SC94954

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Appellant,

v.

PIERRE CLAY,

Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS CITY
TWENTY-SECOND JUDICIAL CIRCUIT
The Honorable Robert H. Dierker, Judge

BRIEF OF FREEDOM CENTER OF MISSOURI AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

DAVID E. ROLAND, MBE #60548
FREEDOM CENTER OF MISSOURI
14779 Audrain Co. Rd. 815
Mexico, Missouri 65265
Phone: (314) 604-6621
Fax: (314) 720-0989
Email: dave@mofreedom.org

Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

Introduction

On August 5, 2014, the people of Missouri voted to amend their state constitution to ensure that it would afford the highest possible level of constitutional protection for citizens' rights to keep and bear arms, ammunition, and firearms accessories. This Court is bound to respect and give effect to the people's decision. In three recent cases, however, the controlling opinions of this Court have suggested that the sweeping changes voters made to Article I, § 23 of the Missouri Constitution *changed nothing at all* about how Missouri courts would enforce these rights. These rulings were manifestly contrary to this Court's longstanding rules regarding the interpretation of constitutional provisions and amendments to those provisions. The people of this state have exercised their "inherent, sole, and exclusive right to regulate the internal government" of this state, and this Court must now give Article I, § 23, the meaning that flows naturally from the words Missouri's voters have chosen.

Interest of the *Amicus Curiae*

The Freedom Center of Missouri is a non-profit, non-partisan organization dedicated to research, litigation, and education for the advancement of individual liberty and the principles of limited government. The Freedom Center emphasizes the importance of the Missouri Constitution as a safeguard for individual liberty that is independent of the U.S. Constitution's Bill of Rights and that frequently affords protections for liberty that are both more explicit and more extensive than those articulated in the U.S. Constitution's Bill of Rights. The Freedom Center litigates constitutional issues in state and federal courts and also assists citizen groups in the

evaluation and drafting of statutes and constitutional amendments that would enhance individual liberty.

Consent of Parties

The parties to this appeal have consented to the filing of this brief, as required by Missouri Supreme Court Rule 84.05(f)(2).

Jurisdictional Statement

Amicus adopts and incorporates by reference the Jurisdictional Statement set forth in the Respondent's brief.

Statement of Facts

Amicus adopts and incorporates by reference the statement of facts as set out in the Respondent's brief.

Argument of *Amicus Curiae*

In the state of Missouri, the people themselves are the ultimate political authority with the power to re-shape the government they have created as they see fit, including the power to impose limits on that government's authority. Mo. Const. Art. I, §§ 1, 3. The people exercise this power and express their intentions through the words of the Missouri Constitution.

In some instances the people of Missouri have chosen to adopt into their state constitution the exact words and phrases previously used in the U.S. Constitution or the

constitutions of other states. This Court has correctly held that under such circumstances it may infer that the people of Missouri intended for this state's courts to apply those provisions in the same way that the other jurisdictions' courts have applied the parallel provisions. *See, e.g., Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006). But when, as in the case of Article I, § 23, the people of this state have adopted constitutional provisions that depart from the language used in similar constitutional provisions in other jurisdictions, and especially when the precise wording of the Missouri constitutional provision is not shared by *any* other jurisdiction, this Court must assume that the voters intended for their constitutional provision to be interpreted differently than courts have interpreted similar constitutional provisions in other jurisdictions.

Although the U.S. Constitution and most other state constitutions contain a provision intended to protect citizens' rights to keep and bear arms, Article I, § 23, does not mirror any of those other provisions. It is a unique creation of the people of this state. As this Court's precedents have long established, this Court is obligated to give meaning and force to the precise words chosen by the people of this state. *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 144 (Mo. banc 2002). Failing to assess Article I, § 23, as amended by the people in 2014, on ***its own unique terms*** would do violence to the constitutional language the people of Missouri have chosen for themselves and would improperly strip the people of their fundamental ability to control the government they have created.

