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Opinion No. 13-14

Tennessee Legislation Declaring Unenforceable Federal Firearms Laws

QUESTION

Are Senate Bill 0100/House Bill 0042 (hereinafter "HB42") and Senate Bill 0250/House Bill 0248 (hereinafter "SB250") of the 108th Tennessee General Assembly constitutional?

OPINION

No. Both HB42 and SB250 if enacted as proposed would violate the Supremacy Clause of the United States Constitution.

ANALYSIS

HB42 and SB250 (collectively referred to as the "Bills") propose to amend the Tennessee Code relative to certain federal firearms laws.[1] HB42 would add a new section to Title 39, Chapter 17, Part 13, declaring "unenforceable" any federal law implemented on or after January 1, 2013, that attempts to (1) ban or restrict ownership of certain firearms, firearm accessories, or ammunition or (2) require that these items be registered in any manner. HB42, 108th Leg., 1st Sess. § 1(a) (Tenn. 2013). Subsection (b) prohibits state employees and officials, and dealers selling firearms in the state, from attempting to enforce such laws. *Id.* § 1(b). In subsection (c), a new crime—a Class A misdemeanor—is created that penalizes federal officials, agents, and employees for enforcing the laws "upon a firearm, a firearm accessory, or ammunition that is owned or manufactured commercially or privately in this state and that remains exclusively within the borders of this state" *Id.* § 1(c).

SB250 proposes similar amendments to Title 4, Chapter 54 of the Code. SB250, 108th Leg., 1st Sess. (Tenn. 2013). Section 2 declares that firearms that are manufactured in this state and remain within its borders "have not traveled in interstate commerce and are otherwise not within powers of the federal government." *Id.* § 2. Section 5 states that any federal action—broadly defined as including acts of congress, federal rules or regulations, executive orders, and judicial opinions—that is prohibited by the chapter and that relates to firearms whether made in

[1] At this time, this Office is unaware of and has not reviewed any proposed amendments to these Bills.

Tennessee or not is "null and void and of no effect in this state." *Id.* § 5(a); *see id.* § 1 (defining "federal action"). The prohibitions are spelled out in the following subsection and include regulation of the ownership, transfer, possession or manufacture of firearms, firearm accessories, and ammunition; registration and tracking requirements; and federal taxes and fees that are payable to any government entity. *Id.* § 5(b). Like HB42, SB250 creates a new offense for "any person" who knowingly enforces or attempts to enforce prohibited federal action. *Id.* § 6. Here, however, the crime is a Class B felony. *Id.*

The Supremacy Clause of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Pursuant to this provision, state law is nullified to the extent that it actually conflicts with constitutionally authorized federal law. *See Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As the United States Supreme Court has explained:

> It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to," federal law. *Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824) (Marshall, C.J.). Under the Supremacy Clause**,** federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Pre-emption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Ibid.; See Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).
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> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz, supra*, 312 U.S., at 67, 61 S.Ct., at 404. *See generally Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-699, 104 S.Ct. 2694, 2700, 81 L.Ed.2d 580 (1984).
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> We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes. *See, e.g., Capital Cities Cable, Inc. v.*

> *Crisp, supra,* at 699, 104 S.Ct., at 2700; *Fidelity Federal Savings & Loan Assn. v. De la Cuesta,* 458 U.S. 141, 153-154, 102 S.Ct. 3014, 3022-3023, 73 L.Ed.2d 664 (1982); *United States v. Shimer,* 367 U.S. 374, 381-383, 81 S.Ct. 1554, 1559-1561, 6 L.Ed.2d 908 (1961). Also, for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws. *See, e.g., City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973).

Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985).

Under the doctrine of intergovernmental immunities, the Supremacy Clause also provides immunity to all federal officers from state interference with acts that are necessary and proper to the accomplishment of their federal duties. *See, e.g., Hancock v. Train,* 426 U.S. 167, 178-80 (1976); *State of Arizona v. Bowsher*, 935 F.2d 332, 334 (D.C. Cir.), *cert. denied,* 502 U.S. 981 (1991); *United States v. Ferrara*, 847 F.Supp. 964, 968 (D. D.C. 1993), *aff'd* 54 F.3d 825 (D.C. Cir. 1995).

