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
The Honorable William B. Collins, Judge

Respondents' Brief

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STATEMENT OF FACTS

The facts relevant to the questions presented are as follows:

In 1970, Alpert was charged with one felony count of possession of a controlled substance under Section 195.200. L.F. at 255. Alpert pleaded guilty and has a state felony conviction. *Id*. In 1975, Alpert was charged with one felony count of possession of methamphetamines, in violation of federal law. *Id*. at 256. One year later, Alpert pleaded guilty and has a federal felony conviction. *Id*. at 257.

Alpert, a convicted felon, wishes to possess firearms. *Id*. at 263–64. Nothing in the record indicates that Alpert has been threatened with prosecution under Section 571.070 for possessing a firearm. *Id*. at 233.

Alpert filed his petition for declaratory judgment on June 1, 2015. *Id*. at 3. The trial court entered summary judgement in favor of the State on October 3, 2016. *Id*. at 1. Alpert timely filed his notice of appeal on November 7, 2016. *Id*. This appeal follows.

ARGUMENT I

This Court need not consider Alpert's constitutional challenges to the felon-in-possession-of-a-firearm statute because Alpert has brought a pre-enforcement challenge that is not yet ripe.

In this declaratory judgment appeal, Alpert asserts that Section 571.070—a criminal statute—violates his constitutional rights. This Court need not reach the constitutional questions presented by Alpert because Alpert's pre-enforcement challenge to this criminal statute is not yet ripe for two reasons. First, Alpert has not presented sufficient facts to establish a fully developed claim. Second, Section 571.070 is not affecting Alpert such that there is an immediate, concrete dispute.

Standard of Review

This Court reviews a circuit court's judgment granting a motion for summary judgement *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). This Court will view the record in the light most favorable to the non-moving party, and this Court will grant the non-moving party all reasonable inferences from the record. *Id.* Questions of law are reviewed *de novo*, but this Court presumes statutes are constitutional. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. 2007). All doubts are resolved "'in favor of the act's validity'" and this Court will "'make every

reasonable intendment to sustain the constitutionality of the statue.'" *Id.* (quoting *Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. 1984)).

Analysis

Alpert's pre-enforcement challenge to the constitutionality of Section 571.070—a statute prohibiting felons from possessing firearms—is not ripe under Missouri law.

The ripeness doctrine prevents courts from issuing declaratory judgment on "hypothetical or speculative situations that may never come to pass." *Schweich v. Nixon*, 408 S.W.3d 769, 778 (Mo. 2013) (quoting *Mo. Soybean Ass'n. v. Mo. Clean Water Com'n.,* 102 S.W.3d 10, 26 (Mo. 2003)). Generally, a pre-enforcement challenge to the constitutionality of a statute is not ripe. *Missouri Health Care Ass'n. v. Attorney Gen.,* 953 S.W.2d 617, 621 (Mo. 1997). A narrow exception applies only when "(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.'" *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 739 (Mo. 2007) (quoting *Missouri Health Care Ass'n*, 953 S.W.2d at 621). Alpert's suit does not satisfy either prong of the pre-enforcement exception.

A. Alpert has failed to present enough "fully developed" facts to stablish justiciability of his claims.

This Court has found that without sufficient facts to create a fully developed claim, a pre-enforcement claim is not ripe. *Foster v. State*, 352 S.W.3d 357 (Mo. 2011). In *Foster*, an inmate filed a petition for declaratory judgment, alleging that the Missouri Incarceration Reimbursement Act (MIRA) could not be used to recover the costs of the inmate's incarceration. *Foster*, 352 S.W.3d at 358. MIRA requires an inmate to have a certain threshold of funds before the Attorney General can attempt to recover incarceration costs. *Id*. In *Foster*, the inmate never demonstrated that he had, or would have, the funds necessary to trigger MIRA. *Id*. at 361. So, the circuit court dismissed the petition for not presenting a ripe claim. *Id*. This Court affirmed, and explained that the inmate had not presented enough fully developed facts in order to allow a court to adjudicate the inmate's claim because the inmate never demonstrated that MIRA could, or even would, be applied to him. *Id*.

Alpert, like the inmate, did not present enough fully developed facts to establish a claim. Alpert only established a desire to possess two firearms from the Second World War. L.F. 263–64. There is no evidence in the record that Alpert is in possession of firearms or that the State has threatened or commenced prosecution against Alpert, even when this Court views the

record in the light most favorable to Alpert. L.F. 263–64. So, all Alpert has shown is a mere desire to possess firearms. But a mere desire to possess firearms, coupled with the *possibility* that Alpert may be charged with violating the statute, is the sort of "hypothetical or speculative situation" that is not ripe. *Foster*, 352 S.W.3d at 358; *see also Schweich*, 408 S.W.3d at 778.

The Missouri Court of Appeals has also found that, without enforcement, some controversies are not ripe because they lack the necessary facts. *See, e.g., Turner v. Mo. Dep't. of Conservation*, 349 S.W.3d 434, 446 (Mo. App. S.D. 2011) (app. for trans. denied SC92029 Oct. 25, 2011). In *Turner*, two plaintiffs were investigated for potentially violating certain Missouri Wildlife Code regulations. *Turner*, 349 S.W.3d at 438. Neither plaintiff was charged in Missouri state court. *Id.* Despite the lack of enforcement, the plaintiffs brought a declaratory judgment action, challenging the validity of the regulations. *Id.* Following this Court's guidance, the Court of Appeals held that "the limited, pre-enforcement conduct exception does not apply here because [plaintiff] failed to demonstrate that the facts concerning him were fully developed. *Turner*, 349 S.W.3d at 446 (citing *Missouri Health Care Ass'n*, 953 S.W.2d at 621). In *Turner*, the Court of Appeals was clear that if the State had attempted to enforce the regulations against the plaintiffs, then plaintiffs could have presented the fully developed facts necessary to present a ripe claim. *Id.*

