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

REPLY BRIEF OF APPELLANT

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ARGUMENT

The trial court erred by granting Respondents' motion for summary judgment; the uncontroverted material facts establish that as applied to Mr. Alpert Section 571.070 violates the Second Amendment and article I, section 23 of the Missouri constitution.

Jack Alpert is a pillar of his community. His youthful dalliances with drugs while a hippie, over 40 years ago, should not bar him from ever keeping and bearing arms. It's uncontroverted that permitting Mr. Alpert to possess firearms would pose no risk to public safety or the public interest – or at least a risk no different than that posed by an average, law-abiding citizen. (LF 278, 391, 392). In 1983, the U.S. Attorney General concluded, after a rigorous investigation, that there was no such risk. That prediction was soundly corroborated by Mr. Alpert's 25 years of lawful, incident-free possession of firearms. Given these uncontroverted facts, Section 571.070 cannot constitutionally be applied to Mr. Alpert. Respondents weren't entitled to judgment as a matter of law, Rule 74.04(c); Mr. Alpert was.

I. The Trial Court Was Authorized to Decide the Merits of Mr. Alpert's Challenge

The trial court concluded that it was authorized to decide the merits of Mr. Alpert's challenge to Section 571.070. (LF 395). The Attorney General and Johnson County prosecutor disagree. They contend that Mr. Alpert's challenge is not ripe and, moreover, that he has an adequate remedy at law, barring his challenge. Why? Because Mr. Alpert has not violated Section 571.070; when he does so, he can raise his

constitutional defense by way of a motion to dismiss.[1] (RB 9-24). Until then, say Respondents, there is no immediate, concrete dispute between the parties, a prerequisite for a declaratory judgment action.

The Attorney General's job is to defend the interests of the State of Missouri. *See generally* MO. REV. STAT. §27.050-.060. The Johnson County prosecutor's job is to enforce the criminal law. Hitherto, those jobs have not been understood to entail urging a Missouri citizen to commit a felony. Thankfully, the law does not require Mr. Alpert to do so – placing his life (he has stage-4 cancer), his marriage, and his livelihood in jeopardy – in order to vindicate his constitutional rights. *Borden v. Thomason*, 353 S.W.2d 735, 741 (Mo. banc 1962); *Tietjens v. City of St. Louis*, 222 S.W.2d 70, 72 (Mo. banc 1949).

[1] In a footnote, Respondents suggest, without citing any authority, that a pardon might be an adequate remedy at law. (RB 31n.1). A pardon, which like a writ of mandamus is an extraordinary remedy, is "a mere matter of grace, and until this act of clemency is fully performed, neither benefit nor rights can be claimed under it." *Ex parte Reno*, 66 Mo. 266, 269 (1877). Not being a "matter of right, but purely discretionary," a pardon is not an adequate remedy at law. *See Hillsborough Tp Somerset County v. Cromwell*, 326 U.S. 620, 625-26 (1946); *see also Cooper v. Holden*, 189 S.W.3d 614, 620 (Mo. App. 2006) (holding that there is no cause of action to compel the issuance of a pardon).

A. Mr. Alpert's Challenge is Ripe

"There can be a ripe controversy before a statute is enforced." *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 738 (Mo. 2007) (per curiam). After all, the purpose of the Declaratory Judgment Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations[.]" MO. REV. STAT. §527.120. And "[o]ne must assume the State will enforce its laws." *Planned Parenthood*, 220 S.W.3d at 738. Even when the government says it will *not*, *Tietjens*, 222 S.W.2d at 72, or it has stopped enforcing a law, *Tupper v. City of St. Louis*, 468 S.W.3d 360, 364, 366 (Mo. 2015), the challenge is still ripe, as long as "(1) the facts necessary to adjudicate the underlying claims [are] fully developed and (2) the laws at issue [are] affecting the plaintiffs in a manner that [gives] rise to an immediate, concrete dispute." *Foster v. State*, 352 S.W.3d 357, 360 (Mo. 2011). Moreover, "[c]ases presenting predominantly legal questions are particularly amenable to a conclusive determination in a pre-enforcement context, and generally require less factual development." *Planned Parenthood*, 220 S.W.3d at 739.).

Mr. Alpert's challenge is such a case. The material facts – for instance, the non-existent risk posed by Mr. Alpert's possession of firearms, his 40 years of abstention from crime, the U.S. Attorney's general express finding that his possession of firearms poses nor risk to public safety or the public interest – are all undisputed. Ironically, Respondents' motion for summary judgment presupposes that they are. Rule 74.04(c). (Are Respondents tacitly conceding the trial court erred in granting their motion?) Whether Section 571.070 is unconstitutional as applied to Mr. Alpert requires

interpreting and applying the law, and would be unaffected by any future factual development.

Nor is there any doubt that Section 571.070 affects Mr. Alpert in a manner that gives rise to an immediate, concrete dispute. From 1983 to 2008, Mr. Alpert lawfully possessed firearms, despite his prior non-violent felonies. The only reason he stopped keeping and bearing arms was the amendment of Section 571.070 in 2008 to cover *all* (convicted) felons. He believes he has a constitutional right to keep and bear arms; Respondents disagree. Section 571.070 is vigorously enforced (RB 43), so there is a "reasonable expectation" that if Mr. Alpert were to exercise his right to bear arms, he would be prosecuted. These facts suffice to establish an immediate, concrete – not a hypothetical or abstract – dispute, resolvable by a declaratory judgment action. *Tupper*, 468 S.W.3d at 364.

