No. 10-36094

In the
United States Court of Appeals for the Ninth Circuit

MONTANA SHOOTING SPORTS ASSOCIATION, *ET AL.*,
Plaintiffs/Appellants,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,
Defendant/Appellee.

On Appeal from the
United States District Court for
the District of Montana, Missoula Division

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, and Virginia Citizens Defense League In Support of Reversal

JOSEPH W. MILLER
LAW OFFICES OF JOSEPH MILLER, LLC.
P.O. Box 83440
Fairbanks, AK 99708
(907) 451-8559

GARY G. KREEP
UNITED STATES JUSTICE FOUNDATION
932 D Street, Suite 2
Ramona, California 92065-2355
(760) 788-6624

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

*Attorney of Record
Counsel for *Amici Curiae*

June 13, 2011

DISCLOSURE STATEMENT

The *amici curiae* herein, Gun Owners of America, Inc., Gun Owners Foundation, and Virginia Citizens Defense League, through their undersigned counsel, submit this Disclosure Statement pursuant Federal Rules of Appellate Procedure 26.1 and 29(c).

These *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. The *amici curiae* are represented herein by Herbert W. Titus, who is counsel of record, William J. Olson, John S. Miles, and Jeremiah L. Morgan, of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615; Joseph W. Miller of the Law Offices of Joseph Miller, LLC., P.O. Box 83440, Fairbank, Alaska 99708; and Gary G. Kreep of the United States Justice Foundation, 932 D Street, Suite 2, Ramona, California 92065-2355.

/s/ Herbert W. Titus

_____

Herbert W. Titus

TABLE OF CONTENTS

DISCLOSURE STATEMENT. i

TABLE OF AUTHORITIES. iv

INTEREST OF THE *AMICI CURIAE*. 1

STATEMENT OF THE ISSUE.. 2

STATEMENT OF FACTS.. 5

ARGUMENT

I. As Stated in 18 U.S.C. § 927, the Federal Firearms Licensure Provision, 18 U.S.C. § 923, Was Not Intended to "Occupy the Field" to the Exclusion of State Law

A. Federal Law Does Not Require Licensing of All Manufacturers and Dealers for Sale of Firearms. 7

B. In 1986 Congress Substantially Limited the Reach of the Federal Firearms Licensure System. 9

II. There Is No Direct and Positive Conflict Between MFFA and 18 U.S.C. § 923 Such That the Two Laws Cannot Be Reconciled or Consistently Stand Together, Allowing Them to Co-exist under 18 U.S.C. § 927. 12

A. The Government Cannot Demonstrate That Compliance With Both MFFA and 18 U.S.C. § 923 is an Impossibility. 15

B. The Government Cannot Demonstrate that MFFA Would Frustrate the Purposes and Objectives of the Federal Firearms Laws. 16

C. The Government Cannot Show that the Purposes of MFFA and GCA, as Amended by FOPA, Cannot be Reconciled or Consistently Stand Together. 19

CONCLUSION. 23

ADDENDA

I. Montana Firearms Freedom Act

II. ATF Open Letter to All Montana Federal Firearms Licensees

III. Letter from Gary Marbut to ATF

IV. Letter from ATF to Gary Marbut

TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION

Amendment II. 18, 20, 22
Amendment IX. 20, 21, 22
Amendment X. 4, 20, 21, 22

STATUTES

18 U.S.C. § 921. . . . . 7, 8, 13
18 U.S.C. § 923. . . . . 5, *passim*
18 U.S.C. § 927. . . . . 3, *passim*
MCA 30-20-102. 21
MCA 30-20-104. . . . . 5, 13
Public Law 90-618. . . . . 7, 16, 17
Public Law 99-308. . . . . 10, 20

