



ATTORNEY GENERAL OF MISSOURI
ERIC SCHMITT

June 17, 2021

Brian M. Boynton
Acting Assistant Attorney General, Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20044

Re: Protecting the Right to Keep and Bear Arms from Federal Overreach

Dear Mr. Boynton:

“The right to keep and bear arms [i]s essential to the preservation of liberty.” *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 858 (2010) (Thomas, J., concurring in part and concurring in the judgment). Missouri provides the Nation’s highest level of protection for the right to keep and bear arms. *See* MO. CONST. art. I, § 23. Recently, Missouri enhanced this protection through the Second Amendment Preservation Act. Your letter purporting to ask for clarification of this important legislation, which was purposefully leaked to the news media, is riddled with a misunderstanding of the law and falsehoods. We will not stand by while the federal government tries to tell Missourians how to live our lives.

Missouri is not attempting to nullify federal law. Instead, Missouri is defending its people from federal government overreach by prohibiting state and local law enforcement agencies from being used by the federal government to infringe Missourians’ right to keep and bear arms.

We must remind you that our liberty is safeguarded both by the right to keep and bear arms and by the power reserved to the State of Missouri under the Tenth Amendment and basic principles of federalism. The rights protected by the Second Amendment and the Tenth Amendment are woven into the fabric of our country.

1. The right to keep and bear arms is inalienable and a critical backstop to liberty.

The Founders viewed the right to keep and bear arms as a natural right that was inalienable. The right to bear arms pre-dates our written Constitution, and the Second Amendment’s text indicates it is not a right granted by the Constitution. U.S. CONST. amend. 2. It descends from our English heritage, after the abuses of the Stuart Kings who used “select militias loyal to them to suppress political dissidents, in part by disarming their opponents.” *Heller*, 554 U.S. at 592. The

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Glorious Revolution gave rise to the English Bill of Rights, which granted that “the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law.” 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441. At the Founding, the colonists understood this right to bear arms as a “natural right of resistance and self-preservation” held by all Englishmen. 1 William Blackstone, Commentaries 136, 139 (1765). Thus, when King George III attempted to disarm the colonists in the most rebellious areas, it prompted outcries that he was violating their English right to keep and bear arms. *Heller*, 570 U.S. at 594–95; Va. Gazette (Williamsburg), Aug. 5, 1775, at 2, col. 1 (noting the “many attempts in the northern colonies to disarm the people, and thereby deprive them of the only means of defending their lives and property”).

With this historical understanding, the Founding generation enshrined the right to keep and bear arms in their constitutions and laws. “Americans understood the ‘right of self-preservation’ as permitting a citizen to ‘repel force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’” *Heller*, 570 U.S. at 595 (quoting 1 William Blackstone, Commentaries 145–146, n. 42 (1803)). “The inherent right of self-defense” is “central to the Second Amendment right.” *Id.* at 628. The Supreme Court’s survey of those provisions shows that, by 1820, nine States expressly guaranteed the right to bear arms in defense of themselves, or of their citizens and the State. *Id.* at 602–03. Justice James Wilson observed that Pennsylvania’s “right of citizens to bear arms, in defence of themselves and the State,” PA. CONST., art. IX, § 21 (1790), recognized the natural right of defense “of one’s person or house.” *Id.* at 585 (citing 2 Collected Works of James Wilson 1142, and n. x (K. Hall & M. Hall eds. 2007)). This widespread adoption of a “citizen’s right to self-defense is strong evidence that that is how the founding generation conceived of the right.” *Id.* at 603. Of course, “[s]elf-defense has to take place wherever the person happens to be, and in some circumstances a person may be more vulnerable in a public place than in his own house.” *Peruta v. California*, 137 S. Ct. 1995, 1998–99 (2017) (Thomas, J., dissenting from denial of certiorari) (quoting Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1515 (2009)).

Early court decisions interpreting these provisions recognized the individual right to bear arms in self-defense, whether in public or private. In Missouri, a jury instruction that “the people’s right to bear arms in defense of themselves cannot be questioned” “could not possibly aid the jury” because it was “known to every jury man” that the “right is to bear arms in defense of ourselves.” *State v. Shoultz*, 25 Mo. 128, 155 (1857). A Louisiana court commented that the Second Amendment “is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country.” *State v. Chandler*, 5 La. Ann. 489, 490 (1850). A Georgia court struck down a statute prohibiting open carry as depriving the “citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms.” *Nunn v. State*, 1 Ga. 243, 251 (1846). *Nunn* emphasized that state legislatures lacked authority to infringe on the right to bear arms in self-defense, holding that “[t]his right is too dear to be confided to a republican legislature.” *Id.* at 250. “Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*, originally belonging to our forefathers, trampled under foot by Charles I and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta!*” *Id.* at 251 (italics in original).

