts found that the federal ban on felons possessing firearms violated the Second Amendment. *Binderup v. Holder*, No. 13-6750-JKG, 2014 U.S. Dist. LEXIS 135110, at pp. 48-71 (E.D. Penn. Sept. 25, 2014); *Suarez v. Holder*, No. 14-968-WWC, 2015 U.S. Dist. LEXIS 19378, at pp. 18-26 (M.D. Pa. Feb. 18, 2015). The Third Circuit affirmed. *Binderup v. Holder*, Slip Opinion, Case Nos. 14-4549 & 14-4550 (3rd Cir. Sept 7. 2016). It held that "Binderup and Suarez have presented unrebutted evidence that their offenses were nonviolent and now decades old, and that they present no threat to society, which places them within the class persons who have a right to keep and bear arms."

If that is true, the same is true *a fortiori* about Mr. Alpert. Mr. Alpert's convictions are older than theirs – much older. Binderup's prior conviction was from 1996; Suarez's, from 1990. In contrast, Mr. Alpert's convictions were from 1970 and 1975. Mr. Alpert's offenses indicated a lesser propensity to commit crimes than Binderup and Suarez's. Mr. Alpert was convicted of nonviolent drug offenses, involving small amounts of drugs. By contrast, Suarez was convicted of unlawful carrying of a handgun (after apparently driving while intoxicated); and Binderup was convicted of corrupting a minor (in essence, statutory rape or sexual abuse), with whom he'd had a fourteen-month sexual relationship and whom he knew to be underage, and 24 years younger than him. Mr. Alpert is about ten years older than Binderup and Suarez. Unlike Binderup and Suarez, Mr. Alpert was deemed by the U.S. Attorney General – the person the former had sued – to pose no threat to public safety or the public interest if he were to possess a firearm. And unlike Mr. Alpert, who after his federal disabilities were lifted possessed a firearm

without incident for 25 years, neither Binderup nor Suarez ever proved that they could be trusted to possess a firearm by doing so without incident, despite their past crimes.

Britt v. State, 681 S.E.2d 320 (N.C. 2009) – a case in which "reasonable regulation" review, not strict scrutiny, applied – also supports Mr. Alpert's challenge. In *Britt*, the North Carolina Supreme Court upheld an as-applied challenge, based on a state constitutional right to bear arms, to a statute similar to Section 571.070. (The prior version of the challenged statute, like the prior version of Section 571.070, applied to felonies "mostly of a violent or rebellious nature"; did not apply to long guns; and had a five-year sunset provision. *Id*. at 321.) Though the challenge was not based on the Second Amendment, but Article I, Section 30 of the North Carolina Constitution, the texts are identical: "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."

In 1979, Britt was convicted of "felony possession with intent to sell and deliver the controlled substance methaqualone"; in committing the offense, Britt was not violent, nor threatened violence. *Id*. at 321, 323. From 1987 (the date when the sunset period expired) to 2004 (when the challenged statute was passed), Britt lawfully possessed firearms without incident. The North Carolina Supreme Court held that "[b]ased on the facts of [Britt's] crime, his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute's operation" (except by pardon) the statutory prohibition, as applied to Britt, was not "fairly related to the preservation of public peace and safety," and so not a "reasonable regulation." *Id*. at 323.

Britt is on all fours with Mr. Alpert's case. If anything, Mr. Alpert's challenge is stronger than Britt's. Mr. Alpert's convictions are older (by nine and five years, respectively) than Britt's. Mr. Alpert's felonies are less severe than Britt's: Mr. Alpert was convicted of a simple drug possession, whereas Britt was convicted of possession with intent to sell and deliver. And Mr. Alpert, unlike Britt, was determined by the U.S. Attorney General, after a rigorous investigation and background check, to pose no threat to public safety or the public interest if allowed to possess firearms – a prediction corroborated by 25 years of proof.

