

CIVIL NO. 10-36094

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

MONTANA SHOOTING SPORTS ASSOCIATION, INC., et al.,

*Plaintiffs-Appellants,*

vs.

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  
(CASE No. 09-CV-147-M-DWM-JCL)

---

**BRIEF OF *AMICI CURIAE* BRADY CENTER TO PREVENT GUN  
VIOLENCE, INTERNATIONAL BROTHERHOOD OF POLICE  
OFFICERS, HISPANIC AMERICAN POLICE COMMAND  
OFFICERS ASSOCIATION, NATIONAL BLACK POLICE  
ASSOCIATION, NATIONAL NETWORK TO END DOMESTIC  
VIOLENCE, MONTANA HUMAN RIGHTS NETWORK, AND  
LEGAL COMMUNITY AGAINST VIOLENCE IN SUPPORT OF  
DEFENDANT-APPELLEE**

JONATHAN E. LOWY  
DANIEL VICE  
BRADY CENTER TO  
PREVENT GUN VIOLENCE  
1225 Eye St., NW  
Suite 1100  
Washington, DC 20005  
(202) 289-7319

GIL N. PELES  
NOEMI A. BLASUTTA  
PROSKAUER ROSE LLP  
2049 Century Park East  
32<sup>nd</sup> Floor  
Los Angeles, CA 90067-3206  
(310) 557-2900

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* the Brady Center to Prevent Gun Violence, International Brotherhood Of Police Officers, Hispanic American Police Command Officers Association, National Black Police Association, National Network To End Domestic Violence, Montana Human Rights Network, and Legal Community Against Violence (collectively, “Amici”) state that they are non-profit organizations, have no parent companies, and have not issued shares of stock.

DATED this 27th day of July, 2011.

/s/ Gil N. Peles

Gil N. Peles  
*Attorney for Amici Curiae  
Brady Center to Prevent Gun  
Violence, International  
Brotherhood Of Police  
Officers, Hispanic American  
Police Command Officers  
Association, National Black  
Police Association, National  
Network To End Domestic  
Violence, Montana Human  
Rights Network, and Legal  
Community Against Violence*

## STATEMENT OF INTEREST<sup>1</sup>

### **Brady Center to Prevent Gun Violence**

The Brady Center to Prevent Gun Violence (the “Brady Center”) is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that gun laws are properly interpreted to allow strong government action to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous briefs of *amicus curiae* in cases relating to gun violence prevention and firearms laws, including in the recent U.S. Supreme Court cases *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), *United States v. Hayes*, 129 S. Ct. 1079 (2009), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

### **International Brotherhood of Police Officers**

The International Brotherhood of Police Officers (“IBPO”) is one of the largest police unions in the country, representing more than 50,000 members. The IBPO fully supports and defends the Second Amendment right to keep and bear arms, and also fully supports the applicability of uniform federal laws to protect the public and law enforcement officers by helping to keep dangerous weapons out of the wrong hands.

---

<sup>1</sup> *Amici* file this brief with the consent of the parties pursuant to Federal Rule of Appellate Procedure 29(a).

### **Hispanic American Police Command Officers Association**

The Hispanic American Police Command Officers Association is the oldest and largest association in the United States of Hispanic-American command officers from law enforcement and criminal justice agencies.

### **National Black Police Association**

The National Black Police Association represents approximately 35,000 individual members and more than 140 chapters.

### **National Network to End Domestic Violence**

The National Network to End Domestic Violence (“NNEDV”) is a non-profit membership organization devoted to remedying domestic violence through legal, legislative, and policy initiatives. The members of NNEDV are the state coalitions against domestic violence, who represent their states’ local organizations that provide shelter, advocacy, and legal and counseling services to survivors of domestic violence. The member organizations of NNEDV collectively represent thousands of organizations that have hundreds of years of experience working with survivors of domestic violence, including undertaking extensive efforts to improve the justice system’s response to victims of domestic violence. NNEDV works daily to protect the safety of survivors of domestic violence, and takes a leadership role within the domestic violence field in providing training, education, litigation

support and legislative advocacy on numerous issues relating to domestic violence and firearms.

### **Montana Human Rights Network**

The Montana Human Rights Network (“MHRN”) is a grassroots, membership-based organization of over 1400 members. In response to white supremacist organizing in Montana in the late 1980s, local groups formed to counter hate activity in their communities. In June of 1990, activists from these groups came together to discuss effective strategies for statewide activity countering bigotry. The result was a commitment to form the MHRN. Over the years, as hate groups have appealed to the “hot-button” social issues of the mainstream, MHRN has expanded its program to counter the efforts of the militias, freemen and other “patriots,” anti-Indian groups, anti-environmental activists, and the religious right in Montana. The MHRN joins this amicus brief in support of the federal government’s right to enact and enforce reasonable gun control laws.

### **Legal Community Against Gun Violence**

Legal Community Against Violence (“LCAV”) is a national law center dedicated to preventing gun violence. Founded by lawyers after an assault-weapon massacre at a San Francisco law firm in 1993, LCAV tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws. As an amicus, LCAV has provided informed analysis in a variety of firearm-

related cases nationwide. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); *Nordyke v. King*, 2011 U.S. App. LEXIS 8906 (9th Cir. May 2, 2011); *Woollard v. Sheridan*, No. 10-2068 (D. Md. filed July 29, 2010); *City of Cleveland v. State*, 942 N.E.2d 370 (Ohio 2010). LCAV supports strong laws to reduce gun violence, and opposes efforts to prevent the enforcement of existing federal firearms laws.

## SUMMARY OF ARGUMENT

The Montana Firearms Freedom Act (“MFFA”), Mont. Rev. Code § 30-20-101, *et seq.*, purports to exempt Montana-made firearms and ammunition from “federal law or federal regulation.” Mont. Code Ann. § 30-20-104. The MFFA violates the Supremacy Clause and poses a dangerous threat to public safety and national security. Specifically the MFFA could:

- allow felons, domestic violence abusers, and the mentally ill to more easily obtain firearms by exempting sales of Montana-made guns from the federal Brady background check requirement that applies to all gun sales by licensed dealers. 18 U.S.C. § 922(g)(t). Montana law does not require any background check when a gun is sold.
- allow Montana-made handguns to be sold to, and possessed by, teenagers 14 to 18 years old who are barred by federal law from possessing handguns when not supervised by an adult. 18 U.S.C. § 922(x). Montana law does not prohibit teenagers 14 and over from possessing handguns unsupervised. MCA § 45-8-344.
- allow the sale of dangerous firearms that can evade metal detectors by exempting Montana-made guns from the federal Undetectable Firearms Act of 1988, threatening airline safety and secured federal, state, and private

facilities. 18 U.S.C. § 922(p). Montana law does not require that firearms be detectable by metal detectors.

- allow the manufacture of armor-piercing ammunition by exempting Montana-made ammunition from the federal ban on the manufacture of this dangerous ammunition. 18 U.S.C. § 922(a)(7)-(8). Montana law does not prohibit the manufacture of ammunition that can pierce police body armor.
- allow the sale of virtually untraceable firearms – a bonanza for criminals and gun traffickers – by exempting Montana-made guns from federal requirements that firearms be stamped with serial numbers that identify firearms so law enforcement can trace them to help solve gun crimes. 18 U.S.C. § 923(i). Montana law does not require that firearms be stamped with serial numbers.
- allow the sale of Montana-made guns without gun dealer records which are used when law enforcement is attempting to trace a crime gun to its purchaser to solve gun crimes and stop gun-traffickers. 18 U.S.C. § 923(g). Because federal law does not allow the federal government to maintain records of gun ownership, 18 U.S.C. § 926, law enforcement generally can only trace a crime gun by using gun dealer records to determine the gun's purchaser. Montana law does not require gun dealers to keep any record of gun sales.



