No. 23A296

In the Supreme Court of the United States

STATE OF MISSOURI, ET AL.,
Applicants,
v.

UNITED STATES OF AMERICA,
Respondent.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR IMMEDIATE ADMINISTRATIVE RELIEF AND A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

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INTRODUCTION

The United States makes no attempt to defend the Eighth Circuit's decision to upend a two-year status quo through an unreasoned order. Instead, the United States presses the same "nullification" argument and the same "radical answer" that this Court rejected in *Whole Woman's Health* v. *Jackson*, 595 U.S. 30, 44, 49 (2021).

But this time, the "nullification" argument is even more outlandish and "cheapens the gravity of past wrongs." *Id.* at 49. Not content simply to attack a provision that simply opines on the constitutionality of some federal statutes, the United States asserts (at 36–37) that Missouri's law is just like South Carolina's 1830s nullification attempt. That is "[p]ure applesauce." *King* v. *Burwell*, 576 U.S. 473, 507 (2015) (Scalia, J., dissenting). South Carolina's law threatened to "absolve" unity with the United States and "organize a separate government"—*i.e.*, secede—if federal officials tried to enforce federal tariffs, and it required courts to hold litigants in contempt if they tried to appeal to the Supreme Court. Ordinance of Nullification (Nov. 1832).[1] That is nothing like Missouri's decision not to use state resources to subsidize federal enforcement—which is Missouri's well-established right under the Tenth Amendment.

The Missouri General Assembly "nullifies" nothing simply by opining that some federal statutes may be "unconstitutional" and thus "invalid." Indeed, the United States admits at least 20 times that Missouri's law does *not* nullify federal law, only that it "purports" to. Stay Opp. at 3, 5, 7, 8, 9, 11, 19, 25, 27, 30, 33, 35.

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[1] https://avalon.law.yale.edu/19th_century/ordnull.asp

This assertion simply highlights that the United States is offended less by what the Act does than what it says.

If anything, it is the United States and the district court's injunction that come closer to "nullifying" federal law. Contrary to the Federal Government's assertion (at 34) that "the Act does not grant private citizens a remedy for violations of their constitutional rights," the Act plainly does just that. One of the casualties of the district court's overbroad, unjustified remedy is a provision imposing liability against the state government when a state official "knowingly deprives a citizen of Missouri of the rights or privileges ensured by Amendment II of the Constitution of the United States." § 1.460; App. 46a. The Act gives Missourians an additional remedy against state officials beyond § 1983 to vindicate violations of their Second Amendment rights. By deleting a cause of action to enforce the U.S. Constitution, it is the United States and the district court's injunction that make it harder to vindicate federal law.

Missouri has an especially strong interest in providing that remedy right now. As the United States concedes (at 9 n.1), this Court is currently considering a major Second Amendment case. And it is still too early to see what the exact effect will be of this Court's major Second Amendment decision last year. *See New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 142 S. Ct. 2111 (2022). In light of this changing doctrine, Missouri's Tenth Amendment prophylaxis is reasonable.

At bottom, the United States runs headlong into two fundamental constraints on federal courts. First is the constraint on equitable power. The United States does not deny that the district court focused its decision almost entirely on striking down

the provision that merely declares the legislature's interpretation. And the United States offers no persuasive rejoinder to the observation that the district court improperly sought to "enjoin challenged laws themselves." *Whole Woman's Health*, 595 U.S., at 44.

Second, the United States disregards mandatory principles of interpretation. The district court devoted just one page to evaluating the substantive provisions of the Act. The United States, in trying to flesh out that threadbare analysis, conspicuously avoids mentioning constitutional avoidance. But the district court had a "plain duty" under this Court's precedent to apply that canon—as well as the Missouri Supreme Court's holding, which the United States likewise disregards. A straightforward application of those rules resolves any concern that the text regulates the Federal Government and thus resolves all the United States' alleged injuries (other than the abstract "injury" the Federal Government experiences when a State opines about whether certain federal statutes might be unconstitutional).

Once one applies those required rules, all that is left is the district court's injunction against the statute itself (which conflicts with *Whole Woman's Health* and the Fifth Circuit's order) and the district court's holding that Missouri's exercising its Tenth Amendment authority is preempted as an "obstacle" to federal law (which conflicts with the Ninth Circuit). There is a "fair prospect" that the Court would grant certiorari to resolve these splits if the district court decision is upheld.

