IN THE SUPREME COURT OF MISSOURI

No. SC85674

ALVIN BROOKS, et al.,
Respondents,

v.

STATE OF MISSOURI, et al.,
Appellants.

Petition For Review
From The Circuit Court of the City of St. Louis,
The Honorable Steven R. Ohmer

Brief of Appellants State of Missouri and Attorney General

Respectfully submitted,

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Jurisdictional Statement

The issue in this case is whether House Bills 349, 120, 136, and 328 – repealing §571.030, RSMo and enacting three new statutes in lieu thereof, §§50.535, 571.030, and 571.094 – violate the Missouri Constitution. The trial court below held that the legislation does violate the constitution, specifically, Article I, §23. Because this case involves the validity of the statutes of this state, this Court has exclusive appellate jurisdiction. Mo. Const. art. V, § 3.

Statement of Facts

I. The 2003 Amendments

On September 11, 2003, a super-majority of the Missouri General Assembly overrode a gubernatorial veto to pass House Bills 349, 120, 136, and 328 (the "2003 Amendments"), excluding certain Missourians under certain circumstance from this state's long-standing criminal law against carrying concealed weapons. The 2003 Amendments repeal §571.030, RSMo, and enact three new sections in lieu thereof, §§50.535, 571.030, and 571.094. App. A25.

Pursuant to §21.250, 2003 Mo. Laws 843-844, the 2003 Amendments were to go into effect 30 days after the override – on October 11, 2003.

The main component of the 2003 Amendments repeals §571.030, RSMo, pertaining to the crime of unlawful use of weapons, including the carrying of concealed weapons, and enacts a new section with the same number, in essence simply adding additional language to its predecessor. That new language establishes, in major part: (i) that persons who are 21 years old may transport a concealable firearm in the passenger compartment of a motor vehicle, so long as the concealable firearm is otherwise lawfully possessed; (ii) that subdivisions (1), (8), and (10) of subsection 1 of the statute do not apply to persons with a valid concealed carry endorsement; and (iii) that subdivisions (3), (4), (5), (6), (7), (8), (9), and (10) of subsection 1 of the statute do not apply to persons engaged in the lawful act of self-defense pursuant to §563.031, RSMo. App. A26-A27.

The 2003 Amendments enact a new law, §571.094, which establishes a process for Missouri residents to obtain the concealed carry endorsement now referenced in §571.030. App. A27. This process is similar to the process already in place under §571.090, RSMo (2000), authorizing persons to obtain a permit to acquire a concealable weapon. Like §571.090, the new process begins with the local sheriff; establishes qualifications for applicants; permits the sheriff to require a fee; requires the sheriff to make inquiry into the accuracy of the statements made in the application; and provides for appeal, beginning in small claims court, upon denial of an application. App. A28-A34, A36-A42.

The new process however, differs in some respects from §571.090. For example, new §571.094 provides that after obtaining a certificate of qualification from the sheriff, applicants must apply to the Director of the Missouri Department of Revenue for a driver's license or nondriver's license that reflects a concealed carry endorsement. App. A30-A31. Pursuant to § 571.094, applicants must take firearm safety training, App. A29; they cannot be the object of an active, full order of protection, App. A28; they must be at least 23 years old, App. A28; they must pay an application fee of up to $100, and a renewal fee of up to $50, App. A31; and they must be fingerprinted, App. A30.

Finally, §571.094.20 lists certain places where, and circumstances under which, the general legislative prohibition against concealed weapons continues notwithstanding a person's concealed carry endorsement. App. A34-A36.

As noted, new §571.094 provides that a sheriff may collect a fee, not to exceed $100, for each application, and a renewal fee not to exceed $50. This fee is more fully addressed in the new §50.535. This section provides that fees shall be deposited by the county treasurer into a separate, interest-bearing fund, the county sheriff's revolving fund, to be expended at the sheriff's direction. App. A25. The "fund shall only be used by law enforcement agencies for the purchase of equipment and to provide training." *Id*. Any balance in the fund carries over from year to year. *Id.* A sheriff in a first class county may designate police chiefs of any town, city, or municipality within the county to handle applications for concealed carry endorsements, and pay the police chiefs out of the revolving fund.

II. Plaintiffs sue the State

On October 8, 2003, plaintiffs filed suit in the Circuit Court for the City of St. Louis, naming two parties defendant – the State of Missouri and the Missouri Attorney General, in his official capacity. LF 13. Plaintiffs sought a permanent injunction to prevent enforcement of the 2003 Amendments, and a declaratory judgment that the 2003 Amendments violate five provisions of the Missouri Constitution: Article I, § 23 – right to bear arms; Article X, § 21 – Hancock amendment; Article I, § 1 – political power vested in and derived from the people; Article III, § 1 – exercise of police power; and unconstitutionally vague.[1] LF 14-24.

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[1] **Plaintiffs cited Mo. Const. art. II, § 1 (separation of powers) in their**

petition, LF 19, but never briefed or argued that provision as a basis for setting aside the new law. Therefore, plaintiffs abandoned that ground.

Plaintiffs did not challenge the law under the United States Constitution.

III. Preliminary matters: venue, intervenors, and preliminary injunction

When plaintiffs filed suit, they made a tactical decision to forego a temporary restraining order and, instead, sought same-day entry of a preliminary injunction. Tr. Vol. 1, p. 3; LF 1. Attorneys for plaintiffs and defendants appeared in court that afternoon. Tr. Vol. 1, p. 3. Before the court took up plaintiffs' motion for preliminary injunction, attorneys for the State and Attorney General made a limited appearance and moved to transfer venue to the Circuit Court of Cole County, Missouri. Tr. Vol. 1, p. 3; LF 25. The trial court heard argument on the motion, and recessed briefly to consider it. Tr. Vol. 1, p. 12. When court reconvened some moments later, and just as it was preparing to grant the State's motion, Tr. Vol. 1, pp. 30, 130-131, plaintiffs' attorney made an oral motion to add a third defendant, the Sheriff of the City of St. Louis. Tr. Vol. 1, p. 12. Plaintiffs' counsel argued that the sheriff "would clearly establish venue in the city. He also, under the conceal and carry law, is the officer charged with the enforcement of the law on the local level. We think this takes care of the venue issue." Tr. Vol. 1, p. 12-13. The court recessed to the following afternoon. Tr. Vol. 1, p. 19.

By the time court reconvened on October 9, plaintiffs had filed an amended petition, different from the original petition only in its addition of the City of St. Louis Sheriff as a defendant. LF 41. The court heard additional argument concerning the motion to transfer venue, including the State's argument that joinder was pretensive.

Tr. Vol. 1, p. 22-26. Counsel for the sheriff appeared, and argued that the sheriff may not be an appropriate defendant, because pursuant to Chapter 57, RSMo, he did not enforce the state's criminal laws. Tr. Vol. 1, p. 26-27. The court denied the motion to transfer venue. Tr. Vol. 1, pp. 30-31; LF 63.

The court then heard argument on plaintiffs' motion for preliminary injunction, Tr. Vol. 1, p. 34 - 99; plaintiffs offered no evidence in support of their claims. The court did not rule, but recessed until the following afternoon. Tr. Vol. 1, p. 99.

The next day, October 10, Bull's Eye, LLC, and Geri and Jim Stephens filed a motion to intervene, which the trial court granted. Tr. Vol. 1, pp. 101, 107; LF 80, 100. The intervenors, who are in the business of providing firearms training, immediately put on evidence through the testimony of Geri Stephens, about the effect that an injunction would have on their business. Tr. Vol. 1, p. 108-118.

The court subsequently entered a preliminary injunction, declaring that plaintiffs had established a likelihood of success only on the merits of their challenge under Article I, §23, of the Missouri Constitution. Tr. Vol. 1, pp. 139-140; LF 101. The court specifically found that plaintiffs had failed to demonstrate a likelihood of success on any of their other constitutional claims. *Id.* Tr. Vol. 1, pp. 134-135; LF 101. To effectuate the preliminary injunction, plaintiffs were ordered to, and did, post a bond in the amount of $250,000. LF 1, 101.