I. This Court Must Apply the Proper Standard for Interpreting an Amended Section of the Missouri Constitution.

This Court has for decades relied upon a clear set of rules for understanding and applying provisions of the Missouri Constitution; those rules must guide this Court's interpretation of Article I, § 23. In construing a constitutional provision, words are to be taken in accord with their fair intendment and their natural and ordinary meaning; when language is plain and unambiguous, no construction is required. *Wright-Jones v. Nasheed*, 368 S.W.3d 157 (Mo. banc 2012); *City of Arnold v. Tourkakis*, 249 S.W.3d 202 (Mo. banc 2008). If there is ambiguity in a constitutional provision, the rules applicable to the construction of statutes are also applicable to the construction of the provision. *Johnson v. State*, 366 S.W.3d 11 (Mo. banc 2012). The rules for construing constitutional provisions are the same as for interpreting statutes, but courts must give constitutional provisions ***broader construction***. *Boone Cnty. Court v. State*, 631 S.W.2d 321 (Mo. banc 1982). In construction of constitutional provisions a court should undertake to ascribe to words the meaning which people understood them to have when the provision was adopted. *State v. Honeycutt*, 421 S.W.3d 410 (Mo. banc 2013). Courts must give *every word* in the constitution its "plain, obvious, and common-sense meaning unless the context furnishes some ground to control, qualify, or enlarge it." *Boyles v. Mo. Friends of Wabash Trace Nature Trail, Inc.*, 981 S.W.2d 644 (Mo.App. W.D. 1998). "Crucial words must be viewed in context, and courts must assume that words were used purposefully." *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991). The meaning apparent on the face of the constitution is controlling, and no forced or unnatural

construction is permissible. *State ex rel. Heimberger v. Bd. of Curators of Univ. of Mo.*, 188 S.W. 128 (Mo. 1916). "Unless the meaning of terms employed is not clear, questions as to the wisdom, expediency or justice of the constitutional provision should play no part in the construction thereof." *Rathjen v. Reorganized Sch. Dist. R-II of Shelby Cnty.*, 284 S.W.2d 516, 527 (Mo. 1955).

Should a Missouri court find that any of a constitutional provision's terms are ambiguous and that, therefore, the court must construe those terms, the court must start by determining whether the terms are being used in a technical sense. "When the constitution employs words that long have had a technical meaning, as used in statutes and judicial proceedings, those words are to be understood in their technical sense unless there is something to show that they were employed in some other way." *Am. Fed'n of Teachers v. Ledbetter*, 387 S.W.3d 360, 364 (Mo. banc 2012). When words are not used in a technical sense in a constitutional provision, they must be given their plain or ordinary meaning unless such construction will defeat the manifest intent of the constitutional provision and courts presume every word in a statute has meaning. *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. 2012); *Vanlandingham v. Reorganized Sch. Dist. No. R-IV of Livingston Cnty*, 243 S.W.2d 107 (Mo. 1951); *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433 (Mo. 1912). If words in a constitutional provision are not used in a technical sense, then the Court must look to the dictionary to discern the words' plain, ordinary, and natural meaning. *See Mo. Gaming Comm'n v. Mo. Veterans' Comm'n*, 951 S.W.2d 611 (Mo. banc 1997); *Buechner v. Bond*, 650 S.W.2d 611 (Mo. banc 1983). Where a constitutional provision has been amended, the amendment must be addressed with the

understanding that it was intended to accomplish a substantive change in the law. *Sermchief v. Gonzales*, 660 S.W.2d 683 (Mo. banc 1983); *see also Cox v. Dir. of Revenue*, 98 S.W.3d 548 (Mo. banc 2003); *Baldwin v. Dir. of Revenue*, 38 S.W.3d 401 (Mo. banc 2001); *Hagan v. Dir. of Revenue*, 968 S.W.2d 704 (Mo. banc 1998); *O'Neil v. State*, 662 S.W.2d 260 (Mo. banc 1983); *State v. Chadeayne*, 323 S.W.2d 680 (Mo. banc 1959). Legislative changes should not be construed as useless acts unless no other conclusion is possible. *Baugus v. Dir. of Revenue*, 878 S.W.2d 39 (Mo. banc 1994); *State ex rel. Mo. State Bd. of Registration for Healing Arts v. Southworth*, 704 S.W.2d 219 (Mo. banc 1986); *Staley v. Mo. Dir. of Revenue*, 623 S.W.2d 246 (Mo. banc 1981); *Kilbane v. Dir. of Dept. of Revenue*, 544 S.W.2d 9 (Mo. banc 1976).

Put simply, in reviewing the amended form of Article I, § 23, this Court must begin with the words the people adopted. If those words are unambiguous, this Court's responsibility is simply to apply those words and to give them a broad effect. If there is any ambiguity, the Court must then determine if the ambiguous words are being used in a technical sense. If so, the words are applied in that technical sense. If not, the Court then turns to the dictionary to discern the meaning of the ambiguous words. It must give effect to every word the amendment added to Article I, § 23, and it must also give meaning to the amendment's removal of words from the Missouri Constitution. Above all, this Court must approach this amendment as though the people intended for it to effect a change in the existing law and ***may not*** conclude that their decision to amend their constitution was a useless act.

II. The 2014 Amendment to Article I, § 23, is Only the Most Recent Step in a Long History of Missouri Citizens Demanding Unique, Heightened Protections for Their Right to Bear Arms.

The Second Amendment to the United States Constitution has existed unchanged since its ratification in 1791, reading: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." At no point in Missouri's history have this state's citizens chosen to adopt these words into the Missouri Constitution.

