MISSOURI CIRCUIT COURT
NINETEENTH CIRCUIT
(Cole County)

CITY OF ST. LOUIS, *et al*.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 21AC-CC00237
	)	Div. 2
STATE OF MISSOURI, *et al*.,	)	
	)	
Defendants.	)	

BRIEF OF *AMICI CURIAE* MISSOURI FIREARMS COALITION, IOWA GUN OWNERS, OHIO GUN OWNERS, MINNESOTA GUN RIGHTS, GEORGIA GUN OWNERS, AND WYOMING GUN OWNERS IN OPPOSITION TO PRELIMINARY INJUNCTION AND IN SUPPORT OF DISMISSAL

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Constitutional Provisions

Interest of *Amici Curiae*

The Missouri Firearms Coalition is Missouri's most effective gun rights organization. It is a nonprofit that is organized under section 501(c)(4) of the Internal Revenue Code. The Coalition has successfully supported the protections of the Second Amendment to the U.S. Constitution and Article I, Section 23 of the Constitution of Missouri through grassroots advocacy and engagement with Missouri policymakers. The Coalition was instrumental in supporting the passage and signing of the statute challenged in this case, the Second Amendment Preservation Act, House Bill Nos. 85 and 310 (2021), codified in Sections 1.410 to 1.485, RSMo. (collectively, "HB85").

By baselessly alleging that HB85 violates the Supremacy Clause of the U.S. Constitution and myriad provisions in the Missouri Constitution, the City of St. Louis, St. Louis County, and Jackson County threaten not only the right to bear arms but fundamental principles of federalism and state sovereignty. The Missouri Firearms Coalition offers this brief in defense of one of its most important achievements and to bolster its future efforts to protect the right to bear arms in Missouri.

Iowa Gun Owners, Ohio Gun Owners, Minnesota Gun Rights, Georgia Gun Owners, and Wyoming Gun Owners are all nonprofits organized under section 501(c)(4) of the Internal Revenue Code. Each organization is supporting the Second Amendment Preservation Act in its respective state. These organizations join in defense of state sovereignty and gun rights.

Argument

The Plaintiffs seek a preliminary injunction from this Court with nothing more than a bombastic, repetitive hodgepodge of a petition. Verified Motion for Preliminary Injunction, Aug. 10, 2021 (hereinafter "PI Motion"); Amended Petition, July 15, 2021 (hereinafter "Amend. Pet."). While Plaintiffs' claims about HB85 are inaccurate hyperbole at best, their arguments as a whole amount to nothing less than an effort by St. Louis County, Jackson County, and the City of St. Louis to secede from the State of Missouri.

This brief dispels the worst of Plaintiffs' baseless rhetoric and their central claims: that HB85 "nullif[ies]" federal gun laws or violates the Supremacy Clause of article VI of the U.S. Constitution, violates various provisions of the Constitution of Missouri, and is unconstitutionally vague. *See* Amend. Pet. at 3-4, 7-8, 9-10 (¶24), 14. HB85 is none of these things: it is an appropriate enactment of the Missouri Legislature in furtherance of the right to keep and bear arms under the Constitution of Missouri, specifically the state's duty to "uphold these rights and ... under no circumstances decline to protect against their infringement." MO. CONST. art. I, § 23; *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("*[S]tate courts* cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." (emphasis added)).

I. The Second Amendment Preservation Act (HB85) Reflects Federalism and State Sovereignty Under the Tenth Amendment and Does Not Violate the Supremacy Clause

It is an understatement to say that gun rights are in a precarious situation in America, in spite of the nation's rich history of law-abiding citizens keeping and bearing arms for sport, self-defense, and national defense. Missouri is no exception, with polarized perspectives between

government officials as to whether the Second Amendment solves problems or is itself a problem to be solved. *See Missouri's Governor Pardons The St. Louis Lawyers Who Waved Guns At BLM Protesters*, NAT'L PUB. RADIO, Aug. 3, 2021, https://www.npr.org/2021/08/03/1024446351/missouris-governor-pardons-the-st-louis-lawyers-who-waved-guns-at-blm-protesters. HB85 definitively establishes that in Missouri, gun rights are paramount and shall not be infringed or circumvented, and the law is constitutional in all respects to the U.S. and Missouri Constitutions.