REGULATIONS

27 C.F.R. § 478.58. 11

CASES

C.D.M. Products, Inc. v. City of New York, 350 N.Y.S.2d 500 (Sup. Ct., N.Y. Co., 1973). 10, 11
California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987). 14, 15
District of Columbia v. Heller, 554 U.S. 570 (2008). 18
Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723 (9th Cir. 1992). 10
Gonzales v. Raich, 545 U.S. 1 (2005). 17
Hamilton v. ACCU-TEK, 935 F. Supp. 1307 (E.D.N.Y. 1996). 14
Marbury v. Madison, 5 (1 Cranch) U.S. 137 (1803). 4
McDonald v. City of Chicago, 561 U.S. ___ (2010), 2010 U.S. LEXIS 5523. 21
New York Blue Cross v. Travelers, Inc., 514 U.S. 645 (1995). 14
New York City Transit Authority v. Beazor, 440 U.S. 568 (1979). 2, 4
Wyeth v. Levine, 555 U.S. __, 129 S.Ct. 1187 (2009). . . . . 14, *passim*

MISCELLANEOUS

Senate Report No. 1097, 2 U.S.C.C.A.N. p. 2113 (90th Cong., 2d Sess. 1968).. 17
Senate Report No. 98-583 (98th Cong., 2d Sess. 1986). 10, 11
House Rep. No. 99-495, 4 U.S.C.C.A.N. 1337 (99th Cong., 2d Sess. 1986) 9
House Report No. 1577 in 3 U.S.C.C.A.N. p. 1441 (90th Cong., 2d Sess. 1968).. 18

INTEREST OF THE *AMICI CURIAE*

Gun Owners Foundation is a nonprofit educational organization, exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code ("IRC"), and is a public charity. Gun Owners of America, Inc. and Virginia Citizens Defense League are nonprofit social welfare organizations, exempt from federal income tax under IRC Section 501(c)(4).

Each of the *amici curiae* was established, *inter alia*, for educational purposes related to participation in the formation, adoption, and implementation of public policy through research and related activities to inform and educate the public on (i) important issues of national concern; (ii) the construction of state and federal constitutions and statutes related to the right of citizens to bear arms; and (iii) questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. These same organizations filed an *amicus curiae* brief in the U.S. District Court for the District of Montana in the case below on April 14, 2010, and participated in oral argument before the magistrate judge on July 15, 2010.

The *amici curiae* believe that their perspective on the issues in this case will be of assistance to the Court of Appeals in deciding this appeal. They anticipate that their *amicus curiae* brief, while generally supporting reversal

sought by the appellants, will explain their view that there is no conflict between federal and state law requiring this Court to address the constitutional issues briefed by the parties.

STATEMENT OF THE ISSUE

In a departure from settled federal practice,[1] this case was litigated in the district court below, and is being appealed to this Court, on the untested presumption that the Montana Firearms Freedom Act ("MFFA") was preempted by federal firearms law, thereby necessitating an adjudication of whether Congress has the power under the Commerce Clause to require a person engaged in the wholly intrastate manufacture and sale of firearms to obtain a federal firearms license ("FFL").[2] In the proceedings below, in both their written brief

---

[1] "From Hayburn's Case, 2 Dall 409, … to Alma Motor Co. v. Timken-Detroit Axle Co. … and the Hatch Act case … this Court has followed a policy of strict necessity in disposing of constitutional issues.… [C]onstitutional issues affecting legislation will not be determined … in advance of the necessity of deciding them.…" New York City Transit Authority v. Beazor, 440 U.S. 568, 582, n.22 (1979).

[2] *See* Defendant's Motion to Dismiss, pp. 21-29 and Notice of Constitutional Challenge; Plaintiffs' Response Brief in Opposition to Motion to Dismiss, pp. 15-32; Reply Memorandum in Support of Defendant's Motion to Dismiss, pp. 19-43; Findings and Recommendations of the United States Magistrate Judge, pp. 36-56; Opinion of U.S. District Court, pp. 6-8; Appellant's Principal Brief, pp. 23-57.

and in oral argument, these *amici curiae* contended that MFFA was not preempted by federal firearms law, as determined by the governing preemption rule laid down by Congress in 18 U.S.C. § 927.[3] These *amici* argued then, and argue now, that Section 927 was designed as the statutory standard by which courts were to adjudicate any claimed conflict between a provision of the federal firearms law and any provision of state law addressing the same subject matter. These *amici* explained then, and elaborate now, that when MFFA and the federal firearms licensure system are analyzed on the basis of Section 927's express terms, then MFFA is not preempted by federal law, and therefore, the constitutional questions, as presented by the parties in this case and as resolved

