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The Applicability of Intergovernmental Immunity Doctrine to Second Amendment Sanctuary Laws

Dominic Biffignani

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The Applicability of Intergovernmental Immunity Doctrine to Second Amendment Sanctuary Laws

*Dominic Biffignani**

ABSTRACT

*To what extent can states enact legislation that frustrates federal regulation of firearms—in an effort to maximize protections of the Second Amendment and related state constitutional provisions—without running afoul of the Supremacy Clause? The answer to that question lies within the intergovernmental immunity doctrine, a virtually obscure legal doctrine with origins in the Supremacy Clause and Chief Justice John Marshall’s famous opinion in *McCulloch v. Maryland*.*

*For many years, the United States Supreme Court was reluctant to clarify the contours of intergovernmental immunity. This did not stop the federal government from asserting the doctrine in various actions to strike down state laws frustrating federal schemes—most notably to challenge California laws frustrating the federal government’s immigration framework. The federal government’s assertion of the doctrine achieved mixed results, with both district courts and the circuit courts applying the doctrine in a haphazard manner. However, the United States Supreme Court’s recent clarification of intergovernmental immunity in *United States v. Washington* breathed new life into the doctrine and cemented its importance in future disputes between the federal government and the states.*

*Supreme Court of Missouri, Law Clerk to the Honorable Paul C. Wilson; B.A., Saint Louis University, 2018; J.D., University of Missouri School of Law, 2022; Senior Lead Articles Editor, *Missouri Law Review*, 2021–2022; Associate Member, *Missouri Law Review*, 2020–2021. The opinions expressed in this Article are my own, and do not purport to reflect the opinions or views of the Supreme Court of Missouri. I would like to thank Professor Royce de R. Barondes for his feedback on early drafts of this Article, as well as Professor Thomas Bennett for recommending literature on Supremacy Clause-related issues. I would also like to thank the outstanding editors of the *Missouri Law Review*, whose suggestions made this piece better than I ever could have imagined. All remaining errors are my own. In loving memory of my grandfather, John J. Nesser.

In response to President Biden's election and vow to increase federal regulation of firearms, many state legislatures passed what this Article calls Second Amendment sanctuary laws. The general purpose of these laws is to resist increasing federal regulation of firearms. Recently, the federal government has brought declaratory judgment actions seeking to declare some Second Amendment sanctuary laws unconstitutional, asserting intergovernmental immunity as a basis for declaring these state laws invalid. This Article recounts the history of intergovernmental immunity (and its doctrinal brethren), argues why the doctrine is important to Second Amendment sanctuary litigation, and applies it to various Second Amendment sanctuary laws in order to provide an applicable framework for future practitioners, legislators, and courts tackling intergovernmental immunity issues.

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I. INTRODUCTION

While running for President in 2020, Joe Biden campaigned on increasing the federal government’s regulation of firearms. Among President Biden’s proposed reforms were: federally banning “assault weapons” and “high-capacity magazines”; repealing the Protection of Lawful Commerce in Arms Act; limiting an individual’s firearm purchases to one firearm per month; and ending the online sale of “firearms, ammunition, kits, and gun parts.”¹ In response to President Biden’s election and vows to pass more restrictive firearms legislation, many states enacted what this Article calls “Second Amendment sanctuary laws.”² The scope of these laws varies, but their general aim is to prevent the enforcement of federal firearm laws inconsistent with the Second Amendment. Following their enactment, the federal government has initiated litigation, arguing that these laws violate the Supremacy Clause of the United States Constitution.³

¹ *The Biden Plan to End Our Gun Violence Epidemic*, BIDEN-HARRIS DEMOCRATS, <https://joebiden.com/gunsafety/> [<https://perma.cc/6KEU-UG5X>] (last visited Mar. 15, 2022). The Protection of Lawful Commerce in Arms Act, among other things, “prohibits causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products . . . for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and attended.” 15 U.S.C. § 7901(b)(1) (2022). The Act makes exceptions to its general ban on civil liability for “actions based on transfers in violation of the Gun Control Act or identical state felony law, actions for negligent entrustment or negligence per se, actions for knowing violations of state or federal law, actions for breach of contract or warranty, actions for design or manufacturing defects, and certain enforcement actions by the United States Attorney General.” 94 C.J.S. *Weapons* § 82 (2022).

² *See, e.g.*, ARIZ. REV. STAT. § 1-272 (2021); Second Amendment Preservation Act, MO. REV. STAT. §§ 1.410-485 (2021); KY. REV. STAT. ANN. § 237.105 (2023); Montana Federal Firearm, Magazine, and Ammunition Ban Enforcement Prohibition Act, MONT. CODE §§ 45-8-365–368 (2021); N.D. DENT. CODE § 62.1-01-03.1 (2021); OKLA. STAT. tit. 21, § 1289.24 (2021); Tennessee Second Amendment Sanctuary Act, TENN. CODE § 38-3-119 (2021); TEX. PENAL CODE § 1.10 (2021); West Virginia Second Amendment Preservation and Anti-Federal Commandeering Act, W. VA. CODE §§ 61-7B-1–10 (2021). In March 2023, Kentucky added itself to the list by passing House Bill 153 into law. While a plethora of Second Amendment sanctuary laws arose in the wake of President Biden’s victory in the 2020 election, they are not a completely new legislative trend. At least three states—Alaska, Idaho, and Wyoming—had similar laws on the books long before the 2020 election. *See* ALASKA STAT. § 44.99.500 (2021) (Alaska Firearms Freedom Act) (added Aug. 25, 2010 and amended June 21, 2013); IDAHO CODE §§ 18-3315A-B (2021) (added Mar. 19, 2014 and amended Jan. 20, 2021); WYO. STAT. § 6-8-405 (2022) (added Mar. 11, 2010 and amended Mar. 25, 2022)).

³ *See, e.g.*, United States’ Memorandum in Support of Motion for Summary Judgment, *United States v. Missouri et al.*, No. 2:22-cv-04022-BCW (W.D. Mo. Feb. 28, 2022), ECF No. 8 (arguing that Missouri’s Second Amendment Preservation Act

Recently, the United States sued the State of Missouri over its Second Amendment sanctuary law, known as the Missouri Second Amendment Preservation Act (“SAPA”).⁴ In March 2023, the United States District Court for the Western District of Missouri struck down SAPA.⁵ Among other things, the district court held that provisions of SAPA violated the intergovernmental immunity doctrine,⁶ a judge-made doctrine rooted in the Supremacy Clause prohibiting states from regulating the federal government and “discriminat[ing] against the Federal Government or those with whom it deals[.]”⁷ The intergovernmental immunity doctrine has been used to prevent states and local municipalities from: “imposing more onerous clean-up standards on a federal hazardous waste site than a non-federal project . . . banning only the U.S. military and its agents from recruiting minors, and . . . taxing the lessees of federal property while exempting from the tax lessees of state property.”⁸ Recently, intergovernmental immunity doctrine has been used, with mixed results, to invalidate state laws the federal government believes frustrate its immigration framework.⁹

Now, the federal government looks to employ arguments used in the immigration context to strike down state law it deems inconsistent with federal firearms law. This Article argues that Second Amendment sanctuary laws violate intergovernmental immunity doctrine where they seek to directly regulate the federal government’s ability to enforce federal firearms law or discriminate against the federal government or those with whom it deals.¹⁰ Second Amendment sanctuary laws that avoid these two pitfalls likely fall within the states’ traditional police powers, and attempts to strike down such laws likely violate anticommandeering doctrine as

is an unconstitutional attempt to nullify federal law in violation of the Supremacy Clause and doctrines arising from the Supremacy Clause).

⁴ See Associated Press, *Justice Department sues Missouri over new gun law*, POLITICO (Feb. 16, 2022), <https://www.politico.com/news/2022/02/16/justice-missouri-gun-law-00009655> [<https://perma.cc/3K56-WKX6>].

⁵ *United States v. Missouri*, 2023 WL 2390677 (W.D. Mo. Mar. 7, 2023), *appeal docketed*, No. 23-1457 (8th Cir. Mar. 10, 2023).

⁶ *Id.* at *11–13.

⁷ *United States v. Washington*, 142 S. Ct. 1976, 1984 (2022) (internal quotation marks omitted) (quoting *North Dakota v. United States*, 495 U.S. 423, 425 (1990)).

⁸ *United States v. California*, 921 F.3d 865, 880 (9th Cir. 2019).

⁹ See, e.g., *Cnty. of Ocean v. Grewal*, 475 F. Supp. 3d 355 (D.N.J. 2020), *aff’d sub nom.* *Ocean Cnty. Bd. of Commissioners v. Att’y Gen. of State of New Jersey*, 8 F.4th 176 (3d Cir. 2021); *GEO Group, Inc. v. Newsom*, 15 F.4th 919 (9th Cir. 2021), *reh’g granted*, *GEO Group, Inc. v. Newsom*, 50 F.4th 745 (9th Cir. 2022); *United States v. California*, 921 F.3d 865 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 124 (2020); see also David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224, 230–31 (2019); see also *infra* Part III.

¹⁰ See *infra* Part IV.

expressed by the United States Supreme Court in *New York v. United States*,¹¹ *Printz v. United States*,¹² and *Murphy v. NCAA*.¹³ Lawmakers interested in maximizing Second Amendment protections should consider laws that successfully avoid the pitfalls of regulating or discriminating against the federal government when drafting their own legislation.¹⁴

This Article proceeds in three parts. Part II gives a summary of the United States' system of dual sovereignty and relevant doctrines arising under the Supremacy Clause. Part III analyzes recent developments in intergovernmental immunity doctrine, including recent litigation in the immigration law context that involves arguments like those made in litigation surrounding certain Second Amendment sanctuary laws. Part IV analyzes Second Amendment sanctuary laws in Missouri, Wyoming, Alaska, Texas, Arizona, Montana, North Dakota, and West Virginia and explores how Second Amendment sanctuary laws could be tailored to avoid future intergovernmental immunity challenges.

II. LEGAL BACKGROUND

A. *The Federalist Scheme: The Supremacy Clause and the Tenth Amendment*

The doctrines of anticommandeering, federal preemption, and intergovernmental immunity all arise from the federalist scheme implicit in the United States Constitution. This scheme emerges from two key provisions within the federal constitution: (1) the Supremacy Clause and (2) the Tenth Amendment.¹⁵

The Supremacy Clause states “[t]his constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹⁶ The Supremacy Clause has been used on countless occasions to invalidate state or local legislation

¹¹ 505 U.S. 144 (1992) (holding that provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 improperly commandeered state legislatures to submit to federal instruction).

¹² 521 U.S. 898 (1997) (holding that provisions of the Brady Handgun Violence Act improperly commandeered state and local law enforcement officers to conduct background checks and other tasks related to the federal government's firearms regulation scheme).

¹³ *Id.* at 935 (holding that the federal government can neither “compel the States to enact or enforce a federal regulatory program” nor “circumvent that prohibition by conscripting the State's officers [into the federal regulatory program] directly”).

¹⁴ See *infra* Part IV.E.

¹⁵ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 5–6 (6th ed. 2019).

¹⁶ U.S. CONST., art. VI, cl. 2.

that conflicts with federal legislation.¹⁷ However, the Supreme Court of the United States in *Armstrong v. Exceptional Child Care Center, Inc.*, concluded that the Supremacy Clause does not confer a private right of action.¹⁸ Rather, the Supremacy Clause creates a rule of decision that “instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.”¹⁹ While the Court’s statement in *Armstrong* seems to forbid using the Supremacy Clause as a cause of action, its holding was limited to *private* rights of action and not suits “to enjoin the unconstitutional actions *by state and federal officers*.”²⁰ The Court noted that those suits were “the creation of courts of equity, and reflect[] a long history of judicial review of illegal executive action, tracing back to England.”²¹ Additionally, the Court found that it had never held or suggested that these suits “rest[] upon an implied right of action contained in the Supremacy Clause.”²² Therefore, there is still some debate as to whether the United States can bring a suit to enjoin unconstitutional state laws, either under an implied right of action under the Supremacy Clause or a suit in equity to enjoin unconstitutional actions of state officers.²³

¹⁷ JOHN E. NOVAK ET AL., CONSTITUTIONAL LAW 465–66 (8th ed. 2010).