How the People of Missouri choose to organize their government and what laws Missouri's officers spend resources enforcing are not subject to revision by a federal

district court. These are intrinsic elements of sovereignty the federal government "is bound to respect," *Arizona* v. *United States*, 567 U.S. 387, 398 (2012) (citing *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991)). The district court's deeply flawed decision and the Eighth Circuit's failure to maintain the status quo while Missouri rights the ship cause irreparable harm and should be stayed pending appeal.

ARGUMENT

I. Section 1.420 is purely declaratory, as the Missouri Supreme Court has held, so the district court's injunction with respect to § 1.420 was an improper injunction against the "laws themselves."

The fundamental problem the United States runs into is that § 1.420 does nothing other than declare the legislature's interpretation of the Second Amendment. App. 44a. The district court enjoined this provision despite admitting that *other* provisions are needed to give the Act any "practical or legal effect." App. 28a. Because *nobody* enforces § 1.420, the district court's injunction with respect to that section is an improper injunction against "challenged laws themselves." *Whole Woman's Health*, 595 U.S., at 44.

That is a major problem for the United States because it does not dispute (and cannot dispute) that the district court spent nearly all its analysis focusing solely on this provision. The United States tries to salvage the injunction by arguing that § 1.420 is in fact "substantive," not declaratory. Stay Opp. 21. But even the district court did not deny that § 1.420 is purely definitional or declaratory. It expressly recognized as much at least seven times. App. 20a, 23a, 25a, 27a. And then it noted (correctly) that "[w]ithout §§ 1.460 and/or 1.470, SAPA has no practical or legal

effect." App. 28a. The district court simply overlooked *Whole Woman's Health* when it fixated almost entirely on a declaratory provision that nobody enforces. *See also California* v. *Texas*, 141 S. Ct. 2104, 2115 (2021) (injunctions "do not simply operate on legal rules in the abstract").

The United States' assertion that § 1.420 is substantive also conflicts squarely with binding authority from the Missouri Supreme Court, which explained that § 1.420 merely sets forth "legislative findings and declarations." *City of St. Louis* v. *State*, 643 S.W.3d 295, 297 (2022); App. 32a. The United States argues (at 21) that this language is dicta because it appears in the section of the opinion entitled "Factual and Procedural Background." But there is no rule against state courts interpreting statutes in the background section of an opinion, especially when the interpretation is (as here) straightforward, and these paragraphs clearly interpret the statute.

Struggling to find some way to describe § 1.420 as substantive, the United States asserts *ipse dixit* that § 1.420 and other provisions "are plainly being implemented by Missouri." Stay Opp. 17. But the United States never identifies any "implementation" by the Attorney General or Governor. And the real life effect of enjoining "Missouri" in the abstract from "implementing" the Act would be an improper injunction against state courts and court clerks. This Court rejected that idea two years ago, holding that federal courts cannot enjoin state courts or clerks from docketing or hearing cases because docketing or hearing cases does not make state courts or clerks "adverse to the [parties involved]." *Whole Woman's Health*, 595 U.S., at 39, 43.

II. The United States ignores the "plain duty" of federal courts to apply the canon of constitutional avoidance, and the United States fails in its other attempts to buttress the district court's threadbare analysis.

1. No stronger is the United States' attempt to flesh out and salvage the district court's single-page, alternate holding that the Act directly regulates the United States. The United States appears to have abandoned that argument in the Eighth Circuit. Brief of United States, No. 23-1457, at 31, (Aug. 10, 2023) ("Standing is not precluded simply because a plaintiff is not the directly regulated party, though it may sometimes be more difficult to establish in those circumstances.") (citation and internal quotation marks omitted) (brackets adopted). And for good reason: the argument flies in the face of the canon of constitutional avoidance.

The idea that the statute regulates the Federal Government rests entirely on one provision: "No entity or person … shall have the authority to enforce or attempt to enforce" federal laws the legislature believes may be unconstitutional. § 1.450; App. 45a. The United States asserts, like the district court did, that "the plain text of that provision" regulates the United States. Stay. Opp. 14. But where a statute is "reasonably susceptible of two interpretations," one of which is constitutional, then it has long been the district court's "plain *duty* to adopt that construction which will save the statute from constitutional infirmity." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909) (emphasis added). It is plainly plausible to interpret this statute to apply only to Missouri entities, Stay App. 33, which is exactly how the Missouri Supreme Court authoritatively interpreted it, *City of St. Louis*, 643 S.W.3d, at 297.

