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**IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI**

ALVIN BROOKS, et al.,)	
)	
Plaintiffs,)	Cause No. 034-02425
)	
v.)	Division No. 2
)	
STATE OF MISSOURI, et al.,)	
)	
Defendants.)	

**NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.’S MOTION FOR
LEAVE TO FILE *AMICUS CURIAE* BRIEF IN OPPOSITION TO THE ENTRY
OF A PERMANENT INJUNCTION ENJOINING THE ENFORCEMENT OF
SECTIONS 50.535, 571.030, AND 571.094, REVISED STATUTES OF MISSOURI**

COMES NOW the National Rifle Association of America, Inc. (“NRA”) and hereby moves the Court for leave to file the attached brief *amicus curiae* in opposition to the entry of a permanent injunction enjoining the enforcement of House Bills No. 349, 120, 136, and 328, 92nd General Assembly, codified as sections 50.535, 571.030, and 571.094, Revised Statutes of Missouri (collectively referred to as “conceal and carry legislation”). NRA further moves the Court for leave to be heard during the hearing on Plaintiffs’ Petition for the Issuance of a Permanent Injunction (“Plaintiffs’ Petition”). Neither the State of Missouri, Bulls Eye, LLC, Geri Stephens, or Jim Stephens oppose the NRA’s motion. Plaintiffs oppose NRA’s motion, however.¹ In support of this motion, the NRA states as follows:

¹ Counsel for NRA unsuccessfully tried to reach counsel for the Sheriff of the City of St. Louis to learn the Sheriff’s position.

2. NRA has a strong interest in upholding the rights of its members and all citizens to keep and bear arms as protected in the constitutions and laws of each State, including Missouri, and in ensuring that the right to due process of law is observed regarding licenses and permits to carry handguns and other firearms.

3. NRA regularly litigates and files *amicus curiae* briefs in matters related to the right to keep and bear arms as guaranteed in the state and federal constitutions, including constitutional challenges to conceal and carry legislation. By virtue of its wide experience litigating matters related to the right to keep and bear arms in courts across the country, including matters related to the constitutionality of laws substantively identical to Missouri's conceal and carry legislation, NRA is uniquely situated to assist the Court in interpreting and understanding Article I, § 23 of the Missouri Constitution in both its modern and historical contexts. Specifically, NRA seeks—through the filing of an *amicus* brief and through oral argument—to assist the Court by providing analysis and research not set forth in the briefs of the parties, including a comprehensive discussion of how other state courts have interpreted substantively similar constitutional provisions setting forth the right of the citizenry to bear arms.

4. In Missouri, a trial court possesses the authority to allow a non-party to participate in litigation as an *amicus curiae* in order to assist the Court “in determining the merits of the case.” In re Roff's Estate Fields, 50 S.W.2d 156, 157 (Mo.App. 1932) (“[A]n *amicus curiae* is heard only by leave and for the assistance of the court in a case already before it.”); see also Parker v. Pulitzer Publishing Co., 882 S.W.2d 245, 249 (Mo.App. E.D. 1994) (Court stating that it was error for trial court to force non-party “to

be heard as an intervenor *rather than allowing him to submit an amicus curiae brief.*") (emphasis added). Moreover, where a non-party is in a position to "aid the court in determining the merits of the case, [] the courts, as a rule, accept such aid." In re Roff's Estate, *supra*. Given NRA's unique—and extensive—knowledge of, and experience with, constitutional challenges to conceal and carry legislation similar to the challenge raised by Plaintiffs in the present case, the Court should grant NRA's motion for leave to file an *amicus curiae* brief and to be heard during oral argument on Plaintiffs' Petition.

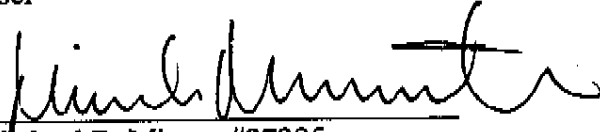
5. With the exception of Plaintiffs, all parties to this litigation have consented to the present motion.

WHEREFORE the NRA respectfully requests that the Court grant it leave to file the attached brief *amicus curiae* in opposition to the entry of a permanent injunction enjoining the enforcement of House Bills No. 349, 120, 136, and 328, 92nd General Assembly, codified as sections 50.535, 571.030, and 571.094, Revised Statutes of Missouri; that the attached brief be deemed filed as of the date of the Court's order; that NRA be granted leave to be heard during oral argument on Plaintiffs' Petition for the Issuance of a Permanent Injunction; and that the Court grant such other and further relief as is just and proper.