Respondents' diktat on ripeness – that Mr. Alpert must "allege specific future activity in order to present a ripe claim" (RB 13) – proves too much. It boils down to the proposition that criminal statutes are not subject to pre-enforcement challenges. This Court disagrees. *E.g., State ex rel. Eagleton v. McQueen*, 378 S.W.2d 449, 452 (Mo. banc 1964); *Sta–Whip Sales Co. v. City of St. Louis*, 307 S.W.2d 495, 498 (Mo. 1957). And for good reason: requiring a challenger to commit a crime in order to vindicate constitutional rights would "place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462, 474-75 (1974). No showing of a threatened prosecution is

necessary for ripeness: "the threat is latent in the existence of the statute." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003). Moreover, the Hobson's choice that Respondents would impose on Mr. Alpert is especially perverse, given the gravamen of his challenge, that he is no different than any other law-abiding citizen – a claim that would be falsified were he to violate Section 571.070.

None of the cases cited by Respondents – *Foster v. State*, 352 S.W.3d 357 (Mo. 2011), *Turner v. Mo. Dep't of Conservation*, 349 S.W.3d 434 (Mo. App. S.D. 2011), *S.C. v. Juvenile Officer*, 474 S.W.3d 160 (Mo. 2015), and *Tupper v. City of St. Louis*, 468 S.W.3d 360 (Mo. 2015) – shows that Mr. Alpert's challenge is unripe. To the contrary, *Tupper* shows why it is ripe.

In *Foster v. State*, 352 S.W.3d 357 (Mo. 2011), Foster, an inmate, challenged the Missouri Incarceration Reimbursement Act (MIRA). MIRA authorizes the Attorney General, if he has "good cause to believe that an offender ... has sufficient assets[,] to recover not less than ten percent of the estimated cost of care of the offender or ten percent of the estimated cost of care of the offender for two years, whichever is less." MO. REV. STAT. §217.831.3. "The requirement that the attorney general have good cause to believe that the reimbursement action will yield a certain recovery is a condition precedent to filing the petition." *State ex rel. Nixon v. Peterson*, 253 S.W.3d 77, 83 (Mo. banc 2008). Foster did not allege that he ever would receive sufficient funds to trigger MIRA, or would like to receive such funds, and their precise amounts, but had avoided having them deposited because of MIRA. *Id.* at 361. Instead, Foster staked his challenge

on the view that "*any* funds" deposited would be seized. *Id*. at 358 (emphasis added). This Court held that Foster's challenge wasn't ripe.

Foster doesn't help Respondents. This Court did not refuse to entertain Foster's challenge because it was a pre-enforcement challenge. This Court rejected that argument. *Id*. at 360. No, this Court held the challenge wasn't ripe because a factual premise of the challenge – that *any* funds deposited into his prison account could be seized – was false. It was also speculative that Foster would ever be aggrieved by MIRA, given that it was unlikely that "10 percent of the estimated cost of incarcerating him for two years" – not a nominal sum – would ever be deposited into his prison account.

Unlike Foster's challenge, Mr. Alpert's is not based on a falsehood or a future, non-present aggrievement. Section 571.070 currently aggrieves him, by barring him from possessing firearms – any firearms. Nor is it speculative whether Section 571.070 applies to him. Mr. Alpert is a convicted felon. By its terms, Section 571.070 applies to him. Given that Section 571.070 is vigorously enforced (RB 43), Mr. Alpert has no reason to doubt that he would be prosecuted were he to exercise his right to keep and bear arms.

S.C. v. Juvenile Officer, 474 S.W.3d 160 (Mo. 2015) is likewise distinguishable. The juvenile disposition S.C. challenged on appeal – he had not filed a declaratory judgment – didn't require him to register for life on the adult sexual offender registry. Yet he challenged that (nonexistent) requirement. It is hornbook law, though, that a judgment can only be reversed if the judgment is erroneous. Accordingly, this Court held S.C.'s challenge *on appeal* to be premature. Granted, S.C. could not have turned around and filed a declaratory judgment action raising the same challenge. But that is because S.C.

was not then required to register on the adult registry, nor was there any threat to compel him to register. *Id*. at 163. No right (constitutional or otherwise) of S.C.'s could have been placed in jeopardy by a non-existent registration requirement and a non-existent threat to compel registration. By contrast, Section 571.070 aggrieves Mr. Alpert by prohibiting him from exercising his right to bear arms, as he did for 25 years before Section571.070 was amended in 2008.

