
WD83427

IN THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE OF MISSOURI, EX REL. ERIC S. SCHMITT,

Appellants,

v.

MUN CHOI AND THE CURATORS OF THE UNIVERSITY OF MISSOURI,

Respondents.

ON APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY
THIRTEENTH JUDICIAL CIRCUIT
The Honorable Jeff Harris, Judge

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

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INTRODUCTION

On August 5, 2014, the people of Missouri voted to make several major changes to the text of Article I, § 23, of the Missouri Constitution, which describes citizens' freedom to possess firearms for defensive purposes. Prior to voting in favor of this amendment, the people were told that it would afford the highest possible level of constitutional protection for this right. In spite of this recent amendment and the people's manifest intention that their right to possess firearms for defensive purposes should be carefully insulated against most types of restrictions, the trial court below upheld a government entity's *near-total ban* on the possession of firearms. The ban applies to a wide range of indoor and outdoor spaces, rather than focusing on buildings or public spaces that (at least arguably) might present security concerns not applicable to most buildings or public spaces. The ban applies to almost everyone, rather than focusing only on persons who have been shown to demonstrate an unusual risk of violent behavior.

A central purpose of a written constitution is to make clear the people's demand that certain liberties should be almost entirely beyond the government's power to restrict. If Missouri courts hold that a government entity headed by unelected officials may almost entirely ban law-abiding citizens from possessing firearms for defensive purposes, even after the people unambiguously expressed their intent to safeguard this freedom, it would call into question the most fundamental premise of our entire constitutional system—that the government in this state is bound to respect the limits the people have imposed upon its power.

FACTS

Section 110.010.B.4(a) of the Collected Rules and Regulations of the University of Missouri (“the University”) states that the “possession 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.”¹ D90, p. 2. The Appellant seeks a declaration that the Gun Ban violates Article I, § 23, of the Missouri Constitution to the extent that it prohibits University employees from (1) possessing firearms while driving their vehicles on University property to and from work; (2) keeping firearms secured and out of sight in their locked vehicles parked on University property while conducting activities within the scope of their employment; and (3) transferring firearms from the passenger compartment of their vehicles to the trunk of their vehicles while parked on University property and conducting activities within the scope of their employment. D90, p. 3. The Appellant also seeks a declaratory judgment that the Gun Ban violates Article I, § 23, to the extent that the Rule provides no meaningful process whereby University employees with valid concealed carry permits can request and obtain permission from the University to carry concealed firearms while at work. D90, p. 3. At trial the University presented testimony and statistical data in support of its contention that the University has compelling governmental interests in (1) ensuring the safety of those on University property (including concerns about accidental injuries and firearm-related suicide); (2) minimizing theft on University property; (3) reducing potential confusion of law enforcement officers in an “active shooter” situation; and (4) enhancing the learning environment (including attracting students, faculty, and staff.) D90, pp.23-25. The trial court concluded that “all the evidence in this case... points to the conclusion that changing the Rule will affect the safety of University campuses.” D90, p. 26.

¹ We will refer to this provision as “the Gun Ban.”

The trial court's Judgment did not indicate that the trial court had assessed the extent to which allowing a small number of University employees to possess lawfully-owned firearms in and around their cars while coming to and from campus might impact the University's efforts to accomplish the interests it had identified. The Judgment did not indicate that the trial court had assessed whether allowing those who have completed the training required to obtain a concealed carry permit to carry their weapons on campus might impact the University's efforts to accomplish the interests it had identified. The Judgment also does not indicate that the trial court had considered whether or to what extent the interests the University has asserted are in any meaningful way distinguishable from the general interest any government entity might have in terms of promoting the public safety, security, and desirability.

ARGUMENT

The [Missouri Constitution](#) declares that *the people* are supposed to be the ultimate political authority in this state, with the “inherent, sole, and exclusive right” 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 their state constitution. Article I comprises Missouri’s Bill of Rights, in which the people have identified a number of specific individual freedoms to be secured against governmental intrusion, including the right to possess firearms for defensive purposes. See Mo. Const. [Art. I, § 23](#).

The University has argued that its Gun Ban is justified because allowing law-abiding adults to possess firearms for defensive purposes creates costs that, in the University’s opinion, outweigh any potential benefits of allowing them to exercise this freedom. But Article I, § 23, itself reflects a judgment by the people of Missouri that, barring truly exceptional circumstances not present in this case, the benefits of allowing law-abiding adults to possess firearms for defensive purposes *necessarily* outweigh the potential costs. See [U.S. v. Stephens, 559 U.S. 460, 470 \(2010\)](#) (constitution not a document “prescribing limits, and declaring that those limits may be passed as pleasure.”)