The U.S. Supreme Court only recognized that the Second Amendment is an individual right in 2008. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). Two years later, the Court ruled that the amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 767-87 (2010). Litigation continues as to the extent of judicial recognition of the right to bear arms, including over issues such as whether certain firearms and accessories are in "'common use' and 'typically possessed by law-abiding citizens for lawful purposes' like self-defense." *U.S. v. Stepp-Zafft*, 733 F. App'x 327, 329 (8th Cir. 2018) (quoting *Heller*, 554 U.S. at 624-25). These are boundaries that branches of certain governments—including, today, the federal government—are determined to push as far as possible toward regulation and confiscation. *See, e.g.*, Factoring Criteria for Firearms With Attached "Stabilizing Braces," 86 Fed. Reg. 30826, *available at* https://www.govinfo.gov/content/pkg/FR-2021-06-10/pdf/2021-12176.pdf (Proposed Rulemaking, June 10, 2021). States need not be mere bystanders as this occurs.

After the filing of this suit, President Joe Biden announced a "zero tolerance" policy against gun dealers who "willfully sell a gun to someone who's prohibited from possessing it" while dismissing one of the foundational concerns underlying the Amendment—resisting tyranny.

President Biden on 2nd Amendment and Zero Tolerance Policy for Gun Dealers, YOUTUBE, June 23, 2021, https://youtu.be/mMUQU4m9Z5U. Such is precisely the purpose of the right to bear arms, and a reason the Second Amendment was added to the Bill of Rights. "[T]he threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution." *Heller*, 554 U.S. at 599. While the President's words may seem innocuous and are, to an extent, reflective of Missouri gun laws, federal law is far more restrictive than Missouri law in many respects. For example, federal law goes so far as to prohibit anyone "who has been convicted in any court of a *misdemeanor* crime of domestic violence" from ever possessing a firearm again, under penalty of felony. 18 U.S.C. § 922(g)(9) (emphasis added); 18 U.S.C. § 924(a)(2); *see* **Exhibit 1** (Letter to Missouri Gov. Michael L. Parson and Missouri Attorney General Eric Schmitt from Acting Assistant Attorney General Brian M. Boynton, June 16, 2021, noting Missouri law contains no such prohibition). On this basis alone, federal and Missouri law distinguish between thousands—perhaps tens of thousands—of Missourians who may keep and bear arms. States thus have an important role in making gun rights a reality. *See* RSMO. §§ 1.440, 1.480.1.

Federalism is also a founding principle; it reflects the American experience that powerful governance from afar tends to be unrepresentative and overzealous. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776). While it provides Missourians with representation in Washington, D.C. to help craft laws that govern the entire United States, the U.S. Constitution was drafted to largely let Missourians govern Missouri. U.S. CONST. art. I, §§ 1-3; *see* THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); *see also* RSMO. § 1.410.2(2). Like the Second Amendment, the value

of federalism is in many ways affirmed by the efforts of certain governments to undermine it. Although court challenges based on the Second Amendment are unfortunately unpredictable at present, federalism and state sovereignty are, as here, cut-and-dry against commandeering.

The federal government may not commandeer the Missouri legislature. This was affirmed by the U.S. Supreme Court in a challenge to the Low-Level Radioactive Waste Policy Act, a response by the U.S. Congress to a serious issue: a dearth of disposal sites for such waste across the country. *New York v. U.S.*, 505 U.S. 144, 150-52 (1992). The law contained provisions that, among other things, required state governments to choose between taking title (that is, liability) for waste or adopting federal guidelines for its disposal. *Id.* at 153-54 (quoting 42 U.S.C. § 2021e(d)(2) (1992)). These provisions were challenged by New York State and some of its local governments—which had established an intrastate approach to disposing of low-level waste—as a violation of the Tenth Amendment. *New York*, 505 U.S. at 154.

When analyzing this federal statute, the Court noted two important principles. First, that the drafters of the Constitution purposefully created a Congress with the power to enact laws that "'at once operate upon the people, and not upon the states[.]'" *Id.* at 166 (quoting 2 J. Elliot, DEBATES ON THE FEDERAL CONSTITUTION 197 (2d ed. 1863)). Second, that a distinction exists between lawful incentives and unconstitutional commandeering. *New York*, 505 U.S. at 167 (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

The *New York* Court ultimately found two out of three provisions of the challenged law were constitutional, but ruled that requiring a state to "either accept[] ownership of waste or regulat[e] according to the instructions of Congress" was commandeering and violated the Tenth Amendment. *New York*, 505 U.S. at 175-77.

> Unlike the first two sets of incentives, the take title incentive does not represent the conditional exercise of any congressional power enumerated in the

> Constitution. In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. *A choice between two unconstitutionally coercive regulatory techniques is no choice at all*.

