NLWJC - Kagan

Counsel - Box 022- Folder 009

Franking

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

19-Jan-1996 01:32pm

TO: Paul J. Weinstein, Jr

FROM: Elena Kagan
Office of the Counsel

SUBJECT: franking

The bottom line is that both OLC and I would feel perfectly comfortable defending the constitutionality of your franking proposal. There are a couple of litigation risks, and there may be ways to frame the proposal so as to minimize those risks. Give me a call when you have time, and we'll discuss.

Telecon Pam Harris 1/19/96

OK

Litig risks

1) 10A issue - sounds as if state m'ls would be handing out.

10A q under NY

Like in Brady legislation (background checks)

OLC says Brady law is const

Much more minimal here - a fortiori - 9th Circuit decision upholding law.

One way of getting around -

mkg stamps avail to st m'ls to pass out (but not req'ing them to do)

This would elim risk altogether

2) Linking stamps to vtg

1A vt not to vote (Circuit ct - 4th cir - identifying such a vt)

↓ ⇒ diff. context.

Even if so - this vt is not directly burdened by mkg this minor benefit available.

one way to minimize -

link to registration (have to show up to get stamps - on election day)

Prob no vt not to register ⇒

3) Ways of trying to do this -

to elim any const concern

Make stamps more generally available

800 number??

Mt not be much more expensive?

Fed m'ls would administer.

- The House should allow public inspection and copying of all unsolicited mass mailings. Current House rules only permit public inspection of a limited number of mailings per day and no copying is allowed.

- The House and Senate should disclose all mass mailing expenditures to the public before an election, not after election.

While these reforms would go a long way towards cleaning up the unfairness in the franking system, we recommend bolder action: Eliminate the frank for unsolicited mass mailings altogether and give a citizen's frank to the American people.

According to Roll Call, at least half the franking budget goes for unsolicited mail. Others say it could be as high as 95%. We propose to eliminate franking privileges for unsolicited mail and use the savings to pay for providing the frank to the American people. This citizen's frank could also apply to the letters to the White House.

Under this proposal, any American who votes during a Presidential election would receive 10 "Democracy Stamps". These stamps, which would have the same value as a first class postage stamp, could be used for sending letters to Members of Congress or the President and the Cabinet. A new edition of the "Democracy Stamp" would be produced every four years.

Advantages

- Will encourage voter participation in democratic process.
- Will increase constituent access to Members of Congress.
- Banning unsolicited franking will eliminate abuse of the franking privilege and will be seen as a significant campaign reform.

Disadvantages

- May be viewed as gimmicky.
- May not encourage voter turnout significantly.

Budget Savings

Budget costs/savings are estimated to be roughly neutral.

DRAFT

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APPENDIX 1

Cost Estimates For Democracy Stamp

1. Total votes cast for President since 1972:
1972 -- 77.7 million
1976 -- 81.5 million
1980 -- 86.5 million
1984 -- 92.6 million
1988 -- 91.5 million
1992 -- 104.4 million

2. Average increase in total votes each four-year election cycle equals 5.3 million
Assume voter turnout in 1996 Presidential election to be (104.4 + 5.3) 109.7 million.

3. Current cost of U.S. postal stamp:
= $0.32.

4. Workout:
Each American will be given 10 "Democracy Stamps" every four years.
3.2 x 109.7 million = 351 million.
351 / 4 = 87.7

Estimated annual cost of "Democracy Stamp" program = $87.7 million.

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APPENDIX 2

Estimated Savings from Banning of Unsolicited Frank Privileges

1. House Franking Costs:

According to the U.S. Post Office the House of Representatives has spent the following on franking since 1991:

1991 $58.9 million
1992 $93.3 million
1993 $92.4 million
1994 $71.4 million
1995 $40 million
1996 $46.6 million

Average annual franking cost $67 million

2. Senate Franking Costs:

Senate official mail costs since 1991:

1991 $30 million
1992 $20 million
1993 $20 million
1994 $20 million
1995 $11 million
1996 $11 million

Average annual franking cost $18.6 million.

3. Unsolicited Franking as a Percentage of Total Franking Costs:

According to Roll Call, at least 50 percent of all franking costs are for unsolicited mail. Others have estimated unsolicited mail costs as high as 95 percent. For the purpose of this estimate, we have taken the average of these two estimates for mass, unsolicited mailings, which is 72.5 percent, and have applied it to the total House and Senate average annual franking costs.

4. Workout:

.725 x 67 = 48.5
.725 x 18.6 = 13.4
48.5 + 13.4 = 61.9

Average annual unsolicited franking cost = $61.9 million

CLOSE HOLD

DRAFT

Repeal The Frank And Give It To The American People

Background

One of the biggest perks for Congressional incumbents is the franking privilege, which gives Members the right to mail whatever they want without stamps. Many critics have stated that the congressional newsletter, which supposedly keeps constituents informed about what's happening in Congress, is merely a propaganda tool for reelection. The Senate decided to ban sending unsolicited postage-free mail, a 219 year-old practice, in this midterm election cycle. It will save $9 million in fiscal year 1995. House members have continued stuffing mailboxes at the taxpayers expense.

According to the National Taxpayers Union Foundation (NTUF), House members spent $62.9 million on franked mail in '93-'94. The study found that:

- The average House member spent $143,026 on franked mail during the first 21 months of the 103rd Congress; the average retiring member spent $39,238;

- House incumbents saved vast amounts of their annually allocated franking money until the final months of 1993 and 1994 to blitz their districts with mailings as close to the 1994 election as possible. December 1993 and August 1994 accounted for nearly one-fifth (18% of all House franking expenditures in the 103rd Congress;

- The $62.9 million far exceeds the $40.8 million in campaign contributions raised by the 1,041 Congressional challengers between January 1, 1993 and June 30, 1994.

Apparently the new Republican Freshman of the 104th Congress have discovered the virtue of the frank. Of the top ten freshman frankers so far, eight are Republicans, including Tom Davis, who introduced a bill earlier this year to cut franking budgets by one-third.

Proposal -- Eliminate the Frank for Congress and Give it to the American People.

Several reform proposals of the frank have been suggested by public interest organizations: These include:

- The House should follow the Senate's lead and endorse an election-year ban on unsolicited mass mailings. In off-years it should adopt the same member-by-member restrictive dollar limits on the use of the frank. NTUF estimates this would save $40 million per Congress.

U. S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

Date: January 19, 1996

FACSIMILE TRANSMISSION SHEET

FROM: Pam Harris OFFICE PHONE: 514-3658

TO: Elena Kagan OFFICE PHONE: 456-7594

NUMBER OF PAGES: 42 PLUS COVER SHEET

FAX NUMBER: 456-1647

REMARKS:

Elena,

Here are the 9th Cir. decision on the Brady law and the DOJ brief filed in the 5th Cir. (decision still pending). We happen to have the 5th Cir. materials in the office because Walter argued the case. Let me know if you want me to track down a copy of the appellant's brief, too.

Pam

ANY QUESTIONS, PLEASE CONTACT KATHLEEN MURPHY ON 514-2057 OR KEVIN SMITH ON 514-2067

OFFICE OF LEGAL COUNSEL FAX NUMBER - 514-0563
FTS - 368-0563

66 F.3d 1025
64 USLW 2169, 95 Cal. Daily Op. Serv. 7123, 95 Daily Journal D.A.R. 12,151
(Cite as: 66 F.3d 1025)

Richard MACK, Sheriff of Graham County, Arizona, Plaintiff-Appellee-Cross-Appellant,
v.
UNITED STATES of America, Defendant-Appellant-Cross-Appellee.
Jay PRINTZ, Sheriff/Coroner, Ravalli County, Montana, Plaintiff-Appellant-Cross-Appellee,
v.
UNITED STATES of America, Defendant-Appellee-Cross-Appellant.

Nos. 94-16940, 94-17002, 94-36193 and 95-35037.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 11, 1995.

Decided Sept. 8, 1995.

County sheriff sought to enjoin enforcement of provisions of Brady Handgun Violence Prevention Act imposing requirements on chief law enforcement officers. The United States District Court for the District of Montana, Missoula Division, Charles C. Lovell, J., 854 F.Supp. 1503, found the criminal penalty provision inapplicable but held the background check requirement to be unconstitutional. Another county sheriff brought a separate action to declare the Brady Act unconstitutional. The United States District Court for the District of Arizona, John M. Roll, J., 856 F.Supp. 1372, found that the criminal provisions applied to law enforcement officers but were void for vagueness and that the background search requirement was unconstitutional. Cross-appeals were taken and were consolidated. The Court of Appeals, Canby, Circuit Judge, held that: (1) interim provisions requiring local law enforcement officials to conduct background searches did not violate Tenth Amendment; (2) claims that criminal provisions applied to law enforcement officers and were void for vagueness were unripe; and (3) duties imposed upon sheriff did not violate Thirteenth Amendment.

Affirmed in part, reversed in part and remanded.

Fernandez, Circuit Judge, filed separate opinion concurring in part and dissenting in part.

[1] COMMERCE ⚷ 82.50
83k82.50
Brady Act, regulating sale of handguns, amends comprehensive federal scheme for regulation of firearm sales that unquestionably affect interstate commerce, as does handgun violence. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[2] COMMERCE ⚷ 12
83k12
Tenth Amendment merely states truism that all powers that have not been surrendered to United States are retained by states or the people and does not purport to limit commerce power or any other enumerated power of Congress. U.S.C.A. Const. Art. 1, § 8, cl. 3; Amend. 10.

[2] STATES ⚷ 4.16(2)
360k4.16(2)
Tenth Amendment merely states truism that all powers that have not been surrendered to United States are retained by states or the people and does not purport to limit commerce power or any other enumerated power of Congress. U.S.C.A. Const. Art. 1, § 8, cl. 3; Amend. 10.

[3] STATES ⚷ 4.16(2)
360k4.16(2)
Tenth Amendment confirms that power of federal government is subject to limits that may in a given instance reserve power to the states. U.S.C.A. Const.Amend. 10.