The Court of Appeals is bound by the Missouri Supreme Court’s decisions interpreting the language in the newly-amended Article I, § 23.² This brief will explain why those decisions were both incorrect and affirmatively dangerous to our constitutional system of government, but the Freedom Center has no intention of asking the Court to depart from that precedent. Instead, we will point out that the Court should rule in Appellant’s favor because the instant case is distinguishable from *Alpert* and *Clay* (“the Felon-in-Possession cases”), but we also respectfully ask

² See [Alpert v. State, 543 S.W.3d 589 \(Mo. banc 2018\)](#); [State v. Clay, 481 S.W.3d 531 \(Mo. banc 2016\)](#); [Dotson v. Kander, 464 S.W.3d 190 \(Mo. banc 2015\)](#).

this Court to use its authority pursuant to Rules [83.01](#) and [83.02](#) to transfer this matter to the Missouri Supreme Court for the purpose of reexamining—and correcting—existing law regarding the proper application of the strict scrutiny standard of review.

I. The Missouri Supreme Court has Misapplied the Strict Scrutiny Standard in Its Recent Cases Dealing with Article I, Section 23.

In 2014, the people amended Article I, § 23, with the goal of bolstering their right to possess arms for defensive purposes—a freedom that has always been protected under the Missouri Constitution, but which many other states have in recent years subjected to increasing levels of restraint. The textual changes were substantial and intended both to significantly increase the scope of this particular freedom and to further safeguard it against governmental interference.

Thus far, however, this state’s courts have declined to give the amendment any substantial meaning. *See, e.g.,* [Clay, 481 S.W.3d at 536-38](#) (holding that Amendment 5 did not substantially change the right to bear arms). More concerning, the Missouri Supreme Court’s cases interpreting the amended provision have departed from the Court’s own precedent and the overwhelming national consensus regarding “strict scrutiny.” The Missouri Supreme Court’s new, radically diminished approach to strict scrutiny is what allowed the trial court to uphold the University’s near-total denial of law-abiding citizens’ freedom to possess firearms for defensive purposes in the face of a standard that is supposed to be “the most demanding test known to constitutional law.” *See* [Kolbe v. Hogan, 849 F.3d 114, 133 \(4th Cir. 2017\)](#); *see also* [Dotson, 464 S.W.3d at 197](#) (strict scrutiny considered “most rigorous and exacting standard of constitutional review”).

The People of Missouri are This State’s Ultimate Political Authority

The Missouri Constitution concisely articulates the essential concepts on which our system of government depends:

- All political power is vested in and derives from the people. [Mo. Const. Art. I, § 1.](#)

- All government originates from the people, is founded on their will only, and is instituted solely for the good of the whole. *Id.*
- The people have the inherent, sole and exclusive right to regulate the internal government of this state, and to alter their constitution and form of government whenever they may deem it necessary to their safety and happiness. Mo. Const. Art. [I, § 3](#).
- The principal office of government is to give security to the people's natural rights to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry. [Mo. Const. Art. I, § 2](#).
- When government does not confer this security, *it fails in its chief design*. *Id.* (emphasis added).

The Bill of Rights embodied by Article I of the Missouri Constitution represents the people's recognition that without clearly articulated limits, the tendency of government would be to deny certain freedoms that the people consider to be essential. In enumerating those rights in their state constitution, the people have demanded that the rights must be preserved against governmental intrusion. As the Missouri Supreme Court once observed:

To what purpose... are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed[.]

[State ex rel. Kansas City v. Public Service Comm'n, 524 S.W.2d 855, 862 \(Mo. banc 1975\)](#) (quoting [Marbury v. Madison, 5 U.S. 137, 176 \(1803\)](#)). Because the judiciary is the branch of government entrusted with interpreting and applying the Missouri Constitution, this state's courts have an obligation to treat the rights enumerated in Article I with the utmost care and 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 \(Mo. banc 2002\)](#).

The People of Missouri Demand the Most Extensive Protections Possible for Their Right to Possess Firearms for Defensive Purposes

Although a handful of states have for some time imposed onerous restrictions on law-abiding citizens' rights to possess firearms for defensive purposes, recent years have seen gun control activists all over the country working to persuade state and local legislators to impose new restrictions on citizens' ability to obtain and use firearms. In the past decade, legislatures in most states—including Missouri—have considered versions of one or more of these sorts of proposals. But in 2014, just when the national conversation about gun control laws was at a fever pitch³ and as an increasing number of states were adopting new restrictions on their citizens' rights to possess firearms, ammunition, and firearms accessories, Missourians emphatically decided to buck that trend. At the August 5, 2014 primary election 61 percent of voters ratified "Constitutional Amendment 5," which was designed to create a more robust constitutional firewall between the government and the rights enshrined in Article I, § 23.⁴

Constitutional Amendment 5			3898 of 3898 Precincts Reported
	YES	602,863	60.946%
	NO	386,308	39.054%
	Total Votes:	989,171	

State Senator Kurt Schaeffer, the legislator who sponsored the amendment, repeatedly told the media and voters all over the state that the Amendment 5 would give the right to possess firearms for defensive purposes the highest possible level of constitutional protection. According to the St. Louis Post-Dispatch, Schaefer said in advance of the statewide vote that the amendment "strengthens the (constitution's) language to guarantee individuals' right (to possess firearms for defensive purposes) at the highest level, which is unalienable[.]" See Alex Stuckey, [Gun Amendment on Missouri Ballot Draws Support, Fire, ST. LOUIS POST-DISPATCH \(July 28, 2014\)](#). The Kansas City Star reported Schaefer claiming that Amendment 5 would protect

³ This followed the tragic shootings at Sandy Hook Elementary School in Newtown, Connecticut.

