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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MONTANA SHOOTING SPORTS ASSOCIATION, INC., *ET AL.*, Plaintiffs, vs. ERIC H. HOLDER, JR., Attorney General of the United States, Defendant.	Case No. 9:09-cv-147-DWM-JCL *AMICI CURIAE* BRIEF OF GUN OWNERS FOUNDATION, GUN OWNERS OF AMERICA, INC., AND VIRGINIA CITIZENS DEFENSE LEAGUE

ARGUMENT

I. THE MONTANA FIREARMS FREEDOM ACT DOES NOT CONFLICT WITH A CONSTITUTIONALLY-VALID FEDERAL LAW.

The current federal firearm licensure system began with enactment of the **Omnibus Crime Control and Safe Streets Act**, Pub. L. 90-351("OCCSSA") in June 1968. In the bill's Senate Report, Senators Dirksen, Hruska, Thurmond, and Burdick noted that the U.S. Department of Justice had supported the federal government's intrusion into the field of firearms regulation with the assurance "that a ban on **interstate** sale of firearms to individuals is not objectionable ... because **there would still be intrastate commerce** in these items." S. Rep. 1097, 90th Cong., 2nd Sess. ("S. Rep."), 1968 U.S.C.C.A.N., p. 2307 (emphasis added). Indeed, the firearms regulations as they first appeared in OCCSSA, and as later reenacted in October of 1968 in the **Gun Control Act of 1968**, Pub. L. 90-618 ("GCA"), do not purport to establish a comprehensive and exclusive set of rules governing both interstate and intrastate traffic in firearms. *See, e.g.,* 18 U.S.C. §§ 921(a)(2) and 922(a). However, both statutory schemes require licensure of manufacturers and dealers of firearms without regard to whether they are engaged in interstate commerce. *See* 18 U.S.C.§ 923.

At issue in this case is whether those licensure provisions preempt the recently-enacted **Montana Firearms Freedom Act** ("MFFA") (Montana Code Annotated ("MCA") § 30-20-101, *et seq.*), which establishes a wholly free intrastate firearms manufacturing and sales market and, if it does preempt MFFA, whether the GCA's firearm licensure system is unconstitutional because either (i) Congress exceeded its legislative powers, or (ii) it violates the Tenth and Second Amendments.

A. The Federal Law Requiring Licensure of All Firearms Manufacturers and Dealers Does Not Preempt the Montana Firearms Freedom Act.

Relying on Gonzales v. Raich, 545 U.S. 1 (2005), the Government argues that the "purely *intrastate* activities" of firearms manufacturing and marketing which the MFFA "purports to exempt from federal law do affect *interstate* commerce and thus are within Congress' power to regulate." Memorandum in Support of Defendant's Motion to Dismiss ("Mot. Dism."), pp. 21-23 (italics original). However, in Raich — unlike in the instant case — there was "no[] dispute that the [law in question] was well within Congress's commerce power." Raich, 545 U.S. at 15. Indeed, in Raich, the Supreme Court decided that the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 ("CDAPCA") (Pub. L. No. 91-513) comprehended the prohibition of the intrastate manufacture and possession of a controlled substance as an integral part of an

overall statutory scheme to prohibit the interstate "traffic in illicit drugs," to which state law had to give way. *Id.*, 545 U.S. at 10, 15-22. However, GCA and related federal firearms regulatory laws are quite different in both scope and purpose.

In its attempt to analogize the federal firearm licensure system to CDAPCA's comprehensive and nationalized policy governing "controlled substances," the Government relies on a Senate Report relating to OCCSSA — asserting that the current firearms licensure system is designed "to control ... interstate and foreign commerce in firearms." Mot. Dism., p. 23. The Government's reliance is mistaken. According to the Senate Report, "[t]he **principal purposes** of [the firearms regulations section of OCCSSA] are to aid in making it possible: (1) **to keep firearms out of the hands of those not legally entitled** to possess them because of age, criminal background, or incompetency, and (2) to **assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime** in the United States." S. Rep., 1968 U.S.C.C.A.N., pp. 2112-14 (emphasis added).