---

[3] 18 U.S.C. § 927 states:

> **No** provision of this chapter [18 U.S.C. §§ 921 et seq.] shall be **construed** as indicating an intent on the part of Congress to **occupy the field** in which the provision operates to the **exclusion of the law** of any **State** on the **same subject matter**, unless there is a **direct and positive conflict** between such provision and the law of the State so that the two **cannot be reconciled or consistently stand together**. [Emphasis added.]

by the court below,[4] need not have been addressed and resolved.[5]

If these *amici* are correct, this case is not governed by the Supreme Court's Commerce Clause jurisprudence — as the parties and court below assumed — but by 18 U.S.C. § 927, which establishes that, by the enactment of its firearm licensing system, Congress did not deny to the States their reserved power under the Tenth Amendment to permit firearm manufacturers and dealers to engage in wholly intrastate commerce, without federal licensure, as the Montana State Legislature has done in MFFA.

According to MFFA, effective October 1, 2009, "[a] personal firearm …

---

[4] The district court below adopted the magistrate judge's findings and recommendations in full. Opinion, p. 8. The magistrate judge's opinion devoted 22 pages to the resolution of the Commerce Clause and Supremacy Clause issues without any reference whatsoever to Section 927. *See* Findings Recommendations of the United States Magistrate Judge, pp. 36-58.

[5] In Marbury v. Madison, 5 (1 Cranch) U.S. 137 (1803), Chief Justice Marshall wrote that it is "of the very essence of judicial duty" to determine whether a statute be in opposition to the Constitution. *Id.*, 5 U.S. at 178. But it is equally "incumbent on [the] courts" that "[b]efore deciding a constitutional question," the court should "consider whether … statutory grounds are dispositive." *See* Beazor, 440 U.S. at 582 (1979). Indeed, as the Supreme Court observed in Beazor:

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality … unless such adjudication is unavoidable. [*Id.*, 440 U.S. at 582.]

that is manufactured commercially or privately **in Montana** and that remains **within the borders** of Montana is **not subject to federal law or regulation** … under the authority of congress to regulate commerce." *See* MCA 30-20-104, Addendum I (emphasis added). At issue in this case is whether 18 U.S.C. § 927 permits a Montanan who seeks to manufacture firearms to be sold and used only in Montana may do so without (i) obtaining an FFL, and (ii) complying with certain federal record-keeping requirements, notwithstanding the federal mandate of 18 U.S.C. § 923(a).

STATEMENT OF FACTS

Prior to the effective date of MFFA, and in response to "questions from industry members as to how [MFFA] may affect them while engaged in firearms business activity," the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") published an Open Letter to all Montana Federal Firearms Licensees advising them that MFFA "conflicts with Federal Firearms laws and regulations."[6] Specifically, ATF stated that "Federal law requires a license to engage in the business of manufacturing firearms, or ammunition, or to deal in

[6] U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Open Letter to All Montana Federal Firearms Licensees, dated July 19, 2009. Addendum II.

firearms, even if the firearms or ammunition remain in the same state." *Id.* Furthermore, ATF continued, as federal firearm licensees, Montana firearms manufacturers and dealers would be subject to all marking, record keeping, and background checks "whether or not the firearms or ammunition have crossed state lines." *Id.*

Approximately one month later, and in reliance on MFFA, Appellant Gary Marbut ("Marbut") sought ATF's opinion as to whether, "consistent" with MFFA, "it is permissible under federal law to either: (i) Manufacture [firearms, firearm accessories or ammunition] for my own use in Montana, or (ii) Manufacture such items for sale to others only within Montana."[7] In response, ATF advised that manufacture for Marbut's "personal use does generally not require [federal] licensure," unless the firearm is "of a type that is defined in 26 U.S.C. Section 5845," but that "the manufacture of firearms or ammunition for sale to others within Montana requires licensure by ATF."[8]

Upon the receipt of this letter, Marbut initiated a civil action in the court

---

[7] Gary Marbut Letter to ATF Resident Agent in Charge, BATFE, Billings, Montana, dated August 21, 2009. Addendum III.

