

**IN THE
CIRCUIT COURT OF ST. LOUIS, MISSOURI
22nd JUDICIAL CIRCUIT**

| | | |
|---------------------|---|-----------------------|
| STATE OF MISSOURI, |) | |
| |) | Case No. 2022-CR01300 |
| v. |) | |
| |) | |
| PATRICIA MCCLOSKEY, |) | |
| |) | |
| Defendants. |) | |

**AMICUS BRIEF OF ATTORNEY GENERAL ERIC SCHMITT
SUPPORTING DISMISSAL OF THE CASE**

The right to use firearms to defend one’s person, family, home, and property has deep roots in Missouri law. Self-defense is the central component of the right to keep and bear arms, which receives the highest level of protection from the Missouri Constitution. Missouri’s statutes specifically authorize Missouri citizens to use firearms to deter assailants and protect themselves, their families, and homes from threatening or violent intruders. A highly publicized criminal prosecution of Missouri citizens for exercising these fundamental freedoms threatens to intimidate and deter law-abiding Missouri citizens from exercising their constitutional right of self-defense.

Attorney General Eric S. Schmitt has a duty to protect the fundamental rights of all Missourians, including the right to keep and bear arms in self-defense of one’s person and home. Although he does not represent the Defendants in this case, this case casts an ominous shadow over those fundamental rights. The prosecution sends a powerful message to all Missourians that they exercise their fundamental right to self-defense at their peril. Missourians should not fear exposure to criminal prosecution when they use firearms to defend themselves and their homes from threatening intruders. Public policy dictates that this prosecution should not proceed. The Court should dismiss this case at the earliest possible opportunity.

Attorney General Schmitt files this amicus brief of right. *See* Mo. Sup. Ct. R. 84.05(f)(4).

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Eric S. Schmitt is the Attorney General of Missouri. Missouri's Constitution vests the Attorney General with broad common-law powers to protect the interests of the State and its citizens. *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 136 (Mo. banc 2000) (“The absence of a provision for specific powers for the attorney general in our constitution vests the office with all of the powers of the attorney general at common law.”). This authority gives him at least five unique interests in this case.

First, Missouri law grants the Attorney General authority to litigate, intervene, and defend in any legal action involving the interests of Missouri and its citizens. Section 27.060 of the Revised Statutes provides that “[t]he attorney general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state,” and that “he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state’s interests are involved.” § 27.060, RSMo. This statute grants the Attorney General the authority and responsibility to intervene in actions that threaten the interests of all Missourians, like this case.

Second, the Attorney General has the traditional duty and responsibility to defend the constitutional rights of Missourians. Attorney General Schmitt frequently sues to safeguard Missourians’ constitutional rights, including the right to keep and bear arms protected by Article I, § 23 of the Missouri Constitution. Article I, § 23 provides “[t]hat the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property ... shall not be questioned.” MO. CONST. art. I, § 23. “The rights guaranteed by this section shall be unalienable.” *Id.* “Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these

rights and shall under no circumstances decline to protect against their infringement.” *Id.* Missouri thus provides the highest level of protection for the right to keep and bear arms of any State in the United States. And Missouri’s Attorney General has the duty and responsibility to ensure that “the State of Missouri shall ... uphold these rights.” *Id.*

Third, the right to self-defense of one’s person, home, family, and property lies at the core of the right to keep and bear arms in the Missouri Constitution, which the State of Missouri “shall be obligated to uphold.” *Id.* Article I, § 23 of the Constitution explicitly states that the first and most fundamental component of “the right of every citizen to keep and bear arms” is to bear arms “in defense of his home, person, family and property.” *Id.* The right to self-defense is also the central component of the right to keep and bear arms guaranteed by the Second Amendment of the U.S. Constitution. “Self-defense ... was the *central component* of the right” to “keep and bear Arms” guaranteed by the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (emphasis in original). The right’s “core lawful purpose” is “self-defense,” which includes “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 630, 635. The Second Amendment protects a “fundamental right” that is “necessary to our system of ordered liberty.” *McDonald v. Chicago*, 561 U.S. 742, 778 (2010).

Fourth, Missouri’s Legislature has provided additional protection for these constitutional rights by enacting the “castle doctrine” of self-defense, which permits Missourians to use force—including the display of firearms in self-defense—to protect themselves, their families, their homes, and their property from threatening or violent intruders. § 563.031, RSMo. Just as the Attorney General defends the constitutional right to keep and bear arms in self-defense, he also safeguards these closely related statutory rights for all Missourians.

