

ORAL ARGUMENT FEBRUARY 14, 2002

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

01-5104

**KENT A. LOMONT, DANIEL J. WHELAN, ERIC M. LARSON, JAMES KADISON,
GERALD C. O'BRIEN, ROBERT F. GRIMES, JR., VIRGLE W. DAVIS,
CHIEF STEPHEN L. HOSE, and SHERIFF DENNIS McCLURE,**

Appellants

v.

**PAUL H. O'NEIL, Secretary, United States Department of the Treasury, and
BRADLEY A. BUCKLES, Director, Bureau of Alcohol, Tobacco and Firearms,
U.S. Department of the Treasury,**

Appellees

BRIEF FOR APPELLANTS

Appeal from the U.S. District Court
for the District of Columbia
District Ct. Civil No. 1:00cv01935 (JR)

STEPHEN P. HALBROOK
10560 Main Street, Suite 404
Fairfax, Virginia 22030-7182
(703) 352-7276
Counsel for Appellants

JAMES H. JEFFRIES, III
3019 Lake Forest Drive
Greensboro, North Carolina 27408
(336) 282-6024
Counsel for Appellants

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

The plaintiffs in the district court were Kent A. Lomont, Daniel J. Whelan, Eric M. Larson, James Kadison, Gerald C. O'Brien, Robert F. Grimes, Jr., Virgle W. Davis, Stephen L. Hose, and Dennis McClure. The defendants were Lawrence H. Summers, Secretary of the Treasury, who has been succeeded in office by Paul H. O'Neill, and Bradley A. Buckles, Director, Bureau of Alcohol, Tobacco and Firearms. There were no other parties and there were no amici in the district court.

Circuit Rule 26.1 is inapplicable inasmuch as all plaintiffs/appellants are natural persons.

Rulings Under Review

The ruling under review is the final Order of the district court for the District of Columbia, Hon. James Robertson presiding, entered in this case on February 5, 2001, granting defendants' motion to dismiss. The ruling is reported at 135 F. Supp. 2d 23.

Related Cases

This case has not previously been before this Court or any other court. There are no related cases currently pending in this court or in any other court of which counsel is aware.

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	i
TABLE OF AUTHORITIES	ii
GLOSSARY	xi
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	1
STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	2
Proceedings in the Court Below	2
Facts	2
SUMMARY OF ARGUMENT	5
ARGUMENT	9
Standard of Review	9
I. THE NATIONAL FIREARMS ACT IS A REVENUE MEASURE NOT SUBJECT TO STATE OR LOCAL VETO	9
A. Statutory and Regulatory Background	9
B. The NFA is a Tax Statute Not Subject to Administration or Nullification by State or Local CLEOs	12
II. THE REQUIREMENT IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW	18
A. The Secretary Has a Statutory Duty to Approve Applications for Qualified Taxpayers and Has No Authority to Delegate a Veto to State and Local CLEOs	18

B.	Congress Intended that Administration of the NFA Be Subject to Judicial Review Under the APA, Precluding Reliance on Non-Federal CLEOs	24
III.	REQUIRING AN APPLICANT TO DISCLOSE NFA TAX FORMS TO A CLEO VIOLATES PRIVACY PROTECTIONS UNDER 26 U.S.C. § 6103	27
IV.	THE REQUIREMENT IS AN UNCONSTITUTIONAL IMPOSITION ON STATE AND LOCAL OFFICERS	34
	CONCLUSION	40

TABLE OF AUTHORITIES*

CASES	Page
<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967)	27
<i>Alexander v. FBI</i> , 971 F. Supp. 603 (D. D.C. 1997)	33
<i>BAM Historic District Association v. Koch</i> , 723 F.2d 233 (2nd Cir. 1983)	25
<i>Berger v. Iron Workers Reinforced Rodmen</i> , 170 F.3d 1111 (D.C. Cir. 1999)	9
<i>Bowen v. Michigan Academy of Family Physicians</i> , 476 U.S. 667 (1986)	27
<i>Bruno v. Albright</i> , 197 F.3d 1153 (D.C. Cir. 1999)	26
<i>Church of Scientology of California v. United States</i> , 506 U.S. 9 (1992)	33
<i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971)	27
<i>City of New York v. United States</i> , 179 F.3d 29 (2nd Cir. 1999)	38
<i>Dart v. United States</i> , 848 F.2d 217 (D.C. Cir. 1988)	27
<i>Davis v. Erdmann</i> , 607 F.2d 917 (10th Cir. 1979)	20
<i>Department of Revenue of Montana v. Kurth Ranch</i> , 511 U.S. 767 (1994)	13
<i>Department of Defense v. FLRA</i> , 510 U.S. 487 (1994)	24, 33
<i>Dillard v. Baldwin County Commissioners</i> , 225 F.3d 1271 (11th Cir. 2000)	26
<i>Dixson v. United States</i> , 465 U.S. 482 (1984)	37
<i>Duke Power Co. v. Carolina Environmental Study Group, Inc.</i> , 438 U.S. 59 (1978)	39
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	24
* <i>F.J. Vollmer Co., Inc. v. Higgins</i> , 23 F.3d 448 (D.C. Cir. 1994),	