Id. at 176 (emphasis added). The Court found the federal government's contrary interpretations of the powers at issue unavailing, forcefully concluding that even a national problem such as radioactive waste does not permit federal law to "compel the States to enact or administer a federal regulatory program." *Id.* at. 188. Here, even if this Court were to adopt the rhetoric of gun-control advocates at face value as to gun violence, a national interest in regulation does not change federalism or permit the federal government (or local governments that would like to cooperate with it) to dictate Missouri state law.

The federal government may not commandeer Missouri executives, either. One of the strongest recognitions of federalism by the U.S. Supreme Court against such commandeering arose from a challenge by two county sheriffs. *Printz v. U.S.*, 521 U.S. 898, 902-04 (1997). Rather than demanding the power to cooperate with the federal government, those sheriffs refused to comply with the federal Brady Act, which required them to participate in background checks for firearm purchases. *Id*. After extensively examining two centuries of federal legislation, the structure of the U.S. Constitution, and jurisprudence, the Court found the Brady Act's background check provisions that "conscript[ed] the State's officers directly" were unconstitutional. *Id.* at 904-35. Dual sovereignty—under the U.S. Constitution—"contemplates that a State's government will represent and remain accountable to *its own citizens*" in inevitable conflicts with the federal government. *Id.* at 920 (emphasis added). This is impossible if the federal government may direct state law enforcement.

The import of *New York* and *Printz* could not be clearer: states do not have to devote any resources whatsoever to enforcing federal mandates that are not specifically required by the U.S. Constitution. *See, e.g.*, *Printz*, 521 U.S. at 908 (noting a federal statute implementing the Extradition Clause of the U.S. Constitution, art. IV, § 2); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 323 (Mo. banc. 2016) (recognizing *New York* and *Printz*). Thus, state-level officials may decline to participate in or enforce federal regulations that do not stem directly from the U.S. Constitution, such as background checks for firearm purchases. *Cf.* Amend. Pet. at 7 (¶13). The courts' anti-commandeering principle, however, is not merely a matter of discretion for state law enforcement. In fact, state law may generally prohibit law enforcement from participating in the enforcement of federal law, unless the state's constitution commands otherwise. *See, e.g.*, PI Motion Exh. 6.

Federalism is a powerful bulwark for the freedom of the states and their people, respectively. The federal government is undoubtedly "more powerful and more pervasive than any in our ancestors' time." Brennan, 90 HARV. L. REV. at 495. And "[t]he actual scope of the Federal Government's authority with respect to the States has changed over the years ... *but the constitutional structure underlying and limiting that authority has not*." *New York*, 505 U.S. at 159 (emphasis added). Federal law applies to Missourians, and still applies to Missourians following the passage of HB85. But the fact is that the federal government cannot effectively regulate everyday life without state-level collaborators, because the federal government cannot commandeer state officials. *See, e.g.*, PI Motion Exhibit 6. Thus, if desired, the legislature of a state may generally enact laws that prohibit collaboration by state and local officials with federal authorities unless there is a specific power in the U.S. Constitution that requires cooperation or a provision in the Missouri Constitution that prohibits curtailing it. The Plaintiffs' allegations that

HB85 violates the Supremacy Clause or in any way "nullifies" federal law are without merit and should be dismissed.

II. The Second Amendment Preservation Act (HB85) Appropriately Prohibits Missouri Law Enforcement from Enforcing Unconstitutional Federal Statutes, Which Is No Cause for Secession by Missouri Cities or Counties

The Plaintiffs' reference to "past generations' nullification attempts" is meritless and sophomoric. Amend. Pet. at 3. But, ironically, the Plaintiffs' interpretation of the Missouri Constitution would provide charter cities and counties nothing less than the power to secede from the state—or at least, the power to engage in *de facto* secession by eliminating the clear distinction between laws that affix a certain duty to government agents statewide and laws that "creat[e] or fix[] the powers, duties or compensation of any municipal office or employment[.]" MO. CONST. art. VI, § 22.

The alleged violations of Article VI, sections 18(b) and 18(e) of the Missouri Constitution relate to counties operating by special charter. This article of the state constitution and charters themselves do provide a certain amount of autonomy to county governments. *See also* MO. CONST. art. VI, § 18(a). Similarly, article VI, section 22 provides some autonomy to charter cities, and section 31 of the same article provides certain autonomy to the City of St. Louis, specifically. *See also* MO. CONST. art. VI, §§ 19, 30(a). The Plaintiffs offer sparse detail but allege that HB85 violates these provisions "regarding employment, hiring and prescribing the duties of law enforcement." Amend. Pet. at 14 (Request ¶3); *see* MO. CONST. art. VI, §§ 18(e), 22. Moreover, they claim that HB85 confers "special privileges to gun owners" under Article III, section 40(28). Amend. Pet. at 13 (Request #2). These allegations are without merit: HB85 complies with these provisions of the Missouri Constitution.