[8] ATF Special Agent in Charge, Denver Field Division, Letter to Gary Marbut, dated September 29, 2009 ("Denver ATF Letter"), Addendum IV.

below, seeking a declaratory judgment against ATF enforcing its licensure requirements with respect to his plan to manufacture and sell, for use solely in Montana, "the 'Montana Buckeroo,' a youth model, single shot, bolt action, .22 caliber rifle." *See* Appellants' Principal Brief, pp. 4-6.

The district court dismissed the action due to lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

ARGUMENT

I. AS STATED IN 18 U.S.C. § 927, THE FEDERAL FIREARMS LICENSURE PROVISION, 18 U.S.C. § 923, WAS NOT INTENDED TO "OCCUPY THE FIELD" TO THE EXCLUSION OF STATE LAW.

A. Federal Law Does Not Require Licensing of All Manufacturers and Dealers for Sale of Firearms.

As quoted above, ATF's letter in response to Marbut's inquiry broadly asserts that **all firearms manufacturers must obtain an FFL** in order to manufacture and sell a firearm to another. *See* Denver ATF Letter. Prior to the 1986 Firearms Owners Protective Act ("FOPA"), this was generally correct — "any person engaged in the manufacture of firearms … for the purpose of sale or distribution" was required to obtain an FFL. *See* Public Law 90-618, §§ 921(a)(10) and 923(a), 82 Stat. 1213, 1215, 1221 (1968). While that had been the law prior to 1986, it was **not true** when the Denver ATF Letter was sent,

and is not true now.

Under current law, an FFL is required of a manufacturer only if he is "engage[d] in the business of … manufacturing, or dealing in firearms." 18 U.S.C. § 923(a). According to 18 U.S.C. § 921(a)(21), "engaged in the business" means:

> (A) as applied to a manufacturer of firearms, a person who devotes time, attention, and labor to manufacturing firearms as a regular course of business with the principal objective of livelihood and profit through the sale and distribution of the firearms manufactured.

Additionally, 18 U.S.C. § 921(a)(22) defines "[t]he term 'with the principal objective of livelihood and profit' [to] mean[]":

> that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: **Provided**, that proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. [Emphasis added.]

Accordingly, there is no federal law which pre-empts the field by requiring **all** firearms manufacturers to obtain an FFL in order to manufacture and sell a firearm to another. Instead, the manufacturer must be "engaged in the business"

before he is required to obtain an FFL.[9]

B. In 1986 Congress Substantially Limited the Reach of the Federal Firearms Licensure System.

Prior to the enactment of FOPA, in an assessment letter dated February 10, 1986, the **ATF complained** that the **new definition** of "engaged in the business" was "**too narrow**." *See* House Rep. No. 99-495, 4 U.S.C.C.A.N. at 1344 (99th Cong., 2d Sess. 1986) (emphasis added). Even after a quarter century, ATF is still chafing at, resisting, and dissembling about the narrowing of the federal firearms licensing scheme by FOPA.[10] The September 2009 ATF letter to Marbut does not accede to the FOPA limiting language, stating flatly that "[t]he manufacture of firearms … for sale to others within Montana requires licensure by ATF." *See* Denver ATF Letter. Yet, one of the major purposes of FOPA was "to correct existing firearms statutes and enforcement policies" "against unconstitutional exercise of authority under the ninth and tenth

---

[9] Even then he may not be required to obtain an FFL, such as here, when Montana law provides otherwise, and there is no such conflict between that law and the federal law, as prescribed by Section 927. *See infra*, pp. 12, *et seq*.

[10] *See, e.g.,* Gun Owners Foundation Comments to the Bureau of Alcohol, Tobacco, Firearms and Explosives in Response to ATF's January 2011 "Study on the Importability of Certain Shotguns" (Apr. 30, 2011). http://www.wjopc.com/site/firearms/GOF_ATFComments.pdf.

amendments." *See* Public Law 99-308, Section 1(b)(1)(D), 100 Stat. 449 (1986). As even a New York state court has observed:

> While section 923 of such chapter deals with Federal licensing of manufacturers and dealers in the business of firearms, section 927 expressly provides that: "No provision of this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same matter." Thus, **Congress has expressly manifested its intent not to pre-empt this area**.[11] [C.D.M. Products, Inc. v. City of New York, 350 N.Y.S. 2d 500, 508 (Sup. Ct., N.Y. Co., 1973) (emphasis added).]