Fifth, a highly publicized prosecution of Missouri citizens for exercising the right bear arms in self-defense will have perverse and corrosive effects on these fundamental rights. To force Missourians to undergo the immense burdens, expense, and stress of defending a criminal prosecution provides a powerful deterrent to the exercise of fundamental rights. No court would tolerate a criminal prosecution of Missourians for exercising other fundamental rights, such as the right to freedom of speech or the right to religious freedom. The right to keep and bear arms—and the right of self-defense that lies at its core—is just as fundamental as these other cherished liberties. The Attorney General has a strong interest in ensuring that *all* Missourians—not just the parties to this case—feel free to exercise their fundamental right to defend themselves and their homes, without fear of facing criminal prosecution.

For all these reasons, the Attorney General files this brief to represent the interests of all Missourians who wish to exercise their fundamental right to defend themselves, their families, and their homes without fear of criminal prosecution, and he urges this Court to dismiss this case.

ARGUMENT

This criminal case is extraordinary. Based on widely reported facts, the prosecution targets conduct explicitly protected by the U.S. Constitution, the Missouri Constitution, and Missouri statutes setting forth the “castle doctrine” of self-defense. In other words, this is not just a case of the government retaliating against a Missouri citizen for exercising a fundamental right—which would be bad enough. Instead, this is a case where the prosecutor contends that exercising the right to keep and bear arms in self-defense—one of Missouri’s most fundamental freedoms—is *itself* a crime. As long as this case continues, it will send a public message to all Missourians that, if they dare to exercise their fundamental right to keep and bear arms in defense of family and

home, they may be prosecuted and sent to prison. It is hard to imagine a more crippling deterrent to the exercise of fundamental rights. Public policy dictates the speedy dismissal of this case.

I. The Right to Keep and Bear Arms in Self-Defense of One’s Person and Home Receives the Missouri Constitution’s Highest Level of Protection.

Self-defense is the “core lawful purpose” and the “central component” of the right to keep and bear arms enshrined in both the Second Amendment and Article I, § 23 of the Missouri Constitution. *Heller*, 554 U.S. at 599, 630. This “core lawful purpose” includes “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 635. The right to keep and bear arms is a “fundamental right” that is “necessary to our system of ordered liberty.” *McDonald*, 561 U.S. at 778.

The Founders viewed the right to keep and bear arms in self-defense as a natural right that was inalienable. This recognition predated the adoption of the U.S. Constitution, and had deep roots in English conceptions of liberty forged in the Glorious Revolution of 1689. During the Glorious Revolution, the English “obtained an assurance from William and Mary, in the Declaration of Rights (which was codified as the English Bill of Rights), that Protestants would never be disarmed: ‘That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law.’” *Heller*, 554 U.S. at 593 (quoting 1 W. & M., ch. 2, § 7, in 3 ENG. STAT. AT LARGE 441). “This right has long been understood to be the predecessor to our Second Amendment.” *Id.*

Thus, under principles of English law that the Founders of our Nation viewed as fundamental, the right to keep and bear arms was “a recognition of the natural right of defense ‘of one’s person or house’” as part of “the law of ‘self preservation.’” *Heller*, 554 U.S. at 585 (quoting 2 COLLECTED WORKS OF JAMES WILSON 1142, and n. x (K. Hall & M. Hall eds. 2007)). The right to keep and bear arms was “one of the fundamental rights of Englishmen.” *Id.* at 594. “Americans

understood the ‘right of self-preservation’ as permitting a citizen to ‘repel force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’” *Id.* at 595 (quoting 1 BLACKSTONE’S COMMENTARIES 145–146, n. 42 (1803)). “The inherent right of self-defense” is “central to the Second Amendment right.” *Id.* at 628.

The Founders recognized that the right to keep and bear arms, not the government, is the citizen’s first line of defense against physical attack. Thus, this right received its greatest emphasis during times in our history when the government could not be trusted to protect citizens’ personal security. For example, “[a]ntislavery advocates routinely invoked the right to bear arms for self-defense.” *Heller*, 554 U.S. at 609. One such advocate “wrote that ‘the right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the guaranty would have hardly been worth the paper it consumed.’” *Id.* (quoting A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 117–118 (1849)). Reflecting this recognition, “Congress enacted the Freedmen’s Bureau Act on July 16, 1866. Section 14 stated: ‘[T]he right ... to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security ... including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens ... without respect to race or color, or previous condition of slavery....’” *Id.* at 615-16 (quoting 14 Stat. 176–177). Because they recognized that the government could not always be relied upon to protect personal security and property, the post-Civil War generation emphasized “that the right to keep and bear arms was essential to the preservation of liberty.” *McDonald*, 561 U.S. at 858 (Thomas, J., concurring in part). In the aftermath of the Civil War, “[t]he use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence.” *Id.* at 857. One writer emphasized that the freed slaves “have the same right to own and carry fire arms that other citizens have. You are not only free but citizens of the United States

and, as such, entitled to the same privileges granted to other citizens by the Constitution of the United States.... All men, without distinction of color, have the right to keep arms to defend their homes, families or themselves.” *Id.* at 848 (quoting Letter to the Editor, Loyal Georgian (Augusta), Feb. 3, 1866, p. 3).