- allow persons to engage in the business of selling Montana-made guns even if they have willfully violated federal gun laws, by exempting them from federal law allowing the revocation of gun dealer licenses for willful gun law violations. 18 U.S.C. § 923(e). Montana law does not require a license to sell guns and does not prohibit willful violators of gun laws from engaging in the business of selling guns.
- allow the possession of Montana-made guns in federal facilities located in Montana if the MFFA's exemption from "federal law" includes an exemption from the federal ban on firearms in federal facilities, which would pose a threat to national security. 18 U.S.C. § 930. Montana law does not ban the possession of firearms in federal facilities.

The MFFA operates from the false premise that the sale and distribution of firearms can occur in an intrastate vacuum. However, as Congress has found, and the district court properly held, all firearms have an effect on interstate commerce and nationwide gun trafficking, and many have been sold or transported in interstate commerce or contain components or accessories that have been so sold or transported.

In particular, by exempting Montana-made ammunition and firearms from the federal restrictions on armor-piercing ammunition and firearms undetectable by metal detectors, and allowing the sale of firearms without serial numbers, without

conducting background checks, and without keeping any record of sale allowing crime guns to be traced, Montana-made guns will be much more likely to be sought after by criminals and used in crimes nationwide. Gun traffickers will likely seek out virtually untraceable Montana-made firearms, fueling the illegal interstate gun trafficking trade. Likewise, with over half a million firearms stolen from homes nationwide each year,<sup>2</sup> stolen Montana-made guns will likely be trafficked interstate to criminals who will particularly prize guns that have no serial number or record of sale. Thus, the MFFA would severely compromise federal efforts to prevent nationwide gun violence and interstate gun trafficking by undermining a core purpose of the Gun Control Act of 1968, which is “to provide for better control of the interstate traffic in firearms.” PL 90-618, October 22, 1968, 82 Stat. 1213 (Oct. 22, 1968).

Even the MFFA implicitly acknowledges that firearms are almost always inherently the products of interstate commerce by purporting to exempt from Congressional power the ability to regulate “firearms accessories” or parts necessary to manufacture firearms. See MFFA § 4 (“[A] firearm accessory, or ammunition that is manufactured in Montana from basic materials and that can be manufactured without the inclusion of any significant parts imported from another

---

<sup>2</sup> Mayors Against Illegal Guns, *Reporting Lost and Stolen Guns*, <http://www.mayorsagainstillegalguns.org/html/local/lost-stolen.shtml> (last visited July 2, 2011).

state.”) Yet, even aside from the severe nationwide impact of gun violence and gun trafficking, the fact that nearly all firearms travel interstate or are made from components that travel interstate demonstrates the interstate character of commerce in firearms.

Due to the inherently interstate nature of firearms, acknowledged repeatedly by Congress, the federal government has ample authority to regulate such weapons with a uniform set of federal laws, regardless of where the guns are made or intended to be initially sold. As explained below, the MFFA’s evasion of federal law would allow individuals to circumvent background checks and dealer licensing requirements, and provide easy firearm access to criminals and convicted domestic violence abusers.

All told, the MFFA would allow an unlicensed seller to sell unlimited numbers of undetectable Montana-made firearms and armor-piercing ammunition to any buyer in all cash, untraceable transactions, without background checks or records of sale. Because Montana has no requirement that gun purchasers even give their name to gun sellers, these nearly anonymous transactions would be highly attractive to criminals and interstate gun traffickers. Even if federal authorities were able to somehow trace crime guns back to the seller, they would be virtually powerless to stop continued gun sales by such an unlicensed dealer.

The district court properly held that, pursuant to the authority granted to Congress by the Commerce Clause, federal gun laws preempt the MFFA “even as applied to the purely intrastate manufacture and sale of firearms contemplated by the [MFFA].” As correctly noted by the district court, “Congress could rationally have concluded that allowing local firearms commerce to escape federal regulation would severely undercut the comprehensive regulatory scheme set in place by federal firearms laws.”

The MFFA would pose a clear threat to federal and other states’ law enforcement’s ability to protect the public from gun violence, solve gun crimes, and stop gun trafficking. Such a result would threaten the safety of citizens nationwide. The district court order must be affirmed.

## TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT .....	1
A. The Constitution Grants Congress Authority to Regulate the Sale and Distribution of Firearms. ....	1
B. The Sale and Distribution of Firearms Cause a Substantial Economic Effect on Interstate Commerce.....	3
C. Federal Laws that Regulate the Sale and Distribution of Firearms are Fundamental to Public Safety.....	8
1. National Firearms Act (1934) (26 U.S.C. § 5801).....	9
2. Gun Control Act of 1968 (18 U.S.C. § 921).....	10
3. Brady Handgun Violence Prevention Act (1993) (18 U.S.C. § 922).....	12
4. Domestic Violence Offender Gun Ban (1996) (18 U.S.C. § 922(g)(9)) .....	13
5. Juvenile Firearm Possession Ban (1994) (18 U.S.C. § 922).....	15
6. Prohibitions on Guns in School Zones and Federal Buildings (18 U.S.C. §§ 922(q), 930).....	17
7. Federal Restrictions on Armor-Piercing Ammunition and Undetectable Firearms (18 U.S.C. §§ 922(a)(7)-(8) and (p)) .....	20
8. Federal Gun Dealer Licensing Requirements (18 U.S.C. § 923).....	21
D. The District Court Properly Held that Federal Gun Regulations Do Not Interfere With the Second Amendment of the United States Constitution. ..	23
E. Conclusion .....	26

## TABLE OF AUTHORITIES

	<u>Page(s)</u>
<b>CASES</b>	
<i>District of Columbia v. Heller</i> , 128 S. Ct. 2783 (2008).....	18, 23, 24, 25
<i>Gibbons v. Ogden</i> , 22 U.S. (9 Wheat.) 1 (1824).....	1
<i>Gonzales v. Raich</i> , 545 U.S. 1 (2005).....	1, 2
<i>Heart of Atlanta Motel v. United States</i> , 379 U.S. 241 (1964).....	7
<i>Hodel v. Indiana</i> , 452 U.S. 314 (1981).....	1, 3
<i>Hodel v. Virginia Surface Mining &amp; Reclamation Ass’n</i> , 452 U.S. 264 (1981).....	8
<i>Huddleston v. United States</i> , 415 U.S. 814 (1974).....	11
<i>Katzenbach v. McClung</i> , 379 U.S. 294 (1964).....	3, 8
<i>Kodak v. Holder</i> , 342 Fed. Appx. 907 (4th Cir. 2009).....	20, 25
<i>Perez v. United States</i> , 402 U.S. 146 (1971).....	2, 3, 7, 8
<i>RSM, Inc. v. Herbert</i> , 466 F.3d 316 (4th Cir. 2006) .....	22
<i>U.S. v. Knight</i> , 574 F. Supp. 2d 224 (D. Me. 2008).....	25
<i>U.S. v. Vongxay</i> , 594 F.3d 1111 (9th Cir. 2010) .....	25