The inapplicability of *Forrest v. State*, 290 S.W.3d 704 (Mo. 2009) follows *a fortiori*. *Forrest* involved a Rule 29.15 action, which can only challenge a "conviction or sentence," not the method of executing a sentence. Forrest challenged the lethal injection method, not his sentence, the death penalty. Hence, the trial court concluded that Forrest's claim "was not cognizable in the Rule 29.15 action." *Id*. at 718. This Court agreed that the challenge was "not ripe in the post-conviction appeal." *Id*. This Court did not opine that a separate declaratory judgment action by Forrest would never be ripe. To the contrary, it said that Forrest could bring such a challenge after he had exhausted his state and federal remedies. *Id*. at 718. Those remedies might very well have mooted any need to challenge the lethal injection protocol. By contrast with *Forrest*, no subsequent developments (other than legislative change) would moot Mr. Alpert's challenge to Section 571.070; and the relief he seeks is cognizable in a declaratory judgment action.

The last arrow in Respondents' quiver is *Turner v. Mo. Dep't. of Conservation*, 349 S.W.3d 434 (Mo. App. S.D. 2011), an especially poor case for Respondents. *Turner* involved a "void for vagueness" challenge to agency regulations on hunting methods, based on "hypothetical scenarios," not "actual situations" involving the challengers.

Vague regulations can – in fact, must – be interpreted to avoid constitutional violations. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n of State*, 399 S.W.3d 467, 481-82 (Mo. App. 2013); *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 598-99 (Mo. 2012). So there was no reason to assume, as the challengers did, that the regulations would be applied to them. By contrast, Mr. Alpert has challenged a statute, Section 571.070, that clearly, not hypothetically, applies to him. Consider, too, that, unlike Mr. Alpert, Turner had a "sufficient alternate remedy so as to bar his attempt to challenge by declaratory judgment the validity of regulations"; he could raise his defense in the criminal action that was then pending in federal court. *Id*. at 447. Finally, unlike the regulations in *Turner*, Section 571.070 *has* "interrupted or prevented a particular course of conduct by [Mr. Alpert]" – namely, his possession of firearms.

B. Mr. Alpert Has No Adequate Remedy at Law

Respondents are correct that a declaratory judgment action cannot be brought when an adequate remedy at law "already exists." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 25 (Mo. 2003); *Preferred Physicians v. Preferred Physicians*, 916 S.W.2d 821 (Mo. App. 1995) (Breckenridge, J.). Mr. Alpert doesn't currently have any remedy at law. He either vindicates his constitutional rights by pursuing a declaratory judgment action, or he abandons his constitutional right to bear arms.

There is no pending or imminent criminal prosecution in which Mr. Alpert can challenge the constitutionality of Section 571.070. *Contrast Schaefer v. Koster*, 342 S.W.3d 299 (Mo. 2011). Nor would violating Section 571.070 give him a remedy at law, for "[t]he liability to be tried as a criminal is no 'remedy' but a hazard, which the law

should help the much regimented citizen to avoid by construing and interpreting inhibitory statutes in a civil proceeding where possible." Edwin Borchard, *Challenging Penal Statutes by Declaratory Action*, 51 YALE L. JOURNAL 445, 461 (June 1943). To be adequate, a remedy must not only be available, but a "more effective or efficient" means for raising a challenge. 6A MOORE'S FEDERAL PRACTICE §57.08 (2d ed. 1993), at pp. 57-42, 57-44. Dismissing Mr. Alpert's declaratory judgment action, so that he can break the law, and then raise his constitutional arguments in a second lawsuit, criminal this time, would be the opposite of efficient; it would be a waste of the time and resources of both the parties and the judiciary.

Respondents ignore one of the purposes of a declaratory judgment action: to be "an alternative to pursuit of . . . arguably illegal activity." *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007); *see also Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73, 75 (4th Cir. 1991). It eliminates the "dilemma" of choosing between "abandoning [constitutional] rights or risking prosecution." *Medimmune*, 549 U.S. at 129. It would be a perverse policy, which this Court should not lightly impute to the General Assembly, *Humane Soc'y of U.S. v. State*, 405 S.W.3d 532, 537 (Mo. 2013), to hold that the vindication of fundamental constitutional rights turns on one's willingness to dirty one's hands by committing a felony, whereas a quotidian dispute over the meaning of a contract can be resolved by a declaratory judgment action without either party first having to breach the contract. MO. REV. STAT. §527.030.

Tupper scotches Respondents' adequacy argument. In *Tupper*, this Court reiterated that a "declaratory judgment action has been found to be a proper action to

challenge the constitutional validity of a criminal statute or ordinance." This Court didn't deny that the challenge could have been raised in prior municipal prosecutions; however, since the City had dismissed those prosecutions, that remedy was "no longer" available. Likewise, Mr. Alpert doesn't currently have an adequate remedy at law. If a declaratory judgment action is permitted even though the challenger could have previously raised the challenge in a prior action, then it follows that a declaratory judgment action is permitted when the challenger never had, and does not currently have, that option.[2]

J.H. Fichman v. Kansas City, 800 S.W.2d 24 (Mo. App. 1990) doesn't help Respondents. *Fichman* (as read by Respondents) is unsound. "An adequate remedy exists," declared *Fichman*, "if a plaintiff could assert the issues sought to be declared in an action brought by defendant." But this Court has held, time and again, that pre-enforcement challenges to criminal statute are permitted, as long as the case is ripe. *Tupper*, 468 S.W.3d at 368 (collecting cases). *Fichman* is also readily distinguishable. The declaratory-judgment action there would not have terminated "the uncertainty or controversy" between the parties, as required by Rule 87.07. J.H. Fichman Company

