

MEMORANDUM

From: Everytown Law*
Re: Arkansas Firearms Nullification Laws
Date: June 17, 2021

Everytown for Gun Safety, the nation's largest gun violence prevention organization, is deeply concerned about two firearms nullification bills that recently became law in Arkansas, which purport to nullify federal gun laws within Arkansas and even go so far as to criminalize the enforcement of federal law, including by federal officers. These nullification laws, much like Missouri's recently enacted HB 85, are at the vanguard of a dangerous movement that seeks to undermine the enforcement of new federal gun safety laws and rules passed or promulgated under the Biden Administration – such as the recently announced ATF rules regarding ghost guns and short-barreled rifles – and even to roll back the protections of existing federal laws and vital coordination between federal and state authorities in enforcing the nation's gun laws.

In addition to being dangerous and wrongheaded, these new laws are clearly unconstitutional under the Supremacy Clause, as the Justice Department has recently recognized with respect to Missouri's HB 85. The Justice Department should take similar action to confront Arkansas's newly enacted firearms nullification laws, both to clarify the scope of such laws and to stem the tide of other states following Missouri's and Arkansas's lead.

Background

President Biden recently announced that his administration intends to focus on tackling the “gun violence public health epidemic” in this country. On May 7, 2021, as part of that initiative, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) issued a notice of proposed rulemaking designed to curb the growing proliferation of “ghost guns” – homemade firearms that lack serial numbers and are sold in kits that can be obtained without a background check and then readily assembled by the purchaser.¹ And on June 7, 2021, the ATF issued a notice of proposed rulemaking that would cut down on the circumvention of rules regulating the sale of short-barreled rifles.²

* Everytown Law is the litigation arm of Everytown for Gun Safety Support Fund. See <https://everytownresearch.org/law/>.

¹ *Justice Department Proposes New Regulation to Update Firearm Definitions*, U.S. Dep't of Just. (May 7, 2021), <https://www.justice.gov/opa/pr/justice-department-proposes-new-regulation-update-firearm-definitions>

² *Justice Department Issues Proposed Rule and Model Legislation to Reduce Gun Violence*, U.S. Dep't of Just. (June 7, 2021), <https://www.justice.gov/opa/pr/justice-department-issues-proposed-rule-and-model-legislation-reduce-gun-violence>

As a direct reaction to the election of the strongest gun safety administration in U.S. history and its announced commitment to strengthening the country's gun laws, numerous states across the country have recently enacted or are in the process of enacting laws that purport to nullify federal gun regulations and even to restrain federal officials from enforcing federal gun laws. Among these states, and in addition to Missouri as the Justice Department has already recognized, Arkansas stands out. The legislature of that state has recently passed into law two bills, SB 59 and HB 1957, both of which we believe are clearly unconstitutional and, along with Missouri's HB 85, among the most egregious bills of this nature anywhere in the country.

SB 59, also called the Intrastate Firearms Protection Act, was enacted on April 26, 2021, and asserts that a firearm that is manufactured and sold within Arkansas and never transported outside that state's borders is exempt from federal regulation. S.B. 59 §1, 93d Gen. Assemb., Reg. Sess. (Ark. 2021). What is more, the bill makes it a misdemeanor for any government official – including “an agent or employee of the United States Government” – to “knowingly enforce or attempt to enforce” any federal laws, rules, or regulations “created or effective on or after January 1, 2021,” that relate to firearms, firearm accessories, or ammunition manufactured and sold within Arkansas. *Id.*

HB 1957, also called the Arkansas Sovereignty Act of 2021, was enacted three days later, on April 29, 2021, and states that “[federal] supremacy does not apply to various federal statutes, orders, rules, regulations, or other actions that restrict or prohibit the manufacture, ownership, and use of firearms, firearm accessories, or ammunition exclusively within the borders of Arkansas.” H.B. 1957 § 1, 93d Gen. Assemb., Reg. Sess. (Ark. 2021). It purports to nullify all federal laws, rules, or regulations “enacted on or after January 1, 2021,” that affect “law-abiding citizens” and involve “[a]ny registering or tracking” of firearms, firearm accessories, or ammunition, or of the owners thereof, “that could have a chilling effect on the purchase or ownership of those items,” as well as “[a]ny act forbidding the possession, ownership, use, or transfer of any type of firearm, firearm accessory, or ammunition.” *Id.* The bill also forbids state and local officers, employees, and agents from “enforcing or assisting federal agencies or officers in the enforcement of any federal statute, executive order, or federal agency directive that conflicts with . . . any Arkansas law.” *Id.*

On their face, these laws purport not only to block state and local enforcement of the Administration's forthcoming ghost gun and short-barreled rifle regulations in Arkansas (among other federal laws), but also purport to subject federal agents attempting to enforce such federal law to criminal prosecution. Even assuming that prosecution of federal agents is unlikely, these bills are sure to confuse Arkansas citizens as to their obligation to obey federal gun laws, posing a significant risk to public safety. Indeed, the state's declaration that any new federal gun laws are inapplicable in Arkansas – particularly when combined with the state's new prohibition on cooperation by Arkansas state and local officials in enforcement of federal laws – risks emboldening Arkansans who are legally prohibited from obtaining firearms to disregard federal law.