The Founders recognized that the right to keep and bear arms, not the government, is the citizen's first line of defense against physical attack. Thus, this right received its greatest emphasis during times in our history when the government could not be trusted to protect citizens' personal security. For example, "[a]ntislavery advocates routinely invoked the right to bear arms for self-defense." *Heller*, 554 U.S. at 609. One such advocate "wrote that 'the right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the guaranty would have hardly been worth the paper it consumed.'" *Id.* (quoting *A Treatise on the Unconstitutionality of American Slavery* 117–118 (1849)). Reflecting this recognition, "Congress enacted the Freedmen's Bureau Act on July 16, 1866. Section 14 stated: '[T]he right ... to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security ... including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens ... without respect to race or color, or previous condition of slavery....'" *Id.* at 615-16 (quoting 14 Stat. 176–177). Because they recognized that the government could not always be relied upon to protect personal security and property, the post-Civil War generation emphasized "that the right to keep and bear arms was essential to the preservation of liberty." *McDonald*, 561 U.S. at 858 (Thomas, J., concurring in part). In the aftermath of the Civil War, "[t]he use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence." *Id.* at 857. One writer emphasized that the freed slaves "have the same right to own and carry fire arms that other citizens have. You are not only free but citizens of the United States and, as such, entitled to the same privileges granted to other citizens by the Constitution of the United States.... All men, without distinction of color, have the right to keep arms to defend their homes, families or themselves." *Id.* at 848 (quoting Letter to the Editor, *Loyal Georgian* (Augusta), Feb. 3, 1866, p. 3).

Based on its original meaning, the right to keep and bear arms backstops "the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally . . . enable the people to resist and triumph over them." 2 J. Story, *Commentaries on the Constitution of the United States* § 1897, pp. 620–621 (4th ed. 1873). The People's right to self-defense was so well regarded that Alexander Hamilton dismissed the threat of Congress raising a large army "while there is a large body of citizens . . . who stand ready to defend their own rights and those of their fellow citizens." *The Federalist* No. 29, p. 185 (C. Rossiter 1961).

Missouri is proud to have the most expansive protection for the right to keep and bear arms anywhere in the United States. Missouri's Constitution has explicitly protected the right to keep and bear arms since its first adoption in 1820. Article XIII, § 3 of the Constitution of 1820 provided that Missourians' "right to bear arms in defence of themselves and of the State cannot be questioned." MO. CONST. of 1820, art. XIII, § 3 (quoted in Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 *Texas Review of Law & Politics* 192, 199 (2016)). Missouri explicitly reaffirmed and readopted the right to keep and bear arms in its Constitutions of 1865, 1875, and 1945.

Moreover, Missouri repeatedly expanded the constitutional language protecting the right to keep and bear arms, making it even more robust. Article II, § 17 of the Constitution of 1875 expanded on the language of 1820 by explicitly stating that the right to keep and bear arms extends to self-defense of one's home and property, as well as one's person: "the right of no citizen to keep

and bear arms in defence of his *home, person and property*, or in aid of the civil power, when thereto legally summoned, shall be called into question.” MO. CONST. of 1875, art. II, § 17 (emphasis added). Article I, § 23 of the Constitution of 1945 reaffirmed the right in these broad terms. MO. CONST. of 1945, art. I, § 23. And most recently, in 2014, an overwhelming majority of Missourians voted to expand the constitutional right even further. As stated in Article I, § 23 of the Constitution, the right to keep and bear arms includes the right to use firearms “in defense of [one’s] home, person, family and property.” MO. CONST. art. I, § 23. These rights to keep and bear arms in self-defense are “unalienable,” and any restriction on these rights is “subject to strict scrutiny.” *Id.* “[T]he state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement.” *Id.*

The Second Amendment Preservation Act advances the right to keep and bear arms enshrined by the Framers of the federal and Missouri constitutions by protecting law-abiding Missourians against unconstitutional gun taxes, confiscation, and control.

2. Missouri has the right to refuse to enforce unconstitutional infringements by the federal government.

“It is the proud boast of our democracy that we have ‘a government of laws, and not of men.’” *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). “The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government.” *Id.*

“Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.” *Id.* “The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom.” *Id.* at 727. “While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty.” *Id.* at 710.

“The federal system rests on what might at first seem a counterintuitive insight, that ‘freedom is enhanced by the creation of two governments, not one.’” *Bond v. United States*, 564 U.S. 211, 220-21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). “[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *Bond*, 564 U.S. at 221 (2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). “Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.” *Id.* Moreover, “federalism enhances the opportunity of all citizens to participate in representative government.” *FERC v. Mississippi*, 456 U.S. 742, 789 (1982) (O’Connor, J., concurring in part and dissenting in part). By preserving room for experimentation in the States, federalism also supports policy innovation that can address many of society’s most pressing problems. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting).

Likewise, the Tenth Amendment directly limits the Federal Government’s ability to shift the balance of power within the federal system away from the States. *See Printz v. United States*, 521 U.S. 898, 919-20 (1997). Thus, “[t]he principles of limited national powers and state

sovereignty are intertwined. . . . Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of the States." *Bond*, 564 U.S. at 225 (citations omitted).