⁴ See [Results of Missouri Primary Election, August 5, 2014, Constitutional Amendment 5](#).

citizens' rights to possess firearms for defensive purposes "in the highest way possible," and that "if the amendment passes, it would make Missouri's enumeration of the right to possess firearms for defensive purposes one of the strongest in the country." Allie Hinga, [Proposed Amendment Would Make Missouri Gun Rights Among the Strongest, KANSAS CITY STAR \(July 6, 2014\)](#). Addressing a crowd in Columbia, Missouri, shortly before the vote on Amendment 5, Schaefer described the amendment as ensuring that

"your right... to possess firearms for defensive purposes 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 possess firearms for defensive purposes in any state in the United States[.]"

Dave Horvath, [Schaefer Explains Amendment 5, NEOSHO DAILY NEWS \(July 26, 2014\)](#).

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 right to possess firearms for defensive purposes, and that it would give Missourians protections that *exceeded* those secured under the Second Amendment.

Missouri's Protection for the Right to Possess Firearms Goes Far Beyond the Second Amendment

The [Second Amendment to the United States Constitution](#) has remained 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 their 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 almost identical to its antecedent.

In 1875, Missouri’s foundational document underwent another wholesale revision, including a dramatic change to the provision addressing the citizens’ right to possess firearms for defensive purposes. 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 again strikingly different from the Second Amendment, emphasizing that the right is an *individual* right that may be utilized not merely for self-defense, but also for 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.

When Missouri voters approved Amendment 5, however, Article I, § 23, changed dramatically. The amendment added several totally new elements to the provision, including statements that:

- (1) the rights secured by the provision include 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;
- (4) the courts must apply "strict scrutiny" against "any restriction on these rights;" and
- (5) the right to use weapons for defensive purposes extended to defense of one's family.

The amendment also modified Article I, § 23, by stripping out the prior permission the people had given the government to restrict or ban the wearing of concealed weapons, and expressly giving the general assembly 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."

The resulting constitutional provision 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 specifically declares citizens' rights to possess firearms for defensive purposes "unalienable." Neither the Second Amendment nor any other state's constitution expressly obligates the state to uphold the citizens' rights to possess firearms for defensive purposes. In light of Missouri's constitutional history regarding the right to possess firearms for defensive purposes, the circumstances under which Missouri voters approved Amendment 5, and the major textual revisions that amendment made to Article I, § 23, it is absolutely clear that the people of this state take this particular constitutional right very seriously and demand its protection.

Requiring Courts to Apply Strict Scrutiny Was the Most Important Element of Amendment 5

The most important element of Amendment 5 was the new requirement that “[a]ny restriction on these rights shall be subject to strict scrutiny[.]” Like most other courts throughout the country, Missouri courts have long adhered to the general proposition that laws are presumed to be constitutional. For decades prior to the summer of 2014, however, that general rule had a very clear exception—laws that interfered with a “fundamental right” were presumed to be *un*constitutional and courts were required to subject such laws to “strict scrutiny.”⁵

In 1977 the Missouri Supreme Court issued its ruling in [*Labor’s Educational and Political Club-Independent v. Danforth*, 561 S.W.2d 339 \(Mo. banc 1977\)](#), which invalidated an act containing “a comprehensive scheme for the regulation of campaign finances and disclosure” on the basis that several of its provisions violated the state and federal constitutions. The Court specified that insofar as several of the challenged provisions had “at least an indirect impact on one of the most basic fundamental rights, the right to vote,” as well as the freedoms of expression and association, those provisions were subject to “strict scrutiny.” *Id.* at 348. The Court put the burden on the government officials defending the restrictions “to show a compelling interest” that might justify them; the Court held the restrictions unconstitutional because proponents could not show that those restrictions furthered any discernible purpose the proponent claimed. *Id.*

The Missouri Supreme Court also 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

⁵ The Missouri Supreme Court 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 prohibition against special and local laws in [Mo. Const. Article III, § 40](#).

‘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.

That 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.⁶

Even more recently, in [Ocello v. Koster, 354 S.W.3d 187, 200 \(Mo. banc 2011\)](#), the Missouri Supreme Court reiterated 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); see also [Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503, 512 \(Mo. banc 1991\)](#) (when challenged regulation “impinges on a substantive right or liberty conferred by the constitution” the regulation is presumptively invalid).