¹⁸ *Armstrong v. Exceptional Child Care Center, Inc.*, 575 U.S. 320, 325–26 (2015).

¹⁹ *Id.* at 325.

²⁰ *Id.* at 327 (emphasis added).

²¹ *Id.*

²² *Id.*

²³ See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 745 (7th ed. 2015) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983) (“[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights”). The recent litigation in *United States v. Texas* presents another issue to add to the confusion of *Armstrong*’s holding. While the *Armstrong* Court suggested that an implied right of action under the Supremacy Clause was not necessary to be able to enjoin unconstitutional acts, the unconstitutional acts would have to be enforced by a state officer in order to sue under the equitable jurisdiction theory. See *Ex parte Young*, 209 U.S. 123, 159–64 (1908) (recognizing an exception to sovereign immunity under the Eleventh Amendment to allow an action to enjoin state officials from enforcing state laws contrary to federal law, but not state-court judges or clerks). Laws like Texas’s S.B. 8—which expressly prohibit state officials from enforcing the law—utilize this constitutional glitch to prevent the federal government from suing under this theory. See *Whole Women’s Health v. Jackson*, 13 F.4th 434, 442–45 (5th Cir. 2021) (discussing the inapplicability of the *Young* doctrine to state clerks in Texas, because S.B. 8 expressly authorizes private parties exclusively to enforce its provisions). Then, it would seem like the only way the United States could get around such an issue would be through some implied right of action under the Supremacy Clause. There is some authority for the proposition that the United States has “a much broader governmental authority to sue, without statutory authorization, to vindicate

The second of the twin pillars of the United States' federal scheme—the Tenth Amendment—states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²⁴ The true meaning of the Tenth Amendment's seemingly uncomplicated demand—and the Supreme Court's application of the Amendment to disputes between the federal government and the states—is a hotly contested issue.²⁵ One well-known approach to interpreting the Tenth Amendment is that the Amendment was a reminder that Congress could legislate only if it has authority to do so under the federal constitution.²⁶ Under this approach, used by the Court in the nineteenth century and most of the twentieth century, federal laws were not invalidated under the Tenth Amendment.²⁷ More recently, however, the Court has interpreted the Tenth Amendment to “reserve[] a zone of activity to the states for their exclusive control” and invalidated federal laws intruding into the States' zone.²⁸

B. Federal Preemption

The doctrine of federal preemption—rooted in the Supremacy Clause of the U.S. Constitution²⁹—offers a mechanism for litigants to have state and local laws inconsistent with federal law declared void.³⁰ The basic operation of preemption can be summarized as follows. Congress enacts

the public interest . . . against intrusion upon federal interests,” but the caselaw is old and looks more like traditional equitable jurisdiction rather than some broader implied right of action under the Supremacy Clause. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 745, 747 (7th ed. 2015) (collecting cases).

²⁴ U.S. CONST. amend. X.

²⁵ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 335–36 (6th ed. 2019).

²⁶ *Id.* at 336.

²⁷ *Id.* Professor Chemerinsky notes that the Supreme Court during this time believed that, so long as Congress was acting within its commerce clause power, Congress could “legislate the same as if there were no states at all.” *Id.* at 339–40 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196–97 (1824)).

²⁸ *Id.* at 336. This approach was used by the Court from roughly 1900–1937 and was revived in the 1990s to strike down various federal laws infringing on state authority. *See id.* at 336, 345–52 (citing *Reno v. Condon* (2000) (upholding federal law based on a Tenth Amendment analysis); *New York v. United States*, 505 U.S. 144 (1991) (striking down federal law based on a Tenth Amendment analysis)).

²⁹ *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)).

³⁰ CHEMERINSKY, *supra* note 25, at 6 (“Practically, the effect of the supremacy clause is that state and local laws are deemed preempted if they conflict with federal law.”).

a law or regulation that broadens or narrows the rights of private actors.³¹ Then, either an existing or newly passed state law broadens or narrows those same rights in a way that conflicts with the federal law.³² After the enactment of the state law, a party with standing challenges the state law on several grounds, including that the law violates the doctrine of preemption. Finally, the conflict resolves with the federal law supplanting the state law or regulation.³³

The United States Supreme Court has identified three types of preemption used to supersede inconsistent state laws/regulations: (1) express preemption, (2) conflict preemption, and (3) field preemption.³⁴ All three types of preemption share the same basic goal: to remedy “a clash between a constitutional exercise of Congress’s legislative power and conflicting state law.”³⁵ However, the situations in which each type of preemption is used vary and therefore necessitate a more in-depth inspection.

Express preemption is relatively straightforward. Federal law preempts state law when Congress “has explicitly stated in the statute’s language or implicitly contained within its structure or purpose” a desire to preempt state law.³⁶ The Airline Deregulation Act of 1978, for instance, expressly preempted state law by providing that “no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any [covered] air carrier.”³⁷ The Supreme Court held that the Act’s preemption provision—even with the broad “relating to” language—successfully preempted “[s]tate enforcement actions having a connection with or reference to airline rates, routes, or services.”³⁸ Express preemption provisions do not “operate directly on the States.”³⁹ Rather, they “confer[] on private entities . . . a federal right to engage in certain conduct subject only to certain (federal) restraints.”⁴⁰

³¹ *Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1480–81 (citing *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000)).

³⁶ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (internal citations and quotations omitted). *See also Murphy*, 138 S. Ct. at 1480 (2018) (illustrating express preemption using statutory language at issue in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)).

³⁷ 49 U.S.C. § 1305(a)(1) (1988 ed.).

³⁸ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (internal quotations omitted).

³⁹ *Murphy*, 138 S. Ct. at 1480.

⁴⁰ *Id.*

Conflict preemption (sometimes called “obstacle preemption”)⁴¹ occurs “where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴² The Supreme Court used conflict preemption to invalidate a New Hampshire law infringing on the Federal Food, Drug, and Cosmetic Act (“the FDCA”).⁴³ The FDCA prohibits generic drug manufacturers from making substantive changes to drug labels.⁴⁴ An individual adversely affected by a generic drug brought a design-defect claim under New Hampshire law regarding the adequacy of warnings provided on a label that generic drug manufacturers could not change.⁴⁵ The Court held that conflict preemption applied because the FDCA “forbid[] [generic drug manufacturers] to take actions required of [them] by state tort law.”⁴⁶

Field preemption occurs “when federal law occupies a field of regulation so comprehensively that it has left no room for supplementary state legislation.”⁴⁷ A classic example of such a field is immigration. Recently, the Supreme Court used field preemption to strike down Arizona law attempting to regulate the registration of immigrants.⁴⁸ The Court held that the registration requirements of the Arizona law were preempted by federal law because federal law “provide[s] a full set of standards governing alien registration” that “reflect[] a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.”⁴⁹ In other words, “[w]here Congress occupies an entire field . . . even complementary state regulation is impermissible.”⁵⁰

When addressing a preemption issue, the Supreme Court has instructed lower courts to consider and apply two maxims: (1) Congressional intent and (2) the “presumption against preemption.”⁵¹ In

⁴¹ See *Pharmaceutical Rsch. & Mfrs. of America v. Walsh*, 538 U.S. 644, 678 (Thomas, J., concurring).

⁴² *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (internal citations and quotations omitted).

⁴³ *Mut. Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472 (2013).

⁴⁴ *Id.* at 477; see also 21 U.S.C. § 335(a) (2013).

⁴⁵ *Mut. Pharm. Co., Inc.*, 570 U.S. at 475–76.

⁴⁶ *Id.* at 492–93.

⁴⁷ *Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018) (quoting *R.J. Reynolds Tobacco Co. v. Durham Cnty.*, 479 U.S. 130, 140 (1986) (internal quotations omitted)).

⁴⁸ *Arizona v. United States*, 567 U.S. 387, 400–03 (2018).

⁴⁹ *Id.* at 401.

⁵⁰ *Id.*

⁵¹ Thomas H. Sosnowski, *Narrowing the Field: The Case Against Implied Field Preemption of State Product Liability Law*, 88 N.Y.U. L. REV. 2286, 2288 (2013). It should be noted that the presumption against preemption may be less important in these cases than it once was. See *Bell v. Blue Cross and Blue Shield of Oklahoma*,

any preemption case, lower courts should first look to the purpose of Congress for enacting the federal law at issue and then defer to the supposed conflicting state law in areas traditionally reserved to the states, “unless the ‘clear and manifest purpose of Congress’ requires it.”⁵² However, preemption cannot serve as the basis to invalidate a state law where the law codifies a state’s lawful decision to *not* participate in federal programs or enforcement efforts, because such a finding would run afoul of a key check on congressional authority—the anticommandeering doctrine.⁵³

C. Anticommandeering Doctrine

At its core, the anticommandeering doctrine is an affirmation of our country’s “dual sovereignty” regime.⁵⁴ While the federal Constitution limits state sovereignty, it does not give Congress “plenary legislative power.”⁵⁵ Rather, Congress is limited to “certain enumerated powers,” with all other powers being reserved to the States via the Tenth Amendment.⁵⁶ The Court has held the anticommandeering doctrine “simply represents the recognition of this limit on congressional authority” and thereby prohibits the federal government from “issu[ing] direct orders to the governments of the States.”⁵⁷

The Supreme Court’s modern formulation of the anticommandeering doctrine first appeared in *New York v. United States*.⁵⁸ There, a provision

823 F.3d 1189, 1201 (8th Cir. 2016) (collecting Supreme Court cases questioning the presumption and its application in preemption disputes).

⁵² *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

⁵³ *United States v. California*, 921 F.3d 865, 890 (9th Cir. 2019).

⁵⁴ *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018).

⁵⁵ *Id.* at 1476 (2018).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 505 U.S. 144 (1992). *See also* JAMES E. PFANDER, *PRINCIPLES OF FEDERAL JURISDICTION* 404–05 (4th ed. 2021). While the anticommandeering doctrine first notably appeared in *New York*, the core of the doctrine was contemplated by the Founders and the early Supreme Court. *See* THE FEDERALIST NO. 46, at 319–20 (James Madison) (Jacob Cooke ed. 1961) (“On the other hand, should an unwarrantable measure of the Federal Government be un-popular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people, their repugnance *and perhaps refusal to co-operate with the officers of the Union* . . . would present obstructions which the Federal Government would hardly be willing to encounter”) (emphasis added); *Prigg v. Pennsylvania*, 41 U.S. 539, 541 (1842) (“The clause relating to fugitive slaves is found in the national constitution, and not in that of any state. It might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry

of the Low-Level Radioactive Waste Policy Amendments Act of 1985 offered States the option to either “take title” to the radioactive waste governed by the Act or “regulate pursuant to Congress’ direction.”⁵⁹ The Court held that the “take title” provision of the Act was beyond Congress’ authority because either option would essentially “commandeer state governments into the service of federal regulatory purposes.”⁶⁰ In holding that the “take title” provision went beyond the scope of Congress’ authority, the Court distinguished between Congress’ recognized ability to incentivize the States to commit to a certain course of action by withholding federal funding and its attempted exercise of coercive power: “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.”⁶¹

Five years after *New York*, the Court broadened the scope of the anticommandeering doctrine in *Printz v. United States*.⁶² There, certain provisions of the Brady Handgun Violence Prevention Act compelled state and local law enforcement officers “to conduct background checks on prospective handgun purchasers” and perform various other tasks related to the federal government’s firearms law scheme.⁶³ The Court found that these provisions exceeded the scope of Congress’ authority: “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”⁶⁴ Thus, anticommandeering doctrine applies not only to federal measures coercing the state as a sovereign entity but also to measures coercing officers of the state.⁶⁵

The Court recently expanded the scope of the anticommandeering doctrine in *Murphy v. NCAA*, making clear that the doctrine applies to

into effect the duties of the national government, nowhere delegated or intrusted to them by the constitution; on the contrary, the natural, if not the necessary, conclusion is, that *the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, executive or judiciary, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution.*”) (emphasis added).