[4] STATES ⚷ 4.16(2)
360k4.16(2)
Federal government may secure assistance of state authorities in achieving federal legislative goals either directly, by coercing states and their employees into complying with federal laws of general applicability, or indirectly, in conditioning grant of federal

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funds on states' taking governmental action desired by Congress. U.S.C.A. Const.Amend. 10.

[5] STATES ⚷ 4.16(2)
360k4.16(2)
Federal government may enlist state employees in implementing federal programs by requiring state judicial and administrative bodies to apply federal law or by offering to preempt regulation in a given area and permitting states to avoid preemption if they regulate in manner acceptable to Congress. U.S.C.A. Const.Amend. 10.

[6] STATES ⚷ 4.16(2)
360k4.16(2)
Interim requirement of Brady Act that chief law enforcement officers of prospective handgun purchasers' places of residence make reasonable effort to ascertain lawfulness of purchases was not unusually jarring to system of federalism, in that obligation imposed on state officers was no more remarkable than federally-imposed duties of state officers to report missing children or traffic fatalities. U.S.C.A. Const.Amend. 10; 18 U.S.C.A. § 922(s)(1, 2), (s)(6)(B)(i), (s)(6)(C); 23 U.S.C.A. § 402(a); Crime Control Act of 1990, § 3701(a), 42 U.S.C.A. § 5779(a).

[6] WEAPONS ⚷ 3
406k3
Interim requirement of Brady Act that chief law enforcement officers of prospective handgun purchasers' places of residence make reasonable effort to ascertain lawfulness of purchases was not unusually jarring to system of federalism, in that obligation imposed on state officers was no more remarkable than federally-imposed duties of state officers to report missing children or traffic fatalities. U.S.C.A. Const.Amend. 10; 18 U.S.C.A. § 922(s)(1, 2), (s)(6)(B)(i), (s)(6)(C); 23 U.S.C.A. § 402(a); Crime Control Act of 1990, § 3701(a), 42 U.S.C.A. § 5779(a).

[7] STATES ⚷ 4.16(2)
360k4.16(2)
Tenth Amendment prohibits federal coercion of state's enactment of legislation or regulations or creation of administrative program, which are inherently essential acts of a sovereign for which it is politically accountable; by contrast, when federal government itself imposes requirement on state official to implement federal regulatory program, requirement is act of federal government and does not undermine political accountability of state officials. U.S.C.A. Const.Amend. 10.

[8] STATES ⚷ 4.16(2)
360k4.16(2)
Brady Act interim requirement that local law enforcement officials perform background checks of handgun purchasers did not embody mandate to states or impose such burdensome federal duties on states' individual employees as would violate Tenth Amendment; state law enforcement officials were not commanded to engage in central sovereign process of enacting legislation or regulations or to produce state policy for which state would be politically accountable, but were required merely to check computer records and to explain reasons for rejection when and if disappointed purchasers requested, activities not alien to officials' usual line of work and which represented minimal interference with state functions. U.S.C.A. Const.Amend. 10; 18 U.S.C.A. § 922(s)(2), (s)(6)(C).

[8] WEAPONS ⚷ 3
406k3
Brady Act interim requirement that local law enforcement officials perform background checks of handgun purchasers did not embody mandate to states or impose such burdensome federal duties on states' individual employees as would violate Tenth Amendment; state law enforcement officials were not commanded to engage in central sovereign process of enacting legislation or regulations or to produce state policy for which state would be politically accountable, but were required merely to check computer records and to explain reasons for rejection when and if disappointed purchasers requested, activities not alien to officials' usual line of work and which represented minimal interference with state functions. U.S.C.A. Const.Amend. 10; 18 U.S.C.A. § 922(s)(2), (s)(6)(C).

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[9] STATES ⚷ 4.16(2)
360k4.16(2)
Assuming that "structuralist test" articulated by Supreme Court in Garcia, under which states are protected from overreaching by federal government primarily by workings of national government itself rather than in discrete limitations on objects of federal authority, is applicable to Brady Act, which imposes waiting period for purchase of handgun and subjects purchaser to background check, Brady Act does not violate Tenth Amendment under test, inasmuch as affected states are not deprived of any right to participate in national political process or singled out in a way that leaves them politically isolated and powerless. U.S.C.A. Const.Amend. 10; 18 U.S.C.A. § 1922(s).

See publication Words and Phrases for other judicial constructions and definitions.

[9] WEAPONS ⚷ 3
406k3
Assuming that "structuralist test" articulated by Supreme Court in Garcia, under which states are protected from overreaching by federal government primarily by workings of national government itself rather than in discrete limitations on objects of federal authority, is applicable to Brady Act, which imposes waiting period for purchase of handgun and subjects purchaser to background check, Brady Act does not violate Tenth Amendment under test, inasmuch as affected states are not deprived of any right to participate in national political process or singled out in a way that leaves them politically isolated and powerless. U.S.C.A. Const.Amend. 10; 18 U.S.C.A. § 1922(s).

See publication Words and Phrases for other judicial constructions and definitions.

[10] CONSTITUTIONAL LAW ⚷ 46(1)
92k46(1)
Question of whether criminal sanctions of Brady Act applied to chief law enforcement officers, subjecting them to criminal liability for failing to make reasonable effort to ascertain whether particular handgun purchase would violate the law, or of whether application of sanctions to officers was unconstitutionally vague was not ripe where plaintiff sheriffs had not been charged with criminal violations under Brady Act and did not face credible threat of prosecution. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. §§ 922(s), 924(a)(5).

[11] CONSTITUTIONAL LAW ⚷ 83(2)
92k83(2)
Brady Act interim requirement that background checks on prospective handgun purchasers be performed by chief law enforcement officer of prospective purchaser's place of residence did not coerce county sheriff into federal service in violation of Thirteenth Amendment; duties imposed by Brady Act as condition of employment as sheriff were not placed on sheriff personally and he could escape all compulsion by quitting work. U.S.C.A. Const.Amend. 13; 18 U.S.C.A. § 922(s).

[11] WEAPONS ⚷ 3
406k3
Brady Act interim requirement that background checks on prospective handgun purchasers be performed by chief law enforcement officer of prospective purchaser's place of residence did not coerce county sheriff into federal service in violation of Thirteenth Amendment; duties imposed by Brady Act as condition of employment as sheriff were not placed on sheriff personally and he could escape all compulsion by quitting work. U.S.C.A. Const.Amend. 13; 18 U.S.C.A. § 922(s).

*1027 David T. Hardy, Tucson, AZ, for plaintiff-appellee-cross-appellant Mack.

Mark I. Levy, United States Department of Justice, Washington, DC, for defendant-appellant-cross-appellee United States of America.

Stephen P. Halbrook, Fairfax, VA, for plaintiff-appellant-cross-appellee Printz.

Jonathan K. Baum, Katten, Muchin & Zavis, Chicago, IL, for amicus United States Senator Paul Simon.

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Richard A. Cordray, Assistant Attorney General, Columbus, OH, for amicus State of Ohio.

James H. Warner, Fairfax, VA, for amicus Law Enforcement Alliance of America.

Randolph D. Moss, Wilmer, Cutler & Pickering, Washington, DC, for amicus Handgun Control, Inc., et al.

Appeals from the United States District Court for the District of Arizona.

Appeals from the United States District Court for the District of Montana.

Before: CHOY, CANBY, and FERNANDEZ, Circuit Judges.

Opinion by Judge CANBY; Partial Concurrence and Partial Dissent by Judge FERNANDEZ.

CANBY, Circuit Judge:

Sheriffs Richard Mack and Jay Printz, in separate actions, challenged the constitutionality of the Brady Handgun Violence Prevention Act, P.L. 103-159, 107 Stat. 1536 (1993), codified at 18 U.S.C. § 922(s). The main issue on appeal concerns the district courts' respective holdings that section 922(s)(2) of the Brady Act, requiring local law enforcement officials to perform background checks of handgun purchasers, violates the Tenth Amendment. We conclude that the Act is constitutional, and we accordingly reverse the judgments of the district courts.

FACTS

The Brady Act, passed in 1993 as an amendment to the Gun Control Act of 1968, imposes a waiting period of up to five days for the purchase of a handgun, and subjects purchasers to a background check during that period. [FN1] See 18 U.S.C. § 922(s)(1). Within five years from the effective date of the Act, such checks will be performed instantaneously through a national criminal background check system maintained by the Department of Justice, 18 U.S.C. § 922(t), but in the meantime the background checks must be performed by the Chief Law Enforcement Officer (CLEO) of the prospective purchaser's place of residence. 18 U.S.C. § 922(s)(2). The Act requires CLEOs to "make a reasonable effort to ascertain ... whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law...." Id. The CLEO performs the check on the basis of a sworn statement signed by the buyer and provided to the CLEO by a federally-licensed gun dealer. 18 U.S.C. § 922(s)(1)(A). If the CLEO approves the transfer, he or she must destroy the buyer's statement within twenty business days after the statement was made. *1028 18 U.S.C. § 922(s)(6)(B)(i). If the CLEO disapproves the transfer, the CLEO must provide the reasons for the determination within twenty business days if so requested by the disappointed purchaser. 18 U.S.C. § 922(s)(6)(C).

FN1. The waiting period and background check prescribed by the Act are not required in States that have permit systems meeting standards prescribed by the Act. 18 U.S.C. § 922(s)(1)(C), (D).

Richard Mack and Jay Printz, as sheriffs, are the CLEOs in their respective jurisdictions of Graham County, Arizona, and Ravalli County, Montana. They brought these actions in their local federal district courts to challenge the Brady Act's provisions imposing duties upon them. Mack and Printz both invoked the Tenth and Fifth Amendments. Mack also challenged the Act as violating the Thirteenth Amendment.

Both district courts held that section 922(s)(2) of the Act, by imposing on the sheriffs a mandatory duty to conduct background checks, violated the Tenth Amendment as interpreted by the Supreme Court in New York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). See Mack v. United States, 856 F.Supp. 1372 (D.Ariz.1994); Printz v. United States, 854 F.Supp. 1503 (D.Mont.1994). [FN2] Neither court enjoined the provisions of the Act requiring CLEOs to explain the reasons for rejecting a purchase application, § 922(s)(6)(C), and requiring

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destruction of records, § 922(s)(6)(B). The Printz decision noted that the requirement of a statement of reasons became optional once the mandatory background check was invalidated, and that the provision for destruction of records was "de minimis."