Finally, the court established time frames for filing answers and briefing, and set October 23, 2003 for the final hearing.[2] LF 2.

IV. Final hearing

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[2] **That evening, the State and Attorney General filed a petition for a writ of prohibition in the Missouri Court of Appeals, Eastern District, styled *State of Missouri ex rel. State of Missouri v. The Hon. Steven R. Ohmer, Circuit Judge,* case no. ED83562, concerning the denial of their motion to transfer venue and the entry of the preliminary injunction. The Court of Appeals denied the petition. The State and Attorney General then filed a similar petition in this Court, case no. SC85619. The Court denied the petition on October 13, 2003, stating that extraordinary relief is not available when the law provides a remedy by later appeal.**

Court reconvened on October 23, 2003 for a final hearing on all matters. Tr. Vol. 2, p. 10. The judge had before him plaintiffs' amended petition, LF 41; the State's and intervenor's answers, LF 90, 148; the parties' briefing, LF 241, 266, 286, 311, and 325; an amicus brief from the National Rifle Association, LF 211; and two stipulations. Plaintiffs and the State stipulated that plaintiff Lyda Krewson is a resident of the City of St. Louis, an alderman, and a Missouri taxpayer; and that plaintiff Alvin Brooks is a resident of Kansas City, a councilman and mayor pro-tem of that city, and Missouri taxpayer. Tr. Vol. 2, pp. 11-12. Plaintiffs and the St. Louis sheriff stipulated that the sheriff had ordered, but not yet received or paid for, certain fingerprinting equipment and that the equipment he is presently using is on loan. Tr. Vol. 2, p. 11.

Plaintiffs offered no evidence on any of their claims other than their claim that the 2003 Amendments violated Article X, §21 of the Missouri Constitution. With respect to that claim, they put on evidence through the testimony of Captain Phillip Moran, of the Jackson County Sheriff's Department, and Greene County Sheriff Jack L. Merritt; they offered no other evidence. The State responded by putting on the testimony of Camden County Sheriff John W. Page and Cape Girardeau County Sheriff John D. Jordan, and recalling Greene County Sheriff Merritt and Captain Moran.

The four witnesses testified that they presently take applications and process payments for any number of different reasons having nothing to do with the concealed carry law. Tr. Vol. 2, pp. 31 (Moran); 95 (Merritt); 55 (Page); and 77 (Jordan).

They take and transmit to the Missouri Highway Patrol fingerprints for any number of different reasons having nothing to do with the concealed carry law. Tr. Vol. 2, pp. 31 (Moran); 97-98 (Merritt: 30,00-40,000 sets per year); 57 (Page: 3,500 sets per year); and 78 (Jordan: 7,00-9,000 sets per year).

They perform background checks on any number of individuals for any number of reasons having nothing to do with the concealed carry law. Tr. Vol. 2, pp. 31 (Moran); 95-96 (Merritt: over 30,000 per year); 56 (Page: 2,000-2,500 per year); and 80 (Jordan: over 5,000 per year).

And they issue other types of permits, and revisit their issue on application for renewal or revocation. Tr. Vol. 2, pp. 31-32 (Moran); 95 (Merritt); 55 (Page); and 77 (Jordan). One such type of permit that the sheriffs' departments issue, separate from the certificate of qualification for concealed carry, is the permit to acquire a concealable weapon under §571.090. Tr. Vol. 2, pp. 3-32 (Moran: 5,000-6,000 per year); 95 (Merritt: 3,500-4,000 per year); 55-56 (Page: 500-600 per year); and 78 (Jordan: over 800 per year).

None of the witnesses knew for certain what their expenses associated with the new law would be. *E.g.* Tr. Vol. 2, pp. 37-38 (Captain Moran). And while each of the witnesses could hazard a guess at the number of applications he might receive if the law went into effect, none of the witnesses could say for certain how many applications he would receive. Tr. Vol. 2, pp. 36 (Moran); 99 (Merritt); 59 (Page); and 83 (Jordan). Generally, the witnesses did expect an initial influx of applications when the law goes into effect, but expected that the rate would

decrease over time. Tr. Vol. 2, pp. 33 (Moran); 99 (Merritt); 61 (Page); and 84 (Jordan). Each would cover the influx of applications in different ways. Captain Moran (Jackson County) planned to hire five full-time employees (three clerical staff persons and two deputies), whom he expected could assume other duties not related to the concealed carry law as the applications subsided. Tr. Vol. 2, pp. 15, 33. Sheriff Merritt (Greene County) testified that he would hire one part-time person. Tr. Vol. 2, pp. 46-47. Sheriff Page (Camden County) planned to hire no additional personnel, and to cover any staffing needs with overtime. Tr. Vol. 2, pp. 60-61. Sheriff Jordan (Cape Girardeau County) did not plan to hire any additional staff or to use any overtime. Tr. Vol. 2, pp. 83-84.

All of the witnesses testified that they planned to charge $100 per initial application. Tr. Vol. 2, pp. 13 (Moran); 103 (Merritt); 62 (Page); and 85 (Jordan). Of that amount, $38 would be forwarded to the Missouri State Highway Patrol for the state and federal fingerprint check, and the sheriffs would deposit the remaining $62 in the new county revolving fund. Tr. Vol. 2, pp. 13 (Moran); 48-49 (Merritt); and 62 (Page).

All of the witnesses – for the plaintiffs and the State – agreed that the application fees collected would exceed their total costs associated with processing the applications. Tr. Vol. 2, pp. 36-37 (Moran); 103-105 (Merritt); 63 (Page); and 85 (Jordan).

The parties rested after the witnesses' testimony. Tr. Vol. 2, pp. 52, 109. After arguments, the court took the case as submitted. Tr. Vol. 2, pp. 203.

V. Judgment and appeal

The court entered its final judgment on November 7, 2003, LF 5-6, awarding plaintiffs a declaratory judgment on the sole legal ground that the 2003 Amendments violate Article I, §23, and permanently enjoining the enforcement of the 2003 Amendments in their entirety.

The court held that the individual plaintiffs had "standing as individual residents, Missouri citizens and taxpayers to litigate" their claims, but none had standing to do so in their official capacities, so dismissed the official capacity claims with prejudice. LF 404; App. A4. Plaintiff Institute for Peace and Justice lacked any standing, and its claims were dismissed with prejudice. *Id.*

The court rejected plaintiffs' Hancock claim, brought under Article X, §21. First, the court held, it was "certainly questionable whether this law establishes a new activity on the part of existing Sheriffs' duties." LF 405; App. A5. Moreover, there was "no evidence to support the proposition that the law will result in increased costs to the Sheriffs' offices of the State. It is clear that the [$100] application fee will be more than adequate to cover any increased costs." *Id*. Therefore, the funding mechanism adequately satisfied the Hancock amendment. *Id*.

The court rejected the claim under Article III, §1. "Regulation of the carrying of firearms and other dangerous weapons is an exercise of the State's police power." LF 405; App. A5. Thus, the "enactment of this legislation is clearly within the broad powers of the legislature to secure the peace, comfort, safety, health and welfare of the people of the State of Missouri." LF 406; App. A6. The court stated that it could not and would not "question the

wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination." *Id.*

The court rejected plaintiffs' claim under Article I, §1, that the new law was against the will of the voters as expressed in the 1999 referendum. There was "certainly no evidence to support the proposition that the legislature somehow acted improperly in its procedures in passing this law." LF 406; App. A6.

The court also rejected plaintiffs' vagueness challenge. Noting that a statute is impermissibly vague only if it fails to provide a person of ordinary intelligence a reasonable opportunity to learn what is prohibited, the court held that the "law is what it is and this Court does not find it to be void due to vagueness." LF 407; App. A7.