Respectfully submitted,

Amicus Curiae National Rifle Association of America, Inc.

By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2003, I caused a copy of the foregoing to be sent via facsimile and hand delivery to all of the parties in this case.

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IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

ALVIN BROOKS, <i>et al.</i> ,)	
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Plaintiffs,)	Cause No. 034-0425
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STATE OF MISSOURI, <i>et al.</i> ,)	
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Defendants)	

**AMICUS CURIAE BRIEF OF NATIONAL RIFLE ASSOCIATION
OF AMERICA, INC., IN SUPPORT OF DEFENDANTS**

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. ("NRA") is a New York not-for-profit membership corporation founded in 1871. NRA has 4.2 million individual members and 10,700 affiliated members (clubs and associations) nationwide. Among its purposes, as set forth in its Bylaws, are:

1. To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens;
2. To promote public safety, law and order, and the national defense;
3. To train members of law enforcement agencies, the armed forces, the militia, and people of good repute in marksmanship and in the safe handling and efficient use of small arms;
4. To foster and promote the shooting sports, including the advancement of amateur competitions in marksmanship at the local, state, regional, national, and international levels;
5. To promote hunter safety, and to promote and defend hunting as a shooting sport and as a viable and necessary method of fostering the propagation, growth and conservation, and wise use of our renewable wildlife resources.

The NRA has a strong interest in upholding the rights of its members and all citizens to keep and bear arms as protected in the constitutions and laws of each State, including Missouri, and in ensuring that the right to due process of law is observed

regarding licenses and permits to carry handguns and other firearms.

The NRA regularly litigates and files *amicus curiae* briefs in matters related to the right to keep and bear arms as guaranteed in the state and federal constitutions. This brief seeks to assist the Court by providing analysis and research, including comparisons with other States, not set forth in the briefs of the parties.

ARGUMENT

I. THE TEXTUAL STATEMENT THAT “THIS” DECLARED RIGHT TO BEAR ARMS “SHALL NOT JUSTIFY THE WEARING OF CONCEALED WEAPONS” DOES NOT AFFECT THE LEGISLATURE’S POWER TO REGULATE CONCEALED WEAPONS AS IT SEES FIT

A. The Limiting Clause Refers Solely to the Declared Right

Missouri Const., Art. I, § 23, as adopted in 1945, 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.” This derived from Mo. Const., Art. II, § 17 (1875), which 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 into question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.”¹

¹ The first version, Mo. Const., Art. XIII, § 3 (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 defence of themselves and of the State cannot be questioned.” Mo. Const., Art. I, § 8 (1865) substituted “the lawful authority of the State” for “the State.”

The terms “*this* shall not justify the wearing of concealed weapons” in the current version refer to “the right” of the citizen to bear arms. Similarly, the previous words “nothing *herein contained* is intended to justify the practice of wearing concealed weapons” referred to the same right as just expressed “*herein*,” i.e., in this section.

The term “this” means “the person, thing, or idea that is present or near in place, time, or thought or that has just been mentioned” *Webster's Ninth New Collegiate Dictionary* 1127 (1991). The “this shall not justify” clause refers solely to the just-declared right to bear arms.

The term “justify” means “(a) to prove or show to be just, right or reasonable, (b) to show to have had a sufficient legal reason” *Id.* at 656. As applied here, the declared right to bear arms, standing alone, is not sufficient legal reason for the wearing of a concealed weapon.

The “this shall not justify” clause removes any ambiguity from the question of whether the constitutional right to bear arms also includes a constitutional right to bear them in a concealed manner. The clause thus assures legislators that they are not violating the Constitution when they enact regulations specifying the circumstances under which concealed weapons may or may not be carried. The provision also gives information to the citizens at large that they have a right to bear arms, but that right is subject to any applicable legislative restrictions on concealed weapons. This precludes a defendant charged with the statutory crime of carrying a concealed weapon from asserting

the right to bear arms to “justify” his conduct.

