IN THE
SUPREME COURT OF MISSOURI

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| STATE OF MISSOURI, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | |
| vs. | ) | No. SC98546 |
| | ) | |
| | ) | |
| MATTHEW J.L. MCCORD, | ) | |
| | ) | |
| Appellant. | ) | |

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT, DIVISION 2
THE HONORABLE DAVID C. JONES, JUDGE

# APPELLANT'S SUBSTITUTE REPLY BRIEF

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## JURISDICTIONAL STATEMENT

Appellant, Matthew J.L. McCord, reincorporates and reasserts herein the Jurisdictional Statement from his opening brief as though set out in full.

## STATEMENT OF FACTS

Appellant, Matthew J.L. McCord, reincorporates and reasserts herein the Statement of Facts from his opening brief as though set out in full.

## REPLY ARGUMENT

**The trial court erred in overruling Matthew's motion for judgment of acquittal and finding him guilty of, and entering sentence and judgment on, Count II, in derogation of his right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that, where the plain and ordinary meaning of "within one thousand feet of" a public school in section 566.147 is inherently ambiguous as to whether a person's residence must be 1,000 feet from the property line of the school or the school building proper, and, as such, the rule of lenity operates to give Matthew the most favorable construction of section 566.147. Given that it is undisputed 3241 W. Glenwood Street was more than 1,000 feet from Carver Middle School measured building-to-building, there was insufficient evidence by which the trial court could have found Matthew guilty of violating that section beyond a reasonable doubt.**

Matthew reincorporates and reasserts all argument from his opening brief that, where section 566.147[1] is inherently ambiguous as to the plain and ordinary meaning of the phrase "within one thousand feet of" a public school for reckoning sex offender residence distances, Matthew should have the most favorable construction of that statute to find that his alleged residence at a distance greater than 1,000 feet from Carver Middle School building-to-building means there was insufficient evidence that he violated section 566.147. The parties agree on the pertinent underlying facts: Matthew resided less than one thousand feet if measured from the property line of his residence to the property line of Carver Middle School, but resided more than one thousand feet from the school measured building-to-building. *See* Resp't's Br. 12. The parties further agree the evident purpose of

[1] All statutory references are to Mo. Rev. Stat. 2016, unless otherwise indicated.

section 566.147 is to hamper sex offender access to prospective child victims by creating a 1,000-foot buffer between them and the sex offender's residence. *See* Resp't's Br. 14-15. Neither does respondent dispute that there are at least two interpretations of the phrase "within one thousand feet of" in section 566.147 (2016), which correspondingly means respondent acknowledges by implication that phrase is ambiguous. *See* Resp't's Br. 14-15.

Respondent nevertheless supposes "the only reasonable and practical construction of the 1,000-foot distance is to measure from property line to property line." Resp't's Br. 10. Respondent's supposition is grounded in the notion that Matthew's building-to-building interpretation of ambiguous section 566.147 "would lessen the legislature's intended protection of children." Resp't's Br. 14. Respondent also declares the 2018 amendment to section 566.147 "clarified" the existing law. Resp't's Br. 20-22. Seemingly, then, it still remains to be determined whether there is evidence for the Court to discern what the General Assembly intended by "within one thousand feet of" in this specific 2016 version of section 566.147, and, if respondent's contention is correct that this phrase always meant a boundary-to-boundary measurement, why the General Assembly ever needed to "clarify" the 2016 statute in the first instance.

The essence of respondent's argument is that the most broad, most drastic, and most punitive of alternative readings of an ambiguous statute is its only reasonable intendment. And that this Court should guess what the General Assembly intended without proof. For the following, respondent's suppositions are orthogonal to Missouri case law, canons of statutory construction, and common sense.

### A. Extant Missouri law and respondent's chosen cases do not resolve the ambiguity.

Respondent hazards that "[t]he purpose of [section 566.147] is to separate children from sex offenders, not simply to separate the buildings." Resp't's Br. 14.

