SUPREME COURT OF MISSOURI
en banc

JACK ALPERT,	)	*Opinion issued April 3, 2018*
	)	
Appellant,	)	
	)	
v.	)	No. SC96024
	)	
STATE OF MISSOURI, et al.,	)	
	)	
Respondents.	)	

APPEAL FROM THE CIRCUIT COURT OF JOHNSON COUNTY
The Honorable William B. Collins, Judge

Jack Alpert (hereinafter, "Alpert") filed a declaratory judgment action against the state of Missouri, the attorney general, and the prosecuting attorney for Johnson County, Missouri (hereinafter and collectively, "the state"), seeking a declaration the state could not enforce section 571.070, RSMo Supp. 2013,[1] against him without violating article I, section 23 of the Missouri Constitution and the Second Amendment to the United States Constitution. This Court holds Alpert's pre-enforcement constitutional challenges are ripe

[1] All statutory references are to RSMo Supp. 2013, unless otherwise indicated.

for determination, and section 571.070 withstands constitutional scrutiny. The circuit court's judgment is affirmed.[2]

Factual and Procedural History

In 1970, Alpert pleaded guilty to possession of a controlled substance in Pettis County, Missouri, and was sentenced to three years' imprisonment. In 1975, Alpert pleaded guilty to possession of a controlled substance in federal district court and received a two-year sentence. Alpert successfully completed both sentences.

In 1983, Alpert filed an application pursuant to 18 U.S.C. § 925(c) with the United States attorney general to restore his right to possess a firearm, which was prohibited due to his felony convictions. Alpert's application was granted. In 1986, Alpert applied for a federal firearms license, class 01 (hereinafter, "FFL01 license"), a three-year, renewable license, permitting one to deal firearms. After the license was issued, Alpert began buying and selling firearms. Alpert's license was renewed regularly.

In 2007, Alpert founded Missouri Bullet Company (hereinafter, "MBC"), a cast bullet manufacturer.[3] In 2008, the General Assembly amended section 571.070, making it unlawful for any person who has been convicted of a felony under Missouri law "or of a crime under the laws of any state or of the United States which, if committed within this state, would be a felony," to possess a firearm. When Alpert attempted to renew his FFL01

[2] This Court has exclusive jurisdiction over an appeal involving the constitutional validity of a statute. Mo. Const. art. V, sec. 3.

[3] MBC holds a federal firearms license, class 06, which allows it to manufacture ammunition. This license does not permit Alpert to possess any firearm, even for the purpose of testing ammunition.

license, he was told he could not because of the 2008 amendment to section 571.070. Consequently, Alpert was required to surrender his FFL01 license.

Alpert filed a declaratory judgment action raising facial and as-applied challenges to section 571.070. Alpert sought a declaration that section 571.070 could not be enforced against him without violating the Missouri and United States constitutions. Alpert set forth facts demonstrating his law-abiding behavior since completing his sentences and having his federal gun rights restored. Alpert's petition further alleged he wished to possess two family heirloom pistols and a rifle he was awarded in 1993. Alpert maintained his claims were ripe because the facts necessary to adjudicate the claims were developed fully, section 571.070 affected him in a manner giving rise to an immediate, concrete dispute, and he lacked an adequate remedy at law.

The parties filed competing motions for summary judgment. Alpert alleged section 571.070 was unconstitutional as applied to him because it was underinclusive, overinclusive, and its prohibition barring felons from possessing firearms was not longstanding. The state countered Alpert's claims were not ripe because he was not being prosecuted or threatened with prosecution for violating section 571.070. The state also argued Alpert, as a convicted felon, categorically was excluded from Second Amendment protections, and, therefore, his facial and as-applied challenges must fail.

The circuit court sustained the state's motion. The circuit court rejected the state's ripeness argument, finding it would be improper to bar Alpert's pre-enforcement action because it would require him to violate the law before proceeding. The circuit court held section 571.070 did not violate the Missouri or United States constitution primarily because

felons categorically are removed from the group of people who can claim the protections of those constitutional provisions. Alpert appeals.[4]

Ripeness

This Court first must determine whether Alpert's constitutional claims are ripe. The state argues Alpert's challenges are not ripe because he failed to present sufficient facts to establish a fully developed claim, and section 571.070 does not affect Alpert such that there is an immediate, concrete dispute. The state further maintains Alpert has not been charged with violating section 571.070, he has not been threatened with prosecution, there is no evidence he currently possesses any firearms, and he has other remedies at law. Alpert counters the state sought summary judgment and did not present any disputed facts requiring further development. Alpert also contends he demonstrated an immediate, concrete dispute existed because he was able to possess firearms lawfully from the time his rights were restored in 1986 until 2008 when section 571.070 was amended.