B. The Limiting Clause Does Not Define a Crime

Plaintiffs assert three untenable claims about the wording of Art. I, § 23. First, “the exception to this constitutional provision is clearly *a prohibition* on the wearing of any concealed firearm.” Amended Verified Petition ¶ 21(a)(1)(i) (emphasis added). Second, the Act at issue “conveys rights to bear firearms at times and under circumstances which go beyond the express limitations of Article I, Section 23, restricting the right to bear arms for the defense of a citizen’s home, person or property.” *Id.* (ii). Third, the Act “allows permit holders to carry exposed firearms at any time, place or in any manner, and allows concealed lethal weapons, excluding firearms, at any time, place or manner.”² This allegedly “extends beyond rights expressly limited by the Missouri Constitution.” *Id.* (iii).

Not all activity fits into either of two dichotomous parts: (1) “constitutionally protected” or (2) “constitutionally prohibited.” The fact that an activity is not a constitutional right does not make the activity unlawful, and does not affect the power of the legislature either to regulate or not to regulate the activity (much less mandate that the legislature must criminalize the conduct). Human activity would indeed be limited if confined only to activity guaranteed by the Constitution, such that all other activity must

² This last assertion is particularly puzzling, in that it involves “exposed firearms,” not concealed ones, and “concealed lethal weapons, excluding firearms.” The relevance of such items to the concealed firearms addressed by the Act is unclear.

be deemed constitutionally prohibited and, therefore, criminal.

The fact that an act is not a constitutional right does not make it a criminal act. The phrase “this [declared right to bear arms] shall not justify the wearing of concealed weapons” does not create and define a crime. The provision does not state that carrying a concealed weapon is an offense, does not set forth the elements of an offense, does not classify it as felony or misdemeanor, and does not specify any punishment. Instead of providing that “the wearing of concealed weapons is unlawful and shall be punished” by whatever sentence, the clause merely states that the right to bear arms “shall not justify” wearing concealed weapons.

If read to create a crime, Art. I, § 23, would be unconstitutionally vague under the United States Constitution, the Fourteenth Amendment’s due process clause of which requires sufficient notice of what is a crime.³ It is fundamental that legal provisions must be interpreted to avoid unconstitutional results.

Moreover, if interpreted as a constitutional crime to carry a concealed weapon in all circumstances, absurd results would follow. All exceptions to the statutory prohibition on carrying a concealed weapon would be void, including the exemptions for peace officers and judges. Moreover, a person could not conceal a pistol in his or her own

³ “Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.” *Chicago v. Morales*, 527 U.S. 41, 56 (1999).

home, in violation of fundamental privacy rights.⁴

In sum, the fact that bearing of concealed arms is not constitutionally guaranteed does not make it a crime. As shown next, that same fact does not prohibit the legislature from legislating or not legislating on the subject.

C. The Limiting Clause Does Not Affect the Legislative Power

The fact that the right to bear arms does “not justify the wearing of concealed weapons” leaves discretion to the legislature to determine whether, and the extent to which, concealed weapons shall be regulated. The effect of the limiting clause is simply to remove any doubt that the legislature has power to regulate the concealed wearing of arms. Both in the past and currently, the legislature has decided the places and circumstances under which wearing concealed weapons are and are not regulated.⁵

It is noteworthy that no pertinent restriction on the legislative power is set forth in Missouri Const., Art. III, Legislative Department. Indeed, Art. III, §§ 36-39, entitled “Limitation of Legislative Power,” would have been the appropriate place to deny

⁴ “The house of every one is his castle, and if thieves come to a man's house to rob or murder, and the owner or his servants kill any of the thieves in defense of himself and his house, it is no felony, and he shall lose nothing.” *State v. Couch*, 52 N.M. 127, 134, 193 P.2d 405 (1948) (quoting *Semayne's Case*, 5 Coke's Rep. 91A). *State v. Stevens*, 113 Ore. App. 429, 432, 833 P.2d 318, 319 (1992), held that a prohibition on carrying concealed weapons “was applied unconstitutionally” to a person in his own home. “[T]he state's interpretation would restrict the manner in which one could carry a legal weapon from room to room within one's home and would inhibit an act that is so intrinsic to ownership and self-defense that it would unreasonably interfere with the exercise of one's constitutional right”

⁵ The wisdom of the legislature's judgment is irrelevant here. It certainly had facts before it which justify the Act. The FBI lists 13 categories of “factors which are known to affect the volume and type of crime occurring from place to place,” none of which includes carrying concealed weapons, particularly by licensees. Department of Justice, Federal Bureau of Investigation, *Crime in the United States 2000, Uniform Crime Reports* (2001), iv-v. The definitive scholarly study demonstrates that States which issue concealed carry permits have lower crime rates. John R. Lott, *More Guns, Less Crime* (University of Chicago Press, 1998).

legislative discretion over whether and how to regulate concealed weapons, but no such limitation exists. The General Assembly has the power to enact any law not prohibited by the United States Constitution or the Missouri Constitution. *Three Rivers Junior College District v. Statler*, 421 S.W. 235, 237-38 (Mo. 1967) (*en banc*).