ATF's complaints about lost regulatory power over the American people notwithstanding, Congress recognized that, if enacted, the FOPA limitations on licensing would have: (i) a "**major** impact [on] who was required to obtain a license"; and (ii) "a **serious weakening** effect on the G[un] C[ontrol] A[ct], by (iii) **expand[ing]** the number of persons who can engage in firearms transactions … **without needing a license or having to comply with the record keeping requirements of the law**." House Report No. 99-495, 4 U.S.C.C.A.N. 1337 (99th Cong., 2d Sess. 1986) (emphasis added). Indeed, according to the Senate Report, the FOPA amendments to the Gun Control Act ("GCA") were said to

---

[11] Indeed, as this Court observed after FOPA was enacted, "Congress expressly disavowed any intent to occupy the field of gun control…." Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 726, n.4 (9th Cir. 1992).

"**substantially narrow** the[] broad parameters by requiring that the person undertake such activities as part of a 'regular course of trade or business with the principal objective of livelihood and profit.'" Senate Report No. 98-583 (98th Cong., 2d Sess. 1986) (emphasis added).

These FOPA amendments reinforce Congress's original purpose **not** to establish a **comprehensive and uniform licensing system** governing all manufacture and sale of all firearms. Even before FOPA, Congress intended to establish a licensure system with more modest goals — one that would accommodate variations arising as a result of different state laws.[12] Indeed, to read Section 923 otherwise would be to disregard the explicit language of FOPA, which protects state laws governing licensing:

> **No** provision of this chapter shall be construed as indicating any intent on the part of Congress **to occupy the field** in which the provision operates to the **exclusion of the law of any State** on the same subject matter. [18 U.S.C. § 927 (emphasis added).]

As is made express in the text of 18 U.S.C. § 927, and amply supported by FOPA's legislative history, Congress intended the licensing requirement of 18

---

[12] *See* C.D.M. Products, 350 N.Y.S. at 507-08; *see also* 27 C.F.R. § 478.58 ("A license issued under this part confers no right or privilege to conduct business or activity contrary to State or other law.").

U.S.C. § 923 to be construed to coexist with, not exclude, provisions of state law such as MFFA — which governs whether a Montana firearms manufacturer or dealer must be licensed with respect to intra-state manufacturing and sales.

II. THERE IS NO DIRECT AND POSITIVE CONFLICT BETWEEN MFFA AND 18 U.S.C. § 923 SUCH THAT THE TWO LAWS CANNOT BE RECONCILED OR CONSISTENTLY STAND TOGETHER, ALLOWING THEM TO CO-EXIST UNDER 18 U.S.C. § 927.

Under FOPA, there is no presumptive invalidity of MFFA, as the ATF argued in the court below. *See* Memorandum in Support of Defendant's Motion to Dismiss, pp. 21-28.[13] To the contrary, 18 U.S.C. § 927 explicitly requires a demonstration of a "direct and positive conflict" between a provision of the federal firearms law and a law of the State in order to find invalidity. Further, the conflict must be so profound that the two laws cannot be "reconciled or consistently stand together," in order for the federal law to be construed in such

---

[13] Indeed, ATF argued that, because "Congress **has** Authority to Regulate the Interstate and Intrastate Manufacture and Sale of Firearms," then the federal firearms licensure provision preempts MFFA. *See id.*, p. 21 (Argument head III.A). However, the issue is not whether Congress **has** any such authority, but whether and how it **exercised** that authority, and for what purpose. Significantly, in its statement of "Statutory & Regulatory Background" section of its Memorandum in Support of its motion to dismiss below, ATF has completely omitted any reference to FOPA. Thus, ATF failed to address (i) the significant cut-backs made by FOPA on the scope of the federal licensure provision and (ii) Congress's findings, as they relate to its intents and purposes. *See id.*, pp. 2-6.

a way as to disallow the state law.