"The stated purpose of the declaratory judgment act is to allow parties 'to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.'" *Planned Parenthood of Kan. v. Nixon*, 220 S.W.3d 732, 738 (Mo. banc 2007) (quoting section 527.120, RSMo 2000). "A declaratory judgment action has been found

[4] Alpert's sole point on appeal contains multifarious allegations of error. A point relied on violates Rule 84.04(d) when it groups together multiple contentions not related to a single issue and is subject to dismissal. *Thummel v. King*, 570 S.W.2d 679, 688 (Mo. banc 1978). Nevertheless, when possible, "This Court's policy is to decide a case on its merits rather than on technical deficiencies in the brief." *Mo. Bankers Ass'n, Inc. v. St. Louis Cnty.*, 448 S.W.3d 267, 276 n.5 (Mo. banc 2014) (quoting *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 338 (Mo. banc 1998)).

to be a proper action to challenge the constitutional validity of a criminal statute or ordinance." *Tupper v. City of St. Louis*, 468 S.W.3d 360, 368 (Mo. banc 2015). However, "[a] court cannot render a declaratory judgment unless the petition presents a controversy ripe for judicial determination." *Lebeau v. Comm'rs of Franklin Cnty., Mo.*, 422 S.W.3d 284, 290-91 (Mo. banc 2014) (quoting *Mo. Health Care Ass'n v. Attorney Gen. of the State of Mo.*, 953 S.W.2d 617, 621 (Mo. banc 1997)). "A ripe controversy exists if the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief with a conclusive character." *Mo. Health Care Ass'n*, 953 S.W.2d at 621.

When the challenge involves the constitutional validity of a statute, "a ripe controversy generally exists when the state attempts to enforce the statute." *Id.* Yet, there are situations in which a ripe controversy may exist prior to the statute being enforced. *S.C. v. Juvenile Officer*, 474 S.W.3d 160, 163 (Mo. banc 2015). Pre-enforcement constitutional challenges are ripe when: (1) "the facts necessary to adjudicate the underlying claims [are] fully developed" and (2) the law at issue affects the plaintiff "in a manner that [gives] rise to an immediate, concrete dispute." *Mo. Health Care Ass'n*, 953 S.W.2d at 621.

The state argues Alpert did not present enough fully developed facts to establish a claim, only a desire to possess certain firearms.[5] The state alleges Alpert's mere desire to

[5] The state alleged in its summary judgment motion there were no genuine disputed issues of material fact, and it was entitled to judgment as a matter of law. The state strongly contested Alpert's attempt to develop his factual record with respect to personal details of

possess firearms, coupled with the possibility Alpert may be charged with violating section 571.070, results in a hypothetical or speculative situation that is not ripe. The state analogizes Alpert's claim to several cases in which pre-enforcement challenges were held not ripe.

To support its arguments, the state first relies on *Turner v. Missouri Department of Conservation*, 349 S.W.3d 434, 445-46 (Mo. App. S.D. 2011), which held a pre-enforcement challenge was not ripe because the plaintiff was never charged with a violation and additional facts needed to be developed. The court found the plaintiff's challenge was not ripe because he failed to demonstrate the department interrupted or prevented a particular course of conduct. *Id*. Here, Alpert alleged he was able to possess firearms legally for more than twenty-five years after having his rights restored and obtaining his FFL01 license. However, once section 571.070 was amended, Alpert's previous conduct was interrupted or prevented because his FFL01 license was revoked and he could no longer possess firearms.

Courts have held the interruption or prevention of previous lawful conduct supports adjudicating pre-enforcement challenges on the merits. *See Borden Co. v. Thomason*, 353 S.W.2d 735, 740 (Mo. banc 1962) (holding a pre-enforcement challenge was ripe when the plaintiff did not violate the statute, but alleged it previously engaged in activities now prohibited by statute and wished to engage in those now-barred activities in the future); *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34 (Mo. banc 1982) (finding a justiciable

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his life to demonstrate he posed no risk to public safety given his age, education, marital status, ties to the business community, and health.

controversy existed when a business challenged the constitutional validity of a statute prohibiting the business' previously lawful activities, even though no statutory enforcement had commenced); *Bldg. Owners & Managers Ass'n of Metro. St. Louis, Inc. v. City of St. Louis, Mo.*, 341 S.W.3d 143, 149 (Mo. App. E.D. 2011) (holding a controversy was ripe when the ordinance changed the way business association members had to conduct business, even though statutory enforcement had not occurred); *Mo. Health Care Ass'n*, 953 S.W.2d at 621 (holding a ripe controversy existed challenging statutes altering the plaintiffs' way of doing business and subjecting them to penalties for violating the statutes, even though the statutes had yet to be enforced).

The state also relies on *Foster v. State*, 352 S.W.3d 357 (Mo. banc 2011), *Schweich v. Nixon*, 408 S.W.3d 769 (Mo. banc 2013), and *J.H. Fichman Co., Inc. v. City of Kansas City*, 800 S.W.2d 24 (Mo. App. W.D. 1990), all of which rejected pre-enforcement challenges, in part due to specific, factual, future events that needed to occur before the controversy was ripe. In *Foster*, the prisoner needed to accumulate sufficient funds to trigger the state's seizure under the Missouri Incarceration Reimbursement Act. *Foster*, 352 S.W.3d at 361. In *Schweich*, the auditor had to await the fiscal year's end to determine whether the governor's fund withholding was an exercise of constitutional authority. *Schweich*, 408 S.W.3d at 779. In *J.H. Fichman*, the court noted the nature of the challenger's business and that the pleadings addressing only certain items banned by the ordinance would not end the controversy because it would not address items not brought to the court's attention or subsequently obtained for resale to the public. *J.H. Fichman*, 800 S.W.2d at 27.