It is telling that even after Missouri raised this issue in the opening brief (at 33–34), the United States offers no response at all. The district court's decision not to apply the canon of constitutional avoidance is indefensible, and so the United States simply ignores the issue. But once one applies that canon, then § 1.450 plainly regulates only state officials, which resolves any constitutional concern about States regulating the Federal Government.

2. No better is the United States' assertion in a single sentence that the statute "punish[es] federal employees who enforce those federal laws by disqualifying them from state employment." Stay. Opp. 18 (citing § 1.470). The district court never adopted this argument, the United States fails to develop it, and the assertion fails for several reasons.

First, the United States provides no citation or support for the idea that it can sue on behalf of former federal employees. Even if § 1.470 were problematic and could not be severed (neither is true), the proper party to bring that challenge would be a former federal official seeking employment in a state office. And that challenge would not ripen until the official sought federal employment and was denied.

Second, the provision does nothing other than put state and federal employees on a level playing field. Section 1.460 places penalties on the state government for hiring a state employee who has helped enforce certain laws, and section 1.470 does the same for former federal employees. Even assuming that this provision "indirectly increases costs for the Federal Government," that poses no problem because "the law imposes those costs in a neutral, nondiscriminatory way," in that it applies the same

costs on state officials. *United States* v. *Washington*, 142 S. Ct. 1976, 1984 (2022). For example, nobody doubts that a State could—to avoid potential concerns about institutional bias—adopt a policy prohibiting former federal prosecutors and federal public defenders from becoming judges on state criminal courts, so long as the State also applied the same policy to former state prosecutors and state public defenders. Missouri's law here is no different.

III. The United States lacks standing.

As Missouri explained in its opening brief (at 30–32), the United States lacks standing because—among other reasons—all the "injuries" it asserts are simply the "injuries" that happen *every* time a State exercises its Tenth Amendment authority not to help enforce federal laws.

The United States candidly admits that its "injury" is Missouri's Tenth Amendment refusal to subsidize federal enforcement, and it does not deny that this "injury" happens every time a State exercises its Tenth Amendment authority to withhold state resources. *See* Stay Opp. 15 (asserting standing "because the Act disrupts cooperation between federal and state agencies"). Instead, the United States dismisses Missouri's argument as one that "concerns the merits, not standing." *Id.*

But just months ago, this Court held that a plaintiff must allege injuries that are both "legally and judicially cognizable." *United States* v. *Texas*, 143 S. Ct. 1964, 1970 (2023) (quoting *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997)). "That requires, among other things, that the dispute is traditionally thought to be capable of resolution through the judicial process—in other words, that the asserted injury is traditionally redressable in federal court." *Ibid.* (citation and internal quotation

marks omitted). The United States identifies no text, precedent, or history establishing that a State's exercise of its Tenth Amendment authority is a cognizable injury to the Federal Government. "Were it otherwise, [the United] State[s] would always have standing to bring constitutional challenges when" a State exercised its Tenth Amendment authority. *Haaland* v. *Brackeen*, 143 S. Ct. 1609, 1640 (2023).

On redressability, the United States likewise does not deny that even if the district court injunction is left in place, "political subdivisions would be unlikely to assist the federal government with enforcing certain federal statutes" because the injunction does not run against private parties. Stay App. 31. Nor does it deny that in 2021 it expressly argued that a plaintiff cannot establish redressability where, as here, an injunction would still leave private plaintiffs free to enforce a law. *See id.* at 32 (citing Brief of the United States, *The School of the Ozarks, Inc.* v. *Biden*, No. 21-2270, at 21 (CA8, Sept. 2021)). This Court can issue a stay for that reason alone.