[2] The dissent from *Tupper* doesn't help Respondents, either – quite the contrary. The dissent would have dismissed the challenge to the presumption of guilt created by the municipal ordinance. The dissent thought there was no longer a justiciable controversy, given the City's dismissal of the municipal prosecutions. Why? Because the challengers did not "claim a right" to run red lights. By contrast, Mr. Alpert does claim a constitutional right that the law, Section 571.070, says he doesn't have.

challenged a drug-paraphernalia ordinance on vagueness grounds. Two problems dogged its challenge: (1) Fichman didn't challenge an identical state statute, Section 195.010, which had previously withstood a vagueness challenge. So, even if it (somehow) prevailed, it would still be subject to the same prohibition. (2) Fichman only sought a declaratory judgment about *some* of the items it sold (alleging they were not drug paraphernalia). So even if Fichman won, the harm it complained about – the police threatening to arrest and prosecute its employees and to seize its property, perhaps bankrupting the company – wouldn't be remedied. By contrast, a declaration that, notwithstanding Section 571.070, Mr. Alpert can keep and bear arms would completely resolve the controversy and uncertainty here.

II. Section 571.070 Violates Article I, Section 23

Respondents admitted before the trial court a key fact[3] in this case: Mr. Alpert's possession of firearms would pose a risk to public safety no greater than that posed by that of an average, law-abiding citizen. (LF 278, 391, 392). Respondents don't deny the admission, nor this fact, let alone try to make a last ditch and untimely effort to rebut it;

[3] Whether one has a predisposition to commit a crime is a "probabilistic question" that is "quintessentially factual." *U.S. v. Mayfield*, 771 F.3d 417 (7th Cir. 2014) (en banc) ("[I]t's hard to imagine how a particular person could be deemed 'likely' to do something as a matter of law."). For instance, whether it is "safe [for an SVP] to be at large and will not reoffend" is "clearly" a "question of fact." *Schottel v. State*, 159 S.W.3d 836, 838, 843-44 (Mo. 2005).

nor can they. As in the trial court, so here, Respondents' defense primarily rests on two propositions: (1) the failure of prior as-applied challenges to Section 571.070 means that Mr. Alpert's must fail; (2) social science research is immaterial. (RB 25-29). As a fallback, Respondents also quibble with Mr. Alpert's strict scrutiny analysis. (RB 29-32). None of their counter-arguments holds any water.

Section 571.070 is a regulatory statute, designed to prohibit conduct (the possession of firearms) not as a punishment for past crimes, but to protect the public from armed criminals. *State v. Merritt*, 467 S.W.3d 808 (Mo. 2015) ("[F]elons are more likely to commit violent crimes than are other law abiding citizens . . . someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use[.]) (internal citations, quotation marks omitted); *State v. Harris*, 414 S.W.3d 447, 450-51 (Mo. 2013) (holding that Section 571.070 does not impose punishment for past crimes). According to Respondents, though, the State can forbid a citizen from possessing firearms even if the possession would pose no (or a de minimis) risk to public safety. That cannot be right. There must be a baseline risk above which bans are constitutional, but below which they are not. It is unnecessary for this Court to nail down that baseline. For the risk posed by Mr. Alpert is *zero* or de minimis or, at a minimum, the same as that posed by an average, law-abiding citizen – clearly below the baseline. If Respondents were right, that *any* risk sufficed for a firearm ban, then the General Assembly could, out of an abundance of caution, ban non-criminals, say, men aged 18 to 30, from possessing firearms. After all, they are more likely than Mr. Alpert to use a firearm to commit a crime. (In fact, some of them are more likely than some felons to use

a firearm to commit a crime.) Likewise, the General Assembly could ban *all* misdemeanants from possessing firearms, because, like felons, they are more likely than non-criminals to use a firearm to commit a crime.

There is one way risk would be constitutionally immaterial: if the right to bear arms never extended to felons (or perhaps just convicted felons). Respondents don't try to make this originalist case; nor can they. (AB 36-39). Instead, Respondents cite a handful of federal decisions: two unpublished (*Khami*, *Stuckey*); one involving a facial, not as-applied, challenge (*Joos*); one that cited a dissent from *Heller* as authority (!) (*Vongxay*); one that relied on pre-*Heller* circuit-court case law (*Anderson*); one that misread *Heller* as *holding* that 18 U.S.C. §922 does not violate the Second Amendment; and one (*Williams*) that expressly notes that "[t]he academic writing on the subject of whether felons were excluded from firearm possession at the time of the founding is inconclusive at best[.]" (RB 28). Respondents ignore, or wish this Court to ignore, the federal precedent *from some of the same courts* – such as the Seventh Circuit's en banc opinion in *Skoien* – that expressly holds that *Heller* did not decide whether any particular felon bans were constitutional, and that even if generally constitutional, felon bans can be unconstitutional as applied to certain types of non-violent felons.