The court then turned to the "crux of this case," plaintiffs' challenge under Article I, §23, framing the issue as whether this constitutional provision is "a check on the inherent and plenary power of the General Assembly to enact" the new law, or "a recognition of the authority of the General Assembly to regulate the right to bear arms." LF 408; App. A8. In reaching its conclusion that the new law was the former, the court acknowledged that the new law was entitled to the strong presumption that it is constitutional, LF 408, App. A8; that plaintiffs bore an "extremely heavy burden" to demonstrate that it clearly and undoubtedly, or plainly and palpably violated the constitution, LF 409, App. A9; and that the words in the constitutional provision are to be afforded their plain and ordinary meaning, LF 410, App. A10.

The court surveyed like constitutional provisions from other states, but noted that it had discovered no ruling from another state bearing on the issue before it. LF 411-415; App. A11-

A15. The court then reviewed Missouri case law interpreting the legislature's various enactments of time, place and manner restrictions on the bearing of firearms, and the banning of concealed weapons, but noted that the cases did not address the distinct issue presently before it. LF 415-416; App. A15-A16. The court also reviewed "numerous [Missouri] laws banning concealed weapons, [including] exceptions for authorizing concealed weapons in limited circumstances, through the exercise of [the legislature's] inherent police power." LF 416-417; App. A16-A17.

Finally, the court looked at the constitutional debates of 1875, specifically, the remarks of Mr. Gantt. LF 417-419; App. A17-A19. The court noted Mr. Gantt's expression of concern about a Kentucky decision striking a Kentucky law banning concealed weapons, on the ground that that law violated the right to bear arms provision of their constitution. *Id*. Summing up its review of the debates, the court held,

> It seems clear from this history that the intent of the framers and the people who adopted the Constitution were to not justify the wearing of concealed weapons. This language was put into the Constitution due to a court striking down a law banning concealed weapons. This is a direct limitation on the inherent power of the legislature to regulate the manner, time and place of the citizens' right to bear arms. While the inherent power and police power of the legislature through Article III, Section 1 of the Missouri Constitution allows the regulation of the right to bear arms, this

> must be done under the limitation of Article I, Section 23 of the Missouri Constitution. To read the Constitutional provision and to find otherwise would make the words of the second clause of Article I, Section 23 a nullity. Clearly, that was not the intent of the framers or of the people in adopting the Constitution.

LF 419; App. A19.

Accordingly, the court held that plaintiffs were entitled to declaratory judgment and permanent injunctive relief on the basis of Article I, §23. LF 419-420; App. A19-A20. The court enjoined the defendants and "all parties, employees or agents working for or in concert with the State of Missouri ... from enforcing §§50.535, 571.030 and 571.094 (House Bills No. 349, 120, 136 and 328, 92nd General Assembly (commonly known as the "Conceal and Carry" or "License to Carry" Law)," and ordered that the law should not take effect pending appellate review. LF 421-422; App. A21-A22.

The court left the bond in place pending resolution of any appeal, and taxed costs "to the Defendants." LF 422; App. A22.

The instant appeal followed. LF 398.

Points Relied On

I.

The trial court erred in granting a permanent injunction and in declaring the 2003 Amendments to be unconstitutional because those amendments do not "clearly and undoubtedly" contravene, nor "plainly and palpably" affront, Article I, Section 23 of the Missouri Constitution in that the 2003 Amendments are merely an exercise by the General Assembly of its authority to regulate the time, place, and manner of bearing arms – authority that Article I, Section 23 reserves and preserves.

Linton v. Missouri Veterinary Medical Board, **988 S.W.2d 513 (Mo. banc 1999)**

Three Rivers Junior College District of Poplar Bluff v. Statler,

421 S.W.2d 235 (Mo. banc 1967)

State v. Wilforth, **74 Mo. 528 (1881)**

Mo. Const. art. I, § 23

II.

The trial court erred in denying the defendants' motion to transfer venue, because venue was proper only in the Circuit Court of Cole County in that, at the time plaintiffs filed their petition, the only defendants were the State of Missouri and the Attorney General, both of whom may be found only in Cole County, and the plaintiffs' subsequent joinder of a defendant from the City of St. Louis was pretensive.

***State ex rel. Malone v. Mummert,* 889 S.W.2d 822 (Mo. banc 1994)**

***State ex rel. Dalton v. Oldham,* 336 S.W.2d 519 (Mo. banc 1960)**

***Hefner v. Dausmann,* 996 S.W.2d 660 (Mo. App. SD 1999)**

§476.410, RSMo (2000)

§508.010, RSMo (2000)

Rule 55.27

III.

The trial court erred in taxing costs "to the Defendants" because sovereign immunity applies, in that the defendants were the State and its Attorney General sued in his official capacity.

In re: the Interest of K.P.B., R.J.B., D.M. and L.M., Minors,

642 S.W.2d 643 (Mo. banc 1983)

***State ex rel. Ashcroft v. Riley,* 590 S.W.2d 903 (Mo. banc 1980)**

***Dunning v. Board of Pharmacy,* 630 S.W.2d 155 (Mo.App. ED 1982)**

Argument

I.

The trial court erred in granting a permanent injunction and in declaring the 2003 Amendments to be unconstitutional because those amendments do not "clearly and undoubtedly" contravene, nor "plainly and palpably" affront, Article I, Section 23 of the Missouri Constitution in that the 2003 Amendments are merely an exercise by the General Assembly of its authority to regulate the time, place, and manner of bearing arms – authority that Article I, Section 23 reserves and preserves.

Nothing in the Missouri Constitution limits the General Assembly's authority to regulate the carrying of concealed weapons in this state. The legislature can criminalize the practice outright – for everyone, everywhere, all the time – but it never has. The legislature can criminalize carrying concealed weapons generally, but exclude certain individuals or circumstances from the reach of this criminal law – and this the General Assembly historically has done. The 2003 Amendments are nothing more than a new exception to a long-standing criminal law.

Plaintiffs argued that the 2003 Amendments "violate" the last phrase of Article I, Section 23, which provides "but this shall not justify the carrying of concealed weapons." Plaintiffs' argument is unprecedented, and so absurd that the absurdity is easy to overlook. The essence of plaintiffs' argument is <u>not</u> that the General Assembly lacks authority to <u>permit</u> concealed weapons. Such an argument would be bizarre, at best, because the Constitution does not authorize the General Assembly to <u>permit</u> any individual conduct. At most, the

Constitution only requires the General Assembly to do, or prohibits it from doing, certain things. No, plaintiffs' argument is that the Constitution itself, and not state statutes, prohibits concealed weapons – for everyone, all the time, everywhere – and that the General Assembly has no authority to enact any exclusions or exceptions to this Constitutional prohibition.

Under plaintiffs' theory, the 2003 Amendments are unconstitutional because the General Assembly cannot create by statute exceptions or exclusions to the constitutional prohibition on concealed weapons. Thus, under plaintiffs' theory, §571.030(1) (which makes it a crime to carry a concealed weapon) is a mere redundancy, but any attempt to repeal it outright would also be "unconstitutional." Nothing in the plain language of Article I, Section 23 permits – far less requires – such an absurd conclusion, and the trial court's declaration to this effect must be reversed and its permanent injunction vacated.

The only reasonable interpretation of the concluding phrase in Article I, Section 23 is that the framers sought to ensure that the General Assembly's authority to regulate concealed weapons would not be frustrated by an overly broad interpretation of the right to bear arms. Every basis of constitutional interpretation available to this Court points overwhelmingly to Appellants' construction of Article I, Section 23 and away from the construction offered by plaintiffs. The plain language of Article I, Section 23 compels this conclusion; the 1875 Constitutional Debates compel this conclusion; and the judicial, legislative, and gubernatorial construction given this language for more than 100 years compels this conclusion. The concluding phrase of Article I, Section 23 simply cannot be read as an absolute prohibition on carrying concealed weapons – for everyone, all the time, everywhere – as plaintiffs suggest.

Instead, this provision merely acknowledges that the General Assembly – and it alone – has the authority to decide whether to prohibit concealed weapons and, if it does so, whether to enact exclusions or exceptions to such a prohibition for certain individuals or circumstances.