* Authorities upon which we chiefly rely are marked with asterisks.

<i>later proceeding, F.J. Vollmer Co., Inc. v. Magaw</i> , 102 F.3d 591 (D.C. Cir. 1996)	7, 20, 25, 26, 29
<i>Fund for Animals, Inc. v. Florida Game & Fresh Water Fish Com.</i> , 550 F. Supp. 1206 (S.D. Fla. 1982)	25
<i>Gardner v. United States</i> , 213 F.3d 735 (D.C. Cir. 2000)	28
<i>Gillespie v. City of Indianapolis</i> , 185 F.3d 693 (7th Cir. 1999)	39
<i>Grosso v. United States</i> , 390 U.S. 62 (1967)	14
<i>*Haynes v. United States</i> , 390 U.S. 85 (1968)	6, 13, 14, 15, 17
<i>Hochstein v. United States</i> , 900 F.2d 543 (2nd Cir. 1990)	19
<i>Koog v. United States</i> , 79 F.3d 452 (5th Cir. 1996), <i>aff'g McGee v. United States</i> , 863 F. Supp. 321, 325 (S.D. Miss. 1994)	37, 38
<i>Leary v. United States</i> , 395 U.S. 6 (1969)	17
<i>Marchetti v. United States</i> , 390 U.S. 39 (1968)	14
<i>McSurely v. McAdams</i> , 502 F. Supp. 52 (D. D.C. 1980)	32
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988)	36
<i>Myers v. United States</i> , 272 U.S. 52 (1926)	36
<i>National Coalition to Ban Handguns v. BATF</i> , 715 F.2d 632 (D.C. Cir. 1983)	16
<i>National Treasury Employees Union v. Federal Labor Relations Board</i> , 791 F.2d 183 (D.C. Cir. 1986)	28
<i>New York v. United States</i> , 505 U.S. 144 (1992)	35, 38, 39
<i>Police Automatic Weapons Service v. Benson</i> , 837 F. Supp. 1070 (D. Ore. 1993)	25
<i>*Printz v. United States</i> , 521 U.S. 898 (1997), <i>rev'g</i> 66 F.3d 1025 (9 th Cir. 1995), <i>rev'g</i> 854 F. Supp. 1503 (D. Mont. 1994)	8, 35, 36, 37, 38-39

<i>Ramirez v. Reich</i> , 156 F.3d 1273 (D.C. Cir. 1998)	27
<i>Romero v. United States</i> , 883 F. Supp. 1076 (W.D. La. 1995)	39
<i>Ryan v. Bureau of Alcohol, Tobacco and Firearms</i> , 715 F.2d 644 (D.C. Cir. 1983)	29
* <i>Sonzinsky v. United States</i> , 300 U.S. 506 (1937)	6, 12, 13
* <i>Tierney v. Schweiker</i> , 718 F.2d 449 (D.C. Cir. 1983)	31, 32
<i>Transactive Corp. v. United States</i> , 91 F.3d 232 (D.C. Cir. 1996)	26
<i>United States v. Bachelor</i> , 611 F.2d 443 (3d Cir. 1979)	31
<i>United States v. Calamaro</i> , 354 U.S. 351 (1957)	21
<i>United States v. Chemical Bank</i> , 593 F.2d 451 (2nd Cir. 1979)	31
<i>United States v. Ferguson</i> , 788 F. Supp. 580 (D. D.C. 1992), <i>affd</i> , 1 F.3d 45 (D.C. Cir. 1993)	13
<i>United States v. Hunter</i> , 863 F. Supp. 462 (E.D. Mich. 1994)	29
<i>United States v. Indelicato</i> , 97 F.3d 627 (1st Cir. 1996)	22
<i>United States v. Kahriger</i> , 345 U.S. 22 (1953)	13
<i>United States v. Lavin</i> , 604 F. Supp. 350 (E.D. Pa. 1985)	31
<i>United States v. Lopez</i> , 514 U.S. 549 (1995)	12
<i>United States v. Nathan</i> , 202 F.3d 230 (4th Cir. 2000)	36
<i>United States v. Oman</i> , 91 F.2d 1320 (9th Cir. 1996)	22
<i>United States v. Sheriff, City of New York</i> , 330 F.2d 100 (2nd Cir.), <i>cert. denied</i> , 379 U.S. 929 (1964)	33
<i>United States v. Thompson/Center Arms Co.</i> , 504 U.S. 505 (1992)	20
<i>United States v. Vogel Fertilizer Co.</i> , 455 U.S. 16 (1982)	21