*United States v. Hayes*,  
129 S. Ct. 1079 (2009).....14

*United States v. Mobley*,  
956 F.2d 450 (3d Cir. 1992) .....11

*United States v. White*,  
593 F.3d 1199 (11th Cir. 2010) .....25

*United States v. Wrightwood Dairy Co.*,  
315 U.S. 110 (1942).....1

*Wickard v. Filburn*,  
317 U.S. 111 (1942).....1, 7

**STATUTES**

28 C.F.R. pt. 25(A) (2006).....12

18 U.S.C. § 841 .....13

18 U.S.C. § 921 .....10

18 U.S.C. § 921(a)(25).....18

18 U.S.C. § 922 .....12, 15

18 U.S.C. § 922(a)(7).....20

18 U.S.C. §§ 922(a)(7)-(8).....20

18 U.S.C. § 922(a)(8).....20

18 U.S.C. § 922(b)(5).....20

18 U.S.C. § 922, *et seq.*.....4

18 U.S.C. § 922(g) .....4, 11

18 U.S.C. § 922(g)(9).....13

18 U.S.C. § 922(h) .....4

18 U.S.C. § 922(p) .....20

18 U.S.C. § 922(p)(1).....21

18 U.S.C. § 922(q) .....17

18 U.S.C. § 922(q)(1)(A) .....18

18 U.S.C. § 922(q)(1)(A)-(I).....20

18 U.S.C. § 922(q)(1)(B) .....4

18 U.S.C. § 922(q)(1)(C) .....4

18 U.S.C. § 922(q)(1)(D) .....5

18 U.S.C. § 922(q)(1)(E) .....5

18 U.S.C. § 922(s).....12

18 U.S.C. § 922(s)(3)(B)(i)-(vii).....12

18 U.S.C. § 922(t) .....13

18 U.S.C. § 922(t)(1)(B)(ii) .....13

18 U.S.C. § 922(t)(2) .....13

18 U.S.C. § 923 .....21

18 U.S.C. § 923(e) .....22

18 U.S.C. § 926.....22

18 U.S.C. § 930.....17, 18

26 U.S.C. § 5801 .....9

26 U.S.C. §§ 5801-5881 .....9

26 U.S.C. §§ 5811-22 .....10

26 U.S.C. § 5841 .....10

26 U.S.C. § 5845 .....9



28 U.S.C. § 599A.....11

H.R. Rep. No. 100-612, 100th Cong., 2d Sess., reprinted in 1988  
U.S.C.C.A.N. 5359 .....21

H.R. Rep. No. 103-711 (1994), reprinted in 1994 U.S.C.C.A.N. 1839.....16, 17

H.R. Rep. No. 103-711 (1994), reprinted in 1994 U.S.C.C.A.N. 1839.....15

H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), 1954 U.S.C.C.A.N. 4025.....9

H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968), reprinted in 1968  
U.S.C.C.A.N. 4410 .....10

H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968), reprinted in 1968  
U.S.C.C.A.N. 4410 .....10

H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968), reprinted in 1968  
U.S.C.C.A.N. 4410 .....10

H.R. Rep. No. 324, 103d Cong., 2d Sess. 6 (1994), reprinted in 1994  
U.S.C.C.A.N. 1802 .....12

Pub. L. No. 73-474, 48 Stat. 1236 (1934).....9

Pub. L. No. 90-351, § 901(a)(1), 82 Stat. 225 (1968) .....4

Pub. L. No. 104-208, 110 Stat. 1303 (1996).....13

**OTHER AUTHORITIES**

142 Cong. Rec. S10379-01 (1996) .....14

142 Cong. Rec. S11872-01 (1996) .....14

S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968  
U.S.C.C.A.N. 2112 .....12

S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968) .....11

## SECONDARY SOURCES

Brady Center to Prevent Gun Violence, <i>Hollow Victory?, Gun Laws Survive Three Years After District of Columbia v. Heller, Yet Criminals and the Gun Lobby Continue Their Legal Assault</i> , June 2010 .....	25
Bureau of Justice Statistics, <i>Background Checks for Firearm Transfers, 2009 - Statistical Tables</i> , Oct. 20, 2010.....	13
Douglas Kmiec, <i>Guns and the Supreme Court: Dead Wrong</i> , TIDINGS ONLINE, July 11, 2008 .....	24
Emily F. Rothman et al, <i>Gun Possession Among Massachusetts Batterer Intervention Program Enrollees</i> , Evaluation Review Vol. 30 No. 3, 283 (June 2006).....	14
<i>Firearm Injuries Cost \$20 Billion a Year-Study</i> , Reuters, Jan. 7, 1994.....	12
<i>Following the Gun: Enforcing Federal Law Against Firearm Traffickers</i> , Department of the Treasury .....	6
Garen J. Wintemute, <i>Guns, Fear, the Constitution, and the Public's Health</i> (Apr. 3, 2008).....	15
<i>Gun Violence: The Real Costs</i> (Phillip J. Cook & Jens Ludwig eds., Oxford Univ. Press 2000).....	3
J. Harvie Wilkinson III, <i>Of Guns, Abortions, and the Unraveling Rule of Law</i> , 95 VA. L. REV. 253 (2009).....	24
<i>Journal of Trauma, Injury, Infection, and Critical Care</i> , Jan. 7, 2011 .....	16
Judy Murnan, Joseph A. Dake, James H. Price, Association of Selected Risk Factors with Variation in Child and Adolescent Firearm Mortality by State, <i>Journal of School Health</i> (Oct. 2004).....	16
<i>Major School Shootings in the United States Since 1997</i> (Dec. 2010) .....	18
Mayors Against Illegal Guns, <i>Inside Straw Purchasing: How Criminals Get Guns Illegally</i> (Apr. 15, 2009).....	5

Mayors Against Illegal Guns, *The Movement of Illegal Guns in America* (2008).....4, 6

National Law Enforcement Officers Memorial Fund, Domestic Violence Takes a Heavy Toll on the Nation’s Law Enforcement Community .....15

Richard Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008.....24

Richardson, Erin G., and David Hemenway, *Homicide, Suicide, and Unintentional Firearm Fatality: Comparing the United States With Other High-Income Countries*.....16

Rose and Shield (Spring 2010) .....15

Shannon Frattaroli & Jon S. Vernick, *Separating Batterers and Guns* Evaluation Rev. 296 (2006) .....14

*The War between the States: How Gunrunners Smuggle Weapons Across America*, 1997 .....5

Violence Policy Center, *States with Higher Gun Ownership and Weak Gun Laws Lead Nation in Gun Deaths* (June 2, 2010).....6

Wendy Max & Dorothy P. Rice, *Data Watch: Shooting In The Dark: Estimating The Cost of Firearm Injuries*, Health Affairs (Winter 1993).....3

## ARGUMENT

### A. The Constitution Grants Congress Authority to Regulate the Sale and Distribution of Firearms.

The Constitution grants Congress the authority, without limitation, “[t]o regulate commerce . . . among the several States.” U.S. Const. art. I, § 8, cl. 3. The Supreme Court has repeatedly recognized that “[t]he power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small.” *Hodel v. Indiana*, 452 U.S. 314, 321 (1981) (quoting *NLRB v. Fainblatt*, 306 U.S. 601, 606 (1939)); accord *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824). Thus, “state action cannot circumscribe Congress’ plenary commerce power.” *Gonzales v. Raich*, 545 U.S. 1, 29 (2005).