This Court has cautioned, time and again, against courts substituting their policy judgment for the General Assembly's under the guise of constitutional "construction." Accordingly, the actions of the General Assembly – as a co-equal branch of Missouri government – are entitled to a strong presumption of validity. Courts may only interfere when a challenger demonstrates that a statute "clearly and undoubtedly" contravenes, or "plainly and palpably" affronts, the Constitution. Plaintiffs failed to carry this burden, and their claims for injunctive and declaratory relief should have been denied.[3]

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[3] **Plaintiffs' arguments lack merit, as discussed herein. But apart from substantive defects, whatever the standing of these plaintiffs to seek a declaration that this law is unconstitutional, an injunction against enforcement of a criminal law is seldom, if ever, appropriate. *State ex rel. Kenamore v. Wood*, 56 S.W. 474, 478 (Mo. banc 1900), and *Oliver v. Orrick*, 288 S.W. 966, 969 (Mo. App. ED 1926).**

A. Standard of review and presumption of constitutionality

Statutory and constitutional interpretations are issues of law that this Court reviews *de novo*. *Barker v. Barker*, 98 S.W.3d 532, 534 (Mo. banc 2003), and *Farmer v. Kinder*, 89 S.W.3d 447, 449 (Mo. banc 2002).

The legislative power of the General Assembly is "plenary and residual." *Penner v. King*, 695 S.W.2d 887, 889 (Mo. banc 1985), *citing State ex rel. Holekamp v. Holekamp Lumber Co.*, 340 S.W.2d 678 (Mo. banc 1960). Thus, the legislature, "vested in its representative capacity with all the primary powers of the people ... has the power to enact any law not prohibited by the federal or state constitution." *Three Rivers Junior College Dist. of Poplar Bluff v. Statler*, 421 S.W.2d 235, 237-238 (Mo. banc 1967).

Legislation is entitled to a strong presumption of constitutionality, *Missouri Libertarian Party v. Conger*, 88 S.W.3d 446, 447 (Mo. banc 2002), because the courts "ascribe to the General Assembly the same good and praiseworthy motivations as inform [the courts'] decision-making processes," *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994). If the question of constitutionality is "fairly debatable," this Court has long respected the legislature's province to make such determinations even if, in the Court's opinion, "the conclusion of the legislature is an erroneous one." *Poole & Creber Market Co. v. Breshears*, 125 S.W.2d 23, 30-31 (Mo. 1939). *See also Penner*, 695 S.W.2d at 889 (court "obligated" to uphold legislative enactment unless unconstitutionality is "clearly demonstrated"). Thus, this Court's

long-standing recognition of the legislature's vital role in formulating law and policy requires it to resolve all doubts in favor of the challenged law's constitutionality. *See Wilson v. Washington County,* 247 S.W. 185, 187 (Mo. 1922) ("constitutional restrictions ought not to be held to apply if there exists any reasonable doubt in the judicial mind as to a conflict"). *See also Carmack v. Director, Missouri Dept. of Agriculture,* 945 S.W.2d 956, 959 (Mo. banc 1997) (same); *and Hammerschmidt,* 877 S.W.2d at 102 (same).

As this Court has observed, the state constitution "bridles" judicial decision-making with respect to a statute's constitutionality. *See Carmack,* 945 S.W.2d at 959. This canon of judicial restraint is deeply rooted in the constitutional "separation of powers" doctrine and the respect that separate, co-ordinate branches of state government owe each other. *See Wilson,* 247 S.W at 187 (courts must keep in mind that legislature has power to make laws, subject only to the constitution); *Poole,* 125 S.W.2d at 30-31 (same). This limitation on the judiciary serves

> **to channel the exercise of the court's discretion and encourage the judicial branch to avoid the temptation to substitute its preferred policies for those adopted by the elected representatives of the people.**

***Spradlin v. City of Fulton,* 924 S.W.2d 259, 263 (Mo. banc 1996).**

Accordingly, one who attacks a statute claiming that it violates the constitution "bears an extremely heavy burden." *Linton v. Missouri Veterinary Medical Board,* 988

S.W.2d 513, 515 (Mo. banc 1999) (citations omitted). To overcome this burden, the assailant must show that the legislation "clearly and undoubtedly contravenes the constitution" and "plainly and palpably affronts fundamental law embodied in the constitution." ***Etling v. Westport Heating & Cooling Svs., Inc.*****, 92 S.W.3d 771, 773 (Mo. banc 2003);** ***Missouri Libertarian Party,*** **88 S.W.3d at 447;** ***Linton,*** **988 S.W.2d at 515;** ***Carmack,*** **945 S.W.2d at 959;** ***and Hammerschmidt,*** **877 S.W.2d at 102.**

Plaintiffs have not – and cannot – meet this heavy burden, and their claims for injunctive and declaratory relief should have been denied.

B. The plain language of Article I, Section 23 recognizes and preserves the General Assembly's authority to regulate concealed weapons.

Plaintiffs claim that the 2003 Amendments are unconstitutional because Article I, Section 23 contains an absolute prohibition on the carrying of concealed weapons – by anyone, any time, anywhere – and the General Assembly has no authority to enact exclusions or exceptions to that prohibition. But Article I, Section 23 does not say that, nor anything like that. Instead, Article I, Section 23 provides:

> That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.

App. A43.

Courts are familiar with many rules of statutory construction; rules can also apply when

construing a constitutional provision such as Article I, Section 23. But resort to these rules is only proper when the constitutional provision subject to interpretation is unclear. *E.g.*, *Lagares v. Camdenton R-III School Dist.*, 68 S.W.3d 518, 525 (Mo. banc 2002). In those instances in which the language is clear – including Article I, Section 23 – there can be no resort to the "tools" of construction. *State ex rel. Heimberger v. Bd. of Curators of University of Missouri*, 188 S.W. 128, 130-131 (Mo. banc 1916). "It is, of course, fundamental that where the language of a statute is plain and admits of but one meaning, there is no room for construction. This rule applies with equal force to constitutional provisions." *Rathjen v. Reorganized School District R-II*, 284 S.W.2d 516, 523 (Mo. banc 1955).

Moreover, a constitutional provision is "interpreted according to the intent of the voters who adopted it." *Conservation Federation of Missouri v. Hanson*, 994 S.W.2d 27, 30 (Mo. banc 1999). When construing a constitutional provision, therefore, a "court must undertake to ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted." *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002) (citation omitted). That meaning is the "ordinary and usual meaning given the words of the provision." *Id*.

Article I, Section 23 has three distinct parts. First, the plain language of the provision guarantees to every Missourian the right to bear arms in defense of "his home, person and property." This provision guarantees this right against intrusion by the General Assembly.

Second, every Missourian has the right to bear arms "in aid of the civil power." This provision is reminiscent of the classical republicanism fancied by our forefathers and envisions

implementation by either the General Assembly, or the Executive Branch, or both.

Finally, the third clause, "but this shall not justify the wearing of concealed weapons," was injected into the 1875 Constitution to clarify that the "right to bear arms" – in and of itself – does not guarantee a right to carry concealed weapons to everyone, all the time, and everywhere. This is the only meaning that can be fairly ascribed to this language. Plaintiffs, however, seek to stand this provision on its head by arguing that this language "clearly and undoubtedly" prohibits the carrying of concealed weapons by anyone, anywhere, at any time. Plaintiffs' construction is contrary to the plain language of the phrase, every word of which must be given effect, *State ex rel. Highway and Transp. Comm'n of Missouri v. Director, Missouri Dep't of Revenue*, 672 S.W.2d 953, 955 (Mo. banc 1984), and must therefore be rejected.

The pivotal concluding phrase of Article I, Section 23 begins with the word "but." "But" logically limits the language that precedes it, the language that broadly establishes the right to keep and bear arms. Thus, this phrase is a limitation only on that right. The next word is "this" – "but this shall not justify the wearing of concealed weapons." Again, "this" can only refer to the broad language in the preceding phrases establishing an individual right, meaning that "this" – the "right of every citizen to keep and bear arms" – "shall not justify the wearing of concealed weapons." Which leaves only the word "justify," which is defined as:

> **1a :** to prove or show to be just, desirable, warranted or useful: VINDICATE ... **b :** to prove or show to be valid, sound or conforming to fact or reason: furnish grounds or evidence for: CONFIRM, SUPPORT, VERIFY ... **c** (1) to show to have had sufficient legal reason ....