While the Senate Report also referenced Congress' power to regulate commerce, those references in no way support the Government's view that the firearms regulatory provisions of OCCSSA's Title IV, like CDAPCA in Raich, were designed to occupy the field to the exclusion of state and local regulations of intrastate concerns. To the contrary, the purpose for the supplemental "Federal

controls over interstate and foreign commerce" was "to **enable States** to effectively cope with the firearms traffic within their own borders" — to make possible more "effective State and local regulation,"[1] **not to displace** state regulations governing the "manufacturing or dealing in firearms," as the Government would have this Court believe. *Compare* Mot. Dism., pp. 22-23, *with* S. Rep., 1968 U.S.C.C.A.N., p. 2114. The federal firearms licensure law was passed in an effort to **"assist"** the States and local governments "in combating ... crime" — **not** to stand in the way of the States' exercise of their "police powers" "to effectively cope with the firearms traffic within their own borders."[2] *See* S. Rep., 1968 U.S.C.C.A.N., p. 2114.

Five months after the enactment of the federal firearms licensure provisions in OCCSSA, Congress reenacted the same licensure provisions in GCA, restating even more strongly that their purpose was to **assist state and local** governments in their effort to fight crime. Thus, the House Report accompanying the enactment of GCA stated that the Act, as a whole, was designed to "strengthen Federal regulation of **interstate** firearms traffic," in order to combat "[t]he increasing rate of crime and lawlessness and the growing use of firearms in violent crime." *See*

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[1] S. Rep., 1968 U.S.C.C.A.N., p. 2114 (emphasis added).

[2] To this day, regulation of intrastate private sales of firearms are governed by state law. *E.g.*, in Maryland, such sales must be reviewed by local police departments; in Virginia, government review is not required.

H. Rep. No. 1577, 90th Cong., 2nd Sess. 1968 ("H. Rep."), 1968 U.S.C.C.A.N., p. 4412 (emphasis added). Thus, the Report stated that the "principal purpose" of GCA wedded two mutually supportive goals: (1) "to strengthen **Federal controls over interstate and foreign commerce** in firearms"; and (2) "**to assist the States** effectively **to regulate** firearms traffic **within their borders**." *Id.* at 4411 (emphasis added).

Consistent with these mutually reinforcing ends, Congress denominated Title I of GCA — the title containing the federal firearms regulations, including the licensure provisions — "**State Firearms Control Assistance**." *See* Pub. L. 90-618, 82 Stat. 1213 (Oct. 22, 1968). With the enactment of GCA, Congress intended GCA's regulations, including licensure, to be supportive of state and local efforts to combat crime:

> The Congress hereby declares that the **purpose** of this title is to provide **support** to Federal, **State, and local** law enforcement officials in their **fight against crime and violence**. [Pub. L. 90-618, Sec. 101, 82 Stat.1213-14 (emphasis added).]

Additionally, Congress expressed its "purpose" that GCA's firearms regulations **not "place any undue or unnecessary burdens on law-abiding citizens** with respect to the **acquisition**, possession, or use appropriate to the purpose of hunting, trapshooting, target shooting, **personal protection**, or any other lawful activity." *Id.* (emphasis added).

Having designed the GCA firearms regulatory provisions to function in harmony with its goal of assisting state and local governments, Congress enacted section 927 of GCA (18 U.S.C. § 927), to ensure that "**no** provision of [GCA] 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 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 stand consistently together." (Emphasis added.) The Government disregards this section expressly limiting preemption, preferring to address the preemption issue as if it were unconstrained by the specific language of 18 U.S.C. section 927. However, when Congress enacts a statute that contains an "express" preemption provision, the statute governs. *See, e.g.,* New York Blue Cross v. Travelers Ins., 514 U.S. 645, 655 (1995).

In recognition that "Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearms accessories, and ammunition," the Montana legislature enacted MFFA. *See* MCA § 30-20-102(3). It did so pursuant to its general legislative powers and, in particular, as a safeguard to its constitution's Article II, section 12 — which secures to the people the right to keep and bear arms "in defense of his own home, person and property." Consistent with the GCA's statement of

purpose "not to place any undue or unnecessary burdens on law-abiding citizens with respect to [their] personal protection," the Montana state legislature has determined that "[a] personal firearm, a firearm accessory, [and] ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana" is permitted without the manufacturer obtaining a federal firearms license.

It is true that MFFA and section 923 of GCA (18 U.S.C. § 923) address the same subject matter — the manufacture and marketing of firearms. Generally, the federal law requires licensure; the state law provides a limited intrastate exemption. Based solely on that difference, the Government assumes that the two laws are in conflict. *See* Mot. Dism., p. 26. But the Government's argument is based upon a faulty premise — that the federal licensure provision is part of a congressionally-enacted comprehensive regulation of the traffic of firearms in interstate and foreign commerce, leaving no room for state regulation of intrastate manufacturing and marketing of such firearms for possession and use by Montanans in Montana. *See* Mot. Dism., pp. 26-28.