It is well-established that Congress may regulate even purely local activities under the Commerce Clause, as augmented by the Necessary and Proper Clause, wherever such activities “so affect interstate commerce, or the exertion of power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end.” *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). As Justice Jackson, speaking for a unanimous Court, explained in *Wickard v. Filburn*:

[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate

commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as “direct” or “indirect.”

317 U.S. 111, 125, 128-29 (1942) (Congress may set quotas limiting local wheat production because “[h]omegrown wheat . . . competes with wheat in commerce”).

In *Gonzales v. Raich*, the Supreme Court upheld a federal law that criminalized the intrastate manufacture and use of controlled substances even if recommended by a physician for purely local, medicinal use and those substances never entered interstate commerce. The Court reiterated that, “[o]ur case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.” *Gonzales*, 545 U.S. at 17. Furthermore:

We have never required Congress to legislate with scientific exactitude. When Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class. . . . [W]hen ‘a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.’

*Id.*, quoting *Perez v. United States*, 402 U.S. 146, 154-55 (1971). Accordingly, so long as “the class of activities is regulated and that class is within the reach of federal power” under the Commerce Clause, “the courts have no power ‘to excise, as trivial, individual instances’ of the class.” *Perez*, 402 U.S. at 154 (citation

omitted).<sup>3</sup> Just as the Court has found that Congress has the power to regulate intrastate production and use of wheat and drugs, Congress certainly also has the power to regulate firearms.

**B. The Sale and Distribution of Firearms Cause a Substantial Economic Effect on Interstate Commerce.**

Congress has long recognized that the manufacture, sale, and possession of firearms substantially affect interstate commerce. Nationwide, nearly 110,000 people are shot each year, with more than 30,000 dead from gunfire.<sup>4</sup> The costs to the nation from gun trafficking and gun violence are about \$100 billion per year, or about \$360 for every American.<sup>5</sup> Annually, more than 42,000 guns cross state lines before being recovered in crimes, and most of these guns flow from states

---

<sup>3</sup> The Supreme Court has thus recognized that Congress has the authority under the Commerce Clause to prohibit racial discrimination even by restaurants not frequented by interstate travelers in order to eliminate obstacles to interstate travel by black citizens, *Katzenbach v. McClung*, 379 U.S. 294, 300-02 (1964); to proscribe “[e]xtortionate credit transactions, though purely intrastate,” because “there is a tie-in between local loan sharks and interstate crime,” *Perez*, 402 U.S. at 154-55; and to protect farmland from surface coal mining in order to prevent “losses in agricultural productivity” that “affect[ ] interstate commerce in agricultural products,” *Hodel v. Indiana*, 452 U.S. at 324-26.

<sup>4</sup> National Center for Injury Prevention and Control, Web-based Injury Statistics Query and Reporting System (2006 (deaths) and 2008 (injuries)).

<sup>5</sup> See *Gun Violence: The Real Costs* 117 (Phillip J. Cook & Jens Ludwig eds., Oxford Univ. Press 2000); See also Wendy Max & Dorothy P. Rice, *Data Watch: Shooting In The Dark: Estimating The Cost of Firearm Injuries*, Health Affairs (Winter 1993) 171, 181.

with weaker gun laws to states with stronger gun laws.<sup>6</sup> Indeed, “states that have strong illegal gun regulations have significantly lower crime gun export rates, on a per capita basis, than states with comparatively weak illegal gun regulations.”<sup>7</sup> In order to stem this flow of guns across state lines, Congress has established minimum federal standards for gun manufacturing, sale, and possession.

Thus, Congress regulated firearms that are manufactured, sold, shipped and possessed in or affect interstate commerce. *See, e.g.*, 18 U.S.C. § 922, *et seq.* Indeed, Congress has found that simple possession of a firearm can “affect[] commerce,” *e.g.*, 18 U.S.C. § 922(g) and (h). Some of the many Congressional findings concerning the impacts of firearms on interstate commerce recognize that:

- “[T]here is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce.” Pub. L. No. 90-351, § 901(a)(1), 82 Stat. 225 (1968).
- “[C]rime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs” 18 U.S.C. § 922(q)(1)(B).
- “[F]irearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools . . .” 18 U.S.C. § 922(q)(1)(C).

---

<sup>6</sup> Mayors Against Illegal Guns, *The Movement of Illegal Guns in America* (2008) at 5-6 (citing Department of Treasury, Bureau of Alcohol, Tobacco, Firearms, and Explosives.

<sup>7</sup> *Id.* at 20.

- “[E]ven before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce” 18 U.S.C. § 922(q)(1)(D).
- “[W]hile criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason” 18 U.S.C. § 922(q)(1)(E).

Gun possession affects interstate commerce in multiple ways. It is a rare firearm that has not been sold or transported in interstate commerce, or that does not contain components that have been so sold or transported.<sup>8</sup> Moreover, after they are purchased, firearms flow freely across state borders. It is no secret that “there is substantial interstate smuggling of guns.”<sup>9</sup> But guns have their most significant impact on interstate commerce when they are used to kill, to injure, to

---

<sup>8</sup> The data from a report prepared by Senator Charles Schumer (NY) (*The War between the States: How Gunrunners Smuggle Weapons Across America*, 1997) illustrates how big a problem gunrunning has become. For this report, Senator Schumer analyzed raw data from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regarding the 47,068 guns traced in 1996 to show that states with weak gun laws are far more often the source of guns used in crimes committed in states with strong laws than the reverse.

<sup>9</sup> Mayors Against Illegal Guns, *Inside Straw Purchasing: How Criminals Get Guns Illegally* (Apr. 15, 2009), available at <http://www.mayorsagainstillegalguns.org/downloads/pdf/inside-straw-purchases.pdf> (last visited July 2, 2010).



intimidate and to commit other crimes. The possession of a firearm is, of course, an essential first step in the use of a firearm. And firearms are used against human beings hundreds of times each day in the United States. The costs of this gun violence -- not only in human terms, but also in economic terms -- are devastating to American society. These costs justify a congressional conclusion that the purchase and possession of firearms has a substantial effect on interstate commerce.<sup>10</sup>

The total annual cost of firearm injuries, including lost earnings, pain, disability, and the costs of lost life, reaches a staggering aggregate economic cost to American society of approximately \$100 billion annually.<sup>11</sup> And, of course, firearms are capable of grave interstate effects: a gun made, bought, and sold in

---

<sup>10</sup> In 2007, the ten states with the weakest gun laws supplied more than half of the guns that crossed state lines before being recovered in crimes. The ATF trace data shows that 42,500 guns crossed state lines before being recovered in crimes in 2007. For 34,127 of these guns, ATF identified the state where the guns were originally purchased. Just ten states accounted for 57% of the guns. Mayors Against Illegal Guns, *The Movement of Illegal Guns in America* (2008) at 5-6 (citing Department of Treasury, Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Following the Gun: Enforcing Federal Law Against Firearm Traffickers*, Department of the Treasury, 2000, p. 23). What's more, states with higher gun ownership and weaker gun laws have more gun deaths while states with a lower percentage of households with guns and strong gun laws have lower numbers of gun deaths. Violence Policy Center, *States with Higher Gun Ownership and Weak Gun Laws Lead Nation in Gun Deaths* (June 2, 2010), <http://www.vpc.org/press/1006gundeath.htm> (last visited July 2, 2010).

<sup>11</sup> Gun Violence: The Real Costs 117 (Phillip J. Cook & Jens Ludwig eds., Oxford Univ. Press 2000).

