No. 13-634

In The Supreme Court of the United States

MONTANA SHOOTING SPORTS ASSOCIATION;
SECOND AMENDMENT FOUNDATION, INC.;
and GARY MARBUT,

Petitioners,

v.

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

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF UTAH, ALABAMA, ALASKA, ARIZONA, IDAHO, KANSAS, MICHIGAN, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

BRIAN L. TARBET
Counsel of Record
Acting Utah Attorney General
P.O. Box 142320
Salt Lake City, Utah 84114-2320
Phone: 801-538-9600
Fax: 801-538-1121
Email: btarbet@utah.gov
Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Additional Counsel

LUTHER STRANGE
Attorney General of Alabama
501 Washington Avenue
Montgomery, Alabama 36130
(334) 242-7300

MICHAEL C. GERAGHTY
Attorney General of Alaska
P.O. Box 110300
Juneau, Alaska 99811
(907) 465-3600

THOMAS C. HORNE
Attorney General of Arizona
1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-5025

LAWRENCE WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, Idaho 83720
(208) 334-4110

DEREK SCHMIDT
Attorney General of Kansas
120 S.W. 10th Avenue,
2nd Floor
Topeka, Kansas 66612
(785) 296-2215

BILL SCHUETTE
Attorney General of Michigan
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

JON BRUNING
Attorney General
of Nebraska
2115 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-2862

SCOTT PRUITT
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, Oklahoma
73105
(405) 521-3921

ALAN WILSON
Attorney General of
South Carolina
P.O. Box 11549
Columbia, South Carolina
29211
(605) 773-3215

MARTY J. JACKLEY
Attorney General of
South Dakota
1302 E. Highway 14, Suite 1
Pierre, South Dakota 57501
(605) 773-3215

PETER K. MICHAEL
Wyoming Attorney General
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

QUESTION PRESENTED

Whether federal laws that preempt the State of Montana's regulation of its own intrastate firearms trade, as set forth in the Montana Firearms Freedom Act, exceed Congressional power enumerated in the Interstate Commerce Clause of the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

The *amici* States have a vital interest in the recognition and preservation of the rights reserved to them and to their citizens under the United States Constitution, including those reserved under the Tenth Amendment. The *amici* States also possess a substantial and persistent interest in defending the constitutionality of State sovereign laws that regulate activity occurring solely within a State's own borders.

Additionally, by having also enacted State statutes, that like the Montana Firearms Freedom Act (MFFA), Mont. Rev. Code § 30-20-101, et seq., (2009), deem certain firearms manufactured and kept within those States' own borders as exempt from federal regulation, the *amici* State of Utah and her seven sister States of Alaska, Arizona, Idaho, Kansas, South Dakota, Tennessee, and Wyoming[2] have a particular

---

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received timely notice of the *amici curiae's* intention to file this brief.

[2] Alaska Stat. § 44.99.500 (2010) (eff. Aug. 25, 2010); Ariz. Rev. Stat. Ann. § 13-3114 (2010) (eff. Oct. 1, 2010); Idaho Code Ann. § 18-3315A (2010) (eff. July 1, 2010); K.S.A. 2013 Supp. 50-1204 (now found at 2013 Kan. Sess. Laws, ch. 100, 4); S.D. Codified Laws §§ 37-35-1 to -5 (2010) (eff. July 1, 2010); Tenn. Code Ann. §§ 4-54-101 to -106 (West 2009) (eff. June 19, 2009); Utah Code Ann. §§ 53-5b-101 to -202 (eff. Feb. 26, 2010); Wyo. Stat. Ann. §§ 6-8-402 to -406 (2010) (eff. March 11, 2010).

Four of these States are within the jurisdiction of the Ninth Circuit Court of Appeals, making a circuit split less likely to arise and the error, therefore, more likely to persist. Moreover, each State has come under threat of suit based on Respondent's

(Continued on following page)

interest in a grant of *certiorari* here. What is more, over the past 4 years, twenty-three (23) state legislatures have introduced similar legislation – fifteen (15) of those States having done so in 2013 alone. *See* www.firearmsfreedomact.com. Those laws, like the MFFA, are intended to allow sovereign State citizens to engage in constitutionally protected activity within their own States' borders without burdensome federal oversight and regulation of their solely intrastate activities.

This case presents an excellent vehicle for the Court to determine whether such new state laws represent the valid exercise of rights reserved to the States under the Tenth Amendment to the United States Constitution, or whether they are preempted by federal statutes and implementing regulations that impose – without regard to the protection due solely to intrastate activity – taxation, registration, licensing, marking, and record keeping requirements on *all* firearms and ammunition manufacturers, dealers, and importers regardless of the purely intrastate nature of their activity. It is important that the States' voices be heard as this Court considers this important constitutional question.

---

desire to invalidate their sovereign laws. Absent *certiorari* and a ruling by this Court, these States will continue to suffer threats from a federal government intent on exceeding its authority under the U.S. Constitution.