⁵⁹ *New York*, 505 U.S. at 174–75; *see also* 42 U.S.C. § 2021 *et seq.* (1992).

⁶⁰ *New York*, 505 U.S. at 174–75.

⁶¹ *Id.* at 176.

⁶² *See also* JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION 405 (4th ed. 2021).

⁶³ *Printz v. United States*, 521 U.S. 898, 902 (1997); *see also* 18 U.S.C. § 922(s) (1997).

⁶⁴ *Printz*, 521 U.S. at 935.

⁶⁵ *Id.*

Congressional mandates and prohibitions on state actors alike.⁶⁶ There, provisions of the Professional and Amateur Sports Protection Act made it unlawful for a state to legalize sports gambling.⁶⁷ The Court held that the provisions in question violated the anticommandeering doctrine.⁶⁸ In so holding, the Court made clear that the anticommandeering doctrine applies both to Congressional commands to the states, as well as Congressional prohibitions to the states.⁶⁹

The Court also took the opportunity to announce the main policy rationales behind the anticommandeering doctrine.⁷⁰ First, the doctrine “serves as one of the Constitution’s structural protections of liberty.”⁷¹ In other words, the doctrine protects the Constitution’s scheme of dual sovereignty, which better protects citizens from tyranny by either the states or the federal government.⁷² Second, it also promotes “promotes political accountability” because it prevents Congress from shifting accountability for unpopular laws to state officials.⁷³ Finally, the anticommandeering doctrine prevents Congress from making states foot the bill for regulatory activities.⁷⁴ Thus, at least recently, the anticommandeering doctrine has become a powerful tool to restrict congressional overreach and protect the limited sovereignty of the states.

D. Intergovernmental Immunity Doctrine

Intergovernmental immunity doctrine is anticommandeering in reverse. Just as the anticommandeering doctrine protects dual sovereignty by restricting federal overreach into state sovereignty, intergovernmental immunity doctrine protects dual sovereignty’s flipside by restricting state overreach into federal sovereignty. The doctrine arose from the Supreme Court’s decision in *McCulloch v. Maryland*, which established that “the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted

⁶⁶ *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

⁶⁷ *Id.* at 1468; *see also* 28 U.S.C. § 3702(1) (2018). It should be noted that Professional and Amateur Sports Protection Act contained grandfather provisions allowing sports gambling regimes in states like Nevada to continue without interruption. *Murphy*, at 1471; *see also* 28 U.S.C. § 3704(a)(1)–(2).

⁶⁸ *Murphy*, 138 S. Ct. 1478.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1477.

⁷¹ *Id.* (quoting *Printz v. United States*, 521 U.S. 898, 921, (1997))

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

by congress to carry into execution the powers vested in the federal government.”⁷⁵

The doctrine prohibits states from enacting a law or regulation that “regulates the United States directly or discriminates against the federal government or those with whom it deals.”⁷⁶ Direct regulation of the federal government is prohibited unless Congress clearly and unambiguously waives federal immunity and authorizes such regulation.⁷⁷ Discrimination occurs where the state subjects the federal government (or those with whom the federal government deals) to less favorable treatment or “regulates them unfavorably on some basis related to their governmental status.”⁷⁸

Typically, if the federal government (or another party with standing) thinks a law runs afoul of the doctrine, it brings a declaratory judgment action against the state who enacted the law and seeks to have it declared invalid (i.e., unconstitutional) for violating the Supremacy Clause.⁷⁹ The federal government has the burden of showing that the relevant law violates either the direct regulation prong or discrimination prong.⁸⁰ If a court determines that the law in question violates either prong, the law will necessarily be declared unconstitutional.⁸¹ Additionally, state laws found to be consistent with federal laws—and thus not preempted—are still subject to intergovernmental immunity challenges.⁸²

⁷⁵ *United States v. Washington*, 142 S. Ct. 1976, 1983–84 (2022) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (internal quotation marks omitted)). *U.S. v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010)).

⁷⁶ *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (Stevens, J.) (plurality opinion).

⁷⁷ *United States v. Washington*, 142 S. Ct. 1976, 1986–87 (2022) (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (internal quotations omitted)). As of the publication of this Article, the Supreme Court has not rejected an intergovernmental immunity challenge on the basis that Congress clearly and unambiguously waived federal immunity.

⁷⁸ *United States v. Washington*, 142 S. Ct. 1976, 1984 (2022) (quoting *North Dakota v. United States*, 495 U.S. 423, 438; *Washington v. United States*, 460 U.S. 536, 546 (1983) (internal quotations omitted)). *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (Stevens, J.) (plurality opinion).

⁷⁹ *See, e.g., City of Arcata*, 629 F.3d at 988–89.

⁸⁰ *Cf. Washington*, 142 S. Ct. 1983.

⁸¹ *North Dakota*, 495 U.S. at 435. Notably, courts have held that federal contractors are persons “with whom [the federal government] deals,” and thus are entitled to the same protections afforded to the federal government under intergovernmental immunity doctrine. *See Boeing Co. v. Robinson*, No. CV 10-4839-JFW (MANx), 2011 WL 1748312, at *12 (C.D. Cal. April. 26, 2011) (citing *Black Hills Power & Light Co. v. Weinberger*, 808 F.2d 665, 669 n.4 (8th Cir. 1987)), *aff’d sub nom. Boeing Co. v. Movassaghi*, 768 F.3d 832 (2014)). The Supreme Court recently affirmed that federal contractors are protected by the doctrine in *United States v. Washington*. 142 S. Ct. at 1984.

⁸² *Arcata*, 629 F.3d at 992.

When analyzing a state law or regulation accused of violating intergovernmental immunity doctrine, courts take “a functional approach,” accounting for the legislative authority of both the federal and state governments while respecting Congress’ historic role in resolving disputes between the two sovereigns. Therefore, state laws that indirectly regulate the federal government by imposing a neutral, nondiscriminatory burden on it do not run afoul of intergovernmental immunity.⁸³ Rather, such laws “are but normal incidents of the organization within the same territory of two governments.”⁸⁴

1. The United States Supreme Court’s Broadening of the Doctrine:
North Dakota v. United States

Traditionally, the doctrine was used exclusively in cases involving one sovereign taxing the other and was known as the “intergovernmental tax immunity doctrine.”⁸⁵ However, the Supreme Court broadened the scope of the doctrine in *North Dakota v. United States*.⁸⁶ There, the federal government sought to invalidate part of North Dakota’s alcohol importation and licensing scheme—specifically reporting and labeling requirements for out-of-state suppliers—in order to buy alcohol for the lowest possible price to sell on military bases.⁸⁷ The government argued, among other things, that the importation and licensing scheme regulated government action and was therefore invalid under the Supremacy Clause.⁸⁸ The Supreme Court took the opportunity to broaden intergovernmental immunity’s applicability to non-taxation cases, and held that North Dakota’s importation and licensing scheme did not violate the doctrine.⁸⁹

In an opinion by Justice Stevens, a plurality of the court held that North Dakota’s laws did not directly regulate the federal government

⁸³ *Washington*, 142 S. Ct. at 1984; see also *North Dakota*, 495 U.S. at 435. In *Washington*, the Court hypothesized such a law: one that “indirectly increases costs for the Federal Government . . . in a neutral, nondiscriminatory way.” *Washington*, 142 S. Ct. at 1984. Comparing the hypothetical law with the California law discussed in *United States v. City of Arcata* provides a clearer illustration of what is an impermissible regulation, and what is permissible nondiscriminatory burden. See *infra* Part III.A.

⁸⁴ *North Dakota*, 495 U.S. at 435 (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 422 (1938) (internal quotations omitted)).

⁸⁵ See *Dawson v. Steager*, 139 S. Ct. 698, 702–03 (2019) (collecting cases involving the “intergovernmental tax immunity doctrine” and the federal codification of that doctrine in 4 U.S.C. § 111).

⁸⁶ 495 U.S. 423 (1990).

⁸⁷ *North Dakota*, 495 U.S. at 427–30.

⁸⁸ *Id.* at 430.

⁸⁹ *Id.* at 435–39.

because the reporting and labeling requirements “operate[d] against suppliers, not the Government.”⁹⁰ Second, the Court held that North Dakota’s law did not discriminate against the federal government or those with whom it deals.⁹¹ Because the federal government *alone* had the option “to purchase liquor from out-of-state wholesalers if those wholesalers comply with the labeling and reporting regulations,” the Court held that North Dakota’s law did not discriminate against the federal government.⁹² The Court reasoned that North Dakota’s favorable treatment of the federal government and grant of the option to choose whether to purchase from out-of-state suppliers “[did] not discriminate ‘with the regard to the economic burdens that result,’” and thus did not violate intergovernmental immunity doctrine.⁹³

2. Affirmation of the Expanded Doctrine: *United States v. Washington*

While the prongs of intergovernmental immunity as explained by Justice Stevens’ plurality opinion might seem relatively straightforward, they were blurred by the fractured holdings in *North Dakota*.⁹⁴ After thirty-two years of silence, the Court reaffirmed Justice Stevens’ formulation of the doctrine in *United States v. Washington*.⁹⁵

In *Washington*, the Court examined a workers’ compensation law that lowered the burden of proof to establish entitlement to workers’ compensation benefits for one group of people—federal contractors involved in the clean-up of a former nuclear testing site in the state of

⁹⁰ *Id.* at 437. For a more detailed description of the various opinions *see infra* n. 94.

⁹¹ *Id.* at 437–38.

⁹² *Id.* at 439 (quoting *Washington v. United States*, 460 U.S. 536, 544 (1983)).

⁹³ *Id.* (quoting *Washington v. United States*, 460 U.S. 536, 544 (1983)).

⁹⁴ The real confusion was with the discrimination prong of the doctrine. The judgment of the Court was supported by Justices Rehnquist, White, Stevens, O’Connor, and Scalia. That judgment was announced in a plurality opinion written by Justice Stevens, in which Justices Rehnquist, White, and O’Connor joined. *Id.* at 426. Justice Scalia wrote a separate opinion concurring in the judgment, arguing that a law does not violate the discrimination prong of intergovernmental immunity where the federal government has the option to avoid the undesired result (e.g., the option to pay the tax). *Id.* at 446–48 (Scalia, J., concurring). Justice Brennan wrote an opinion (in which Justices Marshall, Blackmun, and Kennedy joined) concurring in the judgment with regards to the North Dakota reporting requirement but dissenting as to the judgment regarding the labeling requirement. *Id.* at 448–71. In sum, Brennan would have held that a state law violates intergovernmental immunity doctrine not only where a state directly regulates or discriminates against the federal government, but also where “a state law actually and substantially interferes with federal programs.” *Id.* at 451–52 (Brennan, J., concurring/dissenting in part).

⁹⁵ 142 S. Ct. 1976 (2022).

Washington.⁹⁶ Since the federal government was on the hook for the contractors' claims and the law ensured more contractors' claims would prevail, the law had the effect of increasing costs to the federal government.⁹⁷ The United States sued the state of Washington, arguing the law impermissibly discriminated against the government in violation of intergovernmental immunity because it singled out federal contractors and subjected them to unique treatment.⁹⁸ The State of Washington argued, among other things, that the law did not run afoul of intergovernmental immunity because Congress clearly and unambiguously authorized such discrimination in 40 U.S.C. § 3172(a) (and thus waived federal immunity).⁹⁹ The United States District Court for the Eastern District of Washington determined that § 3172(a) clearly and unambiguously authorized such discrimination, and the Ninth Circuit affirmed.¹⁰⁰ The Supreme Court disagreed and unanimously held that the Washington law violated the discrimination prong of intergovernmental immunity.