By contrast, Alpert's pre-enforcement constitutional claims present predominantly legal questions, such as whether section 571.070 as applied to him violates the Missouri and United States constitutions' rights to bear arms. "Cases 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 (internal quotations omitted); *see also Mo. Health Care Ass'n*, 953 S.W.2d at 622 (holding a controversy was ripe when "[n]o speculation or additional fact-finding was required" to determine how the plaintiffs were affected by the statute); *Bldg. Owners*, 314 S.W.3d at 149 (finding a case ripe when the plaintiff presented largely legal questions needing little factual development); *Tupper*, 468 S.W.3d at 370 (finding a red light camera challenge was ripe because it presented predominantly legal questions not requiring further factual development); *Mo. Alliance for Retired Ams. v. Dep't of Labor and Indus. Relations*, 277 S.W.3d 670, 678-79 (Mo. banc 2009) (holding a pre-enforcement challenge to workers' compensation exclusivity provisions was ripe because no factual development was necessary to address the legal question). Alpert's status as a prior felon and his desire to possess firearms, despite the statute's prohibition, need no additional factual development and present an immediate, concrete dispute, especially given the revocation of Alpert's FFL01 license after section 571.070 was amended in 2008.

The state also contends Alpert needs to possess firearms illegally, be prosecuted, or be threatened with prosecution before he can raise his constitutional claims. In that vein, the state argues Alpert has an adequate remedy in that he can raise his constitutional claims as a defense if and when the state chooses to prosecute.

This Court repeatedly has rejected the notion a person must violate the law to create a ripe controversy. For example, in *Tietjens v. City of St. Louis*, 222 S.W.2d 70, 72 (Mo. banc 1949), this Court disregarded the argument a declaratory judgment action was premature when the plaintiff had not violated the ordinance being challenged because the ordinance had been duly adopted, it affected the plaintiff, and it must be assumed the city will enforce its laws. *See also Borden*, 353 S.W.2d at 741 (finding even though the plaintiff failed to identify a single right that was curtailed or infringed, this Court explicitly held the fact the plaintiff had not violated the statutes did not make the action premature).

In *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 425 (Mo. banc 1988), a plaintiff filed a declaratory judgment action challenging a cat kennel licensing ordinance prior to being cited with a violation. This Court rejected the city's argument the plaintiff could raise his challenge as a defense in a subsequent criminal prosecution. *Id*. This Court explained the claim was "ripe for judicial resolution, and there was no need for him to await criminal prosecution before seeking a determination of his rights." *Id*.; *see also Planned Parenthood*, 220 S.W.3d at 738 (holding the plaintiffs' constitutional claims were ripe even though neither the attorney general nor the state had attempted to enforce the statute yet); *Bldg. Owners*, 341 S.W.3d at 149 (finding a pre-enforcement challenge was ripe even though the plaintiffs would be subject to criminal penalties if they violated the ordinance's provisions); *Tupper*, 468 S.W.3d at 370 (stating the plaintiffs' challenge to the city's red light camera ordinance was ripe despite neither plaintiff facing prosecution at the time the challenge was raised).

"Parties need not subject themselves to a multiplicity of suits or litigation or await the imposition of penalties under an unconstitutional enactment in order to assert their constitutional claim for an injunction .... Once the gun has been cocked and aimed and the finger is on the trigger, it is not necessary to wait until the bullet strikes to invoke the Declaratory Judgment Act." *Planned Parenthood*, 220 S.W.3d at 739 (quoting *ANR Pipeline Co. v. Corp. Comm'n of State of Okla.*, 860 F.2d 1571, 1578 (10th Cir. 1988)); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) (a petitioner need not expose himself to enforcement before challenging a statute). Forcing Alpert to wait until he violates section 571.070 and is prosecuted or threatened with prosecution puts him "in a dilemma that it was the very purpose of the [d]eclaratory [j]udgment [a]ct to ameliorate." *Mo. Health Care Ass'n*, 953 S.W.2d at 622 (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 152, 87 S. Ct. 1507, 1517, 18 L. Ed. 2d 681 (1967)). This Court holds Alpert satisfied the requirements to bring a pre-enforcement declaratory judgment action to challenge the constitutional validity of section 571.070.[6]

[6] Judge Wilson's dissenting opinion relies on *Harris v. State Bank & Trust Company v. Wellston*, 484 S.W.2d 177, 178-79 (Mo. 1972), which states the declaratory judgment act "should be used with caution. And except in exceptional circumstances plainly appearing, it is not to be used and applied where an adequate remedy already exists." The dissenting opinion's reliance on *Harris* is misplaced because *Harris* did not present a constitutional challenge and *Harris*' "exceptional circumstances plainly appearing" test has not been cited or relied upon by this Court since *Harris* was decided. By applying the exceptional circumstances test, the dissenting opinion seeks to have its cake and eat it too. The dissenting opinion argues on the one hand Alpert's unique circumstance of being an elderly man dying of cancer makes it "unlikely" that a prosecutor would exercise discretion to prosecute him for possessing firearms, and on the other argues Alpert has not demonstrated "exceptional circumstances plainly appearing" to be entitled to a declaratory judgment.