Reflecting that the legislature historically has regulated the circumstances under which the carrying of firearms are or are not regulated, *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33, 34 (Mo. App. 1994), explained:

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.* In 1881, one Wilforth was convicted of violating a statute which prohibited the carrying of a firearm into a church or place of religious worship. In upholding the statute against a constitutional challenge, the Missouri Supreme Court adopted the language of the Supreme Court of Alabama in *State v. Reid*, 1 Ala. 612, and stated "the constitution, in declaring that every citizen has the right to bear arms in defense of himself and the state, has neither expressly or by implication denied to the legislature the right to enact laws in regard to the manner in which arms shall be borne." *State v. Wilforth*, 74 Mo. 528, 530, 41 Am.Rep. 330 (1881).

In *State v. Shelby*, 90 Mo. 302, 2 S.W. 468 (1886), the Missouri Supreme Court rejected a constitutional attack upon a statute which prohibited the carrying of a weapon into a school or place where people are assembled for educational, literary or social purposes, or into an election precinct or while intoxicated. ". . . The validity of the Act of 1875 is made to stand upon the ground that the legislature may thus regulate the manner in which arms may be borne." *Id.* at 305,

2 S.W. 468. (Emphasis added)

As if written for this very case, *Joyce* concluded: “Nothing in the Missouri constitution limits the power of the legislature to enact laws pertaining to the time, place and manner of carrying weapons.” *Id.* at 35. That statement obviously applies to the Act at issue here.

II. THE ACT AT ISSUE IS A MERE VARIATION OF THE LEGISLATURE’S HISTORICAL TRADITION OF REGULATING CONCEALED WEAPONS

Historically, the legislature has regulated the carrying of concealed weapons, including the persons, places, and circumstances regarding which the prohibition either applies or does not apply. The legislature has never prohibited the carrying of concealed weapons by all persons in all places and in all circumstances. The Act at issue is just a variation of the many exemptions the legislature traditionally has provided.

RSMo § 571.030, subsection 1, provides in part: “A person commits the crime of unlawful use of weapons if he or she knowingly: (1) Carries concealed upon or about his or her person a knife, a firearm, a blackjack or any other weapon readily capable of lethal use”⁶ However, subsection 2 provides that this prohibition “shall not apply to” a number of categories of persons, including (1) all peace officers, regardless of whether “on or off duty,” and “any person summoned by such officers to assist in making arrests or preserving the peace”; (2) personnel of prisons and jails; (3) members of the armed forces or national guard

⁶ Subsection 7 provides that “Unlawful use of weapons is a class D felony”

while on duty; (4) state and federal judges; (5) persons who execute process; (6) federal probation officers; (7) state probation officers; (8) certain corporate security advisors; and (9) coroners.

According to plaintiffs' argument, all of these exemptions from the concealed carry prohibition must be unconstitutional. If carrying a concealed weapon is a constitutional crime, nothing in the Constitution authorizes the above exemptions.

Subsection 3 of RSMo § 571.030 includes further exemptions from the prohibition on carrying a concealed weapon, including transporting a nonfunctional, unloaded, or inaccessible weapon; transporting a firearm in a motor vehicle's passenger compartment by a person at least 21 years old; possession of an exposed firearm for pursuit of game; "or is in his or her dwelling unit or upon premises over which the actor has possession, authority or control, or is traveling in a continuous journey peaceably through this state." Other than the provision for transport in a motor vehicle, these exemptions were already established law. Again, according to plaintiffs' theory, since carrying a concealed weapon is a constitutional crime, these traditional exemptions are all unconstitutional.