Alpert, like the plaintiffs in *Turner*, has not provided the fully developed facts necessary to present a claim in the absence of any enforcement. Without an enforcement action, there is no indication as to what firearm the State would charge Alpert with possessing in violation of Section 571.070. True, Alpert has indicated that he desires to possess an M1 Garand and a pistol confiscated from a Nazi SS officer. L.F. 263–64. But the record does not establish that Alpert would be in possession of those firearms but for Section 571.070. Instead, Alpert asks the Court to hypothesize that Alpert will possess a firearm, and speculate that the State will charge him with violating Section 571.070. Because the record does not contain those facts, Alpert has presented the sort of "hypothetical activities" that do not constitute a ripe controversy. *Turner*, 349 S.W.3d at 445.

Like the Court of Appeals in *Turner*, this Court has held that the plaintiff must allege specific future activity in order to present a ripe claim. In *Forrest*, this Court reaffirmed that a capital offender could not challenge the constitutionality of lethal injection during post-conviction relief proceedings. *Forrest v. State*, 290 S.W.3d 704, 718 (Mo. 2009) (citing *Worthington v. State*, 166 S.W.3d 566, 582 n.3 (Mo. 2005)). This Court reasoned that the defendant's claim was not ripe because the defendant could not demonstrate what form of lethal injection the State would utilize during his execution. *Id.* History demonstrated the wisdom of this Court's holding.

In 2009, the defendant wanted to challenge the use of pancuronium bromide. *Id*. But when the defendant was executed in 2016, the State used pentobarbital, not pancuronium bromide. *See, e.g. State v. Forrest*, SC86518, Mot. for Stay of Execution (Mo. Apr. 18, 2016). In this case, as in *Forrest*, the claim is too speculative for adjudication.

As in *Forrest*, Alpert's pre-enforcement challenge has not presented sufficient facts to create a well-developed claim. From the record before the Court, it is simply unclear which firearm(s) Alpert will possess, and under what circumstances Alpert will possess such firearm(s). This record is not sufficient to move Alpert within the limited pre-enforcement exception. So, his claim is not ripe.

B. Section 571.070 is not affecting Alpert in a way that creates an "immediate, concrete dispute."

The second prong of the pre-enforcement exception—the challenged law must affect the plaintiff such that there is an immediate, concrete dispute—is not satisfied in this case. The State's potential application of Section 571.070 against Alpert has not created an immediate, concrete dispute between Alpert and the State.

This Court has explained that there is no immediate, concrete dispute when a plaintiff brings a claim that is premature. This Court identified such a premature claim in *S.C. v. Juvenile Officer*, 474 S.W.3d 160 (Mo. 2015). In

S.C., a juvenile was found guilty of first-degree attempted rape, and was ordered to register on the juvenile sexual offender registry. *Id.* at 161. S.C. was not ordered to register on the adult sexual offender registry. *Id.* at 162. S.C. appealed and argued it was unconstitutional to force him to register as an adult sexual offender. *Id.* at 161. This Court found S.C.'s pre-enforcement challenge to be premature. *Id.* at 163. This Court explained that "there has been no attempt to compel him to register on the adult sexual offender registry" so "there is no immediate, concrete dispute at this time." *Id.* Like S.C., Alpert's claim is premature. Although Section 571.070 prohibits Alpert from possessing firearms, there has been no attempt to enforce the statute against him. In *S.C.*, the defendant could have argued that there was an enforcement history because the State forced S.C. to register as a juvenile sex offender. But, unlike *S.C.*, there is no history of State enforcement attempts against Alpert.

In limited circumstances, a history of State enforcement against the plaintiff can give rise to an immediate, concrete dispute in the absence of current enforcement efforts. For instance, in *Tupper v. City of St. Louis*, St. Louis City enacted a red-light camera scheme, and issued ordinance violations to the owners of cars that were photographed inside an intersection while the traffic signals were red. *Tupper v. City of St. Louis*, 468 S.W.3d 360, 365 (Mo. 2015). Plaintiff Tupper received notice of two ordinance violations;

one was ultimately resolved in her favor, and she did not respond to the other. *Id*. at 366. Plaintiff Tupper and others filed a petition for declaratory judgment challenging several elements of St. Louis City's ordinance. When reviewing the case, this Court noted that plaintiffs were "not currently facing prosecution" under the ordinance. *Id*. at 370. Yet, this Court found the case was ripe because the ordinance "has already affected [plaintiffs] in that they were previously subject to prosecutions" and because the plaintiffs were still subject to the ordinance because the city was enforcing it. *Id*. at 370. In this way, the plaintiffs had presented an immediate, concrete dispute.

Alpert is different. No evidence in the record indicates that the State threatened or commenced prosecution against Alpert, unlike *Tupper*. Moreover, no evidence in the record indicates that Alpert has violated Section 571.070. Conversely, the record in *Tupper* demonstrated that St. Louis City had charged the plaintiffs and others with violating the ordinance. *Id*. And, when plaintiffs attempted to raise their complaints in the enforcement action, St. Louis City dismissed the case. *Id*. Under those unique facts, the majority held that the controversy was sufficiently immediate and concrete so as to be ripe. *Tupper*, 468 S.W.3d at 370.

The dissent believed that the unique facts still did not merit enlarging the narrow pre-enforcement exception. In his dissent, Judge Wilson explained his view that past enforcement against the plaintiff and current enforcement

against others did not merit relaxing the ripeness requirements. *Tupper*, 468 S.W.3d at 376–77 (Wilson, J., dissenting). The majority disagreed. *See id.* at 370.