4. *Heller* Does Not Bar Mr. Alpert's Challenge to Section 571.070

Though *Heller* did say that "nothing in our opinion should be taken to cast doubt on *longstanding* prohibitions on the possession of firearms by felons," 554 U.S. at 616, it was adamant that it was not delineating the "full scope of the Second Amendment," *id*. at 626. *Heller* was simply using "precautionary language that

> warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense. What other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open. The opinion is not a comprehensive code; it is just an explanation for the Court's disposition. Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration.

Skoien, 614 F.3d at 640. That is precisely how the U.S. Supreme Court has instructed lower courts to read its decisions. *E.g., Zenith Radio Corp. v. U.S.*, 437 U.S. 443, 462 (1978); *Cohens v. Virginia*, 5 L.Ed 247 (1821). So *Heller* does not even contain dictum about the validity of "longstanding" prohibitions on felons possessing firearms.

Yet even if *Heller* were read as placing a thumb on the scale in favor of such longstanding prohibitions, that would not save Section 571.070. For starters, Section 571.070 is not longstanding. The expansion of Section 571.070 to cover Mr. Alpert is eight years old. Whatever "longstanding" means, it does not apply to laws that have been on the books for only 8 of the nearly 200 years that Missouri has been a state. Justice Scalia, author of the majority opinion in *Heller*, would agree, if he were still around. He rejected the notion that statutes of "recent vintage," those passed within "the past few decades," could constitute a "tradition" showing the (narrow) scope of a constitutional provision. *Printz v. U.S.*, 521 U.S. 898, 918 (1997) (invalidating the Brady Handgun Violence Prevention Act, pursuant to an opinion by Justice Scalia).

Neither at this country's founding nor in 1820 when the Missouri constitution first embraced an individual right to keep and bear arms were there any federal or state statutes that barred felons from possessing firearms. C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARVARD J. OF L. & PUB. POLICY 695, 697 (March 2009) ("[A] lifetime ban on any felon possessing any firearm is not 'longstanding' in America."). "The federal 'felon' disability – barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm – is less than fifty years old." *Id*. at 698. For a quarter century before 1961, the federal ban applied only to

those convicted of a "crime of violence." *Id*. at 699. A "crime of violence" was defined as "murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking" and "certain forms of aggravated assault – "assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year." *Id*. (citing Federal Firearms Act, ch. 850, §1(6), 52 Stat. 1250, 1250 (1938)). In Missouri, there was no ban on felons possessing firearms before 1981 (except in furtherance of the commission of a crime). And from 1981 to 2008, the only felons in Missouri who were prohibited from possessing firearms were dangerous felons; and the prohibition period was not for life, but only for five years (and did not even apply to most rifles and shotguns). So even if this Court were to allow Section 571.070 to piggy-back on federal or prior Missouri law, that wouldn't help save it.

English common law provides no historical warrant for Section 571.070, either. There was "just one common-law rule for the regulation of arms: a prohibition against going about armed so as to terrify the people." Marshall, *supra* at 716; *see also* William Hawkins, 1 TREATISE ON THE PLEAS OF THE CROWN ch. 63, ¶9 (lead ed., 6th ed. 1788) (noting that "no wearing of arms is within the meaning of" the Statute of Northampton "unless it be accompanied with such circumstances as are apt to terrify the people," by causing "suspicion of an intention to commit an[] act of violence or disturbance of the peace").

To be sure, under English common law a felon could no longer "perform[ ] legal functions, such as being a witness or suing" and was deprived of all personal property,

including firearms in his or her possession. William Blackstone, 2 COMMENTARIES 96–97 (discussing forfeiture as the historical foundation of felony); id. at *377 (describing the possible punishments of serious crime as including "confiscation, by forfeiture of lands, or moveables, or both, or of the profits of lands for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like"). Yet the "forfeiture of estate" imposed by English common law was an attainder, always prohibited by both the federal and Missouri constitutions. MO. CONST. ART. I, §30 ("[N]o person can be attainted of treason or felony by the general assembly"; "no conviction can work corruption of blood or forfeiture of estate"); U.S. CONST. ART. I, §§9-10. St. George Tucker noted, in an annotation of Blackstone, that the civil forfeiture rule of English common law was never transplanted to the United States. William Blackstone, 5 COMMENTARIES 377 n.8 (St. George Tucker ed., 1803) (1767); *see also Austin v. U.S.*, 509 U.S. 602, 611-13 (1993).

