SB727, the Right to Keep and Bear Arms, and Missouri Courts

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by Dave Roland

My name is Dave Roland and I am the Director of Litigation and co-founder of the Freedom Center of Missouri, a non-profit, non-partisan law firm dedicated to research, litigation, and education in defense of state and federal constitutional principles. I have spent my entire career focusing on constitutional law while working with groups such as the Freedom Forum's First Amendment Center, the Becket Fund for Religious Liberty, the Institute for Justice, and, just prior to founding the Freedom Center, with the Show-Me Institute. I drafted the original version of Amendment 5, which Missouri voters adopted in 2014 to amend Article I, section 23 of the Missouri Constitution. I also had a significant role in drafting Missouri's Second Amendment Preservation Act. This commentary is being offered for informational purposes so that legislators may have a better understanding of how Missouri courts have interpreted legal provisions that relate to citizens' right to keep and bear arms for defensive purposes.

<u>Missouri courts consistently interpret legal provisions in ways that are *hostile* to the right to keep and bear arms.</u>

In preparing this commentary I have considered statements other attorneys have submitted regarding this bill. Some, such as my friend Marc Ellinger, have explained that if Missouri courts apply the usual rules of interpretation and give proper effect to the protections Article I, section 23 of the Missouri Constitution, the phrasing of SB727 should not pose any risk to the right to keep and bear arms. I wish to be clear that I do not disagree with Mr. Ellinger's statements about how courts *should* interpret the various statutes and constitutional provisions that are relevant to this proposed bill. In an ideal world, I would likely agree with his assessment. But the past decade, in which I have both drafted and argued cases in support of Missouri's protections for the right to keep and bear arms, has repeatedly shown that even where statutes or constitutional provisions are carefully crafted to protect citizens' right to keep and bear arms, Missouri courts *routinely* find ways of interpreting those provisions in ways that are hostile to this constitutional right. Simply put, even if the legislature has the best of intentions when it comes to securing this right, it would be exceedingly unwise to make any statutory changes that could *even conceivably* be read as expanding governmental authority to restrict law-abiding citizens' possession and use of firearms. I hope the remainder of my letter will clearly illustrate this problem.

In 2014 a solid majority of Missouri voters ratified Amendment 5, which I played a major role in drafting. That amendment made major changes to the preexisting text of Article I, section 23 of the Missouri Constitution, adding 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, section 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, section 23, it should have been absolutely clear to Missouri courts that the people of this state take this particular constitutional right very seriously and demand its protection.

A central element of Amendment 5 was the requirement that any restriction on the rights protected under Article I, section 23, was supposed to be subjected to "strict scrutiny," the most stringent form of constitutional analysis. For several decades prior to the adoptions of Amendment 5, "strict scrutiny" had a very particular meaning: a court assessing a restriction on a fundamental right must begin by assuming that the restriction is *unconstitutional* and the government officials defending the restriction had the burden of demonstrating "compelling interest" that might justify the restriction of that right and also that the restriction in question was "narrowly tailored" so as not to burden more of the right than was

necessary to serve the government's compelling interest. *See, e.g., City of St. Louis v. State*, 382 S.W.3d 905, 914 (Mo. banc 2012); *Ocello v. Koster*, 354 S.W.3d 187, 200 (Mo. banc 2011); *Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 (Mo. banc 1992); *Labor's Educational and Political Club-Independent v. Danforth*, 561 S.W.2d 339, 348 (Mo. banc 1977). As the Eighth Circuit described it in *Stiles v. Blunt*, 912 F.2d 260, 263 (8th Cir. 1990):

> 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.

But when it came time to apply the amended version of Article I, section 23, however, the Missouri Supreme Court held that "Amendment 5 *did not substantially change article I, section 23* but rather… simply enshrined the status quo as to the right to bear arms." *State v. Clay*, 481 S.W.3d 531, 536 (Mo. banc 2015). More concerningly, despite Amendment 5's specification that restrictions on the rights stated in Article I, section 23, must be subjected to "strict scrutiny," in *Clay* and several other cases interpreting the amended provision the Missouri Supreme Court abandoned its own precedent and the overwhelming national consensus regarding the very meaning of "strict scrutiny." *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). Instead, Missouri courts are now instructed to presume that restrictions on the right to keep and bear arms *are constitutional*. Even worse, although the overwhelming national consensus regarding "strict scrutiny" requires the government to (1) identify a compelling government interest to be served by the restriction and (2) show that the restriction is "narrowly tailored" to serve that compelling government interest, a majority of the Missouri Supreme Court has concluded that Missouri courts may apply "alternate and less stringent strict scrutiny tests" such as "whether a regulation imposes 'reasonable, non-discriminatory restrictions' that serve 'the State's important regulatory interests,' or whether the encroachment is 'significant,'" *Clay* at 535, or whether a regulation is supported by "a long history, a substantial consensus, and simple common sense." *Merritt* at 814. In other words, at least as far as the right to keep and bear arms is concerned, the Missouri Supreme Court has rejected *every aspect* of "strict scrutiny" that makes that test such a valuable tool for securing constitutional freedoms.