"[N]o law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees." MO. CONST. art. VI, § 18(e). Similarly, "[n]o law shall be enacted

creating or fixing the powers, duties or compensation of any municipal office or employment, for any city framing or adopting its own charter ....” MO. CONST. art. VI, § 22. HB85 engages in no such meddling. Rather, it states:

> No entity or person, including any public officer or employee of this state or any political subdivision of this state, shall have the authority to enforce or attempt to enforce any federal acts, laws, executive orders, administrative orders, rules, regulations, statutes, or ordinances infringing on the right to keep and bear arms as described under section 1.420.

RSMO. § 1.450. HB85 does not create any offices or employment within charter cities or counties, much less enact specific powers or duties of any office or employment. *Cf. State ex rel. Sprague v. City of St. Joseph*, 549 S.W.2d 873, 874, 877 (Mo. banc. 1977) (citing *Preisler v. Hayden*, 309 S.W.2d 645 (Mo. 1958)). Nor does HB85 meddle or affect the compensation of law enforcement officers within charter cities or counties. Instead, HB85—applying to “any public officer or employee of this state or any political subdivision of this state”—is “of general interest and import, [and] is applicable state-wide at all levels of government in the state, including a constitutional charter city and ... the city of St. Louis.” *Cohen v. Poelker*, 520 S.W.2d 50, 54 (Mo. banc. 1975). The *Poelker* case is particularly terse and instructive: if a law of general applicability such as a Sunshine Law may be ignored—or *nullified*—by charter cities and counties, then they are effectively no longer political subdivisions of the state but rather states themselves.

HB85 does not alter the powers and duties of the Plaintiffs’ law enforcement officers in a manner that violates the Missouri constitution’s charter provisions, and it also does not grant “special privileges to gun owners[.]” Amend. Pet. at 13 (Request ¶2). For purposes of Article III, Section 40 of the Missouri Constitution, “[i]t is well settled in this state that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is considered a special law.” *Planned Indus. Expansion Auth. of City of St. Louis v. Sw. Bell Tel. Co.*, 612 S.W.2d 772, 777 (Mo. banc. 1981). Missouri’s Constitution only

prohibits the latter. *Id.* By the Plaintiffs' own formulation, gun owners are not particular persons or things of a class: the barriers to entry are minimal, and *amicus* Missouri Firearms Coalition can attest to the vigor with which Missouri gun owners aim to make the "class" as large as possible. But as a factual matter the Plaintiffs are wrong to claim that HB85 is even that focused: the class in HB85 is law-abiding citizens, those who are "not otherwise precluded under state law from possessing a firearm[.]" RSMo. § 1.480. This is as broad a law as could be drafted, and in no way implicates the special law article of the Missouri Constitution.

Simply put, "[t]he state has the right in the exercise of the police power to prescribe a policy of general state-wide application which applies to special charter cities." *City of St. Louis v. Grimes*, 630 S.W.2d 82, 84 (Mo. banc. 1982) (quoting *Petition of City of St. Louis*, 266 S.W.2d 753, 755 (Mo. 1954)). So, too, may the state protect law-abiding citizens without implicating restrictions upon special laws. If prohibiting the enforcement of federal firearms statutes statewide is unconstitutional meddling in the duties and powers of special charter cities and counties, then just about any law fits the bill. Likewise, if "law-abiding citizens" constitutes a special class, then every law is a special law. HB85 is a generally applicable law that comports with the Missouri Constitution.

III. Compliance With The Second Amendment Preservation Act (HB85) is as Simple as Focusing on Crime Itself

The Plaintiffs allege that HB85 is vague, though this claim does not appear to be tied to any cause of action or claim for relief. Amend. Pet. at 2-3, 7-9, 13-14. Vagueness is a serious concern in criminal law because clarity is fundamental to due process. *See Skilling v. U.S.*, 561 U.S. 358, 402-03 (2010). When fundamental rights such as free speech are implicated, vagueness is an even greater concern, because citizens "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked" and thus forgo the exercise of their rights.

Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (internal quotation omitted). However, because HB85 only provides for a civil penalty and a civil cause of action, it should be afforded greater tolerance by the Court. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). Further, because the infringements identified in HB85 are clearly understood by the Plaintiffs, there is no reason to evaluate Plaintiffs' vagueness claim. RSMo. § 1.420; *see* PI Motion at 3-5 (¶¶11-20).

