# IN THE MISSOURI COURT OF APPEALS
# WESTERN DISTRICT

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| STATE OF MISSOURI, ex rel., ERIC SCHMITT, ATTORNEY GENERAL, | ) | |
| Appellant, | ) | |
| v. | ) | WD83427 |
| MUN CHOI, et al., | ) | Opinion filed: February 2, 2021 |
| Respondents. | ) | |

**APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI**
**THE HONORABLE JEFF HARRIS, JUDGE**

Division One: Thomas N. Chapman, Presiding Judge,
Mark D. Pfeiffer, Judge and W. Douglas Thomson, Judge

This appeal involves a challenge by the State of Missouri, at the relation of Attorney General Eric Schmitt ("State") to section 110.010.B.4(a) of the University of Missouri System Rules and Regulations ("Rule") which operates to prohibit University of Missouri employees from possessing firearms in their vehicles on university campuses. The State appeals from the trial court's judgment in favor of Mun Choi and the Curators of the University of Missouri (collectively, the "University") entered in part on the pleadings and in part after a bench trial. On appeal, the State claims the trial court erred in: (1) finding the Rule does not conflict

with section 571.030.6;[1] (2) holding the State has the burden of proof under strict scrutiny review; (3) finding the Rule survives strict scrutiny review; and (4) in admitting opinion testimony from lay witness, Dr. Mun Choi ("Dr. Choi"), President of the University of Missouri System. We affirm in part, reverse in part, and remand to the trial court for proceedings consistent with this opinion.

**Factual and Procedural History**

The material facts are not in dispute. In 2015, Royce Barondes ("Barondes"), a University of Missouri employee, filed a petition for declaratory and injunctive relief against the University in case number 15AC-CC00426 in the Cole County circuit court. The petition alleged that the Rule violates section 571.030.6 and challenged the Rule's constitutionality. In October 2015, the case was removed to federal court. In November 2015, Barondes filed an amended complaint removing all allegations pertaining to any federal question. In May 2016, the case was remanded back to the Cole County circuit court.

In August 2016, the State intervened and the action was transferred to Boone County circuit court and given case number 16BA-CV03144. The State filed a parallel action in Boone County circuit court in its own name raising similar claims in case number 16BA-CV02758. In both actions, the State alleges four counts. In count one, the State alleges statutory preemption asserting the Rule conflicts with section 571.030.6. In general, the Rule prohibits the possession and discharge of weapons on campus, and the State's claim is that 571.030.6 allows state employees

[1]All statutory references are to RSMo 2000, as supplemented, unless otherwise indicated.

to possess a firearm on state property in certain circumstances. In counts two, three, and four the State alleges as applied constitutional challenges. On September 8, 2017, the State moved for judgment on the pleadings on its count I, in both actions, arguing that the Rule conflicts with section 571.030.6. The University filed a motion for judgment on the pleadings against Barondes and a cross-motion for judgment on the pleadings against the State on all counts. Barondes filed a motion for summary judgment on count I of his second amended petition, which contained his allegation that the Rule violates section 571.030.6.

On September 5, 2018, the trial court entered an order and judgment with both case numbers 16BA-CV02758 and 16BA-CV03144, denying the University's motion and cross-motion on the State's and Barondes' constitutional claims but granting the University's motion and cross-motion for judgment on the pleadings on the section 571.030.6 claims.[2] Thereafter, pursuant to a settlement agreement, the remaining claims between Barondes and the University were dismissed with prejudice. A bench trial was held on the State's remaining claims challenging the constitutionality of the Rule. On November 18, 2019, the trial court entered findings of fact, conclusions of law and judgment in favor of the University finding the Rule satisfies strict scrutiny review and is constitutional. The State appeals.

[2]Regarding the constitutional claims, the trial court stated that it disagreed with the University's argument that because there is no constitutional right to bear arms on University property, the plaintiff's claims should be dismissed without any constitutional analysis. The trial court found the Rule is not exempt from some level of constitutional scrutiny to determine whether it passes constitutional muster.

On appeal, the State claims the trial court erred in: (1) finding the Rule does not conflict with section 571.030.6; (2) holding the State has the burden of proof under strict scrutiny review; (3) finding the Rule survives strict scrutiny review; and (4) in admitting opinion testimony from Dr. Choi.

**Point I—Section 571.030.6 preempts the Rule**

In Point I, the State claims that the trial court erred in granting judgment on the pleadings in favor of the University, finding that the Rule is not preempted by section 571.030.6 because the Rule conflicts with section 571.030.6 under either the statute's plain and ordinary meaning or after applying principles of statutory construction, in that the statute plainly provides that state entities such as the University shall not prohibit their employees from having firearms which are not visible in their locked vehicles while conducting activities within the scope of their employment, and in that all applicable principles of statutory interpretation support the State's view of this interpretation. We agree.