In holding that the Washington law violated the discrimination prong of intergovernmental immunity, the Court first took the opportunity to clarify the contours of the doctrine. The Court affirmed that the doctrine arose from the Supremacy Clause and traced its origins back to the Court's opinion in *McCulloch v. Maryland*.¹⁰¹ The Court expressly adopted Justice Stevens' plurality opinion from *North Dakota*, finding that intergovernmental immunity "prohibit[s] state laws that *either* 'regulat[e] the United States directly *or* discriminat[e] against the Federal

⁹⁶ 142 S. Ct. at 1982–83; *see also* WASH. REV. CODE. § 51.32.187 (2018).

⁹⁷ *Washington*, 142 S. Ct. at 1983.

⁹⁸ Opening Brief of Plaintiff-Appellant at 9, *United States v. Washington*, 994 F.3d 994 (9th Cir. 2020), *vacated and remanded by* *United States v. Washington*, 41 F.4th 1196 (9th Cir. 2022).

⁹⁹ Appellee's Answering Brief at 16–17, *United States v. Washington*, 994 F.3d 994 (9th Cir. 2020), *vacated and remanded by* *United States v. Washington*, 41 F.4th 1196 (9th Cir. 2022). 40 U.S.C. § 3172(a) provides that "[t]he state authority charged with enforcing and requiring compliance with the state workers' compensation laws and with the orders, decisions, and awards of the authority may apply the laws to all the land and premises in the State which the Federal Government owns or holds by deed or act of cession, and to all projects, buildings, constructions, improvements, and property in the State and belonging to the Government, *in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State in which the land, premises, projects, buildings, constructions, improvements, or property are located.*" (emphasis added).

¹⁰⁰ *United States v. Washington*, 994 F.3d 994, 1012 (9th Cir. 2020), *modifying* 971 F.3d 856 (9th Cir. 2020), *reh'g en banc denied, vacated and remanded by* *United States v. Washington*, 41 F.4th 1196 (9th Cir. 2022).

¹⁰¹ *Washington*, 142 S. Ct. 1976, 1983–84.

Government or those with whom it deals' (e.g., contractors)."¹⁰² Additionally, the Court shed light on the discrimination prong, finding it violated where a state law singles out the Federal Government or its contractors "for less favorable treatment," or "regulates [the federal government or its contractors] unfavorably on some basis related to their governmental status."¹⁰³ However, the discrimination prong is not violated where a state law "indirectly increases costs for the federal government, so long as the law imposes those costs in a neutral, nondiscriminatory way."¹⁰⁴

Turning to the Washington law, the Court found the discrimination prong violated because the law, by its own terms, applied only to federal contractors.¹⁰⁵ Since the law "explicitly treat[ed] federal workers differently than state or private workers" and in doing so "impose[d] costs upon the federal government that state or private entities d[id] not bear," the law violated the discrimination prong *unless* Congress had provided "a clear congressional mandate" for such regulation.¹⁰⁶ Put differently, "Congress must provide clear and unambiguous authorization" for the type of state regulation at issue in order for a state to directly regulate or discriminate against the federal government.¹⁰⁷

Here, the Court found that the language of § 3172(a) did not constitute a clear and unambiguous waiver of federal immunity for purposes of Washington's law.¹⁰⁸ While the statute arguably contained a waiver of immunity "authorizing a state to extend its generally applicable state workers' compensation laws to federal lands and projects within the State," it could not be said that § 3172(a) "authorize[d] a State to enact a discriminatory law that facially singles out the Federal Government for unfavorable treatment."¹⁰⁹ In so holding, the Court emphasized that "discrimination against the Federal Government lies at the heart of the Constitution's intergovernmental immunity doctrine," and that the nondiscrimination prong supports a narrow construction of waivers of

¹⁰² *Id.* at 1984 (emphasis and alterations in the original) (quoting *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (plurality opinion)).

¹⁰³ *Id.* (quoting *Washington v. United States*, 460 U.S. 536, 546 (1983) (internal quotation marks omitted) (also quoting *North Dakota v. United States*, 495 U.S. at 438) (internal quotation marks omitted)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (citing WASH. REV. CODE. § 51.32.187(1)(b) (2018)).

¹⁰⁶ *Id.* (quoting *Hancock v. Train*, 426 U.S. 167, 179 (1976)).

¹⁰⁷ *Id.* (quoting *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (internal quotation marks and alterations omitted)).

¹⁰⁸ *Id.* at 1984–86.

¹⁰⁹ *Id.* at 1985.

federal immunity to ensure that states do not shift the costs of legislation to the federal government.¹¹⁰

In sum, the Court's opinion in *Washington* provided much needed clarity to intergovernmental immunity jurisprudence. It confirmed that the doctrine originates from the Supremacy Clause and prohibits direct regulation of, or discrimination against, the federal government (or those with whom it deals). It also suggested that preventing discrimination against the federal government is the main policy rationale behind the doctrine and clarified that a state law impermissibly discriminates against the federal government in violation of intergovernmental immunity where the law singles out the federal government for unfavorable treatment. Finally, the opinion made clear that federal waivers of immunity will be construed narrowly, and states should not rely on statutes implying waiver to defend laws from intergovernmental immunity challenges.

III. RECENT DEVELOPMENTS

No appellate court has applied intergovernmental immunity doctrine to Second Amendment sanctuary laws. In fact, authority on the expanded doctrine announced in *North Dakota* has been relatively sparse, with the most developed precedent originating from the Ninth Circuit. Some of the Ninth Circuit's most recent cases directly involving intergovernmental immunity challenges provide a more complete picture of the doctrine's current state.

A. *The Ninth Circuit's Recent Gloss on Intergovernmental Immunity: United States v. City of Arcata & Boeing v. Movassaghi*

One relatively recent case, *United States v. City of Arcata*, clearly illustrates the application of the contemporary intergovernmental immunity doctrine.¹¹¹ There, two California municipalities passed ordinances prohibiting the United States military from engaging in activities to recruit minors.¹¹² Military recruiters who violated the ordinances were subject to civil penalties for each infraction committed.¹¹³ The district court granted the United States' motion for judgment on the pleadings and permanently enjoined the municipalities from enforcing the ordinances, finding that the ordinances clearly violated intergovernmental

¹¹⁰ *Id.* at 1985–86 (citing *County of Fresno*, 429 U.S. at 462; *McCulloch*, 4 Wheat., at 428, 435–36).

¹¹¹ 629 F.3d 986 (9th Cir. 2010).

¹¹² *Id.* at 988.

¹¹³ *Id.*

immunity.¹¹⁴ The Ninth Circuit affirmed the district court, finding the ordinance violated both the regulation and discrimination prongs of the expanded doctrine.¹¹⁵ The ordinances expressly regulated federal agents, i.e., military recruiters, by prohibiting certain conduct—recruiting minors.¹¹⁶ The ordinances also discriminated against the federal government by exempting identical conduct by non-federal actors, thereby “treating someone else better” than the federal government.¹¹⁷ *Arcata* presents a textbook application of intergovernmental immunity doctrine—state laws which expressly try to regulate federal activity and/or prohibit conduct based on the federal government’s identity should not survive.

More recently, the Ninth Circuit confronted a more difficult state law in *Boeing Co. v. Movassaghi*.¹¹⁸ There, Boeing contracted with the U.S. Department of Energy to clean up a federal nuclear testing ground near Los Angeles.¹¹⁹ Throwing a wrench in Boeing’s cleanup efforts was SB 990, which prescribed certain cleanup standards for radioactive materials.¹²⁰ SB 990’s standards were more stringent than federal standards, and the law criminalized “sell[ing], leas[ing], subleas[ing] or otherwise transfer[ing]” land that did not meet its cleanup standards.¹²¹ Since it would have taken tens of thousands of years to comply with SB 990’s standards, Boeing sued to challenge the validity of the statute.¹²² The district court agreed with Boeing, finding SB 990 violated the doctrine because it essentially told the federal government *how* to engage in the

¹¹⁴ *Id.* at 988–89; *see also* United States v. City of Arcata, 2009 WL 1774269 (N.D. Cal. June 18, 2009).

¹¹⁵ *Arcata*, 629 F.3d at 991–92.

¹¹⁶ *Id.* (citing *Tennessee v. Davis*, 100 U.S. 257, 263 (1879)). The Ninth Circuit also noted that incidental *regulation* (as opposed to discrimination) might be enough to violate the first prong of *North Dakota*, but declined to discuss the issue in any detail because the ordinances at issue expressly regulated federal activity. *See* Blackburn v. United States, 100 F.3d 1426, 1435 (9th Cir. 1996) (holding that a state statute imposing safety requirements on a resort on federal land violated the regulation prong of intergovernmental immunity).

¹¹⁷ *Arcata*, 629 F.3d at 991–92 (quoting *North Dakota v. United States*, 495 U.S. 423, 438 (1996) (Stevens, J.) (plurality opinion) (internal quotations omitted)). The Ninth Circuit also dismissed the municipalities’ Tenth Amendment argument, stating that the ordinances were not a valid exercise of general police powers because “[t]he Constitution expressly provides Congress the power to ‘raise and support Armies’ and to ‘make Rules for the Government and Regulation of the land and naval Forces.’” *Id.* at 992 (quoting U.S. CONST. art. I, § 8, cls. 12, 14)).

¹¹⁸ 768 F.3d 832 (9th Cir 2014).

¹¹⁹ *Id.* at 836–38.

¹²⁰ *Id.* at 837; *see also* CAL. HEALTH & SAFETY CODE § 25359.20.

¹²¹ *Boeing Co.*, 768 F.3d at 837–38 (quoting CAL. HEALTH & SAFETY CODE § 25359.20(d)); *see also* *Boeing Co.*, 2011 WL 1748312, at *12–16 (C.D. Cal. April 26, 2011).

¹²² *Id.*

otherwise exclusively federal activity (i.e., the cleanup of radioactive materials).¹²³ The Ninth Circuit affirmed, noting that SB 990 violated both the regulation and discrimination prongs of intergovernmental immunity.¹²⁴ In holding that the regulation prong was violated, the Ninth Circuit noted SB 990 authorized California’s relevant regulatory agencies to “use any legal remedies available” to compel Boeing to comply with the SB 990’s standards and regulated “the environmental sampling required, the cleanup procedures to be used and the money and time [] spent” on the cleanup.¹²⁵ The Ninth Circuit also noted that there was no “clear and unambiguous” authorization from Congress for California to regulate cleanup of federal nuclear testing grounds.¹²⁶ In holding that the discrimination prong was violated, the Ninth Circuit noted SB 990 expressly targeted federal activity and was enacted to remedy the less protective cleanup standards the federal government was relying on.¹²⁷ Since SB 990 applied “more stringent cleanup standards than generally applicable state environmental laws,” the discrimination prong of intergovernmental immunity was violated.¹²⁸

B. Intergovernmental Immunity in Immigration: United States v. California; GEO Group, Inc. v. Newsom; and McHenry County v. Kwame Roul

Litigation surrounding state laws that infringe on federal immigration policy provides the strongest analogue to litigation over Second Amendment sanctuary laws. These immigration cases provide a comparative framework to judge future intergovernmental challenges in the Second Amendment Context.¹²⁹

One of the most prominent cases wrestling with intergovernmental immunity in the immigration context is *United States v. California*.¹³⁰ There, California enacted three laws essentially frustrating the federal immigration scheme and protecting Californians from enforcement of the federal immigration framework: AB 450, AB 103, and SB 54.¹³¹ In turn, the United States moved to preliminarily enjoin their enforcement.¹³² The

¹²³ *Id.*

¹²⁴ *Id.* at 839–43.

¹²⁵ *Id.*

¹²⁶ *Id.* at 840.

¹²⁷ *Id.* at 843.

¹²⁸ *Id.*

¹²⁹ *See infra* Part IV.

¹³⁰ *United States v. California*, 921 F.3d 865 (9th Cir. 2019), *cert denied.*, 141 S. Ct. 124 (2020) (noting Justice Thomas and Justice Alito would have granted petition for cert.).

¹³¹ *California*, 921 F.3d at 872–73.