Respondent cites no case for this proposition. Rather, respondent eventually invokes the dissent from a 2010 opinion from this Court. Resp't's Br. 15 (citing *F.R. v. St. Charles Cnty. Sheriff's Dep't*, 301 S.W.3d 56, 67 (Mo. banc 2010) (Russell, J., dissenting)). But respondent overlooks that both its and Matthew's readings of section 566.147 can accomplish this purpose.

Respondent also alludes to inapposite authority which it misconstrues. *See* Resp't's Br. 14 (citing *State v. Gonzales*, 253 S.W.3d 86, 87-91 (Mo. App. E.D. 2008)). Respondent's chosen authority dealt exclusively with the issue of whether there was sufficient evidence the sex offender defendant had knowledge that his residence lay within 1,000 feet of a school. *See Gonzales*, 253 S.W.3d at 89. There is thus nothing in that opinion to support respondent's sweeping supposition that because the *Gonzales* Court implied a school entails the entirety of its property to demonstrate a defendant's knowledge of potential residency infringement, that such knowledge *ipso jure* means section 566.147 is constructed to mean parcel to parcel. *See* 253 S.W.3d at 90-91. Inasmuch, this Court should reject respondent's wrong-headed reading of this case and associated argument.

Even ill-advised, respondent's argument only makes Matthew's point. For, rather than indicating a groundswell of support for an exclusive conclusion section 566.147 should only result in parcel-to-parcel measurement, respondent's struggle to credibly argue its position without Missouri authority reinforces that the plain language of the sex offender residency statute is open to multiple reasonable interpretations. This is the epitomic situation to which the rule of lenity should be applied: to resolve plausible doubts underscoring this Court's guess about the meaning of the building-to-building measurement in Matthew's favor. *See State v. Liberty*, 370 S.W.3d 537, 547 (Mo. banc 2012).

Moreover, the foreign cases respondent relies on do not help it. *See* Resp't's Br. 16-17 (citing a case[2] interpreting an Oklahoma civil statute governing penal institution administration as measuring distance from halfway house to school as from property line to property line; and an Ohio case[3] and California case[4] each finding their respective sex-offender-residency and SVP-offender-residency statutes must measure distance under a "straight line" approach). At best, these cases merely support that courts in three other states have chosen one of two reasonable prospective interpretations of a statute attempting to delineate a distance restriction. At worst, respondent's cited authority has nothing to do with and has no effect on Missouri's sex offender residency statute. Besides, any unpublished foreign cases or opinions analyzing a statute without penal consequences have limited persuasive value in the first instance. Accordingly, interpreting section 566.147 to be reckoned as the crow flies does nothing to resolve the question of

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[2] *Western Heights Indep. Sch. Dist. No. I-41 v. Avalon Retirement Ctrs., LLC*, 37 P.3d 962, 963-64 (Okla. Civ. App. 2001).

[3] *City of Parma v. Burgos*, 139 N.E.3d 553, 555-56 (Ohio Ct. App. 2019). Respondent also string-cites to an unpublished opinion from an Ohio appellate court for the proposition that "under Ohio's statutory provisions 'the appropriate measurement is from property line to property line rather than from the nearest wall of defendant's individual apartment unit." Resp't's Br. 17 (quoting *State ex rel. O'Brien v. Messina*, No. 10AP-37, 2010 WL 3835795, at *4-5 (Ohio Ct. App. Sept. 30, 2010)). Respondent overstates the import of this latter case. The "statutory provisions" at issue in the Ohio cases defined "residential premises" as "the building in which a residential unit is located and the grounds upon which that building stands, extending to the perimeter of the property." *O'Brien*, 2010 WL 3835795, at *5 (citing Ohio Rev. Code Ann. § 2950.01(T)). "School premises" are defined as "[t]he parcel of real property on which any school is situated[.]" Ohio Rev. Code Ann. § 2925.01(R). Thus, beyond that it is an unpublished foreign opinion, the Court should reject respondent's invocation of this case as having any bearing on the question at issue where the Ohio proximal residency statutes have a definitional certainty section 566.147 (2016) lacks.