**Standard of Review**

"The question presented in a motion of judgment on the pleadings is whether the moving party is entitled to judgment as a matter of law on the face of the pleadings." *Buehrle v. Missouri Dept. of Corrections*, 344 S.W.3d 269, 270 (Mo. App. E.D. 2011). "'A court's grant of judgment on the pleadings is reviewed *de novo*.'" *Bell v. Phillips*, 465 S.W.3d 544, 547 (Mo. App. W.D. 2015) (citation omitted). Moreover, here the State challenges the trial court's interpretation of section 571.030.6, and

"[s]tatutory interpretation is a question of law" that we review *de novo*. *Henry v. Piatchek*, 578 S.W.3d 374, 378 (Mo. banc 2019).

**Analysis**

"The issue of preemption may be divided into two questions: (1) Has the Missouri legislature expressly preempted the area?; and (2) Is the [University's] regulation in conflict with state law?" *St. Charles County Ambulance Dist v. Town of Dardenne Prairie*, 39 S.W.3d 67, 68 (Mo. App. E.D. 2001). "In construing statutes to determine whether the area of regulation has been expressly preempted, we look to the statute's plain and ordinary meaning." *Id.* at 68-69. "[W]hen the expressed or implied provisions of the local regulation and the state statute are inconsistent and in irreconcilable conflict, then the local regulation is void. A conflict exists if the local regulation 'permits what the statute prohibits' or 'prohibits what the statute permits.'" *Id.* at 69 (citations omitted).[3] "In order to interpret the expressions 'prohibit what the statute permits' and 'permits what the statute prohibits' we look to *specific substantive prohibitions and liberties* in the statute[.]" *Miller v. City of Town & Country*, 62 S.W.3d 431, 438 (Mo. App. E.D. 2001).

"This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *Karney v. Dep't of Labor & Indus. Relations*, 599 S.W.3d 157, 162 (Mo. banc 2020) (internal quotation marks omitted). Accordingly:

> We will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result. A statute is ambiguous when its plain language does not answer the

[3]This preemption analysis is equally applicable to the University's Rule as to local regulations.

> current dispute as to its meaning. Ambiguities in statutes are resolved by determining the intent of the legislature and by giving effect to its intent if possible. When determining the legislative intent of a statute, no portion of the statute is read in isolation, but rather the portions are read in context to harmonize all of the statute's provisions. Rules of statutory construction are used to resolve any ambiguities if the legislative intent is undeterminable from the plain meaning of the statutory language.

*Truman Med. Ctr., Inc. v. Progressive Cas. Ins. Co.*, 597 S.W.3d 362, 367 (Mo. App. W.D. 2020) (quoting *Truman Med. Ctr., Inc. v. Am. Standard Ins. Co.*, 508 S.W.3d 122, 124-25 (Mo. App. W.D. 2017) (internal quotation marks omitted)).

Section 571.030.6 provides:

> Notwithstanding any provision of this section to the contrary, the state shall not prohibit any state employee from having a firearm in the employee's vehicle on the state's property provided that the vehicle is locked and the firearm is not visible. This subsection shall only apply to the state as an employer when the state employee's vehicle is on property owned or leased by the state and the state employee is conducting activities within the scope of his or her employment. For the purposes of this subsection, 'state employee' means an employee of the executive, legislative, or judicial branch of the government of the state of Missouri.

The Rule provides, in pertinent part, "The possession of . . . firearms . . . on University property . . . is prohibited except in regularly approved programs or by University agents or employees in the line of duty."[4]

In its judgment on the pleadings, the trial court concluded the Rule does not conflict with section 571.030.6. The trial court found:

> The Rule does not conflict with and is not invalidated by Section 571.030.6. Section 571.030.6, by its own language, addresses criminal

[4]The full text of the Rule provides, "The possession of and discharge of firearms, weapons, and explosives on University property including University farms is prohibited except in regularly approved programs or by University agents or employees in the line of duty." In this appeal, the State is only challenging the Rule as it relates to firearms.

> conduct, and does not determine what defendants can regulate as a civil matter on their own property.
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> The plain language of Section 571.030.6 supports defendants' argument that the Rule does not conflict with the statute. Section 571.030.6 begins with the clause, 'Notwithstanding any provision of this section to contrary.' 'Notwithstanding' means 'despite' or 'in spite of.' *See*, *e.g.,* Black's Law Dictionary at 1094. The 'section' referred to is Section 571.030, which begins, 'A person commits the offense of unlawful use of weapons, except as otherwise provided . . . if he or she knowingly . . .' RSMo Section 571.030.1. Section 571.030 goes on to define the criminal offense of unlawful use of weapons and enumerate exceptions to the offense and punishment for the offense. *See, e.g.,* RSMo Section 571.030.1(3) (a person commits the offense of unlawful use of a weapon if he knowingly 'discharges or shoots a firearm into a dwelling house'); RSMo Section 571.030.2 (exempts uses associated with or necessary to fulfilling 'official duties') RSMo Section 571.030.9 (listing criminal sentences for violations). Section 571.030.6, accordingly, addresses what conduct constitutes the unlawful use of weapons, and not what conduct the University can regulate on its property as a civil matter.
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> In concluding that the Rule does not conflict with the statute, the Court simply cannot ignore the plain language and meaning of the 'notwithstanding' clause and read the rest of Section 571.030.6 in isolation. 'Notwithstanding,' as noted above, quite obviously means 'despite,' or 'in spite of,' and the Court must give effect to its plain meaning. In doing so, the Court gives no effect or significance to the title of the statute given by the Revisor. The plain language controls. There is no conflict between the Rule and Section 571.030.6. For these reasons, the Court grants defendants' motions as to plaintiffs' 571.030.6 claims.