Nor is this concern limited to Arkansas and Missouri. The legislatures of several other states, including Wisconsin, Texas, and South Dakota, have also been considering

bills that, like Arkansas’s, would purport to nullify federal gun laws in one way or another. *See, e.g.*, [A.B. 293](#) § 3, 2021–2022 Reg. Sess. (Wis. 2021) (“A firearm, a firearm accessory, or ammunition that is owned or manufactured in this state and that remains within the borders of this state is not subject to federal law or federal regulation”); [H.B. 957](#) § 1, 87th Reg. Sess. (Tex. 2021) (“A firearm suppressor that is manufactured in this state and remains in this state is not subject to federal law or federal regulation”); [H.B. 1075](#) § 1, 2021 Reg. Sess. (S.D. 2021) (purporting to nullify any federal laws or regulations imposing extreme-risk protection orders).³

Arkansas’s Bills are Unconstitutional

We strongly believe that the bills passed in Arkansas – and other similar bills in additional states that may soon become law – are clearly unconstitutional and would be struck down if challenged in the courts. Moreover, if left unchallenged, these bills threaten to undermine – both legally and as an expressive matter – the Administration’s ability to make meaningful progress against the gun violence epidemic.

First, both bills’ assertions that federal law cannot reach firearms manufactured and sold wholly intrastate have already been tested in court – and rejected. *See Mont. Shooting Sports Ass’n v. Holder*, 727 F.3d 975, 982–83 (9th Cir. 2013). In 2009, the Montana legislature passed a law strikingly similar to SB 59: both declared, in almost identical language, that firearms manufactured within and never transported outside the state were not subject to federal regulation.⁴ The Ninth Circuit had little difficulty concluding that the Montana law was “necessarily preempted and invalid,” *id.* at 983 (citing *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (explaining that to the extent a state law conflicts with federal law, “the state law . . . ceases to be operative”)), and that regulating the manufacture and sale of firearms – even as to wholly intrastate activities – is well within Congress’s power under the Commerce Clause, *id.* at 981 (“Congress may regulate a commodity under the Commerce Clause . . . if there exists a rational basis for concluding that the activities at issue, taken in the aggregate, substantially affect interstate commerce.” (citing *Gonzales v. Raich*, 545 U.S. 1, 22 (2005))). *See generally United States v. Koech*, 992 F.3d 686, 691 (8th Cir. 2021) (“Congress may ‘regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce.’” (quoting *Raich*, 545 U.S.

³ At present, each of these bills has already been passed by at least one chamber of its state’s legislature; the Texas bill was recently signed into law.

⁴ *Compare* Mont. Code Ann. § 30-20-104 (“A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce.”), *with* Ark. S.B. 59 § 1 (“A personal firearm, a firearms accessory, or ammunition that is manufactured commercially or privately in Arkansas and that remains within the borders of Arkansas is not subject to federal law or federal regulation, including registration, under the authority of the United States Congress to regulate interstate commerce, as those items have not traveled in interstate commerce.”).

at 17)). Under this precedent, Arkansas's newly enacted nullification laws are clearly preempted.

Second, HB 1957's attempt to nullify all new federal regulation of firearms is unconstitutional for much the same reason. Under the Supremacy Clause, it has long been established that "the States have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress." *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819); accord *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 438, 834 S.W.2d 136, 142 (1992) ("Under the Supremacy Clause, state laws that 'interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution' are invalid."). As a consequence, "when federal and state law conflict, federal law prevails and state law is preempted." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018); see, e.g., *Mont. Shooting Sports*, 727 F.3d at 983. Here, there is no question of conflict; HB 1957 expressly declares that a broad and ill-defined category of new federal gun regulations are "null and void in this state." Ark. S.B. 59 § 1. Under the Supremacy Clause, such a law simply cannot stand.

Third, SB 59's provision prohibiting federal law-enforcement officials from enforcing federal gun regulations and penalizing them for doing so contravenes settled and longstanding principles of constitutional law establishing that states are prohibited from prosecuting any federal officer for an act that "federal law 'authorized' the officer to undertake," when, "in doing that act, he did no more than what was necessary and proper for him to do," *Texas v. Kleinert*, 855 F.3d 305, 314 (5th Cir. 2017) (quoting *In re Neagle*, 135 U.S. 1, 75 (1890)); accord *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004); *Kentucky v. Long*, 837 F.2d 727, 749 (6th Cir. 1988) ("[T]he Supremacy Clause will shield a federal agent from state prosecution, *provided* his acts are both authorized by the laws of the United States and necessary and proper to the performance of his duties."). Under these principles, Arkansas clearly may not prosecute "an agent or employee of the United States Government" for "enforc[ing] or attempt[ing] to enforce" federal law, Ark. S.B. 59 § 1.

Absent action by the Justice Department, these laws will undermine federal gun laws and encourage lawbreaking by Arkansas residents. Additionally, so long as they go unchallenged, Arkansas's laws will serve as a model for other states seeking to upend our constitutional system and to roll back new and stronger federal gun laws and regulations. For these reasons, just as was done with respect to Missouri's HB 85, the Justice Department should call upon officials in Arkansas to clarify the scope and impact of SB 59 and HB 1957.