Both the text and legislative history of GCA reveal that there was no federal purpose to preempt the field. As detailed above, the overarching purpose of the federal firearms licensure system is to **assist** the state and local governments in their fight against crime, **including the facilitation of state laws "regulat[ing]**

firearms traffic within their borders." *See* H. Rep., 1968 U.S.C.C.A.N., p. 4411 (emphasis added). The Montana statute is precisely tailored to that purpose, applying only to the manufacture of a firearm "that remains within the borders of Montana." Thus, there is no "direct and positive conflict" between MFFA and 18 U.S.C. section 923. Nor is there a "direct and positive conflict" between MFFA and 18 U.S.C. section 922(a), because MFFA does not authorize either the shipment or the receipt of a firearm "in interstate or foreign commerce" by a Montana intrastate manufacturer or dealer. And, as GCA's section 921(a)(2) (18 U.S.C. § 921(a)(2)) explains — "interstate or foreign commerce," as it appears in 18 U.S.C. section 922(a), "includes 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**...." (Emphasis added.)

According to the test Congress set out in GCA's section 927 for this Court to apply, MFFA is neither in conflict with, nor preempted by, the GCA.

B. The Federal Law Requiring Licensure of All Firearms Manufacturers and Dealers Is Not the Product of a Valid Exercise of Congressional Power.

The Government asserts that "it is hornbook law that Federal law prevails [over MFFA] under the Supremacy Clause." Mot. Dism., p. 26. The Government fails to acknowledge, however, that, to be the Supreme Law of the land, a "Federal

law" must first pass the test that it was "made in Pursuance of" the Constitution. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

As discussed *supra*, the Government relies primarily, if not exclusively, upon Raich in support of its argument that GCA's federal licensure provisions are a valid exercise of Congress's power to "regulate commerce ... among the several states." *See* Mot. Dism., pp. 21-26. And, as previously noted, the constitutionality of the federal drug laws were not even contested in Raich. *See id.*, 545 U.S. at 15. Unlike Raich, the plaintiff here vigorously contends that the federal firearms licensure provision in 18 U.S.C. section 923 is an unconstitutional exercise of congressional power. *See* Complaint, ¶¶ 9, 15 and Prayer for Relief, ¶ A(ii). Thus, "Raich's holding" does **not** "apply here." *See* Mot. Dism., p. 22.

At no point does the Government examine whether GCA's licensure provisions are a regulation of interstate commerce; instead, it asks and answers only whether Congress' power to regulate interstate commerce could rationally reach the intrastate manufacturing and marketing of firearms as described in the MFFA. *See* Mot. Dism., pp. 22-26. The threshold question here, however, is whether the GCA's licensure provisions are constitutionally valid, either as a legitimate (i) exercise of Congress' power to regulate interstate commerce, or (ii) as a means to regulate such commerce under the Necessary and Proper Clause. *See* Raich, 545 U.S. at 34-38 (Scalia, J. concurring).

GCA section 923 requires federal licensure of any person "engage[d] in the business of ... manufacturing, or dealing in firearms." 18 U.S.C. § 923(a). The section 921(a)(21) definition of "engaged in the business" requires a person only to be "in a regular course of trade" **without any reference** whatsoever to whether his course of trade is in interstate or foreign commerce, or even whether that course of trade "affects commerce" in any way. *See* S. Rep., 1968 U.S.C.C.A.N., p. 2206. By definition, the power to require a federal firearms license of **all** firearms manufacturers and dealers "cannot come from the Commerce Clause alone," because a license is required even if the manufacturer or dealer is engaged solely in "intrastate activities." *See* Raich, 545 U.S. at 34 (Scalia, J., concurring). *See also* Gibbons v. Ogden, 22 U.S. at 194.

Accordingly, the question in this case is whether GCA section 923's licensure requirement may be justified as an exercise of power "[t]o make all laws which shall be necessary and proper for the carrying into execution of" the power to regulate interstate commerce. As Chief Justice Marshall ruled in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), under the Necessary and Proper Clause, Congress may regulate subjects that are not among its enumerated powers, so long as the object of that regulation is among those embraced by an enumerated power. Thus, Congress could create a national bank, even though such an act was not authorized by any enumerated power, so long as the bank was created for a

constitutionally-enumerated purpose, such as "to lay and collect taxes," as authorized by Article I, Section 8, Clause 1. *Id.*, 17 U.S. at 406-11. In reviewing any law enacted by Congress pursuant to the Necessary and Proper Clause, the Court laid down the time-honored rule:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. [*Id.*, 17 U.S. at 421.]