Alpert does not meet even the relaxed ripeness standard articulated by the *Tupper* majority. Unlike the unique situation in *Tupper*, there has been no history of State enforcement of Section 571.070 against Alpert. And, unlike St. Louis City, the State has not attempted to enforce Section 571.070 against Alpert and then dismissed the charges in order to avoid Alpert's arguments by making the enforcement case moot. *Id.* at 369. Thus, Alpert's case should be governed by the general rule in *S.C.* and not by the special rule in *Tupper*.

The State is not arguing that a pre-enforcement challenge can never be ripe. This Court has rejected that argument. *Foster*, 352 S.W.3d at 360 (The state's argument ... overlooks the principle that "[t]here can be a ripe controversy before a statute is enforced") (quoting *Planned Parenthood*, 220 S.W.3d at 738). But *Foster* does not hold that pre-enforcement status is irrelevant; *Foster* reaffirms that pre-enforcement challenges are not ripe unless the facts are fully developed *and* there is an immediate, concrete dispute. *Id.* Here, just as in *S.C.*, Alpert has brought a premature claim. Without actual or threatened enforcement proceedings—or the special

Tupper facts—Alpert has presented a claim that is speculative, not a claim that is immediate and concrete. The case is not yet ripe.

Conclusion

Under Alpert's facts, and without threated or actual enforcement, Alpert has failed to satisfy either part of the pre-enforcement exception. Alpert has not placed sufficient facts in the record to create a fully developed claim. Alpert has not demonstrated that Section 571.070 is affecting him in a way that creates an immediate, concrete dispute. Thus, this Court should affirm the circuit court's outcome and remand with an order dismissing Alpert's petition without prejudice.

ARGUMENT II

This Court need not consider Alpert's constitutional challenges to the felon-in-possession-of-a-firearm statute because Alpert has another adequate remedy at law.

In this declaratory judgment appeal, Alpert asserts that Section 571.070—a criminal statute—violates his constitutional rights. Declaratory judgment is not appropriate when the plaintiff has another adequate remedy at law. In this case, Alpert may make his arguments in a pre-trial motion to dismiss, if the State charges him with a violation of Section 571.070. So, this Court should affirm the circuit court's result because Alpert has another adequate remedy at law.

Standard of Review

This Court reviews a circuit court's judgment granting a motion for summary judgement *de novo*. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376. This Court will view the record in the light most favorable to the non-moving party, and this Court will grant the non-moving party all reasonable inferences from the record. *Id.* Questions of law are reviewed *de novo*, but this Court presumes statutes are constitutional. *Murrell*, 215 S.W.3d at 102. All doubts are resolved "'in favor of the act's validity'" and this Court will "'make every reasonable intendment to sustain the constitutionality of the statue.'" *Id*. (quoting *Westin Crown Plaza Hotel*, 664 S.W.2d at 5).

Analysis

Declaratory judgment is not appropriate if the plaintiff has an adequate remedy at law. *Schaefer v. Koster*, 342 S.W.3d 299, 300 (Mo. 2011). In this case, Alpert has an adequate remedy at law; Alpert may raise his constitutional challenges in a pre-trial motion to dismiss if he is charged with a violation of Section 571.070. Accordingly, this Court should deny Alpert relief without reaching the merits of his constitutional challenges.

Several Missouri courts have found that a pre-trial motion to dismiss is an adequate remedy instead of filing a petition for declaratory judgment. For instance, in *J.H. Fichman Co. Inc., v. City of Kansas City*, the plaintiff—FichCo—maintained a tobacco shop in Kansas City that sold tobacco and tobacco related products, including pipes. *J.H. Fichman Co. Inc., v. City of Kansas City*, 800 S.W.2d 24, 26 (Mo. App. W.D. 1990) (app. for trans. denied Jan. 9, 1991). Kansas City passed an ordinance that prohibited the sale of drug paraphernalia, and the Kansas City Police Department informed FichCo that several of the pipes sold by FichCo were drug paraphernalia. *Id.* The Kansas City Police Department also informed FichCo that if it did not stop selling the pipes, then warrants would be issued, the managers would be arrested, and the pipes would be confiscated. *Id.* Before any warrants were issued and before Kansas City brought an enforcement action, FichCo filed a petition for declaratory judgment. FichCo alleged that drug paraphernalia

ordinance was unconstitutional as applied to FichCo because it sold tobacco pipes that were not paraphernalia. *Id.*

On appeal, the Missouri Court of Appeals explained that declaratory judgment action was inappropriate because FichCo could raise its arguments in a pre-trial motion to dismiss *if* Kansas City filed an ordinance enforcement action against FichCo. *Id.* at 27. This Court should reach the same conclusion in Alpert's case. Like the petitioners in *FichCo*, Alpert wishes to challenge the constitutionality of a provision of law. And, like the petitioners in *FichCo*, Alpert could litigate his arguments *if* he is charged with a violation of Section 571.070. In fact, this Court has recently heard several criminal appeals challenging the constitutionality of Section 571.070. *See, e.g., State v. Harris*, 414 S.W.3d 447 (Mo. 2013) (arguing that Section 571.070 violated the prohibition on *ex post facto* laws); *State v. McCoy*, 468 S.W.3d 892 (Mo. 2015) (arguing that Section 571.070 was unconstitutional under Mo. Const. Art. I, § 23); *State v. Merritt*, 467 S.W.3d 808 (Mo. 2015) (same); *State v. Clay*, 481 S.W.3d 531 (Mo. 2016) (arguing that Section 571.070 was unconstitutional as-applied to non-violent felons under Mo. Const. Art. I, § 23); *State v. Raymond*, 479 S.W.3d 621 (Mo. 2016) (same). Alpert has offered no compelling reason why he could not use the same pre-trial motion practice used in *Harris*, *McCoy*, *Merritt*, *Clay*, and *Raymond*. Those cases

demonstrate that Alpert has another adequate remedy at law, and that declaratory judgment is inappropriate.