Two scenarios can be postulated:

- There would be no conflict whatsoever between MFFA and 18 U.S.C. § 923 if the person manufacturing firearms for sale and use only in Montana **did not meet** the federal licensing threshold by not being "engaged in the business" of manufacture "with the principal objective of livelihood and profit," as defined in 18 U.S.C. §§ 921(a)(21) and (22). Neither Montana law nor federal law would require such a person to obtain a license as a manufacturer of firearms, there being no conflict whatsoever, much less a "direct and positive" one that could not be "reconciled or stand consistently together." *Compare* MCA 30-20-104 *with* 18 U.S.C. §§ 921(a)(21), (22) and 923(a).
- A potential "direct and positive" conflict could only arise if a Montanan — seeking to manufacture firearms for sale and use only in Montana, pursuant to MFFA — **met** the federal requirement of being engaged in the business of manufacturing.
    - In such a case, if Section 923 were read alone to require federal licensure without regard to whether such a person was

engaged in interstate commerce, there would be a conflict.

- However, because MFFA frees Montanans from having to acquire the federal license when they are engaged wholly in intrastate commerce, Section 923 cannot be read alone, but is limited by the rule of preemption established in Section 927.

Under the general principles governing preemption by federal law, the burden is on the Government to show an "actual conflict" between the two laws. *See* California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987); *see also* Hamilton v. ACCU-TEK, 935 F. Supp. 1307, 1320 (E.D.N.Y. 1996). This rule is especially applicable to this case, where "Congress took care to preserve state law," having "added a savings clause, indicating that a provision of state law would only be invalidated upon a 'direct and positive conflict'" with the federal statute at issue. *See* Wyeth v. Levine, 555 U.S. __, 129 S.Ct. 1187, 1196 (2009). And when Congress expresses its pre-emptive intent in a statute, it is the statutory language that governs the answer to a pre-emption question. *See* New York Blue Cross v. Travelers, Inc., 514 U.S. 645, 655 (1995). In sum, as the Supreme Court observed in Wyeth v. Levine, there are "two cornerstones" by which a "direct and positive" conflict is to be ascertained: (i) "the purpose of Congress is the ultimate touchstone in every pre-

emption case"; and (ii) "we 'start with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.*, 129 S.Ct. at 1194-95.

A. The Government Cannot Demonstrate That Compliance With Both MFFA and 18 U.S.C. § 923 is an Impossibility.

In determining whether there is a "direct and positive" conflict, the first question is whether compliance with both the federal and state law is a "physical impossibility," that is, whether the obedience required by the one would put a person into disobedience of the other. *See* California Savings & Loan, 479 U.S. at 281. This is not such a case. A Montana manufacturer of firearms may comply with both MFFA and 18 U.S.C. § 923, because MFFA does not prohibit a Montana firearms manufacturer from voluntarily seeking and obtaining an FFL. Nor does MFFA punish a Montana manufacturer who meets MFFA criteria, but who chooses nonetheless to comply with the federal licensure and record-keeping requirements. As the Supreme Court pointed out in Wyeth v. Levine, "[i]mpossibility pre-emption is a demanding defense," requiring one to "demonstrate that it [would be] impossible for it to comply with both federal and state requirements." *Id.*, 129 S.Ct. at 1199. This "defense" is not available here.

B. The Government Cannot Demonstrate that MFFA Would Frustrate the Purposes and Objectives of the Federal Firearms Laws.

In enacting the GCA, Congress declared its purpose to be four-fold:

> (1) "to provide **support** to Federal, **State and local law enforcement** officials in their fight against crime and violence";
>
> (2) "**not …** to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession or use of firearms appropriate for the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity";
>
> (3) "**not** … to discourage … the private ownership or use by law-abiding citizens for lawful purposes"; and
>
> (4) "[**not** to] provide for the imposition of Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title." [Public Law 90-618, Title I, Sec. 101, 82 Stat. 1213 (1968) (emphasis added).]