Plaintiffs' "discovery" that any legislative exemption from the prohibition on concealed weapons is unconstitutional would have surprised the authors of the Constitutions of 1875 and 1945. The Act of 1874 prohibited having a concealed weapon only in a church, school, certain assemblies, and courts. *Laws of Missouri 1874* at 43. Carrying a concealed weapon at all other places was lawful. The following year, this was amended only to state

that any acts inconsistent with this one were repealed. *Session Laws of Missouri 1875* at 51. That was the same year, of course, that the 1875 Constitution inserted the qualification to the right to bear arms that “nothing herein contained is intended to justify the practice of wearing concealed weapons.” Mo. Const., Art. II, § 17 (1875). If plaintiffs’ theory is correct, no one in Missouri knew at the time – whether members of the legislature, the judiciary, or the public – that the law was unconstitutional because it did not ban concealed weapons at all times and places by all persons.

Similarly clueless, according to plaintiffs’ hypothesis, was the legislature of 1879, which enacted a more sweeping provision punishing “any person [who] shall carry concealed, upon or about his person, any deadly or dangerous weapon” RSMo § 1274 (1879). That statute also included a “shall not apply” provision, exempting various law enforcement officers and “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.” *Id.* § 1275. According to plaintiff’s theory, these “shall not apply” provisions were void under the Constitution just enacted four years before.

The last above exemption was the subject of *State v. Cook*, 112 S.W. 710 (Mo. App. 1908), in which the defendant was carrying a large sum of money and feared attack.

The court explained the following further facts:

Defendant is a negro, and his evidence shows that in April, 1906, three negroes were taken from the jail at Springfield by a mob of whites and hung and burned on the public square of that city, and also introduced evidence tending to show that the negro population of Springfield was still in danger from mob violence, that they had been notified in the spring of 1906 to leave the county, and at about the same time he received two letters threatening to make way with him if he did not leave the county.

Id. at 710-711.

Notwithstanding the clause providing that "nothing herein contained is intended to justify the practice of wearing concealed weapons," Const., Art. I, § 23, *Cook* held that the defendant "had the right to carry arms concealed on his person to defend his possession thereof [i.e., the cash], if in good faith he believed there was danger of thieves and robbers trying to take it from him on his way home."⁷ *Id.* at 711. *Cook* reversed the conviction, holding that "there is very substantial evidence tending to show defendant was justified under the statute in carrying the revolver" *Id.*

According to plaintiffs' theory here, the court erred in reversing the conviction because the defendant was constitutionally prohibited from protecting himself with a concealed pistol, and the legislature was constitutionally prohibited from exempting from the prohibition the carrying of a concealed weapon in necessary self defense. Yet this

⁷ *Cook*, 112 S.W. at 711, further explained:

[T]he prosecuting attorney . . . was permitted to show that defendant kept or owned a club composed of negroes in the city of Springfield, and that defendant and other negroes had pleaded guilty to the illegal sale of liquor at this club, and in his address to the jury the prosecuting attorney used the following objectionable and prejudicial remarks: "What causes white people to rise in a mob in a community? It's a white jury backing up a burly negro in such offenses as packing a pistol. The experience you all have had is that such dives as this defendant was running causes the mobs."

novel theory occurred to no one.⁸

Comparable exemptions were on the books after the adoption of the Constitution of 1945, which shortened the exception to the right to bear arms to state more concisely that "this shall not justify the wearing of concealed weapons." Const., Art. I, § 23. *State v. Murray*, 925 S.W.2d 492 (Mo. App. 1996), for instance, applied the still-valid exemption for travelers. "The exception enables travelers to protect themselves 'against perils which typically do not face them back home among their neighbors.'" *Id.* at 493. Only in 2003 when they commenced this action, according to plaintiffs' theory, was it discovered that all exemptions are void and that carrying a concealed weapon is a constitutional crime.

The impetus for plaintiffs' challenge is just another "shall not apply" clause in the broad tradition of the previous ones. Subsection 4 of RSMo § 571.030 provides in pertinent part: "Subdivisions (1) . . . of subsection 1 of this section shall not apply to any person who has a valid concealed carry endorsement issued pursuant to section 571.094 or a valid permit or endorsement to carry concealed firearms issued by another state or political subdivision of another state." This is no different qualitatively than the

⁸ See also *State v. Venable*, 93 S.W. 356 (Mo. App. 1906), which explained:

The statute (section 1863) provides that it shall be a good defense for carrying the 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." We think that, in order to justify the defendant in carrying a concealed weapon, he must have believed that there was danger of the threat being executed.

exemptions in previous enactments for categories of persons, places, or circumstances.