Standard of Review

The constitutional validity of a statute is a question of law this Court reviews *de novo*. *Planned Parenthood*, 220 S.W.3d at 737. This Court will presume the statute is valid and will not declare a statute unconstitutional unless it clearly contravenes some constitutional provision. *Id*. Alpert's petition challenged section 571.070's validity under both the Missouri and United States constitutions.

Article I, Section 23 Challenge

Article I, section 23 of the Missouri Constitution provides:

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

Alpert's petition alleged section 571.070 as applied to him violated article I, section 23 because section 571.070 is not narrowly tailored to achieve any compelling state interest.[7] Alpert's petition asserted several ways section 571.070 is not narrowly tailored,

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Finally, Judge Wilson's dissenting opinion characterizes this Court's long line of precedent cited herein as "lax" only because there is no discernable ground upon which to distinguish those holdings to support its position. Rather than being "lax," the Court applied valid precedent as required by the doctrine of stare decisis.

[7] Alpert conceded in the circuit court his facial challenges under article I, section 23 and the Second Amendment failed because there were circumstances under which section 571.070 can be applied constitutionally.

in that: it is not restricted to violent or dangerous offenders, but applies to all felons; there is no temporal limit to its applicability; it applies to persons such as Alpert who have demonstrated an ability to possess firearms peaceably and without incident since their convictions; it applies to disabled felons who may need to possess a firearm for self-defense; it applies to felons whose right to possess firearms was restored under 18 U.S.C. § 925(c); the prohibition on nonviolent felons possessing firearms is not longstanding; it is not restricted to persons who have been adjudicated by a state agency or court to be a danger to themselves or others; it restricts all possession by felons, even types of possession posing no risk to safety; it is underinclusive; and the legislature did not consult or rely upon any research, studies, or other data to support the broad prohibition it was adopting.

"The legislature has the authority to adopt laws, except when expressly prohibited by the constitution and section 23 is silent as to the right of nonviolent felons to possess firearms." *State v. Clay*, 481 S.W.3d 531, 532-33 (Mo. banc 2016). *Clay* recognized this Court always has applied strict scrutiny to laws regulating the right to bear arms, citing *State v. Merritt*, 467 S.W.3d 808 (Mo. banc 2015), *State v. McCoy*, 468 S.W.3d 892 (Mo. banc 2015), and *Dotson v. Kander*, 464 S.W.3d 190 (Mo. banc 2015). *Id*. at 533. In upholding section 571.070 as a constitutional restriction against a convicted nonviolent felon's right to bear arms, *Clay* explained:

> This Court already has subjected section 571.070.1 to strict scrutiny in *Merritt* and *McCoy* and found that section 571.070.1 is narrowly tailored to serve a compelling government interest in protection of the public. This Court already has determined in *Dotson* that Amendment 5 worked no substantial change in article I, section 23. This Court here has clarified that

> the specific grant of authority in Amendment 5 to adopt laws regulating the possession of firearms by convicted violent felons does not affect the right of the legislature to adopt laws regulating the right of others to possess firearms where, as here, those laws pass strict scrutiny. Accordingly, section 571.070.1 is a constitutional restriction of a convicted nonviolent felon's right to bear arms.

Id. at 538 (footnote omitted). This Court further clarified:

> 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.

Alpert repackages many of the arguments this Court addressed and rejected in *Merritt*, *McCoy*, and *Clay*. First, this Court recognized the prohibition on felons possessing firearms was longstanding. *Clay*, 481 S.W.3d at 535-36; *see also United States v. Bena*, 664 F.3d 1180, 1182-84 (8th Cir. 2011) (providing an extensive discussion of the longstanding prohibition of felons possessing firearms under the common law, federal statutes, and the Second Amendment). This Court explicitly held section 571.070 was narrowly tailored despite not being restricted to violent or dangerous offenders, having no temporal limit, and restricting possession by all felons, even types of possession posing no safety risk. *McCoy*, 468 S.W.3d at 898-99; *Merritt*, 467 S.W.3d at 815-16. This Court rejected the notion section 571.070 prohibited self-defense. *McCoy*, 468 S.W.3d at 899; *Merritt*, 467 S.W.3d at 816. This Court also declined to find section 571.070 required procedural safeguards for judicial review to determine whether the felon posed an actual

danger to the public by possessing a firearm to pass constitutional muster. *McCoy*, 468 S.W.3d at 899. This Court held section 571.070 was not underinclusive because it did not apply to misdemeanants and other offenders likely to commit violent offenses. *McCoy*, 468 S.W.3d at 899.[8] Finally, this Court recognized "statistics do not bear on the constitutional analysis [of section 571.070's validity] because they prove nothing about the law's design." *Merritt*, 467 S.W.3d at 814 n.6.

As for Alpert's other claims, such as his restoration of federal rights, his demonstrated ability to possess firearms peaceably, and the lack of restriction for those persons who have been adjudicated by a state agency or court to be a danger to themselves or others, "narrow tailoring 'does not require exhaustion of every conceivable … alternative.'" *Merritt*, 467 S.W.3d at 815 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003)). This Court noted the contrast between the federal felon-in-possession law, 18 U.S.C. § 922(g)(9) (2006), and section 571.070. *McCoy*, 468 S.W.3d at 899. Likewise, Missouri has no mechanism for the restoration of rights absent a pardon or expungement, neither of which Alpert has obtained. *Id*. Hence, when subjected to strict scrutiny under article I, section 23, section 571.070 is valid. *Clay*, 481 S.W.3d at 538.