So it was absolutely clear in mid-2014 that courts were required to give “fundamental rights” the highest degree of constitutional protection and that the appropriate analysis began with an assumption that a law restricting a fundamental right was **un**constitutional, but it was not nearly as clear what qualified as a

⁶ Even though in [Weinschenk v. State, 203 S.W.3d 201 \(Mo. banc 2006\)](#), the Missouri Supreme Court did not expressly state that the challenged law was presumed to be invalid, the Court nonetheless noted that the government had—and failed to carry—the burden of demonstrating that the restriction on the right to vote was justified. [Id. at 217](#).

fundamental right under Missouri law. At the same time, federal courts were largely coming to the conclusion that, so far as the Second Amendment was concerned, unless a law prevented one from keeping a loaded handgun in one's house, courts would only apply "intermediate scrutiny" to restrictions on the right to keep and bear arms—and intermediate scrutiny seemed to result in the restrictions being upheld in almost every case. *See, e.g., Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014) (upholding law requiring handguns in residence to be stored in locked container when not carried on person); *U.S. v. Carter*, 750 F.3d 462 (4th Cir. 2014) (upholding law prohibiting unlawful users of controlled substances from possessing guns); *Drake v. Filko*, 724 F.3d 426 (3rd Cir. 2013) (upholding law requiring gun license applicants to show "justifiable need" to carry handgun for self-defense); *Kwong v. Bloomberg*, 723 F.3d 160 (2nd Cir. 2013) (upholding \$340 handgun licensing fee).

That is why, when Missouri voters were considering whether to ratify Amendment 5, it seemed that the best way to ensure the highest possible level of constitutional protection for the right to possess firearms for defensive purposes would be to specify that courts were required to apply strict scrutiny to *any* restriction on these rights. But when the Missouri Supreme Court began to interpret Amendment 5, the rules changed.

The Missouri Supreme Court Rejected Its Own Precedent and the National Consensus Regarding Strict Scrutiny.

As noted above, by mid-2014 it was a well established point of Missouri law that where courts apply "strict scrutiny," they begin by presuming that the challenged restriction is *un*constitutional and requiring the government to bear the burden of proving otherwise. *Ocello*, 354 S.W.3d at 200; *Witte*, 829 S.W.2d at 439. But—without any explanation whatsoever—that changed when the Missouri Supreme Court started handing down cases dealing with Amendment 5. *See Dotson v. Kander*, 464 S.W.3d 190, 198 (Mo. banc 2015) ("the addition of strict scrutiny to the constitution does not mean that laws regulating the right to possess firearms for defensive purposes are presumptively invalid"); *State v. McCoy*, 468 S.W.3d 892, 897 (Mo. banc

[2015](#)) (“It is clear that laws regulating the right to possess firearms for defensive purposes are not ‘presumptively invalid’”); [State v. Merritt, 467 S.W.3d 808, 814 \(Mo. banc 2015\)](#) (same); [State v. Clay, 481 S.W.3d 531, 533 \(Mo. banc 2016\)](#) (“Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision.”); [State v. Robinson, 479 S.W.3d 621, 623 \(Mo. banc 2016\)](#) (same).

This key shift—presuming that a statute is constitutional *even when* it implicates a fundamental right and is subject to strict scrutiny—was plainly a departure from the Missouri Supreme Court’s long-established precedent. It was also a departure from a truly overwhelming national consensus. Every single federal appellate court agrees that when a restriction on a fundamental right requires the court to apply strict scrutiny, the regulation being scrutinized gets no benefit of the doubt; the government must prove the regulation serves a compelling governmental interest and is narrowly tailored to that end.⁷ See, e.g., [Cooper v. Harris, 137 S.Ct. 1455, 1464 \(2017\)](#); see also list of additional citations at *Freedom Center Appendix*, A1. This same rule, that laws subject to strict scrutiny are presumptively invalid, prevails in almost every state court. See list of citations at *Freedom Center Appendix*, A2; but see [In re Treatment and Care of Luckabaugh, 568 S.E.2d 338, 347 \(S.C. 2002\)](#) (even under strict scrutiny analysis one attacking a law bears burden of showing it to be unconstitutional).