More significantly, a felony under English common law was not the same as a felony under American law today. The former were typically limited to the gravest, most dangerous, and usually violent, offenses, such as murder, manslaughter, mayhem, robbery, rape, burglary, arson, and sodomy, *Jerome v. U.S.*, 318 U.S. 101, 108 n.6 (1943); and "nearly all" were punishable by the critical sentences of death or deportation[.]" *U.S. v. Francesco*, 449 U.S. 117, 134 (1980). These common-law felonies is like the "dangerous felonies" listed in the pre-2008 Section 571.070. By contrast, possession of a controlled substance was not a felony under English common law – it wasn't even a crime. *U.S. v. Greeno*, 679 F.3d 510, 519 (6th Cir. 2012) ("[L]aws

prohibiting the possession, use, and distribution of narcotics are of relatively recent vintage.").

In America, the term "felony" is a "verbal survival which has been emptied of its historic content"; it generally applies to any offense punishable by imprisonment for more than a year. *Adams v. United States*, 317 U.S. 269, 287 n.2 (1942). In Missouri, a felony even includes crimes for which a term of *less than a year* of imprisonment is imposed! *See* MO. REV. STAT. §558.011 (providing maximum sentences for felonies but not minimum sentences). And since the 1960s (when the first federal felon in possession statute was enacted), there has been an explosion in the number of crimes, most of which are classified as felonies. Husak, OVERCRIMINALIZATION, at p. 34 (describing legislatures as "'offense factories' that churn out new statutes each week"). So capaciously defined are felonies, that is no joke to say, as Judge Alex Kozinski did in the so-titled article, "You're (Probably) a Federal Criminal." Timothy Lynch, ed., IN THE NAME OF JUSTICE 43, 43 (Cato 2009).)

In sum, the common law in effect in the 50 states when the U.S. Constitution was adopted provides no historical support for the notion that Section 571.070 is a longstanding prohibition. In any event, even if Section 571.070 were a longstanding prohibition, that would just mean that it is (in *Heller*'s words) "presumptively lawful"; it leaves open "the possibility that the ban could be unconstitutional in the face of an as-applied challenge." *Williams*, 616 F.3d at 692. As previously explained, Section571.070 is not narrowly tailored.

5. This Court's Precedents Do Not Bar Mr. Alpert's Challenge

There are three distinct reasons why Mr. Alpert's challenge is not barred by this Court's precedent. First, Mr. Alpert's challenge is based on a more rigorous form of strict scrutiny than that applied in prior challenges. Second, Mr. Alpert substantiated his arguments with ample, uncontradicted evidence, unlike the prior challengers. Third, the prior challengers deserved to lose; their cases are factually distinct.

a. Mr. Alpert's Challenge is Based On a More Rigorous Version of Strict Scrutiny

This is not the first time that this Court has faced a constitutional challenge to Section 571.070. *See State v. Clay*, 481 S.W.3d 531 (Mo. banc 2016); *State v. Robinson*, 479 S.W.3d 621 (Mo. banc 2016); *State v. McCoy*, 468 S.W.3d 892 (Mo. banc 2015); *State v. Merritt*, 467 S.W.3d 808 (Mo. banc 2015). However, this is first time this Court has faced a constitutional challenge to Section 571.070 based on the Second Amendment. (All prior challenges were based on article I, section 23 of the Missouri constitution. *Clay*, 481 S.W.3d at 533-34; *Robinson*, 479 S.W.3d at 623-24; *McCoy*, 468 S.W.3d at 894, 894 n.3; *Merritt*, 467 S.W.3d at 811, 811 n.3.) This distinction matters because the strict scrutiny required by U.S. Supreme Court in adjudicating federal constitutional rights is more rigorous than the strict scrutiny required by article I, section 23.