[8] Alpert's argument on appeal that section 571.070 is underinclusive because it treats similarly situated felons in a disparate fashion was not presented in his petition and will not be addressed here.

Second Amendment Challenge

Alpert's petition raises identical arguments to support his claim section 571.070 as applied to him violates his Second Amendment rights, again alleging the statute cannot withstand strict scrutiny because it is not narrowly tailored to achieve a compelling state interest. This Court has not yet declared a level of scrutiny to apply to Second Amendment challenges. *Merritt*, 467 S.W.3d at 813, n.5; *McCoy*, 468 S.W.3d at 896 n.4.

In *District of Columbia v. Heller*, 554 U.S. 570, 595, 128 S. Ct. 2783, 2799, 171 L. Ed. 2d 637 (2008), the United States Supreme Court held the Second Amendment conferred an individual right to keep and bear arms for lawful purposes, such as self-defense. *Heller* declined to establish a level of scrutiny when it evaluated the Second Amendment restriction. *Id*. at 634. In a footnote, the Supreme Court stated judicial review required something more than "rational basis" because "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id*. at 629 n.27. *Heller* found the right to keep and bear arms is not unlimited and is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. at 626. *Heller* was careful to point out "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." *Id*. at 626-27. The Supreme Court went on to identify prohibitions against felons possessing firearms as "presumptively lawful regulatory measures." *Id*. at n.26.

Two years after *Heller*, the Supreme Court extended the Second Amendment's application to the states by virtue of the Fourteenth Amendment's Due Process Clause. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 791, 130 S. Ct. 3020, 3050, 177 L. Ed. 2d 894 (2010). The Supreme Court again judiciously avoided naming or applying a particular level of scrutiny when reviewing this fundamental right. *Id*. at 782-84.

In *Clay*, this Court reiterated both *Merritt* and *McCoy* held that because cases such as *Heller* and *McDonald* recognized the right to bear arms is a fundamental right, strict scrutiny must be used in analyzing the constitutional validity of any regulation of that right under Missouri law. *Clay*, 481 Sat 534; *Merritt*, 467 S.W.3d at 812-13; *McCoy*, 468 S.W.3d at 895-96. However, *Clay* still did not reach the issue of how to analyze Second Amendment challenges because one was not raised in that case.

Alpert contends strict scrutiny is appropriate yet he relies on cases from other jurisdictions that apply a lesser level of scrutiny when analyzing Second Amendment challenges to support his claim. First, Alpert relies heavily on *United States v. Barton*, 633 F.3d 168 (3rd Cir. 2011), and the factors it analyzed to demonstrate section 571.070 violates the Second Amendment as applied to him. In *Barton*, the Third Circuit explained:

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

Barton, 633 F.3d at 174.[9] *Barton* ultimately denied the challenger relief because "he has presented no facts distinguishing his circumstances from those of other felons who are categorically unprotected by the Second Amendment." *Id*. at 175.

Barton was overruled in part by another case Alpert relies upon, *Binderup v. Attorney General United States of America*, 836 F.3d 336 (3rd Cir. 2016), a fractured decision analyzing as-applied challenges to the Second Amendment. In *Binderup*, two men with state misdemeanor convictions were prohibited from possessing firearms under federal law and argued the law was unconstitutional as applied in violation of the Second Amendment. *Id*. at 340. The court explained it adopted a two-pronged approach for deciding as-applied challenges in *United States v. Marzzarella*, 614 F.3d 85 (3rd Cir. 2010). The court must consider "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id*. at 89. If not, the challenged law stands. *Id*. If the challenged law burdens protected conduct, the court subjects the law to intermediate scrutiny. *Id*. After discussing *Barton*'s holding, *Binderup* synthesized *Marzzarella* and *Barton* as follows:

> Read together, *Marzzarella* and *Barton* lay out a framework for deciding as-applied challenges to gun regulations. At step one of the *Marzzarella* decision tree, a challenger must prove, per *Barton*, that a presumptively lawful regulation burdens his Second Amendment rights. This requires a challenger to clear two hurdles: he must (1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and then (2) present facts about himself

[9] The Eighth Circuit acknowledged these factors as potentially relevant to a Second Amendment as-applied challenge, but it has yet to grant relief when applying them. *See United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014); *United States v. Siegrist*, 595 F.App'x. 666, 668-69 (8th Cir. 2015) (unpublished per curiam opinion).

> and his background that distinguish his circumstances from those of persons in the historically barred class.

Binderup, 836 F.3d at 346-47 (internal citations omitted).