Especially in light of how challenging it is supposed to be to overcome strict scrutiny, the question of which party is required to justify their position is an important one. In the instant case, the trial court’s Judgment hints that Appellant did not make much effort to counter the testimony offered by the University’s witnesses regarding the University’s alleged interests in retaining the Gun Ban. D90, p. 2. If the Appellant has the burden of proof and persuasion, that relative imbalance

⁷ Most federal appellate courts have also expressly stated that even where only *intermediate* scrutiny applies, the challenged restriction must be presumed to be invalid and the government must prove that it is justified. See, e.g., [Kolbe, 849 F.3d at 133](#).

of testimony might make it difficult for them to prevail, even if the University’s arguments are not particularly strong.⁸ But if the University has the burden of proof and persuasion, even that relative imbalance of testimony is unlikely to be sufficient for it to prevail because, properly understood, strict scrutiny obligates courts to “peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis.” [Witte, 829 S.W.2d at 439 n2.](#)

Again, due to the Missouri Supreme Court’s recent holdings in the Felon-in-Possession cases, this Court is obliged to leave the Appellant with the burden of proving that the Gun Ban is unconstitutional. But it is the Freedom Center’s hope that in light of the Missouri Supreme Court’s inexplicable deviation from precedent and the national consensus regarding the application of strict scrutiny—and particularly because that deviation has significant ramifications on the way Missouri courts will apply strict scrutiny in cases involving the Missouri Bill of Rights⁹—this Court will order the matter transferred to the Missouri Supreme Court for the purpose of reexamining existing law.

II. Broad Restrictions on Law-Abiding Citizens’ Rights to Possess Firearms for Defensive Purposes Violate Article I, § 23.

If this Court declines to transfer this case to the Missouri Supreme Court, it can and should still come to the conclusion that the Gun Ban violates Article I, § 23, as applied to University faculty or staff who only wish to transport a firearm in their vehicle while commuting to and from work and to transfer the firearm from the passenger compartment of the car to their trunk for safekeeping while at the University, or to a University employee who has obtained a concealed-carry permit

⁸ The Freedom Center notes that the law enforcement witnesses and Dr. Choi offered mainly anecdotal observations and speculation rather than statistics or other hard evidence to support their conclusions about the potential impact of loosening the Gun Ban’s restrictions.

⁹ We are concerned that this new, watered-down version of strict scrutiny will ultimately get applied in cases involving other fundamental rights as well, dramatically weakening constitutional protection for those rights. See Abigail E. Williams, [Missed the Mark: The Supreme Court of Missouri’s Faulty Application of Strict Scrutiny to the Right to Bear Arms](#), 82 MO. L. REV. 620 (2017).

and wishes to carry their firearm at work while still abiding by certain geographic restrictions.

The fundamental purpose of constitutional interpretation is to give effect to the will of the voters who adopted the constitutional provision being analyzed. [*Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301, 302 \(Mo. banc 1991\)](#). This brief has thoroughly explained that the voters who approved Amendment 5 believed that the amendment would establish the highest possible degree of constitutional protection for the rights enumerated in Article I, § 23. The Missouri Supreme Court has not yet addressed how courts applying strict scrutiny should assess whether an alleged governmental interest can be considered sufficiently “compelling” to justify a broad prohibition on a fundamental right, or whether a challenged restriction satisfies the “narrow tailoring” requirement that strict scrutiny imposes. This Court should rely on the guidance that the U.S. Supreme Court and federal circuit courts have provided to conclude that, as a matter of law,¹⁰ the trial court erred in concluding that the interests the University asserted in support of the Gun Ban were sufficiently “compelling” for the purposes of surviving strict scrutiny, or, in the alternative, that the trial court erred in concluding that Gun Ban was “narrowly tailored” to restrict only as much freedom as is necessary to serve the University’s asserted interests. *See* [*Krislov v. Rednour*, 226 F.3d 851, 863 \(7th Cir. 2000\)](#) (the questions of whether asserted interest is compelling and whether challenged restriction is necessary are questions of law); [*U.S. v. Doe*, 968 F.2d 86, 88 \(D.C. Cir. 1992\)](#) (whether regulation meets “narrowly tailored” requirement is question of law).

¹⁰ To the extent that this matter requires review of the evidence, the U.S. Supreme Court has stated that in the context of a constitutional challenge “the role of appellate courts ‘in marking out the limits of a standard through the process of case-by-case adjudication’ favors *de novo* review even when answering a mixed question [of law and fact] requires plunging into a factual record.” [*U.S. Bank Nat’l Ass’n ex rel. CWCaptial Asset Management LLC v. Village at Lakeridge, LLC*, 138, S.Ct. 960, 967 n4 \(2018\)](#).

**General Concerns About Safety and Security Cannot Justify
Restrictions on Law-Abiding Citizens' Rights to Possess Firearms**

The Court must focus on the question of whether, as a matter of law, a general governmental interest in reducing violence or theft can be used as a justification for preventing law-abiding citizens from possessing firearms where, as in the case of Article I, § 23, the people have definitively expressed their intent to protect the possession of firearms for defensive purposes. Missourians are well aware that firearms can be extremely dangerous, being designed specifically to enable those handling the firearms to employ deadly force if and when a serious threat should present itself. At the same time, Missourians are also aware that, just like any other unusually valuable or useful possession, firearms might be a target for thieves. The people have unambiguously insisted that courts must protect their right to possess weapons for the purpose of defending people or property even in spite of these inherent risks.¹¹ The idea that the general governmental interest in protecting the public from crime¹² might justify denying law-abiding citizens the means to protect themselves from criminals is utter nonsense. If courts conclude that such general governmental interests will justify broad prohibitions, these judicially-created exceptions will very quickly obliterate the constitutional rule. Thus, as a matter of law, this Court's interpretation of Article I, § 23, must take into account that the people of Missouri, being fully aware of the risks that attend the possession of firearms, nonetheless have demanded protection for "the right of every citizen to keep and bear arms... in defense of his home, person, family and property[.]" This Court is obliged to respect and uphold their choice.