FN2. Four other district courts have ruled on whether the interim provisions of the Brady Act violates the Tenth Amendment. See Romero v. United States, 883 F.Supp. 1076 (D.La.1995) (provisions of Brady Act requiring CLEOs to perform background checks, destroy sworn statements, and provide written response to those denied a handgun, held unconstitutional); Frank v. United States, 860 F.Supp. 1030 (D.Vt.1994) (provision of Brady Act requiring CLEOs to perform background checks unconstitutional); McGee v. United States, 863 F.Supp. 321 (S.D.Miss.1994) (same); Koog v. United States, 852 F.Supp. 1376 (W.D.Tex.1994) (interim provisions not unconstitutional).

In Mack, the district court also held that the criminal provisions of the Act applied to CLEOs, and were void for vagueness under the Fifth Amendment because they made it a crime for CLEOs to fail to make a "reasonable effort" to ascertain the lawfulness of a prospective handgun purchase. The Printz court held that the criminal provisions did not apply to CLEOs. Finally, the Mack court rejected Mack's Thirteenth Amendment challenge. Both district courts held that the invalid portions of the Act were severable, and accordingly refused to hold the entire Act unconstitutional.

In both actions, both sides appealed. [FN3] The sheriffs primarily dispute the holdings of severability, while the United States contends that the entire Act is constitutional. [FN4]

FN3. Handgun Control, Inc., et al., Senator Paul Simon, and the State of Ohio, have filed briefs as amici curiae in support of the United States. The Law Enforcement Alliance of America filed an amicus curiae brief in support of Mack.

FN4. The United States also argues that, if the disputed provisions are unconstitutional, the injunction should prevent enforcement only against the two sheriffs because they did not bring class actions. Our disposition of the appeal makes it unnecessary for us to address this contention.

ANALYSIS

I. THE TENTH AMENDMENT CHALLENGE

[1] No one in this case questions the fact that regulation of the sales of handguns lies within the broad commerce power of Congress. [FN5] The issue for decision is whether the manner in which Congress has chosen to regulate in the Brady Act violates the Tenth Amendment.

FN5. Nor is any question raised by the Supreme Court's recent decision in United States v. Lopez, -- U.S. —, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), holding that Congress lacked authority under the commerce clause to enact the Gun Free School Zones Act. Unlike the statute in Lopez, the Brady Act regulates the sale of handguns and thus directly regulates commerce. The Brady Act is an amendment to a comprehensive federal scheme for the regulation of firearms sales that unquestionably affect interstate commerce. The legislative history of the Brady Act also contains findings that gun violence affects commerce, and we accept those findings. See H.R.Rep. 103-344, 103rd Cong., 1st Sess., reprinted in 1993 U.S.C.C.A.N. 1984, 1985.

*1029 [2] The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." U.S. Const. amend. X. As a textual matter, therefore, the Tenth Amendment "states but a truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 124, 61 S.Ct. 451, 462, 85 L.Ed. 609 (1941). By its terms, the Amendment does not purport to limit the commerce power or any other enumerated power of Congress.

[3] In recent years, however, the Tenth Amendment has been interpreted "to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of

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federalism derived generally from the Constitution." South Carolina v. Baker, 485 U.S. 505, 511 n. 5, 108 S.Ct. 1355, 1360 n. 5, 99 L.Ed.2d 592 (1988). Thus, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." New York v. United States, 505 U.S. 144, 157, 112 S.Ct. 2408, 2418, 120 L.Ed.2d 120 (1992). The question before us is whether the Brady Act, by requiring CLEOs to perform background checks on handgun purchasers, transgressed such an implied limitation on federal power. We conclude that it did not.

[4] There are numbers of ways in which the federal government is permitted to secure the assistance of state authorities in achieving federal legislative goals. First and most directly, the federal government may coerce the states and their employees into complying with federal laws of general applicability. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). [FN6] Second, Congress may condition the grant of federal funds on the States' taking governmental action desired by Congress. South Dakota v. Dole, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

FN6. It is true that this principle was rejected for certain state functions in National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), but National League of Cities was expressly overruled in Garcia, 469 U.S. at 557, 105 S.Ct. at 1020-21, and Garcia remains the law controlling us.

[5] These broad categories do not exhaust, however, the means by which the federal government can enlist state employees in implementing federal programs. State judicial and administrative bodies may be required to apply federal law. Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947); FERC v. Mississippi, 456 U.S. 742, 760-61, 102 S.Ct. 2126, 2137-38, 72 L.Ed.2d 532 (1982). The federal government may offer to preempt regulation in a given area, and permit the states to avoid preemption if they regulate in a manner acceptable to Congress. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 290-91, 101 S.Ct. 2352, 2367-68, 69 L.Ed.2d 1 (1981).

The federal government has been permitted effectively to compel the states to issue registered rather than bearer bonds. South Carolina v. Baker, 485 U.S. 505, 514, 108 S.Ct. 1355, 1361-62, 99 L.Ed.2d 592 (1988). Finally, the federal government has been permitted to require state utility regulators to consider prescribed federal standards in determining regulatory policies. FERC v. Mississippi, 456 U.S. at 765, 102 S.Ct. at 2140-41. In the course of the latter ruling, the Supreme Court referred to and rejected the "19th century view" that "Congress has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." Id. at 761, 102 S.Ct. at 2138 (quoting Kentucky v. Dennison, 24 How. 66, 107, 16 L.Ed. 717 (1861)). That view, said the Court, "is not representative of the law today." Id. "The federal government has some power to enlist a branch of state government ... to further federal ends." Id. 456 U.S. at 762, 102 S.Ct. at 2139.

[6] Against this background, there would appear to be nothing unusually jarring to our system of federalism in the Brady Act's requirement that CLEOs, during a five-year interim period, "make a reasonable effort to ascertain" the lawfulness of handgun purchases. The obligation imposed on state officers by the Brady Act is no more remarkable *1030 than, say, the federally-imposed duties of state officers to report missing children, 42 U.S.C. § 5779(a), or traffic fatalities, 23 U.S.C. § 402(a).

Mack and Printz, however, contend that the precedential background set forth above was changed by New York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), and that the federal government is now flatly precluded from commanding state officers to assist in carrying out a federal program. We do not read New York that broadly.

Although we concede that there is language

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in New York that lends support to the view of Mack and Printz, that language must be interpreted in the context in which it was offered. New York was concerned with a federal intrusion on the States of a different kind and much greater magnitude than any involved in the Brady Act. The constitutional evil that New York addressed was one recognized by several of the cases already cited: the federal government was attempting to direct the States to enact their own legislation or regulations according to a federal formula.

New York involved the constitutional validity of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b et seq. The part of the Act that the Court found to violate the Tenth Amendment was the so-called "take title" provision. Under that provision, a State that failed to regulate radioactive waste according to congressional standards was simply given title to the waste within its borders (which previously would have been in private hands). The waste then became the total responsibility of the State as owner. The alternative to this unacceptable prospect was for the State to legislate or regulate in a manner that Congress dictated, and "a direct order to regulate, standing alone, would ... be beyond the authority of Congress." Id. at 176, 112 S.Ct. at 2428. Thus, in response to the government's argument that a strong federal interest supported the "take title" provision, the Court in New York stated: "whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable federal regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation." Id. at 178, 112 S.Ct. at 2429. In the same vein was the Court's conclusion after reviewing the debates at the time of the founding of the Constitution:

> We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. E.g., FERC v. Mississippi.... The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

Id. at 166, 112 S.Ct. at 2423.

Other decisions of the Supreme Court have recognized this proposition that the federal government cannot coerce States into performing the ultimately sovereign acts of legislating or regulating in a manner specified by the federal government. In Virginia Surface Mining, the Court noted that the provision of an alternative of federal regulation rendered federal standards for state regulation permissible; because the State had a constitutional option, "there can be no suggestion that the Act commandeers the legislative processes by directly compelling them to enact and enforce a federal regulatory program." Virginia Surface Mining, 452 U.S. at 288, 101 S.Ct. at 2366 (emphasis added). Similarly, in FERC v. Mississippi, the Court noted that the federal command that the State "consider" federal alternatives was constitutional because "[t]here is nothing in PURPA 'directly compelling' the States to enact a legislative program." FERC v. Mississippi, 456 U.S. at 765, 102 S.Ct. at 2141.

New York, then, is best read as a case that draws a line already partly delineated in Virginia Surface Mining and FERC v. Mississippi: the federal government is not entitled to coerce the States into legislating or regulating according to the dictates of the federal government. Certainly New York did not purport to overrule Virginia Surface *1031 Mining or FERC v. Mississippi, or even to disavow the latter decision's rejection of the nineteenth century view that the federal government cannot command state employees. New York can be read consistently with these cases as an instance where "the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, cf.

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New York." United States v. Lopez, — U.S. ---, ---, 115 S.Ct. 1624, 1642, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring); see also Board of Natural Resources v. Brown, 992 F.2d 937, 947 (9th Cir.1993) ("direct commands to the states to regulate according to Congress's instructions" "violate the Tenth Amendment as interpreted by New York"). [FN7]

FN7. Thus we conclude that when the Court in New York stated that "[t]he Federal Government may not compel States to enact or administer a federal regulatory program," the Court meant "administer" in the sense of being in charge of a program and making policy decisions with respect to the program. New York, 505 U.S. at 188, 112 S.Ct. at 2434-35.

[7] There are good reasons for focusing Tenth Amendment concern on federal coercion of a State's enactment of legislation or regulations or creation of an administrative program. These activities are inherently central acts of a sovereign; if an area of state activity is to be protected from direct coercion by an implication drawn from the Tenth Amendment, legislating and regulating are prime candidates. "[T]he power to make decisions and to set policy is what gives the State its sovereign nature." FERC v. Mississippi, 456 U.S. at 761, 102 S.Ct. at 2138. There is a second reason, also, emphasized in New York itself. Democratic governments must be politically accountable. When the federal government requires the States to enact legislation, the enacted legislation is state legislation. Thus, it will likely "be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." New York, 505 U.S. at 169, 112 S.Ct. at 2424. When the federal government itself imposes a requirement on a state official, the requirement is more clearly an act of the federal government and thus does not, to the same extent, undermine political accountability. [FN8]

FN8. We recognize that some individuals may criticize local officials for implementing federal regulations. But when federal regulations are imposed by the federal government, political accountability by the federal government for those regulations remains.

