No. SC99290

IN THE SUPREME COURT OF MISSOURI

CITY OF ST. LOUIS, ST. LOUIS COUNTY, and JACKSON COUNTY,

Appellants,

v.

STATE OF MISSOURI and ERIC SCHMITT, Attorney General of Missouri,

Respondents.

Appeal from the Circuit Court of Cole County, Missouri
Nineteenth Judicial Circuit
The Honorable Daniel R. Green, Circuit Judge

BRIEF OF THE MISSOURI FIREARMS COALITION, IOWA GUN OWNERS, OHIO GUN OWNERS, MINNESOTA GUN RIGHTS, GEORGIA GUN OWNERS, AND WYOMING GUN OWNERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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* Motion for *pro hac vice* admission pending.

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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 Missourians' right to bear arms but also the 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 supports Missouri's Second Amendment Preservation Act in its respective state and join the Missouri Firearms Coalition in its defense of state sovereignty and gun rights.

Introduction and Summary of Argument

The Appellants sought an injunction from the court below with nothing more than a bombastic, repetitive hodgepodge of a petition, which is now reflected in a bombastic, repetitive hodgepodge of a brief for this Court. Verified Motion for Preliminary Injunction, Aug. 10, 2021 (hereinafter "PI Motion"); Amended Petition, July 15, 2021 (hereinafter "Amend. Pet."); *see generally* Appellants' Brief. While Appellants' 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 Appellants' 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* App. Br. 27-38, 43-46, 38-43. 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)).

Argument

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); *see generally* Br. of the United States as *Amicus Curiae*. 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). 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. *See* Br. of the United States as *Amicus Curiae* at 10-16. 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. 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 Appellants' claims that HB85 violates the Supremacy Clause or in any way "nullifies" federal law are without merit, and should be rejected if addressed by this Court.

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 Appellants' references to "nullification" and "the ghost of John C. Calhoun" are meritless and sophomoric. App. Br. at 44. But, ironically, the Appellants' 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; *see* App. Br. at 27-38.

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 Appellants offer sparse detail but allege that HB85 violates these provisions by "superimpos[ing] specific duties and penalties on plaintiffs and their police officer employees[.]" App. Br. at 32; *see* MO. CONST. art. VI, §§ 18(e), 22. 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. 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. 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.

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. 1982) (quoting *Petition of City of St. Louis*, 266 S.W.2d 753, 755 (Mo. 1954)). 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. 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 Appellants allege that HB85 is a "vague and unintelligible penal legislation" and violates due process. App. Br. at 38-43. 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 Appellants, there is no reason to accept Appellants' 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 Appellants' complaint, in essence, is that HB85 requires law enforcement to steer far wider of enforcing unique

federal gun laws than they would prefer. *See* App. Br. at 41.[1] 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.

[1] Appellants make the bizarre assertion that "until convicted of a felony, no person in Missouri is precluded from possessing a firearm." App. Br. at 41. This is not true: Missouri law also prohibits fugitives from justice, habitual drug users, and persons who have been adjudged as mentally incompetent from possessing firearms. RSMO. § 571.070.1(2). These Missouri regulations parallel roughly half of the prohibition categories under federal law. *See* 18 U.S.C. § 922(g)(1)-(4). So, too, does Missouri law specifically reflect federal law limiting handgun possession to persons over the age of 18. RSMO. § 571.080 (citing 18 U.S.C. § 922(b), (x)). The Court should be wary of vagueness arguments from parties who have apparently made little effort to read the laws at issue.

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 Appellants' 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

Appellants present nothing but an appeal 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. 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 affirm the ruling of the court below.

Respectfully submitted,

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Certificate of Compliance

The undersigned counsel certifies that this *amici curiae* brief in support of Respondents complies with the requirements of Missouri Supreme Court Rule 84.06 and that this brief contains 3,737 words, excluding the cover, the table of contents, the table of authorities, certificates and the signature blocks, as determined by Microsoft Word. The font is Times New Roman 13-point type.

/s/ *Edward D. Greim*

Certificate of Consent

The undersigned counsel certifies that all parties have consented to the filing of this *amici curiae* brief.

/s/ *Edward D. Greim*

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 20th day of January, 2022.

/s/ *Edward D. Greim*