When Missourians drafted their first state constitution in 1820, it might have made sense for them simply to mirror the language of the Second Amendment, but they did not. Instead, Article XIII, § 3 of the Missouri Constitution of 1820 read: "That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance; and that the right to bear arms, in defense of themselves and of the state, cannot be questioned." Thus, Missouri's constitutional provision differed significantly from the Second Amendment in that made no reference to "a well regulated militia," it explicitly authorized the bearing of arms for self-defense, and rather than stating that the right therein articulated could not be "infringed," Missourians emphasized that the right could not even be "questioned."

When Missourians adopted a new state constitution in the wake of the Civil War, they once again could have chosen to conform this state's constitutional language to the Second Amendment—but again they chose not to. Instead, Article I, § 8 of the Missouri

Constitution of 1865 was only slightly changed from its antecedent, reading: "That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance; and that their right to bear arms in defense of themselves, and of the lawful authority of the state, cannot be questioned." Each of these first two provisions differed significantly from the U.S. Constitution by linking the right to bear arms with the rights to assemble and to petition those in power, and also by utilizing different terminology to describe the right being protected.

In 1875, Missouri's foundational document underwent another wholesale revision, including a dramatic change to the provision addressing the citizens' right to bear arms. Article II, § 17 of the Missouri Constitution of 1875 stated: "That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons." This articulation of Missourians' rights is strikingly different from the Second Amendment, emphasizing in a way that the Second Amendment does not that the right is an *individual* right, that it may be utilized not merely for self-defense, but also in defense of one's home or property. This provision also clarified that it would allow the government to restrict the wearing of concealed weapons. When Missouri voters adopted yet another new constitution in 1945, they carried over into Article I, § 23, the essential elements from Article II, § 17 of the Missouri Constitution of 1875, with only minor changes in phrasing that did not address the substance of the rights protected.

Senate Joint Resolution 36, which became the so-called “Amendment 5” on the 2014 primary election ballot, dramatically expanded upon Article I, § 23 of the Missouri Constitution. It added statements to the effect that (1) for the purposes of the Missouri Constitution the right to keep and bear arms includes the possession of firearm ammunition and accessories, (2) the rights protected in the provision are "unalienable,” (3) the state is obligated to uphold these rights, and (4) that the courts must apply “strict scrutiny” against "any restriction on these rights.” Additionally, where the earlier version of Article I, § 23, only specified that the right to use weapons extended to defense of home, person, and property, the amendment clarified that citizens also have the right to use weapons in defense of their families. The amendment also stripped out of the constitution the prior permission the people had given the government to restrict or ban the wearing of concealed weapons. And, finally, it granted the general assembly limited authority to keep guns out of the hands of "convicted violent felons or those adjudicated by a court to be a danger to self or others as a result of a mental disorder or mental infirmity."

More than sixty percent of voters approved these changes, which create a constitutional provision that is ***completely unique to Missouri***. Neither the Second Amendment nor any other state’s constitution specifies that citizens have a right to keep and bear “ammunition and accessories typical to the normal function of” firearms. Neither the Second Amendment nor any other state’s constitution declares citizens’ rights to keep and bear arms “unalienable.” Neither the Second Amendment nor any other state’s constitution expressly obligates the state to uphold the citizens’ rights to keep and

bear arms, ammunition, and firearms accessories. Because Missouri's citizens have chosen to enact constitutional protections for their rights to keep and bear arms that are unique among all the other constitutions in the United States, this Court must not dilute the power and meaning of these constitutional protections by relying on other jurisdictions' application of dissimilar constitutional provisions to establish the meaning of Article I, § 23.

III. This Court Must Understand and Take Into Account the Context in Which the People of Missouri Chose to Amend Article I, § 23.

Although a handful of states have for some time imposed onerous restrictions on citizens' rights to keep and bear arms, ammunition, and firearms accessories, recent years have seen gun control activists (spearheaded by groups such as the Law Center to Prevent Gun Violence) work all over the country to persuade state and local legislators to impose new restrictions on citizens' ability to obtain and use firearms. Among the sorts of restrictions being proposed are:

- Universal background checks for any person purchasing a gun;
- Government licensing of all gun owners;
- Registration of all firearms;
- Restrictions on the sale, purchase, or possession of ammunition;
- Bans on certain types of weapons and accessories;

- Bans on the possession, manufacture, sale, barter, or transfer of firearms magazines capable of holding more than a specified number of rounds of ammunition;
- Restrictions on the number of firearms that any given citizen may purchase;
- Mandatory waiting periods when a citizen wishes to purchase a firearm; and
- Mandatory reporting to law enforcement if a firearm is lost or stolen.