[8] The Brady Act is not the kind of a federal mandate condemned by New York, nor does it present the concerns related above. The Brady Act does not embody a mandate to the "States" in the sovereign sense discussed in New York, FERC v. Mississippi, or Virginia Surface Mining. The Brady Act is a regulatory program aimed at individuals and not the States. It is true that, for a limited period of time, the Act requires state law enforcement officials, the CLEOs, to make reasonable efforts to assist in carrying out the federal program. But the CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations. They are not even being asked to produce a state policy, for which the state must bear political accountability. Instead, they are directed to serve for a temporary period as law enforcement functionaries in carrying out a federal program. Their activities are not alien to their usual line of work, and represent a minimal interference with state functions. In that sense, their duties are not different from other minor obligations that Congress has imposed on state officials.

Mack and Printz do not agree that the Brady Act's interference with their state duties is minimal. They point out that there are many factors that may make a prospective handgun purchase illegal under the Act. A purchase is unlawful, for example, if the purchaser is a fugitive, is an unlawful user of a controlled substance, has been adjudicated a mental defective, has been dishonorably discharged from the armed forces, has renounced his citizenship, or is under certain restraining orders involving an intimate partner. 18 U.S.C. § 922(g). They also contend that it will be unduly burdensome to give reasons for rejecting a proposed purchase, *1032 within 20 days of being requested by the disappointed purchaser. See § 922(s)(6)(C). Mack and Printz point out that they are sheriffs in rural

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counties with limited staffs and resources. To research for all of these disabilities and to give reasons for rejection, Mack and Printz argue, will either take all of their time or so much of it that they will be unable to perform their regular county duties.

The government, on the other hand, argues that there is no requirement that CLEOs pursue all of these avenues of potential disqualification. They are enjoined only to "make a reasonable effort," § 922(s)(2), and the statute's only fixed requirement is a search in whatever recordkeeping systems are available and in a national system. Id. A reasonable effort, the government contends, might in the circumstances of Mack and Printz simply be a check of the existing computer records.

We agree, and the government concedes, that there is likely to be some point at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment. Surely the federal government cannot stall the state government in its tracks by imposing all-consuming federal duties on the State's employees. We conclude, however, that the Brady Act does not approach that point. Mack and Printz have not demonstrated that the Act will interfere unduly with their duties. Indeed, to a considerable degree, the dispute over the magnitude of the burden imposed upon them is not ripe for resolution. Mack and Printz have not been subjected to any interpretation of the Act, or any attempt to enforce it against them, that requires them to do more than check computer records. On this record, we cannot conclude that "a reasonable effort" inevitably requires more than this minimum for Mack and Printz. To perform such computer checks, and to explain reasons for rejection when and if disappointed purchasers so request, has not been shown to constitute the kind of interference with state functions that would raise Tenth Amendment concerns. It follows even more strongly that the minimal requirement of destruction of records presents no constitutional problem.

[9] We also find no support for the Tenth Amendment claims of Mack and Printz in the cases from our circuit that they cite. See Board of Natural Resources v. Brown, 992 F.2d 937 (9th Cir.1993); United States v. Best, 573 F.2d 1095 (9th Cir.1978); Brown v. Environmental Protection Agency, 521 F.2d 827 (9th Cir.1975), vacated as moot 431 U.S. 99, 97 S.Ct. 1635, 52 L.Ed.2d 166 (1977). [FN9] In Board of Natural Resources we held that the Forest Resources Conservation and Shortage Relief Act violated the Tenth Amendment. Board of Natural Resources, 992 F.2d at 947. That Act however--akin to the statute in New York--required the States to issue regulations and was far more demanding of state officials than the Brady Act. See Board of Natural Resources, 992 F.2d at 947. Best applied the National League of Cities governmental function test, Best, 573 F.2d at 1102, which has been abandoned. See Garcia Metropolitan Transit Authority, 469 U.S. at 531, 105 S.Ct. at 1007 (overruling National League of Cities). And Brown, like Board of Natural Resources, involved regulations that clearly intruded upon a state's sovereignty, unlike the contested provisions of the Brady Act. See Brown, 521 F.2d at 829-830 (State had to develop and implement plan for implementing, enforcing, and maintaining national air standards). Additionally, Brown relied upon the Tenth Amendment view espoused in Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107, 16 L.Ed. 717 (1861), overruled by Puerto Rico v. Branstad, 483 U.S. 219, 107 S.Ct. 2802, 97 L.Ed.2d 187 (1987), that "the Federal Government ... has no power to impose on a State officer, as such, any duty whatsoever...." See Brown, 521 F.2d at 841. As the Supreme Court has made clear, the view espoused in Kentucky v. Dennison is no longer representative of the law. ***1033** FERC, 456 U.S. at 761, 102 S.Ct. at 2138. [FN10] We therefore reject Mack's and Printz's Tenth Amendment challenges to the Brady Act. [FN11]

FN9. Although the Supreme Court vacated Brown, on remand we stated: "Except as modified herein, we continue to regard, or once more adopt if necessary, our opinion in Brown I as the law of this circuit." Brown v. EPA, 566 F.2d 665, 666 (9th Cir.1977). For reasons discussed later in the text,

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however, the precedential value of Brown is limited.

FN10. The Law Enforcement Alliance of America, as Amicus Curiae, argues that the method by which the Brady Act was enacted violates the "structuralist" test articulated by Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), under which the States are protected from overreaching by the federal government primarily by "the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority." Id. at 552, 105 S.Ct. at —. The Court in New York has indicated that Garcia is limited to statutes that subject "a State to the same legislation applicable to private parties." New York, 505 U.S. at 160, 112 S.Ct. at 2420. But even if we assume that Garcia's structuralist test were applicable, we cannot accept the Law Enforcement Alliance's view that the Brady Act would fail the test. There is no showing that the States affected were "deprived of any right to participate in the national political process" or were "singled out in a way that left [them] politically isolated and powerless." South Carolina v. Baker, 485 U.S. at 513, 108 S.Ct. at 1361.

FN11. Because we hold that the Brady Act does not violate the Tenth Amendment, we do not consider whether section 922(s)(2) is severable from the remainder of the Act, or whether the district courts erred in issuing injunctions that applied statewide.

II. THE FIFTH AMENDMENT VAGUENESS CHALLENGE

[10] Section 924(a)(5) of the Act provides that "[w]hoever knowingly violates subsection (s)" of the Act is subject to fine or imprisonment or both. Mack and Printz contend that this provision subjects them to criminal liability for failing to "make a reasonable effort" to ascertain whether a particular purchase would violate the law, as required by section 922(s)(2). So construed, the criminal provision is unconstitutionally vague, according to Mack and Printz, because a person of reasonable intelligence has no way of knowing what may constitute a "reasonable effort."

It is not at all clear, however, that section 924(a)(5) is intended to apply to the Act's requirements imposed upon CLEOs. Indeed, the Montana district court viewed the criminal prohibition as ambiguous in that regard, and concluded that it did not apply to CLEOs.

We decline to reach this issue, however, because it is not ripe. [FN12] Mack and Printz have not been charged under the Act with any criminal violations, nor are they likely to be. The United States represented during oral argument that the Justice Department's official position is that the criminal sanctions of the Brady Act do not apply to CLEOs. Because Mack and Printz do not face a "credible threat of prosecution," San Francisco County Democratic Cent. Comm. v. Eu, 826 F.2d 814, 821 (9th Cir.1987), aff'd 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989), there is no "case or controversy." See Campbell v. Wood, 18 F.3d 662, 680 (9th Cir.), cert. denied, — U.S. —, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994). [FN13] In the extremely unlikely event that a criminal prosecution is one day brought against a CLEO, the constitutional objection may be raised in defense at that time.

FN12. Mack and Printz also make a vagueness argument based on their exposure to civil proceedings. Neither Mack nor Printz has been subjected to civil proceedings, nor have they pointed to any civil proceeding to which they would be subject that would violate the Fifth Amendment. In any event, because this issue was not raised below, we decline to reach it.

FN13. Mack and Printz also suggest that they need not face a reasonable threat of prosecution. None of the cases that they cite support this proposition, however. See Board of Natural Resources, 992 F.2d at 945 (plaintiff showed injury in fact); Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) (Court did not reach the justiciability issue); Beacon Journal Pub. Co. v. Unger, 532 F.Supp. 55, 58 (N.D.Ohio 1982) (plaintiff showed injury in fact); Brown v. EPA, 521 F.2d at 831 & 829 n. 1 (the EPA had already given a notice of violation.); Gentile v. State Bar, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (plaintiff charged with violation); Babbitt v. Farm Workers, 442 U.S. 289, 299-300, 99 S.Ct.

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2301, 2309-10, 60 L.Ed.2d 895 (even though plaintiffs did not face an imminent threat of prosecution, statute was "sure to work the injury alleged," and so Court found a case or controversy).

We therefore vacate the ruling of the District Court of Arizona that the criminal provisions apply to CLEOs and are void for vagueness, as well as the ruling of the District *1034 Court of Montana that the criminal provisions do not apply to CLEOs. These claims are to be dismissed as unripe.

III. THE THIRTEENTH AMENDMENT CHALLENGE

[11] Mack also challenges the Brady Act as violating the Thirteenth Amendment. The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime ... shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII. According to Mack, section 922(s) requires him to perform labor for the United States or face legal sanctions, even though he is not a federal employee.