Montana by a Montana resident may be used to shoot residents of other states, even when they are within their own borders.

All of these costs associated with gun violence appropriately may be considered in determining the nexus between gun possession and interstate commerce. As *Wickard v. Filburn* made clear, the relevant inquiry is whether the regulated activity may be deemed to have “a substantial economic effect on interstate commerce,” not whether the effect is “direct” or “indirect.” 317 U.S. at 125. In much the same manner that loan sharking in *Perez v. United States* affected interstate commerce by providing organized crime with the means by which to “finance its national operations,” 402 U.S. at 157, gun possession affects interstate commerce by providing individuals with the means by which to commit the killings, assaults and other violent crimes that so severely tax the national economy.

The costs of gun violence to our nation provide an ample factual basis for a Congressional conclusion that firearm possession has the requisite effect on interstate commerce. Any activity whose annual consequences impose costs of about \$100 billion on individuals, insurance companies and federal, state and local governments necessarily “is ‘commerce which concerns more States than one’ and has a real and substantial relation to the national interest.”” *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 255 (1964). Moreover, victims of firearm injuries

travel from one state to another to obtain medical and rehabilitative services; pharmaceuticals, medical supplies and equipment to care for these individuals also are transported in interstate commerce; and sums of money are transferred across state lines from private insurers and government agencies to hospitals, physicians, disabled victims and others.

Gun possession and consequent gun violence also affect commerce for many of the same reasons that other activity has been found to affect commerce. They “exact[] millions from the pockets of people,” *Perez*, 402 U.S. at 156, as a result of crimes committed by persons wielding firearms. They “degrad[e] the quality of life in local communities” by turning streets, parks and even schools into battle zones, “damag[e] the property of citizens” and “deter[] professional, as well as skilled, people from moving into [certain] areas . . . and thereby caus[e] industry to be reluctant to establish there.” *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 277 (1981); *Katzenbach v. McClung*, 379 U.S. at 300. They also “counteract[] governmental programs and efforts,” *Hodel*, 452 U.S. at 277, in such fields as crime control, public health, urban development and education.

**C. Federal Laws that Regulate the Sale and Distribution of Firearms are Fundamental to Public Safety.**

For over seventy-five years, beginning with the National Firearms Act of 1934, Congress has regulated the sale and distribution of firearms. Federal

regulations prevent the sale of certain types of particularly dangerous weapons and accessories, disallow criminals and domestic violence abusers from obtaining weapons, and prevent children from obtaining firearms. By seeking to avoid federal regulations that establish minimum standards to keep deadly firearms away from dangerous criminals and individuals who may misuse them, the MFFA threatens to jeopardize the ability of federal and state governments and law enforcement to promote public safety and protect communities from gun violence.

**1. National Firearms Act (1934) (26 U.S.C. § 5801)**

In 1934, Congress enacted the National Firearms Act (“NFA”)<sup>12</sup> in an effort to target “lethal weapons. . . [that] could be used readily and efficiently by criminals or gangsters.”<sup>13</sup> Thus, the NFA was directed towards the regulation of machine guns, sawed-off shotguns and rifles, silencers, and certain concealable firearms.<sup>14</sup> The NFA required parties manufacturing or transferring such “firearms”<sup>15</sup> to submit an application for the transaction, thereby taxing such

---

<sup>12</sup> Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801-5881 (1988)).

<sup>13</sup> H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), 1954 U.S.C.C.A.N. 4025, 4542.

<sup>14</sup> See National Firearms Act: Hearings on H.R. 9066 before the House Comm. on Ways and Means, 73d Cong., 2d Sess. 1-3 (1934).

<sup>15</sup> The NFA defines “firearm” to include a shotgun having a barrel length of less than 18 inches or a weapon made from a shotgun with an overall length of less than 26 inches, a rifle having a barrel length of less than 16 inches or a weapon made from a rifle with an overall length of less than 26 inches, a machinegun, a silencer, and a destructive device; it excludes an antique firearm from the definition. 26 U.S.C. § 5845.

activities and seeking to ensure that criminals do not obtain these weapons.<sup>16</sup> The Act also required that those firearms be registered to aid the tracing of crime guns back to their owner or purchaser.<sup>17</sup> The MFFA would threaten these longstanding federal regulations, exempting some Montana-made weapons from federal laws that restrict the sale and possession of these dangerous weapons.

## 2. Gun Control Act of 1968 (18 U.S.C. § 921)

In the wake of several highly publicized violent crimes involving firearms, including the assassinations of President John F. Kennedy and Martin Luther King, Jr., and the shooting of Medgar Evers,<sup>18</sup> Congress understood that any truly effective firearm measure would have to control the sale of firearms nationwide to prevent dangerous people from arming themselves with deadly weapons.<sup>19</sup> Thus, in 1968, Congress sought to curb growing use of firearms in violent crimes<sup>20</sup> via the Gun Control Act of 1968 (“GCA”).<sup>21</sup> To accomplish this, the legislation sought to “strengthen Federal controls over interstate and foreign commerce in firearms and [] assist the States effectively to regulate firearms traffic within their

<sup>16</sup> See 26 U.S.C. §§ 5811-22.

<sup>17</sup> 26 U.S.C. § 5841.

<sup>18</sup> H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 4410, 4413, 4426 (commenting on incidents which should have been subject to stricter controls).

<sup>19</sup> H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 4410, 4413 (noting incidents involving rifles or shotguns that have been cited to further illustrate demand for more restrictive transactions).

<sup>20</sup> See H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 4410, 4413 (listing violence statistics for thirteen months ending September, 1967).

<sup>21</sup> H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 4410, 4411.

borders.”<sup>22</sup>

The Act thus ensured that many “firearms were channeled through federally licensed dealers to eliminate mail order purchases and the generally widespread commerce in them.”<sup>23</sup> The Act also barred the sale of firearms to dangerous people, including felons, the mentally ill, and fugitives from justice. 18 U.S.C. § 922(g).

In addition to providing a more effective licensing system for firearms, the GCA contained record-keeping requirements to help ensure that prohibited persons did not obtain firearms. Also included were marking requirements, *e.g.*, serial numbers, to create a chain of custody and thereby “combat crime” and “assist” law enforcement.<sup>24</sup> Congress also used the GCA to grant the Bureau of Alcohol, Tobacco, Firearms and Explosives the authority to investigate criminal and regulatory violations of both the NFA and the GCA.<sup>25</sup> The MFFA purports to exempt Montana-made weapons from the minimum standards set by the GCA that have helped law enforcement combat gun violence and interstate gun trafficking for more than four decades.

---

<sup>22</sup> *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (*quoting* S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968)).

<sup>23</sup> S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968).

<sup>24</sup> *United States v. Mobley*, 956 F.2d 450, 454 (3d Cir. 1992).

<sup>25</sup> 28 U.S.C. § 599A.