First, HB85 does not *abridge* a fundamental right, it *bolsters* gun rights. Missouri law enforcement may not assist in the enforcement of federal gun laws against Missourians who are "not otherwise precluded under *state* law from possessing a firearm[.]" RSMo. § 1.480.1 (emphasis added); *see* RSMo. § 571.010, *et seq.* The Plaintiffs' complaint, in essence, is that HB85 requires law enforcement to steer far wider of enforcing unique federal gun laws than they would prefer. *See* Amend. Compl. at 2-3, 8, 9 (¶22); PI Motion at 2 (¶8). But it bears reiterating that it is wholly within a state legislature's prerogative to place such duties and prohibitions on all state executives, even if the unique federal restrictions in question were deemed constitutional by the United States Supreme Court. *See supra* parts I, II. Law enforcement do not have a constitutional right to enforce federal gun laws as they prefer, but Missourians do have a constitutional right to bear arms.

Earlier in this brief, *amici* noted that Missouri law, unlike federal law, does not prohibit citizens convicted of misdemeanor domestic violence from possessing a firearm. *See supra* part I. This is cause for consternation by gun-control proponents and some law enforcement, under the belief that such a conviction raises too great a risk for gun violence by the perpetrator. Gun rights proponents (and, following HB85, the Missouri Legislature and Governor of Missouri) consider gun rights to be something that should not be deprived owing to a misdemeanor. To give effect to

this federal law, federal agents will simply have to operate independently. They probably won't, which gives the lie to the actual importance of such restrictions. It is important to note, however, that even after the passage of HB85, felons are still prohibited from possessing firearms under both federal and Missouri law. *See* 18 U.S.C. § 922(g)(1), RSMo. § 571.070.1(1). Thus, in enforcing such offenses, Missouri law enforcement may continue to collaborate with federal authorities. While collaborative efforts may have to be adjusted, our law enforcement system is not going to descend into anarchy.

Following passage of HB85, Missouri law enforcement must in many instances pivot its focus to crime itself. Too often, individual rights are curtailed as prophylactics against bad outcomes. Numerous federal gun restrictions are akin to banning parades because they might turn into riots. *See, e.g.*, 86 Fed. Reg. 30826 (*supra*). Moreover, firearms prosecutions, in the vast majority of instances, accompany charges with real crimes—that is, crimes that are not status offenses and inflict real harm. *See, e.g.*, *U.S. v. Barrett*, 552 F.3d 724, 725 (8th Cir. 2009). No such prosecutions are curtailed by HB85: murder, assault, and other crimes that might be committed with firearms are just as unlawful as they were before and may be investigated and prosecuted by Plaintiffs' law enforcement officials, even in cooperation with the federal government. The only caveat is to stop pretending that guns are a suitable alternative target to crime.

Conclusion

Plaintiffs present nothing but a petition contrary to state sovereignty and federalism; their crusade against gun rights amounts to nothing more than a secessionist tantrum. The City of St. Louis, St. Louis County, and Jackson County remain inseparable parts of the State of Missouri and subject to state laws such as HB85. Paradigm shifts can be difficult, but that does not a constitutional crisis make. *See, e.g.*, PI Motion at 3-5 (¶¶14-20) (detailing how entangled Plaintiffs' law enforcement is with federal law enforcement). To the contrary: HB85 is constitutional clarity,

affirming that gun rights are not a problem to be solved. For the foregoing reasons, *amici* support the State of Missouri and urge the Court to deny Plaintiffs' motion for preliminary injunction and expeditiously dismiss their claims that HB85 violates the Supremacy Clause of the United States Constitution or the Missouri Constitution.

Respectfully submitted,

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Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel of record for all parties by means of the court's electronic filing system on this 18th day of August, 2021.

/s/ *Edward D. Greim*

EXHIBIT 1

U.S. Department of Justice
Civil Division

Office of the Assistant Attorney General

Washington, DC 20044

June 16, 2021

By Electronic and U.S. Mail

The Honorable Michael L. Parson
Governor of Missouri
P.O. Box 720
Jefferson City, MO 65102

The Honorable Eric Schmitt
Missouri Attorney General's Office
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Re: Missouri HB 85 – Second Amendment Preservation Act

Dear Governor Parson and Attorney General Schmitt:

I write regarding Missouri House Bill Number 85 (HB 85), which was signed into law on Saturday, June 12. By its terms, the statute appears to declare numerous federal firearms laws to constitute "infringements" of state and federal constitutional rights, to prohibit all persons from enforcing such laws in Missouri, to preclude Missouri law enforcement agencies from participating in the enforcement of such laws, and to prohibit Missouri law enforcement agencies from hiring any former federal law enforcement officer or agent who enforced such laws or provided support for their enforcement.