Unlike a slave, however, Mack can quit work at any time. By doing so, he escapes all compulsion. The requirements of the Brady Act are not placed on Mack personally; the duties that are imposed attend the office. Thus the Brady Act does not coerce Mack "by improper or wrongful conduct" into service by causing and intending to cause him "to believe that he ... has no alternative but to perform the labor." Brogan v. San Mateo County, 901 F.2d 762, 764 (9th Cir.1990) (citation omitted). The fact that Mack, if he continues to be sheriff, must perform certain duties as a condition of his employment, does not violate the Thirteenth Amendment. Cf. United States v. 30.64 Acres of Land, 795 F.2d 796, 800-01 (9th Cir.1986) (requiring lawyers to perform pro bono services does not violate Thirteenth Amendment because requirement is a condition of practicing law).

CONCLUSION

The Brady Act violates neither the Tenth nor Thirteenth Amendment. Mack and Printz's Fifth Amendment vagueness challenge is not ripe. Accordingly, the district courts' injunctions prohibiting the United States from enforcing the disputed provisions of the Brady Act are vacated, and the district courts' judgments are reversed insofar as they invalidate portions of the Act. The portions of the cross-appeal in Mack and the appeal in Printz that challenge the district courts' rulings of severability are dismissed as moot; in all other respects the rulings challenged by Mack and Printz, are affirmed. The cases are remanded with instructions to dismiss the vagueness challenges as unripe. The United States is entitled to its costs on appeal.

No. 94-16940 (Appeal by United States) REVERSED.

No. 94-17002 (Cross-appeal by Mack) AFFIRMED in part and DISMISSED in part.

No. 94-36193 (Appeal by Printz) AFFIRMED in part and DISMISSED in part.

No. 95-35037 (Cross-appeal by United States) REVERSED.

FERNANDEZ, Circuit Judge, concurring and dissenting.

I concur in parts II and III of the majority opinion, but I respectfully dissent from part I. [FN1]

FN1. Given the majority's decision, I see no need to discuss the criminal provisions of this law, the severability of the law's provisions, or the breadth of the injunctions imposed by the district courts.

This case makes palpable the notion that the states are just a part of the national government, a notion that was rejected when this country was founded. Congress has previously attempted to order the states to legislate or regulate in particular ways, and it has failed at that. See, e.g., New York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992); Board of Natural Resources v. Brown, 992 F.2d 937 (9th

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Cir.1993); cf. United States v. Best, 573 F.2d 1095, 1102-03 (9th Cir.1978). That is to say, Congress has failed when it has not given the states the option to avoid the intended yoke. See, e.g., FERC v. Mississippi, 456 U.S. 742, 766, 102 S.Ct. 2126, 2141, 72 L.Ed.2d 532 (1982); see also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); Brown v. EPA, 521 F.2d 827 (9th Cir.1975), vacated by 431 U.S. 99, 97 S.Ct. 1635, 52 L.Ed.2d 166 (1977), on remand to 566 F.2d 665 (9th Cir.1977). Even those determinations are not without their problems because *1035 they could lead to a "dismemberment of state government." See FERC, 456 U.S. at 782, 102 S.Ct. at 2150 (O'Connor, J., dissenting).

Now Congress has avoided those issues, but it has done so by eliminating the niceties of the federal-state relationship entirely. Rather than ordering state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly. Under this new approach, the states have nothing to say about it. Their officials are ordered to become part of a federal gun control program at the state's own expense and are ordered to engage in various tasks necessary to administer that program. Those officials must make a "reasonable effort" to decide whether receipt of a weapon by a proposed transferee "would be in violation of the law" of the United States. 18 U.S.C. § 922(s)(2). Those efforts must include "research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." Id. (emphasis added). And the work must be done within five business days. Id. The officials must also dispose of the materials and may not make any use of them other than that directed by Congress. Id. § 922(s)(6)(B). They must provide written explanations for negative determinations upon request. Id. § 922(s)(6)(C). Presumably those officials must also adopt appropriate procedures for the carrying out of those functions. Perhaps that is not forced administration of the federal gun regulation program, but I fail to see why it is not.

Of course, the states are to bear the full cost of these tasks, and, unless the states adopt a local permit system, they cannot opt out of the federal program. If a state does not choose to engage in the regulation of this part of commerce--commerce in weapons--that makes no difference at all. In other words, state officials are conscripted by the federal government to fulfill its purposes and they can do nothing about that.

The government argues that this is much more respectful of state sovereignty than the legislation struck down in New York. I do not agree. If the Tenth Amendment has anything to do with the separate sovereign dignity of the states, it is difficult to see how that dignity is not undermined by the reality of a command that they commit their resources to the carrying out of this kind of federal policy, whether they like it or not.

Moreover, we are not dealing with a situation where a state seeks to stay in the business of regulating commerce in weapons. Quite the contrary. This legislation impacts states that do not wish to do so. I assume that the Supreme Court meant what it said when it said:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several states a residuary and inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment.
>
> Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.

New York, 505 U.S. at 186-90, 112 S.Ct. at 2434-35 (citations omitted).

This legislation is a step toward concentrating power in the hands of the federal government, for it treats state officials and workers as if they were mere federal

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employees. It makes every CLEO's office an office of the federal bureaucracy, funded by the states, but directed from Washington. The time to stop this journey of a thousand miles is at the first step. [FN2]

FN2. Cf. Lao-tzu, Bartlett's Familiar Quotations 65, quotation 1. (1980).

Therefore, I respectfully dissent from the majority's determination that the statute does not violate the Tenth Amendment.

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Nos. 94-50562 and 94-60518 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SHERIFF J.R. KOOG, Val Verde County, Texas,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

SHERIFF BILL MCGEE AND FORREST COUNTY, Mississippi,

Plaintiffs-Appellants/Cross-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee/Cross-Appellant.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AND THE UNITED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

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INTRODUCTION

In our opening brief in these consolidated appeals ("Govt. Br."), we identified a fundamental constitutional distinction: The federal government may require the assistance of state officials in the implementation of the federal government's own regulation of private parties; but Congress may not command the States themselves to undertake regulation or legislation to address the problem identified by Congress. This distinction is critical, as the Court emphasized in New York v. United States, 112 S. Ct. 2408 (1992), because a congressional directive that the States legislate or regulate shifts political accountability from Congress to the States, thereby encroaching on state sovereignty.

In their opening brief, plaintiffs ignored this critical distinction, and instead relied on a strikingly broad proposition of constitutional law: "Congress cannot issue commands to state officials." Brief of Appellant Koog and Appellants/Cross-Appellees McGee and Forrest County at 23. As we previously have shown, this proposition is indefensible. The ability of Congress to issue such commands is firmly rooted in our constitutional tradition, and is confirmed by the understandings of the authors of The Federalist and by the statutes enacted by the earliest Congresses. Thus, as the Court explained in FERC v. Mississippi, 456 U.S. 742 (1982), the "rigid" view "that Congress 'has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,' * * * is not representative of the law today." Id. at 761 (quoting Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1861)) (footnote omitted). To the contrary, on several occasions, including in FERC

itself, "the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." Id. at 762.

History and precedent thus refute plaintiffs' original absolutist position. In their reply brief, plaintiffs acknowledge several cases, such as FERC, Testa v. Katt, 330 U.S. 386 (1947), and South Carolina v. Baker, 485 U.S. 505 (1988), in which the Court upheld congressional enactments that "issue[d] commands to state officials." Reply Brief of Appellant Koog and Appellants/Cross-Appellees McGee and Forrest County ("Pl. Reply Br.") at 14-15. Nevertheless, plaintiffs continue to insist that "Congress has no power generally to issue commands to State officials." Pl. Reply Br. at 7 (emphasis added).

As we show in this brief, plaintiffs' restatement fares no better than their original formulation in providing support for their assertion that § 922(s) of the Brady Act is unconstitutional. Insofar as plaintiffs' use of the word "generally" is meant to suggest that Congress usually, or typically, has no power to issue commands to state officials, such a suggestion is inconsistent with the cases the Supreme Court has decided in this area. In contrast to the numerous federal statutes that the Court has upheld in which Congress has required state officials to take some action, the Court has invoked the state sovereignty principle identified in New York to invalidate only a single statutory command -- namely, the "take title" provision considered in New York itself. 112 S. Ct. at 2427-29. As we explained in our opening brief at 23-27, and as we demonstrate further infra at pages 4 to 8, the Court's holding

and opinion in New York simply do not establish the broad rule of constitutional law on which plaintiffs rely.

In the end, plaintiffs, like the district court in McGee, rely on little more than a single word -- "administer" -- in the final paragraph of the Court's opinion in New York. 112 S. Ct. at 2435. That single word, however, does not establish the radical new limitation on congressional power that plaintiffs propose.

ARGUMENT

I. THE CONSTITUTION DOES NOT PROHIBIT CONGRESS FROM REQUIRING STATE OFFICIALS TO PROVIDE MINISTERIAL ASSISTANCE IN THE IMPLEMENTATION OF THE BRADY ACT.

In New York, the Supreme Court identified two important principles of federalism that frame the issue in this case. The first principle is that Congress has expansive powers to address national problems. 112 S. Ct. at 2418-20. And, as the Court also recognized, Congress, in exercising those powers, has often made extensive use of state officials.[1] The second, corollary principle, derived from the structure of our federal system, is that in exercising its expansive powers, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" Id. at 2420 (quoting Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc., 452 U.S. 264, 288 (1981)).

These principles compel the critical distinction on which this case turns: The federal government may require the assistance of state officials in the implementation of federal law where Congress

[1] See, e. g., the cases cited in 112 S. Ct. at 2420, 2429. See also Govt. Br. at 17-19.

devises a legislative solution to a national problem and merely calls upon those state officials for ministerial aid in implementing that solution. But Congress may not identify a problem and instruct the States to devise their own solutions to that problem. Within the scope of its enumerated powers, Congress has the constitutional authority to pass laws requiring or prohibiting certain acts, but Congress lacks the authority "directly to compel the States to require or prohibit those acts." New York, 112 S. Ct. at 2423. In accordance with this distinction, the New York Court did identify something that Congress may not do; but that something is not, as plaintiffs would have it, "to issue commands to State officials." Rather, as the Court explicitly stated: "Congress generally may not compel state governments to regulate pursuant to federal direction." 112 S. Ct. at 2429 (second emphasis added).