Between 2012 and 2015, legislatures in most states—including Missouri—considered versions of one or more of these sorts of proposals. Ultimately, however, as the national conversation about gun control laws rolled on and as more states considered additional restrictions on their citizens' rights to keep and bear arms, ammunition, and firearms accessories, Missourians decided to ensure that these rights would not depend on the whims of those who hold political power. Instead, Missourians acted to increase the state constitution's protections for these rights and thereby to put them beyond the reach of most legislation. This is why Missourians approved a state constitutional amendment that would give their rights to keep and bear arms the highest possible level of protection.

And, to be sure, the voters believed Amendment 5 would ensure this "highest possible level of protection" because that is what they were repeatedly told it would do. Although this Court has cited State Senator Kurt Schaefer's briefs for the proposition that the amendment to Article I, § 23, did not make any substantive changes to the Missouri Constitution's protections for citizens' rights to keep and bear arms, Sen. Schaefer told the media and voters all over the state the exact opposite, that the amendment would provide these rights the highest possible level of constitutional protection. The St. Louis

Post-Dispatch reported Schaefer saying in advance of the statewide vote that the amendment "strengthens the (constitution's) language to guarantee individuals' right (to keep and bear arms) at the highest level, which is unalienable[.]" *See* Alex Stuckey, *Gun Amendment on Missouri Ballot Draws Support, Fire*, ST. LOUIS POST-DISPATCH (July 28, 2014), www.stltoday.com/news/local/govt-and-politics/gun-amendment-on-missouri-ballot-draws-support-fire/article_98ea2c84-ffa5-59ca-a498-090da67c0fb0.html. The Kansas City Star reported Schaefer stating that Amendment 5 would protect citizens' rights to keep and bear arms "in the highest way possible," and that "if the amendment passes, it would make Missouri's enumeration of the right to bear arms one of the strongest in the country." Allie Hinga, *Proposed Amendment Would Make Missouri Gun Rights Among the Strongest*, KANSAS CITY STAR (July 6, 2014), www.kansascity.com/news/government-politics/article679122.html. Addressing a crowd in Columbia, Missouri, shortly before the vote on Amendment 5, Schaefer described the amendment as ensuring that

> "your right… to keep and bear arms is an unalienable right of the highest degree[.] Anything that infringes on that right gets strict scrutiny, which is the highest level of review by a court to hold the government to the tightest restraint, and it is the affirmative obligation of the state of Missouri to uphold that right. If we pass this, we will have the strongest right to keep and bear arms in any state in the United States[.]"

Dave Horvath, *Schaefer Explains Amendment 5*, NEOSHO DAILY NEWS (July 26, 2014), www.neoshodailynews.com/article/20140726/News/140729220.

These public statements about the impact of Amendment 5, in addition to the clear and unambiguous language of the amendment, show that when more than sixty percent of Missourians voted to amend Article I, § 23, they had every reason to believe that they were adopting the highest possible level of constitutional protection for their constitutional rights to keep and bear arms, and that it would give Missourians protections not enjoyed by citizens of any other state.

IV. This Court Must Give Meaning to Every Word That Amendment 5 Added To or Subtracted From Article I, § 23.

The 2014 amendment to Article I, § 23, added a number of words and phrases to that provision and deleted one longstanding phrase. The Court must give these changes full effect.

1. "That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the 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 words that have been added to the first sentence of Article I, § 23, are "ammunition," "accessories typical to the function of such arms," and "family." According to Webster's Third New International Dictionary (the Missouri Supreme Court's institutional dictionary of choice), the word "ammunition" means "the various projectiles together with their fuzes, propelling charges, and primers that are fired from guns." That same dictionary defines "accessory" as "an object or device that is not essential in itself but that adds to the beauty, convenience, or effectiveness of something

else." Taken together, the addition of these words to the first sentence of Article I, § 23, indicates that the people of Missouri intended to protect not only their access to and use of firearms themselves, but also those items that enable and/or enhance a citizen's use of a firearm.

These clarifications make perfect sense in the broader context described above. Although Judge Stith's concurring opinion in *Dotson v. Kander*, 464 S.W.3d 190 (Mo. banc 2015), expressed confusion as to the reason for the addition of these specific terms, gun control advocates have, in fact, been aggressively promoting various types of legislative measures that would interfere with citizens' ability to obtain ammunition or firearms accessories. For example, several states require would-be purchasers of ammunition to obtain a background check, a government license, or limit the types of ammunition that citizens can purchase, possess, or use. *See* Law Center to Prevent Gun Violence, *Regulating Guns in America: A Comprehensive Analysis of Gun Laws Nationwide, 2014 Edition* 169-75 (2014). Additionally, the cities of Chicago and Seattle have recently adopted extraordinary taxes on firearms and ammunition. Gene Johnson, *Seattle City Council Votes to Adopt "Gun Violence Tax,"* KOMONews.com (August 10, 2015), www.komonews.com/news/local/Seattle-City-Council-votes-to-adopt-gun-violence-tax-321322141.html.