Although this Court has not always required plaintiffs to litigate their claims in the enforcement action instead of filing petitions for declaratory judgment, Alpert does not fit within this Court's exception. In *Tupper*, this Court found that the plaintiffs did not have another adequate remedy at law because there was not an ongoing enforcement action. *Tupper*, 468 S.W.3d at 369. There is not a current enforcement action against Alpert. But *Tupper* should not control here because of *Tupper*'s unique facts. In *Tupper*, St. Louis City had brought enforcement actions against the plaintiffs by prosecuting them for allegedly violating the red-light camera ordinance. *Tupper*, 468 S.W.3d at 366. Once St. Louis City began prosecuting the plaintiffs, they filed suit seeking declaratory judgment and a preliminary injunction against St. Louis City. *Id.* at 366. On the same day a hearing on the preliminary injunction was held, St. Louis City dismissed the ordinance violation cases against plaintiffs and obtained a continuance of the hearing on the preliminary injunction. *Id.* Then, St. Louis City moved to dismiss the petition for declaratory judgment. *Id* at 367. The circuit court found that the plaintiffs had no adequate remedy at law because the ordinance violation prosecution was dismissed. *Id.* This Court affirmed, noting that St. Louis City "dismissed

the pending prosecutions against [the plaintiffs] before filing its motion to dismiss." *Id.* at 369.

The unique facts in *Tupper* led the majority to reach a unique result. Unlike St. Louis City, the State has not executed a strategy in this case designed to make Alpert's claims unreviewable. Because the special circumstances present in *Tupper* are not present here, this Court should follow the general rule and find that Alpert has an adequate remedy at law.

This Court has found plaintiffs to have an adequate remedy at law when the plaintiffs could litigate their claims in a pre-trial motion to dismiss in the enforcement case. For example, in *Schaefer v. Koster*, two defendants were charged with intoxication-related driving offenses. *Schaefer v. Koster*, 342 S.W.3d 299, 299 (Mo. 2011). While their criminal charges were pending, the defendants filed a petition for declaratory judgment alleging that Section 577.023 (RSMo. Supp. 2008) violated the Missouri constitution. *Id.* at 300. The circuit court dismissed the petition, reasoning that the claims should be litigated in the criminal cases, and that the plaintiffs had an adequate remedy at law. *Id.* This Court affirmed and adopted the circuit court's holding that "the constitutional issues should be litigated (if at all) by each plaintiff in each separate criminal case." *Id.*

Schaefer's holding—the general rule—should apply in this case. True, Alpert has not been charged with a violation of Section 571.070, unlike the

plaintiffs in *Schafer* who were charged. But that difference does not compel the application of a separate rule. Unlike the plaintiffs in *Schaefer*, Alpert may never be charged because he may never violate Section 571.070. If he never violates Section 571.070, then he will never be charged. If Alpert is never charged, then he has never been harmed and there is no need for a remedy, unlike the plaintiffs in *Tupper*. But, if Alpert is threatened with enforcement of Section 571.070 (like the plaintiffs in *FichCo*), or actually charged with a violation of Section 571.070 (like the plaintiffs in *Schaefer*), then Alpert will be able to raise his arguments in the criminal enforcement case. That means Alpert has an adequate remedy at law, and declaratory judgment is not appropriate.

Conclusion

Because Alpert has another adequate remedy at law, his petition for declaratory judgment was inappropriate. Therefore, this Court should affirm the circuit court's order granting summary judgment to the State.

ARGUMENT III

Missouri's prohibition on felons possessing firearms does not violate the Missouri Constitution. – Responds to Alpert's Point I

In his brief, Alpert asserts that Missouri's prohibition on felons possessing firearms violates the Missouri Constitution. Alpert—a felon—argues that he should be allowed to possess a firearm because Section 571.070, as applied to him, violates Article I, Section 23 of the Missouri Constitution. Alpert's Br. at 24. Alpert's as-applied challenge fails for two reasons. *First*, Alpert cannot bring an as-applied challenge to Section 571.070 under the Missouri constitution because this Court has precluded such a claim. *Second*, even if Alpert could bring an as-applied challenge, then he is still not entitled to relief because the statute survives strict scrutiny when applied to felons.

Standard of Review

The Missouri Constitution establishes a general rule that individuals may possess firearms. Mo. Const. Art. I, § 23. However, the General Assembly may restrict firearm ownership. *Clay*, 481 S.W.3d at 538. If the General Assembly acts to restrict firearm ownership, then those restrictions are subject to strict scrutiny review under the Missouri Constitution. *Id*. A constitutional challenge to a statute is reviewed *de novo*, and this Court presumes that statutes are constitutional. *Id*. at 535.

The most common articulation of strict scrutiny review requires a court to determine whether a law is narrowly tailored to achieve a compelling state interest. *Clay*, 481 S.W.3d at 535. "Depending on the extent the regulation burdens a particular right," a court may perform strict scrutiny review by looking "to whether a regulation imposes 'reasonable, non-discriminatory restrictions' that serve 'the State's important regulatory interests' or whether the encroachment is 'significant.'" *Id*.

Analysis

A. Alpert cannot bring an as-applied challenge to Section 571.070 under the Missouri Constitution because such claims are not cognizable.