In reviewing prior article I, section 23 challenges, this Court declared that it has "always . . . applied strict scrutiny to laws regulating the right to bear arms[.]" If by "strict scrutiny," this Court means strict scrutiny as employed by the U.S. Supreme Court (as opposed to strict scrutiny under Missouri law), that is incorrect. Before Section

571.070 was amended in 2008, this Court, in adjudicating gun rights challenges brought under the Missouri constitution (until *McDonald*, the Second Amendment did not bind the states), had held that the right to bear arms was subject to the "police power" of the state, which permits "reasonable regulations" that have a "real and substantial relationship to the protection of the public health, safety, morals or welfare." *Heidbrink v. Swope*, 170 S.W.3d 13, 15 (Mo. banc 2005); *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886). That test should sound familiar: It is identical to the classic statement of the test for rationality review, expressed by the U.S. Supreme Court in *Nebbia v. New York*, 291 U.S. 502, 525 (1934) ("the guaranty of due process, as has often been held, demands only that the laws shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained"). Under that test, as long as a law passes rationality review, the legislature has "*plenary* control of any matter falling within the domain of the police power." *Southwest Missouri R. Co. v. Public Service Commission*, 219 S.W. 380, 381 (Mo. banc 1920) (emphasis added); *see also Ziffrin v. Reeves*, 308 U.S. 132,139 (1939) ("The police power of a state is as broad and plenary as its taxing power[.]"). So if strict scrutiny under Missouri law means "reasonable regulations" review, then article I, section 23 simply impose the rationality review already required by the federal and state due process clauses; it is superfluous.

Before article I, section 23 was amended, this Court, in conducting reasonable regulations review, had never employed either the terminology of strict scrutiny as used by the U.S. Supreme Court (e.g., "compelling state interest," "narrowly tailored," etc.) or its substantive requirements. To the contrary, this Court had expressly distinguished

reasonable regulation review from strict scrutiny. *Weinschenk v. State*, 203 S.W.3d 201, 215 (Mo. banc 2006) (per curiam).[5] In fact, it applied reasonable regulations review in gun regulations cases precisely *because* the right to bear arms was not deemed a "fundamental right" (to which strict scrutiny would apply). *State v. Horne*, 622 S.W.2d 956, 957-58 (Mo. 1981) (per curiam).

In practice, too, "reasonable regulations" review has long been understood to be the opposite of the strict scrutiny, as used by the U.S. Supreme Court. The former "permit[s] vastly overinclusive and underinclusive laws to survive judicial scrutiny." Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POLICY REV. 593, 595, 598 (2004) (noting that courts that apply the "reasonable regulations" standard "universally reject strict scrutiny or any heightened level of review"). As Professor Winkler notes:

> By requiring that regulations be merely 'reasonable' the state courts give wide latitude to the legislatures to enact policies to preserve and enhance

[5] "Missouri election-law cases in which strict scrutiny was not applied simply recognize, as does this Court today, that reasonable regulation of the voting process and of registration procedures is necessary to protect the right to vote. So long as those regulations do not impose a heavy burden on the right to vote, they will be upheld provided they are rationally related to a legitimate state interest. If the regulations place a heavy burden on the right to vote, as here, our constitution requires that they be subject to strict scrutiny."

> public safety. . . . The reasonable regulation standard, like rationality review used elsewhere in constitutional jurisprudence, is shorthand for a considerable degree of judicial deference rather than a set of substantive principles one could identify ex ante. . . . state courts uphold legislation as reasonable without much discussion of what precisely separates out reasonable from unreasonable regulations. To the extent reasonableness has substantive limits, courts will invalidate a gun law only if it is arbitrary or so restrictive that it 'eviscerates,' renders 'nugatory,' or results in the effective 'destruction' of the right to bear arms"

Id. (footnotes omitted).