One of the more popular regulations that states have been considering is a prohibition on so-called "assault weapons." These sorts of bans, which have been adopted by a number of jurisdictions, are quite literally defined by their focus on firearms accessories. Indicative of this trend is Connecticut's "assault weapons" ban, which first

lists a number of specific models of firearm that are banned, then additionally bans firearms that have one or more specified accessories, including:

- A folding or telescoping stock;
- A pistol grip or various other types of stocks that enhance the shooter's ability to control the weapon;
- A forward pistol grip;
- A flash suppressor;
- A barrel shroud; or
- A fixed magazine capable of holding more than ten rounds of ammunition.

Conn. Gen. Stat. § 53-202a.

Under the new language of Article I, § 23, citizens have reserved to themselves not only the rights to keep and bear firearms, but also to keep and bear the ammunition and accessories that enhances the usefulness, convenience, and effectiveness of those firearms. In light of the amendment, Missouri courts must assess any government restriction on citizens' access to ammunition or firearms accessories as if it was a restriction on citizens' access to firearms themselves. And, as will be shown below, the people have demanded that these rights be given the highest possible degree of constitutional protection.

2. "The rights guaranteed by this section shall be unalienable."

The second sentence of Article I, § 23, is entirely new and unique to this provision. The people of Missouri have not labeled any other right protected in their state

constitution "unalienable," and no other state constitution uses this term to describe citizens' rights to keep and bear arms. This term has special resonance because it directly and unmistakably echoes Thomas Jefferson's use of the word in the Declaration of Independence, describing rights that all people enjoy as gifts from their Creator, and the protection of which is the reason people instituted governments. The common-sense understanding of the word "unalienable" indicates something that may not properly be taken away from the possessor. Webster's Third New International Dictionary defines the word to mean "incapable of being alienated, surrendered, or transferred." *Webster's Third New International Dictionary, Unabridged*, s.v. "inalienable," accessed September 28, 2015, http://unabridged.merriam-webster.com. As is reflected in Sen. Schaefer's comments to newspapers and political audiences described above, utilizing this powerful word to describe the rights being protected in Article I, § 23, unmistakably indicates that the people intended to give those rights the highest possible level of constitutional protection; this Court is obligated to give due force to the people's decision.

3. "Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and under no circumstances decline to protect against their infringement."

The focal point of the third sentence of Article I, § 23, is the term "strict scrutiny." This Court has held that if a constitutional provision uses words that have a "technical meaning" as used in judicial proceedings, those words are "to be understood in their technical sense unless there is something to show that they were employed in some other way." *Am. Fed'n of Teachers*, 387 S.W.3d at 364. As the principal opinion correctly

noted in *Dotson*, "strict scrutiny" is a legal phrase of art grounded in decisions of the United State Supreme Court and it represents the "most rigorous and exacting standard of constitutional review." *Dotson*, 464 S.W.3d at 197. In the context of Article I, § 23, there can be no serious question but that the term was intended in this technical sense, and there is nothing in the provision "to show that [the words 'strict scrutiny'] were employed in some other way." This Court must conclude that in using the term "strict scrutiny" the people of Missouri intended to require the courts to apply the most "rigorous and exacting" form of judicial review against any governmental action that would restrict citizens' right to keep and bear arms, ammunition, and firearms accessories. *Amicus* will discuss the proper approach to applying strict scrutiny below.

4. "~~but this shall not justify the wearing of concealed weapons.~~"

For more than 140 years the Missouri Constitution expressly carved out an exception to citizens' right to keep and bear arms, authorizing (but not requiring) the government to enact laws to restrict the circumstances under which citizens could lawfully carry concealed weapons. The 2014 amendment to Article I, § 23, removes that express authorization. Under this Court's own standards for interpreting constitutional provisions, it must construe this phrase applying the theory that the people intended to accomplish a substantive change in the law by deleting this phrase. *See Sermchief*, 660 S.W.2d at 689. Consequently, this Court should conclude that the people intended to end the government's authority to restrict the circumstances under which citizens may lawfully carry concealed weapons. This conclusion is supported by the fact that, as shown below, the people specifically authorized the government to impose certain other

restrictions on the rights to keep and bear arms, ammunition, and firearms accessories, but did not include in that authority the power to regulate the concealed carry of weapons.

5. "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 a result of a mental disorder or mental infirmity."