According to both the text of GCA and its legislative history dating back to OCCSSA, the "end" or "purpose" of the federal licensure provisions **cannot** be found to have established a nationalized system governing the interstate firearms traffic. Rather, repeatedly Congress expressed its purpose to be:

- keeping firearms out of the hands of certain undesirable persons. *See* S. Rep., 1968 U.S.C.C.A.N. at 2113.
- assisting state and local governments "in combating the increasing prevalence of crime in the United States." *Id.* at 2113-14.
- enabling "States to effectively cope with firearms within their own borders." *Id.* at 2114.
- making possible "effective State and local regulation of the firearms traffic." *Id.* at 2114.
- "State Firearms Control Assistance." Pub. L. 90-351, 82 Stat. 225 and Pub. L. 90-618, 82 Stat. 1213.

In GCA section 101, Congress explained that GCA's regulations were enacted to "support ... the[] fight against crime and violence" without placing

"undue or unnecessary restrictions or burdens on law-abiding citizens with respect to the **acquisition, possession, or use of firearms** appropriate to the purpose of ... **personal protection.**" Pub. L. 90-618, 82 Stat. 1213-14 (emphasis added).

In United States v. Lopez, 514 U.S. 549 (1995), a sharply-divided Court struck down a federal statute prohibiting the knowing possession of a firearm in a school zone. As divided as the Court was, "the majority and [dissenting] Justice Breyer agree[d] in principle: The Federal Government has nothing approaching a police power." *Id.*, 514 U.S. at 584-85 (Thomas, J., concurring). Quoting Chief Justice John Marshall, Justice Thomas reminded us that "Congress ha[s] 'no general right to punish murder committed within any of the States' [and] 'that Congress cannot punish felonies generally.'" *Id.*, 514 U.S. at 596. Such exercises of police power belong exclusively to the States. *See* United States v. DeWitt, 76 U.S. (9 Wall.) 41, 44-45 (1870).

Without question, the GCA licensure provision was designed from the beginning to help state and local government fight crime. Indeed, with the enactment of GCA, Congress **repealed** an earlier licensing system that was limited to manufacturers and dealers that transported, shipped or received firearms in **interstate or foreign commerce**, and extended it to "include one engaging in such a business in **intrastate** commerce." S. Rep., 1968 U.S.C.C.A.N., p. 2066 (emphasis added). While the former licensure law appeared in Title 15 of the

United States Code — Business and Trade, the new licensure provisions were enacted as part of Title 18 — Crimes and Criminal Procedure. This transposition drew "stiff opposition" because it "place[d] the regulation of legitimate firearms commerce in the Criminal Code,"[3] and for the obvious reason that the purpose of the new law, in contradistinction to the old, was to fight crime, not to regulate interstate and foreign commerce in firearms. *See id.* at 2296-97.

Just as there is no enumerated power vesting in Congress any legislative power to fight crime, there is no such authority to assist state and local governments to fight crime. *See* United States v. Morrison, 529 U.S. 598, 618-19 (2000). Rather, authority to combat crime comes with the police power. And as Justice Thomas observed in Lopez, the Supreme Court *always* ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Id.*, 514 U.S. at 584 (italics original). *Accord*, Morrison, 529 U.S. at 618-19. The current federal firearms licensure system embodied in section 923 of Title 18, therefore, is unconstitutional.

C. The Federal Law Requiring Licensure of All Firearms Manufacturers and Dealers Violates the Tenth Amendment by Usurping Police Powers.

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[3] *Id.*, p. 2296 (Individual Views of Messrs. Dirksen, Hruska, Thurmond, and Burdick on Title IV).

In 1986, Congress enacted the **Firearms Owners' Protection Act** ("FOPA"), a finding of which states that "the rights of citizens ... against unconstitutional exercise of authority under the ninth and **tenth amendments** ... require additional legislation to correct existing firearms statutes and enforcement policies." Pub. L. 99-308, 100 Stat. 449 (May 19, 1986) (emphasis added). Additionally, in the enactment of FOPA, Congress "reaffirm[ed] the intent of Congress, as expressed in [GCA], that 'it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition ... or use of firearms appropriate to the purpose of hunting, ... personal protection, or any other lawful activity...." *Id.* Thus, FOPA's "purpose" was "to further numerous constitutional rights guaranteed to firearms owners by correcting substantial deficiencies in the Federal firearms laws." *See* S. Rep. 98-583, 98th Cong., 2nd Sess., p. 1 (Aug. 6, 1984).