**3. Brady Handgun Violence Prevention Act (1993)**  
**(18 U.S.C. § 922)**

With gun violence, as well as the accompanying societal and economic costs, reaching new levels,<sup>26</sup> Congress enacted the Brady Handgun Violence Prevention Act (“Brady Act”) in 1993.<sup>27</sup> Like the GCA, the Brady Act addresses the nationwide scourge of gun violence by restricting access to guns by dangerous people.<sup>28</sup> This is accomplished, in part, by the establishment of a background check system whereby background checks are conducted by gun dealers at the point of purchase.<sup>29</sup> Thus, pursuant to the Brady Act, the Attorney General established and maintains the National Instant Criminal Background Check System (NICS) within the FBI.<sup>30</sup> The Brady Act authorizes NICS to issue a denial of a gun purchase if it has concluded “that the receipt of a firearm” by the prospective

---

<sup>26</sup> See H.R. Rep. No. 324, 103d Cong., 2d Sess. 6 (1994), reprinted in 1994 U.S.C.C.A.N. 1802, 1803 (*citing* U.S. Dep’t of Justice, Federal Bureau of Investigation, Bureau of Justice Statistics Sourcebook of Criminal Justice Statistics -- 1992 at 357 and U.S. Dep’t of Justice, Federal Bureau of Investigation, Uniform Crime Reports for the United States 1992 at 10). See S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2116. See *Firearm Injuries Cost \$20 Billion a Year-Study*, Reuters, Jan. 7, 1994, available in LEXIS, News Library, Current News File. Contingent-valuation estimates intended to capture the complete social costs of gun violence suggest a value of around \$1 million per assault-related gunshot injury. Gun Violence: The Real Costs (Phillip J. Cook & Jens Ludwig eds., Oxford Univ. Press 2000).

<sup>27</sup> 18 U.S.C. § 922(s) (Supp. V 1993).

<sup>28</sup> See 18 U.S.C. § 922(s)(3)(B)(i)-(vii) (Supp. V 1993).

<sup>29</sup> Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s) (Supp. 1993).

<sup>30</sup> See 28 C.F.R. Part 25(A) (2006).

transferee “would violate” federal or state law.<sup>31</sup> Alternatively, NICS must issue a “proceed” response if it has concluded that such receipt “would not violate” federal or state law.<sup>32</sup> Gun dealers may sell a firearm to a buyer if NICS transmits a “proceed” response or if three business days have elapsed since the background check was begun. 18 U.S.C. § 922(t). Brady background checks have contributed to a historic decline in lethal assaults by blocking 1.9 million attempts by high-risk people to buy a gun from a licensed gun dealer.<sup>33</sup> The MFFA would exempt Montana-made guns from Brady background checks, making it much easier for guns to be purchased by dangerous people prohibited by federal law from possessing guns.

#### **4. Domestic Violence Offender Gun Ban (1996)**

##### **(18 U.S.C. § 922(g)(9))**

The Domestic Violence Offender Gun Ban<sup>34</sup> was an amendment to the Omnibus Consolidated Appropriations Act of 1997.<sup>35</sup> The Act is often referred to as “the Lautenberg Amendment” after its sponsor, Senator Frank Lautenberg. Congress enacted the Lautenberg Amendment to prevent dangerous domestic violence abusers from having access to firearms. Allowing convicted domestic

---

<sup>31</sup> 18 U.S.C. § 922(t)(1)(B)(ii) (emphasis added).

<sup>32</sup> 18 U.S.C. § 922(t)(2) (emphasis added).

<sup>33</sup> Bureau of Justice Statistics, *Background Checks for Firearm Transfers, 2009 - Statistical Tables*, Oct. 20, 2010.

<sup>34</sup> Pub. L. 104-208, 18 U.S.C. § 922(g)(9).

<sup>35</sup> Pub. L. No. 104-208, 110 Stat. 1303; 18 U.S.C. § 841.



violence abusers to arm themselves with firearms not only jeopardizes the abusers' family members, but also places law enforcement officers at a heightened risk of death or injury, causing a nationwide public safety issue. Indeed, the Supreme Court recently upheld a broad interpretation of this law, declaring that “[f]irearms and domestic strife are a potentially deadly combination nationwide.” *United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009).

Because domestic violence is a pervasive national epidemic, the Lautenberg Amendment was enacted to establish “zero tolerance when it comes to guns and domestic violence.”<sup>36</sup> As stated by Senator Lautenberg, “the amendment would prohibit any person convicted of domestic violence from possessing a firearm.”<sup>37</sup> Senator Lautenberg emphasized that the Amendment ensures “that a spouse abuser, wife beater, or child abuser should not have a gun.”<sup>38</sup>

The statute was passed to address “an estimated 2 million women [who] are victimized by domestic violence.”<sup>39</sup> The presence of a gun in a violent home substantially elevates the risk that domestic violence will turn deadly.<sup>40</sup> In fact, living in a home where there are guns increases the risk of homicide by 40 to 170%

---

<sup>36</sup> 142 Cong. Rec. S11872-01, 11878 (1996).

<sup>37</sup> 142 Cong. Rec. S11872-01, 11878 (1996).

<sup>38</sup> 142 Cong. Rec. S11872-01, 11878 (1996).

<sup>39</sup> 142 Cong. Rec. S10379-01, 10380 (1996).

<sup>40</sup> Shannon Frattaroli & Jon S. Vernick, *Separating Batterers and Guns*, 30 *Evaluation Rev.* 296 (2006); Emily F. Rothman et al, *Gun Possession Among Massachusetts Batterer Intervention Program Enrollees*, *Evaluation Review Vol.* 30 No. 3, 283 (June 2006).

and the risk of suicide by 90 to 460%.<sup>41</sup> When domestic violence incidents involve a firearm, the abuse is twelve times more likely to result in death compared to abuse incidents that do not involve a firearm.<sup>42</sup> In addition, allowing domestic violence abusers to access firearms is especially dangerous for law enforcement, with 14% of police officer deaths nationwide occurring during a response to domestic violence calls.<sup>43</sup> Since 1855, nearly 700 officers have lost their lives while responding to domestic disturbance calls, including 12 officers gunned down in these circumstances in 2009.<sup>44</sup> The MFFA would endanger domestic violence abuse victims and law enforcement by exempting Montana-made guns from this law.

##### **5. Juvenile Firearm Possession Ban (1994) (18 U.S.C. § 922)**

By 1994, Congress realized that it was necessary to prohibit the sale of handguns to, and the possession of handguns by, juveniles.<sup>45</sup> Spurring this realization was, among other things, an awareness that juvenile crime, which often

---

<sup>41</sup> Garen J. Wintemute, *Guns, Fear, the Constitution, and the Public's Health*, (Apr. 3, 2008), <http://content.nejm.org/cgi/content/full/NEJMp0800859> (last visited July 2, 2010).

<sup>42</sup> *Id.*

<sup>43</sup> National Law Enforcement Officers Memorial Fund, Domestic Violence Takes a Heavy Toll on the Nation's Law Enforcement Community, available at <http://www.nleomf.com/media/press/domesticviolence07.htm>.

<sup>44</sup> The Rose and Shield (Spring 2010), available at [http://www.nleomf.org/assets/pdfs/newsletters/the\\_rose\\_and\\_shield\\_spring\\_2010.pdf](http://www.nleomf.org/assets/pdfs/newsletters/the_rose_and_shield_spring_2010.pdf) (last visited July 2, 2010).