Respondents are mistaken that this Court's precedent bars *all* as-applied challenges. (RB 27-29). Never has this Court said so. What this Court did was to reject prior as-applied challenges. As-applied challenges are based on the particular factual record before the court. *Richmond Med. Ctr. 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). As

Mr. Alpert has shown (AB 51-53), his challenge is factually distinct from the prior challenges. For instance, it is undisputed that Mr. Alpert's possession of a firearm poses no risk to public safety or the public interest – or a risk no different than that of an average, law-abiding citizen. That cannot be said about the risk posed by the prior challengers. Moreover, Mr. Alpert's challenge is based on a different legal theory. The prior challengers claimed that *all* non-violent felons retain their right to bear arms. Mr. Alpert alleges only that *some* non-violent felons, those similarly situated to himself, do. Simply put, neither factually nor legally does Mr. Alpert fall within the same basket of deplorables as the prior challengers.

If Respondents were right that there is no colorable – nay, "cognizable" – basis for challenging Section 571.070, given *State v. McCoy*, 468 S.W.3d 892 (Mo. 2015), then the dispositions of *State v. Clay*, 481 S.W.3d 531 (Mo. 2016), and *State v. Robinson*, 479 S.W.3d 621 (Mo. 2016) make little sense. This Court's exclusive appellate jurisdiction requires more than a constitutional issue; the "issue must be real and substantial, not merely colorable"; it cannot already been decided by this Court. *McNeal v. McNeal-Sydnor*, 472 S.W.3d 194, 195 (Mo. 2015); *In re Kirk*, No. SC95752 (Mo. banc June 27, 2017) (slip op. at 1 n.2). This Court did not dismiss *Clay* and *Robinson* for lack of appellate jurisdiction; it disposed of the cases on the merits.

Respondents are also mistaken that this Court's precedent forbids the use of social science ("studies," Respondents' word) in challenges based on article I, section 23. (RB 27). Respondents invoke footnote 5 from *State v. Clay*, 481 S.W.3d 531 (Mo. 2016):

> This Court rejects any suggestion that for the law to survive strict scrutiny this Court must in each case de novo reconsider and itself evaluate the strength of studies about the use of weapons by felons before it can determine whether restrictions on the right of felons to bear arms are sufficiently narrowly tailored. This Court very recently held that the law in question is narrowly tailored and is consistent with this country's tradition of limiting weapons in the hand of felons. No new evidence or changed law has been identified that calls for reevaluation of that determination.

Id. at 536 n.5. Footnote 5 does not say what Respondents think it says.

Footnote 5 was written in rebuttal of Judge Teitelman's dissent. Judge Teitelman would have held that "section 571.070.1, as applied to convicted nonviolent felons violates article I, section 23 of the Missouri Constitution." Why? Because the State had failed to produce "sufficient" "studies and data" to "demonstrate that permanently banning convicted nonviolent felons from possessing a firearm will ameliorate any gun crimes whatsoever." (Judge Teitelman agreed with the ACLU of Missouri, which argued that under strict scrutiny the burden of proof is on the State to justify its law, which is presumed unconstitutional.) The majority in *Clay*, as in *McCoy*, had held that Section 571.070 is presumptively constitutional, placing the burden of proof (i.e., production and persuasion) on the challenger. That is why footnote 5 rejected the notion that the State must "in each case" produce "studies" to prove Section 571.070's valid application. That is why footnote 5 noted the challenger's failure to present "new evidence."

Mr. Alpert has plugged the gap by producing that "new evidence." (Not that he needed this evidence: the undisputed facts present here, but not in the prior challengers, shows that Section 571.070's application to him is unconstitutional.) That new evidence shows that there was no longstanding tradition of prohibiting felons like Mr. Alpert from possessing firearms. *E.g.*, C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARVARD J. OF L. & PUB. POLICY 695 (March 2009). It also corroborates what Respondents have conceded: Mr. Alpert's possession of firearms poses no risk to public safety and the public interest – at least, a risk no different than that posed by an average, law-abiding citizen. That the State need not produce social science to shoulder its (nonexistent[4]) burden doesn't mean a challenger can't present social science to bolster an as-applied challenge. (Mr. Alpert is such a challenger.) Otherwise, footnote 5's chiding of Clay for not presenting any "new evidence" would be otiose, faulting him for failing to do what this Court just said he couldn't do.

In any event, footnote 5 isn't part of *Clay*'s holding; it is dictum. (Hence, it "bindeth none, not even the lips that utter it." *Muench v. South Side*, 251 S.W.2d 1, 6 (Mo. 1952).) Clay didn't present social science purporting to show (or corroborate) that his recidivism rate, despite his prior felony (unlawful use of a weapon), was the same or lower than that of an average, law-abiding citizen. (Instead, Clay argued that "the increase in . . . crime rates" was not "derived from the professed recidivism of prior felons" (whatever that means), but from the repeal of "gun control laws"; that merely

[4] For purposes of article I, section 23.