Conspicuously absent from this recitation of purposes is any design to establish a comprehensive system of gun control. To the contrary, even the original federal licensure and regulatory system governing the manufacture and sale of firearms was for the purpose of "**enabl[ing] the States** to effectively cope with firearms traffic within their own borders through the exercise of their police powers" (emphasis added), **not** to **displace** or interfere with existing state and local firearms policies, by placing all commerce in firearms under direct federal

control. *See* Senate Report No. 1097, 2 U.S.C.C.A.N., pp. 2113-14 (90th Cong., 2d Sess. 1968). To that more limited end, even GCA defined the term "**interstate** … **commerce**" (emphasis added) to "include[] commerce between any place **in** a State and any place **outside** of that State…, but such term does **not** include commerce between places **within** the same State but through any place outside of that State." Pub. L. No. 90-618, Section 921(a)(2), 82 Stat. at 1214 (emphasis added).

Had Congress intended its licensure and record-keeping rules to displace state regulation of its own **intrastate commerce** in firearms, such as MFFA, it certainly would have defined "**interstate commerce"** more expansively, utilizing such terms as "affecting commerce" to demonstrate its intent to control wholly intrastate commerce in firearms. *See generally* Gonzales v. Raich, 545 U.S. 1 (2005). Instead, Congress used a **restrictive, minimalist definition of "interstate commerce"** to indicate that the purpose of its regulation of the manufacture and sale of firearms was to **assist the States** in combating crime, **not to stand in the way** of the States' exercise of their police powers to govern wholly intrastate commerce in firearms. Indeed, as the House Judiciary Committee reported it, GCA was designed "to strengthen Federal controls over **interstate and foreign commerce in firearms"** and, at the same time, "to assist

the States effectively to regulate firearms traffic **within their borders."** House Report No. 1577 in 3 U.S.C.C.A.N., p. 4411 (90th Cong., 2d Sess. 1968) (emphasis added). Thus, there is no "direct and positive conflict" between the free intrastate market policy of the MFFA, and the more limited interstate commercial policy of GCA, especially in light of the 1986 FOPA amendments that relaxed the licensure and record-keeping rules of GCA by expanding the class of persons permitted to manufacture and sell firearms without an FFL.

While ATF has demonstrated hostility to a robust, but original, construction of the peoples' Second Amendment right — as secured in District of Columbia v. Heller, 554 U.S. 570 (2008) — and resistance to any Congressional policy which constrains its regulatory power over firearms, allowing MFFA to stand should be of no concern to the federal government or the residents of any other state. Indeed, **MFFA's exemption from licensure is narrower than that allowed by Congress** in its definition of "interstate commerce" in that MFFA provides for no exception for firearms which travel out of the state, and back into the state.

Section 927 was Congress's chosen means to accommodate variations of intrastate firearms policies, in that the section sets out "the intent … of Congress" with respect to each provision of the chapter as it relates to the law of

any State on the "same subject matter." *See* 18 U.S.C. § 927. While the Montana legislature has chosen a deregulated solution to its firearms needs as they relate to self defense, hunting, target shooting, and other lawful pursuits, a state like New Jersey may reject such an approach, and thereby choose to have federal law continue to govern intra-state manufacturing and sales under the more restrictive federal regulatory approach. The merits of either choice are not at issue in this case, as both approaches are permitted by Congress. Rather than creating a monolithic national market for firearms manufacturing and sales, Section 927 provides a rule of accommodation of a state law that reaches only firearms traffic within its borders.

C. The Government Cannot Show that the Purposes of MFFA and GCA, as Amended by FOPA, Cannot be Reconciled or Consistently Stand Together.

There is good reason to believe that the approach taken by Montana with MFFA is more harmonious with Congressional policy than ATF would want this Court to believe. Not only did the FOPA amendments signal a change of Congressional commercial policy by enlarging the class of persons involved in the manufacture and sale of firearms free from having to secure an FFL, FOPA was designed to effectuate more fully the GCA policy not to place unnecessary burdens on firearm acquisition and possession by law-abiding citizens. *See*

Public Law 99-308, Section 1(b)(2), 100 Stat. 449 (1986). To that end, Congress "**reaffirmed**" its original purposes to **facilitate private ownership and possession** of firearms for lawful purposes. *Id.*