The public safety of the people of the United States and citizens of Missouri is paramount. We are concerned that, absent clarification, HB 85 threatens to imperil the longstanding and close cooperation between the Federal Government and law enforcement agencies in Missouri that seek to jointly combat violent crime in the state. At a time when homicides have increased in Missouri and neighboring states, measures that impair the effective enforcement of federal law will increase the risk of violent crime in our communities. Existing federal laws and regulations relating to firearms, which are consistent with the Second Amendment, are an important check to keep firearms out of the hands of criminals.

As explained below, numerous provisions of HB 85 raise significant federal law enforcement and legal concerns. In light of the significant public safety risks the law presents, the United States Department of Justice respectfully requests that you take action to clarify the scope of the law and respond to this letter by Friday, June 18.

HB 85's Key Provisions

HB 85 includes a number of provisions that raise concerns. Section 1.420 states that "federal acts, laws, executive orders, administrative orders, rules, and regulations" falling into five categories of regulations relating to firearms "shall be considered infringements on the people's right to keep and bear arms, as guaranteed by Amendment II of the Constitution of the United States and Article I, Section 23 of the Constitution of Missouri." HB 85 § 1.420. The categories of federal laws and regulations that are considered "infringements" are:

(1) "[a]ny tax, levy, fee, or stamp imposed on firearms, firearm accessories, or ammunition not common to all other goods and services and that might reasonably be expected to create a chilling effect on the purchase or ownership of those items by law-abiding citizens,"[1]

(2) "[a]ny registration or tracking of firearms, firearm accessories, and ammunition,"

(3) "[a]ny registration or tracking of the ownership of firearms, firearm accessories, and ammunition,"

(4) "[a]ny act forbidding the possession, ownership, use, or transfer of a firearm, firearm accessory, or ammunition by law-abiding citizens" (as defined under HB 85 with reference only to state law, *see supra* n.1), and

(5) "[a]ny act ordering the confiscation of firearms, firearm accessories, or ammunition from law-abiding citizens."

HB 85 further provides that any such purported infringements "shall be invalid to this state, shall not be recognized by this state, shall be specifically rejected by this state, and shall not be enforced by this state." *Id.* § 1.430. Additionally, Section 1.450 provides that:

> No entity or person, including any public officer or employee of this state or any political subdivision of this state, shall have the authority to enforce or attempt to enforce any federal acts, laws, executive orders, administrative orders, rules, regulations, statutes, or ordinances infringing on the right to keep and bear arms as described under section 1.420.

Id. § 1.450.

The statute also imposes limits on the law enforcement officers who can be employed by Missouri governmental agencies. HB 85 provides for civil penalties of $50,000 per occurrence against political subdivisions or law enforcement agencies that employ a law enforcement officer who "knowingly" violates Section 1.450. *Id.* § 1.460. The law also imposes similar penalties on any political subdivision or law enforcement agency that "knowingly employs an individual acting or who previously acted as an official, agent, employee, or deputy of the government of

[1] The term "law-abiding citizens" is defined as those who may possess firearms under Missouri law. *See* HB 85 § 1.480(1).

the United States, or otherwise acted under the color of federal law within the borders of this state, who has knowingly" either (1) attempted to enforce the "infringements identified in section 1.420" or (2) has "[g]iven material aid and support to the efforts of another who enforces or attempts to enforce" them. *Id.* § 1.470. The law appears to materially limit the cooperation of state officials or others in "federal prosecution[s]" insofar as only certain specified federal prosecutions are identified in a purported safe harbor provision. *See id.* § 1.480(4).

Significant Law Enforcement and Legal Concerns Raised by HB 85

HB 85 threatens to immediately disrupt the working relationship between federal and state law enforcement officers, many of whom work shoulder-to-shoulder on various joint task forces, for which Missouri receives ample federal grants and other technical assistance. In addition, HB 85 risks sowing confusion among both the regulated community of federal firearms licensees, who are obligated under criminal penalty to comply with federal law, and Missouri citizens. And as drafted, HB 85 raises significant concerns under the Supremacy Clause of the United States Constitution.

1. Section 1.420's Declaration that Certain Federal Firearms Regulations Are Unlawful

As an initial matter, Section 1.420 raises significant preemption concerns. That provision purports to declare that five categories of federal firearms regulations "shall be considered infringements" of the Missouri Constitution's right to keep and bear arms as well the Second Amendment to the U.S. Constitution. Specifically (as noted above), this provision purports to declare unlawful federal firearms regulations pertaining to taxes and fees, registration and tracking, possession, ownership, use, transfer, and confiscation.