being arrested, as his client had been, increases recidivism; and that the only way to reduce crime was to ban *all* guns (Clay Brief 12-14) – a strange argument for a would-be champion of the right to bear arms.) So footnote 5 addressed an issue that this Court didn't need to decide in order to dispose of the case – that's why it's a footnote. *See 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). Not being essential (nor even helpful or pertinent) to the disposition in *Clay*, footnote 5 is dictum. *State v. Wright*, 382 S.W.3d 902, 905 (Mo. 2012). (Stated differently, it could be deleted without changing the outcome. *Sarnoff v. American Home*, 798 F.2d 1075, 1084 (7th Cir. 1986) (Posner, J.).) So even if Respondents read footnote 5 accurately, it doesn't bind this Court. Nor should footnote 5, as construed by Respondents, be transformed into a holding. As Mr. Alpert has shown (AB 46-50), social science has long been used in constitutional adjudication, for it helps plug the gaps in our knowledge and can prevent our intuition from leading us astray.

Section 571.070 is both overbroad and underinclusive; Respondents' arguments to the contrary are meritless. A self-defense exception is pertinent to the constitutionality of a firearm regulation – so holds *State v. Shelby*, 2 S.W. 468 (Mo. 1886). But Respondents say, without citing any authority, that Section 571.070 doesn't bar him from using a firearm in self-defense. Practically speaking, that is nonsense. Suppose Mr. Alpert could lawfully use a firearm to defend himself or his wife, per Section 563.031. He would never be able to exercise that right. Section 571.070 prohibits not just actual possession, but also constructive possession – that is, control, indirect or direct – of a firearm. *State v.*

Ludemann, 386 S.W.3d 882, 885 (Mo. App. 2012). So unless a firearm were to fall from the sky when he or his wife were attacked, Mr. Alpert would never be able to avail himself of any (supposed) right to self-defense.

Respondents don't deny that felons sometimes receive pardons that eliminate their convictions, but not their guilt. Section 571.070 doesn't apply to them. Respondents say that's irrelevant. (RB 31). It's clearly relevant. To survive strict scrutiny, a statutory regulation cannot exclude conduct that poses substantially the same threats to the government's compelling state interest as the prohibited conduct. *Church of the Lukumi Babalu v. City of Hialeah*, 508 U.S. 520, 546 (1993). Guilty felons who are pardoned pose the same or substantially the same risk to public safety as those who are not.

The same is true of felons on probation and serial misdemeanants and many domestic violence misdemeanants, who are often felons manqué – none of whom are covered by Section 571.070. Respondents say such felons *cannot* be covered, because the longstanding ban on felons applies only to *convicted* felons. (RB 32). (This seems to be some type of concession that if the ban is *not* longstanding, Mr. Alpert prevails.) That's false. First, there are no longstanding bans on (all) felons possessing firearms. Second, Respondents have adduced no evidence that such bans were always limited to convicted felons. They clearly weren't: from 1981 to 2008, Missouri's ban applied only to all (dangerous) felons, convicted or not. Third, statutory bans don't have to be based on convictions; they can be based on guilt. *Guastello v. Dep't of Liquor*, 536 S.W.2d 21, 23 (Mo. banc 1976). Regarding the felons manqué – the wife-bears and child abusers who are not charged as felons for practical reasons – Respondents don't deny that allowing

these people to possess firearms poses a grave risk to the life and limb of women and children. They just call the risk "irrelevant," because proven by "social science statistics": a non sequitur.

Missouri's armed criminal action and the federal felon ban, combined with the high discount rate of many felons, makes any marginal deterrence effected by Section 571.070 negligible. (AB 30-31). Respondents don't disagree. Instead, they note that the "purpose of the armed criminal action statute is to punish more harshly those who use firearms to commit crimes." (RB 30). That is true, but completely misses the point: Section 571.070 does little, perhaps nothing, to further its compelling state interests. It might make it easier for a state prosecutor to secure a conviction; it might also eliminate the inefficiency of having two prosecutions, one federal, one state. But administrative convenience is insufficient for a statute to pass strict scrutiny. *Richmond v. Croson*, 488 U.S. 469, 508 (1989).

III. Section 571.070 Violates the Second Amendment

Mr. Alpert has explained why Respondents have failed to satisfy the "heavy burden of justification" that (federal) strict scrutiny requires Section 571.070 to satisfy. (AB 14-15, 25-32; *supra* at pp. 17-19). Respondents question whether strict scrutiny is the applicable scrutiny. They note that the "majority of the circuits of the United States Court of Appeals have applied intermediate scrutiny to Second Amendment challenges." (RB 35). Yet the law is no popularity contest.