Among those deficiencies were several "undue and unnecessary burdens" imposed by GCA's licensure system upon lawful ownership and use of firearms. Of special concern was the definition of who was "engaged in the business" of manufacturing and dealing in firearms — the standard by which it was determined whether a person was required to obtain a federal license. *Id.* at 7-9. By shrinking the class of persons required to obtain a federal license, FOPA widened the door for the manufacture and marketing of firearms by unlicensed persons, thereby

facilitating the transfer of firearms (i) by correcting "the broad reading which courts had given" to the GCA licensing system (*id.* at 7), and (ii) by restoring perfectly "legitimate methods and avenues of commerce in firearms" that had been foreclosed by the original OCCSSA/GCA licensure system, as its critics had previously maintained. *See* S. Rep., 1968 U.S.C.C.A.N., pp. 2290-91.

MFFA is designed to achieve the same goals. The Montana state legislature has taken the initiative to exercise its police power — a "power[] not delegated to the United States by the Constitution, nor prohibited by it to the States" — to open a free, wholly-intrastate market in firearms. *See* MCA § 30-20-102(1) and (3). The state legislature has determined that by facilitating an intrastate market in firearms, the people of Montana would have more ready access to firearms for "defense of his own home, person, and property." MCA § 30-20-102(5). In our system, it is the business of the state, not federal, government, to attend to "the objects, which, in the ordinary course of affairs, concerns the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." J. Madison, *Federalist No. 45,* p. 241 (Liberty Fund, Indianapolis: 2001). To rule against Montana's MFFA would turn this federalist principle upside down, transforming Congress into the primary legislative protector of the "internal order" of the State of Montana, instead of leaving that power in the state legislature as "agreed upon and adopted by Montana and the United States in

1889," the year that Montana was admitted to statehood. *See* MCA § 30-20-102(1).

II. FEDERAL LAW REQUIRING LICENSURE OF ALL FIREARMS MANUFACTURERS AND DEALERS VIOLATES THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS.

As noted above, the federal firearm licensure system originated with the enactment of OCCSSA in June 1968. In remarks submitted with the Senate Report accompanying such enactment, Senators Dirksen, Hruska, Thurmond, and Burdick observed that the Department of Justice had advised Congress that the Second Amendment should be no barrier to the enactment of the OCCSSA firearms provisions because the "amendment applies only to the organized militia" and "that individual rights were not contemplated at the time of the adoption of the amendment." S. Rep., 1968 U.S.C.C.A.N., p. 2307.

Indeed, the entire range of firearms regulations in America, from 1934 through 1968 and to the present, including OCCSSA was developed on the assumption that the Second Amendment secured only a collective right. While the enactment of FOPA in 1986 was based, in part, on a finding of "the rights citizens to keep and bear arms under the second amendment," the corrective measures undertaken by that Act fell far short of the changes needed to bring federal firearms law into conformity with an individual Second Amendment right.

With the Supreme Court's decision in District of Columbia v. Heller, 554 U.S. __, 128 S. Ct. 2783 (2008), the Second Amendment has been definitively determined to secure an individual right. It is often said that with the attacks on the World Trade Center and the Pentagon on September 11, 2001 — "everything changed." Certainly with the Heller decision, everything changed relating to the federal regulation of firearms in America. While the entire regulatory scheme developed by Congress will require re-evaluation,[4] this case necessitates only a re-examination of the GCA firearms licensure provisions.

A. The Federal Law Requiring Licensure of All Firearms Manufacturers and Dealers Is Designed to Deter Lawful Firearm Possession and Ownership.

Federal Firearms Licensees ("FFLs") operate each day under a mountain of federal laws and regulations. Largely as a result of these complex and burdensome regulations, the number of FFLs has plummeted, from 284,000 in 1993 to 109,000 in 2007 — and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE") asserts that tightening congressional and administrative rules are in large measure responsible for this decline.[5] An American cannot keep

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[4] *See, e.g.,*, Brief Amicus Curiae of Gun Owners Foundation and Gun Owners of America, Inc. In Support of Appellant and Reversal, United States v. Skoien, U.S. Court of Appeals for the Seventh Circuit, Docket No. 08-3770 (Apr. 2, 2010), pp. 7-12.