The Constitution of the United States created a system of "dual sovereignty" in which the States retained "a residuary and inviolable sovereignty." *Printz*, 521 U.S. at 918 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) and *The Federalist* No. 39, at 245 (J. Madison)). "[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'" *Id.* at 919-20 (quoting *The Federalist* No. 15, at 109). "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. 700, 725, 19 L. Ed. 227 (1868), *overruled in part by Morgan v. United States*, 113 U.S. 476, 28 L. Ed. 1044 (1885). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

"[S]tate legislatures are *not* subject to federal direction." *Printz*, 521 U.S. at 912 (citing *New York v. United States*, 505 U.S. 144 (1992)); *see also id.* at 925 ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."). The federal government has been down this road before on a gun issue, so it should know better. *See id.* In *Printz*, the Supreme Court held that certain interim provisions of the Brady Handgun Violence Protection Act, commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violated the Tenth Amendment. *Id.* at 902, 935. Guided by text, structure, history, and original public meaning, the Court aptly observed that the "extensive mutual assistance the States and Federal Government voluntarily provided one another in the early days of the Republic" rested on there being "consent" to such cooperation. *Id.* at 910-11. Thus, "without the consent of the States," the Court explained, "Congress could [not] impose these responsibilities." *Id.*; *see also id.* at 915 ("If it was indeed Hamilton's view that the Federal Government could direct the officers of the States, that view has no clear support in Madison's writings, or as far as we are aware, in text, history, or early commentary elsewhere."). That was because "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 920 (quoting *New York*, 505 U.S. at 166). "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens." *Id.*

Accordingly, the State of Missouri has every right under our system of government and the Tenth Amendment to place limitations on what state and local officials may do. The Department of Justice has identified no conflict with federal law from the Second Amendment Preservation Act's restrictions on state activities and hiring practices. Indeed, any such conflict would raise

concerns that the federal government was unconstitutionally commandeering Missourians and their State government.

The Department of Justice's June 16, 2021 letter also directly conflicts with its own policy toward "sanctuary cities." On his first day in office, President Biden rescinded President Trump's executive order that prohibited federal grant awards to sanctuary jurisdictions that refused to cooperate with the federal government to enforcement immigration laws. Exec. Order 13993, 86 Fed. Reg. 7051 (Jan. 20, 2021), *rescinding* Exec. Order 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017). In April, the Office of Justice Programs reportedly repealed the Department of Justice's policy that required recipients of a law enforcement grant to cooperate with U.S. Immigration and Customs Enforcement as a condition of their funding. See Sarah N. Lynch, *Exclusive U.S. Justice Department Ends Trump-Era Limits on Grants to 'Sanctuary Cities,'* REUTERS, Apr. 28, 2021, available at <https://www.reuters.com/world/us/exclusive-us-justice-department-ends-trump-era-limits-grants-sanctuary-cities-2021-04-28/> (last accessed June 17, 2021). President Biden and the Department of Justice have decided to reward states and cities that refuse to cooperate with enforcing constitutional immigration laws that protect our citizens against foreign threats, but now they attack Missouri for refusing to cooperate with enforcing unconstitutional gun confiscation laws that put our citizens in danger and degrade their rights. You cannot have it both ways.

3. Missouri will defend its citizens and its laws from federal government overreach.

In an interview with Anderson Cooper in August 2019, then-candidate Biden confirmed his desire to confiscate guns.

COOPER: So to gun owners out there who say, 'Well, a Biden administration means they're going to come for my guns' –

BIDEN: Bingo. You're right, if you have an assault weapon. The fact of the matter is they should be illegal, period.

Transcript, CNN, Aug. 6, 2019, available at <http://edition.cnn.com/TRANSCRIPTS/1908/06/nday.03.html> (last accessed June 17, 2021).

Your letter of June 16, 2021, provides no confidence that the Biden Administration has retreated from this radical, anti-gun position. Indeed, your letter explicitly endorses the view the federal laws authorizing the "confiscation" of firearms from law-abiding gun owners would be constitutional and valid. Letter, at 3. We do not share your radical view that federal law may effectively cancel out the fundamental liberty equally guaranteed both by the Second Amendment and the Missouri Constitution.

The Second Amendment Preservation Act protects Missourians from such attempts to violate the right to keep and bear arms. Missouri's Constitution requires the State of Missouri to uphold the right to keep and bear arms and "under no circumstances decline to protect against their infringement." MO. CONST. art. I, § 23. We will carry out our constitutional duty to defend Missourians' right to keep and bear arms and the Second Amendment Preservation Act.

We will fight tooth and nail to defend the right to keep and bear arms protected by the Second Amendment, Article I, § 23 of the Missouri Constitution, and the Second Amendment Preservation Act. And we will not tolerate any attempt by the federal government to deprive Missourians of this critical civil right.

Very Truly Yours,



Michael L. Parson
Governor



Eric S. Schmitt
Attorney General