We disagree with the trial court's analysis. The Rule directly conflicts with section 571.030.6 in that it prohibits what the statute *expressly* directs the state not prohibit. *St. Charles County Ambulance Dist.*, 39 S.W.3d at 69. The plain language of section 571.030.6 provides a mandatory directive, "the state *shall* not prohibit any state employee from having a firearm in the employee's vehicle on the state's property

provided that the vehicle is locked and the firearm is not visible." (emphasis added).[5] *See Allen v. Public Water Supply Dist. No. 5 of Jefferson County*, 7 S.W.3d 537, 540 (Mo. App. E.D. 1999) ("The term 'shall' is used in laws, regulations, or directives to express what is mandatory."). The University's Rule directly conflicts with this mandatory directive of section 571.030.6.

This mandatory directive is preceded by the phrase, "Notwithstanding any provision of this section to the contrary," which means only that no other provision of section 571.030 can be held in conflict with it. *See State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 632 (Mo. banc 2007). The trial court looked to the dictionary definition of "notwithstanding" and concluded it means "despite" or "in spite of." However, when reading "notwithstanding" in the context of section 571.030.6, the trial court understood "in spite of" to mean "in spite of *and only in spite of*." That is not a plain reading of the word "notwithstanding." It likewise miscomprehends how notwithstanding clauses operate.

In *Riley*, the Missouri Supreme Court succinctly explained how a prefatory notwithstanding clause operates with respect to the provision that follows it. *Id.* at 631. *Riley* involved the interpretation of two venue statutes. *Id.* One of the statutes provided:

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[5]It is undisputed that the University is a state employer and its employees are state employees. "[T]he Board of Curators of the University of Missouri is invested by constitutional mandate as a public entity with the status of a governmental body and, as such, is immune from suit for liability in tort in the absence of an express statutory provision." *Krasney v. Curators of Univ. of Missouri*, 765 S.W.2d 646, 649 (Mo. App. W.D. 1989). "'Section 537.600, RSMo1994, provides that the doctrine of sovereign immunity remains the general rule in Missouri protecting public entities from liability for negligent acts.'" *Langley v. Curators of Univ. of Missouri*, 73 S.W.3d 808, 811 (Mo. App. W.D. 2002) (citation omitted).

> Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the state of Missouri, venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action.

Section 508.010.4, RSMo Supp. 2005. As the Missouri Supreme Court recognized, "[i]f those words mean what they say, so that section 508.010.4 applies notwithstanding section 508.050, the case should remain in St. Louis City." *Id.* This was the only conclusion possible when "'giving the language used its plain and ordinary meaning.'" *Id.* (citation omitted). This was true because "section 508.010.4, by its plain meaning, expressly appl[ied] *to the exclusion* of all [other] laws to the contrary." *Id.* (emphasis added). The scope of the general tort venue statute was not limited to the extent that it conflicted with other laws. It does not operate merely as an exception to other laws. Rather, the opposite is true. It operates to the exclusion of contrary laws *and not* as an exception to the contrary laws.

Applying the Missouri Supreme Court's interpretation of a notwithstanding clause to the statute in this matter, it is apparent that the operation of section 571.030.6 is not limited by its prefatory notwithstanding clause. Thus, applying the *Riley* court's understanding of a notwithstanding clause, by its plain meaning the mandatory directive expressed in section 571.030.6 applies to the exclusion of all other provisions of section 571.030 to the contrary. *See id.* Quite simply, section 571.030 does not limit the application of section 571.030.6 merely because of the notwithstanding clause that prefaces section 571.030.6. This is a necessary conclusion when the language used is given its plain and ordinary meaning. *See id.*

Thus, even if the mandatory directive of 571.030.6 conflicts with other provisions set forth in section 571.030, the mandatory directive prevails.[6] Thus, the University's Rule is in irreconcilable conflict with the mandatory directive of section 571.030.6, rendering the Rule void to the extent of that conflict. *St. Charles County Ambulance Dist.*, 39 S.W.3d at 69.

The trial court's analysis focuses primarily on the notwithstanding clause itself and ignores the mandatory directive that is contained in section 571.030.6. In doing so, the trial court's analysis fails to give proper effect to the words following the notwithstanding clause, the mandatory directive language of section 571.030.6. "'[E]very word, clause, sentence, and provision of a statute must have effect.' Presumably, the legislature did not insert superfluous language in a statute." *St. Charles Co. v. Dir. of Rev.*, 407 S.W.3d 576, 578 (Mo. banc 2013) (citation omitted).