<sup>45</sup> See H.R. Rep. No. 103-711, at 390-91 (1994), reprinted in 1994 U.S.C.C.A.N. 1839, 1858-59.

involves both guns and drugs, was a pervasive, nationwide problem that could not be solved at the local level alone. Youth in our nation suffer a “rate of firearm trauma that is the highest in the industrialized world,<sup>46</sup>” such that fatal firearm injuries are the second-leading cause of death for young people between the ages of one and 19.<sup>47</sup> Studies have shown that access to firearms is the main factor leading to these firearms deaths and injuries.<sup>48</sup>

Congress realized that violent crime resulting from juvenile handgun use went “hand-in-hand”<sup>49</sup> with the use of illicit drugs. To attempt to control one without controlling the other, Congress concluded, would be fruitless.<sup>50</sup> Congress also understood that guns, illegal drugs, and criminal gangs were able to move easily across state lines.<sup>51</sup> This mobility allowed juveniles easy access to handguns, created an environment that allowed those juveniles to become violent

---

<sup>46</sup> For 15-year olds to 24-year olds, firearm homicide rates in the United States are 42.7 times higher than in the other countries. Richardson, Erin G., and David Hemenway, *Homicide, Suicide, and Unintentional Firearm Fatality: Comparing the United States With Other High-Income Countries*, 2003 () *Journal of Trauma, Injury, Infection, and Critical Care*, Jan. 7, 2011, available at <http://www.ncbi.nlm.nih.gov/pubmed/20571454> (last visited July 2, 2011).

<sup>47</sup> Judy Murnan, Joseph A. Dake, James H. Price, Association of Selected Risk Factors with Variation in Child and Adolescent Firearm Mortality by State, *Journal of School Health* (Oct. 2004).

<sup>48</sup> *Id.*

<sup>49</sup> See H.R. Rep. No. 103-711, at 390-91 (1994), reprinted in 1994 U.S.C.C.A.N. 1839, 1858.

<sup>50</sup> *Id.* at 1858-59.

<sup>51</sup> *Id.* at 1858.

criminals, and created a mentality that considered the random use of handguns to be acceptable.<sup>52</sup>

Moreover, this mobility prevented states from successfully targeting these illegal activities: “[i]ndividual States and localities find it impossible to handle the problem by themselves; even States and localities that have made a strong effort to prevent, detect, and punish crime find their efforts unavailing due in part to the failure or inability of other States and localities to take strong measures.”<sup>53</sup> It was clear that a national effort was needed to solve the problem of juvenile handgun possession and use so as to curtail both violent crime and illegal drug trafficking.<sup>54</sup>

The MFFA exempts Montana-made guns from the federal Juvenile Firearm Possession Ban, allowing teens 14 and over to possess handguns unsupervised, and thereby jeopardizing federal efforts to prevent the gun deaths and injuries caused by persons under 18.

**6. Prohibitions on Guns in School Zones and Federal Buildings (18 U.S.C. §§ 922(q), 930)**

Sixty-five students and six school employees were shot and killed at school during the academic years 1986 through 1990.<sup>55</sup> An additional 201 individuals

---

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1858-59.

<sup>54</sup> *Id.* at 1859.

<sup>55</sup> Center to Prevent Handgun Violence, Caught in the Crossfire: A Report on Gun Violence in our Nation's Schools (Sept. 1990), reprinted in Gun-Free School Zones Act of 1990: Hearing on H.R. 3757 Before the Subcomm. on Crime of the House

were severely wounded by firearms at school during that same period.<sup>56</sup> And 242 more were taken hostage at gunpoint on school premises.<sup>57</sup>

Congress responded to this alarming increase in gun violence in schools by enacting the Gun-Free School Zones Act.<sup>58</sup> The Act amended the existing federal criminal statute regulating the possession and sale of firearms in order to address the growing national problem of guns in and around schools. The Act prohibits any individual from knowingly possessing a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.<sup>59</sup>

Likewise, Congress acted to protect federal facilities from gun violence by barring the possession of firearms at buildings owned or leased by the federal government and federal court facilities. 18 U.S.C. § 930. The U.S. Supreme Court recently recognized the importance of keeping guns out of “sensitive places such as schools and government buildings,” declaring such laws to be “presumptively lawful” under the Second Amendment. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008).

---

Comm. on the Judiciary, 101st Cong., 2d Sess. 7 (1990) (statement of Rep. Feighan), p. 81. Between 2005 and 2010, one hundred individuals fell victim to on-campus shootings. *Major School Shootings in the United States Since 1997* (Dec. 2010), <http://www.bradycampaign.org/studies/view/140/> (last visited July 2, 2011).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 18 U.S.C. § 922(q)(1)(A).

<sup>59</sup> 18 U.S.C. § 922(q)(1)(A). A school zone is defined as a place in, on the grounds of, or within a distance of 1,000 feet from the grounds of a public, parochial or private elementary or secondary school. 18 U.S.C. § 921(a)(25).

In enacting the Gun-Free School Zones Act, Congress listed numerous factual findings concerning the nationwide impact of guns at schools, declaring that:

(A) crime, particularly crime involving drugs and guns, is a ***pervasive, nationwide problem***;

(B) crime at the local level is exacerbated by the ***interstate movement*** of drugs, guns, and criminal gangs;

(C) firearms and ammunition ***move easily in interstate commerce*** and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary [of] the House of Representatives and the Committee on the Judiciary of the Senate;

(D) even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made ***have considerably moved in interstate commerce***;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may ***fear to travel*** to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a ***decline in the quality of education in our country***;

(G) this decline in the quality of education has an ***adverse impact on interstate commerce*** and the foreign commerce of the United States;

(H) States, localities, and school systems find it ***almost impossible to handle gun-related crime by themselves***--even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts

unavailing due in part to the failure or inability of other States or localities to take strong measures; and

(I) *Congress has the power*, under the interstate commerce clause and other provisions of the Constitution, to enact measures such as the Gun-Free School Zones Act in order to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

18 U.S.C. § 922(q)(1)(A)-(I) (emphasis added).

In exempting Montana-made firearms from federal prohibitions on guns in sensitive places, the MFFA threatens the safety of school zones and the security of federal facilities, undermines federal efforts to prevent gun violence, and adversely impacts interstate commerce in all of the ways described by Congress.

7. **Federal Restrictions on Armor-Piercing Ammunition and Undetectable Firearms (18 U.S.C. §§ 922(a)(7)-(8) and (p))**

Federal law bans the manufacture or importation of armor-piercing ammunition and requires strict recordkeeping of the sale of armor-piercing ammunition. 18 U.S.C. §§ 922(a)(7) and (8); (b)(5). Armor-piercing ammunition poses a particular risk for law enforcement, as this ammunition can pierce police body armor. *See, e.g., Kodak v. Holder*, 342 Fed. Appx. 907 (4th Cir. 2009) (unpublished) (rejecting Second Amendment challenge to federal armor-piercing bullet restrictions because “armor-piercing ammunition is not in common use by law-abiding citizens for lawful purposes,” “has no application for hunters,” and “is frequently referred to as ‘cop-killer bullets’.”).

In 1988, Congress enacted the Undetectable Firearms Act, making it unlawful to “manufacture, import, ship, deliver, possess, transfer, or receive” any firearms not detectable “by walk-through metal detectors” or which “when subjected to inspection by the type of x-ray machines commonly used at airports, do not generate an image that accurately depicts the shape of” any major component thereof. 18 U.S.C. § 922(p)(1). Congress enacted this law to counter “the threat posed by firearms which could avoid detection at security checkpoints: airports, government buildings, prisons, courthouses, the White House.” H.R. Rep. No. 100-612, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 5359.

The MFFA undermines these federal efforts to protect against these particularly dangerous weapons, jeopardizing the safety of law enforcement as well as national security at airports and other sensitive locations.