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1228 (3d ed. 1993).

Though painstaking, the foregoing exercise demonstrates that plaintiffs' interpretation of the provision is simply wrong. Giving plain meaning and effect to every disputed word – "but this shall not justify" – demonstrates that the phrase modifies the broad right laid down in the first portion of the section, the right of the citizenry to keep and bear arms. That right, though broad, "shall not justify" – shall not furnish grounds or evidence for, shall not support, shall not provide sufficient legal reason for – the carrying of concealed weapons.

Plaintiffs' argument, which the trial court seemed to adopt, is that the concluding phrase of Article I, Section 23 should be read as follows: "but the carrying of concealed weapons is hereby prohibited." This "construction" ignores the plain language of the provision and, in fact, directly contradicts the language actually chosen by the framers and adopted by Missouri voters. Nothing in the plain language of the Article I, Section 23 (whether the 1820, 1865, 1875 or 1945 versions, App. A43-A44) "prohibits" individuals from doing anything, nor can this provision be fairly read to prohibit the General Assembly from excluding certain persons or circumstances from an otherwise blanket prohibition of concealed weapons that it chooses to adopt.

Constitutions do not proscribe individual conduct; that is the province of legislatures. If the framers had wanted to include a prohibition of concealed weapons in the constitution – which they did not – they certainly knew how to do so. Indeed, the Missouri Constitution contains the word "prohibit" in a variety of articles and sections. *E.g.* Mo. Const. art. III, §39 (participation in games of chance); art. III, §51 (appropriation by initiative); art. V, §23 (municipal judges). These provisions, and others, amply demonstrate that if the framers had intended the blanket prohibition for which plaintiffs now argue, then Article I, Section 23 would have said "but the carrying of concealed weapons shall be prohibited." It does not. Instead, the Constitution leaves the regulation of concealed weapons to the General Assembly, and the framers intended only to eliminate any future argument that such regulation is prohibited by the broad constitutional right to keep and bear arms.

The correctness of this reading of Article I, Section 23 – and the absurdity of the plaintiffs' proposed reading – is proven by Article I, Section 5. There, the framers set forth certain protections of religious freedoms, but go on to state that those freedoms "shall not . . . justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others." Consistent with Appellants' interpretation of Article I, Section 23, this language means that framers sought only to ensure that the General Assembly could – though it was not required to – regulate such conduct, and that the authority to do so was not subsumed by the enumerated rights. If plaintiffs' interpretation of Article I, Section 23 were to prevail, however, this Court would have to interpret Article I, Section 5 to mean that all religious practices "inconsistent with the good order, peace or safety of the state, or with the rights of

others" are prohibited by the Constitution, and the General Assembly has no authority to regulate in this area. Such an absurd interpretation must be rejected in both the Article I, Section 5 and Section 23 contexts.

It may be rejected in a variety of other contexts outside the Bill of Rights, where the framers have carved out or preserved the General Assembly's plenary legislative power from a prohibition that the constitution puts in place. For example, the constitution prohibits the General Assembly from authorizing games of chance, but the constitution excludes from that prohibition a state lottery. Mo.Const. art. III, §§39(9) and 39(b). Thus, the General Assembly may, but is not required to, authorize a state lottery. The constitution prohibits the General Assembly from borrowing money, but it excludes from that prohibition certain kinds of borrowing. Mo.Const. art. III, §§39 and 37. Thus, the General Assembly may, but is not required to, authorize certain kinds of borrowing. The General Assembly's broad plenary authority to legislate within an arena that has been constitutionally carved out or preserved cannot seriously be questioned.

There are even more textual reasons to reject plaintiffs' proposed "constitutional prohibition" on concealed weapons. As stated above, such a prohibition on individual conduct has no precedent in our state or federal constitution, and such a prohibition would be decidedly out of place in Article I. Article I is the Bill of Rights, which is otherwise entirely devoted to protecting certain individual rights from government regulation, not imposing such regulation. Even if plaintiffs were urging that the concluding phrase of Article I, Section 23 is a limitation on the General Assembly's authority to permit concealed weapons – which, as explained above,

is not their claim – such a limitation would more properly be found elsewhere in the Constitution and not in the Bill of Rights.

Only the Appellants' construction is true to both the language of Article I, Section 23 and to that provision's context in the Bill of Rights.

C. The debates of the constitutional conventions support the General Assembly's authority to regulate concealed weapons.

Where the language of a constitutional provision is clear, resort to the constitutional debates is not necessary. *State ex rel. Heimberger v. Bd. of Curators of University of Missouri*, 188 S.W. 128, 131 (Mo. banc 1916). And although the debates may be illustrative of the framers' intent, they are not controlling of the meaning of a provision, nor do they have binding force on the courts. *Metal Form Corp. v. Leachman,* 599 S.W.2d 922, 296 (Mo. banc 1980). For what they are worth, however, the 1875 debates simply demonstrate that, although the framers may have individually abhorred the practice of carrying concealed weapons, the convention as a whole was acting to ensure that the legislature could regulate that practice and not be precluded from doing so under an overbroad construction of the right to "keep and bear arms" provision such as had prevailed in at least one other state.

In 1875, Missouri was, like the rest of the nation, struggling with reconstruction. It was a period in which outlaws and highwaymen roamed the countryside. In at least one other state, Kentucky, a garden-variety "right to keep and bear arms" provision was judicially construed to prohibit any legislative regulation of the practice of carrying concealed weapons. *See Bliss v. Commonwealth,* 2 Litt. 90 (Ky. 1822). Because the Missouri Supreme Court had not yet

addressed the *Bliss* issue, and because the delegates to Missouri's Constitutional Convention in 1875 were determined to prevent any possibility of such an overbroad interpretation from occurring in Missouri, they inserted the concluding phrase of Article I, Section 23.

Delegate Gantt specifically noted that the Kentucky decision "prohibited the Legislature" from regulating concealed weapons:

> There will be no difference of opinion I think upon that subject; but then the declaration is distinctly made, Mr. President, that nothing contained in this provision shall be construed to sanction or justify the wearing of concealed weapons. I need not call the attention of my brethren of the bar to the fact that in one, at least, of the states of the Union, the decision was made that a provision in the Constitution declaring that the right of any citizen to bear arms shall not be questioned, prohibited the Legislature from preventing the wearing of concealed weapons.

Debates of Missouri Constitutional Convention 1875, Vol. I, p. 439. He went on to express, in the rhetoric of the day, his personal view that the practice of wearing concealed weapons was abhorrent. *Id*. at 339-340. Speaking for the Committee, Mr. Gantt stated that by this provision, they did not intend to include in the right to bear arms the right "to carry a pistol in the pocket or a bowie knife under the belt." *Id.* at 340. Thus, the revision was intended to clarify that the constitution did not guarantee a right to wear concealed weapons, and that the power to regulate had been reserved to the legislature – to avoid the precedent set in Kentucky.

During the 1945 Constitutional Convention, the delegates do not appear to have substantively discussed the right to bear arms; times had changed since 1875. The changes to this provision appear only to have been in the nature of clean up and modernization, at the suggestion of the committee in charge of such matters. *See* 1943-1944 Constitutional Convention of Missouri, File No. 8, Report No. 1 of "Committee No. 23 on Phraseology, Arrangement and Engrossment. Preamble and Articles I and II," p. 10. The provision was ultimately renumbered as Article I, Section 23, and presented to the voters.

In their petition, plaintiffs alleged that the changes between the 1875 and 1945 verbiage were more than cosmetic. LF 46-47. The debates belie their position. And the topical title on which plaintiffs so heavily relied, "right to keep and bear arms – exception," LF 47 (fn. 7), is not even a part of the 1945 Constitution. Though the word "exception" is included in the reported topical title of Article I, Section 23, the delegates to the 1945 debates did not insert it. Instead, they were written by a member of the Committee on Legislative Research in 1945, who used them to compile a table of contents and index for the new constitution. *See* Affidavit of Kevin H. Winn, Missouri State Archivist (L.F. at 157-201). Moreover, the official ballot language submitted to voters, as reflected in Vol. III of the Journals of the 1993-1994 Constitutional Convention of the State of Missouri, did not contain topical titles. *Id*. The topical title of this section does not – and should not – play any role in this Court's interpretation of Article I, Section 23.