Under our federal system, a state cannot nullify federal law. Instead, where federal law conflicts with state law, state law is preempted. The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Pursuant to the Supremacy Clause, federal law preempts state laws when, among other things, state laws "interfere with, or are contrary to, federal law"—commonly referred to as conflict preemption. *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985). Conflict preemption occurs when a state law "actually conflicts with federal law," *id.* at 713, such as when "compliance with both federal and state [law] is a physical impossibility," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Conflict preemption also occurs when state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Section 1.420 declares that five categories of valid federal firearms regulation are unlawful. But the Missouri statute makes no effort to establish that the five categories of federal regulations violate the Second Amendment to the U.S. Constitution. And there is no basis to conclude that they do. The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008), stated that "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and identified "examples" of "presumptively lawful regulatory measures"

consistent with that right, including "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Yet Section 1.420 would declare such measures to constitute "federal acts, laws, executive orders, administrative orders, rules, and regulations" that "infringe[] on the people's right to keep and bear arms" under the state and federal Constitutions. Such a declaration threatens to stand as an obstacle to federal law. The new state law tells the people of Missouri that federal firearms regulation is invalid. The provision may also make it "'impossible' for [federal firearms licensees] to comply with both state and federal law." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000). For example, does Section 1.420 purport to make it unlawful for federal firearms licensees to run National Instant Criminal Background Check System (NICS) checks before the transfer of a firearm? Likewise, does this section also purport to make it unlawful for a state or local police officer to request the Bureau of Alcohol, Tobacco, Firearms and Explosives trace a firearm recovered from a crime scene? Please provide clarification.

Although Section 1.420(4) is limited to possession, ownership, use, and transfer restrictions on "law-abiding citizens," that does not appear to shield that prong of the statute. Section 1.480(1) defines the term "law-abiding citizen" as "a person who is not otherwise precluded *under state law* from possessing a firearm." (Emphasis added.) Federal law presently includes prohibitions on the possession of firearms not reflected in Missouri law, including prohibitions on possession by a person "who has been convicted in any court of a misdemeanor crime of domestic violence," 18 U.S.C. § 922(g)(9), by a person subject to a court order that complies with the requirements of 18 U.S.C. § 922(g)(8), or by a person dishonorably discharged from the military, *id.* § 922(g)(6).

2. Section 1.450's Prohibition on Enforcing Federal Law

By its terms, Section 1.450 provides that "*[n]o entity or person* . . . shall have the authority to enforce or attempt to enforce any federal acts, laws, executive orders, administrative orders, rules, regulations, statutes, or ordinances infringing on the right to keep and bear arms as described under section 1.420." (Emphasis added.) If this section were construed to apply to *federal officers* operating in the State of Missouri, then this section would violate the doctrine of intergovernmental immunity, which prohibits the states from regulating the federal government. *See Mayo v. United States*, 319 U.S. 441, 445 (1943) ("[T]he activities of the Federal Government are free from regulation by any state."); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) ("The states have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by [C]ongress to carry into execution the powers vested in the general government[.]").

We assume that Missouri does not intend to directly regulate federal law enforcement agencies and instead means to impose limits on state law enforcement. We also assume Missouri does not intend Section 1.450's limit on enforcing federal firearms laws to prohibit private persons and entities from complying with or implementing federal law. The persons subject to Section 1.450 "includ[e] any public officer or employee of *this state* or any political subdivision of *this state*." (Emphasis added.) This provision accordingly could be interpreted to extend only

to such Missouri state and local officers, as well as to state and local agencies. If that is the case, please provide immediate confirmation.

3. Section 1.460's Restriction on State Agencies Cooperating with Federal Firearms Law Enforcement

Section 1.460 imposes liability on "[a]ny political subdivision or law enforcement agency that employs a law enforcement officer who acts knowingly" to violate Section 1.450—*i.e.*, who knowingly "enforce[s] or attempt[s] to enforce" any federal laws pertaining to firearms that fall within the categories set forth in Section 1.420. Section 1.460 thus appears to impose liability on any Missouri agency that employs a law enforcement officer who participates[2] in any joint operations with federal law enforcement to enforce federal firearms laws outside of very narrow exceptions.[3]

A limitation of this kind raises substantial law enforcement concerns. The United States deeply values the partnerships it has formed with state and local law enforcement agencies to keep our communities safe. Enforcing federal firearms laws is an important part of those efforts. Without the kind of federal-state cooperation that has benefited all of us over many years, our collective law enforcement efforts will be impaired. To the extent HB 85 is not intended to impede federal-state cooperation, we ask that you provide that clarification.