Article I, § 23, functions primarily as a limit on the legitimate powers of government in regard to citizens' rights to keep and bear arms, ammunition, and firearms accessories, but the people identified two sets of citizens whose rights the government *is* authorized to restrict: (1) "convicted violent felons" and (2) "those adjudicated by a court to be a danger to self or others as a result of a mental disorder or mental infirmity." In nearly half of the states in the nation a person previously convicted of certain misdemeanors may be prohibited from possessing firearms, even for the purposes of self-defense. Many more states deny citizens' rights to possess firearms if the citizen has been convicted of a felony, even if no violence was involved in the Comm'n of the crime. Applying the maxim of *expressio unius est exclusio alterius*, it is clear that although the people of Missouri agree that the government should have the power to try to keep weapons out of the hands of those previously proven to have committed serious violent crimes or those adjudged to be a danger to themselves or others, the people have determined that non-violent offenders should continue to enjoy the right to keep and bear arms, ammunition, and firearms accessories on the same terms as those never convicted of breaking any laws. This Court is not permitted to question the wisdom of Article I, §

23, in this regard, but rather must give effect to the words the people have chosen. *Rathjen*, 284 S.W.2d at 527.

V. How This Court Should Apply Article I, § 23, Going Forward.

In its first three cases touching upon the meaning of the amended language of Article I, § 23, this Court improperly disregarded the actual language of that provision in favor of (1) language the U.S. Supreme Court has used in discussing the Second Amendment and the rights it affords to U.S. citizens and (2) Louisiana cases interpreting that state's constitutional provision regarding the right to keep and bear arms. Each of those other constitutional provisions is manifestly different from Article I, § 23, so the Court should not look to these cases as guides when interpreting and applying Article I, § 23; to construe Article I, § 23, as a reiteration of the Second Amendment or some other state's constitutional provision would do violence to the longstanding judicial standard for interpreting constitutional provisions and the words the people of Missouri use to describe the limits on governmental power.

A. Nothing in the Text of Article I, § 23, Supports the Idea that the U.S. Supreme Court's Interpretation of the Second Amendment Provides a Useful Guide for Understanding or Applying this Provision.

In *Dotson*, it was argued that the people's decision to amend Article I, § 23, merely reflected an intent to align our state's constitutional provisions with the standard of review the U.S. Supreme Court established in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). As an initial matter, the very idea of amending a state constitution to align with the U.S. Supreme Court's

articulation of rights guaranteed by the U.S. Constitution is pure nonsense. States are required to afford citizens the full extent of federal constitutional rights regardless of what language is contained in the state's constitution, so any effort to amend a state provision to align with a similar federal provision would be the very definition of a "meaningless act." But this suggestion is even more bizarre where, as is the case with Article I, § 23, (1) there is not the remotest suggestion that the state constitutional provision being amended is in any way inconsistent with the federal right at issue, or (2) the wording of the amendment does not even arguably echo any part of the judicial reasoning that allegedly prompted the amendment. If the people of Missouri intended for Article I, § 23, to be parallel to the Second Amendment, they only needed to adopt the language of the Second Amendment as the new Article I, § 23—but they did not do this. Furthermore, the language the people did adopt does not in any way echo the *Heller* or *McDonald* cases. In neither of those cases does the majority opinion discuss ammunition or accessories typical to the function of firearms. Neither of those cases even hints that the rights to keep and bear arms are unalienable or that restrictions on those rights are subject to strict scrutiny. In fact, because the *Heller* and *McDonald* majorities flatly declined to identify a particular level of scrutiny applicable to restrictions on Second Amendment rights, most courts considering the question have concluded that *Heller* and *McDonald* actually require *intermediate* scrutiny, not strict scrutiny. *See, e.g., Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2nd Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252-53 (D.C. Cir. 2011); *U.S. v. Masciandaro*, 638 F.3d 458, 474 (4th Cir. 2011); *U.S. v. Marzzarella*,

614 F.3d 85, 96 (3rd Cir. 2010); *U.S. v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *U.S. v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *Kolbe v. O'Malley*, 42 F.Supp.3d 768, 790-91 (D. Md. 2014); *Colo. Outfitters Assoc. v. Hickenlooper*, 24 F.Supp.3d 1050, 1068 (D. Colo. 2014); *Fyock v. City of Sunnyvale*, 25 F.Supp.3d 1267, 1277-79 (N.D.Ca. 2014); *N.Y. State Rifle and Pistol Ass'n, Inc. v. Cuomo*, 990 F.Supp.2d 349, 366 (W.D.N.Y. 2013); *U.S. v. Walker*, 709 F.Supp.2d 460, 466 (E.D.Va.2010). Consequently, no fair-minded person reading the majority opinions in *Heller* or *McDonald* could look at the unamended version of Article I, § 23, and conclude that it conflicted with the majority's reasoning, nor could that same person read the amended language of Article I, § 23, and conclude that the amendments were designed for the purpose of aligning with those majority opinions.