As this Court has recognized, both this Court and the U.S. Supreme Court generally subject laws affecting fundamental rights, such as the right to bear arms under

the Second Amendment, to strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("[C]lassifications affecting fundamental rights are given the most exacting scrutiny[.]"); *McCoy*, 468 S.W.3d at 896. Consequently, this Court has held that *McDonald v. City of Chicago*, 561 U.S. 742 (2010) mandates strict scrutiny. *Dotson v. Kander*, 464 S.W.3d 190, 197 n.5 (Mo. 2015). (Granted, *Dotson* did say that *McDonald* required strict scrutiny "under the Missouri constitution," but that is incorrect. Fundamental rights are incorporated against the states by the Due Process Clause, but it "does not . . . enable [the U.S. Supreme] court to revise the decisions of the state courts on questions of state law," such as the applicable tier of scrutiny for state constitutional rights. *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926).) Moreover, "the Supreme Court has suggested that there is a presumption in favor of strict scrutiny when a fundamental right is involved." *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 775 F.3d 308, 327 (6th Cir. 2015) (collecting cases). Insofar as the choice of scrutiny turns on "the severity of the burden," *Peters v. Johns*, 489 S.W.3d 262, 273 (Mo. 2016), Section 571.070 imposes the most severe burden of all – a criminal prohibition. It should also be remembered that Justice Breyer, writing in dissent, urged the Court in *Heller* to adopt an interest-balancing approach akin to intermediate scrutiny; the majority rejected it. 775 F.3d at 328.

Ultimately, Respondents argue, it doesn't matter what level of scrutiny is applied, because *Heller* has held that felon bans like Section 571.070 are longstanding and hence constitutional. (RB 39,40). Wrong. The issue in *Heller* was whether the Second Amendment guaranteed an individual, as opposed to collective, right to bear arms. No felon ban was before the Court. The U.S. Supreme Court cannot issue advisory opinions;

it can only decide the case or controversy before it. *Muskrat v. U.S.*, 219 U.S. 346, 362-63 (1902). That *Heller* said that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons" does not mean it was declaring any particular felon ban to be longstanding, let alone that any longstanding ban is necessarily constitutional. As the en banc Seventh Circuit held in *Skoien*, that language was simply precautionary language, designed to prevent the misinterpretation of the scope of its holding, which just resolved the collective-individual rights issue. It is fallacious to infer from the proposition "X does not invalidate Y" that therefore Y is valid (or invalid) – doubly so when doing so requires imputing unsound history to the Court.

Mr. Alpert is not (*pace* Respondents) embracing the "absurd" argument that a felon ban is invalid unless it is longstanding. (RB 39). That there were no felon bans "on the books in 1791," as Judge Easterbrook noted in *Skoien*, doesn't make such bans unconstitutional. 614 F.3d at 641. Mr. Alpert notes the recent vintage of felon bans (ignoring the English attainders, which are foreign to our constitutional tradition) not to prove that Section 571.070 is unconstitutional, but to rebut any claim that they are covered by the "presumptively lawful" language from *Heller*. If the bans were longstanding, that would help Respondents, because under an originalist methodology – the one purportedly employed in *Heller* by the king of originalism, Justice Scalia – a longstanding practice is a sign of constitutionality. (Otherwise, it would have been challenged and presumably invalidated at some point.)

If Respondents are simply citing *Skoien* to show that a categorical ban, even if unknown to the Founders, can be constitutional, Mr. Alpert concedes the point. (The

legislature is not stuck with the common law.) That doesn't mean, though, that Section 571.070 is such a ban. (As Mr. Alpert argues, Section 571.070 is overbroad and underinclusive, and its application to him fails to advance its purpose.) In *Skoien*, the Seventh Circuit Court of Appeals, sitting en banc, upheld a categorical ban on those convicted of misdemeanor domestic violence. The court's opinion was written by Judge Easterbrook. He made two primary arguments. First, he analogized such bans to categorical prohibitions on speech (e.g., obscenity, threats) permitted by the First Amendment. That analogy limps. Felon bans don't apply to particular conduct, but particular *persons*. Does the First Amendment authorize permitting Democrats and Republicans to speak, but not Communists, misdemeanants but not felons? Obviously not. Second, Judge Easterbrook argued that the "logic and data" presented by the defendants of the ban satisfied the "strong showing" that the ban was constitutional. 614 F.3d at 641. That logic and data showed that misdemeanor domestic violence offenders pose a risk as great as that posed by convicted felons (assumed to be the applicable baseline); in fact, that they are often felons manqué. What logic and data have Respondents presented that Mr. Alpert and those similarly situated pose a similar risk? None. Respondents concede that the risk Mr. Alpert presents is no greater than the risk posed by an average, law-abiding citizen.

Trying to scare this Court into ruling against Mr. Alpert, Respondents march a parade of horribles before it. There are no horribles, only boogeymen. If Mr. Alpert prevails, it would still be illegal to carry firearms into government buildings like courthouses. As with the First Amendment, so with the Second Amendment, reasonable

time, place, and manner restrictions, of which Sections 571.030 and 571.107.1(4) are obvious examples, are clearly constitutional, even if outright prohibitions – such as Section 571.070, as applied to Mr. Alpert – are sometimes unconstitutional. *Heller*, 554 U.S. at 595 ("Of course the right was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose."). Public property is property, and the law of trespass protects public property, as it protects private property, from uninvited guests." *Gilles v. Blanchard*, 477 F.3d 466, 469-70 (7th Cir. 2007). Governments "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock*, 424 U.S. 828, 836 (1976).