In cases in which a state attempts to regulate the federal government directly, the inquiry focuses on whether state action threatens to interfere with or impair the efficiency of federal agencies in the performance of their functions. *See Nat'l Bank v. Kentucky,* 76 U.S. (9 Wall.) 353, 362 (1869). Thus, for example, in *McCulloch v. Maryland*, the United States Supreme Court struck down a state tax on a national bank. *McCulloch*, 17 U.S. (4 Wheat.) 316, 436 (1819). Although the tax did not literally conflict with the federal statute creating the bank, its imposition threatened to hinder the functioning of a national institution:

> [N]o principle . . . can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.

Id. at 427; *see also Johnson v. Maryland*, 254 U.S. 51, 57 (1920) ("It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them . . . ."). Accordingly, if direct state regulation of federal actors threatens to compromise legitimate federal interests in the efficient operation of government or the execution of federal policy, it is preempted. *See, e.g., Tennessee v. Davis*, 100 U.S. 257, 263 (1880) ("No State government can exclude [the federal government] from the exercise of any authority conferred upon it by the Constitution [or] obstruct its authorized officers against its will. . . ."); *see also In re Neagle*, 135 U.S. 1, 75 (1890) ("[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State of California.").

The Bills are intended to create an "actual conflict" with federal law. *See Florida Lime* 373 U.S. at 141. In the event that the federal government lawfully promulgates rules respecting

the sale, registration, or taxation of firearms,[2] Tennessee lacks authority to render them ineffective within its borders, for the States are not "free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People." *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 383 (1990). While the Bills themselves declare that certain federal firearms regulations are unconstitutional as, for example, by exceeding the scope of the commerce power, *see* SB250 § 2, the responsibility for that determination rests with the judiciary, not a state legislature. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995) ("Since the United States Supreme Court decision in *Marbury v. Madison*, it has been the sole obligation of the judiciary to interpret the law and determine the constitutionality of actions taken by the other two branches of government." (citation omitted)). Absent such a judicial determination—and SB250 lists "judicial opinions" among the "federal action" that it proscribes, SB § 1—federal law is effective in Tennessee. "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery . . . ." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (quoting *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809), and further stating, "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it").

Nor may a state legislature accomplish the nullification of federal firearms regulation indirectly, either by criminalizing the activities of federal officers, *see Neagle*, 135 U.S. at 75, or by criminalizing actions of state citizens, such as firearm dealers, who have enforcement obligations under federal law, since to do so would make compliance with both federal and state regulations impossible, *see United States v. Arizona*, 132 S. Ct. at 2051. In either instance, the Bills' provisions would directly threaten to frustrate federal policy objectives and to impair the ability of federal actors to carry them out. Consequently, the Bills violate the Supremacy Clause of the United States Constitution.

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[2] SB250 could be read to apply to "federal action" already taken. SB250 §§ 1, 5(b). The federal government already imposes taxes on the transfer and making of firearms, 26 U.S.C. §§ 5811, 5821, requires manufacturers to register firearms, *id.* § 5841, bans the manufacture or transfer of certain firearms and ammunition, *see, e.g.*, 18 U.S.C. § 922(a)(7) (armor piercing ammunition), (o)(1) (machine guns), (p)(1) (firearms not detectable by metal detector or x-ray), and further regulates the sale of firearms to certain persons, *see, e.g., id.* § 922(d) (sale to felons and certain others); *see also, e.g., id.* § 922(t)(1) (requiring licensed manufacturers and dealers to conduct background checks prior to transfer). Because section 5 of SB250, as enforced through section 6, would actually conflict with this non-exhaustive list of extant federal laws, it would be preempted by them.

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