The plain language of Article I, Section 23 eliminates any need for this Court to resort to the constitutional debates to find the meaning of this provision. But, even looking behind

the plain language of the provision, nothing in the debates reflects that it was the Convention's intent to ban the carry of concealed weapons for everyone, all the time, and everywhere. Instead, the debates confirm that the framers acted only to preserve and protect the legislature's authority to regulate concealed weapons as it saw fit.

D. Missouri courts have always recognized the General Assembly's authority to regulate concealed weapons.

Until this lawsuit, the legislature's plenary authority to regulate the carrying of concealed weapons has never been challenged by the cramped reading that plaintiffs would give Article I, Section 23. Every reported decision touching on the issue in this state, from the adoption of the 1875 Constitution through the present, has acknowledged the authority of the legislature to regulate concealed weapons. Plaintiffs would have this Court ignore, and thus implicitly overrule, every one of those cases.

In *State v. Wilforth*, 74 Mo. 528 (1881), this Court rejected the minority view, expressed in *Bliss v. Commonwealth*, 2 Litt. (Ky.) 90 (1822), that the constitutional right "to keep and bear arms" prohibits any legislative regulation of concealed weapons. If, as plaintiffs here argue, the Constitution itself forbids carrying concealed weapons – by anyone, all the time, anywhere – the Court would never have reached the issue. Thus, *Wilforth* is as close to dispositive of plaintiffs' claims as any case could be, and this Court should respect both the reasoning and the holding of that case.

In *State v. Shelby*, 2 S.W. 468 (Mo. 1886), this Court reviewed a defendant's conviction under section 1274, Rev. St. 1879, for the possession of a deadly weapon while

intoxicated and for the carrying of concealed weapon.[4] The defendant argued that the legislature had exceeded its constitutional limitations in outlawing his possession of a concealed revolver, regardless of his state of sobriety. This Court rejected that argument. Reaffirming *Wilforth*, this Court held that the "legislature may ... regulate the manner in which arms may be borne," not only with respect to time and place, but also as "to the condition of the person who carries such weapons." *Id*. at 469. This Court held that the law was "a reasonable regulation of the use of ... arms, and to which the citizen must yield, and a valid exercise of the legislative power." *Id*. (emphasis added). Again, this Court could not have reached this result if the present plaintiffs' construction of Article I, Section 23, were correct.

After the turn of the century, this Court again took up the issue in *State v. Keet*, 190 S.W. 573 (Mo. 1916). The defendant had been convicted of carrying a concealed revolver and he appealed, arguing that the statute, Rev. St. §4496 (1909), violated the Missouri Constitution because he should be permitted to do so for the purpose of self defense. This Court again rejected the *Bliss* rationale. *Id*. at 574-575. Instead, citing *Wilforth* and *Shelby*, this Court noted that legislature had in 1909 eliminated the statutory provision allowing persons to carry concealed weapons for self defense, and refused to find the statutory change unconstitutional. *Id*. at 576. This Court did not hold that the criminal conviction stood on the simple foundation

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[4] **Section 1274 made it a crime to possess a deadly weapon while intoxicated, or to carry a concealed deadly weapon. Section 1275 contained exceptions and defenses to Section 1274. *See* Brief Section I.E., below.**

of the violation of a constitutional provision. Instead, this Court held that the General Assembly (not the Constitution) had "finally spoken in no uncertain language," *id*., on the question of who may carry concealed weapons and under what circumstances.

This Court again squarely addressed the legislature's authority to regulate concealed weapons in *State v. White*, 299 S.W. 724 (Mo. 1923). The defendant, who had pointed a shotgun at a sheriff and threatened to kill him, was convicted of exhibiting a dangerous and deadly weapon. *Id.* at 725-726. He challenged the conviction, arguing his constitutional right to bear arms entitled him to so use his weapon in defense of his home, person and property. *Id* at 726. This Court upheld the statute, patiently explaining that the constitutional right to bear arms is not unlimited, and that the General Assembly unmistakably had the authority to regulate the carrying of concealed weapons.

This unbroken 40-year line of cases, from *Wilforth* to *White*, was reaffirmed in a 1994 Court of Appeals decision – again holding that Article 1, Section 23 does not bind the legislature's hands in its passage of laws regulating weapons:

> Every constitution adopted by the citizens of the State of Missouri since its inception in 1820 has contained language virtually identical to that of Article I, Section 23. However, such constitutional provisions have never been held to deprive the General Assembly of authority to enact laws which regulate the time, place and manner of bearing firearms.

City of Cape Girardeau v. Joyce, 884 S.W. 33, 34 (Mo. App. ED 1994).

Other states have constitutional provisions concerning concealed weapons, similar to Missouri's. *E.g.*, Colo. Const. art. II, §13; Ky. Const. §1, para. 7; Idaho Const. art I, §11; La. Const. art I, §11; Miss. Const. art. III, §12; Mont. Const. art. II, §12; N.M. Const. art. II, §6; N.C. Const. art. I, §30; and Okla. Const. art. III, §26. Yet, no other state has construed a provision similar to Missouri's as the sort of wholesale, constitutional ban on the carrying of concealed weapons that plaintiffs propose. At least two other states' high courts have held that their analogous constitutional provisions simply permit their legislatures to exercise their authority to regulate concealed weapons. *See Douglass v. Kelton,* 610 P.2d 1067, 1069 (Colo. 1980) (construing the constitutional provision, "but nothing herein contained shall be construed to justify the practice of carrying concealed weapons"); *and State v. Dawson,* 159 S.E.2d 1, 11 (N.C. 1968) (construing constitutional provision, "nothing herein shall ... prevent the General Assembly from enacting penal statutes against that practice").

Finally, plaintiffs' argument that the Constitution prohibits concealed weapons makes little sense in light of a line of Missouri case law concerning defendants' appeals from criminal convictions for carrying concealed weapons. *See*, *e.g*., *State v. Hovis,* 116 S.W. 6 (Mo. App. 1909); *State v. Cook*, 112 S.W. 710 (Mo. App. 1908); *State v. Dees*, 109 S.W. 800 (Mo. App. 1908); *State v. Roan*, 106 S.W. 581 (Mo. App. 1907); and *State v. Livesay,* 30 Mo. App. 633 (1888). The defendants in these cases sometimes fell within a statutory "safe harbor" for carrying a concealed weapon, and their convictions were reversed; sometimes they did not. Were the concluding phrase of Article I, Section 23 the sort of absolute prohibition on carrying concealed weapons that plaintiffs claim it to be – a constitutional criminalization of

sorts – every conviction would have had to have been affirmed. No court has ever so held. Moreover, no court has ever even suggested that the defendants were guilty of "violating the constitution." Instead, in each of these cases, the trial and appellate courts properly measured the legality of the defendants' conduct against the restrictions on concealed weapons that the legislature had established by statute.

E. The General Assembly and the Executive Branch have always recognized the General Assembly's authority to regulate concealed weapons.

Plaintiffs' construction of Article I, Section 23 as an absolute prohibition of concealed weapons – by anyone, anywhere, and any time – is directly contrary to actions of the legislature and governor immediately before and after the adoption of the 1875 Constitution, and continuing to the present day. The authority of the General Assembly to regulate concealed weapons has been exercised to a greater and lesser degree with the changing times, but has never seriously been questioned to exist – until this lawsuit.

Within a few decades after the disputed provision had appeared in the 1875 Missouri Constitution, this Court twice held in other contexts that legislative and gubernatorial construction of the constitution, while not binding on the court, is "entitled to much weight." *State ex rel. Major v. Patterson*, 129 S.W. 888, 890 (Mo. banc 1910). *See also Gantt v. Brown*, 149 S.W. 644, 646 (Mo. banc 1912) (same). That construction comes about when the legislature passes a bill based on a new constitutional provision, and the governor signs it into law. *Gantt, supra*. The construction is "at least persuasive, and especially so when [it] occur[s] ... soon after the adoption of the instrument." *Gantt*, at 646.