[4] *People v. Christman*, 176 Cal. Rptr. 3d 884, 88c9 (Cal. Ct. App. 2014).

whether "within one thousand feet of" means boundary-to-boundary or building-to-building. The Court should disregard respondent's red herring. In these ways, respondent's foreign cases are inapposite to resolving the question of statutory interpretation of the sex offender residency statute under Missouri law posed by Matthew's case.

### B. Canons of construction do not resolve the ambiguity because section 566.147 cannot be read *in pari materia* with other statutes.

Respondent's statutory construction argument is similarly misguided. Even assuming, *arguendo*, sections 579.030, 573.531, and 566.148 form part of the same *corpus juris* as section 566.147, they cannot be considered *in pari materia*. Matthew's opening brief explained in detail why the loitering statute, section 566.148, cannot be read *in pari materia* with section 566.147. Appellant's Br. 20-22. He refers the Court to that argument to rebut respondent's contention.

For many of those same reasons, respondent's invocation of the drug-distribution-near-a-school statute, section 579.030.1, and sexually oriented businesses statute, section 573.531, are not well taken. While these statutes might seem superficially "harmonized," since they all ostensibly create a "zone of safety" around a school, they appear in a completely different chapter of the criminal code. Sex offenses, and the many consequent offenses emanating from them, like the proximal residency statute, have been deemed by public policy as a unique class of crimes.

More importantly, the General Assembly had the opportunity to specify that "within one thousand feet of" in section 566.147 meant the same thing as in sections 579.030 and 573.531 but did not. These other statutes were enacted prior to the 2016 version of section 566.147 at issue here. *See* section 573.531 (2010 Cum. Supp.); section 195.218 (1993 Cum. Supp.). The legislature could have easily adopted their distance reckoning when the 2016 code was amended. This seems to signify that the General Assembly believed the sex offender proximal residency statute was <u>not</u> part

of the same *corpus juris* as the statutes respondent invokes. That the legislature chose not to amend 566.147 to specify that the 1,000-foot distance was measured from boundary to boundary until 2018 damages respondent's *in pari materia* argument.

### C. Respondent failed to overcome the presumption that the 2018 amendment to section 566.147 changed the substantive law.

Despite Matthew's reliance on this Court's well-settled maxim that the 2018 amendment to section 566.147 was presumed to change the substantive law,[5] respondent asserts "nothing indicates that the change by the legislature was intended to do anything other than clarify and restate the previous law." Resp't's Br. 20. Without citing to authority or providing any substantiation, respondent further baldly proclaims "the legislature's amendment to section 566.147 expressly stating that the distance should be measured property line to property line, was not a substantive change in state policy but merely a clarification of how the legislature intended the distance to be measured." Resp't's Br. 21-22.

It is true "[t]he purpose of a particular change may be to clarify – not change – the existing law." *State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 607 (Mo. banc 2019) (citing, *inter alia*, *City of Colo. Sprs. v. Powell*, 156 P.3d 461, 465-68 (Colo. 2007) (en banc)). Yet respondent has failed to carry its burden[6] to show the purpose

[5] *Cox v. Dir. of Revenue*, 98 S.W.3d 548, 550 (Mo. banc 2003).

[6] Because the Court has recently viewed it with approbation, Matthew references the framework for evaluating the legislative intent distinguishing change from clarification of existing law as set forth by the Supreme Court of Colorado. *Powell*, 156 P.3d at 465. There, the *Powell* Court acknowledged the presumed change to existing law by legislative amendment could be rebutted "by a showing that the legislature meant only to clarify an ambiguity in the statute by amending it." *Id.*; *see also Hillman*, 566 S.W.3d at 607 (citing same). "To distinguish between a change and a clarification, we employ a three-pronged analysis by looking at the legislative history surrounding the amendment, considering the plain language used by the

of the 2018 amendment to section 566.147 was to clarify, rather than change, the existing proximal residency statute because respondent has adduced no proof to rebut the presumption of change.