¹¹ See [*District of Columbia v. Heller*, 554 U.S. 570, 592-595 \(2008\)](#) (explaining historical origin and understanding of fundamental right to bear arms for defensive purposes).

¹² See [*In re Care and Treatment of Norton*, 123 S.W.3d 170, 174 \(Mo. banc 2003\)](#).

**None of the Interests the University Identified are
Sufficiently Compelling to Justify the Gun Ban**

The University identified four categories of interests that, it contends, are served by its Gun Ban: (1) ensuring safety of those on University property (including concerns about accidental injuries and firearm-related suicide); (2) promoting security (by minimizing theft on University property); (3) reducing confusion in an “active shooter” situation; and (4) enhancing the learning environment (including attracting students, faculty, and staff.)

As an initial matter, it is important to point out that there is nothing special or unique about the University’s interests in safeguarding the safety and security of its property. Every community aspires to be as safe and secure as possible. The record in this case affords no basis for concluding that the University’s concerns about safety and security are somehow distinct from or more important than those of the surrounding neighborhoods, the City of Columbia, or the State of Missouri as a whole. As the U.S. Supreme Court said in [*West Virginia v. Barnette*, 319 U.S. 624, 638 \(1943\)](#):

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

The Freedom Center does not dispute that maintaining the safety and security of the general public is an interest that would qualify as “compelling” in most contexts. But the entire reason for having a constitutional provision that says “the right of every citizen to possess firearms for defensive purposes, ammunition, and accessories typical to the normal function of such arms... shall not be questioned,” is to ensure that each law-abiding individual who exercises that right will be equipped to defend

their “home, person, family and property” if and when that need should arise.¹³ When the people of Missouri went to the polls to vote on Amendment 5, they were fully aware of the risks firearms pose as well as the ways in which firearms impact public safety and security. They voted (overwhelmingly) to ratify Amendment 5 because they believed that while the government might have a general interest in protecting citizens’ safety and security, denying law-abiding citizens the freedom to possess firearms for defensive purposes must not be considered a valid or acceptable way of addressing the government’s concerns. Put another way, if merely claiming a general interest in public safety and security is sufficient to ban law-abiding citizens from possessing firearms for defensive purposes, Article I, § 23, is no more than the sort of “parchment barrier” of the sort James Madison warned might prove to be ineffective against “the encroaching spirit of power.” [FEDERALIST 48](#) (James Madison).

The third alleged governmental interest the University asserted was reducing confusion on the part of law enforcement officials in an “active shooter” situation. The Freedom Center does not question that under certain circumstances it might be difficult for a law enforcement official to discern whether a civilian with a firearm is a criminal to be confronted or whether they are not. When a court applies strict scrutiny it must ensure that any “compelling interests” asserted by the proponent of the challenged provision are the “actual purpose[s]” of that provision, not just “hypothetical justifications.” [Bostic v. Schaefer, 760 F.3d 352, 377 \(4th Cir. 2014\)](#); [Awad v. Ziriox, 670 F.3d 1111, 1130 n15 \(10th Cir. 2012\)](#) (proponent of challenged provision must still show that addressing an identified compelling interest it is the provision’s “actual purpose”). There is no evidence in the record that the University adopted the Gun Ban for the purpose of preventing law enforcement confusion in an active shooter situation; two witnesses testified that the Gun Ban might help avoid such confusion, but neither claimed this was an issue the University intended to

¹³ Violent crimes can and do take place anywhere, including on university campuses. See [National Center for Education Statistics, Fast Facts: College Crime](#).

address by adopting the Gun Ban. This being the case, this Court cannot rely on this asserted governmental interest to justify upholding the Gun Ban.

As for the fourth interest the University asserted, one of the most troubling aspects of this case is the University's contention that it may disregard fundamental constitutional freedoms if doing so might make the University more appealing to the kind of faculty and staff it wishes to attract. Under Missouri law, the right to possess firearms for defensive purposes is no less fundamental than the freedom of speech, the freedom of assembly, the free exercise of religion, or constitutional guarantees of due process and equal protection of the law. If it should happen that a number of elite potential faculty or staff members decided that they could not be comfortable on a campus that allowed student groups to host speakers who shared highly controversial viewpoints, would courts agree that the University's interest in attracting their preferred staff might justify silencing and/or disbanding the student group? Absolutely not. If an extremely wealthy donor promised to contribute tens of millions of dollars for the purpose of making one of the University's departments one of the finest of its kind in the world, but conditioned that gift on the University's willingness to prohibit the student newspaper from publishing stories critical of the benefactor's business practices, would courts agree that the University might justify freedoms of speech and press in order to advance its academic mission by becoming more prestigious? Of course not. The suggestion that a university's goal of "enhancing its learning environment" might somehow justify depriving people of their fundamental rights is both deeply concerning and without legal support.