Nor would this Court be hit with an avalanche of as-applied challenges if Mr. Alpert prevailed. (RB 43) ("The Office of State Courts Administration reports that between August 28, 2008 and December 31, 2016, there were 5,985 convictions under Section 571.070."). That didn't happen after article I, section 23 was amended in 2014. Plus, the vast majority of felony cases result in guilty pleas, precluding any appeal (except to challenge the sufficiency of the charging instrument). *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 n.4 (Mo. 1993). If Mr. Alpert prevails, dangerous felons and the vast majority of non-dangerous felons will still have no colorable constitutional challenges, without which this Court lacks appellate jurisdiction. *McNeal*, 472 S.W.3d at 195. Afterwards, too, the General Assembly would likely amend Section 571.070,

eliminating the need for any appeals; and, in the interval between this Court's decision and legislative action, prosecutors simply decline to charge or continue to prosecute felons similarly-situated to Mr. Alpert. In all likelihood, the number of felons who would challenge their Section 571.070 convictions after Mr. Alpert wins would be zero, at most a handful. But even if it were more than that, it should be remembered that the vindication of constitutional rights does not turn on whether it is convenient for the judiciary to recognize them. Otherwise, Rules 24.035, 29.15, and 91 would have been rescinded long ago.

Respondents' attempt to distinguish *Binderup v. Holder*, 836 F.3d 336 (3d Cir. 2016) (en banc) and *Britt v. State*, 681 S.E.2d 320 (N.C. 2009) are nonstarters. Respondents note that under state law, Binderup and Suarez had committed misdemeanors; they fail to mention that the Third Circuit held that they were actually *felonies* for purposes of federal law and *Heller*'s presumptively lawful comment. 836 F.3d at 348. The Third Circuit thought the most important feature of their offenses was that they weren't "serious" – in part, because they did not involve "the use or attempted use of force." *Id*. at 352. Neither did Mr. Alpert's: he was convicted of minor drug crimes, at a time when most offenders like him would receive probation. That Mr. Alpert has *two* felony convictions isn't dispositive, for the last was committed over 40 years ago; in 1983, the federal government expressly found that Mr. Alpert's possession of firearms poses no risk to public safety or the public interest; and for 25 years Mr. Alpert lawfully possessed firearms, without incident. In any event, Respondents have conceded that, despite his two felony convictions, Mr. Alpert's possession of firearms would pose

no greater risk to public safety than that of an average, law-abiding citizen. Mr. Alpert's challenge is *stronger* than either Suarez's or Binderup's.

Respondents urge this Court to follow the dissent in *Binderup*. The dissent cited *U.S. v. Bean*, 537 U.S. 71 (2002), a pre-*Heller* case, for the proposition that the courts are not institutionally equipped to make predictions about future dangerousness or violence; as applied challenges are best handled by the executive or legislative branches. Well, Mr. Alpert *did* convince the executive branch of the federal government – the U.S. Attorney General – that his possession of firearms would pose no risk to public safety or the public interest. Mr. Alpert is not foisting on the judiciary a cumbersome factual inquiry; his case is factually easy. In any event, administrative inconvenience doesn't cut it under either strict or intermediate scrutiny. *Croson*, 488 U.S. at 508; *see also State Farm v. Powell*, 529 S.W.2d 666, 668 (Mo. App. 1975) (holding that the "existence of factual issues" does not justify refusing to grant declaratory relief).

Against *Britt*, all Respondents say (other than repeating the bogus administrative inconvenience stuff) is that it doesn't apply because it involved the North Carolina constitution. So? The right to bear arms in both it and the Second Amendment are textually the same. Respondents cite no historical evidence that shows that North Carolina's right to bear arms was always understood to be stronger than the right to bear arms under the Second Amendment or article I, section 23 of the Missouri constitution.

If Mr. Alpert prevails, Missourians will benefit; they will be safer. Section 571.070 will not be invalidated en toto. (It survives facial challenge.) The unconstitutional applications to Mr. Alpert and those similarly-situated will be severed.

Associated Industries v. Director of Revenue, 918 S.W.2d 780, 784 (Mo. 1996). The General Assembly will likely amend Section 571.070 to make it a leaner, meaner crime-fighter. How it will be improved will depend on the scope of this Court's holding. (Perhaps serial misdemeanants and domestic violence misdemeanants will need to be covered. Perhaps more felons, those without convictions, will be covered. Perhaps non-violent felons who have abstained from criminality for 40 years or more will be exempted. Perhaps felons like Mr. Alpert who have had their federal disabilities restored pursuant to 18 U.S.C. §925 will be exempted.) Whatever the scope of this Court's holding, Mr. Alpert will be permitted to do what he lawfully did for 25 years until 2008; what the federal government has expressly found poses no threat to public safety or the public interest; and what Respondents admit poses a risk no different than that posed by an average, law-abiding citizen: exercise his fundamental right to keep and bear arms, vouchsafed him by the Second Amendment and article I, section 23 of the Missouri constitution.

CONCLUSION

The trial court erred by concluding that Respondents were entitled to judgment as a matter of law. Hence, the summary judgment of the Circuit Court of Johnson County should be reversed. Rule 74.04(c).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE & SERVICE

I certify that:

1. Pursuant and in compliance with Rule 84.06, the attached brief contains 7,345 words, as determined by Microsoft Word 2010 software;

2. On July 10, 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.

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