Only as an example of the rule that an amended statute can clarify the law, respondent cites to *Andresen v. Bd. of Regents of Mo. W. State Coll.*, 58 S.W.3d 581 (Mo. App. W.D. 2001). Resp't's Br. 20-21. Yet *Andresen* is illustrative of why respondent's conclusory clarification argument fails. Respondent's recitation of the facts of that case is nearly correct, but omits that the chief reason for the appeals court's conclusion the amendment at issue was only a clarification to existing law was because the presumption of a substantive change was rebutted by proof that that amendment of explicit exclusion affirmed that the exclusion had always been the law. *Andresen*, 58 S.W.3d at 589-90. The upshot of *Andresen* is that there must always be something more than mere conjecture to rebut the presumption a statutory amendment changed the substantive law. *See id.*

Moreover, it is not likely a coincidence that this case entails a non-penal statute. Seldom are amendments to criminal statutes deemed mere clarifications. *See, e.g.*, *State v. Joos*, 218 S.W.3d 543, 548-50 (Mo. App. S.D. 2007) (where 2005 amendment to section 575.150.5 added resisting a stop to enumerated felony offenses, but the 2004 version of that section listed resisting a stop as misdemeanor

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General Assembly, and whether the provision was ambiguous before it was amended." *Powell*, 156 P.3d at 465.

Critically here, the *Powell* Court saddled the **proponent** of the clarification interpretation with the burden of rebutting the change presumption by proving the legislature's intent under the tripartite analysis. *See id.* at 467-68 (absence of legislative inaction addressing appellate court interpretations of statute "adds to the evidence that Petitioners have failed to meet their burden of rebutting the presumption that H.B. 1288 constituted a change to substantive law, rather than a clarification of it."). To the extent the Court favors the *Powell* model, respondent has not adduced any legislative or case law history evidence to satisfy that test. Therefore, under the *Powell* framework, respondent has failed to meet its burden to hurdle the presumptive change to the substantive law in section 566.147. *See id.*

conduct, such was a substantive change). This should especially be true when the amendment results in a change to the *actus reus* of the crime. *See id.* Because the act of residing "within one thousand feet of" a school or daycare is the criminal act proscribed in all versions of section 566.147, the 2018 amendment affirmatively broadening the scope of that *actus reus* to encompass a parcel-to-parcel 1,000-foot residency restriction was obviously a substantive change to the law.

Furthermore, there is evidentiary support for Matthew's contention the 2018 amendment changed the substantive law of "within one thousand feet of" to a property-line-to-property-line construction from a building-to-building interpretation. For example, a decade ago, this Court expressly declined to "address[ ] the issue of whether the 1,000 foot measurement is from property line to property line or building to building" under the earliest version of 566.147.[7] *F.R. v. St. Charles Cty. Sheriff's Dep't*, 301 S.W.3d 56, 64 n.13 (Mo. banc 2010). Arguably, the Court's failure to address this issue meant it knew the issue might spring up in the future, strongly suggesting there was more than one plausible interpretation of the 1,000-foot measurement. *See id.* Moreover, it was the dissent from *F.R.* to which respondent now clings as support for its articulation of the intent of section 566.147. *See* Resp't's Br. 14-15 (citing *F.R.*, 301 S.W. at 67 (Russell, J., dissenting)).