Because none of the four interests the University has asserted as justification for its Gun Ban qualify as sufficiently compelling to justify depriving law-abiding citizens of their fundamental right to possess firearms for defensive purposes, this Court should reverse the trial court's judgment and rule in favor of the Appellants.

**The Gun Ban is More Restrictive Than Necessary to Address
Any of the Interests the University has Asserted**

If the Court decides that one or more of the interests the University has asserted is “compelling,” the next step in the strict scrutiny analysis is to determine whether the Gun Ban is “narrowly tailored” to meet that interest.

A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of [the fundamental right] (is the least-restrictive alternative).

[*Republican Party of Minn. v. White*, 416 F.3d 738, 751 \(8th Cir. 2005\).](#)

The crucial fact for the purposes of the “narrow tailoring” assessment is that there is virtually no nuance to the Gun Ban; it applies to everyone who comes on University property, with the only exceptions being for “regularly approved programs or by university agents or employees in the line of duty.” D90, p. 2. Thus, even though Article I, § 23, states that every law-abiding citizen has a fundamental right to possess firearms for defensive purposes, on University property ***no one*** has a right to possess firearms for defensive purposes. There is no evidence that prior to adopting the Gun Ban the University considered whether the restriction might be just as effective if its scope was limited to only those persons previously shown to have committed crimes or likely to cause harm to themselves or others. There is no evidence that prior to adopting the Gun Ban the University considered whether the restriction might be just as effective if its scope was limited to only those persons below a given age, who might arguably lack the maturity needed to safely handle firearms. The indiscriminate scope of the Gun Ban and the University’s apparent failure to consider any less-restrictive alternatives to the Gun Ban shows that it cannot be considered “narrowly tailored” to any purpose, much less the purposes the University has asserted.

In Count II of the Petition the Appellant simply asks the University to give its adult, law-abiding employees permission to have a firearm in the passenger

compartment of a vehicle while commuting to and from work. D90, p. 3. For this accommodation, the adult, law-abiding owner of the gun would be physically present and in control of the gun. There is virtually no risk that the gun would be stolen from the owner while the owner is present and, indeed, if someone attempted to carjack the gun's owner that would indicate a situation in which the owner actually needed the ability to use the weapon to defend themselves.

Count III of the Petition goes but one step farther, asking that once an employee has parked on University property, the University might give its adult, law-abiding employees permission to move their gun from the passenger compartment of the vehicle to the trunk for safe-keeping while the employee conducts activities within the scope of their employment. D90, p 3. Once again, for this accommodation, the adult, law-abiding owner of the gun would be physically present and in control of the gun. There is virtually no risk that the gun would be stolen from the owner while the owner is present and, indeed, if someone attempted to steal the gun while the owner was present, that would indicate a situation in which the owner actually needed the ability to use the weapon to defend themselves. Although the record does not support a conclusion that there is a legitimate concern that vehicle trunks will prove inadequate for the task of protecting firearms from theft while the owner is away, any concern the University had along those lines could be addressed by requiring an additional layer of security, such as requiring the gun to be stored not only in the trunk, but in a gun safe as well.

The remedies the Appellant has requested in Counts II and III reveal how easy it would be for the University to impose less-restrictive alternatives to the Gun Ban—particularly where University employees are concerned¹⁴—while still satisfactorily

¹⁴ Unlike persons merely visiting the campus, University employees are persons who regularly appear on campus and have, at least to some extent, been vetted by the University. Campus security could be made aware of any employees who have been given permission to keep a firearm in their vehicle, which would allow them to (1) pay particular attention to the vehicles that are known to have weapons in them, just in case a thief might attempt to break into them, or (2) check to ensure that one of these employees does not accidentally forget to leave their gun in their trunk.

serving whatever compelling interests the University might have in maintaining safe and secure campuses. As the accommodations proposed in Counts II and III would not allow the University employee to carry the firearm away from their vehicle, University security would know that anyone carrying a firearm on campus was necessarily not complying with the permissions the University had given them. Thus, the University could quite easily make these accommodations the Appellant has proposed without seriously diminishing its present ability to keep its campus safe and secure.