¹³² *Id.* at 876.

district court, among other things, denied the United States' motion for preliminary injunction as to AB 450, AB 103, and SB 54.¹³³ The Ninth Circuit affirmed the district court as to AB 450, SB 54, and the majority of the provisions in AB 103.¹³⁴ However, the Ninth Circuit held that one provision of AB 103 violated intergovernmental immunity.¹³⁵

Before analyzing whether the various California laws were likely to violate intergovernmental immunity doctrine, the Ninth Circuit laid out both the federal government's immigration framework and California's corresponding framework.

First, the court recognized that the federal government has *plenary authority* in the field of immigration and reviewed two key laws within the federal framework¹³⁶: The Immigration and Nationality Act ("INA") and the Immigration Reform and Control Act of 1986 ("IRCA").¹³⁷

The INA is the embodiment of Congress' authority "to regulate the entry, presence, and removal of" aliens.¹³⁸ The INA grants federal immigration officials broad authority to arrest and detain aliens pending a deportation proceeding while simultaneously giving the Attorney General of the United States broad discretion in finding suitable detention facilities—including the ability to broker agreements with local and state governments, as well as private contractors.¹³⁹ The IRCA was enacted pursuant to Congress' authority to "combat[] the employment of illegal aliens."¹⁴⁰ The IRCA forbids employers from "knowingly hir[ing] or employ[ing] aliens without proper work authorization,"¹⁴¹ and employers who ignore this command are subject to civil and criminal penalties.¹⁴² Employers are required to complete various verification processes to ensure against employment of aliens, including maintaining "documentary evidence of authorized employment . . . to which immigration officers and

¹³³ *Id.* at 873.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.") (quoting *Arizona v. United States* (Arizona II), 567 U.S. 387, 394 (2012) (citing U.S. CONST. art. I, § 8 cl. 4)).

¹³⁷ *Id.* at 873–75.

¹³⁸ *Id.* at 873. The use of the term "alien" throughout this section is not meant to be a pejorative or slur. Rather, it is a term defined by statute meaning "any person not a citizen or national of the United States." See 8 U.S.C. §§ 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States").

¹³⁹ *Id.* at 873–74 (citing 8 U.S.C. §§ 1103(a)(11), 1226(a), (c), 1231(g)).

¹⁴⁰ *Id.* at 874 (quoting *Arizona v. United States* (Arizona II), 567 U.S. 387, 404 (2012) (internal quotations omitted)).

¹⁴¹ *Id.* (quoting 8 U.S.C. § 1324a(a)(1)–(2)) (internal quotations omitted).

¹⁴² *Id.* (citing 8 U.S.C. § 1324a(a)(e)–(f)). Employers are only subject to criminal penalties where "a pattern or practice of violations" has been established. *Id.*

administrative law judges have reasonable access.”¹⁴³ Additionally, aliens who accept employment in violation of IRCA (1) become ineligible to become “a lawful permanent resident”; (2) “may be removed from the country for having engaged in unauthorized work”; and (3) can be criminally prosecuted (if employment has been obtained through fraudulent means).¹⁴⁴

Next, the court turned to California’s immigration framework, noting that the overall legislative intent of the laws in question was to “protect immigrants from an expected increase in federal immigration enforcement actions.”¹⁴⁵ The court first turned to AB 450, which prohibits public and private employers from (1) providing voluntary consent to allow a federal immigration agent to enter “any nonpublic areas of a place of labor” without a warrant; (2) “providing voluntary consent to allow a federal immigration agent to access, review, or obtain the employer’s employee records without a subpoena or judicial warrant”; and (3) “reverify[ing] the employment eligibility of a current employee at a time or in a manner not required by the IRCA.”¹⁴⁶ AB 450 also requires employers to provide employees with notice that a federal immigration inspection will be taking place within seventy-two hours of the employer getting notice, as well as requiring employers to provide certain employees with the results of the federal inspection.¹⁴⁷ At issue in the Ninth Circuit case were AB 450’s “employer-notice” provisions, which the court held to not violate intergovernmental immunity.¹⁴⁸ The court found that since AB 450’s “employer notice” provisions took aim at conduct of employers—rather than the United States or its actors—there was no direct regulation under

¹⁴³ *Id.* (quoting 8 U.S.C. §§ 1324a(b), (e)(2)(A)) (internal quotations omitted). This documentary evidence can only be used to enforce violations of IRCA, INA, and various other criminal statutes expressly authorized within the framework. *See* 8 U.S.C. §§ 1324a(b)(5), (d)(2)(F)–(G).

¹⁴⁴ *California*, 921 F.3d at 874 (quoting *Arizona v. United States* (Arizona II), 567 U.S. 387, 404–05 (2012) (internal quotations omitted)).

¹⁴⁵ *Id.* at 875 (9th Cir. 2019) (quoting Hearing on AB 450 Before the Assemb. Comm. On Judiciary, 2017–18 Sess. 1 (Cal. 2017 (synopsis) (internal quotations omitted))).

¹⁴⁶ *Id.* (quoting CAL. GOV’T CODE §§ 7285.1(a), (e), 7285.2(a)(1) (internal quotations omitted)).

¹⁴⁷ *Id.* (citing CAL. GOV’T CODE §§ 90.2(a)(1), (b)(1)–(2)). Employers are required to notify those employees that the federal government has identified as potentially lacking work authorization or as having deficiencies in their work authorization. CAL. GOV’T CODE § 90.2(b)(1)–(2).

¹⁴⁸ *California*, 921 F.3d at 879–81. The Ninth Circuit did not analyze AB 450’s “voluntary consent” and “reverification” provisions on this appeal for a preliminary injunction. The district court granted the United States’ motion for a preliminary injunction as to these provisions, believing they were likely preempted by the federal immigration scheme. *United States v. California*, 314 F. Supp. 3d 1077, 1096, 1098 (E.D. Cal. 2018).

the first prong of *North Dakota*.¹⁴⁹ Additionally, the “employer notice” provisions did not discriminate under the second prong of *North Dakota* because they “did not treat the federal government worse than anyone else.”¹⁵⁰ Finally, the court noted intergovernmental immunity doctrine “is not implicated when a state merely references or even singles out federal activities in an otherwise innocuous enactment.”¹⁵¹ Therefore, AB 450’s “employer notice” provisions were held to not violate intergovernmental immunity doctrine.

The court then examined AB 103. AB 103 requires the California Attorney General to review and draft a report regarding (1) “the conditions of confinement”; (2) “standards of care and due process”; and (3) “the circumstances around apprehension [of] aliens” at certain “county, local, or private locked detention facilities” in California where aliens are held for federal immigration proceedings.¹⁵² To enable the California Attorney General to meet these objectives, AB 103 requires the facilities to “provide[] all necessary access for the observations necessary to effectuate reviews . . . including, but not limited to, access to detainees, officials, personnel, and records.”¹⁵³ Unlike AB 450, the Ninth Circuit found the review provisions of AB 103 to violate intergovernmental immunity.¹⁵⁴ The court found that the review provisions of AB 103 “burden federal operations, and only federal operations,” because the law only applied to facilities housing aliens in preparation for federal immigration proceedings.¹⁵⁵ Beyond that finding, the rest of the analysis is less clear. In sum, the Ninth Circuit reversed the district court’s denial of a preliminary injunction toward one provision of AB 103—Section 12532(b)(1)(C)’s “circumstances around apprehension” provision—while noting that any provision of AB 103 that “impose[d] an additional economic burden *exclusively* on the federal government” would violate intergovernmental immunity.¹⁵⁶

¹⁴⁹ *California*, 921 F.3d at 879–81.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 875–76 (9th Cir. 2019) (quoting CAL. GOV’T CODE § 12532(a)–(c) (internal quotations omitted)).

¹⁵³ *Id.* at 876 (9th Cir. 2019) (citing CAL GOV’T CODE § 12532(c)).

¹⁵⁴ *Id.* at 882–85.

¹⁵⁵ *Id.* at 882–83.

¹⁵⁶ *Id.* at 876, 880, 884–85. Key to the Ninth Circuit’s reversal on the “circumstances surrounding apprehension” provision was the fact that the district court erroneously relied on a *de minimis* exception to intergovernmental immunity doctrine and found that the burden imposed by this provision was minimal. *Id.* at 883–85. Since the district court based its decision on erroneous findings of fact and/or an erroneous legal standard, the district court abused its discretion, and reversal was merited. *Id.* at 878–79 (citing *Associated Press v. Otter*, 682 F.3d 821, 824 (9th Cir. 2012)).

Finally, the court analyzed SB 54. SB 54 prohibits California “state and local law enforcement agencies” from (1) “inquiring into an individual’s immigration status”; (2) “detaining an individual on the basis of a hold request”; and (3) “providing information regarding a person’s release date or other personal information,” subject to certain exceptions.¹⁵⁷ Like the current litigation in Missouri regarding SAPA, much of the court’s analysis of SB 54 was spent on the issues of preemption and anticommandeering.¹⁵⁸ However, the Ninth Circuit rejected the United States’ claim that SB 54 violated intergovernmental immunity doctrine: “A finding that SB 54 violates [intergovernmental immunity doctrine] would imply that California *cannot* choose to discriminate against federal immigration authorities by refusing to assist their enforcement efforts—a result that would be inconsistent with the Tenth Amendment and the anticommandeering rule.”¹⁵⁹

The Ninth Circuit’s analysis of the intergovernmental immunity issue was deeply intertwined with its preemption and anticommandeering analysis, further suggesting that these issues share a common origin in the Supremacy Clause but are not well delineated.¹⁶⁰ The United States suggested that conflict preemption applied because SB 54 “forc[ed] federal authority to expend greater resources to enforce immigration laws,” thus frustrating the federal scheme.¹⁶¹ The Ninth Circuit rejected this argument, noting that “[f]ederal schemes are inevitably frustrated when states opt not to participate in federal programs and enforcement efforts,” but SB 54 could not be invalidated because it would “dictate[] what a state legislature may and may not do,” running afoul of anticommandeering doctrine.¹⁶² The Ninth Circuit also noted that the United States “was free to *expect* as much as it wanted [when Congress enacted the INA], but it could not *require* California’s cooperation without running afoul of the Tenth Amendment.”¹⁶³ Thus, the federal government could not invalidate SB 54 under either an intergovernmental immunity or conflict preemption analysis, because results under those doctrines would

¹⁵⁷ *Id.* at 876–77 (9th Cir. 2019) (quoting CAL. GOV’T CODE §§ 7282.5(a), 7284.6(a) (internal quotations omitted)). Some of the exceptions to SB 54’s general rule include: (1) transferring an alien to federal immigration authorities pursuant to a judicial warrant or probable cause determination and (2) sharing personal information with federal officials if the alien has been convicted of a crime or the information is available to the public. CAL. GOV’T CODE §§ 7282.5(a), 7284.6(a)(1)(C)–(D).

¹⁵⁸ *California*, 921 F.3d at 886–91.

¹⁵⁹ *Id.* at 891.

¹⁶⁰ *See supra* Part II.A.

¹⁶¹ *California*, 921 F.3d at 889.

¹⁶² *Id.* at 889–90 (quoting *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018) (internal quotations omitted)).

¹⁶³ *Id.* at 891.

run afoul of anticommandeering doctrine and our country's system of dual sovereignty.