When applying this framework, the court explicitly overruled *Barton* to the extent it suggested "people who commit serious crimes retain or regain their Second Amendment rights if they are not likely to commit a violent crime" as part of the step one analysis. *Id.* at 349. The court noted *Heller* recognized "longstanding prohibitions on the possession of firearms by felons," not just violent felons. *Id*. at 348. Hence, this category included "any person who has committed a serious criminal offense, violent or nonviolent." *Id*. The court also rejected *Barton*'s holding "that the passage of time or evidence of rehabilitation will restore the Second Amendment rights of people who committed serious crimes." *Id*. at 349. "A challenger's risk of violent recidivism tells us nothing about whether he was convicted of a serious crime, and the seriousness of the purportedly disqualifying offense is our sole focus throughout *Marzzarella*'s first step." *Id*. at 350.

The *Binderup* court determined, under the first step, the challengers demonstrated their crimes were not serious enough to strip them of their Second Amendment rights because they distinguished their circumstances from those historically excluded from the right to bear arms. *Id*. at 353. When moving to the second step and applying intermediate scrutiny, the court recognized the *Barton* factors were relevant to determine whether there is a substantial governmental interest in disarming those who fall within Second Amendment protections. *Id*. at 354 n.7. After examining those factors, the court found the federal law was unconstitutional as applied to the challengers because "isolated, decades-

old, non-violent misdemeanors do not permit the inference that disarming people like them will promote the responsible use of firearms" and there was no evidence demonstrating "why people like them remain potentially irresponsible after many years of apparently responsible behavior." *Id*. at 356. The court determined that, without more, there was not a substantial fit between prohibiting their possession of firearms and an important government interest. *Id*.

Alpert argues *Binderup* fully supports his claim, especially when comparing the offenses committed by himself and the challengers and applying the *Barton* factors. Assuming *arguendo* this Court adopted the two-step framework in *Binderup*, Alpert's claim would fail. Unlike the *Binderup* challengers, Alpert falls into the category of *serious* offenders traditionally prohibited from possessing firearms under *Marzzarella*'s first step. Although Alpert characterizes his offenses as "minor drug crimes at a time when most offenders like him would receive probation," he downplays the fact he received both state and federal *felony* drug convictions, requiring him to serve prison time. This contrasts with the *Binderup* challengers, both of whom were state misdemeanants, not sentenced to jail time, and whose crimes were considered non-serious in several jurisdictions. *Binderup*, 836 F.3d at 352-53. *Binderup* noted it was not presented with an instance in which the disqualifying offense was considered a felony by the authority that created the crime, but stated, "it is possible to read *Heller* to leave open the possibility, however remote, of a successful as-applied challenge by someone convicted of such an offense. At the same time, even if that were so, the individual's burden would be extraordinarily high – and

perhaps even insurmountable." *Id*. at 353 n.6. Hence, Alpert's claim cannot prevail under *Binderup* or *Barton.*[10]

Finally, Alpert alleges this Court's precedent does not bar his Second Amendment challenge for three reasons. First, Alpert claims his challenge is based on a more rigorous form of strict scrutiny than applied in prior challenges. However, as this Court stated in *Clay*, "section 571.070.1's restriction on the possession of weapons by felons survives even the most stringent formulation of the strict scrutiny standard in that it is narrowly tailored to achieve a compelling state interest." *Clay*, 481 S.W.3d at 535. Alpert has not cited any case in which a Second Amendment claim was subject to a "stringent formulation of the strict scrutiny standard" and the challenger prevailed. Second, Alpert contends he substantiated his claim with ample, uncontradicted evidence regarding personal details of his life to demonstrate he posed no risk to public safety. This Court has not adopted such a test as articulated in *Binderup*, and even if this Court chose to do so, as discussed previously, Alpert cannot prevail. Lastly, Alpert claims his case is distinguishable from *Merritt*, *McCoy*, and *Clay*, because their felonies were less remote in time, they did not have their federal gun rights restored, and they presented no evidence about their potential

[10] Alpert also relies on *Britt v. State*, 681 S.E.2d 320 (N.C. 2009), in which the North Carolina Supreme Court found a statute banning possession of firearms was unconstitutional as applied to a challenger who had one felony drug conviction from 1979, had his right to possess firearms restored before the ban was enacted, had no further criminal history, there was no evidence he misused a firearm in any way, and there was no determination he was violent, potentially dangerous, or more likely than the general public to commit a crime involving a firearm. *Britt* was decided on state, not federal, constitutional law. This Court declines to apply North Carolina's state constitutional analysis when analyzing whether a Missouri statute violates the federal constitution.

threat to public safety. However, Alpert disregards the common denominator that ties his case to the others: he committed two serious felonies requiring him to serve prison time. Alpert fails to demonstrate section 571.070 violates the Second Amendment as applied to him.

Conclusion

The circuit court's judgment is affirmed.

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GEORGE W. DRAPER III, JUDGE

Russell, Breckenridge and Stith, JJ., concur; Fischer, C.J., dissents in separate opinion filed; Wilson, J., dissents in separate opinion filed; Powell, J., concurs in opinion of Wilson, J.

SUPREME COURT OF MISSOURI
en banc

JACK ALPERT,	)	
	)	
Appellant,	)	
	)	
v.	)	No. SC96024
	)	
STATE OF MISSOURI, et al.,	)	
	)	
Respondents.	)	

DISSENTING OPINION

I concur with the analysis in Judge Wilson's dissent that the principal opinion erroneously declares a criminal statute constitutional even though the case is not ripe. I write separately because the principal opinion's error in deciding a case that is not ripe is compounded by the concession that Alpert's sole point relied on violates Rule 84.04(d). Because Alpert's sole point relied on violates Rule 84.04(d), it preserves nothing for appellate review and his appeal should be dismissed.