Alpert asserts that Section 571.070 is unconstitutional as applied to him because, in Alpert's view, the statute is under-inclusive (Alpert's Br. at 25–26) and over-inclusive (Alpert's Br. at 26–32). Before this Court considers Alpert's as-applied arguments, it must consider whether Alpert may raise an as-applied challenge. He may not.

For at least the last four years, this Court has heard several challenges to the constitutionality of Section 571.070. *See, e.g., Harris*, 414 S.W.3d 447. This Court has never found Section 571.070 to violate the Missouri constitution. Against this backdrop, this Court recently advised the State that it should no longer use statistics to demonstrate Section 571.070's

validity. *McCoy*, 468 S.W.3d at 896. Shortly after this Court decided *McCoy*, it decided *Clay*. In *Clay*, the defendant alleged that Section 571.070 was unconstitutional as applied to non-violent felons. *Clay*, 481 S.W.3d at 533. The circuit court agreed with the defendant, and this Court reversed. *Id*. This Court wrote that it

> 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.

Id. at 536 n.5. The Court further explained that "restrictions on the right of felons to possess arms have long been recognized as an exception to the right to bear arms." *Id*. at 536.

Taken together, these two passages make clear that this Court has found that as-applied challenges to Section 571.070 are not cognizable. In *Clay* and *McCoy*, this Court explained that statistical studies "do not bear on the constitutional analysis" and that the Court is not required to perform *de*

novo review for each challenger who wants to attack the validity of Section 571.070. *McCoy*, 468 S.W.3d at 896 n.5; *Clay*, 481 S.W.3d at 536 n.5.

Additionally, *Clay*'s holding was a pronouncement that felons are categorically exempt from the right to bear arms. Other jurisdictions, construing the Second Amendment, have reached the same conclusion. *See, e.g., United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010); *United States v. Joos*, 638 F.3d 581 (8th Cir. 2011); *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011); *United States v. Stuckey*, 317 Fed.Appx. 48, 50 (2d Cir. 2009); *United States v. Anderson*, 559 F.3d 348, 352 n. 6 (5th Cir. 2009); *United States v. Khami*, 362 Fed.Appx. 501, 507 (6th Cir. 2010); *United States v. Williams*, 616 F.3d 685, 691-94 (7th Cir. 2011); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Rozier*, 598 F.3d 768, 770-71 (11th Cir. 2010). If felons are categorically exempt from the right to bear arms, then felons are not able to bring an as-applied challenge to statutes that burden that right.

The United States Court of Appeals for the Third Circuit understands *Heller*'s holding to mean "that these longstanding limitations are exceptions to the right to bear arms." *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) (citing Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L.Rev. 375, 413 (2009)). Other State Supreme Courts have reached the same conclusion. *See, e.g. Commonwealth*

v. McGowan, 464 Mass 232, 238 (Mass. 2013). And this Court's holding in *Clay* implicitly finds that felons fall outside of the scope of the Second Amendment. There is no compelling reason to treat Article I, Section 23 of the Missouri Constitution differently from the Second Amendment.

Because Alpert is a felon, and because Article I, Section 23 does not protect felons, Alpert's as-applied challenge is not cognizable.

B. Even if Alpert could bring an as-applied challenge to Section 571.070, then he is not entitled to relief because Section 571.070 is narrowly tailored.

If this Court decides that Alpert's as-applied challenge to Section 571.070 under the Missouri constitution is cognizable, then he is still not entitled to relief. This Court has held that Section 571.070 is narrowly tailored. Although Alpert complains about various factors that he believes the General Assembly should have considered, Alpert has not demonstrated that the statute is not narrowly tailored.

Alpert's claim that the statute is over-inclusive is mostly premised on his statistic-based arguments about rates of offending and recidivism rates. Alpert's Br. at 27–29. Alpert does claim that the statute is overbroad in that it does not provide for a self-defense exception. Alpert's Br. at 29. But such a claim is not ripe for declaratory judgment because Alpert could merely assert self-defense if he is charged with violating Section 571.070. *See* Point II,

supra. In fact, Alpert relies on an 1886 case from this Court, *State v. Shelby*, 2 S.W. 468 (Mo. 1886), where the Court considered the constitutionality of a firearm regulation *in a criminal case*. If the defendant in *Shelby* could raise his challenge to the statute during a criminal prosecution, then so can Alpert. Alpert next argues that Section 571.070 is over-inclusive because it is duplicative of other laws. Alpert's Br. at 30–32. But these are arguments about the facial validity of Section 571.070, not arguments unique to Alpert. This Court rejected such arguments in *Clay*, writing that Section 571.070 "is narrowly tailored in that it does not apply to misdemeanors, [or] felony convictions that have been pardoned..." *Clay*, 481 S.W.3d at 536. Alpert cannot reasonably argue that Section 571.070 is overbroad for the very reasons that this Court has found the provision to be narrowly tailored. Moreover, Alpert cannot complain that armed criminal action accomplishes the same purpose as prohibiting felons from possessing firearms. Alpert's Br. at 30. The purpose of the armed criminal action statute is to punish more harshly those who use firearms to commit crimes. *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983).

Alpert's final argument that Section 571.070 is over-inclusive is that it is unfair that some ex-felons can possess firearms after receiving a pardon. Alpert's Br. at 31–32. The fact that some individuals may receive mercy from the Governor under the Missouri Constitution is not relevant to Alpert's

challenge to the statue. The People vested the pardon power in the Governor, not the General Assembly. Mo. Const. Art. IV, § 7.[1] While the General Assembly has given the courts the authority to expunge convictions, that fact is also irrelevant to Alpert's challenge. An individual who has received an expungment is not "similarly situated" to Alpert, who has not received an expungment. Put another way: whether there is a mechanism to remove felon status from individuals says nothing about the General Assembly's authority to prohibit those with felon status from owning firearms.