"The legislature is presumed to know the existing case law when it enacts a statute." *Hudson v. Dir. of Revenue*, 216 S.W.3d 216, 222-23 (Mo. App. W.D. 2007); *see also Matter of Nocita*, 914 S.W.2d 358, 359 (Mo. banc 1996) ("In construing a statute, the Court must presume the legislature was aware of the state of the law at the time of its enactment."). The General Assembly enacted the statute at issue, section 566.147 (2016), containing the unadorned "within one thousand feet of" language with full knowledge of this Court's *F.R.* opinion, which ostensibly

[7] Like the 2016 version Matthew was charged with violating, this inaugural statute (and its 2006 and 2008 amendments) all proscribe sex offenders residing "within one thousand feet of" a public school or child-care facility. Section 566.147 (2004 Cum. Supp.); *see F.R.*, 301 S.W.3d at 59 n.5.

put the legislature on notice that this 1,000-foot measurement was reasonably interpreted as from building-to-building. The legislature could have then specified (or clarified) that "within one thousand feet of" could only "provide a 1,000-foot buffer zone between sex offender residences and the schools and daycares that are entrusted with the daily care of thousands of Missouri children[ ]" by articulating a property-line-to-property-line reckoning, but it did not. Legislative inaction following this Court's interpretation of the language at issue here adds to the evidence that the presumption of a substantive change in 2018 has not been rebutted. *See Powell*, 156 P.3d at 467-68. Accordingly, the General Assembly's unwillingness to change section 566.147 to define "within one thousand feet of" as a property-line-to-property-line measurement until 2018 despite the *F.R.* opinion reinforces that this 2018 change went to the substance of that phrase. *See id.*; *Hudson*, 216 S.W.3d at 222-23; *Nocita*, 914 S.W.2d at 359. This is proof for Matthew's argument that the 2018 amendment to section 566.147 changed the substantive law that respondent failed to adduce for its position.

As noted, *supra*, this Court has observed two equally plausible interpretations of "within one thousand feet of" in section 566.147: building-to-building (Matthew's) and property-line-to-property-line (respondent's). *See F.R.*, 301 S.W.3d at 64 n.13. Respondent implies Matthew's interpretation defies common sense. *See* Resp't's Br. 23-24. Since respondent surely does not seek to substitute its judgment for that of the Court's, then that means there are at least two reasonable interpretations of the phrase at issue in section 566.147. That being the case, the Court should hold fast to its earlier common-sense observations of "within one thousand feet of" to reject respondent's contrary contention.

### D. The Court must apply the rule of lenity in the absence of a clear answer on the meaning of "within one thousand feet of" in section 566.147 (2016).

Respondent's argument is to ask this Court to presume, without evidence, it was always the intent of the General Assembly that section 566.147 meant the 1,000-foot buffer between sex offender residences and schools was always measured property line to property line. This means respondent asks this Court to simply guess how "within one thousand feet of" might be reckoned. Since the Court can no more than guess the meaning of this penal statutory language, than it should apply the rule of lenity. *See State v. Liberty*, 370 S.W.3d 537, 547 (Mo. banc 2012).

Matthew instead contends the legislature's inaction to define "within one thousand feet of" in 566.147 in 2016, but subsequent amendment of that section in 2018 by giving explicit shape to that phrase, means that the 2018 amendment changed the substantive law from a building-to-building metric in all previous version of the statute. Should not Court not find this proof sufficiently persuasive, it must still choose, *viz.* guess, which of Matthew's and respondent's interpretations is correct. Accordingly, whether it adopts respondent's argument or is unpersuaded by Matthew's, the Court will always be forced to conjecture the meaning of "within one thousand feet of" in section 566.147. Thus, the Court must yet again apply the rule of lenity in Matthew's favor. *Liberty*, 370 S.W.3d at 547.

It should be remembered the rule of lenity is itself a canon of construction. *See Liberty*, 370 S.W.3d at 547. And this Court can and should directly apply this canon to resolve question of ambiguity in section 566.147 before it here. To that end, this Court's unanimous opinion in *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016), is instructive. There, the Court held that the plain language of section 570.030 meant that the value of property or services was not an element of the offense of stealing and could not be used to enhance that crime to a felony, despite that this would mean Bazell's theft of firearms convictions would result in their reclassification from felonies to misdemeanors. *Id.* at 266-67. The *Bazell* Court thus intuited that statutory drafting begetting even illogical or absurd results contrary to the General Assembly's purpose should not necessarily result in using interpretative tools. *See id.* ("We cannot know why the legislature, in 2002, decided to amend