If anything, this right is even more deeply rooted in Missouri’s unique history and tradition. Missouri’s Constitution has explicitly protected the right to keep and bear arms since its first adoption in 1820, and Missouri’s Constitution has always stated that *self-defense* is a core aspect of that right. Article XIII, § 3 of the Constitution of 1820 provided that Missourians’ “right to bear arms *in defence of themselves* and of the State cannot be questioned.” MO. CONST. of 1820, art. XIII, § 3 (emphasis added) (quoted in Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEXAS REVIEW OF LAW & POLITICS 192, 199 (2016)). Missouri reaffirmed the right to keep and bear arms for self-defense in its Constitutions of 1865, 1875, and 1945.

Moreover, Missouri repeatedly expanded the constitutional language protecting the right to keep and bear arms, making it more robust. Article II, § 17 of the Constitution of 1875 expanded on the language of 1820 by explicitly stating that right to keep and bear arms extends to self-defense of one’s home and property, as well as one’s person: “the right of no citizen to keep and bear arms in defence of his *home, person and property*, or in aid of the civil power, when thereto legally summoned, shall be called into question.” MO. CONST. of 1875, art. II, § 17 (emphasis added). Article I, § 23 of the Constitution of 1945 reaffirmed the right in these broad terms. MO. CONST. of 1945, art. I, § 23. And most recently, in 2014, an overwhelming majority of Missourians voted to expand the constitutional right even further, resulting in the most expansive protection for the right to keep and bear arms anywhere in the United States. As stated in Article I, § 23 of the Constitution, the right to keep and bear arms includes the right to use firearms “in defense of

[one's] home, person, family and property.” MO. CONST. art. I, § 23. These rights to keep and bear arms in self-defense are “unalienable,” and any restriction on these rights is “subject to strict scrutiny.” *Id.* “[T]he state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement.” *Id.*

II. By Enacting the “Castle Doctrine” of Self-Defense, Missouri’s Statutes Explicitly Authorize the Use of Firearms to Defend One’s Person, Family, Home, and Property From Threatening and Violent Intruders.

Missouri has adopted one of the strongest versions of “castle doctrine,” a legal doctrine that expressly authorizes the use of force to defend the security of one’s person, family, home, and property. This castle doctrine is not merely a creature of statute, but is deeply rooted in—and implements—the constitutional right to keep and bear arms “in defense of [one’s] person, home, family, and property.” MO. CONST. art. I, § 23.

Section 563.031 of Missouri’s Revised Statutes specifically authorizes Missouri’s citizens and homeowners to protect themselves from illegal invasions and intrusions into their homes and private property. § 563.031, RSMo. This statute establishes three principles in Missouri law: (1) Missourians may defend themselves and others by using physical force—including the display of firearms—to deter the imminent use of unlawful force by another person; (2) Missourians may use deadly force against a person who unlawfully enters or attempts to unlawfully enter private property owned by another and threatens to use unlawful force against another; and (3) Missourians have no duty to retreat from their own residence or property when threatened by an unlawful intruder.

Each of these principles is set forth, clearly and unambiguously, in the statute. First, section 563.031.1 provides that “[a] person may ... use physical force upon another person when and to the extent he or she reasonably believes such force to be necessary to defend himself or herself or

a third person from what he or she reasonably believes to be the use or imminent use of unlawful force by such other person.” § 563.031.1, RSMo. Second, section 563.031.2(3) provides that a person may use deadly force to prevent “the use or imminent use of unlawful force” by another person, provided that such deadly force is “used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter private property that is owned or leased by an individual.” § 563.031.2(3), RSMo. Third, section 563.031.3 provides that “[a] person does not have a duty to retreat (1) From a dwelling, residence, or vehicle where the person is not unlawfully entering or unlawfully remaining; (2) From private property that is owned or leased by such individual; or (3) If the person is in any other location such person has the right to be.” § 563.031.3(1)-(3), RSMo.