#### **8. Federal Gun Dealer Licensing Requirements**

##### **(18 U.S.C. § 923)**

Federal law requires that anyone “engaged in the business” of manufacturing or selling firearms obtain a license. 18 U.S.C. § 923. Licensees are charged with keeping records of gun acquisitions and sales and conducting background checks on prospective buyers. *Id.* “When a firearms dealer ... fails to ensure that guns are sold to authorized persons, the public safety is directly and meaningfully implicated,” and this “is a significant factor in the prevalence of lawlessness and



violent crime in the United States.” *RSM, Inc. v. Herbert*, 466 F.3d 316, 324 (4th Cir. 2006) (*quoting* Omnibus Crime Control & Safe Streets Act of 1968, Pub.L. No. 90-357, § 901(a)(2), 82 Stat. 197, 225).

The MFFA purports to exempt all Montana-made guns from the requirements of federal law that anyone engaged in the business of selling firearms obtain a license and keep a record of all firearm sales. Because federal law does not allow the government to maintain records of gun ownership, 18 U.S.C. § 926, law enforcement generally can only trace a crime gun by using gun dealer records to determine the gun’s purchaser. Without these records, crime guns are usually untraceable. Federal law also allows the revocation of licenses of dealers who have willfully violated federal gun laws. 18 U.S.C. § 923(e). Because Montana law does not require a license to sell guns and does not prohibit willful violators of gun laws from engaging in the business of selling guns, the MFFA would make it much more difficult for law enforcement nationwide to solve crimes committed with Montana-made weapons.

**D. The District Court Properly Held that Federal Gun Regulations Do Not Interfere With the Second Amendment of the United States Constitution.**

The district court correctly held that the Second Amendment is not implicated in this case. Section 2(4) of the MFFA cites to the Second Amendment of the United States Constitution as support for the law. According to that section:

The second amendment to the United States constitution reserves to the people the right to keep and bear arms as that right was understood at the time that Montana was admitted to statehood in 1889, and the guaranty of the right is a matter of contract between the state and people of Montana and the United States as of the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.

However, federal gun regulations, identified above, do not interfere with the Second Amendment because they are reasonable gun violence prevention laws that protect the public without unduly interfering with the ability of “law-abiding, responsible citizens” to use firearms for self-defense in their home. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008). The Supreme Court’s recent Second Amendment decision does not place these laws in jeopardy. In *Heller*, the Court struck down the District of Columbia’s broad restrictions on handgun possession and use in the home because they did not allow for self-defense use.

128 S. Ct. at 2783. While the Court’s 5-4 decision was controversial,<sup>60</sup> it was also narrow: the Court made clear that it was only recognizing a right against the federal government for “law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 2821. Thus, the Court recognized only a limited right for citizens who were both “law-abiding” and “responsible,” and then only for gun use in the home for self-defense.<sup>61</sup>

As the district court properly noted, the recognition in *Heller* of a Second Amendment right to possess firearms in the home for self-defense does not restrict the ability of Congress to enact a comprehensive regulatory scheme relating to the intrastate manufacture and sale of firearms. The Court in *Heller* emphasized that the Second Amendment right is “not unlimited,” does not prevent a wide range of reasonable and “presumptively lawful” gun laws, and is certainly not a right to keep a gun “in any manner whatsoever.” *Id.* at 2816, 2817 n.26. According to the Court, “nothing in our opinion should be taken to cast doubt on longstanding

---

<sup>60</sup> See, e.g., Richard Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 33 (criticizing the “faux originalism” of Justice Scalia’s majority opinion); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 266-67 (2009) (arguing that historical evidence on both sides was equally strong and the majority should have deferred to the legislature rather than interject its own values on the text); Douglas Kmiec, *Guns and the Supreme Court: Dead Wrong*, TIDINGS ONLINE, July 11, 2008, available at <http://www.the-tidings.com/2008/071108/kmiec.htm> (arguing that a true originalist undertaking in *Heller* would have led to the exact opposite result).

<sup>61</sup> Moreover, as noted by the District Court, *Heller* did not extend Second Amendment protection to firearm manufacturers or dealers.

prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 2817. Thus, the Court’s narrow holding was that Mr. Heller had a right only to register his gun and obtain a license to carry it in his home if he was both “law abiding” and “responsible.”

Since *Heller*, there have been more than 400 challenges to federal gun laws, claiming that these gun laws violate the Second Amendment.<sup>62</sup> These challenges have been overwhelmingly rejected. *See, e.g., United States v. White*, 593 F.3d 1199, 1205-06 (11th Cir. 2010) (rejecting Second Amendment challenge to domestic violence abuser gun ban); *U.S. v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010) (rejecting Second Amendment challenge to felon gun ban); *Kodak v. Holder*, 342 Fed. Appx. 907 (4th Cir. 2009) (unpublished) (rejecting Second Amendment challenge to federal armor-piercing bullet restrictions); *U.S. v. Knight*, 574 F. Supp. 2d 224 (D. Me. 2008) (rejecting Second Amendment challenge to ban on gun possession by person subject to court order restraining such person from harassing, stalking, or threatening an intimate partner).

---

<sup>62</sup> Brady Center to Prevent Gun Violence, *Hollow Victory?, Gun Laws Survive Three Years After District of Columbia v. Heller, Yet Criminals and the Gun Lobby Continue Their Legal Assault*, June 2010, available at [http://www.bradycampaign.org/xshare/pdf/reports/Hollow\\_Victory.pdf](http://www.bradycampaign.org/xshare/pdf/reports/Hollow_Victory.pdf).

Thus, the MFFA's claim that the Second Amendment somehow allows states to exempt themselves from federal gun laws is wholly unsupported by the Supreme Court's explanation of the limited nature of the Second Amendment right in *Heller*.

**E. Conclusion**

The Commerce Clause grants the federal government authority to regulate firearms because such weapons are easily and frequently sold and traded across state lines and used in crimes that affect commerce. The MFFA's evasion of federal law would allow individuals to circumvent numerous safety measures,

///

///

///

///

///

///

///

///

///

///

including background checks, gun dealer licensing and record-keeping requirements, and would provide firearm access to minors, criminals and convicted domestic violence abusers. Such a result would threaten nationwide public safety. The district court order must be affirmed.

DATED this 27th day of July, 2011.

/s/ Gil N. Peles

Gil N. Peles  
*Attorney for Amici Curiae  
Brady Center to Prevent Gun  
Violence, International  
Brotherhood Of Police  
Officers, Hispanic American  
Police Command Officers  
Association, National Black  
Police Association, National  
Network To End Domestic  
Violence, Montana Human  
Rights Network, and Legal  
Community Against Violence.*

## CERTIFICATE OF COMPLIANCE

Pursuant to FRAP Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points, and the argument section contains 6,373 words, inclusive of footnotes.

DATED this 27th day of July, 2011.

/s/ Gil N. Peles

Gil N. Peles  
*Attorney for Amici Curiae  
Brady Center to Prevent Gun  
Violence, International  
Brotherhood Of Police  
Officers, Hispanic American  
Police Command Officers  
Association, National Black  
Police Association, National  
Network To End Domestic  
Violence, Montana Human  
Rights Network, and Legal  
Community Against Violence.*

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 27, 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.

DATED this 27th day of July, 2011.

/s/ Gil N. Peles

Gil N. Peles  
*Attorney for Amici Curiae  
Brady Center to Prevent Gun  
Violence, International  
Brotherhood Of Police  
Officers, Hispanic American  
Police Command Officers  
Association, National Black  
Police Association, National  
Network To End Domestic  
Violence, Montana Human  
Rights Network, and Legal  
Community Against Violence.*