In sum, both the history and the plain text of Article I, § 23, show that Missourians have always preserved their rights to keep and bear arms independent of and without regard for the Second Amendment. The people of this state have used the Missouri Constitution to protect rights to keep and bear arms that are both more detailed and more extensive than the rights protected under the Second Amendment or under any other state's constitution. As such, this Court should respect the uniqueness of Article I, § 23, and should flee from any temptation to let other courts' analyses of other constitutional provisions distract from or dilute the protections the citizens of this state have enshrined in the Missouri Constitution.

B. Missouri Courts Must Apply the Most Stringent Version of Strict Scrutiny to Any Restrictions on Citizens' Rights to Keep and Bear Arms, Ammunition, or Firearm Accessories.

In *State v. Merritt*, ___ S.W.3d ___, 2015 WL 4929765 (Mo. banc August 18, 2015), and *State v. McCoy*, ___ S.W.3d ___, 2015 WL 4930615 (Mo. banc August 18, 2015), the principal opinions first determined that the pre-amendment version of Article I, § 23, was applicable to the appellants' challenges, then proceeded to apply a watered-down version of "strict scrutiny" in assessing § 571.070.1. The principal opinions started with a statement that the right to keep and bear arms has "accepted limitations," then held that even when strict scrutiny is applicable Missouri courts would still require the challenger to overcome a heavy presumption that the challenged law is constitutional. *Id.* at *4. For reasons explained below, neither of these propositions is supportable in regard to the amended version of Article I, § 23. Even if that watered-down version of strict scrutiny might have been justifiable in the context of a pre-amendment Article I, § 23, when Missourians voted to amend that provision they did so with the understanding that the courts would have to apply a very robust version of strict scrutiny analysis to restrictions on their rights to keep and bear arms, ammunition, and firearms accessories.

Although Missouri courts have long held to the general proposition that laws are presumed to be constitutional, prior to the adoption of Amendment 5 that particular doctrine met its limit whenever the courts were required to apply "strict scrutiny." For decades both Missouri and federal courts had held that once a law was subject to strict

scrutiny, it lost any presumption of constitutionality. This Court expressly addressed this matter in *Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 (Mo. banc 1992), explaining:

> There are exceptions to the general rule regarding the presumption of constitutionality and the burden of showing a lack thereof. For example, the strong presumption in favor of the constitutionality of a statute does not apply where the statute creates a classification scheme that affects fundamental rights or involves suspect classifications… 'Cases involving 'suspect classifications' or 'fundamental interests' force the courts to peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, thus subjecting the classification to strict scrutiny. The effect is to shift the burden of proof to justify the classification from the individual attacking such classification to the State or its agencies.

This explanation of strict scrutiny followed close on the heels of the Eighth Circuit's decision in *Stiles v. Blunt*, 912 F.2d 260, 263 (8th Cir. 1990), which explained:

> Strict scrutiny is the most exacting form of equal protection review. Strict scrutiny is applied when a challenged classification affects a fundamental constitutional right or suspect class. Under this standard, we will uphold a classification only if it is 'necessary to promote a compelling state interest.' Unlike rational relationship review, where the classification is presumed constitutional and the plaintiff bears the burden of proving otherwise, the

strict scrutiny test requires the government to prove that it has a compelling interest in the classification it has selected.

See also Peterson v. City of Florence, Minn., 727 F.3d 839, 842 (8th Cir. 2013) (content-based speech restriction must satisfy strict scrutiny and is presumptively invalid).

Even more recently, in *Ocello v. Koster*, 354 S.W.3d 187, 200 (Mo. banc 2011), this Court confirmed this understanding, stating that "[u]nder strict scrutiny, ***legislation is presumptively invalid*** and will be declared unconstitutional unless it is 'narrowly tailored to serve a compelling governmental interest.'" (emphasis added) This Court also held in *City of St. Louis v. State*, 382 S.W.3d 905, 914 (Mo. banc 2012), that a presumption of unconstitutionality also applies in the context of other constitutional provisions, such as the Article III, § 40 prohibition against special and local laws.