Rule 84.04 establishes mandatory briefing rules. *Storey v. State*, 175 S.W.3d 116, 126 (Mo. banc 2005). Rule 84.04(d)(1) requires an appellant's brief to contain a "Point Relied On" identifying a claim of reversible error, concisely stating the legal reasons for the claim, and summarily explaining why the stated legal reasons support the claim of

reversible error.[1] "Rule 84.04(d) prohibits a point relied on that groups together multiple contentions not related to a single issue and such a point is subject to dismissal." *State v. S.F.*, 483 S.W.3d 385, 388 n.5 (Mo. banc 2016). A point relied on including multiple allegations of error is "multifarious" and preserves nothing for review. *Peters v. Johns*, 489 S.W.3d 262, 268 n.8 (Mo. banc 2016). "[A]llegations of error . . . not properly briefed shall not be considered in any civil appeal." Rule 84.13(a).

The principal opinion concedes Alpert's point violates Rule 84.04(d) because it contains multifarious allegations of error. While some might think it worthwhile to reiterate the importance of the Rule 84.04 briefing rules, reiteration without consequence implicitly condones continued violations and undermines the mandatory nature of the rules. As required by Rule 84.13(a), this Court should not consider Alpert's defective point relied on and instead, should dismiss this appeal. Rather than gratuitously excusing violations of this Court's briefing rules, this Court should consistently enforce its rules as written and decline to review points relied on that violate briefing rules. *See J.A.R. v. D.G.R.*, 426 S.W.3d 624, 630 n.10 (Mo. banc 2014) (declining to consider a claim not raised in the court of appeals and noting Rule 84.04(d) requires separate allegations of error to be raised in separate points relied on); *see also Sun Aviation, Inc. v. L-3 Commc'ns Avionics Sys.*, 533 S.W.3d 720, 730 n.8 (Mo. banc 2017) (same).

[1] Rule 84.04(d)(1) provides: "The point shall be in substantially the following form: 'The trial court erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error*], in that [*explain why the legal reasons, in the context of the case, support the claim of reversible error*].'"

This Court's rules expressly condition the consideration of appeals on compliance with those rules. In my view, this Court should lead by example and follow its own rules as it did in *J.A.R. v. D.G.R.*, 426 S.W.3d at 630 n.10, and most recently in *Sun Aviation*, 533 S.W.3d at 730 n.8.[2]

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Zel M. Fischer, Chief Justice

[2] If the rules need to be amended or modified, this Court has the constitutional authority to do so. *State ex rel. St. Charles Cty. v. Cunningham*, 401 S.W.3d 493, 500 (Mo. banc 2013) (Fischer, J., dissenting).

SUPREME COURT OF MISSOURI
en banc

JACK ALPERT,	)	
	)	
Appellant,	)	
	)	
v.	)	No. SC96024
	)	
STATE OF MISSOURI, et al.,	)	
	)	
Respondents.	)	

DISSENTING OPINION

Section 571.070.1(1), RSMo Supp. 2013, forbids felons from knowingly possessing firearms. In *State v. Clay*, 481 S.W.3d 531, 538 (Mo. banc 2016), this Court held this statute could be enforced against a nonviolent felon without violating his state constitutional right to bear arms. Jack Alpert, a nonviolent felon who has yet to be threatened with prosecution for possessing firearms, now seeks a declaration that the executive branch cannot enforce this statute against him in the future without violating his state and federal constitutional rights to bear arms. To maintain this declaratory judgment action, Alpert must show there is a justiciable controversy and he has no adequate remedy at law. *Foster v. State*, 352 S.W.3d 357, 359 (Mo. banc 2011). Alpert failed to carry this burden, and his action should be dismissed. Accordingly, I respectfully dissent.

Justiciability

"A declaratory judgment is not a general panacea for all real and imaginary legal ills." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 25 (Mo. banc 2003). A declaratory judgment should not be used to decide "hypothetical or speculative situations that may never come to pass." *Id.* Instead, there must be:

> (1) a justiciable controversy that presents a real, substantial, presently-existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation; (2) a plaintiff with a legally protectable interest at stake, "consisting of a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief;" (3) a controversy ripe for judicial determination; and (4) an inadequate remedy at law.

Id. In the context of a declaratory judgment action, there is "[n]o principle … more fundamental to the judiciary's proper role in our system of government" than the requirement of a justiciable controversy. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). If the judiciary does not exercise restraint and confine itself to deciding those disputes that traditionally have been the business of the courts, it necessarily enlarges its own power and can more easily interfere with the workings of the political branches. *Id.*

"In the context of a constitutional challenge to a statute, a ripe controversy generally exists when the state attempts to enforce the statute." *Mo. All. for Retired Ams. v. Dep't of Labor and Indus. Relations*, 277 S.W.3d 670, 677 (Mo. banc 2009) (quotation marks omitted). At a minimum, the party challenging the validity of a statute before its enforcement against him must show some likelihood of a "threatened application of the statute" by the executive branch. *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 333

(Mo. banc 2015); *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (a party seeking pre-enforcement declaratory relief must "allege[ ] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [prove] a ***credible threat of prosecution***") (emphasis added) (citation and quotation marks omitted). Even in such cases, the facts necessary to adjudicate the underlying claims must be developed fully and the law being challenged must already be "affecting the plaintiff[] in a manner that [gives] rise to an immediate, concrete dispute." *Mo. Health Care Ass'n v. Attorney Gen. of the State of Mo.*, 953 S.W.2d 617, 621 (Mo. banc 1997).