Not even two years later, the Ninth Circuit would once again revisit intergovernmental immunity challenges to state immigration laws in *GEO Group, Inc. v. Newsom*.¹⁶⁴ This time, California had enacted a law—AB 32—to combat federal contracting of private detention facilities for immigration detention.¹⁶⁵ Among other things, AB 32 prohibited the California Department of Corrections and Rehabilitation from entering into contracts with private detention facilities both inside and outside the state and established a general ban on persons operating private detention facilities within California.¹⁶⁶ GEO Group—a federal contractor operating private detention facilities within the state of California—and the United States sought to preliminarily enjoin AB 32, but their claims failed at the district court.¹⁶⁷ On appeal, the Ninth Circuit reversed, finding AB 32 likely preempted and invalid under the discrimination prong of intergovernmental immunity.¹⁶⁸

To determine whether AB 32 violated the discrimination prong of intergovernmental immunity, the panel applied a “net effects” test.¹⁶⁹ If the “net effect of a state law discriminate[s] against the federal government,” the law violates intergovernmental immunity.¹⁷⁰ AB 32 met this net effects test because it imposed a general prohibition on detention facilities but then made permanent exemptions that select state detention facilities could take advantage of—but not the federal government or its

¹⁶⁴ *GEO Grp., Inc. v. Newsom*, 15 F.4th 919 (9th Cir. 2021), *reh'g en banc granted, opinion vacated*, 31 F.4th 1109 (9th Cir. 2022).

¹⁶⁵ *Id.* at 925.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 926.

¹⁶⁸ *Id.* at 927–40. Although not directly relevant to the current intergovernmental immunity analysis, it is helpful to briefly consider why the Ninth Circuit found AB 32 to be preempted. First, the Ninth Circuit analyzed why the presumption against preemption canon did not apply. *Id.* at 927. The Ninth Circuit found that the federal government was solely responsible for federal immigration detention. *Id.* at 929 (citing *United States v. Locke*, 529 U.S. 89, 99 (2000)). Additionally, the Ninth Circuit found that the presumption against preemption did not apply because AB 32 did not merely “touch upon the area of immigration,” but rather “bulldoze[d] over the federal government’s ability to detain immigrants by trying to ban all the current immigration facilities in California.” *Id.* at 929. Next, the Court found that the DHS Secretary had broad authority under federal law to hire private contractors to operate detention facilities. *Id.* at 930–35. Finally, the Court found that conflict preemption applied, because AB 32 “bars the [DHS] Secretary from doing what federal immigration law explicitly permits him or her to do.” *Id.* at 935–36 (citing *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000)).

¹⁶⁹ *Id.* at 937–38.

¹⁷⁰ *Id.* (citing *Washington v. United States*, 460 U.S. 536, 544–45 (1983)).

contractors.¹⁷¹ Therefore, AB 32 likely violated intergovernmental immunity.¹⁷²

Six months after the panel decision in *GEO Group*, the Ninth Circuit ordered the case be reheard en banc.¹⁷³ A little over two months after the Supreme Court handed down *Washington*, the Ninth Circuit handed down their en banc opinion in *GEO*.¹⁷⁴ This time, the court found AB 32 likely violated the direct regulation prong of intergovernmental immunity and vacated the district court's denial of preliminary injunctive relief.¹⁷⁵ Interestingly enough, the court expressly declined to evaluate the law under the discrimination prong.¹⁷⁶ Rather, it focused its analysis on the direct regulation prong, finding AB 32 implicated intergovernmental immunity because it "controlled federal operations by interfering . . . with ICE's contracting decisions."¹⁷⁷ In other words, AB 32's prohibition on *any persons* operating private detention facilities in California—including federal contractors—amounted to direct regulation of the federal government and thus likely violated intergovernmental immunity.¹⁷⁸

A month before the Ninth Circuit's en banc opinion in *GEO Group* was handed down, the Seventh Circuit finally chimed in on intergovernmental immunity in *McHenry County v. Kwame Roul*.¹⁷⁹ The case addressed the Illinois Way Forward Act, which prohibited political subdivisions of Illinois from contracting with the federal government to house civil immigration detainees.¹⁸⁰ The Act also required any political subdivisions with existing contracts with the federal government to terminate those agreements within four months of the Act's enactment.¹⁸¹ Two political subdivisions of Illinois, McHenry County and Kankakee County, brought a declaratory judgment action seeking to find the Act

¹⁷¹ *Id.*

¹⁷² *Id.* The Ninth Circuit declined to address claims of direct regulation, citing the competing plurality opinions in *North Dakota. Id.* at 939. However, Justice Scalia, who provided the fifth vote necessary to render the judgment, seems to not have had a problem with Stevens' "direct interference" approach to the regulation prong. *See North Dakota v. United States*, 495 U.S. 423, 444 (1995) (Scalia, J., concurring).

¹⁷³ *GEO Grp, Inc. v. Newsom*, 31 F.4th 1109 (9th Cir. 2022).

¹⁷⁴ 50 F.4th 745 (9th Cir. 2022).

¹⁷⁵ *Id.* at 763. The Ninth Circuit also found that AB 32 was likely preempted because it stood as an obstacle to Congress' execution of its immigration policies. *Id.* at 762–63.

¹⁷⁶ *Id.* at 758 n.7.

¹⁷⁷ *Id.* at 759–61 (citing *Pub. Util. Comm'n v. United States*, 355 U.S. 534, 543–44 (1958); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 188–90 (1956) (per curiam)).

¹⁷⁸ *Id.* at 759–61 (citing *Pub. Util. Comm'n*, 355 U.S. at 543–44; *Leslie Miller, Inc.*, 352 U.S. at 188–90).

¹⁷⁹ 44 F.4th 581 (7th Cir. 2022).

¹⁸⁰ *Id.* at 586; *see also* 5 ILCS 085/15(g)(1).

¹⁸¹ *McHenry Cnty.*, 44 F.4th at 586; *see also* 5 ILCS 085/15(g)(2).

unconstitutional as violating the Supremacy Clause on preemption and intergovernmental immunity grounds.¹⁸² The United States District Court for the Northern District of Illinois rejected the counties' preemption and intergovernmental immunity arguments.¹⁸³ The Seventh Circuit affirmed.¹⁸⁴

First, the Seventh Circuit analyzed the Illinois law under the direct regulation prong of the doctrine, and found that the law—by its plain terms—did not try to regulate the federal government.¹⁸⁵ Rather, the law only prohibited law enforcement agencies, law enforcement officials, and political subdivisions of the State of Illinois from entering into detention contracts.¹⁸⁶ The law did *not* prohibit the federal government from contracting with private parties to hold detainees, or prohibit the federal government from holding detainees in their own facilities in Illinois.¹⁸⁷ The Seventh Circuit then analyzed the Illinois law under the discrimination prong. Using *Washington* as a guide, it found that the law did not violate the discrimination prong because the law did not subject the federal government to differential treatment.¹⁸⁸ Specifically, since the law only affected the federal government, and the counties could not identify similar situated actors who received more favorable treatment, there was no basis for finding discrimination.¹⁸⁹ In other words, “the mere fact that [a law] touches on an exclusively federal sphere is not enough to establish discrimination” for purposes of intergovernmental immunity.¹⁹⁰

IV. APPLYING THE EXPANDED DOCTRINE TO SECOND AMENDMENT SANCTUARY LAWS

Even after extensive development in the Ninth Circuit and the Supreme Court's recent opinion in *Washington*, intergovernmental immunity doctrine is still in its infancy. In fact, *Washington* represents the first time the Supreme Court affirmed its expansion of the doctrine in *North Dakota* and clarified the doctrine's origin (i.e., the Supremacy

¹⁸² *McHenry Cnty.*, 44 F.4th at 586.

¹⁸³ *McHenry Cnty. v. Kwame Roul*, 574 F. Supp. 3d 571, 578–81 (N.D. Ill. 2021).

¹⁸⁴ *McHenry Cnty.*, 44 F.4th at 585.

¹⁸⁵ *Id.* at 592–93.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 593–94.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 594.

Clause).¹⁹¹ But, even after *Washington*, questions still remain regarding the scope of the doctrine and its interaction with its doctrinal brethren.

For starters, *Washington* did not clarify the scope of the direct regulation prong, leaving lower courts wondering whether they should follow Justice Stevens's or Justice Brennan's formulation in *North Dakota*.¹⁹² This was a point of tension in *GEO Group*, with the majority and dissent vehemently disagreeing as to whether interference with the private conduct of federal contractors could amount to direct regulation.¹⁹³

Second, the Seventh Circuit's discussion of intergovernmental immunity in *McHenry County* highlights discrepancies with the discrimination prong. *McHenry County* suggests that a state law will not violate the discrimination prong where the federal government is acting in an exclusively federal sphere, and thus there are no similarly situated actors who can be treated better than the federal government. *McHenry County* also highlights the on-going tension between intergovernmental immunity and anticommandeering. If a state enacted a law codifying its lawful decision to not participate in a federal program, and the United States invoked the discrimination prong of the doctrine to invalidate the law, the state would have a genuine anticommandeering argument.

Before *Washington*, circuit courts understandably remained reluctant to expand the doctrine,¹⁹⁴ notwithstanding the Ninth Circuit. Now, circuit courts will inevitably be forced to grapple with the doctrine in a variety of scenarios.

Recently, the federal government has asserted intergovernmental immunity to strike down Second Amendment sanctuary laws. As of the

¹⁹¹ *United States v. Washington*, 142 S. Ct. 1976, 1983–84 (2022). It should be noted that in the interim between *North Dakota* and *Washington*, the Supreme Court continued to decide intergovernmental tax immunity claims. *See Dawson v. Steager*, 139 S. Ct. 698, 702–03 (2019) (collecting cases involving the “intergovernmental tax immunity doctrine” and the federal codification of that doctrine in 4 U.S.C. § 111).

¹⁹² *North Dakota v. United States*, 495 U.S. 423, 438–39, 451–52 (1990).

¹⁹³ *Compare GEO Grp., Inc. v. Newsom*, 50 F.4th 745, 758–60, 758 n.8 (9th Cir. 2022) (finding interference with the private conduct of federal contractors likely amounts to direct regulation), *with GEO Grp., Inc. v. Newsom*, 50 F.4th 745, 763–65, 765 n.1 (9th Cir. 2022) (Murguia, Rawlinson, Sung, JJ., dissenting) (finding such conduct does not amount to direct regulation and suggesting the majority's opinion muddies intergovernmental immunity by reviving Justice Brennan's “substantial interference” test). The majority also cast doubt on its holding in *U.S. v. California*, 50 F.4th at 760 n. 10 (“[I]t is clear we spoke too broadly in *United States v. California* when we said that ‘[f]or purposes of intergovernmental immunity, federal contractors are treated the same as the federal government itself.’ 921 F.3d at 882 n.7. Rather, states may impose some regulations on federal contractors that they would not be able to impose on the federal government itself.”).

¹⁹⁴ *See, e.g., Deane v. United States*, 329 F. App'x 809, 814–15 (10th Cir. 2009) (exercising judicial discretion to avoid discussion of intergovernmental immunity claims).

date of this Article, the federal government has only asserted these claims in *United States v. Missouri*.¹⁹⁵ The district court’s opinion granting the United States’ motion for summary judgment is currently being appealed to the Eighth Circuit,¹⁹⁶ and the result will likely influence further development of intergovernmental immunity in the Second Amendment sanctuary sphere because several state laws have a similar scope to Missouri’s SAPA. Therefore, the final section of this Article aims to faithfully apply intergovernmental immunity doctrine—as expressed by the Supreme Court in *North Dakota* and *Washington*, as well as by the federal circuit courts—to relevant Second Amendment sanctuary laws to provide an applicable framework for future practitioners, legislators, and courts tackling these issues.

Before setting off on a comparative analysis, a few additional considerations merit mention. First, the Ninth Circuit’s framework in *California* and *GEO Group* is not a perfect fit because, unlike the area of immigration, the federal government does not enjoy plenary power over the area of firearms regulation.¹⁹⁷ Second, federal courts presented with intergovernmental immunity issues might abstain from making a determination in “cases in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law”¹⁹⁸ Third, this Article is not exhaustive but rather analyzes a representative sample of Second Amendment sanctuary laws to inform the reader of intergovernmental immunity issues likely to arise with this type of legislation. With those considerations in mind, the following analysis presents the state laws in a descending order, from most likely to violate intergovernmental immunity doctrine to least likely, starting with Missouri’s SAPA.