Moreover, there is nothing in section 571.030.6 that supports the trial court's conclusion that its application is limited to section 571.030, which provides for the crime of unlawful use of weapons. Although the notwithstanding clause references section 571.030, it does so only to provide that the application of subsection 6 prevails to the extent of any conflict therein. Section 571.030.6 does not provide that the mandatory directive applies *only* to exempt criminal liability under section 571.030. In fact, *there is no limiting language from which we could conclude that the*

[6]For example, section 571.030.6 could otherwise be in conflict with 571.030.1(8), which provides that a person commits the offense of unlawful use of weapons if he knowingly "[c]arries a firearm . . . into any building owned by any agency of the … state government…." A conflict between section 571.030.1(8) and section 571.030.6 could arise where such state government building has self-contained parking and the person carrying the firearm in her or his vehicle is a state employee. Thus, the "Notwithstanding clause" operates to eliminate such conflict.

*mandatory directive contained in subsection 6 is applicable only to criminal liability for the crime of unlawful use of weapons*.

The University argues that 571.030.6, like subsections 2 through 5 of said section, is simply an exception to the criminal liability which would be imposed for certain uses of weapons deemed unlawful by 571.030.1 granted to certain persons and actions. This simply cannot be the case when "'giving the language used its plain and ordinary meaning.'" *Riley,* 236 S.W.3d at 331 (citation omitted). Subsections 2, 3, 4, and 5 specifically and indisputably create defenses to the weapons offenses described in subsection 1.[7] Conversely, 571.030.6 does not merely create an exception to criminal liability by stating that 571.030.1 "shall not apply" in certain situations. Rather, given its plain and ordinary meaning, *subsection 6 expressly applies to "the state" and is a prohibition of what the state, as an employer, can do*. Prohibiting certain actions of the State as an employer is far different than exempting certain persons or actions from criminal liability. This argument is of no effect.

Therefore, we conclude that to the extent the Rule prohibits state employees from having a firearm that is not visible in the employee's locked vehicle on state's property while the employee is conducting activities within the scope of his or her employment, the Rule is in conflict with section 571.030.6 and is therefore void. Our holding does not extend to the remainder of the Rule, which also prohibits the

[7]Section 571.030.2 provides that certain subsection 1 weapons offenses "shall not apply to the persons described in this subsection…." Subsection 3 provides that certain subsection 1 weapons offenses "do not apply when the actor is transporting such weapons in a nonfunctioning state…." Subsection 4 provides that certain subsection 1 weapons offenses "shall not apply to any person who has a valid concealed carry permit." Subsection 5 provides that certain subsection 1 weapons offenses shall not apply "to persons who are engaged in a lawful act of defense…."

possession of weapons[8] and explosives, and the "discharge of firearms, weapons, and explosives on University property," as such prohibitions are not in conflict with section 571.030.6. Likewise, our holding does not impede the University's further regulation of firearms where such regulation is not in conflict with the express mandatory directive of section 571.030.6. Accordingly, we find that the trial court erred in its judgment on the pleadings in favor of the University finding the Rule was not invalidated by section 571.030.6.

Point I is sustained.

**Points II and III–The Rule Survives Strict Scrutiny**

Although we found that the Rule is void to the extent that it conflicts with section 571.030.6 in Point I, that determination does not resolve all the issues raised in this appeal. We review the trial court's determination that the Rule survives strict scrutiny because it regulates conduct *in addition* to that which was found in conflict with section 571.030.6. In addition to prohibiting the possession of firearms on University property as discussed in Point I, the Rule also prohibits the possession of weapons and explosives on University property, and the "discharge of firearms, weapons, and explosives on University property," prohibitions which are not in conflict with section 571.030.6.

[8]We recognize that the University has actually prohibited the possession of firearms in its Rule twice, first by specifically referencing firearms and again in its reference to weapons, firearms being a subset of weapons. To this extent, and for purposes of possession only, firearms must be excluded from the term 'weapons' in the University's Rule as a result of our ruling.

In Point II, the State asserts the trial court erred in holding the State had the burden of proof under the strict scrutiny review in that the University, as the government entity restricting the constitutional right, had the burden of proof to show a narrow tailoring to achieve a compelling interest. In Point III, the State claims that the trial court erred in finding that the Rule survives strict scrutiny review in that the University failed to meet its burden of proving that the Rule is narrowly tailored to advance the compelling governmental interest in promoting safety and reducing crimes.