Likewise, Alpert's claim that the statute is under-inclusive is premised on his argument that the General Assembly chose not to prohibit firearm ownership by misdemeanants. Alpert's Br. at 25. And those arguments are premised on statistics about misdemeanant offenders. *Id*. But again, this Court has warned litigants that social science statistics are not relevant to challenges to state constitutional provisions. *Clay*, 481 S.W.3d at 536 n.5. Alpert makes a final argument that the statute is under-inclusive because it does not apply to those who are not convicted felons because they received a suspended imposition of sentence. Alpert's Br. at 26. But the long-standing

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[1] Alpert's ability to receive an expungement or a pardon may also constitute an "adequate remedy at law."

prohibition on felons possessing firearms applies to those who are *convicted felons*. Alpert's argument is essentially that it is unfair that some defendants receive diversions from the criminal justice system. Not so. And, the fact that the General Assembly limited the prohibition on possessing firearms to only those with a conviction is proof that the statute is narrowly tailored, not proof that the statute is constitutionally infirm.

Conclusion

Because Alpert is a felon and Article I, Section 23 of the Missouri constitution does not extend to felons, Alpert's as-applied challenge is not cognizable. In the alternative, if Alpert's is cognizable, then he is still not entitled to relief because the statute is narrowly tailored. Under either theory, this Court should affirm the circuit court's order granting summary judgment to the State.

ARGUMENT IV

Missouri's prohibition on felons possessing firearms does not violate the Federal Constitution. – Responds to Alpert's Point I

Alpert's final argument is that Missouri's prohibition on felons possessing firearms violates the Second Amendment as-applied to Alpert. Alpert's Br. at 24–32. Alpert is mistaken; Missouri's statute is not unconstitutional as applied to Alpert. Alpert correctly identifies that there is a circuit split on the level of scrutiny that must be applied to Second Amendment challenges. But this Court need not answer that question because Section 571.070 survives under either intermediate or strict scrutiny.

Standard of Review

A constitutional challenge to a statute is reviewed *de novo*, and this Court presumes that statutes are constitutional. *Clay*, 481 S.W.3d at 533. The federal courts use a two-step approach when reviewing Second Amendment challenges to statues. First, federal courts will "ask 'whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.'" *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017) (en banc) (citing *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)). If there is no burden on protected Second Amendment activity, the inquiry ends. *Id.* But, if "the challenged law imposes a burden on conduct

protected by the Second Amendment," then federal courts will apply "an appropriate form of means-end scrutiny." *Id.*

This Court has recognized that the United States Supreme Court has not identified what level of scrutiny is applied to statutes in a Second Amendment challenge. *Clay*, 481 S.W.3d at 534 n.3 (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010)). This Court has not yet decided whether Section 571.070 should receive strict scrutiny review or intermediate scrutiny review when challenged under the Second Amendment. *McCoy*, 468 S.W.3d at 896 n.4.

The most common articulation of strict scrutiny review requires a court to determine whether a law is narrowly tailored to achieve a compelling state interest. *Clay*, 481 S.W.3d at 535. "Depending on the extent the regulation burdens a particular right," a court may perform strict scrutiny review by looking "to whether a regulation imposes 'reasonable, non-discriminatory restrictions' that serve 'the State's important regulatory interests' or whether the encroachment is 'significant.'" *Id.*

Intermediate scrutiny is a less demanding standard that requires the government to show the statute "serves important government interests and is substantially related to achieving those interests." *Glossip v. Missouri Dep't of Transp. & Highway Patrol Employees' Ret. Sys.,* 411 S.W.3d 796, 802 (Mo. 2013). The United States Court of Appeals for the Third Circuit has

articulated the intermediate scrutiny standard as requiring "the asserted governmental end" to be "significant, substantial, or important" and "the fit between the challenged regulation and the asserted objective" must be "reasonable." *Marzzarella*, 614 F.3d at 98.

Analysis

A. There is a split in authority over what level of scrutiny to apply, but the majority of the United States Court of Appeals apply intermediate scrutiny.

This Court has recognized that the United States Supreme Court has not yet identified what level of scrutiny applied to statutes in a Second Amendment challenge. *Clay*, 481 S.W.3d at 534 n.3. (citing *Heller*, 554 U.S. 570, and *McDonald*, 561 U.S. 742). This Court has also held that those who have attempted to present this question to this Court have failed to preserve the issue. *McCoy*, 468 S.W.3d at 894 n. 3 While this Court is not bound by opinions from the United States Court of Appeals, this Court may "look respectfully to such opinions for such aid and guidance as may be found therein." *Hanch v. K. F. C. Nat. Mgmt. Corp.*, 615 S.W.2d 28, 33 (Mo. 1981).

The majority of the circuits of the United States Court of Appeals have applied intermediate scrutiny to Second Amendment challenges. *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc) ("*Tyler II*") ("A non-exhaustive review of these cases reveals a near

unanimous preference for intermediate scrutiny."); *see also United States v. Booker*, 644 F.3d 12 (1st Cir. 2011); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Marzzarella*, 614 F.3d 85 (3d Cir. 2010); *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *Nat'l Rifle Ass'n v. McCraw*, 719 F.3d 338 (5th Cir. 2013); *Baer v. Lynch,* 636 Fed. Appx. 695 (7th Cir. 2016); *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *Heller v. District of Columbia* (*"Heller II"*), 670 F.3d 1244 (D.C. Cir. 2011); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (applying intermediate scrutiny in part).