Here, the impact of legislative and gubernatorial interpretation argues strongly for the conclusion that the General Assembly has the authority to regulate the carrying of concealed weapons and thus, that the 2003 Amendments[5] are constitutional under Article I, Section 23. The parties agree that the concluding phrase of Article I, Section 23 first appeared in the 1875 Missouri Constitution. Even at the time this provision was being debated and adopted, the General Assembly had already begun to regulate concealed weapons. In a statute that became effective in 1874, the General Assembly provided:

[5] **No "implied" gubernatorial construction of the Constitution may be fairly attributed with respect to the 2003 Amendments because they were passed by legislative override of the Governor's veto. In the Governor's veto message, however, although he raised many points about the efficacy and desirability of the proposed amendments, he did not question their constitutionality under Article I, Section 23.**

> Section I. Whoever shall, in this state, go into any church or place where people have assembled for religious worship, or into any school room, or into any place where people may be assembled for education, literary or social purposes, or to any election precinct on any election day, or into any court-room during the sitting of court, or into any other public assemblage of persons met for other than militia drill or meetings ...having concealed about his person any kind of fire-arms . . . shall be deemed guilty of a misdemeanor . . . . *Provided*, **that this act shall not apply to any person whose duty it is to bear arms in the discharge of duties imposed by law**[6] **. . . .**

Laws 1874, p. 43 (approved March 26, 1874).

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[6] **If the concluding phrase of Article I, Section 23 was intended by the framers as a blanket prohibition on concealed weapons, as plaintiffs argue, it is hard to imagine why the debates disclose no discussion about whether or how to include the type of "law enforcement" exception that the General Assembly had so recently adopted. The reason, of course, is that the language was not intended to be a prohibition but, instead, was intended to ensure that the General Assembly could regulate concealed weapons by enacting whatever prohibitions – and whatever exclusions or exceptions – it saw fit.**

Four years after the passage of the 1875 Constitution, this law was amended, and two new sections were enacted in its place, §1274 and §1275, Revised Statutes 1879. In pertinent part, the 1879 Amendments expanded the exceptions and exclusions for certain persons and circumstances as to whom and which the statutory prohibition on concealed weapons would not apply:

> **Sec. 1275. *Above section not to apply to certain officers*. – The next preceding section shall not apply to police officers, nor to any officer or person whose duty it is to execute process or warrants, or to suppress breaches of the peace, or make arrests, nor to persons moving or traveling peaceably through this state, and it shall be a good defense to the charge of carrying such weapon, if the defendant shall show that he has been threatened with great bodily harm, or had good reason to carry the same in the necessary defense of his person, home or property. (New section.)**

Though renumbered a few times, Sections 1274 and 1275 were in place for over three decades. In 1909, they were repealed and replaced with language more similar to the 1874 version, but which contained the following language at the end, concerning concealed weapons:

> **Section I. Carrying deadly weapons, etc. –**
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> ********

> ***Provided,*** **that nothing contained in this section shall apply to legally qualified sheriffs, police officers and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceably through this state.**

Laws of 1909, p. 452. *See State v. Gentry,* 242 S.W. 398, 399 (Mo. 1922) (tracing changes in concealed weapons statutes), and *State v. Keet,* 190 S.W. 573, 576 (Mo. 1916) (same).

The foregoing record of legislative and gubernatorial actions demonstrate that neither of these branches of government has ever viewed the concluding phrase of Article I, Section 23 as the sort of "constitutional prohibition" of concealed weapons – for everyone, everywhere, and at all times – that the plaintiffs now insist it to be. Instead, acting in 1879 while the new constitutional provision "was yet fresh in their minds," *Gantt,* at 645, neither branch viewed this language as any impediment to new exceptions or exclusions to the legislative ban on concealed weapons, exceptions and exclusions that significantly widened the class of persons who could carry a concealed weapon in this state. This long-standing legislative and gubernatorial interpretation is entitled to much weight, and it should be highly persuasive of the meaning that this Court should afford the provision.

Not only is plaintiffs' interpretation of the concluding phrase of Article I, Section 23 patently incorrect in its historical context, it threatens havoc in the modern

context as well. If the constitutional provision is a flat prohibition on the carrying of concealed weapons, as plaintiffs argue, then taken to its logical conclusion, the entire panoply of exceptions and exclusions to the General Assembly's general prohibition on concealed weapons is also constitutionally suspect. *See, e.g.*, § 571.030.2, RSMo (2000) (concealed carry permitted for state, county and municipal law enforcement officers; wardens, superintendents and other keepers of prisons, jails, etc.; member of the armed forces or national guard; persons vested with the judicial power of this state or the United States; persons whose bona fide duty is to execute process; federal probation officers; state probation or parole officers; and certain corporate security advisors); and § 571.030.3, RSMo (2000) (concealed weapons not prohibited when weapon is in a non-functioning condition, or unloaded, or not readily accessible; or when the bearer is in pursuit of game with exposed firearm or bow; or when the bearer is traveling in a continuous peaceable journey through the state).

There is no reasonable construction of Article I, Section 23 that would prohibit the 2003 Amendments, but permit the remainder of the historically unchallenged legislative exceptions and exclusions to §571.030 and its predecessors. Plaintiffs do not advocate the unconstitutionality of §§ 571.030.2 and 571.030.3 under Article I, Section 23 but, if they were true to their proposed construction, they would have to do so. Fortunately, this Court has long held that "[a] constitutional provision should never be given a construction which would work confusion and mischief unless no other reasonable construction is possible." *Three Rivers Junior College District of Poplar*

***Bluff v. Statler*, 421 S.W.2d 235, 242 (Mo. banc 1967) (and citations therein).**

For this reason, as well as the plain language of the provision, and the long-standing judicial, legislative, and gubernatorial constructions given this provision, the better reading of Article I, Section 23 is one that recognizes the General Assembly's authority to regulate concealed weapons as it sees fit.

II.

The trial court erred in denying the defendants' motion to transfer venue, because venue was proper only in the Circuit Court of Cole County in that, at the time plaintiffs filed their petition, the only defendants were the State of Missouri and the Attorney General, both of whom may be found only in Cole County, and the plaintiffs' subsequent joinder of a defendant from the City of St. Louis was pretensive.

When plaintiffs filed their **original petition, they named only two defendants: the State of Missouri and the Attorney General, in his official capacity. Plaintiffs alleged, in conclusory fashion only, that "[v]enue is proper in [the City of St. Louis Circuit Court." LF 13-14 (¶17). In fact, there was no basis for venue in that court. The defendants immediately moved for transfer to Cole County Circuit Court.[7] The trial court erred in denying that motion.**

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[7] **Defendants' counsel entered a special appearance for the purpose of challenging venue. *State ex rel. Toberman v. Cook*, 281 S.W.2d 777, 780 (Mo. banc 1955)(limited appearance preserves defenses and challenge to venue); *Walker v. Gruner*, 875 S.W.2d 587, 589 (Mo. App. ED 1994)(same).**

To be clear, the State and Attorney General firmly believe, as discussed in the preceding section, that the trial court's judgment requires reversal on the merits. As such, the case does not need to be retried – the appropriate judgment upholding the constitutionality of the new law simply needs to be entered, promptly. The people of the State of Missouri deserve a speedy resolution of this case. Thus, we do not seek reversal, remand, and transfer of this case to Cole County for a new trial, solely on the ground that the court below erred in denying the motion to transfer the case to a court of proper venue. However, the trial court's error was an error of some moment, and should be reviewed on appeal for purposes of providing direction, in this case and others.[8]

Venue in Missouri is determined solely by statute. *State ex rel. Budd Co. v. O'Malley,* 114 S.W.3d 266, 268 (Mo. App. WD 2002). A trial court's interpretation of a statute and its application are reviewed *de novo*. *Ochoa v. Ochoa*, 71 S.W.3d 593, 595

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[8] **After the trial court denied transfer, and entered its order of preliminary injunction, the State and Attorney General immediately sought a writ of mandamus in the Court of Appeals, Eastern District and, upon denial, in this Court, which also denied the writ. One of the grounds for the writs was a request for an order requiring the case to be transferred to Cole County Circuit Court, the court of proper venue. In denying the writ, this Court explicitly stated that the trial court's rulings could be reviewed on appeal.**

(Mo. banc 2002). Whenever venue is improper, the court should transfer the action to a proper venue. §476.410, RSMo (2000); Rule 55.27(a)(3). Section 508.010(1), RSMo (2000) provides that when the defendant is a resident of the state, suit shall be brought

> **either in the county within which the defendant resides, or**
>
> **in the county within which the plaintiff resides, *and the defendant may be found*. (emphasis added)**

Although some of the plaintiffs were residents of St. Louis City, neither the State of Missouri nor the Attorney General are. Neither defendant "may be found" in St. Louis City for purposes of satisfying §508.010(1).