A. *Missouri (Second Amendment Preservation Act)*

Missouri’s Second Amendment sanctuary law, known as the Second Amendment Sanctuary Act, is codified in sections 1.410 to 1.485 of the

¹⁹⁵ See, e.g., United States’ Motion for Summary Judgment, *United States v. Missouri et al.*, No. 2:22-cv-04022-BCW (W.D. Mo. Feb. 28, 2022), ECF No. 8 (arguing that Missouri’s Second Amendment Preservation Act is an unconstitutional attempt to nullify federal law in violation of the Supremacy Clause and doctrines arising from the Supremacy Clause).

¹⁹⁶ *United States v. Missouri*, 2023 WL 2390677 (W.D. Mo. Mar. 7, 2023), *appeal docketed*, No. 23-1457 (8th Cir. Mar. 10, 2023).

¹⁹⁷ See *D.C. v. Heller*, 554 U.S. 570, 599–600 (2008) (impliedly recognizing that the federal government enjoyed plenary authority to organize federal militias, but not state militias and the regulation of the right to “keep” arms).

¹⁹⁸ *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (citing *Railroad Comm’ of Tex. v. Pullman Co.*, 321 U.S. 496 (1941)).

Missouri Revised Statutes.¹⁹⁹ The ongoing federal court litigation in *United States v. Missouri*, as well as the state court litigation in *City of St. Louis v. Missouri*,²⁰⁰ present multiple Supremacy Clause challenges to the constitutionality of SAPA.²⁰¹ While the issues in both of those cases deserve a full article to themselves, the review here is limited to issues arising in the federal case surrounding application of the intergovernmental immunity doctrine.

The United States District Court for the Western District of Missouri found five provisions of SAPA, sections 1.430-470, to violate intergovernmental immunity. The court first examined section 1.430 which states:

All federal acts, laws, executive orders, administrative orders, rules, and regulations . . . that infringe on the people’s right to keep and bear arms as guaranteed by the Second Amendment to the Constitution of the United States and Article I, Section 23 of the Constitution of Missouri 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 in this state.²⁰²

The district court found that section 1.430 violates the regulation prong of intergovernmental immunity because the plain language of the provision attempts to regulate and/or interfere with federal law enforcement.²⁰³ The district court failed to clarify what language in the provision violated intergovernmental immunity and instead noted that the provision “violates intergovernmental immunity on its face.”²⁰⁴ However, it is likely that the “shall not be enforced in this state” language of section 1.430 infringes on the regulation prong because it seems to forbid the federal government from enforcing federal firearms law within the state of Missouri.

The court then turned to section 1.440. Section 1.440 states that “[i]t shall be the duty of the courts and law enforcement agencies of this state to protect the rights of law-abiding citizens to keep and bear arms within the borders of this state and to protect these rights from infringements defined under section 1.420.”²⁰⁵ The district court found section 1.440 violates intergovernmental immunity because it “impos[es] a duty on

¹⁹⁹ MO. REV. STAT. §§ 1.410-485 (2021).

²⁰⁰ *City of St. Louis v. State*, 643 S.W.3d 295 (Mo. 2022).

²⁰¹ See *United States v. Missouri*, 2023 WL 2390677, at *8–11 (W.D. Mo. Mar. 7, 2023), *appeal docketed*, No. 23-1457 (8th Cir. Mar. 10, 2023) (finding § 1.420 of SAPA violates the Supremacy Clause, is conflict preempted, and is inseverable from the rest of SAPA).

²⁰² MO. REV. STAT. § 1.430 (2021).

²⁰³ *Missouri*, 2023 WL 2390677 at *12.

²⁰⁴ *Id.*

²⁰⁵ MO. REV. STAT. § 1.440 (2021).

courts and state law enforcement to obstruct the enforcement of federal firearms regulations in Missouri.”²⁰⁶ Notably, the court did not decide whether section 1.440 violates the regulation prong or discrimination prong of intergovernmental immunity. However, since the plain language of section 1.440 does not single out the federal government or those with whom the federal government deals, the district court must have been relying on the regulation prong. The district court’s holding seems to adopt the “substantial interference” test used by Justice Brennan in *North Dakota* and the majority in *GEO Group* to justify a violation of intergovernmental immunity.²⁰⁷ It will be interesting to see whether the Eighth Circuit addresses this discrepancy in a future opinion.

The district court then addressed section 1.450 which 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. Nothing in the sections 1.410 to 1.480 shall be construed to prohibit Missouri officials from accepting aid from federal officials in an effort to enforce Missouri laws.*²⁰⁸

The district court found that section 1.450 violates the direct regulation prong of intergovernmental immunity because, by using “[n]o entity or person,” the plain language of the provision prevents the federal government from enforcing federal firearms law in Missouri.²⁰⁹ Indeed, section 1.450 seems to have the same objective that the municipal ordinances in *Arcata* had—proscribing the activity of federal agents operating under federal law.²¹⁰ Unless proponents of SAPA can find some clear and unambiguous waiver of federal immunity in this area, the Eighth Circuit will likely find that section 1.450 violates intergovernmental immunity.

Finally, the district court addressed sections 1.460 and 1.470. Section 1.460 states:

Any political subdivision or law enforcement agency that employs a law enforcement officer who acts knowingly, as defined under section 562.016, to violate the provisions of section 1.450 or otherwise

²⁰⁶ *Missouri*, 2023 WL 2390677 at *12 (citing *Tennessee v. Davis*, 100 U.S. 257, 263 (1879)).

²⁰⁷ *North Dakota v. United States*, 495 U.S. 423, 451–52 (1990) (Brennan, J., concurring/dissenting in part); *GEO Grp, Inc. v. Newsom*, 50 F.4th 745, 759–61 (9th Cir. 2022).

²⁰⁸ MO. REV. STAT. § 1.450 (2021) (emphasis added).

²⁰⁹ *Missouri*, 2023 WL 2390677 at *12.

²¹⁰ See *United States v. City of Arcata*, 629 F.3d 986, 991–92 (9th Cir. 2010).

*knowingly deprives a citizen of Missouri of the rights or privileges ensured by Amendment II of the Constitution of the United States or Article I, Section 23 of the Constitution of Missouri while acting under the color of any state or federal law shall be liable to the injured party in an action at law, suit in equity, or other proper proceeding for redress, and subject to a civil penalty of fifty thousand dollars per occurrence. Any person injured under this section shall have standing to pursue an action for injunctive relief in the circuit court of the county in which the action allegedly occurred or in the circuit court of Cole County with respect to the actions of such individual. The court shall hold a hearing on the motion for temporary restraining order and preliminary injunction within thirty days of service of the petition.*²¹¹

Section 1.470, states:

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 the United States, or otherwise acted under the color of federal law within the borders of this state*, who has knowingly, as defined under section 562.016, after the adoption of this section:

- (1) Enforced or attempted to enforce any of the infringements identified in section 1.420; or
- (2) Given material aid and support to the efforts of another who enforces or attempts to enforce any of the infringements identified in section 1.420;

shall be subject to a civil penalty of fifty thousand dollars per employee hired by the political subdivision or law enforcement agency.²¹²

The district court found that sections 1.460 and 1.470 offended the discrimination prong of intergovernmental immunity because the monetary penalties contained within the statutes discriminate against the federal government and those with whom the federal government deals.²¹³ Specifically, the district court found that section 1.460's monetary penalty discriminates against local law enforcement officials who assist or previously assisted "in federal firearms regulatory enforcement in a deputized capacity," i.e., those with whom the federal government deals.²¹⁴ The court also found section 1.470 discriminates against the

²¹¹ MO. REV. STAT. § 1.460.1 (2021) (emphasis added). Section 1.460 also contains an attorneys' fees provision and a waiver of sovereign immunity. See §§ 1.460.2 (attorneys' fees); 1.460.3 (waiver of sovereign immunity).

²¹² *Id.* § 1.470 (2021) (emphasis added).

²¹³ *Missouri*, 2023 WL 2390677 at *12.

²¹⁴ *Id.*

federal government because the plain text of the statute expressly targets federal law enforcement.²¹⁵

It is likely that the Eighth Circuit will find both sections 1.460 and 1.470 violate the discrimination prong on appeal because the statutes penalize municipalities/law enforcement agencies for hiring federal agents who have previously enforced federal law or other actors who have “acted under the color of federal law,” thus expressly “singling out the Federal Government for unfavorable treatment.”²¹⁶

B. Wyoming (*Wyoming Firearms Freedom Act*)

Wyoming’s Second Amendment sanctuary law, known as the Wyoming Firearms Freedom Act, is codified in sections 6-8-402 to 6-8-406 of the Wyoming statutes.²¹⁷ Unlike most statutes referenced in this section and the Introduction, Wyoming’s law predates the 2020 election and looks to prevent federal regulation of firearms involved in *intrastate* rather than *interstate* commerce.²¹⁸ Notwithstanding the catalyst for the law’s passage, its main objective is to prevent federal overreach in the area of firearms regulation, and thus it is a Second Amendment sanctuary law for purposes of this Article.

Putting preemption issues aside, the most problematic section of the Wyoming Act is section 6-8-405(b), which states:

Any official, agent or employee of the United States government who enforces or attempts to enforce any act, order, law, statute, rule or regulation of the United States government upon a personal firearm, a firearm accessory or ammunition that is manufactured commercial or privately in Wyoming and that remains exclusively within the borders of Wyoming shall be guilty of a misdemeanor and, upon conviction,

²¹⁵ *Id.*

²¹⁶ *Washington*, 142 S. Ct. at 1984. The Court’s opinion in *Washington* seems to suggest that laws discriminating against individuals *formerly* associated with the federal government still violate the discrimination prong of intergovernmental immunity. *Id.*

²¹⁷ WYO. STAT. §§ 6-8-402–406 (2022).

²¹⁸ *See id.* Montana had a similar Act seeking to prevent federal regulation of firearms made in intrastate commerce which was challenged by the United States in *Montana Shooting Sports Ass’n v. Holder*. 727 F.3d 975, 978–89 (9th Cir. 2013). The Ninth Circuit held the similar Montana Act preempted by federal law and held that Congress could regulate the intrastate manufacture of firearms through the Commerce Clause because there “exist[ed] a rational basis for concluding that the activities at issue, taken in the aggregate, substantially affect interstate commerce.” *Id.* at 981–82 (citing *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *Wickard v. Filburn*, 317 U.S. 111 (1942)). While Wyoming is not within the Ninth Circuit’s jurisdiction and the United States has not sued to invalidate the Wyoming law, the Ninth Circuit’s holding in *Holder* would be significantly persuasive authority should such a challenge arise.

shall be subject to imprisonment for not more than one (1) year, a fine of not more than two thousand dollars (\$2,000.00), or both.²¹⁹

Section 6-8-405(b)'s problems are not limited to issues of intergovernmental immunity,²²⁰ but the law almost certainly violates both the regulation and discrimination prongs of the doctrine. Like section 1.450 of Missouri's SAPA, section 6-8-405 purportedly prohibits federal officials from operating pursuant to federal law, without clear and unambiguous authorization from Congress to engage in such prohibition.²²¹ Additionally, like the laws in *Arcata*, section 6-8-405 discriminates against the federal government because it "treats federal workers differently than state or private workers."²²² Given its blatant regulation and discrimination, even a conservative reading of intergovernmental immunity doctrine should see this law fail.

C. Alaska (*Alaska Firearms Freedom Act*)

Alaska's Second Amendment sanctuary law, known as the Alaska Firearms Freedom Act, is codified in section 44.99.500 of the Alaska statutes.²²³ Like Wyoming, Alaska's Second Amendment sanctuary law predates the 2020 election and concerns federal regulation of firearms manufactured and sold exclusively within the state.²²⁴ Again, since the purpose of the law is to prevent federal overreach into the arena of firearms regulation, it shares a sufficient nexus with other Second Amendment sanctuary laws discussed in this Article.

Putting other Supremacy Clause issues aside, the most problematic section of the Alaska Act is section 44.99.500(e):

A federal statute, regulation, rule, or order adopted, enacted, or otherwise effective on or after June 21, 2013 is unenforceable in this state by an official, agent, or employee of this state, a municipality, or the federal government if the federal statute, regulation, rule, or order

²¹⁹ WYO. STAT. § 6-8-405(b) (2022) (emphasis added).