Before August 5, 2014, when Missouri voters voted to ratify of the new version of Article I, § 23, the above cases were the prevailing explanation for what "strict scrutiny" meant in the context of Missouri constitutional law. Indeed, *amicus* has been unable to locate any case—not a single one—handed down by a Missouri court or in any federal court prior to the voters' ratification of the new version of Article I, § 23, suggesting that a court applying strict scrutiny was allowed to presume the constitutionality of the law to which that standard was being applied. To the contrary, the U.S. Supreme Court and the federal circuit courts appear universally to agree that in the context of strict scrutiny analysis, courts are required to presume the *invalidity* of the law being challenged. *See, e.g., McCullen v. Coakley*, 134 S.Ct. 2518, 2530 (June 26, 2014); *Starlight Sugar, Inc. v. Soto*, 114 F.3d 330, 331 (1st Cir. 1997); *Mastrovincenzo v. City of New York*, 435 F.3d 78,

98 (2nd Cir. 2006); *Marzzarella*, 614 F.3d at 99; *Eisenberg ex rel. Eisenberg v. Montgomery Cnty. Public Sch.*, 197 F.3d 123, 133 (4th Cir. 1999); *Carey v. Wolnitzek*, 614 F.3d 189, 199 (6th Cir. 2010); *Ezell v. City of Chicago*, 651 F.3d 684, 707 (7th Cir. 2011); *Peterson v. City of Florence, Minn.*, 727 F.3d 839, 842 (8th Cir. 2013); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009); *U.S. v. Rich*, 708 F.3d 1135, 1139 (10th Cir. 2013); *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1306 (11th Cir. 2003); *Heller v. District of Columbia*, 670 F.3d 1244, 1252-53 (D.C. Cir. 2011). As amply explained in the above cases, presuming the constitutionality of a law in that context contradicts the very concept of "strict scrutiny." When Missouri voters amended Article I, § 23, to describe their rights to bear arms, ammunition, and firearms accessories as "unalienable" and to require courts to apply strict scrutiny to any restrictions on those rights, they made unmistakably clear that they intended for these rights to have the highest degree of constitutional – and therefore judicial – protection. They demonstrated their intention that these rights should be very broad by withdrawing the government's authority to prohibit the carrying of concealed weapons and articulating two—and only two—carefully-defined circumstances under which the legislature might deprive citizens of this right. This Court is obligated to submit to the express will of the people in this regard, broadly construing the rights protected in Article I, § 23, and narrowly construing the authorized limitations on those rights.

C. Section 571.070 Violates Article I, § 23, As Applied to the Respondent.

Section 571.070.1 plainly imposes restrictions on certain Missourians' rights to keep and bear arms, ammunition, and firearms accessories. As such, this Court's

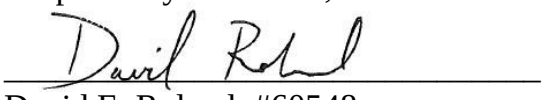
obligation is to apply strict scrutiny to that law, particularly as applied to the Respondent. Under strict scrutiny, this Court must presume that the challenged provision is *un*constitutional, and it may only survive if the government produces evidence adequate to show that the restriction on citizens' rights is supported by a compelling government interest and also that the restriction is no broader than necessary to serve the compelling interest the government demonstrated. *McCullen*, 134 S.Ct. at 2530; *281 Care Comm. v. Arneson*, 766 F.3d 774, 787 (8th Cir. 2014). In this case, the government has failed to put forward evidence showing that preservation of public safety requires that those convicted of non-violent offenses must be deprived of their constitutional right to keep and bear arms, ammunition, and firearms accessories. Thus, § 571.070 cannot constitutionally be applied to non-violent former felons.

Conclusion

As has always been the case, the words of the Missouri Constitution are the most essential, most fundamental tool the people of this state have to define and limit the powers of the government they have established. By amending Article I, § 23, the people of Missouri used the most powerful language available to them to demand that this state's government and courts must afford the highest level of protection for the citizens' rights to keep and bear arms, ammunition, and firearms accessories. The court below acted correctly in ruling that § 571.070, RSMo., is not consistent with these rights. If this Court should rule that the language of Article I, § 23, ***does not*** establish the highest possible level of constitutional protection for the rights articulated therein, *amicus* ***implores*** the Court to give the people of Missouri guidance as to what language they would need to

adopt to accomplish that highest level of protection for this particular right, or for any other right they wish to put beyond the government's reach.

Respectfully submitted,



David E. Roland, #60548
FREEDOM CENTER OF MISSOURI
14779 Audrain Co. Rd. 815
Mexico, Missouri 65265
Phone:(314) 604-6621
Fax: (314) 720-0989
Email: dave@mofreedom.org

Attorney for Amicus Curiae

RULE 84.06(c) CERTIFICATION AND CERTIFICATE OF SERVICE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2013 and contains no more than 8,244 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 27,900 word limit in the rules). The font is Times New Roman, double-spacing, 13-point type.

I hereby certify that I electronically filed the foregoing with the Clerk of the Missouri Supreme Court using the Electronic Filing System, and that a copy will be served by the Electronic Filing System upon those parties indicated by the Electronic Filing System.

Respectfully submitted,

_____

David E. Roland