[5] Fact Sheet, ATF, "Decline in the Number of Federal Firearms Licenses" (June 2008).

and bear that which he cannot acquire. Therefore, the exercise of the Second Amendment rights of Americans to acquire arms is currently bottlenecked through those relatively-few remaining FFLs. If Congressional regulation and BATFE drive this number of federally-sanctioned dealers down much further, the Second Amendment could be undermined not by overt restrictions on Americans' right to own firearms such as the ban struck down in Heller, but via "reasonable regulations" which impair their ability to acquire them.

It is no wonder that FFLs are losing or voluntarily relinquishing their licenses. FFLs are not only responsible for keeping abreast of new laws and regulations as they appear, but they are also required to monitor their customers to make sure they too are complying with federal law.[6] Even the list of required forms on the ATF website is off-putting.[7] Failure to measure up to these requirements can result not only in revocation of the FFL's license, but also civil penalties, civil forfeiture, and criminal penalties including imprisonment for up to

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http://www.atf.gov/publications/factsheets/factsheet-decline-in-ffls.html.

[6] This, too, was forecast by early opponents of the licensure scheme. *See* S. Rep., 1968 U.S.C.C.A.N., p. 2291.

[7] *See* http://www.atf.gov/forms/firearms/.

10 years.[8] In 2005, the BATFE summarized federal laws applicable to FFLs — a booklet consisting of 242 pages of small print.[9]

Under GCA, before dealing in firearms, an applicant must apply for, and be granted, a federal firearms license. 18 U.S.C. § 923(a). The application process itself is daunting. For reasons that are not clear, BATFE does not even post the application on its website.[10] The applicant must notify his local law enforcement officials that he plans to apply for a license, even before he does so. 18 U.S.C. § 923(d)(1)(F)(iii); ATF Form 5300.36. He must provide his photograph and fingerprints, and certify that he is in compliance with all state and local laws, and that the firearms will be stored in a way that protects them from theft. 18 U.S.C. § 923(d)(1)(G); ATF Forms 5310.12 and 5300.42. He must pay a $200 fee for the first three years, a $90 renewal fee every three years after that, and if he fails to

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[8] Indeed, in 1968, opponents of the licensure system forewarned that "commercial firearms dealers would be subjected to severe federal criminal sanctions without the ability to safeguard or protect themselves against liability." S. Rep., 1968 U.S.C.C.A.N., p. 2291.

[9] BATFE, "Federal Firearms Regulations Reference Guide," ATF Publication 5300.4 (rev'd September 2005) http://www.atf.gov/publications/download/p/atf-p-5300-4.pdf.

[10] The website explains vaguely "[b]ecause of legal reasons, and the requirement of fingerprint cards and photographs, the Form 7 cannot be posted on our site." ATF F5310.12 (Form 7), http://www.atf.gov/forms/download/atf-f-5310-12-notice.html.

renew on time, must pay the higher initial fee and file additional forms.[11] 18 U.S.C. § 923(a)(3)(B).

If he is "granted" a license, such license is good only for the address listed on the license. If a FFL does business at a location with more than one address (for example, a store consisting of two attached units with different street addresses), he must obtain a separate license for each. 26 C.F.R. § 478.50. He may not transfer the license to another person if he sells the business. 26 C.F.R. § 478.51. If he wants to move, he must file an application to amend the license. *Id.* The FFL must at all times keep a copy of the license, along with various forms and notifications, posted conspicuously at the place of business. 26 C.F.R. § 478.103.

The FFL must immediately assist with all criminal investigations, or investigations determining the disposition of firearms. 18 U.S.C. § 923(g). Additionally, he must immediately submit to surprise inspections by BATFE to ensure compliance with inventory, storage, and records requirements, all without warrant or allegation of wrongdoing. *Id.*

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[11] From the beginning, it was feared that the license fee schedule, alone, was "unreasonable and discriminatory against small business." *See* S. Rep., 1968 U.S.C.C.A.N., p. 2291.

A FFL must forever maintain a "bound book" of all acquisitions and dispositions of firearms that come through the business. 26 C.F.R. § 478.124-25. He can be sanctioned for abbreviating words like "Junior" or "Montana" in his records. Any errors may be considered by BATFE to be "willful" record-keeping violations, resulting in possible suspension, and even revocation, of the license, as well as a fine and up to a one-year incarceration. *See* 18 U.S.C. §§ 922(m) and 924(a)(3).

If transferring a firearm to or from another FFL, a FFL must first obtain a copy of the other FFL's license. 26 C.F.R. § 478.94. If a FFL ships a firearm interstate to a person other than a FFL, it could bring up to five years in prison. *See* 18 U.S.C. §§ 922(a)(2) and 924(a)(1)(D).