Indeed, subsection 20 of § 571.094 provides that a concealed carry endorsement shall not authorize a person to carry a concealed firearm into some seventeen broad categories of places, including a police station, within 25 feet of a polling place on election day, a jail or prison, a courthouse or court office, any meeting of local government or the general assembly, any building designated by certain legislative or judicial bodies, a bar, the restricted area of an airport, any place where federal law restricts firearms, a school or institution of higher education, a child care facility, a riverboat gambling operation, an amusement park, a church, any private property with posted signs, a sports arena or stadium, and a hospital.⁹

The above analysis of the Act in the context of the historical statutes makes clear that plaintiffs' absolutist view has never been even imagined by anyone until now, much less has such a view been applied by any court. Since it first regulated concealed weapons, the legislature has never criminalized the general carrying of concealed weapons in all places and circumstances. It has regulated them in some places and not others and has made exceptions for some people involved in certain activities and not others. The legislation at issue is no different.

⁹ Pursuant to subsection 21 of § 571.094, a person who carries a concealed firearm in any such place may be removed from the premises, and if removal requires that a peace officer be summoned, the person is subjected to various monetary fines ranging from \$100 to \$500, and suspension or revocation of the endorsement. In addition to these penalties, such person who refused to leave may be subject to arrest for criminal trespass.

III. STATES WITH COMPARABLE CONSTITUTIONAL PROVISIONS ALSO HAVE ENACTMENTS PROVIDING FOR CONCEALED-CARRY PERMITS

A number of states have limiting clauses in their arms guarantees much like that of Missouri. Also like Missouri, these same states traditionally have regulated concealed weapons in some places and circumstances and not in others. These regulatory schemes typically include provision for licenses or permits to carry concealed firearms, and the courts have upheld these provisions. These experiences all refute plaintiffs' novel theory.

Carrying a concealed weapon was not an offense at common law.¹⁰ Kentucky was the first state to make it a criminal offense, but the law was declared to violate the right to bear arms. *Bliss v. Commonwealth*, 2 Litt. (Ky.) 90, 13 Am.Dec. 251 (1822). That prompted Kentucky and some other states to add clauses to their arms guarantees authorizing legislation or "shall not justify" type clauses like that of Missouri. Other states did not add such clauses, but their courts still upheld concealed weapon prohibitions.¹¹

¹⁰ "It was not a violation of the common law to carry a pistol about one's person; it is only made so by statute." *Town of Lester v. Trail*, 85 W.Va. 386, 101 S.E. 732, 733 (1920). To be an offense, carrying arms had to be "malo animo" (with an evil intent). *Rex v. Knight*, Comb. 38, 90 Eng. Rep. 330 (K. B. 1686). See William Hawkins, *Pleas of the Crown*, I, 488 (8th ed., London 1824) (affray committed "where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law").

¹¹ "The constitution in declaring that, 'Every citizen has the right to bear arms in defense of himself and the State,' has neither expressly nor by implication, denied to the Legislature, the right to enact laws in regard to the manner in which arms shall be borne." *State v. Reid*, 1 Ala. (New Series) 612, 616 (1840). However, "a statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." *Id.* at 616-17.

Explicitly clarifying that the legislature may regulate concealed weapons precludes any argument, such as by a criminal defendant, that the right to bear arms proscribes such regulation. This clarification was undoubtedly asserted out of caution and to remove the issue from any doubt. Such clauses render the legislature's power beyond dispute.

The following analysis concerns states other than Missouri which explicitly declare that the right to bear arms may not be interpreted to authorize the carrying of concealed weapons and/or recognize the legislative power to regulate concealed weapon. In these states, the power of the legislature to define the carrying of concealed weapons as a crime and provide exceptions, including licenses or permits, has not been questioned.¹²

Colorado Const., Art. II, § 13, provides: "The right of no person 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 shall be construed to justify the practice of carrying concealed weapons.*" (Emphasis added.) This language is almost identical to Mo. Const., Art. II, § 17 (1875). Permits for concealed weapons are provided by COLO. REV. STAT § 18-12-201 *et seq.* "Whether the legislature or municipality shall choose to delegate or create the power to issue permits [to carry concealed weapons] is a matter of legislative policy." *Douglass v.*

¹² The arms guarantees and firearm laws of each state, including procedures for licenses and permits to carry concealed firearms, are summarized in the Appendix to Stephen P. Halbrook, *Firearms Law Deskbook: Federal and State Criminal Practice* (St. Paul, MN: Thomson/West Group, 2002).