The critical distinction outlined above runs throughout the Court's analysis in New York, is responsive to the concerns the Court expressed in that case, and is necessary to explain the various results of the Court's decisions in this area.

A. The Supreme Court's Decisions Compel the Conclusion that Congress May Require the Assistance of State Officials in the Implementation of Federal Law.

1. In New York, the Court explained that within the scope of its enumerated powers, Congress may pass legislation that addresses and attempts to resolve a national problem; but the Constitution bars Congress from avoiding direct responsibility -- and political accountability -- by compelling a State to devise its own solutions to problems Congress identifies. If Congress itself devises the

solution to the problem and enshrines that solution in federal law, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." 112 S. Ct. at 2424. By contrast, where the Federal Government forces States to come up with their own solutions to congressionally identified problems, political accountability that should rightly be borne by Congress is shifted to the States, thereby impinging on state sovereignty. Id.

This accountability principle is implicated to the greatest extent where Congress requires a State literally to legislate a scheme that is itself specified by Congress, or to promulgate a state legislative or regulatory scheme to solve a problem for which Congress itself has failed to provide an answer. Thus, the central theme of the decision in New York, stated time and again, is that Congress is barred from requiring the States to legislate or to regulate -- i.e., from compelling the States to devise or adopt legislative or regulatory policies.[2] As we explained in our

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[2] See, e.g., 112 S. Ct. at 2420 ("this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations") (internal quotation omitted); id. at 2421 (statute in FERC upheld because there was nothing in that statute "directly compelling the States to enact a legislative program") (internal quotation omitted); id. (Framers had "lively debate" on "whether the Constitution should permit Congress to employ state governments as regulatory agencies"); id. at 2423 (Constitution does not authorize Congress "to regulate state governments' regulation of interstate commerce"); id. at 2424 (accountability is impermissibly diminished where Congress "compels States to regulate"); id. at 2427 (statute putting States to the choice between regulating disposal of radioactive waste and federal preemption of the field is constitutional because "[t]he affected States are not compelled by Congress to regulate"); id. at 2429 ("Congress generally may not compel state governments to regulate (continued...)

opening brief at pages 25-26, this limitation on congressional power also applied to the statutory option, at issue in New York, that States actually take title to radioactive waste. That option effectively forced the States to engage in policymaking to solve problems identified by Congress. As the Court concluded in New York, whether New York was required to regulate or to take title to the waste, "[e]ither way, the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 112 S. Ct. at 2428 (internal quotation omitted; emphasis added). In sum, because the "take title" requirement required the States inevitably to legislate or adopt a regulatory policy, Congress was barred from imposing it.

2. Plaintiffs do not acknowledge the critical distinction we have discussed. Instead, plaintiffs assert that Congress may not compel state officials to assist in the implementation of federal

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[2](...continued)
pursuant to federal direction"); id. (Congress may not "command a state government to enact state regulation," or "require the States to regulate"); id. at 2430 (no constitutional provision "authorizes Congress to command state legislatures to legislate"); id. (no "authority on the part of Congress to mandate state regulation"); id. at 2430-31 ("the Framers did not intend that Congress should exercise th[e commerce] power through the mechanism of mandating state regulation"); id. at 2435 (Congress may not "simply * * * direct the States to provide for the disposal of the radioactive waste generated within their borders"). See also FERC, 456 U.S. at 780-81 (O'Connor, J., dissenting in part) (expressing view that statute is unconstitutional because it "sets the agendas of agencies exercising delegated legislative power in a specific field"); id. at 785 (Congress may not "impress State legislative bodies into federal service," because the "power to choose subjects for legislation is a fundamental attribute of [state] legislative power, and interference with this power unavoidably undermines state sovereignty"); id. at 796 (neither Congress nor a state legislature may "harness[] the legislative powers of the other sovereign")(all emphasis in original).

law, because Congress "has no power generally to issue commands to State officials." Pl. Reply Br. at 7. We have shown that the Court's treatment of the "take title" provision in New York provides no support for this expansive limitation on Congress's power. Plaintiffs must, therefore, look elsewhere for authority for their proposition.

In the end, plaintiffs rest their argument for a radical new interpretation of the Constitution on little more than a single word -- "administer" -- in the final paragraph of the Court's New York opinion. See Pl. Reply Br. at 9-11.[3] The quotation on which plaintiffs rely is that the "Federal Government may not compel the States to enact or administer a federal regulatory program." 112 S. Ct. at 2435. Plaintiffs put great weight on the Court's choice of the word "administer," and the district court in McGee called this sentence "the most pointed holding of the Court in New York." McGee Op. at 8, MR 150. But the Court's use of the word "administer" did not effect the revolutionary limitation on congressional power that plaintiffs urge.

The Court's reference to "administ[ration]" must be read in the context of the Court's repeated explanations that what the Constitution forbids is requiring States to create or adopt state legislation or regulatory policies to solve problems identified by

[3] Plaintiffs also discuss at length Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986) (Pl. Reply Br. at 11-12), a case that has literally nothing to do with the constitutional issues in the present case. The only issue in Bowen was whether certain regulations governing the provision of health care to handicapped infants were authorized by the Rehabilitation Act. 476 U.S. at 612. The Court did not address the constitutionality of the challenged regulations (which, in any event, differ markedly from the statutory provisions of the Brady Act).

Congress. See, e.g., supra note 2. And in particular it must be read in reference to the Court's actual holding that the statute under review was defective because both its options required the States to "enact and enforce" a regulatory regime (112 S. Ct. at 2428 (emphasis added)), a requirement that has no counterpart in the Brady Act.[4]

The Court's use of the word "administer" does not establish a bar on the sort of assistance required of the CLEOs in this case. As plaintiffs themselves point out (Pl. Reply Br. at 10), Congress itself explicitly provided that the "administration" of the Gun Control Act "shall be vested in the Secretary of the Treasury." Pub. L. No. 90-618, § 103, 82 Stat. 1214, 1226 (1968). This power of administration has been delegated to the Bureau of Alcohol, Tobacco, and Firearms ("ATF"); and pursuant to that power, ATF establishes and enforces the regulatory scheme that Congress enacted. See 18 U.S.C. § 926; 37 Fed. Reg. 11696-97 (1972). It is precisely this "administrative" regulatory role that Congress could not impose, and has not imposed, on the States themselves. See FERC, 456 U.S. at 761 ("the ability of a state legislative (or, as here, administrative) body * * * to consider and promulgate regulations of its choosing must be central to a State's role in the federal system").

[4] As we explained in our opening brief (Govt. Br. at 27), if the Court had intended, by its use of the word "administer," to erect an absolute bar to requiring state officials' assistance in implementing federal programs, its searching analysis of the problems presented by the statute at issue in New York would have been superfluous.

3. In stark contrast to the congressional enactment that the Court invalidated in New York because it "commandeer[ed] the legislative processes of the States" (112 S. Ct. at 2428 (internal quotation omitted)), the Court has never struck down any congressional requirement that state officials assist in implementing a federal statute, where the federal government itself has devised the regulatory scheme and where that scheme itself provides the standards of conduct for the private parties Congress has chosen to regulate.

This distinction is critical in order to understand why the Court ruled in FERC that section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA") was constitutional. Section 210 required that "'each State regulatory authority shall, after notice and opportunity for public hearing, implement such [FERC-imposed] rule (or revised rule) for each electric utility for which it has ratemaking authority.'" 456 U.S. at 759 (quoting 16 U.S.C. § 824a-3(f)(1); emphasis added). If plaintiffs were correct that Congress "has no power generally to issue commands to State officials," the Court would have had no choice but to invalidate PURPA § 210.[5] But in section IV-A of the FERC decision, the Court upheld § 210's "command" to state officials because FERC's interpretive regulations made clear that the States were not required to devise their own solutions to a problem that Congress

[5] Also invalidated under plaintiffs' reading of New York would be the Extradition Act, 18 U.S.C. § 3182, which the Court enforced in Puerto Rico v. Branstad, 483 U.S. 219, 229-30 (1987). That Act requires under certain circumstances that a state "executive authority" arrest and return to another state all fugitives of justice who have fled to the executive's state from the state in which the crime was committed. See id. at 223 n.2.

identified but did not itself regulate; instead, the States could meet their responsibilities by enforcing federal law in state administrative proceedings, on a case-by-case basis with respect to the private facilities and electric utilities that were the objects of the congressional regulatory scheme. Id. at 760.

As noted in our opening brief, the Brady Act requirements in § 922(s) parallel this FERC provision in every constitutionally significant way. Neither statute requires the States to formulate law or policy through legislation or regulation. In both instances, state officials are required merely to assist in the implementation of a federal law -- the details of which are prescribed by Congress, and for which Congress will be accountable -- on a case-by-case basis with respect to the private parties regulated by the federal scheme.

Plaintiffs, and the recent district court opinion on which they place great reliance,[6] attempt to distinguish this case from FERC on several grounds. Upon inspection, however, those distinctions disappear; and in any event, the factors plaintiffs identify are not constitutionally significant.

First, plaintiffs mischaracterize the Court's holding as to PURPA § 210 (in section IV-A of FERC) by confusing it with a different part of the Court's opinion (section IV-B). Plaintiffs assert that the Court upheld § 210 because the statute "simply condition[ed] continued state involvement in a pre-emptible area on the consideration of federal proposals," and thus permitted a State to avoid § 210's demands by ceasing to regulate in the area. Pl.

[6] Romero v. United States, No. 94-0419 (W.D. La. Dec. 8, 1994).

Reply Br. at 14 (quoting 456 U.S. at 765, emphasis added by plaintiffs). This assertion rests on a simple misreading of FERC. Section IV-B of FERC, on which plaintiffs rely, addressed an issue unrelated to § 210 -- namely, whether the Constitution permitted Congress, in different provisions of PURPA (Titles I and III), to require state regulatory commissions to consider specific ratemaking standards. But it is PURPA § 210, which the Court described as a "requirement" that the "States enforce standards promulgated by [the federal government]," 456 U.S. at 759, that is the provision in FERC directly parallel to § 922(s) of the Brady Act.