Here, there is no evidence Alpert currently possesses firearms or likely will be threatened with prosecution if he does. Nor do these propositions appear to be self-evident. As a young man, Alpert was twice convicted of nonviolent felonies involving the sale of drugs. He was punished, learned from his mistakes, and – by all accounts – made himself an extremely productive member of society. Tragically, at the age of 65, Alpert now suffers from stage four renal cancer. Assuming he were to come to possess the firearms he says he desires,[1] and assuming further that such possession came to the attention of law enforcement, a prosecutor would have to exercise his or her discretion before seeking to lock up an elderly man suffering from cancer. Such cases are the reason why prosecutors have broad "discretion to determine when, if, and how

[1] Among the firearms Alpert claims he would possess are a Karabiner 98 Mauser and a Belgian Browning pistol (which Alpert's father obtained in World War II), and an M1 Garand, which was so instrumental during World War II that General George S. Patton reportedly referred to it as "the greatest battle implement ever devised."

criminal laws are to be enforced." *State v. Honeycutt*, 96 S.W.3d 85, 89 (Mo. banc 2003). At the very least, the facts in this case fall far short of a likelihood of "threatened application of the statute" against Alpert. *Labrayere*, 458 S.W.3d at 333. Because Alpert failed to carry this burden, his case should have been dismissed. *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. banc 2002).[2]

Adequate Remedy

Assuming for the sake of argument Alpert's controversy is justiciable, i.e., that the risk of prosecution is "immediate" and "concrete," Alpert nevertheless cannot pursue a declaratory judgment action because he has an adequate remedy at law. *Mo. Soybean Ass'n*, 102 S.W.3d at 26. The fact that Alpert can assert his constitutional claims as a defense to any prosecution under section 571.070.1(1) is an adequate remedy and bars a claim for declaratory judgment. *Schaefer v. Koster*, 342 S.W.3d 299, 300 (Mo. banc 2011);[3] *see also Tupper v. City of St. Louis*, 468 S.W.3d 360, 376-77 (Mo. banc 2015)

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[2] The principal opinion suggests an application of ordinary standards of justiciability to Alpert "puts him in a dilemma that it was the very purpose of the declaratory judgment act to ameliorate." Slip op. at 10 (quotation marks and brackets omitted). But the declaratory judgment act is not a magic wand with which to waive away traditional requirements of standing, ripeness, and an absence of an adequate remedy at law. *See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937) ("The Declaratory Judgment Act must be [construed to] authorize[ ] relief which is consonant with the exercise of the judicial function in the determination of controversies to which … the judicial power extends."). Judicial power does not extend to remote, abstract, or speculative controversies of the sort now before this Court.

[3] The court of appeals has followed this rule faithfully. *See, e.g., Van Dyke v. LVS Bldg. Corp.*, 174 S.W.3d 689, 692 (Mo. App. 2005); *Shelter Mut. Ins. Co. v. Vulgamott*, 96 S.W.3d 96, 103 (Mo. App. 2003); *Preferred Physicians Mut. Mgmt. Grp., Inc. v. Preferred Physicians Mut. Risk Retention Grp.*, 916 S.W.2d 821, 824 (Mo. App. 1995); *J.H. Fichman Co. v. City of Kan. City*, 800 S.W.2d 24, 27 (Mo. App. 1990); *Polk Cnty. Bank v. Spitz*, 690 S.W.2d 192, 194 (Mo. App.

(Wilson, J., dissenting). To be sure, this Court has been lax from time to time in enforcing this "adequate remedy at law" requirement, but such deviations only can be justified – if it all – when there are "exceptional circumstances" that "plainly appear[ ]" from the facts of the case. *Harris v. State Bank & Tr. Co. of Wellston*, 484 S.W.2d 177, 178-79 (Mo. 1972). Alpert fails to explain why his controversy is so exceptional that this Court should depart from its general rule forbidding declaratory judgment actions when the plaintiff can assert his constitutional claims as a defense in the event he is prosecuted under the statute at issue.

Conclusion

Alpert lacks standing to seek a declaratory judgment as to the constitutional validity of section 571.070.1(1) because he has shown no likelihood this statute will be enforced against him. Even if he had shown such a likelihood, Alpert would have an adequate remedy at law in that he could assert his constitutional claims as a defense to such a prosecution. Accordingly, I would dismiss this action.

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Paul C. Wilson, Judge

1985); *State Farm Fire & Cas. Co. v. Powell*, 529 S.W.2d 666, 669 (Mo. App. 1975). Hopefully, it will continue to do so even in the wake of this decision.