

No. 02-10318

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT WILSON STEWART, JR.,

Appellant.

Rehearing on Remand from the United States Supreme Court

Brief of *Amicus Curiae* Oregon Firearms Educational Foundation in Support
of Appellant, Robert Wilson Stewart, Jr., Urging Maintenance and Retention
of this Court's November 13, 2003 Opinion

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CORPORATE DISCLOSURE STATEMENT

Oregon Firearms Educational Foundation is a public benefit non profit corporation. It has no corporate parent and it has no stock.

TABLE OF AUTHORITIES

CASES

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REGULATION

27 CFR Ch 11 § 479.1022

OTHER AUTHORITIES

Memorandum Opinion for the Attorney General dated August 24, 2004
which Memorandum is Entitled and Subtitled: “Whether the Second
Amendment Secures an Individual Right – The Second Amendment secures
a right of individuals generally, not a right of States or a right restricted to
persons serving in militias.”
<http://www.usdoj.gov/olc/secondamendment2.htm>4

Webster’s Third New International Dictionary 922 (2002)2

STATEMENT OF AMICUS CURIAE

Oregon Firearms Educational Foundation is a civil rights organization whose function is to preserve and defend the related rights of all Oregonians to keep and bear arms and to defend themselves. Oregon Firearms Educational Foundation has funded individual challenges to governmental attempts to infringe the right to keep and bear arms. Oregon Firearms Educational Foundation educates state and federal lawmakers about the right to keep and bear arms. Moreover, and finally, Oregon Firearms Educational Foundation has members who asked the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives (“BATFE”) to register machine guns due to this court’s November 13, 2003 opinion for this case. Some of Oregon Firearms Educational Foundation’s members requests for registration were approved, some members requests were held by the BATFE pending the United State’s Supreme Court’s decision on the United State’s Government’s Petition for Writ of Certiorari.

Amicus received leave to file this brief by order of the court dated July 27, 2005.

SUMMARY OF ARGUMENT

This case is significantly different from *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). First, machine guns are not fungible commodities. Hence there is no risk that a machine gun manufactured for personal possession and use can slip into or affect interstate commerce. Second, unlike Raich, Stewart does not concede that the Congress has the constitutional authority to promulgate 18 USC §922(o). To the contrary, 18 USC §922(o) is not necessary and proper because it violates the Second, Ninth, and Tenth Amendments to the United States Constitution.

ARGUMENT

I Machine Guns Are Not Fungible Commodities

Unlike the marijuana described in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) or the wheat described in *Wickard v. Filburn*, 317 US 111 (1942), machine guns are not fungible commodities. Fungible commodities are essentially indistinguishable and are consumed when used.

“Fungible” is defined in Webster’s Third New International Dictionary 922 (2002) as:

“1: of such a kind or nature that one specimen or part may be used in place of another specimen or equal part in the satisfaction of an obligation — used of things that can be counted, weighed, or measured and are consumed or alienated by use (as food, coal, oil, lumber) <~goods enjoyed under the usufruct of property> 2: capable of mutual substitution: INTERCHANGEABLE”

Machine guns, unlike marijuana, wheat, or bullets, are not interchangeable and are not consumed or “used up” when operated normally.

Machine guns are functionally and legally similar to automobiles. If properly maintained and operated, a machine gun and an automobile will function for many years. Both machine guns and automobiles can be physically moved with little effort but, when owned or possessed by individuals – as opposed to government entities – must be registered with a government agency and must be identified by a unique identifying mark which mark must be disclosed to the governmental agency which registers the item. *See* 27 CFR Ch 11 § 479.102 for the requirement that firearms (machine guns are firearms – 26 USC §921(a)(3); 26 USC §921(a)(23); 26 USC §5845(a)(6); 26 USC §5845(b)) must each bear a unique, identifying mark.

In light of the requirement that each and every machine gun have a unique, identifying mark, there can be no enforcement difficulties

distinguishing between a machine gun manufactured for personal possession from machine guns manufactured or possessed for sale or transfer. In the absence of any enforcement difficulties distinguishing between a machine gun manufactured for personal possession from other machine guns, Congress could not and did not have a rational basis for believing that failure to regulate the intrastate manufacture and possession of machine guns would leave a gaping hole in 18 USC § 922. *Compare Gonzales v. Raich*, 125 S. Ct. at 2209.

II 18 USC § 922(o) Is Not Necessary and Proper

In *McCulloch v. Maryland*, 4 Wheat. 316 (1819) the Supreme Court set forth a test for determining when an Act of Congress is permissible under the Necessary and Proper Clause of the U.S. Const. Art. I, §8.

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *McCulloch* at 421.

18 USC §922(o) is not within the scope of the constitution, it is not appropriate, it is prohibited, and it is inconsistent with both the letter and the spirit of the constitution. It is therefore, unconstitutional.

18 USC §922(o) infringes an individual’s right to keep and bear arms.

The Second Amendment to the United States Constitution reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

Although latter day scholars have debated whether the right to keep and bear arms is a right held by individuals or by states or their subdivisions, the parties to this case agree that the right to keep and bear arms is a right held by individuals.

While the United States Government has hitherto argued against Defendant Stewart's assertion that 18 USC §922(o) was unconstitutional, the government's arguments in this case pre-dated the current, official position of the United States Department of Justice as outlined in its Memorandum Opinion for the Attorney General dated August 24, 2004 which Memorandum is Entitled and Subtitled:

“Whether the Second Amendment Secures an Individual Right – The Second Amendment secures a right of individuals generally, not a right of States or a right restricted to persons serving in militias.”

<http://www.usdoj.gov/olc/secondamendment2.htm>

The parties to this case have agreed that the right to keep and bear arms is an individual and not a collective right. Therefore, this court is not bound by its holding to the contrary in *Silveira v. Lockyer*, 312 F3d 1052 (9th Cir 2002) *en banc rehearing denied* 328 F3d 567 (9th Cir 2003). To the contrary, the parties having agreed that the right to keep and bear arms is an individual right, the court is now required to determine if 18 USC §922(o) is “necessary and proper” in light of the parties' agreement.

18 USC §922(o) infringes an individual's right to defend himself.¹

The Ninth Amendment to the United States Constitution reads: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The Tenth Amendment to the United States Constitution reads: “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.”

¹ The machine gun was used effectively in World War I and in subsequent wars to stop massed infantry attacks on fixed positions. Although the machine gun can be used for offensive purposes, historically it has been most effectively used as a defensive weapon.

There can be no question that one of the rights reserved to the people is the right to defend themselves.

Conclusion

Gonzales v. Raich, 125 S. Ct. 2195 (2005) does not require this court change its November 13, 2003 Opinion for this case. Machine guns are not fungible commodities. Should this court revisit its November 13, 2003 Opinion, this court should hold that 18 USC §922(o) is not necessary and proper because it violates the Second, Ninth, and Tenth Amendments to the United State's Constitution.

Dated this 8th day of August, 2005.

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(2)(C) and Ninth Circuit Rule 32-1, the undersigned attorney for *amicus curiae* certifies that this brief is proportionally spaced, has a typeface of 14 points or more and contains 1648 words, and therefore complies with the word limitation imposed upon *amicus curiae* briefs by FRAP 29(d) and FRAP 32(a)(7)(i). This brief was prepared using Microsoft Word 2004 for Mac Version 11.1 and Adobe Acrobat 7.0 Standard Version.

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