Second, plaintiffs assert that the FERC Court's holding with respect to § 210, which also found support in the Court's holding in Testa v. Katt, 330 U.S. 386 (1947), is distinguishable from this case because the statute in FERC imposed duties upon state officials who are part of the "state adjudicatory machinery," and who "thus w[ere] subject to [the Supremacy Clause], which binds state judges." Pl. Reply Br. at 14. See also Romero, slip op. at 19-20. But this "distinction" rests on a fundamental misunderstanding of the operation of the Supremacy Clause.

The fact that federal law is "the supreme law of the land" simply means that all state and federal governmental actors must apply federal law when that law comes into conflict with state law. All state executive officials, whether or not they are part of an "adjudicatory machinery," are constrained by the supremacy of federal laws in precisely the same manner as are state courts. "The Constitution and laws of the United States are the supreme law

of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity." Ex parte Siebold, 100 U.S. 371, 392 (1880).

Moreover, even if there were a material difference between state executive officers and state courts under the Supremacy Clause, that could not explain the Court's holding with respect to the utilities commission in FERC, which was composed of nonjudicial officers. Therefore, it must be something other than the Supremacy Clause that explains why Congress may enact requirements such as those at issue in Testa and in FERC. Accordingly, although the Court in New York referred to the Supremacy Clause in discussing Testa, it emphasized what was "[m]ore to the point" -- namely, that congressional requirements for assistance from state officials such as that in the statute in Testa (and, implicitly, in § 210 in FERC) are constitutionally permissible because they involve requiring assistance by state officials in the "congressional regulation of individuals, not congressional requirements that States regulate." 112 S. Ct. at 2430 (emphasis added).

It is this fact, which plaintiffs fail to address, that is the constitutionally significant difference between the holdings in FERC and New York. As the Court in New York explained, despite the fact that the statutes in cases like Testa (and, by implication, PURPA § 210 in FERC) do "direct state [officials] to enforce them," they are constitutionally permissible because they "all involve congressional regulation of individuals, not congressional requirements that States regulate." 112 S. Ct. at 2430. By contrast, in the statute at issue in New York, Congress required

the States to engage in one of two things, each of which "'commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" 112 S. Ct. at 2428 (internal citation omitted; emphasis added). The salient point, in other words, was that the state officials in FERC and in Testa -- unlike the State in New York -- were not required to promulgate state laws or regulations, but were required simply to enforce federal law as applied to private parties on a case-by-case basis. The same is true of the CLEOs under § 922(s) of the Brady Act.[7]

Plaintiffs suggest that the Brady Act requires the States to create a "legal regime" parallel to that the States were required to devise in New York. Pl. Reply Br. at 10-11. But this is in no meaningful way true. Congress has not ordered the States to devise solutions to achieve the federal goal of reducing unlawful gun transfers, nor to make policy of any kind. Whereas the "take

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[7] Plaintiffs also refer to, and the court in Romero relied heavily upon, the statement in FERC that the adjudication required there was "the very type of activity customarily engaged in by the Mississippi Public Service Commission." 456 U.S. at 760; see Pl. Reply Br. at 14 n.13; Romero, slip op. at 20. Section 922(s) cannot be distinguished on these grounds. Congress clearly required the Mississippi Commission in FERC to adjudicate new disputes under federal law that it would not otherwise have considered. Similarly, though Sheriffs Koog and McGee do not already perform the precise background checks required by § 922(s), they do routinely undertake the same kind of background checks for a variety of purposes. The court in Romero was of the belief that the requirement in § 922(s) of the Brady Act, but not the requirement in PURPA § 210, "expand[ed] the scope of the officials' responsibilities." Romero, slip op. at 20. But the Court's reference in FERC was to the "type," rather than the "scope," of the state officials' responsibilities. And more to the point, the "scope" of the CLEOs' responsibilities is not "expanded" by § 922(s) in any way that might distinguish this case from PURPA § 210's expansion in the "scope" of the Commission's activities in FERC.

title" requirement in New York directed the States "to provide for the disposal of * * * radioactive waste" (112 S. Ct. at 2435 (emphasis added)), States under the Brady Act need not "provide for" a means of reducing the sales of firearms; Congress has taken care of that. Indeed, Congress has charged a federal body -- ATF -- with the responsibility for administration of the law. Congress requires CLEOs only to assist in implementing the "congressional regulation of individuals" (New York, 112 S. Ct. at 2430), according to a regulatory scheme that Congress itself constructed and for which Congress, not the States, is politically accountable.

B. The Framers Contemplated that Congress Could Require the Assistance of State Officials in Implementing Federal Law, and this Understanding is Reflected in Both Early and Contemporary Congressional Enactments.

1. Our opening brief established that the Framers understood that the federal government could require state officials to assist in implementing federal programs. The Framers, like the Court in FERC and New York, distinguished between the national government's ability to make use of state officials in regulating private persons and congressional insistence that the States enact legislative solutions in response to a federal problem. Moreover, the Framers were of the view that the federal government should be able to enlist state actors for federal purposes precisely because such use of state and local officials would reduce the need for the intrusive use of federal officials.

In response to this historical argument, plaintiffs rely heavily on the fact that the constitutional convention rejected the New Jersey Plan, under which the national government would have placed near-exclusive reliance on the States themselves to execute

federal law. Pl. Reply Br. at 17. This casts little light on the issue presented. The Framers certainly designed a national government empowered to regulate private citizens directly, but they did so precisely because they did not want the federal government to be dependent on state legislation. The Brady Act is a fine example of this: Congress has acted to regulate gun sales directly, without any dependence on state legislation. The power to enact such national legislation without resort to the state legislatures in no way implies that the federal government is forbidden from using state officials to implement that national legislation.

Plaintiffs' citation of The Federalist No. 16 (Pl. Reply Br. at 17), is beside the point for the same reason. Plaintiffs read the essay to imply that Congress cannot require assistance from state officials because "military coercion" would be necessary to enforce their compliance. In fact, however, Hamilton's point in that essay was that without the power of direct legislation Congress would be compelled to deal with the States themselves as sovereigns, against which there could be no final sanction except military compulsion. As proposed and adopted, the Constitution avoids this problem by empowering Congress to legislate directly on individuals, including individual state officials. Congress thus can carry its will into effect by the ordinary means of governance, without requiring resort to what Hamilton called "intermediate [state] legislations." The Federalist No. 16 at 102 (J. Cooke ed.).

While warning against reliance on state legislation, The Federalist contains clear statements from both Hamilton and Madison explaining that the national government would be able to require assistance from state officials in executing national programs, which is quite different from requiring the States qua States to do so. For example, in The Federalist No. 27, Hamilton noted that, by extending federal authority "to the individual citizens of the several States, [the Constitution] will enable the government to employ the ordinary magistracy of each in the execution of [federal] laws." Id. at 174. Hamilton thus made plain that the state "magistracy" -- a class of officials that included executive officials -- could be called upon to execute federal legislation regulating private conduct.

Plaintiffs quote this passage from The Federalist No. 27 (Pl. Reply Br. at 17), but they appear to argue that the ability to "employ" the state magistracy should be understood to mean the ability to "hire" the magistracy only if the magistracy is willing, rather than the ability to require the assistance of such state executive officials. There is no support for such a reading. Read in the context of the essay as a whole -- for example, Hamilton's statement that state officials "will be rendered auxiliary to the enforcement of [federal] laws" (The Federalist No. 27 at 175 (J. Cooke ed.)) -- the word "employ" clearly refers to Congress's ability to make use of state officials as instruments at Congress's discretion, rather than to negotiate with them for their services.[8]

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[8] Hamilton thus was using "employ" in accordance with what would appear to be its predominant eighteenth-century meaning. Dr. (continued...)

Similarly, in The Federalist No. 36, Hamilton explicitly states that the national government "will make use of the State officers and State regulations, for collecting" federal revenues. Id. No. 36 at 227. Hamilton argued that the federal government could entirely avoid the employment of federal officials to collect internal taxes by using state officers if Congress so chose, an argument that would have had little force if Congress's choice were subject to a veto by unwilling state officers.[9]

In short, The Federalist is absolutely clear in its view that requiring state officials to assist in implementing national programs would be not only permissible, but appropriate. For example, in a passage from The Federalist No. 45, cited by plaintiffs (Pl. Reply Br. at 18), Madison noted that the federal government might make use of state tax collectors. In Madison's view, the power to require assistance from state officials was a

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"(...continued)
Johnson, for example, defined "to employ" to mean "to busy," "to use as an instrument," "to use as means," and "to use as materials," before mentioning a definition ("to commission") compatible with the plaintiff's strained interpretation of The Federalist No. 27. Samuel Johnson, A Dictionary of the English Language (1755); see also Noah Webster, American Dictionary of the English Language (1828) (defining "employ" first as "to occupy the time, attention and labor of; to keep busy, or at work; to use").

[9] Plaintiffs themselves do not suggest otherwise, but instead rely on Hamilton's additional statement that state officials might be given "an accumulation of their emoluments" as payment for executing federal laws. Pl. Reply Br. at 18. What plaintiffs have failed to observe is that Hamilton was not commending such an arrangement, but instead attacking it as objectionable. Federal payments to state officials, he reasoned, could be a means by which an overreaching Congress might attempt to subvert state government, in essence by bribing state officials in order "to attach them to the Union." The Federalist No. 36 at 228 (J. Cooke ed.). Plaintiffs have foisted onto Hamilton a concept of federal/state relations that he dismissed as the product of "invidious" speculation. Id.

virtue precisely because it would reduce the need for a large federal bureaucracy. The Brady Act is faithful to this vision.

2. The Framers' understanding was reflected in the naturalization statutes passed by the early Congresses, which required state officials to assist in implementing federal enactments. See Govt. Br. at 21-22. Plaintiffs contend that the naturalization statutes "did not require states to act," but rather gave state courts discretionary power to grant aliens citizenship. Pl. Reply Br. at 20. But plaintiffs do not explain how the statutory language could support such an assertion. See, e.g., Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (1790) (state court clerks "shall record" the application of an alien seeking citizenship).[10] Similarly, plaintiffs fail to come to terms with a host of contemporary statutes that also require state officials to perform ministerial tasks to assist in the implementation of federal regulatory schemes. See Govt. Br. at 23 & n.13.[11]

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[10] The Court's decision in Holmgren v. United States, 217 U.S. 509 (1910), cited in Pl. Reply Br. at 20, in no way undermines the plain meaning of the statutes. Indeed, the Court in that case explicitly stated that "[t]he question is not here presented whether the States can be required to enforce such naturalization laws against their consent." Id. at 517.