Significantly, FOPA also added **two new findings**, each of which evidenced a design to accommodate laws such as MFFA. First, Congress found that the Second Amendment protects the **right of individual citizens to keep and bear arms**. *Id.*, Section 1(b)(1)(A). Second, Congress found that the **Ninth and Tenth Amendments** protect citizens "against … unconstitutional exercise of authority" not expressly delegated to the federal government. *Id.*, Section 1(b)(1)(D). To the end that these constitutional rights be more fully realized, FOPA was designed "to correct existing firearms statutes and enforcement policies" (*id.*) which included, as noted above, a cut-back in the licensing and record-keeping requirements for persons engaged in the manufacture and sale of firearms. *See id.*, Section 101(b), 100 Stat. at 450.

Like FOPA, MFFA is designed to enable Montanans to enjoy more fully their constitutional right to keep and bear arms, not only as protected by the Second Amendment,[14] but also by the constitution of the State of Montana. *See*

---

[14] *See* McDonald v. Chicago, 561 U.S. __, 130 S.Ct. 3020 (2010).

MCA § 30-20-102(4) and (5). Like, FOPA, MFFA is designed to realize more fully the constitutional rights of Montanans under the Ninth and Tenth Amendments. *See* MCA § 30-20-102(1)-(3). Rather than being at cross-purposes, FOPA and MFFA are in harmony on these important freedoms.

To be sure, there is tension between the two statutes in that GCA, as amended by FOPA, literally requires Montana manufacturers of firearms for sale and use wholly within Montana to obtain an FFL. But Section 923(a), like every other provision of the federal firearms law, is subject to the terms of Section 927. And that section mandates that no state law is pre-empted by any federal provision unless "there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together."

There can be no doubt that Section 927 is a product of the widely different views on firearms policy prevailing in the several states. As the Supreme Court observed in Wyeth v. Levine, "'[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'" *Id.*, 129 S. Ct. at 1200. The case for pre-emption is even weaker in light of the shared purposes of

MFFA and FOPA to facilitate lawful gun ownership and possession, in recognition of the Second, Ninth, and Tenth Amendment rights of the people of Montana. *Compare* Public Law 99-308, Section 1(b)(1)(A) and (D) *with* MCA 30-20-102(1)-(5).

In the Wyeth case, the Vermont courts construed and applied the state's common law to **enhance the rights of Vermonters** to a remedy from pharmaceutical injury. In the instant case, the Montana legislature has **enhanced the rights of Montanans** to be able to manufacture, sell, and acquire firearms within the state's boundaries. Just as the Supreme Court ruled in Wyeth — that "Levine's common law claims do not stand as an obstacle to the accomplishment of Congress's purposes in the FDCA"[15] — so recognition of Marbut's MFFA claim here does not stand as an obstacle to Congress's purposes in GCA, as amended by FOPA.

CONCLUSION

For the foregoing reasons, the parties' assumption that MFFA statutorily conflicts with federal firearms licensure law is clearly flawed. At a minimum, this Court should direct the parties to submit briefing on the application and

---

[15] Wyeth v. Levine, 129 S.Ct. at 1204.

effect of 18 U.S.C. § 927 on this case. In the alternative, the Court should reverse the decision below and remand the case to the District Court with instructions to address the preemption issue in accordance with the standard set forth in Section 927.

Respectfully submitted,

/s/ Herbert W. Titus

JOSEPH W. MILLER
LAW OFFICES OF JOSEPH MILLER, LLC.
P.O. Box 83440
Fairbanks, AK 99708
(907) 451-8559

GARY G. KREEP
UNITED STATES JUSTICE FOUNDATION
932 D Street, Suite 2
Ramona, California 92065-2355
(760) 788-6624

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

*Attorney of record

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,997 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 13.0.0.568 in 14-point CG Times.

/s/ Herbert W. Titus

_____

Herbert W. Titus
Attorney for *Amici Curiae*

Dated: June 13, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing Brief *Amicus Curiae* of Gun Owners of America, *et al.*, in Support of Reversal, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate Case Management/Electronic Case Files system on June 13, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Herbert W. Titus

_____

Herbert W. Titus
Attorney for *Amici Curiae*