In the prior challenges, then, this Court was employing a form of rationality review. Of course, in fleshing out Missouri law, this Court is free to adopt whatever version of strict scrutiny (lenient or strict) it deems correct. *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926).[6] In adjudicating federal constitutional rights, though, this Court

[6] "Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the state. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law." It follows that *McDonald* cannot have compelled this Court to apply strict scrutiny (or any particular level of scrutiny) in challenges brought under article I, section 23 of the Missouri constitution. *See generally*

cannot employ a strict scrutiny that is "strict in theory but feeble in fact." *Fisher*, 133 S.Ct. at 2421. "Strict scrutiny is a searching examination, and the government bears the burden to prove," with "sufficient evidence," that its restrictions its legislation is narrowly tailored. *Id*. at 2413, 2421.

That requirement was not satisfied in Mr. Alpert's case. The State presented *no* evidence in support of Section 571.070. It made no attempt to satisfy its burden.

b. Mr. Alpert Presented Ample Evidence; The Prior Challengers, None – Only Unsubstantiated Argument

As previously noted, as-applied challenges are based on the record before the court. Unlike the record here, the record before the Court in *McCoy*, *Merritt*, *Robinson*, and *Clay* did not include much, if any evidence, that bore on the challenger's risk to public safety from possessing a firearm. That is because the prior challenges came to this Court on motions to dismiss; the appellate record was limited to the facts as alleged in the charging document (i.e., information or indictment) and any supporting documents attached thereto (e.g., a probable cause affidavit). *Richard*, 298 S.W.3d at 532 ("The ultimate facts of this case have yet to be established because the circuit court sustained Richard's motion to dismiss the information prior to trial. At *this stage of litigation*, the facts for assessing Richard's constitutional challenge are provided by the allegation in the state's information and probable cause affidavit.") (emphasis added). Nowhere in these

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Printz v. U.S., 512 U.S. 898 (1997) (forbidding federal commandeering of state governments).

documents, nowhere in the trial court record did the State ever *admit* that the challenger's risk of misusing firearms was less than that posed by the typical felon. Here, though, the State did precisely that. (*See* LF 278, 391).

Instead of presenting evidence, the State simply contended that social science research is "not material" in constitutional challenges, citing footnotes from *McCoy* and *Merritt*. These footnotes condemned statistics about crime rates. 468 S.W.3d at 897 n.5; 467 S.W.3d at 814 n.6. "These statistics," this Court stated, "do not bear on the constitutional analysis because they prove nothing about the law's design." *Id*. Whether crime increases or decreases, there remains a compelling state interest in reducing crime; that crime rates have decreased or increased has no bearing on whether Section 571.070 is narrowly tailored. Of course, this Court didn't stop there; it also stated that the parties' invocation of crime statistics was "merely one example of why the *ever-changing* body of science and statistics is ill-suited to constitutional analysis." However, Mr. Alpert did not rely on "ever-changing" social science. He relied on robust, long-established social science, whose reliability, conclusions, and applicability to Mr. Alpert went unquestioned by the State. This social science directly addresses whether Mr. Alpert and others similarly situated pose a risk to public safety form possessing a firearm and whether that risk is less than that posed by the average, law-abiding citizen – two key factual issues in this case. *See White*, 416 F.3d at 751 (holding that strict scrutiny requires a challenged statute to "actually advance[] the state's interest").