**Standard of Review**

Who has the burden of proof is a question of law which we review *de novo*. *Earth Island Institute v. Union Electric Company*, 456 S.W.3d 27, 32 (Mo. banc 2015). "[T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is 'against the weight of the evidence' with caution and a firm belief that the decree or judgment is wrong." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

"Constitutional challenges are issues of law … review[ed] *de novo*. *State v. McCoy*, 468 S.W.3d 892, 894 (Mo. banc 2015).[9] "In a court-tried civil case it is the

[9]The State is challenging a rule promulgated by the University, not the validity "of a statute or provision of the constitution of this state," and thus this claim does not fall under the exclusive jurisdiction of the Missouri Supreme Court. *See* Mo. Const. art. V, sec. 3.

court's duty to judge the credibility of the witnesses and the weight to be given to their testimony. The judge is free to believe none, part, or all of the testimony and chooses between conflicting evidence. We defer to these determinations." *White v. R.L. Persons Constr., Inc.*, 503 S.W.3d 339, 342 (Mo. App. S.D. 2016).

**Analysis**

***(a) The State has the burden of proof***

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.[10]

(Emphasis added).

In *Dotson v. Kander*, 464 S.W.3d 190, 198 (Mo. banc 2015), the Supreme Court expressly held that "the addition of strict scrutiny to the constitution does not mean that laws regulating the right to bear arms are presumptively invalid." There, the Supreme Court stated, "The right to bear arms 'is not unlimited' and there are still 'longstanding prohibitions on the possession of firearms by felons and the mentally

[10]We are not called upon to decide if the Rule's provisions prohibiting the discharge of a firearm on campus would conflict with this provision if the employee discharged the firearm in defense of themselves, their family or their property, and therefore do not address such question.

ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings[.]'" *Id.* (citation omitted). Notably, the State's argument was raised and addressed by the dissenting and concurring opinions in *Dotson*. The dissenting opinion claimed legislative restrictions on the right to bear arms are presumptively *invalid*. *Id.* at 216. The concurring opinion responded to the dissenting opinion stating, "This stands at odds with the well-settled legal standard for constitutional challenges: 'A statute is presumed valid and will be declared unconstitutional only if *the challenger proves* the statute clearly and undoubtedly violates the constitution[.]'"[11] *Id.* at 204. (quoting *Lewellen v. Franklin*, 441 S.W.3d 136, 143 (Mo. banc 2014) (emphasis added); see also *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010) ("The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations."); *Cooperative Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 578 (Mo. banc 2017) ("The party challenging the validity of the ordinance carries the burden of proving the municipality exceeded its constitutional or statutory authority.").

Since *Dotson*, the Supreme Court has continually reaffirmed its holding. *See State v. Clay*, 481 S.W.3d 531, 533 (Mo. banc 2016) (A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional

[11]Likewise, ordinances, regulations, and rules are presumed to be valid and lawful. *Cooperative Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 578 (Mo. banc 2017); *State ex rel. Missouri Public Defender Com'n v. Waters*, 370 S.W.3d 592, 602 (Mo. banc 2012) (administrative agency rules and regulations presumed valid). Moreover, as the trial court found, at paragraph 87 of the Judgment, "the Board of Curators of the University of Missouri is invested by constitutional mandate as a public entity with the status of a governmental body." *Krasney v. Curators of Univ. of Mo.*, 765 S.W.2d 646, 649 (Mo. App. W.D. 1989).

provision."); *State v. Merritt*, 467 S.W.3d 808, 814 (Mo. banc 2015) ("It is clear that laws regulating the right to bear arms are not 'presumptively invalid.'"); *McCoy*, 468 S.W.3d at 897; *Alpert v. State*, 543 S.W.3d 589, 595 (Mo. banc 2018) ("This Court will presume the statute is valid and will not declare a statute unconstitutional unless it clearly contravenes some constitutional provision.").

Here, the trial court followed the analysis set forth by *Dotson* and its progeny:

> The Court concludes that the Attorney General bears the burden of proof, but even if the Court found that the University had the burden of proof, the University met that burden of proof based on the evidence adduced at trial. . . .The Missouri Supreme Court has held that laws and Rules reviewed under Article 1, section 23 are not presumptively invalid. *Dotson v. Kander*, 464 S.W.3d 190, 198 (Mo. 2015).
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> . . . .
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> This principle--that Article 1, section 23 does not shift the burden of proof to the proponent of the law or regulation--has been reaffirmed in every subsequent Missouri Supreme Court case addressing the issue. *Alpert v. State*, 543 S.W.3d 589, 595 (Mo. 2018) . . .*State v. Clay*, 481 S.W.3d 531, 533 (Mo. 2016) . . . *State v. Merritt*, 467 S.W.3d 808, 814 (Mo. 2015) . . . *State v. McCoy*, 468 S.W.3d 892, 897 (Mo. 2015).
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> These cases make clear, then, that in an Article 1, section 23 case, the party challenging the law or regulation bears the burden of proof, and that the Rule in this case is not presumptively invalid. However, even if the University had the burden of proof, or even if the burden shifted to the University, *Witte v. Director of Revenue*, 829 S.W.2d 436 (Mo. banc 1992), the University sustained that burden in this case.
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> The analysis does not change merely because it is a University rule at issue rather than a state law or regulation. That is because "the Board of Curators of the University of Missouri is invested by constitutional mandate as a public entity with the status of a governmental body." *Krasney v. Curators of Univ. of Mo.*, 765 S.W.2d 646, 649 (Mo. Ct. App. 1989) (emphasis added); see also Article IX, section 9(a) ("The government of the state university shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate."); Mo. Rev. Stat. section 172.100 ("the

> curators shall have power to make such bylaws or ordinances, rules and regulations as they may judge most expedient for the accomplishment of the trust reposed in them"). Accordingly, the University's Rule is entitled to the same deference that any other state law or regulation is entitled to under Article 1, section 23.