For every transfer of a firearm to an individual, a FFL must obtain a fully and properly completed Form 4473,[12] containing great detail about the purchaser. The FFL must then run an "instant" (instant only in name) criminal background check on the National Instant Criminal Background Check System ("NICS") for each purchaser, and may only transfer the firearm if and when approval is received. 18 U.S.C. § 922(t). If the FFL knowingly transfers a firearm to a person without first running a NICS check, there is a potential fine and imprisonment for

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[12] *See* ATF Form 4473 http://www.atf.gov/forms/download/atf-f-4473.pdf.

one year. 18 U.S.C. § 924(a)(5). If it turns out that the transferee was ineligible, there is also the potential of an administrative six-month suspension of the FFL's license, and a $5,000 fine. 18 U.S.C. § 922(t)(5).

If the FFL knowingly sells a firearm to a person in another state, he may be liable for up to five years imprisonment, along with forfeiture of the firearm involved in the transaction. 18 U.S.C. §§ 922(b) and 924(d). If a FFL knowingly transfers the firearm to a person ineligible under 18 U.S.C. section 922(d), the potential term of imprisonment is 10 years, along with forfeiture. 18 U.S.C. § 924(d).

The FFL must retain the Forms 4473 for not less than 20 years for completed purchases, and five years for attempted sales. If a buyer purchases more than two handguns within a period of five business days, the FFL must file a form with both federal and local law enforcement by the close of the same business day. *See* 18 U.S.C. § 923(g)(3); 26 C.F.R. § 478.126a; and ATF Form 3310.4.

In the event a firearm is misplaced or is stolen, even from his private collection, the FFL has 48 hours to report the event to both his local law enforcement and BATFE, and must keep records thereof. 18 U.S.C. § 923(g)(6); 26 C.F.R. § 478.39(a).

If a FFL goes out of business, he has 30 days to turn over all records, along with his bound book, to BATFE. He must also follow detailed procedures for disposing of any remaining inventory. 26 C.F.R. § 478.57.

Every handgun a FFL sells must be accompanied by a "secure gun storage or safety device" (a gun lock, in almost all cases). Failure to do so may result in a suspension of the license for six months and a $2,500 fine per occurrence. 18 U.S.C. § 924(p). Violation of this requirement need not be willful to incur these penalties. Thus, if a FFL forgets to place even one gun lock into one customer's bag, the FFL may lose his license.

Viewed as a whole, the regulatory burdens imposed on the FFL can be viewed as nothing less than extreme hostility to the industry on which most Americans rely to begin the exercise of their Second Amendment right to keep and bear arms.

B. The Federal Law Requiring Licensure of All Firearms Manufacturers and Dealers Operates as an Unconstitutional Prior Restraint on Firearms Possession and Ownership.

As Senators Dirksen, Hruska, Thurmond, and Burdick observed in their remarks dissenting to the enactment of OCCSSA's firearm provisions, the Second Amendment is "[o]ne of the great pillars upon which the constitutional framework of this Nation rests." S. Rep., 1968 U.S.C.C.A.N., p. 2307. "There are," they wrote, "two highly significant aspects about this provision of our Bill of Rights":

> This first is a specific command of the language: "the right of the people to keep and bear arms **shall not be infringed**." The second is the place the amendment occupies: it comes **immediately after** the amendment respecting religion, free speech, **free press**, peaceable assembly and petition for redress of grievances. **The position of the second amendment certainly indicates its preferred status in the constitutional scheme.** [*Id.*, at 2307 (emphasis added).]

In Heller, the Supreme Court observed that, according to its prefatory clause, the purpose of the Second Amendment right to keep and bear arms was thought "to be 'necessary to the security of a free state.'" *Id.*, 128 S. CT. at 2800. Likewise, according to Blackstone, "[t]he liberty of the press is ... essential to the nature of a free state." 4 William Blackstone, Commentaries on the Laws of England, p. 151 (U. Of Chi. Facsimile ed. 1769).

At the heart of the freedom of the press is the rule against the Government "laying no *previous* restraints upon publications." *Id.* (italics original). According to this principle, the Government has no power to impose a licensure requirement **as a condition of entry** into the marketplace of ideas, but only the power to punish its misuse. *Id.* at 151-52.