With respect to the State, Jefferson City has been the seat of Missouri state government for nearly 177 years. The site was selected by a five-member commission under the original state constitution in 1820, which mandated that the seat of government be located on the Missouri River within forty miles of the mouth of the Osage River. As a result, the legislature first convened in Jefferson City in November 1826.[9] Consequently, the State of Missouri can be "found" for venue purposes only in Cole County, except when a specific statute, such as § 536.050, RSMo (2000), provides

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[9] ***See*** **Gary R. Kremer, The City of Jefferson: The Permanent Seat of Government, 1826-2001.**

an alternate venue. There is no such statute applicable in this case.

Though plaintiffs argued that the Attorney General may have an office in St. Louis City, Tr. Vol. 1, p. 7, that is irrelevant to the question of venue in an action against the state. *See State ex rel. Dalton v. Oldham*, 336 S.W.2d at 522-23. State law mandates that the "attorney general shall reside at the seat of government and keep his office in the supreme court building." §27.010, RSMo (2000). *See also State ex rel. Dalton v. Oldham*, 336 S.W.2d 519, 522-523 (Mo. banc 1960) (state legislator in Jasper County district sued the Missouri Attorney General to challenge a determination concerning a ballot title; venue was not proper in Jasper County, but lay only in Cole County, where the Attorney General's principal offices were located and his principal duties were performed), and *State ex rel. Toberman v. Cook*, 281 S.W.2d at 780 (venue in action seeking declaratory and injunctive relief against the Missouri Secretary of State, the Director of Revenue, and the Superintendent of the Missouri State Highway Patrol lay only in Cole County; "we judicially know that relators are heads of executive departments of state government and their offices are located in and their principal official duties are required to be performed at the State Capitol in Jefferson City."). Accordingly, venue for an action naming the Attorney General as a defendant is proper only in Cole County because that is where he can be found.

That plaintiffs added – as the trial court prepared to announce its ruling on the transfer motion – a defendant who could be found in the City of the St. Louis did not affect the necessity and propriety of transfer. Courts must not permit plaintiffs to engage

in the pretense of joining defendants for the sole purpose of obtaining venue, *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 824 (Mo. banc 1994), and plaintiffs' joinder here was pretensive.

When deciding whether venue is pretensive, a court will look to the record. *Hefner v. Dausmann*, 996 S.W.2d 660, 664 (Mo. App. SD 1999). "Pretensive joinder exists where the pretensive nature of the joinder appears on the face of the pleadings, and where there is in fact no cause of action against the joined defendant." *Id.* "The pretensive joinder test is disjunctive: we [the court] need find only that the first or second prong applies." *Hefner*, 996 S.W.2d at 663.

In the instant case, the joinder of the sheriff qualified as pretensive under either prong. With respect to the first, plaintiffs initially sued the State of Missouri and the Attorney General. Plaintiffs recognized, at the time they filed their original verified petition, that they could achieve the relief they sought by suing the State of Missouri.[10] That implicit admission of the sufficiency of the State's presence as a defendant establishes pretense. The timing of

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[10] **The Attorney General has no enforcement powers under the new legislation, nor general prosecutorial powers. Of course, the Attorney General is entitled to receive notice of a constitutional challenge to a statute and may choose to participate in such a case, as here. §527.110, RSMo and Rule 87.04. *See also* §27.060, RSMo (2000) (Attorney General "may" appear, interplead, answer, or defend in any proceeding in which the State's interests are involved).**

the addition of the sheriff, as well, confirms that this joinder was pretensive.[11] The lack of a written pleading asserting specific claims against the sheriff, or any oral statement of the claims against him at the time that plaintiffs moved to join him as a party, also establishes pretense. The "amended" petition that plaintiffs filed the next day – only different from the original petition in its addition of the sheriff's name to the caption and inclusion in the list of defendants in the text – established pretense. The circumstances satisfied the objective test of *Malone* on the first prong, and venue should have been transferred on that basis alone.

But the circumstances also satisfied the second prong. The Sheriff was not a person needed for the just adjudication of the case: The amended pleading stated no cause of action against him. It did not even demonstrate in what way complete relief could not have been granted unless he was a party. Plaintiffs never called upon the sheriff **to testify, though they put on testimony of sheriffs from other parts of the state. And the St. Louis Sheriff, whether personally or through counsel, never expressed concern that he must be a party, lest he risk exposure to inconsistent liabilities. The sheriff's counsel in fact advised the court that the City of St. Louis sheriff, unique among sheriffs across the**

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[11] **As discussed above, the parties had argued the venue motion and the court had reconvened from a short recess, preparing to announce its decision, when the plaintiffs made their oral motion to join the sheriff. Perhaps plaintiffs saw the writing on the wall. The court stated the following day that it had been prepared to grant the motion to transfer, until plaintiffs added the new defendant. Tr. 130-131.**

state, does not generally enforce the criminal laws of the state. Tr. Vol. 1, pp. 26-27; §57.450, RSMo. The only purpose that plaintiffs served in bringing the St. Louis sheriff before the court below was to avoid transfer of venue to the court of proper venue, Cole County Circuit Court.

Therefore, the trial court should have found the joinder pretensive under the second prong, as well, and granted the motion to transfer venue. To reiterate, the State is not seeking reversal on this point; no purpose would be served by the pointless delay that would ensue by a remand, transfer, entry of a judgment, and a second *de novo* review in this Court. Nevertheless, the proper venue for litigation challenging the constitutionality of a statue is an important issue, one that comes up often, and one on which this Court's guidance is essential.

III.

The trial court erred in taxing costs "to the Defendants" because sovereign immunity applies, in that the defendants were the State and its Attorney General sued in his official capacity.

T**he state is not liable for costs in its own courts, absent express statutory authorization therefor.** ***In re: the Interest of K.P.B., R.J.B., D.M. and L.M., Minors,*** **642 S.W.2d 643, 644-45 (Mo. banc 1983);** ***State ex rel. Ashcroft v. Riley,*** **590 S.W.2d 903, 907 (Mo. banc 1980); and** ***Dunning v. Board of Pharmacy,*** **630 S.W.2d 155, 159 fn.2 (Mo. App. ED 1982).** The same is true with respect to costs taxed to the Attorney General. ***Riley,*** **590 S.W.2d at 907. The court below cited no such statutory authority, and we are not aware** of any that applies.

Having erred in its application of the law, the lower court's cost award must be vacated.

Conclusion

This Court should dissolve the permanent injunction entered by the court below, reverse that court's judgment, enter judgment upholding the constitutionality of House Bills 349, 120, 136, and 328, and order that the law go into effect immediately. This Court should also hold that the lower court erred in denying the motion to transfer to the only court of proper jurisdiction, the Circuit Court of Cole County, Missouri. Finally, this Court should vacate the assessment of costs against the State and Attorney General.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 19th day of November, 2003, one true and correct copy of the foregoing brief, one disk containing the foregoing brief, and one true and correct copy of the separately bound Appendix to the brief were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 12,996 words.

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