The law is clear that the State bears the burden of proof. All authority relied upon by the State pre-dates the Supreme Court decision in *Dotson* and its progeny. The State also cites Louisiana authority holding that laws regulating the right to bear arms are presumptively invalid in that state, however those cases are unpersuasive where, as here, the Supreme Court of this state has repeatedly declared the opposite presumption. "'[T]he Court of Appeals is constitutionally bound to follow the most recent controlling decision of the Supreme Court of Missouri.'" *State v. Brightman*, 388 S.W.3d 192, 199 (Mo. App. W.D. 2012) (citation omitted).

It is also noteworthy that the State ***conceded that it had the burden of proof*** at the hearing on the parties' respective motions for judgment on the pleadings, as the trial court noted in the Judgment, footnote 2, which reads:

> Notably, at the hearing in this case on the Parties' respective motions for judgment on the pleadings on July 25, 2018, the Deputy Attorney General, in addressing the University's Motion stated
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> "So this [passage in Dotson] is really responding to text in the dissent which is saying, Oh, my goodness, the passage of [the 2014 amendment to Article 1, section 23] has now created presumptively invalid laws. Not at all. **They are presumptively valid**, but they are still subject to strict scrutiny analysis, and that's the important point, Your Honor."
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> 7/25/18 Hearing Tr. 102:2-7 (emphasis added).

Thus, it is clear that the trial court did not err in finding that the State had the burden of proof. In any event, it is also clear from the record that, even if the

burden shifted to the University, the University met their burden of demonstrating that the Rule is narrowly tailored to achieve a compelling state interest.

***(b) The Rule is narrowly tailored to achieve a compelling state interest***

Although "'[t]here is no settled analysis as to how strict scrutiny applies to laws affecting the fundamental right to bear arms,'" it has "'historically been interpreted to have accepted limitations.'" *McCoy,* 468 S.W.3d at 897 (citation omitted). "Additionally, the application of strict scrutiny depends on context, including the controlling facts, the reasons advanced by the government, relevant differences, and the fundamental right involved." *Id.* "'Context matters . . . strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker[.]'" *Clay*, 481 S.W.3d at 535 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)). "Accordingly, 'that strict scrutiny applies says nothing about the ultimate validity of any particular law; that determination is the job of the court applying' the standard." *McCoy,* 468 S.W.3d at 897 (quoting *Dotson*, 464 S.W.3d at 197). "'Courts routinely uphold laws when applying strict scrutiny, and they do so in every major area of the law.'" *Id.* (citation omitted). "The right to bear arms 'is not unlimited' and there are still . . . 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings[.]'" *Dotson*, 464 S.W.3d at 198.

It has been routinely held and, here, it is undisputed by the State that "[t]he [University] has a compelling interest in ensuring public safety and reducing firearm-related crime." *McCoy*, 468 S.W.3d at 897; *In re Care & Treatment of Norton*, 123 S.W.3d 170, 174 (Mo. banc 2003) ("The State has a compelling interest in protecting

the public from crime.").[12] Although the State concedes the University's compelling interest in promoting safety and reducing crimes, the State asserts that the University failed to adduce evidence showing the Rule is narrowly tailored to advance its interest. We disagree.

Here, regarding whether the Rule was narrowly tailored to achieve the compelling interests of promoting safety and reducing crime, the trial court found:

> Based largely on the testimony from law enforcement, the Court finds that the Rule satisfies strict scrutiny and is constitutional. The University presented ***unambiguous and essentially unrebutted*** testimony in support of the Rule from two police chiefs with nearly 70 years of law enforcement experience, backed by statistical evidence. The police chiefs explained how and why ***the Rule is narrowly tailored to achieve compelling interests***, and how the Rule achieves those interests. Notably, one police chief described himself as 'pro gun' and the other is a gun enthusiast and accomplished marksman, yet both are unequivocally opposed to changing the Rule.
>
> By contrast, the Attorney General offered no evidence from law enforcement and relied solely on a statistician whose opinions arguably support the Rule.
>
> To reach a result based on something other than the evidence adduced at trial would be engaging in judicial activism, which the Court will not do. The Court must reach a judgment based on the evidence adduced at trial, and the evidence adduced at trial supports a finding that the Rule is constitutional.