Insofar as the State construes the footnotes from *McCoy* and *Merritt* as adopting a bright-line rule against social science, the State has misread the footnotes.[7] There is no need for a *per se* rule forbidding social science. If research cited by a party is unreliable, the other party can have it excluded on that very ground. *State v. Taylor*, 298 S.W.3d 482, 500 n.8 (Mo. banc 2009) (discussing the "reliability" requirements of *Frye* and *Daubert*). And any erroneous finding by the trial court on any legislative facts ("facts not pertaining to a particular party but which bear upon law, policy or discretion," *Jackson County Public Water Supply Dist. No. 1 v. State Highway Commission*, 365 S.W.2d 553, 559 (Mo. 1963)) can, and will, be reviewed *de novo*. *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) ("The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."); *Crowell v. Benson*, 285 U.S. 22, 60 (1932) (noting that in "cases brought to enforce constitutional rights" the judicial power "extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function"); *U.S. v. Singleterry*, 29 F.3d 733, 740 (1st Cir. 1994); *Dunagin v. Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc).

[7] It is be uncommon for a court to hide such a significant rule of law in a footnote. *See, e.g., Kovacs v. Cooper*, 336 U.S. 77, 90 (1949) ("A footnote hardly seems an appropriate way of announcing a new constitutional doctrine.") (Frankfurter, J., concurring); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 831 (2007) (noting that the Court does not "hide its understanding of the law in a corner of an obscure opinion or in a footnote, unread but by experts").

A per se rule against social science in constitutional challenges would make Missouri's judiciary an outlier. In an as-applied challenge, the semantic analysis of a statute is just the first step (and, animus cases to the side, the last step when review is rationality review). When strict scrutiny applies, there is a second step: an analysis of whether the statute is narrowly tailored. Narrow tailoring requires a statute "to regulate activities that pose substantially the same threats to the government's purportedly compelling interest as the conduct that the government prohibits." Fallon, 54 UCLA L. REV. at 1327. Social science, by providing legislative facts upon which the judiciary can rely, can help decide whether a challenged statute actually furthers the State's compelling state interest, and whether there are other narrower or broader means that would better further that compelling state interest. Proof that strict scrutiny is not limited to semantic analysis is found in the remedy when a statute is declared unconstitutional as-applied. None of the statute's text is removed (though the legislature is free to do so); the unconstitutional *applications* are simply declared verboten. *Associated Industries of Missouri v. Director of Revenue*, 918 S.W.2d 780, 784 (Mo. banc 1996).

What's the alternative? The judiciary could rely on intuition, hunches, in a word common sense. Yet "[c]ommon sense can mislead; lay intuitions . . . are often wrong." *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990). One judge's common sense is another's nonsense. Yes, there is a tradition of the judiciary consulting its collective gut to decide constitutional challenges – a flawed, embarrassing, shameful tradition. In *Bradwell v. State*, 83 U.S. 130 (1872), for instance, the U.S. Supreme Court, invoking its inner patriarch, pronounced:

> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

Likewise, in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the U.S. Supreme Court ignored the manifest psychological harm caused by segregation. It denigrated the "assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority," saying, "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.* at 551. Not until 60 years later was this bigoted falsehood laid to rest, by *Brown v. Board of Education*, 347 U.S. 483 (1954). And that case relied on, you guessed it, social science (the famous "doll test" conducted by Dr. Clark in the 1940s).

Brown is no aberration. Social science has been omnipresent in constitutional litigation during the past 100 years, ever since *Muller v. Oregon*, 208 U.S. 412 (1908). (There is a special name used for an appellate brief that is heavy on social science – a "Brandeis brief," named after Justice Louis Brandeis, who before his ascension to the U.S. Supreme Court filed such a brief in *Muller*.) It is no exaggeration to say that most as-applied challenges before the U.S. Supreme Court in the past 50 years has involved

consideration of social science, some quite controversial. *E.g., Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 565 U.S. 304 (2002). As Professor Larsen has noted:

> Supreme Court decisions today frequently turn on questions of so-called 'legislative fact' – generalized facts about the world that are not limited to any specific case. These types of factual questions should be familiar: Do violent video games harm child brain development? Does racial diversity have educational benefits? Is a partial birth abortion ever medically necessary? The evidence the Justices use to answer these questions is not limited in any respect.