Unfortunately, Missouri's lower courts have wholeheartedly embraced the Missouri Supreme Court's guidance. Indeed, in the time that has passed since Missouri voters overwhelmingly adopted Amendment 5 I am not aware of *even one* case in which a Missouri court has relied on Article I, section 23, to invalidate a law or policy restricting a citizen's right to keep and bear arms. To the contrary, the Missouri Court of Appeals upheld a University of Missouri policy that banned anyone who was not a state employee from possessing *any kind of weapon* on *any university-owned property*; state employees were permitted to keep firearms in locked vehicles, but were not allowed to carry firearms anywhere on university property. Relying on *Dotson* and its progeny, the Court of Appeals insisted that it must presume the restriction to be constitutional and that the challenging party had to prove that the restriction "clearly contravened" Article I, section 23. *State ex rel. Schmitt v. Choi*, 627 S.W.3d 1, 12-14 (Mo. App. W.D. 2021). Also – crucially for the bill at issue here – the Court of Appeals held that the right to keep and bear arms had limited (if any) application "in sensitive places such as *schools* and

government buildings." *Id.* at 14. The Court of Appeals then proceeded to declare that the government had a compelling interest in "ensuring public safety and reducing firearm-related crime" and that the *near-total ban* on possessing weapons on University-owned property was "narrowly tailored" to address that compelling interest. *Id.*

The legislature should also be aware of the lengths to which some courts have gone to use the definition of "school" to justify restrictions on the possession of firearms by law-abiding citizens. Shortly after the passage of Amendment 5, the St. Louis Zoo sued a gun rights activist named Jeffry Smith who had publicly stated his intent to defy the Zoo's "no weapons" policy by carrying a gun onto its grounds. The Zoo claimed (among other things) that it constituted a "elementary or secondary school facility" or a "gated amusement park" within the meaning of § 571.107, RSMo. The St. Louis City Circuit Court held that the Zoo was a "school facility" because it sometimes hosted school groups and educational events and because a "state-regulated pre-school" operates on part of the Zoo's property. The court also rooted its ruling in "the readily apparent underlying public policy of protecting children in educational settings from the dangers and distractions of firearms." *Zoological Park Subdistrict of the Metropolitan Park Museum v. Smith*, Case No. 1522-CC09876-01, Order and Judgment, *10 (Mo. Cir. Ct., May 6, 2020). The trial judge specifically rejected Smith's Article I, section 23 challenge to the Zoo's "no weapons" policy, holding that "neither the Second Amendment nor Article I, § 23 provides the Defendant with an affirmative defense which can validly overcome the Zoo's right, under the laws of this State, to prohibit Defendant from carrying firearms onto the Zoo's property." *Id.* at 12. Even worse, the circuit court held that Mr. Smith had to pay the Zoo's litigation costs and attorney fees because his statements that he intended to exercise his right to keep and bear arms forced the Zoo to take legal action to prevent him and others from engaging in "intentional misconduct."

In summary, although it is clear that Article I, section 23 of the Missouri Constitution was designed to give Missourians the highest possible level of

constitutional protection for the right to keep and bear arms, Missouri courts have *completely gutted* that provision. If Missouri courts will use a general interest in "public safety and reducing firearm-related crime" to justify a near-total ban on the carrying of firearms for defensive purposes, then Article I, section 23 is practically worthless, so far as Missouri courts are concerned. With that being the case, and with the courts' demonstrated willingness to use the so-called "sensitive places" rationale to justify interpretations of state law that would allow restrictions on the possession of firearms, I implore the legislature to exercise unusual caution before amending state statutes in any way that courts might seize upon as a justification for allowing such restrictions.

Thank you very much for your time and consideration.