[11] Plaintiffs suggest that three of the seven statutes we cited as examples of current enactments that require state officials' participation in implementing federal regulatory schemes are inapposite to this case because they involve Congress' spending power. Pl. Reply Br. at 13 n.12. Plaintiffs misread the statutes. These three statutes, like the other four we cited, unequivocally require compliance. The fact that the three statutes also permit the federal government to make discretionary grants to States does not alter the mandatory nature of the requirements imposed on the States. See 20 U.S.C. § 4013 ("the Governor of each State shall submit to the Administrator a plan"); 42 U.S.C. § 6933(a) (States "shall * * * undertake a continuing program to compile, publish, and submit to the Administrator an inventory"); 23 U.S.C. § 402(a)

(continued...)

II. THE CONSTITUTION DOES NOT PROHIBIT CONGRESS FROM IMPOSING MINIMAL BURDENS ON STATE OFFICIALS, SUCH AS THOSE THAT § 922(s) OF THE BRADY ACT IMPOSES.

As explained in Part I above, § 922(s) of the Brady Act is distinguishable from the "take title" provision invalidated in New York because § 922(s) does not require the States to enact or adopt legislative or regulatory solutions to congressionally identified problems. What is more, § 922(s) is clearly constitutional because any burden it imposes is too minimal to implicate any constitutional principle of state sovereignty. See Govt. Br. at 19-20 & n.9, 30-37.

At the very outset of their reply brief, plaintiffs again struggle to depict the § 922(s) requirements placed on CLEOs as overwhelmingly burdensome. Pl. Reply Br. at 1-4. This argument was rejected by both district courts below, which concluded that the burdens placed on local officials by the Brady Act are not "particularly onerous" (McGee Op. at 9, MR 151) and "minimal." Koog Order at 28, KR 354. The district courts were clearly correct in their assessment. Plaintiffs strive to manufacture burdens never contemplated by Congress or the agency charged with the Brady Act's interpretation.

Plaintiffs argue that compliance with the Brady Act requires them to investigate all records that might conceivably provide evidence regarding any legal impediment to a handgun transfer. Pl. Reply Br. 1-2. But Congress did not enact legislation requiring an exhaustive search of all possibly relevant records. It carefully

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[11](...continued)
(States "shall have a highway safety program"; States "shall collect and report such data as the Secretary may require").

limited the statutory requirement to include only a "reasonable effort" by local officials. 18 U.S.C. § 922(s)(2). Plaintiffs' insistence on reading the "reasonable effort" language out of the statute is fatal to their argument.

Plaintiffs' construction of the statute is particularly implausible in light of ATF's interpretation provided in guidance to local law enforcement officers. ATF is charged with the interpretation and implementation of the Gun Control Act, including the Brady Act (see 18 U.S.C. § 926; 37 Fed. Reg. 11696-97 (1972)), and its interpretation of the statute is entitled to substantial deference. National Rifle Assoc. v. Brady, 914 F.2d 475, 479 (4th Cir. 1990), cert. denied, 499 U.S. 959 (1991); Gun South, Inc. v. Brady, 877 F.2d 858, 864 (11th Cir. 1989).[12]

In its regulatory guidance, ATF explained that CLEOs enjoy great discretion in determining the nature of a reasonable effort and that CLEOs' inquiries should be guided by reference to "the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction." ATF Letter at 10, SRE 12. ATF emphasized that CLEOS are not obligated to check "every conceivable record system that may contain information relating to categories of prohibited persons." Id. at

[12] Plaintiffs suggest that the Supreme Court held in United States v. Thompson/Center Arms Co., 112 S. Ct. 2102 (1992), that ATF's interpretation of the Gun Control Act is not entitled to deference. Pl. Reply Br. at 2 n.3. In fact, the Court in that case (which involved a different statute) at no point addressed, let alone determined, the deference to be accorded an ATF interpretation. Cf. Thompson/Center Arms, 112 S. Ct. at 2110 n.9.

9, SRE 11.[13] In other words, these plaintiffs satisfy the "reasonable effort" standard when they decide, in light of their other pressing duties and limited resources, only to conduct routine computer checks of criminal history records from their offices. Moreover, contrary to plaintiffs' argument (Pl. Reply Br. at 1-2), these quick searches may reveal that a purchaser is disqualified for a variety of reasons, not only because the purchaser has a criminal background. ATF Letter at 9, SRE 11; see Govt. Br. at 32.

Plaintiffs' argument to this Court is extraordinary. Though the federal agency charged with administration of the Brady Act insists that plaintiffs would satisfy the requirements of § 922(s) with minimal efforts -- the sufficiency of which is to be determined with reference to plaintiffs' other duties -- plaintiffs nonetheless implore this Court to find that such efforts would be insufficient under § 922(s). Plaintiffs make this tortured argument because if the ATF is correct that plaintiffs' burdens are minimal, then § 922(s) could not possibly implicate any constitutional concerns. Plaintiffs' tactic -- asking this Court

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[13] Plaintiffs argue that a "reasonable effort" cannot mean "no effort." Pl. Reply Br. at 2. It is undisputed that the Act generally imposes a duty to conduct some research. The question is what kind of effort is "reasonable" within the meaning of the Act and the intent of Congress. ATF has noted that in some circumstances a CLEO may reasonably determine that no research -- and thus no real effort -- is required, as when the CLEO has personal knowledge of a prospective purchaser. See ATF Letter at 10, SRE 12. Similarly, although plaintiffs assert that the Brady Act requires wide-ranging legal research to ensure absolute certainty about a purchaser's eligibility (Pl. Reply. Br. at 3-4), ATF sensibly has interpreted the "reasonable effort" requirement differently. See ATF Letter at 11, SRE 13 (CLEO need only have "reasonable cause to believe" that a purchaser is not eligible).

to accept an unreasonable interpretation of a statute in order to create constitutional issues that would not otherwise exist -- turns customary canons of interpretation on their head. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (courts should interpret statutes to avoid raising significant constitutional concerns).[14] In fact, as we have demonstrated, the "reasonable efforts" standard itself ensures that the burdens on CLEOs will be commensurate with their other duties.[15]

Plaintiffs also argue in passing that the Brady Act requirements have "economic consequences" for the States. Pl. Reply Br. at 11. But the Supreme Court has stated unequivocally that the Constitution does not bar federal directives solely

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[14] Notably, plaintiffs have used this same tactic in an attempt to breathe life into their Fifth Amendment claim. The Justice Department has officially determined, and assured plaintiffs, that CLEOs may not, and will not, be prosecuted for violating the "reasonable efforts" requirement of § 922(s). Accordingly, in their futile attempt to establish justiciability on their constitutional vagueness argument, plaintiffs have insisted that they can and will be prosecuted despite the government's assertions to the contrary.

[15] Quoting from the district court decision in Romero, plaintiffs go so far as to argue that the "reasonable efforts" provision in § 922(s) "'control[s] States' methods of enforcing their own * * * criminal statutes concerning possession of handguns,'" and that provision "regulates CLEOs' law enforcement methods" and "'maintenance of public order.'" Pl. Reply Br. at 8-9 (quoting Romero, slip op. at 9-10). This is incorrect. The Brady Act does not in any way instruct state officers on how they should enforce state law, and does not "control" the States' methods of enforcing state and local statutes.

because they may require the States to expend resources. See FERC, 456 U.S. at 770 n.33.[16]

III. THIS CASE DOES NOT INVOLVE A SEPARATE ISSUE CONCERNING CONGRESS'S POWERS UNDER THE COMMERCE CLAUSE.

Plaintiffs argue at length that Congress lacks the power under the Commerce Clause to impose the § 922(s) requirements. Pl. Reply Br. at 4-9. This argument is wholly without merit. See Govt. Br. at 37 n.21. Congress clearly has authority under the Commerce Clause to make laws governing the purchase and sale of firearms. See, e.g., United States v. Nelson, 458 F.2d 556, 559 (5th Cir. 1972). Plaintiffs argue that, though Congress has the broad power to regulate firearms sales, it lacks the authority to choose one of the particular means it has chosen -- the interim use of CLEOs at issue in this case -- to carry out its regulation. This argument flies in the face of decisions dating back to the Marshall Court. See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824). Once it is determined that the regulated activity is subject to commerce-power regulation, which is not in dispute here, "the only remaining question for judicial inquiry" is whether "the means chosen" by Congress are "reasonably adapted to the end permitted by the Constitution." Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc., 452 U.S. 264, 276 (1981) (citations omitted). "The

[16] In any event, the relatively small economic burden created by the Brady Act is more than outweighed by the massive federal funds provided to the States. See Govt. Br. at 36-37. Plaintiffs argue that the funds are received by the States and not directly by individual CLEOs. Pl. Reply Br. at 13. Plaintiffs miss the point. The constitutional principles discussed in New York afford protection to the States, not to individual CLEOs, and Sheriffs Koog and McGee claim infringements on the powers reserved to their respective States.

judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme." Id. The plaintiffs have offered no basis for concluding that § 922(s) is an unreasonable or irrational means of advancing the end of regulating the sale of guns.

Because the Commerce Clause authorizes Congress to regulate gun sales, and § 922(s) is reasonably adapted to that end, the provision is constitutional unless it transgresses some independent constitutional limitation on federal power, such as the principle identified in New York. See 112 S. Ct. at 2418; see also Gibbons, 22 U.S. (9 Wheat.) at 196 (the commerce power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution"). The only question before this Court, therefore, is that which has already been briefed at length: whether the means Congress has chosen to carry out its goal of handgun regulation impermissibly trammel the sovereignty of the States. See New York, 112 S. Ct. at 2417.

CONCLUSION

For the reasons stated in this brief and in our opening brief, § 922(s) of the Brady Act is constitutional.

Respectfully submitted,

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