(Emphasis added).

[12]The trial court also concluded that the University has a compelling interest in creating an environment that the University concludes is most conducive to its academic mission. The State claims that the trial court erred in finding the education related interests as vague and unsupported by empirical evidence. Because we find the Rule is narrowly tailored to achieve the compelling interest in promoting safety and reducing crimes, we find the Rule survives strict scrutiny, and, as such, need not address the State's argument regarding the academic interests.

Specifically addressing the determination that the Rule is ***narrowly tailored*** to the compelling interest of promoting safety and reducing crimes, the trial court made the following findings of fact:

> 43. To summarize their testimony, MU Police Chief Doug Schwandt and UMSL Police Chief Dan Freet:
>
> a. Testified that they are strongly opposed to changing the Rule.
> b. Testified that firearms-related crimes and violent crimes have been low with the Rule in place.
> c. Testified that the crime rate and violent crime rate on their campuses have been relatively low.
> d. Testified that the Rule has been effective in creating a safe campus.
> e. Testified that currently, firearms theft is not a problem on campus, but if the rule were changed the number of firearm thefts will increase, especially from cars. Stolen firearms, in their opinion, are then frequently used to commit other crimes.
> f. Testified that currently, accidental shootings are not a significant problem on campus, but the likelihood of firearms accidents will increase if the Rule were changed.
> g. Testified that suicides on campus are a significant concern, but that currently the incidence of firearm-related suicides is low. They testified that if the Rule were changed, the number of firearm-related suicides will likely increase. Chief Schwandt testified that campus police can often prevent a non-firearm suicide or rescue the person in time; suicide attempts by firearm, however, almost always result in death.
> h. Testified that properly managing an active shooter situation and "target misidentification" are concerns on campus. They testified that if the Rule is changed it will make proper target identification more difficult during an active shooter situation. They testified that if, due to the presence of firearms on campus, the police accidentally targeted the wrong person, the result would be catastrophic for the innocent person shot and for the University.
> i. Testified that currently, the Rule allows police officers to do their jobs because it is easy to administer: The police know immediately that if they see a firearm on campus, the firearm is not supposed to be there. If the Rule is changed, they testified that this will increase the administrative burden on University police officers: A Rule change would make it substantially more difficult to determine who may possess a firearm on campus and will take time away from officers' other law enforcement and public safety duties.

j. Testified that the "response time" once campus police are called is very fast. For this reason, neither police chief thinks firearms are necessary for an individual's protection on campus.
k. Testified that the Rule includes exceptions for law enforcement officers in the line of duty and for approved programs.

44. Having witnessed their testimony firsthand, the Court finds Chief Schwandt's and Chief Freet's testimony credible and persuasive. They are gun enthusiasts with nearly 70 years of law enforcement experience, and they are unequivocally opposed to changing the Rule.

45. Notably, the Attorney General offered no testimony from any current or former law enforcement official.

## The Statistical Evidence Presented by the Parties

### The Attorney General's Statistical Expert: Dr. Carlisle Moody

46. At trial, the Attorney General called only one witness: Dr. Carlisle Moody, a statistician and professor at the University of William and Mary.

47. Dr. Moody's statistical opinions arguably corroborate the law enforcement testimony of Chief Schwandt and Chief Freet and the testimony of the University's statistical expert Dr. John Donahue, infra. Even giving Dr. Moody's opinions their most favorable construction, they are at best inconclusive and do not provide the Court with a basis for second-guessing law enforcement and finding the Rule unconstitutional.

. . . .

57. Every test and model in Dr. Moody's Report and Supplement points in the same direction: ***Violent crime***—again, defined by Dr. Moody to include murder, rape, robbery and assault—***always increased***, either in absolute or relative terms, ***after colleges started allowing firearms on campus***, and this was true whether firearms were allowed on campus ***generally or possession was limited to trunk storage***.

58. Dr. Moody's Report, Supplement and trial testimony only addressed the University's Columbia campus; he did not provide any opinions relating to the University's St. Louis campus, Rolla campus, or Kansas City campus.

59. Furthermore, Dr. Moody only addressed the University's interest in reducing violent crime. Dr. Moody did not testify about any other interest the University has in the Rule. Those other interests, discussed below, include preventing firearms-related suicides; reducing accidental shootings; reducing firearm thefts; reducing the administrative burden on law enforcement; reducing the likelihood of target misidentification during active shooter situations; and promoting the academic environment of the University consistent with its mission.

**The University's Statistical Expert: Dr. John Donohue**

60. The University called Dr. John Donohue as an expert witness. Dr. Donohue is a lawyer, statistician and professor at Stanford Law School. Defs.' Ex. 1. His research focuses on the statistical impact of laws and public policy, and he has spent decades studying the impact of firearms laws and regulations on public safety and crime.

. . . .

65. Dr. Donohue opined that theft and firearms thefts increase after passage of right to carry laws.

. . . .