The accommodation the Appellant has suggested in Count IV is also quite limited and nothing in the record suggests that the University is incapable of fashioning a process whereby adult, law-abiding University employees with valid concealed-carry permits could obtain the University's permission to carry concealed firearms while at work. If the University is concerned about trustworthiness, it could require applicants to complete the very same background review process it already applies to the security officials who are authorized to carry firearms. If the University is concerned about training, it could require applicants to complete a firearms training program similar to what the University already requires for security officials who are authorized to carry firearms. The record is devoid of any evidence suggesting that an adult, law-abiding University employee who has completed the same background checks and firearms training required of University security officials would jeopardize the safety or security of those on University property. Because each of the accommodations the Appellant has suggested represent simple, less-restrictive alternatives to the Gun Ban that would still adequately serve any legitimately compelling interest the University has in keeping its property safe and secure, the Gun Ban cannot survive strict scrutiny.

The University's third allegedly compelling interest, its desire to avoid law enforcement confusion in the event of an active shooter event, is even more easily set aside. The accommodations the Appellant proposes in Counts II and III would not allow the adult, law-abiding University employee to carry their firearm away from their vehicle and onto campus. There is no evidence to suggest that an adult, law-

abiding University employee is more likely than any non-University employee to bring their firearm onto campus during an active shooter situation, so there is no reason at all to conclude that the University would compromise its interest in avoiding confusion on the part of law enforcement officials if they allowed the accommodations requested in Counts II or III.¹⁵

In short, the Gun Ban is the equivalent of using a sledgehammer to kill a fly. Although the record does not support a conclusion that University property is entitled to greater safety or security than the surrounding neighborhoods or towns, or that the Gun Ban is likely to significantly reduce the risks of violence or theft on University property, the University has nevertheless prohibited almost every law-abiding adult on its property from exercising their fundamental constitutional right to possess firearms for defensive purposes, denying most of its employees even the most minimal accommodations imaginable. This is the antithesis of “narrow tailoring.” This Court must rule that the Gun Ban, as applied in this case, cannot survive strict scrutiny and, thus, violates Article I, § 23.

CONCLUSION

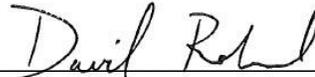
The people of Missouri have chosen to enact unique and meaningful constitutional protections for their rights to possess firearms for defensive purposes. Missouri’s courts have an obligation to facilitate the exercise of these rights and to prevent unjustifiable governmental limitation of these rights. In light of the important questions of general interest presented by this case, and in order to ensure that Missouri courts are properly applying the strict scrutiny standard, the Freedom

¹⁵ Furthermore, if the University granted a few adult, law-abiding employees permission to carry concealed weapons while on University property, it could give them specific instructions to reduce the potential for confusion. For example, it could require them to keep their weapon holstered at all times unless directly confronted with someone threatening another person with deadly force. It could also require them to immediately shelter in a pre-established location—of which law enforcement officers would be informed—in the event of an active shooter situation, dramatically reducing the likelihood that law enforcement officers would mistake an adult, law-abiding University employee with a concealed-carry permit for a hostile criminal.

Center respectfully asks this Court to order this case transferred to the Missouri Supreme Court

In the alternative, we ask the Court to rule in favor of the Appellant and to reverse the trial court's judgment. A conclusion that the University's Gun Ban is consistent with strict scrutiny would call into question the validity of our constitutional system. The Missouri Constitution begins with the statement that "all political power is vested in and derived from the people... [and] is founded upon their will only,"¹⁶ But if, despite the people's recent adoption of Amendment 5, this Court determines that even "the most demanding test known to constitutional law,"¹⁷ allows an unelected government entity to prohibit law-abiding adults from exercising "every citizen's right to keep and bear arms... in defense of his home, person, family, and property," no serious person could believe that *the people* actually determine the limits of governmental power. To the contrary, if the judiciary concludes that, despite the plain and emphatic language of Article I, § 23, the government may broadly ignore citizens' fundamental right to possess weapons for defensive purposes, the only rational conclusion would be that, in the words of Article I, § 2, this government has failed in its chief design.

Respectfully submitted,



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¹⁶ Mo. Const. Art. I, § 1.

¹⁷ *Kolbe*, F.3d at 133.

THE FREEDOM CENTER'S INTEREST IN THIS CASE

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. We emphasize 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 citizens and lawmakers in the evaluation and drafting of statutes and constitutional amendments that are intended to enhance individual liberty.

The Freedom Center's Director of Litigation was heavily involved in the drafting of the amendment to Art. I, § 23, which voters of the state overwhelmingly ratified on August 5, 2014. The Freedom Center also filed *amicus* briefs with the Missouri Supreme Court in *State v. Clay*, 481 S.W.3d 531 (Mo. banc 2016); *State v. Robinson*, 479 S.W.3d 621 (Mo. banc 2016), and *State v. Lomax*, Case No. SC94989 (consolidated into *Robinson*), the first Missouri Supreme Court cases interpreting the amended version of Article I, § 23. On the motion of Pierre Clay's counsel, Nick Zotos, the Missouri Supreme Court allowed our Director of Litigation to argue the merits of *State v. Clay* in place of Mr. Zotos.