This is — and has been — the rule governing the application of the First Amendment's prohibition against "Congress ... mak[ing] no law ... abridging the freedom ... of the press." *See* Near v. Minnesota, 283 U.S. 697 (1931); New York Times Co. v. United States, 403 U.S. 713 (1971). Seventy-four years ago, a unanimous Supreme Court intervened to protect the publishers of politically-

disfavored newspapers in the State of Louisiana from a special tax. Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936). The Court explained that "the First Amendment ... was meant to **preclude** the national government ... from adopting **any form of previous restraint** upon printed publications, or their circulation." *Id.* at 249 (emphasis added). Even prior to Grosjean, the Court explained that, if the Government had licensure power over the press, it could "censor" views critical of government officials, robbing the people of their precious liberties. *See* Near, 283 U.S. at 709-14. After Grosjean, Justice Black writing for himself and Justice Douglas summarized the reason for the prohibition against licensure of the press:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. **The press was to serve the governed not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could ... inform the people.** [New York Times, 403 U.S. at 717 (emphasis added).]

As the press is free from government licensure to "inform" the people, the firearms industry must be free from such licensure to "arm" the people. As freedom from the licensure of the press is essential to a free state, so freedom from the licensure of the firearms industry is necessary to ensure a people prepared to "resist tyranny" by means of a well-regulated "citizen's militia," as affirmed in Heller (128 S. CT. at 2800-02). As pointed out above, the federal system of

licensure of firearm manufacturers and dealers is designed to serve the governors, not the governed. Indeed, any system of government licensure of firearm manufacturing and marketing would, like a system of government licensure of the press, enable the Government to exercise tyrannical powers, thereby destroying the very right of the people to keep and bear arms that is secured by the Second Amendment.

How could the federal licensing scheme outlined *supra* be viewed, other than as a prior restraint on the Second Amendment individual right to purchase a firearm, so that the purchaser could "keep and bear" it? If there can be no "previous restraint" on First Amendment press rights, why should there be a different rule for Second Amendment firearms rights? Without ready access to purchasing new firearms, the Second Amendment right becomes hollow as firearms age and deteriorate. The right to keep and bear arms presupposes the right to purchase new and used firearms — and that right of access must operate without prior restraint by civil government. The Government is limited by the Second Amendment to enacting laws against misuse of the weaponry within its umbrella of protection.

At times like these, it is vital for courts to return to first principles — including the role of government in a country where the people, not the government, is sovereign. The government's role is limited to punishing

wrongdoing by the people, and to reward their good works.[13] The government's role is not to restrict the rights of all in a way that it believes will be beneficial for the people. Such a decidedly unconstitutional objective logically and inexorably leads **not** to the free state that was intended, but to the creation of a surveillance society and a police state — by which government attempts to suppress the people ostensibly to prevent wrongdoing.

C. The Federal Law Requiring Licensure of All Firearms Manufacturers and Dealers Infringes on the Sovereign Power of the People Reserved by the Tenth Amendment.

The Tenth Amendment is often mischaracterized as a reservation of "State's rights." *See* http://en.wikipedia.org/wiki/States'_rights. Rather, the amendment reserves "**powers**," not "rights," and the powers reserved belong not only to the States, but "to the people." As Joseph Story observed in his Commentaries on the Constitution, the purpose of this express reservation was to secure to the people their "residuary sovereignty." 2 Joseph Story, Commentaries on the Constitution, § 1907, p. 652 (5th ed.1891). According to the Declaration of Independence, that residual sovereignty includes "the right of the people to alter or abolish" the current form of government, if that government ceases to secure their God-given rights of life, liberty and the pursuit of happiness. According to Heller, the right

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[13] *See, e.g.,* Romans 13:4 ("For he is the minister of God to thee for good ... a revenger to execute wrath upon him that doeth evil.").

of the people to keep and bear arms is designed "to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Id.*, 128 S. CT. at 2801.

Among the purposes of MFFA in creating an intrastate market free from licensure by either the federal or the state government is to preserve the people's right to keep and bear arms. *See* MCA § 20-30-102(4). As such, MFFA respects and protects the "residual sovereignty" of the people, consistent with the Tenth Amendment's reservation of the powers of the people.

CONCLUSION

For the reasons stated, the Government's motion to dismiss should be denied.

Respectfully submitted this 13 day of April, 2010.

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CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED, as required by Local Civil Rule 7.1(d)(2)(A), that this *Amici Curiae* Brief of Gun Owners Foundation, Gun Owners of America, Inc., and Virginia Citizens Defense League contains 6,434 words, excluding the parts of the document that are exempted, thus complying with the word limit listed in Rule 7.1(d)(2)(A).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon the persons named below by mailing, hand-delivery, Federal Express, or by telecopying to them a true and correct copy of said document. Dates this 13th of April, 2010.

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