SUMMARY

Our system of government provides that each State retains its sovereignty except to the extent the federal government has explicitly been granted sovereign powers by the United States Constitution. And though among the powers granted to the national Congress is the power "[t]o regulate Commerce with foreign Nations, and among the several states . . . ", U.S. Const. art. I, § 8, cl. 3, a long-standing corollary posits that the federal government does not also possess the unfettered authority to regulate or impose a substantial burden on commercial activity that occurs solely within a sovereign State. Applying that corollary here, this Court should determine that neither the National Firearms Act, *see* 26 U.S.C. §§ 5842-5843, nor the federal Gun Control Act, *see* 26 U.S.C. § 2621, contravene or preempt the MFFA, which decrees that neither firearms nor ammunition that are manufactured in the State of Montana, and that remain in that State are subject to federal law or regulation. But consistent with the authority granted Montana under the United States Constitution, this Court should grant certiorari to review the erroneous decision of the United States Court of Appeals for the Ninth Circuit that usurps Montana's right – and also that of its several, similarly situated sister states – to regulate firearms and munitions that will never leave its borders.

REASONS FOR GRANTING CERTIORARI

I. This Court Should Grant *Certiorari* to Promote the Tenth Amendment's Limitation on the Federal Government's Authority to Disrupt the Powers Properly Reserved to the Sovereign States

The United States Constitution delegates to a national Congress the power to regulate commerce *between* the States, and preserves to the States the sovereign authority to direct lawful commerce that occurs entirely *within* a State's own borders. Such complementary principles make clear that the Congress's authority to control lawful commerce appropriately extends only to commerce that occurs between the various States, but not to that which takes place within the borders of a single State alone. That authority instead, the Tenth Amendment provides, is reserved to each individual State. The Ninth Circuit's decision does not honor this principle; consequently, this Court should grant *certiorari* to review and also reverse the same.

An enduring feature of our federal form of government posits that each State is sovereign within its territorial borders. This axiom, which is of tremendous import and present on the face of the Constitution, establishes a system of government in which each State shares sovereignty with a national government. *See* U.S. Const. art. VI.

How to divide authority between the Federal Government and the States under this system presents one of the oldest questions of constitutional law.

See New York v United States, 505 U.S. 144, 149 (1992). James Madison famously wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting *The Federalist No. 45*, 292-93 (C. Rossiter ed. 1961)). Indeed, prior to ratifying them, widespread disagreement existed between the Federalists and Anti-Federalists as to whether the amendments contained in the Bill of Rights were necessary to protect the division between State and Federal power. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568-70 (1985) (Powell, J., dissenting). This disagreement was won by the Anti-Federalists, leaving "the Federalists [to] eventually concede[ ] that such provisions were necessary," *id.* at 569, and making passage of the Bill of Rights – which included the Tenth Amendment – an initial order of business for the First Congress. *Id.*

Succinctly, the Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. With that provision at the fore, this Court has recognized that States retain significant sovereign authority to the extent the Constitution has not transferred such authority to the Federal Government. *See New York*, 505 U.S. at 156. In one sense, "[t]he [Tenth] amendment states but a truism that all is retained which has not been surrendered."

United States v. Darby, 312 U.S. 100, 123-24 (1941). But that is not to say that States merely retain authority over that which Congress has chosen, as "a matter of legislative grace," not to regulate. *United States v. Morrison*, 529 U.S. 598, 616 (2000). Instead, the Court's decisions in *Lopez*, *Morrison*, and *New York* represent a narrow construction of federal power textually grounded in the federalism embodied by the Tenth Amendment. *See Lopez*, 514 U.S. 566-68; *New York*, 505 U.S. at 174-77; *Morrison*, 529 U.S. at 615-19.

In other words, while providing no substantive limits of its own, as a tool of judicial construction, the Tenth Amendment serves to ensure that the constitutional limits placed on the powers of the federal government are respected. And while some have argued that the political position of the States within the federal system is sufficient to guard against expansive federal power, *Garcia*, 469 U.S. at 551-54, the more realistic view recognizes that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

When that balance is in question, issues of federalism and each State's reserved powers have reached the Court in two principal ways. In the first instance, through cases that have asked whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment, and otherwise through cases that have asked whether an Act of

Congress is authorized by the powers delegated to it under Article I of the U.S. Constitution. *See New York*, 505 U.S. at 155-56. Questions raised in the first instance require the Court to examine the scope of State sovereignty at issue. *Id.* Questions raised in the latter, necessitate an inquiry into the scope of Congress's enumerated powers. *Id.*

Petitioners raise the first question and rely on the bedrock principle of federalism that preserves the State of Montana's rights reserved under the Tenth Amendment. But like Respondent and the district court before it, the Ninth Circuit ignored the clarity of Petitioners' claim and side-stepped Petitioners' Tenth Amendment refrain, reframing instead the question. By doing so, the Ninth Circuit addressed not whether the MFFA is consistent with Montana's exercise of its reserved sovereign powers, but whether the federal Congress's power under the Commerce Clause encompasses the power to regulate the manufacture, sale, and possession of firearms and ammunition even if they occur solely within the manufacturing state. *See Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 981-82 (9th Cir. 2013); *also Montana Shooting Sports Ass'n v. Holder*, 2010 WL 3926029, at *23 (D. Mont. August 31, 2010). That court's affirmative answer to a question, reframed by it, led the Ninth Circuit to all but ignore and to ultimately reject Petitioners' actual Tenth Amendment claim. But it is only by asking – as Petitioners have – the correct question, that the Court may reach the correct result.