67. Dr. Donohue testified that the results of Dr. Moody's Report and Supplement—that violent crime always increased in absolute or relative terms after colleges started allowing firearms on campus—were consistent with his own findings. Similarly, he was not surprised that Dr. Moody did not find the impact of the change in firearms policies at universities was "statistically significant," because these policies have only been changed in the last few years and there is often a time-lag between a regulation's being implemented and being able to detect its impact at a statistically significant level.

. . . .

69. The Court finds that Dr. Donohue's opinions are not specific to universities, and therefore are entitled to somewhat less weight than if he had opined strictly about campus-specific statistics. His opinions are, however, statistically reliable, and his overall testimony, like that of the Attorney General's expert Dr. Moody, corroborates the testimony of law enforcement regarding the Rule.

(transcript citations omitted).

We agree with the trial court's assessment of the evidence presented at trial. The evidence presented by the University's three witnesses support the conclusion that the Rule is narrowly tailored to achieve a compelling governmental interest.

Moreover, even if the trial court erred in finding that the Rule is narrowly tailored to achieve a compelling governmental interest, the State's challenge of the trial court's strict scrutiny determination still fails. This is because the trial court found the Rule survives strict scrutiny under each of *three* alternate standards.[13] In addition to finding the Rule survives the "narrowly tailored to advance the compelling governmental interest" formulation, the trial court made the additional findings that the Rule survives the alternate and less stringent strict scrutiny tests of "reasonable, non-discriminatory restrictions serving important regulatory interests" and "long history" or "substantial consensus." *See Clay*, 481 S.W.3d at 535; *Merritt*, 467 S.W.3d at 814. But, the State *only* claims error with the trial court's findings that the Rule survives strict scrutiny under the "narrowly tailored to advance the compelling governmental interest" formulation, the "most stringent formulation." *Clay*, 481 S.W.3d at 535. Thus, even if we were to find that the Rule did not pass the "narrowly tailored to advance the compelling governmental interest" formulation, which we are

[13]"While most commonly courts apply strict scrutiny by determining whether a law was narrowly tailored to achieve a compelling state interest, in other cases, depending on the extent the regulation burdens a particular right, the courts look to whether a regulation imposes 'reasonable, non-discriminatory restrictions' that serve 'the State's important regulatory interests' or whether the encroachment is 'significant.'" *Clay*, 481 S.W.3d at 535. Additionally, in *Merritt*, 467 S.W.3d at 814, our Supreme Court found a Supreme Court of Louisiana case persuasive where that court found "'a long history, a substantial consensus, and simple common sense' to be sufficient evidence for even a strict scrutiny review." (citation omitted).

not, the trial court's findings that the Rule survives strict scrutiny under the "reasonable, non-discriminatory restrictions serving important regulatory interests" and "long history" or "substantial consensus" formulations remain.[14]

The trial court did not err in finding that the State had the burden of proof and in finding that the Rule is narrowly tailored to advance a compelling government interest.

Points II and III are denied.

**Point IV--Dr. Choi's testimony**

In Point IV, the State asserts the trial court erred and abused its discretion in admitting opinion testimony from Dr. Choi, in overruling a motion to strike it, and in relying on that testimony because the testimony was inadmissible lay testimony, in that Dr. Choi repeatedly testified about unidentified studies he relied on, unidentified conversations he had, and his opinions about the ultimate issues in this case, to the prejudice and surprise of the State, since he was not disclosed during discovery as an expert witness.

Dr. Choi's testimony relates solely to the University's academic interests. Thus, while experienced law enforcement officers and statisticians provided credible, competent evidence as to the compelling interest of promoting safety and reducing crimes, Choi opined on an altogether different, rather esoteric and ethereal, interest

[14]We note that the State may have recognized their dilemma, and in its reply argued there is only one standard and that the same result would be reached under each formulation. We disagree. *Clay* references that "narrowly tailored to achieve compelling state interest" is the most stringent of the formulations. 481 S.W.3d at 535. Moreover, arguments omitted from an appellant's initial brief may not be supplied in the reply brief, and we are precluded from addressing arguments made for the first time in the reply brief. *Berry v. State*, 908 S.W.2d 682, 684 (Mo. banc 1995); *Coyne v. Coyne*, 17 S.W.3d 904, 906 (Mo. App. E.D. 2000).

as an alternative. In light of our determination in Point III, that the Rule is narrowly tailored to achieve the compelling interest of promoting safety and reducing crimes and thereby survives strict scrutiny, we need not determine whether Dr. Choi's testimony pertaining to an alternative, alleged, compelling interest was proper.

Point IV is denied.

**Conclusion**

Because we find as a matter of law that the Rule does conflict with, and is preempted by, Section 573.030.6, we reverse that portion of the trial court's decision and remand for further proceedings consistent with this opinion. We affirm that portion of the judgment finding the Rule to be constitutional, to the extent such Rule is not in conflict with 571.030.6.

W. DOUGLAS THOMSON, JUDGE

All concur.