4. Section 1.470's Limit on Hiring Former Federal Officers and Agents and Potential Interference with Federal Grand Juries

Section 1.470 would impose significant liability ($50,000) on any state or local agency that employs an individual who previously worked for the federal government or who acted in coordination with the federal government in Missouri and who enforced or attempted to enforce federal firearms laws falling within Section 1.420 or who gave "material aid and support" to someone who did so. On its face, the provision therefore appears to discriminate against federal law enforcement officers and others who worked with them, such as state or local law enforcement officers who served on a joint task force or other similar operation. This kind of targeting of former federal employees and individuals who worked cooperatively with the federal government may well be unprecedented and raises significant concerns under the intergovernmental immunity doctrine. *See, e.g.*, *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (state laws are invalid if they "regulate[] the United States directly or discriminate[] against the Federal Government or those with whom it deals").

[2] To avoid retroactivity issues, we interpret Section 1.460 as applying only prospectively, rather than to prior actions by state and local law enforcement officers.

[3] Section 1.480(4) allows for the provision of "material aid to federal prosecution" for "[f]elony crimes against a person when such prosecution includes weapons violations substantially similar to those found in chapter 570 or chapter 571 [of Missouri Revised Statutes]" but only where "such weapons violations are merely ancillary to such prosecution." Section 1.480(4) does not define the statutory terms "merely ancillary" or "crimes against a person" or provide any means for determining the construction of those terms. Giving those terms their plain meaning, however, the provision would provide a safe harbor for only a limited set of federal firearms prosecutions.

Section 1.470 also raises serious preemption concerns regarding federal grand juries and prosecutions. It is well established that state laws that conflict with the enforcement of federal grand jury and other subpoenas are preempted under the Supremacy Clause. *See, e.g.*, *In re Grand Jury Subpoena*, 198 F. Supp. 2d 1113, 1115 (D. Alaska 2002) ("District courts all over the country have subscribed to the proposition that the Supremacy Clause gives federal grand jury investigative powers precedence over state confidentiality statutes."); *Or. Prescription Drug Monitoring Program v. DEA*, 860 F.3d 1228, 1236 (9th Cir. 2017) (Oregon statute "interferes with the scheme Congress put in place for the federal investigation of drug crimes" by requiring DEA to obtain a court order prior to enforcing its investigative subpoenas); *see also Hillsborough*, 471 U.S. at 712 (federal law preempts state laws that "interfere with, or are contrary to, federal law"); *Baylson v. Disciplinary Bd. of Supreme Ct. of Pa.*, 975 F.2d 102 (3d Cir. 1992) (enforcement of a state rule requiring federal prosecutors to obtain prior judicial approval before serving a grand jury subpoena would violate the Supremacy Clause). Under section 1.470, an officer who works on a joint federal-state task force and testifies before a grand jury or at trial could be deemed to have provided "material aid and support to the efforts of another who enforces or attempts to enforce any of the infringements identified in section 1.420." HB 85 § 1.470(1)(2). In light of active investigations and prosecutions of violent criminal activity in Missouri and ongoing proceedings in federal grand juries, please confirm immediately that HR 85 does not purport to prevent any individual, including state and local officials, from complying with federal grand jury or other federal subpoenas.

5. Clarifying the Effective Date of HB 85

Section B of HB 85 states that the law shall be "in full force and effect upon its passage and approval." Section 1.480, however, indicates that "[t]he provisions of sections 1.410 to 1.485 shall be applicable to offenses occurring on or after August 28, 2021." We ask that you clarify whether "offenses" refers to violations of HB 85 or to underlying criminal offenses, and whether actions taken after the date of enactment of HB 85 but before August 28, 2021, can constitute violations of HB 85. Given the language of Section 1.480(5), we assume that no action can violate the law prior to August 28, 2021. Absent clarity on this score, we have concerns that important law enforcement efforts could be chilled.

* * *

Under the Supremacy Clause of the United States Constitution, Missouri lacks the authority to nullify federal law, to shield Missouri businesses or its citizens from the reach of federal law, or to obstruct and prevent federal employees and officials from carrying out their responsibilities under federal law. Because HB 85 conflicts with federal firearms laws and regulations, federal law supersedes this new statute; all provisions of federal laws and their implementing regulations therefore continue to apply. Federal law enforcement agencies, including the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Federal Bureau of Investigation, the Drug Enforcement Administration, the United States Marshals Service, and the United States Attorney's Office for the Eastern and Western Districts of Missouri, will continue to execute their duties to enforce all federal firearms laws and regulations.

Given the importance of this matter, we ask that you provide the clarifications requested above by close of business Friday, June 18. Please contact me if you wish to discuss this matter further.

Respectfully,

Brian M. Boynton

Brian M. Boynton
Acting Assistant Attorney General