However, some courts have applied strict scrutiny to Second Amendment challenges. For instance, the United States Court of Appeals for the Seventh Circuit has applied strict scrutiny to a Chicago ordinance that required firearm owners to obtain yearly firearms training while simultaneously banning all firearm ranges within the city limits. *Ezell v. City of Chicago*, 651 F.3d 684, 708–09 (7th Cir. 2011), *but see Ezell*, 651 F.3d at 708 (recognizing that a different panel applied intermediate scrutiny to a Second Amendment challenge to 18 U.S.C. §922). Alpert argues that the Sixth Circuit applied strict scrutiny in *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 775 F.3d 308 (6th Cir. 2014) ("*Tyler I*"). Alpert's Br. at 14. But the Sixth Circuit's panel decision in *Tyler I* was vacated and the Sixth Circuit en banc then applied intermediate scrutiny. *Tyler II*, 837 F.3d at 692.

Respondent respectfully suggests that it is still not necessary for this Court to determine which form of heightened scrutiny applies because Section 571.070 does not burden protected Second Amendment activity. But even if Section 571.070 does burden Second Amendment activity, this Court need not resolve which form of heightened scrutiny applies because the statute survives under either standard of review.

B. Alpert cannot bring an as-applied challenge to Section 571.070 because felons are categorically removed from Second Amendment protections.

Under the two-step approach used by the federal courts, courts first consider if the challenged statute imposes a burden on protected Second Amendment activity. *Kolbe*, 849 F.3d at 133. Because the Second Amendment does not protect the right of convicted felons to possess firearms, Alpert's challenge fails the first step. In other words, Alpert is not entitled to relief because felons are categorically excluded from Second Amendment protections.

Alpert disagrees and presents four arguments, none of which are persuasive. First, Alpert argues that *Heller* did not categorically exempt felons from Second Amendment protection. Alpert's Br. at 35–36. Not so. In *Heller*, the United States Supreme Court wrote that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession

of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings..." *Heller*, 554 U.S.at 626–27. The most straightforward interpretation of this holding is that possession of firearms by felons and the mentally ill are not protected by the Second Amendment. Other courts have reached the same conclusion. *See, e.g., Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *Rozier*, 598 F.3d 768, 771 (11th Cir. 2010). This Court has reached that conclusion as well. *Clay*, 481 S.W.3d at 536. (holding that "restrictions on the right of felons to possess arms has long been recognized as an exception to the right to bear arms.").

If this Court accepts Alpert's understanding of *Heller*, then statues preventing possession of firearms in government buildings like courthouses would also be subject to as-applied challenges. *See* Section 571.030 (unlawful use of a weapon); *see also* Section 571.107.1(4) (no possession of a concealed firearm in courthouse or courtroom). Recently, the United States Court of Appeals for the Tenth Circuit was confronted with a similar question in *Bonidy v. United States Postal Service*, 790 F.3d 1121 (10th Cir. 2015). In *Bonidy*, the plaintiff wished to possess a firearm while inside the Post Office. *Id.* at 1122–23. The Tenth Circuit, citing *Heller*, held that "the Second Amendment right to carry firearms does not apply to federal buildings" and rejected the plaintiff's appeal. *Id.* at 1125. It cannot be the rule that *Heller*

means that the Second Amendment does not apply to government buildings but does apply to felons.

In his second and third arguments, Alpert argues that Missouri does not have a longstanding prohibition on possession of firearms by felons and that the English common law does not support a ban on felons possessing firearms. Alpert's Br. at 36–38. These arguments miss the mark. According to *Heller*, the prohibition on felons possessing firearms is itself longstanding. *Heller*, 554 U.S. at 626–27. Alpert attempts to shift the focus from the type of prohibition to what prohibition each state employed at the time of the founding. Alpert's Br. at 36. But if Alpert is correct, then the Second Amendment could invalidate the same statute in two separate states based only on the date each State enacted the statute. That would be an absurd result. When the United States Court of Appeals for the Seventh Circuit, en banc, was presented with this argument, that court rejected it. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).

Even if the Court were inclined to consider the age of Section 571.070 as a relevant factor, Alpert has not established which year the statute should be measured against. The United States Supreme Court did not recognize the incorporation of the Second Amendment against the States until 2010. *McDonald*, 561 U.S. at 749. Section 571.070 was enacted two years *before* the United States Supreme Court's ruling in *McDonald*. But again, Alpert's

arguments miss the mark because the United States Supreme Court has already held that felon-in-possession bans are "longstanding." *Heller*, 554 U.S. at 626–27.

And fourth, Alpert argues that *Heller*'s use of "presumptively lawful" still allows for the possibility of an as-applied challenge. Alpert's Br. at 39. Some courts have understood "presumptively lawful" to mean there is a rebuttable presumption of validity that can be overcome on an as-applied challenge. *Binderup v. Holder*, 836 F.3d 336, 350 (3d Cir. 2016). But many courts have rejected that argument, finding that felons are categorically removed from the scope of Second Amendment protections. *See, e.g., Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *Rozier*, 598 F.3d 768, 771 (11th Cir. 2010). This Court's prior cases indicate that it has understood felons to be categorically excluded from Second Amendment protections. This Court should expressly hold that felons are not entitled to Second Amendment protections.

Given this Court's prior holdings, as well as the holdings in *Vongxay* and *Rozier*, Alpert is unable to bring an as-applied challenge to Section 571.070 under the Second Amendment because Alpert is a felon.

C. Section 571.070, as applied to Alpert, does not violate the Second Amendment.

Alpert believes that Section 571.070 violates the Second Amendment for the same reasons that Alpert believes that Section 571.070 violates

Article I, Section 23 of the Missouri Constitution. Alpert's Br. 24–32. Respondent has already demonstrated that Alpert's argument is incorrect in Point III, *supra*. Respondent does not repeat those arguments here. However, Alpert also contends that cases from other jurisdictions support his argument that Section 571.070 is unconstitutional as-applied to Alpert. Alpert's Br. 32–34. Even if Alpert is right that cases from other jurisdictions support his argument, this Court should still decline to grant relief and should decline to rely on those cases.