Like the Petitioners whom they support, the *amici* States agree that Montana, like all States, retains under the Tenth Amendment the right to control purely intrastate activities, including the local manufacture of firearms, accessories, and ammunition that remain out of interstate commerce. Consequently, they ask this Court to honor an essential part of our constitutional structure and to recognize that the Tenth Amendment is not an empty promise to the States, but a vital guarantor of rights retained by them, including the right to regulate purely intrastate activities. Accordingly, the *amici* States ask this Court to grant *certiorari* to review this case.

II. This Court Should Grant *Certiorari* to Prevent the United States Congress From Exercising its Enumerated Powers Under the Commerce Clause in a Manner That Interferes with Purely Intrastate Activity

The Court of Appeals for the Ninth Circuit concluded that the U.S. Congress's Commerce Clause powers extend to purely intrastate manufacture of firearms. *Montana Shooting Sports*, 727 F.3d at 982. The *amici* States, though mindful of the precedent upon which that decision is based, believe that the federal statutes at issue here exceed those powers, because when properly construed, they reach only interstate action.

The Constitution provides that Congress "shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the

Indian tribes." U.S. Const. art. I, § 8, cl. 3. Citing this clause, Justice Felix Frankfurter observed more than 75 years ago that the Commerce Clause "has throughout the Court's history been the chief source of its adjudications regarding federalism." *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring) (quoting Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* 66 (1937)). This is so because sovereign States cannot successfully reassert the powers they retain under the Tenth Amendment until this Court revisits and alters its expansive reading of the "commerce" that Congress may properly regulate.

But contemporary Court precedent has construed Congress's authority to regulate interstate commerce in a manner that permits regulation of purely *intrastate*, private, non-commercial activity, as long as the regulated activity substantially affects interstate commerce. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *Lopez*, 514 U.S. at 555-57; *Wickard v. Filburn*, 317 U.S. 111 (1942). This "substantial effects" test – a 20th century innovation lacking textual support – has enabled a sweeping expansion of Congress's Commerce Clause powers since the time of the New Deal. *See Lopez*, 514 U.S. at 596 (Thomas, J., concurring); *Morrison*, 529 U.S. at 607-08. That test, derived from the Necessary and Proper Clause, allows Congress to regulate *intrastate* activities in order to make effective a regulation of *interstate* commerce. *Raich*, 545 U.S. at 34-35 (Scalia, J., concurring); *see also Garcia*, 469 U.S. at 585-86 (O'Connor, J., dissenting). And in doing so, has effectively eliminated any requirement that acts of Congress be a regulation of interstate

commercial activity. But "commerce," expansively defined in this way, "threatens to sweep all of productive human activity into federal regulatory reach." *Raich*, 545 U.S. at 49 (O'Connor, J., dissenting).

By abandoning any meaningful standard for the substantiality of an intrastate activity's effects on interstate commerce, this Court has enabled the Congress to "draw the circle broadly enough to cover" activity, that when viewed in isolation, would have no substantial effect on interstate commerce at all. *Lopez*, 514 U.S. at 600-01 (Thomas, J., concurring). By applying this "rootless and malleable" standard for over half a century "the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits." *Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *see also Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring).

This Court's construction of congressional authority to regulate interstate commerce, the *amici* States agree, "[comes] close to turning the Tenth Amendment on its head" as the "case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution." *Lopez*, 514 U.S. at 589 (Thomas, J., concurring). But by expanding congressional Commerce Clause authority far beyond the incidental powers contemplated by the Necessary and Proper Clause, *see Raich*, 545 U.S. at 58-66 (Thomas, J., dissenting), the substantial effects test has transformed the Commerce Clause's purpose – regulation of commerce "among the several States" – into a means for Congress to appropriate State power.

See Morrison, 529 U.S. at 627 (Thomas, J., concurring); *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring). Supporting, however, the federalism embodied by the Constitution, *see Lopez*, 514 U.S. at 584-85, 600-01 (Thomas, J., concurring); *Raich*, 545 U.S. at 67-74 (Thomas, J., dissenting), the Tenth Amendment compels a different approach; one that demands that the "substantial effects" test yield to a construction of congressional authority that is consistent with the text and the original meaning of the Commerce Clause. *See Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring).

CONCLUSION

For the foregoing reasons, the *amici* States urge this Court to grant *certiorari* to review, and also to reverse, the erroneous decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

BRIAN L. TARBET
Acting Utah Attorney General
P.O. Box 142320
Salt Lake City, Utah 84114-2320
Phone: 801-538-9600
Fax: 801-538-1121
Email: btarbet@utah.gov
Counsel for Amici Curiae