Kelton, 199 Colo. 446, 449, 610 P.2d 1067, 1069 (1980).

Florida Const., Art. I, § 8(a), states: “The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, *except that the manner of bearing arms may be regulated by law.*” (Emphasis added.) Permits for concealed weapons are provided by FLA. STAT. ANN. § 790.06. *See Iley v. Harris*, 345 So. 2d 336 (Fla. 1977) (county had no discretion under State law to deny license to carry firearm).

Georgia Const., Art. I, § 1, ¶ VIII, provides: “The right of the people to keep and bear arms shall not be infringed, *but the General Assembly shall have power to prescribe the manner in which arms may be borne.*” (Emphasis added.) Permits for concealed weapons are provided by GA. CODE ANN. § 16-11-126 et seq.

Idaho Const., Art. I, § 11, states in part: “The people have the right to keep and bear arms, which right shall not be abridged; *but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person*” (Emphasis added.) Permits for concealed weapons are provided by IDAHO CODE § 18-3302.

Kentucky Const., Art. I, § 7, provides: “All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Seventh: The right to bear arms in defense of themselves and of the State, *subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed*

weapons." (Emphasis added.) Permits for concealed weapons are provided by KY. REV. STAT. ANN. § 237.110. *See Holland v. Commonwealth*, 294 S.W.2d 83, 85 (Ky. 1956) (defining offense of carrying concealed weapon and noting exceptions).

Louisiana Const., Art. I, § 11, states : "The right of each citizen to keep and bear arms shall not be abridged, *but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.*" (Emphasis added.) Permits for concealed weapons are provided by LA. REV. STAT. ANN. § 1379.3.

Mississippi Const., Art. III, § 12, provides: "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, *but the legislature may regulate or forbid carrying concealed weapons.*" (Emphasis added.) Permits for concealed weapons are provided by MISS. CODE. ANN. § 45-9-101.

Montana Const., Art. II, § 12, states: "The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, *but nothing herein contained shall be held to permit the carrying of concealed weapons.*" (Emphasis added.) Permits for concealed weapons are provided by MONT. CODE ANN. § 45-8-321. *See State v. Nickerson*, 126 Mont. 157, 166, 247 P.2d 188, 192 (1952) (statute exempts "the carrying of arms on one's own premises or at his home or place of business").

New Mexico Const., Art. II, § 6, provides: "No law shall abridge the right of the

citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, *but nothing herein shall be held to permit the carrying of concealed weapons*. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.” (Emphasis added.) New Mexico’s permit system for concealed weapons was recently invalidated because it included a local option to opt out, in violation of the above preemption provision. *Baca v. New Mexico Dep’t. of Public Safety*, 47 P.3d 441, 443 (N.M. 2002). The court did “not reach the argument that Article II, Section 6 prohibits the carrying of concealed weapons.” *Id.* That was the first time in American jurisprudence that such an argument had been made¹³ -- the case at bar is the second. The legislature promptly enacted new legislation providing for concealed weapon permits which does not include the invalid local option. N.M. S.B. 23 (signed Apr. 7, 2003).

North Carolina Const., Art. 1, § 30, states in part: “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 *Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.*” (Emphasis added.) Permits for concealed weapons are provided by N.C.

¹³ As here, that argument disregarded that historically the state never prohibited the carrying of concealed weapons at all times and places, and instead made the prohibition applicable in some circumstances and not others. *Lopez v. Chewiwie*, 51 N.M. 421, 422-23, 186 P.2d 512, 513 (1947), quoted the arms guarantee with its limiting clause and noted that the statute “makes it an offense to carry deadly weapons, but permits them to be carried in the residence of the carrier or on his landed estate” and “allows travelers to carry arms for their protection.” Another statute “allows the carrying of an unloaded concealed weapon.” *State v. Ramirez*, 79 N.M. 475, 478, 444 P.2d 986, 989 (1968).”