Never mind all that, the United States says; it can at least sue the Attorney General to prevent *him* from bringing a lawsuit. Stay Opp. 16. But as above, that would not redress the injuries the United States asserts. Moreover, a pre-enforcement suit is permissible only when "there exists a credible threat of prosecution" and the threat is "sufficiently imminent." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 159 (2014) (citation omitted). Because the statute does not regulate the United States, *see* Part II, there is no threat at all of prosecution by the Missouri Attorney General against the United States. And the Attorney General has consistently argued that he lacks authority to enforce the Act, so even if any "threat"

existed, it certainly would not be "sufficiently imminent." Indeed, if a court accepts the Attorney General's position, there is a strong argument that the Attorney General would be precluded from asserting otherwise in future cases because issue preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted).

The two other standing arguments[2] pressed by the United States are that the United States can sue when a statute opines that a federal law may be unconstitutional and that the United States can sue because it is directly regulated. Stay Opp. 13–14. These fail because *Whole Woman's Health* and *California* v. *Texas* prohibit anyone from challenging statutes that are purely declaratory, and because, as explained in Part II, the statute does not regulate the United States.

IV. There is a "fair prospect" of certiorari.

The district court decided important questions of federal law in a way that conflicts with two courts of appeal and also "so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

The United States principally relies on the assertion that Missouri simply raises a "dispute[ ] about the proper interpretation of state law." Stay Opp. 31. To

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[2] Although the United States does not characterize it as a standing argument, the United States asserts that a state official, once deputized, becomes locked in and cannot later withdraw from assisting with federal enforcement. Stay Opp. at 24–25. But lending state resources to the Federal Government is not an on-off switch, and the Federal Government identifies no authority otherwise.

the contrary, Missouri argues that the district court exceeded its federal equitable authority by enjoining a statute not enforced by any named defendant, failed to comply with its "plain duty" to apply the canon of constitutional avoidance and also to defer to the holding of the Missouri Supreme Court, and did all this without any jurisdiction. When federal courts are permitted to exceed the bounds of their federal authority and disregard binding mandates by this Court, the appeal raises a federal issue worthy of review. *See, e.g., Missouri* v. *Jenkins*, 515 U.S. 70, 83 (1995) (granting certiorari due to the "importance of the issue[]" of "whether the District Court exceeded its constitutional authority").

On the circuit split issue, the United States does not deny that the district court's decision squarely conflicts with the preemption holding in *United States* v. *California*, 921 F.3d 865 (CA 2019). Instead, the Federal Government asserts only that review would be improper because the district court's order here also includes other issues. Stay Opp. 30. But where, as here, there is a clear circuit split, the presence of additional issues does not necessarily make a case unworthy of review. That is especially true because the district court's opinion on those other issues is plainly incorrect. At the very least, the undisputed circuit split creates a "fair prospect" of certiorari. *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam).

No stronger is the United States' argument with respect to *United States* v. *Texas*, where the Federal Government successfully sought certiorari before this Court dismissed the appeal as improvidently granted. *United States* v. *Texas*, No. 21-50949, 2021 WL 4786458 (CA5 Oct. 14, 2021). Now, the United States downplays that

decision as an unpublished order without "an opinion explaining its order," yet in the next breath the Federal Government praises the Eighth Circuit's unreasoned, one-sentence order as a "construction of state law" requiring deference. Stay Opp. 28–29, 32. But unlike the Eighth Circuit decision (which provided *no* analysis), the Fifth Circuit decision expressly incorporated and adopted the reasoning from a different decision. *Texas*, 2021 WL 4786458, at *1.

Nor does *Texas* "differ[ ] markedly from this case." Stay Opp. 29. The United States asserts, for example, that the statute in *Texas* "did not authorize any enforcement at all by Texas officials," and that Missouri's does. *Id.*[3] But the district court's view that Missouri officials enforce the law is so flatly contradicted by Eighth Circuit precedent that the Federal Government in effect abandoned that argument, asserting that the named state defendants instead "are necessarily subsumed by the suit against the State itself." Brief of United States, No. 23-1457, at 27, (Aug. 10, 2023). And the United States asserts that *Texas* concerned whether the United States had an equitable cause of action, while "Missouri's stay application does not dispute that the United States has a cause of action." Stay Opp. 29. That only makes the "fair prospect" of certiorari higher because, as the United States well knows, Missouri has consistently argued in the district court and the Eighth Circuit that there is no cause of action, just like there was not in *Texas*. *E.g.,* Brief of Missouri, No. 23-1457, at 27 (May 11, 2023). Although not expressly mentioned in the stay

[3] This conflicts with what the United States told this Court in *Texas*. *See* Brief of United States, No. 21-588, at 40 (Oct. 2021) (seeking an injunction against "state officials who enforce S.B. 8 judgments").

application, that argument is preserved if Missouri needs to file a petition for certiorari. And any holding affirming the district court would necessarily conflict with the Fifth Circuit's determination that the United States lacked a cause of action.