section 570.030.3 to add the requirement that only offenses for which 'the value of property or services is an element' may be enhanced to a felony, but this is what the legislature clearly and unambiguously did."); *cf. Ivie v. Smith*, 439 S.W.3d 189, 202 (Mo. banc 2014) ("Courts look elsewhere for interpretation only when the meaning is ambiguous *or would lead to an illogical result that defeats the purpose of the legislation*."). In other words, the *Bazell* Court sidestepped both its precedent and rules of statutory interpretation to intuit that the General Assembly just sometimes fails to draft criminal statutes with clarity of intent, and, when they do, these illogical (or ambiguous) statutes sometimes defy further inquiry. *See* 497 S.W.3d at 266-67. In this way, this Court was applying the principle of parsimony: sometimes the simplest route is the best. *See id.*; *see also Ala.-Tenn. Natural Gas. Co. v. Fed. Power Comm'n*, 359 F.2d 318, 335 (5th Cir. 1966) ("Occam's razor slices through the arguments based on legislative history and congressional intent.").

The same principle could apply to objectively ambiguous statutes, as with the contested language in section 566.147 here. In such a situation, the lenity canon would take first place in the interpretive hierarchy for this criminal statute. The Court could shave away convoluted interpretations of section 566.147 to move directly to its narrowest construction. Adopting the canon of lenity as the Court's go-to when confronted with ambiguity ensures structure in the lawmaking process by "compel[ling] legislatures to detail the breadth of prohibitions in advance of their enforcement, and [by compelling] prosecutors to charge crimes with enough specificity to indicate to voters – and juries – what conduct has been treated as criminal." Zachary Price, *The Rule of Lenity as Structure*, 72 Fordham L.Rev. 885, 887 (2004). Just as the Court did by reasoning past an illogical result in *Bazell*, embracing lenity in Matthew's case promotes legislative accountability. *See id.*; *accord Bazell*, 497 S.W.3d at 266-67.

Finally, it is axiomatic the text of any penal statute must be clear and definite in its meaning. This is because due process demands that criminal statutes give adequate notice to persons of ordinary intelligence of the conduct proscribed. *See*

*Labor's Ed. And Political Club-Independent v. Danforth*, 561 S.W.2d 339, 347 (Mo. banc 1977) (citing *United States v. Harriss*, 347 U.S. 612, 617 (1954)). Missouri's stringent statutory scheme for sex offenders has national notoriety. *See, e.g.*, *Why sex offenders in Missouri don't stick around long*, telegram.com, May 13, 2018, available at https://www.telegram.com/zz/news/20180513/why-sex-offenders-in-missouri-dont-stick-around-long. If sex offenders must bear the scarlet letter of their conviction through subjection to innumerable statutory restrictions entangling their lives, including enforced ostracism, then the least they (we) should expect is that those criminal impediments are codified with clarity and certainty. Because "within one thousand feet of" is not clear and definite, the Court should find that this distance in the sex offender proximal residency statute must be measured from building-to-building. Therefore, and because there was insufficient evidence Matthew's resided within 1,000 feet of Carver Middle School by a building-to-building reckoning, this Court must reverse his conviction under section 566.147.

## CONCLUSION

For the foregoing and those reasons articulated in his opening brief, because there was insufficient evidence Matthew resided within 1,000 feet of Carver Middle School, the trial court erred in entering sentence and judgment under section 566.147, and Matthew respectfully requests this Court reverse his conviction and sentence on Count II.

Respectfully submitted,

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## Certificate of Compliance and Service

I, Jedd C. Schneider, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the brief contains 4,369 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 3d day of December, 2020, an electronic copy of Appellant's Substitute Reply Brief was placed for delivery through the Missouri e-Filing System to Julia Rives, Assistant Attorney General, at Julia.Rives@ago.mo.gov.

/s/ Jedd C. Schneider

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Jedd C. Schneider