GEN. STAT. § 14.415.10. "This exception indicates the extent to which the right of the people to bear arms can be restricted; that is, the Legislature can prohibit the carrying of concealed weapons, but no further." *State v. Kerner*, 181 N.C. 574, 575, 107 S.E. 222, 223 (1921). Authorization that "the legislature may enact penal statutes against carrying concealed weapons was undoubtedly 'a matter of superabundant caution, inserted to prevent a doubt,'" but even without the clause the legislature could still regulate concealed weapons under its "police powers." *State v. Dawson*, 272 N.C. 535, 548, 159 S.E.2d 1, 11 (1968).

Oklahoma Const., Art. II, § 26, provides: "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; *but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.*" (Emphasis added.) Permits for concealed weapons are provided by OKLA. STAT. ANN. § 1290.1.

Tennessee Const., Art. I, § 26, states: "That the citizens of this State have a right to keep and to bear arms for their common defense; *but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.*" (Emphasis added.) Permits for concealed weapons are provided by TENN. CODE ANN. § 39-17-1351.

Texas Const., Art. I, § 23, states: "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; *but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.*" (Emphasis

added.) Permits for concealed weapons are provided by TEX. CODE ANN. § 411.171.

Utah Const., Art. I, § 6, provides: "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; *but nothing herein shall prevent the legislature from defining the lawful use of arms.*" (Emphasis added.) Permits for concealed weapons are provided by UTAH CODE ANN. § 53-5-701.

Considering all fifty states and the District of Columbia, almost all jurisdictions provide for the issuance of permits or licenses to carry concealed weapons. Hon. J. Harvie Wilkinson III, "Federalism for the Future," 74 *S. Cal. L. Rev.* 523, 525 (2001), summarizes them as follows:

Currently there are four broad categories of state laws that concern carrying concealed weapons. At one end of the spectrum are eight jurisdictions that generally prohibit the carrying of concealed weapons.¹⁴ Less restrictive are thirteen states that have "may-issue" laws, meaning the state has some discretion in deciding to whom to issue a concealed weapons permit.¹⁵ Even less restrictive are twenty-nine states that have "shall-issue" laws, meaning the state must issue a concealed weapons permit to anyone not subject to a statutory exclusion (e.g., convicted felons).¹⁶ Vermont apparently does not require any type of permit to carry a concealed weapon.

¹⁴ Illinois, Kansas, Missouri, Nebraska, New Mexico, Ohio, Wisconsin, and the District of Columbia prohibit the carrying of concealed weapons. . . .

¹⁵ Alabama, California, Colorado, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, and Rhode Island have "may-issue" laws. . . .

¹⁶ Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Mississippi, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming have "shall-issue" laws.

Since the above was written, the number of jurisdictions which do not issue concealed carry permits or licenses have shrunk by at least two (New Mexico and Missouri), leaving only five states and the District of Columbia. Yet most of those states allow concealed carry under various circumstances.¹⁷ The “shall-issue” states have increased to at least thirty one. Added to the “may-issue” states and Vermont, a total of forty-five states provide for concealed weapon permits or licenses.

In sum, legislation providing for permits or licenses to carry concealed weapons exists in *all* states with arms guarantees which qualify the right by authorizing restrictive legislation regarding concealed weapons or by “shall not justify” type clauses like that of Missouri. No state of all the fifty states has apparently ever prohibited the carrying of concealed weapons by all persons in all places and circumstances. Plaintiffs’ claim here – that the qualification to the right to bear arms that “this shall not justify the wearing of concealed weapons” somehow criminalizes concealed weapons in all circumstances and removes the subject from legislative discretion – is contrary to the text and its historical interpretation by the legislatures and judiciaries of Missouri and every other state with similar provisions.

¹⁷ This typically includes carrying in one’s dwelling or in other circumstances. See Halbrook, *Firearms Law Deskbook*, *supra*, Appendix A-76, A-94 (Illinois and Kansas); Ohio R.C. 2923.12 & Neb. R.S. § 28-1202 (may carry for defensive purposes). Even the District of Columbia provides for a permit to carry a firearm, although it is “virtually unobtainable.” *Bsharah v. United States*, 646 A.2d 993, 996 n.12 (D.C. 1994).

CONCLUSION

This Court should deny plaintiffs' motion for injunctive relief and should dismiss the complaint with prejudice.

Respectfully submitted,

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I hereby certify that on October 20, 2003, I caused a copy of the foregoing to be sent via facsimile and hand delivered to all of the parties in this case.

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