Allison Orr Larsen, *The Trouble with Amicus Facts,* 100 VA. L. REV. 1757, 1759 (2014) (citing, among other cases, *Fisher v. Univ. of Tex.*, 133 S.Ct. 2411 (2013) and *Gonzales v. Carhart*, 550 U.S. 124 (2007)).[8]

Not only is social science commonly used in constitutional cases; the failure to present any, or even conflicting, social science can be fatal to a statute subject to strict scrutiny. In *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), the U.S. Supreme Court struck down a California law barring the distribution of violent video

[8] There is whole field of constitutional law dedicated to "constitutional facts" and the use of social science to establish these facts. *See generally* David L. Faigman, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS (Oxford 2008); Rosemary J. Erickson & Rita Simon, THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS (1997).

games to minors. The law was subject to strict scrutiny. California presented no social science showing "a direct causal link between violent video games and harm to minors," which was the State's (purported) compelling state interest. Instead, California simply relied on a prior decision by the Court (in which intermediate scrutiny was applied) for the proposition that "it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on *competing* psychological studies" (emphasis added). The Court disagreed; it held that because California bore the "risk of uncertainty, ambiguous proof [cannot and] will not suffice." If ambiguous evidence doesn't cut it, then no evidence is a serious problem.

No doubt about it, social science can sometimes be unenlightening. When it is, it can be disregarded, as the crime statistics in *McCoy* and *Merritt* were. And sometimes the social science, reliable social science, can be in conflict, not providing a univocal answer to a pertinent issue of fact. But the judiciary cannot punt when it is faced with hard cases, or place an improper thumb on the scale, making hard cases disappear by judicial fiat. As the U.S. Supreme Court has noted in a related context:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future

> conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities.

Jurek v. Texas, 428 U.S. 262, 274-75 (1976), *overruled on other grounds by Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654 (2007); *cf. Barefoot v. Estelle*, 463 U.S. 880, 896 (1983) ("The suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel.").

c. The Prior Challenges Are Factually Distinct

This Court does not issue advisory opinions, only opinions that address issues that are "part of a live case or controversy." *State ex rel. Dahl v. Lange*, 661 S.W.2d 7, 8 (Mo. banc 1983); *Smith v. State*, 152 S.W.3d 275, 280 (Mo. banc 2005) (White, J., concurring). "Any reported opinion should be read in the light of the facts of that particular case[.]" *State on Information of Dalton v. Miles Laboratories*, 282 S.W.2d 564, 573 (Mo. banc 1955). In particular, "a rule of constitutional law" is formulated to be no "broader than is required by the precise facts to which it is applied." *State v. Griffin*, 662 S.W.2d 854, 860 (Mo. banc 1983). These principles must guide this Court in deciding whether the prior challenges are on point with Mr. Alpert's challenge.

They are not; they are factually distinct. To begin with, Mr. Alpert's history and background could not be more different than those of the prior challengers. The former prove that Mr. Alpert's crimes were aberrational, youthful indiscretions; the latter prove that the prior challengers were habitual criminals, who have yet to abandon a life of crime. They certainly cannot be trusted with a firearm, unlike Mr. Alpert.

Consider Santonio McCoy. He was 40 years old when this Court ruled against him; Mr. Alpert is 65 years old, the age at which most criminals have aged out of crime. McCoy had committed six serious felonies before this Court ruled against him. Many of them, such as burglary, resisting arrest, and unlawful use of weapon, were violent. (And after he lost his appeal, McCoy went on to commit statutory sodomy and statutory rape, *see* Case No. 15SL-CR07524-01). Mr. Alpert has committed only two felonies, neither violent (and both involving small amounts of drugs). McCoy's last felony (when this Court ruled) was from 2006; Mr. Alpert's, from over 40 years ago.