The two other cases cited by the United States involving statutes in Kansas and Montana provide the Federal Government no support. Stay Opp. 30. Unlike Missouri's law, the Kansas law directly subjected federal officials "to prosecution for 'a … felony.'" *United States* v. *Cox*, 906 F.3d 1170, 1189 (CA10 2018) (quoting Kan. Stat. § 50-1207). And even then, the Tenth Circuit (contrary to the United States' assertion) did not declare the statute unconstitutional. It simply rejected a criminal defendant's assertion that the Kansas law so confused him that he could not be liable under federal law. *Id.* at 1189; *see also id.* 1188 ("The validity of the Second Amendment Protection Act [in Kansas] has never been at issue in this case ...."). Similarly, the Montana case did not invalidate the Montana statute but dismissed a declaratory judgment suit asking for a ruling on whether Congress exceeded its Commerce Clause power. *Montana Shooting Sports Ass'n* v. *Holder*, 727 F.3d 975, 981 (CA9 2013). The plaintiff did not seek a declaration that the federal firearms licensing statutes violated the Second Amendment. *Id.* These cases and the underlying statutes bear no resemblance to this case, and certainly do nothing to undermine the "fair prospect" of this Court eventually granting review.

V. Missouri suffers irreparable harm, and the equities favor maintaining the status quo.

The United States' newfound argument (at 33) that Missouri does not face irreparable harm from a federal court striking down a state statute cannot be taken

seriously. The United States itself regularly asserts that an injunction against a *federal* statute or *federal* executive action necessarily causes irreparable injury.[4]

The United States seeks an exception to this established rule by asserting that Missouri "purports to invalidate and obstruct the enforcement of federal statutes." Stay Opp. 33 (emphasis in original). But that argument rests solely on the Federal Government's self-serving and incorrect interpretation of the Missouri's law. It does not overcome the serious irreparable harm Missouri citizens face from an injunction eliminating a remedy designed to enable them to keep their own local governments accountable. And it does not overcome the irreparable harm Missouri faces from an injunction forcing the State to allow its subdivisions to expend state resources on federal enforcement. Indeed, the district court's order expressly freed "local law enforcement officials" to "assist in the investigation and enforcement of federal firearm" laws, App. 29a, contrary to the Tenth Amendment right of States to prevent the Federal Government from "impress[ing] into its service—and at no cost to itself—the police officers of the 50 States," *Printz* v. *United States*, 521 U.S. 898, 922 (1997).

The balance of harms could not be more disparate. Contrary to its current argument, the Federal Government in fact "did … file this suit to vindicate some point

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[4] *E.g.*, Brief of United States, *Murthy* v. *Missouri*, No. 23A243, at 36 (claiming irreparable harm from a district court injunction prohibiting federal officials from pressuring social media companies to censor speech); Brief of United States, *Biden* v. *Nebraska*, No. 22A444, 2022 WL 17330762, at 36 (Nov. 2022); Reply Brief of United States, *Pennsylvania* v. *Trump*, Nos. 18-1253, 17-3752, 19-1129, 19-1189, 2019 WL 1567982, at 37–38 (CA3, Apr. 2019) ("a government suffers irreparable harm '[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people.'"); Reply Brief of United States, *Padilla* v. *Immigration and Customs Enforcement*, No. 19-35565, 2019 WL 4889763, at *26 (CA9, Sept. 2019).

of principle." Stay Opp. 35. It simply could not stomach a State expressly opining that some federal statutes might violate the Second Amendment. As the United States concedes, Missouri is "free to withhold [state] assistance" for enforcement of federal law; thus, the supposed "negative effect" of Missouri's law "on successful law enforcement and public safety" is not a cognizable harm to the Federal Government. *Id.* 23, 35. Neither is the United States' philosophical objection to States expressing legal opinions the Department of Justice dislikes.

CONCLUSION

For the foregoing reasons, this Court should stay the injunction pending appeal.

October 12, 2023

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