²²⁰ As a matter of practicality, any federal law enforcement officer that was arrested in violation of the Wyoming law would have a claim for habeas relief under 28 U.S.C. § 2241(c)(2) (2022). *See* *Cunningham v. Neagle*, 135 U.S. 1, 71–73 (1890) (holding that 28 U.S.C. § 2241 applies to federal officers discharging their duties under federal law).

²²¹ *See* *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (Stevens, J.) (plurality opinion); *Boeing Co. v. Movassaghi*, 768 F.3d 832, 839–42 (9th Cir. 2014); *United States v. City of Arcata*, 629 F.3d 986, 991–92 (9th Cir. 2010).

²²² *United States v. Washington*, 142 S. Ct. 1976, 1984 (citing *Dawson v. Steager*, 139 S. Ct. 698, 705 (2019)).

²²³ ALASKA STAT. § 44.99.500 (2021).

²²⁴ *See id.* (*Alaska Firearms Freedom Act*) (added Aug. 25, 2010 and amended June 21, 2013).

violates the Second Amendment to the Constitution of the United States or art. I, sec. 19, Constitution of the State of Alaska, by

- (1) Banning or restricting ownership of a semiautomatic firearm or a magazine of a firearm; or
- (2) Requiring a firearm, magazine, or other firearm accessory to be registered.²²⁵

While certainly less explicit than Wyoming's law, the Alaska law likely violates the regulation prong of intergovernmental immunity without authorization from Congress to do so. Again, the effect of the Alaska law seems to be to prohibit federal officials from carrying out duties pursuant to federal firearms laws, which would likely be a violation of the regulation prong as expressed in *Arcata* (if other circuits or the Supreme Court finds *Arcata* persuasive).²²⁶ Neither subsection (e) nor any other provision of the statute seems to facially violate the discrimination prong because the prohibited conduct does not stem from the *identity* of the actor.²²⁷ Therefore, the only colorable argument the federal government could make to invalidate the Alaska law on intergovernmental immunity grounds would stem from a violation of the regulation prong.

D. Texas

Texas's Second Amendment sanctuary law is codified in section 1.10 of the Texas Penal Code.²²⁸ Texas's law is primarily concerned with limiting the enforcement of federal firearms laws inconsistent with Texas law,²²⁹ and federal firearms laws relating to mandatory firearms registries,²³⁰ mandatory licensing regimes,²³¹ background checks,²³² confiscation programs,²³³ and mandatory buy-back programs.²³⁴ The only potentially problematic provision of the Texas law (at least concerning intergovernmental immunity) is section 1.10(d):

²²⁵ *Id.* § 44.99.500(e) (2022) (emphasis added).

²²⁶ *See* *United States v. City of Arcata*, 629 F.3d 986, 991–92 (9th Cir. 2010).

²²⁷ *Washington*, 142 S. Ct. at 1983–84; *see also* *Boeing Co. v. Movassaghi*, 768 F.3d 832, 843 (9th Cir. 2014).

²²⁸ TEX. PENAL CODE § 1.10 (2021).

²²⁹ *Id.* § 1.10(b)(1).

²³⁰ *Id.* § 1.10(b)(2)(A).

²³¹ *Id.* § 1.10(b)(2)(B).

²³² *Id.* § 1.10(b)(2)(C).

²³³ *Id.* § 1.10(b)(2)(D).

²³⁴ *Id.* § 1.10(b)(2)(D).

A political subdivision of this state may not receive state funds if the political subdivision enters into a contract or adopts a rule, order, ordinance, or policy under which the political subdivision requires or assists with the enforcement of any federal statute, order, rule, or regulation described by Subsection (b) or, by consistent actions, requires or assists with the enforcement of any federal statute, order, rule, or regulation described by Subsection (b). State funds for the political subdivision shall be denied for the fiscal year following the year in which a final judicial determination in an action brought under this section is made that the political subdivision has required or assisted with the enforcement of any federal statute, order, rule or regulation described by Subsection (b).²³⁵

On its face, section 1.10(d) invokes questions of sub-federal commandeering (i.e., whether or not state governments can co-opt political subdivisions to do their bidding) and the ability of states to condition state funding based on compliance with state law. Those questions, however, are beyond the scope of this Article.²³⁶ However, it is at least plausible that section 1.10(d) violates the discrimination prong of intergovernmental immunity as expressed in *Boeing*. Like the California law at issue in *Boeing*, section 1.10(d) targets local actors who decide to contract/cooperate with the federal government.²³⁷ The statute threatens to withhold state funding based on cooperation with the federal government, thus discriminating against the federal government or those with whom it deals.²³⁸ However, it is at least plausible that finding section 1.10(d) violates intergovernmental immunity doctrine would invoke anticommandeering concerns.²³⁹ Therefore, section 1.10(d) seems to toe the line between a valid exercise of state police power and an invalid exercise of discrimination against the federal government.

E. Arizona, Montana, North Dakota, and West Virginia

These states' Second Amendment sanctuary laws are grouped together under this section because they (likely) present no intergovernmental immunity issues while validly exercising state police powers to prevent federal overreach into the area of firearms regulation. They are listed here for the reader's convenience, in order to provide examples of formidable Second Amendment sanctuary legislation. Arizona's law states in pertinent part:

²³⁵ *Id.* § 1.10(d).

²³⁶ *Cf.* Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437, 485–89 (2020).

²³⁷ *Boeing Co. v. Movassaghi*, 768 F.3d 832, 843 (9th Cir. 2014).

²³⁸ *Id.*

²³⁹ *See, e.g., United States v. California*, 921 F.3d 865, 891 (9th Cir. 2019).

Pursuant to the sovereign authority of this state and article II, section 3, Constitution of Arizona, this state and all political subdivisions of this state are prohibited from using any personnel or financial resources to enforce, administer or cooperate with any act, law, treaty, order, rule or regulation of the United States government that is inconsistent with any law of this state regarding the regulation of firearms.²⁴⁰

Montana's law states in pertinent part:

(1) A peace officer, state employee, or employee of a political subdivision is prohibited from enforcing, assisting in the enforcement of, or otherwise cooperating in the enforcement of a federal ban on firearms, magazines, or ammunition and is also prohibited from participating in any federal enforcement action implementing a federal ban on firearms, magazines, or ammunition.

(2) An employee of the state or a political subdivision may not expend public funds or allocate public resources for the enforcement of a federal ban on firearms, magazines, or ammunition.

(3) Nothing in this section may be construed to prohibit or otherwise limit a peace officer, state employee, or employee of a political subdivision from cooperating, communicating, or collaborating with a federal agency if the primary purpose is not:

(a) law enforcement activity related to a federal ban; or

(b) the investigation of a violation of a federal ban.²⁴¹

North Dakota's law states in pertinent part:

2. An agency or political subdivision of the state and a law enforcement officer or individual employed by an agency or political subdivision of the state may not provide assistance to a federal agency or official or act independently with respect to the investigation, prosecution, or enforcement of a violation of a federal statute, order, rule, or regulation purporting to regulate a firearm, firearm accessory, or firearm ammunition enacted after January 1, 2021, if the federal statute, order, rule, or regulation is more restrictive than state law, unless:

a. The federal agency appeals to the federal district court of the federal district in which the violation or possible violation occurred or would

²⁴⁰ ARIZ. REV. STAT. § 1-272 (2021).

²⁴¹ MONT. CODE § 45-8-368 (2022).

occur and the court finds probable cause that a national security threat exists;

b. The violation also is a violation under this title; or

c. The violation also is a violation of chapter 12.1-16, 12.1-17, 12.1-18, 12.1-20, 12.1-41, or 19-03.1.²⁴²

West Virginia’s law states in pertinent part:

No agency of this state, political subdivision of this state, or employee of an agency, or political subdivision of this state, acting in his or her official capacity, may be commandeered by the United States government under an executive order or action of the President of the United States or under an act of the Congress of the United States. Federal commandeering of West Virginia law-enforcement for purposes of enforcement of federal firearms laws is prohibited.²⁴³

All of the above laws likely comply with the regulation and discrimination prongs of intergovernmental immunity. They contain no attempts to directly regulate the conduct of the federal government and its agents pursuant to federal law. Nor do the above laws penalize or otherwise subject federal agents, federal contractors, or those with whom the federal government deals to unfavorable treatment.²⁴⁴ Instead, they prohibit state mechanisms from cooperating with the federal government in order to effectuate a federal regulatory scheme—an appropriate exercise of the states’ police powers under the Tenth Amendment.²⁴⁵ While some may believe that the net effect of these laws is harmful, that is a policy determination not salient to the constitutionality of these laws.²⁴⁶ As the Ninth Circuit mentioned in *United States v. California*, federal schemes are inevitably frustrated when the states refuse to assist in enforcement efforts.²⁴⁷ While the federal government can expect as much cooperation as it wants, it cannot compel cooperation from a state legislature—or other

²⁴² N.D. CENT. CODE § 62.1-01-03.1 (2022).

²⁴³ W. VA. CODE ANN. § 61-7B-4 (2022).

²⁴⁴ *United States v. Washington*, 142 S. Ct. 1976, 1984–85 (2022).

²⁴⁵ *See, e.g., United States v. California*, 921 F.3d 865, 886–91 (9th Cir. 2019).

²⁴⁶ *See New York State Bd. Of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (Stevens, Souter, JJ., concurring) (“I think it appropriate to emphasize the distinction between constitutionality and wise policy . . . as I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: ‘The Constitution does not prohibit legislatures from enacting stupid laws.’”).

²⁴⁷ *California*, 921 F.3d 865, 882–83 (9th Cir. 2019) (quoting *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018) (internal quotations omitted)).

state mechanisms—to enforce federal law.²⁴⁸ Any contrary finding would violate anticommandeering doctrine and infringe on state sovereignty.²⁴⁹ Unless the Supreme Court decides to curtail anticommandeering (which is unlikely given the current composition of the court), the laws mentioned above—and any similarly modeled laws—should be able to withstand the plethora of Supremacy Clause challenges mentioned in this Article.

V. CONCLUSION

Thirty-two years have passed since the United States Supreme Court expanded intergovernmental immunity doctrine in *North Dakota v. United States*. The Court breathed new life into the doctrine with its recent opinion in *Washington*. The ongoing litigation in *United States v. Missouri* represents the first—but surely not the last—assertion of intergovernmental immunity doctrine in the arena of firearms law. However, given the Biden administration’s continuing commitment to firearms regulation and the impending 2024 presidential election (in which firearms ownership/use will inevitably be a hot button issue),²⁵⁰ it would not be surprising to see the federal government continue to assert the doctrine to subdue “defiant” state legislatures.

While the interpretation and application of intergovernmental immunity is subject to change as the doctrine continues to evolve, its staying power in our contemporary jurisprudence is evident. Only time will tell how the doctrine’s relationship with Second Amendment jurisprudence is defined.

²⁴⁸ See, e.g., *Printz v. United States* 521 U.S. 898, 935 (1997) (holding that the federal government can neither “compel the States to enact or enforce a federal regulatory program” nor “circumvent that prohibition by conscripting the State’s officers [into the federal regulatory program] directly.”).

²⁴⁹ *California*, 921 F.3d 865, 882–83 (9th Cir. 2019) (quoting *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018) (internal quotations omitted)).

²⁵⁰ In June 2022, President Biden signed into law the Bipartisan Safer Communities Act, which, among other things, created new firearms-related crimes and expanded background checks for gun purchasers under 21 years old. Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., 34 U.S.C., and 42 U.S.C.) (codified as newly created in 6 U.S.C. § 665k; 18 U.S.C. §§ 932–934). In March 2023, President Biden issued an executive order to help implement the Bipartisan Safer Communities Act and help “provide[] communities with new tools to combat gun violence[.]” Exec. Order No. 14,092, 88 Fed. Reg. 16527 (Mar. 14, 2023).