Alpert primarily relies on *Binderup v. Holder*, No. 13-6750-JKG (E.D. Penn. Sept. 25, 2014). Since the time that Alpert wrote his brief, the United States Court of Appeals for the Third Circuit heard the case en banc. *Binderup v. Holder*, 836 F.3d 336 (3d Cir. 2016) (en banc) (pet. for cert. docketed *Binderup v. Sessions*, 16-983; and *Sessions v. Binderup*, 16-847)). The Third Circuit's opinion was badly fractured, but a majority of the court en banc found that 18 U.S.C. § 922 was unconstitutional as-applied to two people with misdemeanor convictions. *Binderup*, 836 F.3d at 356. Importantly, Section 571.070 has no application to misdemeanants, unlike 18 U.S.C. § 922. Because of the structure of 18 U.S.C. § 922, the majority found that the statute can only apply to "serious crimes." *Id.* at 350. The majority then found that the two challenger's misdemeanor convictions were not serious. *Id.* at 351. Having cleared step one, the majority then found that 18

U.S.C. § 922 did not survive intermediate security as-applied to the challengers because a large amount of time passed between when the challengers were convicted of their misdemeanors and when the challengers brought their as-applied challenge. *Id*. at 353–54.

The seven judge dissenting opinion in *Binderup* observed that the Fifth, Ninth, Tenth, and Eleventh Circuit have found that felons may not bring a Second Amendment as-applied challenge to disarmament statutes. *Binderup*, 836 F.3d at 382 (dissenting opinion of Fuentes, J.) (citing *United States v. Scroggins*, 599 F.3d 433 (5th Cir. 2010); *Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *McCane*, 573 F.3d 1037 (10th Cir. 2009); *Rozier*, 598 F.3d 768 (11th Cir. 2010)).

Alpert relies on *Binderup* for its analysis at the second step, that is, that he should prevail on his Second Amendment as-applied challenge because of the amount of time that has passed between his convictions and the date of the challenge. Alpert's Br. at 33–34. But *Binderup* is factually distinguishable. Unlike the challengers in *Binderup*, Alpert has two separate felony convictions. Moreover, those convictions were obtained by separate sovereigns for separate events. While it is true that Alpert is older and that more time has passed for Alpert, the fact remains that he has a larger number of convictions, and that Alpert's convictions are both felonies unlike

the misdemeanant offenders in *Binderup*. These different facts compel a different result.

But on a more basic level, this Court should decline to adopt *Binderup*'s implicit holding that felons may bring as-applied challenges to felon-in-possession statutes. As the dissenting judges observed, the United States Supreme Court has remarked that courts are ill equipped to "conduct[] a neutral, wide-ranging investigation" into individual's backgrounds so as to make a case-by-case determination if a person should possess firearms. *Binderup*, 836 F.3d at 350 (dissenting opinion of Fuentes, J.) (citing *United States v. Bean*, 537 U.S. 71, 77 (2002)). If this Court permits felons to bring as-applied challenges to Section 571.070, then the circuit courts will be forced to adjudicate questions that are best left to the political branches. Moreover, this Court will have original jurisdiction to hear these as-applied constitutional challenges. And there is the potential for a substantial number of challenges. 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. Other courts have refused to allow felons to make as-applied challenges because of the number of potential claims and the inherent difficulty for courts to adjudicate such claims. *See, e.g.,Torres-Rosario*, 658 F.3d at 113.

Alpert also relies on *Britt v. State*, a North Carolina Supreme Court case that allowed a challenger to assert that the North Carolina disarmament statute violated the North Carolina constitution as applied to the challenger. *Britt v. State*, 681 S.E.2d 320 (N.C. 2009). *Britt* does not assist Alpert with his Second Amendment challenge because *Britt* is limited to the North Carolina constitution. Moreover, the United States Court of Appeals for the First Circuit refused to follow *Britt* because allowing as-applied challenges would mean "countless variations in individual circumstances" and "would obviously present serious problems of administration, consistency, and fair warning." *Torres-Rosario*, 658 F.3d at 113. This Court should reject *Britt* for the same reasons.

Even if this Court does rely on the majority opinion in *Binderup* or the rationale of *Britt*, Alpert is still not entitled to relief. Section 571.070 is not unconstitutional as applied to Alpert. This Court has explained that Section 571.070 serves a compelling state interest: "ensuring public safety and reducing firearm-related crime." *Clay*, 481 S.W.3d at 535. And Alpert is a convicted felon. This Court has explained that "[p]rohibiting felons from possessing firearms is narrowly tailored ... because '[i]t is well-established that felons are more likely to commit violent crimes than are other law abiding citizens.'" *Id.* at 535–36. The other facts about Alpert—his age, how far he lives from town, his physical condition—are irrelevant.

Conclusion

Because Alpert is a felon and the Second Amendment right to bear arms does not extend to felons, Alpert's as-applied challenge is not cognizable. In the alternative, if Alpert's is cognizable, then he is still not entitled to relief because the statute is narrowly tailored. Under either theory, this Court should affirm the circuit court's order granting summary judgment to the State.

CONCLUSION

This Court should decline to reach the merits of Alpert's appeal because he has used declaratory judgment to bring an inappropriate pre-enforcement challenge. And Alpert has another adequate remedy at law. But if this Court does reach the merits, then Alpert is still not entitled to relief because Missouri's prohibition of the possession of firearms by felons does not violate the Missouri Constitution or the Second Amendment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 9,149 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software.

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