Furthermore, the castle doctrine specifically shields Missourians who act in valid self-defense from prosecution for unlawful use of a weapon by exhibiting a weapon in an angry or threatening manner under § 571.030.1(4). Section 563.031 provides explicit protection from criminal liability for any conduct that falls within its scope. In addition, the statute criminalizing unlawful use of a weapon, section 571.030, specifically exempts from its coverage any conduct that falls within the castle doctrine set forth in section 563.031. Section 571.030.5 provides: “Subdivisions (3), (4), (5), (6), (7), (8), (9), and (10) of subsection 1 of this section *shall not apply to persons who are engaged in a lawful act of defense pursuant to section 563.031.*” § 571.030.5, RSMo (emphasis added). The crime of exhibiting a weapon in an angry or threatening manner is set forth in subdivision (4). *See id.* Thus, displaying a firearm in an angry or threatening manner *to defend oneself and one’s home*, as provided in section 563.031, is not a crime in Missouri. It is not the case that the defendant must raise self-defense as an affirmative defense, or must assert the

exercise of a constitutional right as a defense to justify conduct that otherwise would constitute a crime. Exhibiting a weapon in an act of valid self-defense *is not a crime at all*.

Missouri's castle doctrine thus makes several principles clear. Under section 563.031.3, a Missouri citizen has no duty to retreat from his or her front porch or lawn area, even if an unruly crowd of trespassers is passing in front of his or her house. § 563.031.3, RSMo. Under section 563.031.1, a Missouri citizen may use physical force (including the display of weapons as a deterrent) if that citizen reasonably believes that another person is contemplating the imminent use of unlawful force. § 563.031.1, RSMo. Thus, if Missouri citizens receive threats of violence from others, they may display weapons to protect themselves. *Id.* This is especially true if those threats come from intruders who are already trespassing on private property and at least one of whom is carrying an assault rifle. *Id.* Under section 563.031.2, a Missouri citizen may use even deadly force against someone who is both threatening unlawful force against another person and trespassing on private property at the same time. § 563.031.2, RSMo. Thus, if an angry intruder invades private property and threatens to harm the homeowner or another person, a Missouri citizen may defend himself or herself, even if it may require the use of deadly force. *Id.* Finally, under section 571.030.5, self-defense is not merely an affirmative defense to charges under this statute. § 571.030.5, RSMo. To display firearms in self-defense as defined in section 563.031 is not a crime, and it should not be charged as a crime in the first place.

III. The Prosecution of Missouri Citizens For Exercising Their Right to Keep and Bear Arms in Self-Defense Will Intimidate and Deter Other Missourians From Exercising Their Fundamental Right of Self-Defense.

The case reflects the opposite of the State's constitutional obligation under Article I, § 23 of the Missouri Constitution to "uphold these rights" to keep and bear arms in self-defense and to "protect against their infringement." *Id.* The highly publicized prosecution of Missouri citizens

for exercising their right to keep and bear arms in defense of their home and family sends a powerful message to all Missourians: You exercise your right to keep and bear arms in self-defense at your peril. If you do so, you may be targeted with criminal prosecution, even though your fundamental right to defend yourself is deeply rooted in Missouri's history and traditions, and protected by Missouri's Constitution and statutes. As long as this case is pending, that powerful message of intimidation and deterrence will be broadcast, loud and clear, to all Missourians.

This case, therefore, has significance that extends far beyond the parties. The pendency of this case chills and deters all citizens of Missouri from exercising one of our most fundamental rights, which receives the highest level of protection in Missouri's Constitution and statutes. The right to keep and bear arms in self-defense is not a "second-class right," in Missouri or elsewhere. *McDonald*, 561 U.S. at 780. It receives the highest, most robust level of constitutional protection. The text of our Constitution and our State's unique tradition reflect an increasing awareness of the importance of this right and the need to provide it the broadest, most explicit protection known in law. *See* MO. CONST. art. I, § 23. The right to keep and bear arms in self-defense, therefore, is just as fundamental as other cherished freedoms such as the right to free speech, to freedom of the press, and to the free exercise of one's religion.

A criminal prosecution that publicly targeted the exercise of any one of those other fundamental rights should not and would not be tolerated. For example, suppose a prosecutor charged members of an unpopular religious group with felony crimes solely because they had participated in worship services of their religious group. Or suppose a prosecutor charged local journalists with felony crimes solely because they had engaged in speech that the prosecutor deemed unpopular or damaging to the public interest. Our system of justice would not tolerate such cases. The courts would recognize that the mere pendency of those cases would intimidate

and deter others from exercising the same fundamental freedoms. The courts would recognize that Missouri citizens should not be forced to endure the burdensome, expensive, and stressful process of defending a criminal case through jury trial and appeal as a condition of exercising their fundamental rights. So also here. The right to keep and bear arms in self-defense is no less fundamental than these other deeply cherished liberties, and it should be given no less protection.

CONCLUSION

On behalf of all Missourians who wish to exercise their right to keep and bear arms in self-defense of their persons, homes, families, and property, the Attorney General respectfully requests that the Court dismiss this case at the earliest possible opportunity.

Dated: July 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 20, 2020, the foregoing was filed electronically through the Court's electronic filing system to be served electronically on all counsel of record.

/s/ D. John Sauer