



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
Supreme Court Building
207 W. High St.
P.O. Box 899
Jefferson City, MO 65102

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 participates² 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,

A handwritten signature in blue ink that reads "Brian M. Boynton". The signature is written in a cursive style with a clear, legible font.

Brian M. Boynton
Acting Assistant Attorney General