Next, consider Marcus Merritt. He was 54 years old when this Court ruled against him (Merritt LF 9) – 11 years younger than Mr. Alpert. Merritt's education stopped after the 11th grade (Merritt Transcript 4); Mr. Alpert got a B.A. and then went to graduate school, before forming two successful businesses. Merritt's last felony (before this Court ruled against him), possession of heroin (along with a misdemeanor charge of possession of drug paraphernalia) was committed in November 2012 (Merritt Transcript 7), and after that crime, Merritt was sentenced in federal district court to 36 months imprisonment on a weapons charge. (Merritt Transcript 7-8); Mr. Alpert's last crime was committed over 40 years ago. Like Mr. Alpert, Merritt had previously been convicted of a drug felony, but it was not just for possession, but rather for distribution of PCP. 467 S.W.3d at 810.

Finally, consider Pierre Clay, Raymond Robinson, and Steve Lomax. All three are younger than Mr. Alpert – by forty, nine, and ten years, respectively. (Clay LF 3; Robinson LF 7; Lomax LF 9). All three have prior convictions for unlawful use of a weapon (in Clay's case, a *concealed* weapon). 479 S.W.3d at 622; 481 S.W.3d at 533.

And Lomax has a long history of drug offenses, including distributing controlled substances near a school. (Lomax LF 10-11). By contrast, Mr. Alpert's prior offenses did not involve a weapon, nor distributing drugs, but only possession (of small amounts of drugs). Clay's last felony was from 2010; Robinson's, from 2003; Lomax's, from 2007. (Clay LF 4; Robinson LF 7; Lomax LF 8). By contrast, Mr. Alpert's last felony is over 40 years old.

Even if the histories and backgrounds of McCoy, Merritt, Clay, Robinson, and Lomax were similar to Mr. Alpert's, there are still three key features that set Mr. Alpert apart from them. First, in 1983, the U.S. Attorney General, after a background check and six-week investigation, concluded that permitting Mr. Alpert to keep and bear arms poses no risk to public safety and the public interest. No federal or state government has ever made any such conclusion about the prior challengers. Second, the Attorney General's prediction has been confirmed by the test of time: for 25 years, from 1983 to 2008, Mr. Alpert lawfully possessed firearms without incident, just as he did in his youth. The test of time has shown that McCoy, Merritt, Clay, Robinson, and Lomax are habitual criminals who cannot be trusted with firearms. Third, and finally, these habitual criminals staked their claim on an overbroad proposition – that *all* nonviolent convicted felons have a constitutional right to bear arms. That is not Mr. Alpert's claim. His claim is that *some* nonviolent convicted felons, those similarly situated to Mr. Alpert, have a constitutional right to keep and bear arms that the state cannot abrogate (though it can regulate it). That claim, accepted by the Third Circuit Court of Appeals and the Supreme Court of North Carolina, should be accepted by this Court.

CONCLUSION

The judgment of the Circuit Court of Johnson County should be reversed; the case should be remanded with instructions to enter judgment in Mr. Alpert's favor or else to hold a trial on the merits.

Respectfully submitted,

RON RIBAUDO
Mo. Bar No. 53833
The Ribaudo Law Firm
361C Quail View Drive
Ballwin, MO 63021
phone: (636) 485-8252
facsimile: (866) 499-3491
ron@ribaudolaw.com

Counsel for Appellant

CERTIFICATE OF COMPLIANCE & SERVICE

I certify that:

1. Pursuant and in compliance with Rule 84.06, the attached brief contains 13,850 words, as determined by Microsoft Word 2010 software;

2. On March 29, 2017, an electronic copy of this brief in PDF format was emailed to the clerk of this Court to be served by operation of the Court's electronic filing system upon Respondents' counsel of record;

3. The PDF versions of the brief provided to this Court and opposing counsel via the electronic filing system were scanned and found virus-free.

Respectfully submitted,

RON RIBAUDO
Mo. Bar No. 53833
The Ribaudo Law Firm
361C Quail View Drive
Ballwin, MO 63021
phone: (636) 485-8252
facsimile: (866) 499-3491
ron@ribaudolaw.com

Counsel for Appellant