**Weyer v. United States*, 429 F.2d 74 (5th Cir. 1970) 7, 16, 17, 20

CONSTITUTIONS

U.S. Const., art. I 1
U.S. Const., art. I, § 8 6, 12
U.S. Const., art. II 1
U.S. Const., Amendment IV 7, 8, 18, 23, 25
U.S. Const., Amendment X 1, 39

STATUTES

5 U.S.C. § 551(1) 15
5 U.S.C. § 701(a)(1)-(2) 25
5 U.S.C. § 701(b)(2) 26
5 U.S.C. § 702 1, 26
5 U.S.C. § 706 26
18 U.S.C. § 921(a)(20) 22, 23
18 U.S.C. § 922(b)(4) 15
18 U.S.C. § 924(b)(4) 6, 14
18 U.S.C. § 1905 33
26 U.S.C. § 7213 33
26 U.S.C. § 5801 9
26 U.S.C. § 5811 1, 2, 28

26 U.S.C. § 5811(a)	10
26 U.S.C. § 5812	1, 2, 5
26 U.S.C. § 5812(a)	7, 10, 18
26 U.S.C. § 5814	17
26 U.S.C. § 5821	2, 10, 28
26 U.S.C. § 5822	1, 2, 5, 7, 10, 18
26 U.S.C. § 5841	2, 5, 9, 19
26 U.S.C. § 5845(a)	9
26 U.S.C. § 5861	34
26 U.S.C. § 6103	<i>passim</i>
26 U.S.C. § 6103(a)	2, 8, 28
26 U.S.C. § 6103(b)	2
26 U.S.C. § 6103(b)(1)	29
26 U.S.C. § 6103(b)(3)	29
26 U.S.C. § 6103(b)(8)	8, 30
26 U.S.C. § 6103(b)(2)(A)	29
26 U.S.C. § 6103(d)	2
26 U.S.C. § 6103(d)(1)	31
26 U.S.C. § 6103(i)(3)(B)	31
26 U.S.C. § 6103(l)	31
26 U.S.C. § 6103(o)(1)	31

26 U.S.C. § 6103(p)(8)	31
26 U.S.C. § 6301	18, 21
26 U.S.C. § 7213	33
26 U.S.C. § 7431	33
26 U.S.C. § 7431(c)	33
26 U.S.C. § 7805(a)	20, 21
28 U.S.C. § 1291	1
28 U.S.C. § 1331	1
28 U.S.C. § 1361	1
28 U.S.C. § 2201	1
42 U.S.C. § 14081(b)	37
§ 102(b), Pub. L. 103-159, 107 Stat. 1536 (1993)	23
§ 103, Pub. L. 103-159, 107 Stat. 1536 (1993)	23
P.L. 90-351, 82 Stat. 197 (1968)	6, 14
P.L. 90-618, 82 Stat. 1213 (1968)	6-7, 14
P.L. 90-618, 82 Stat. 1216 (1968)	19
P.L. 99-308, 100 Stat. 449 (1986)	23
I.R.C. Chapter 53	1, 5, 9, 31
I.R.C. § 5843 (1954)	14
I.R.C. § 5847 (1954)	19
I.R.C. § 6107 (1954)	15

REGULATIONS

26 C.F.R. § 179 16

26 C.F.R. § 179.99 16

27 C.F.R. § 179, Subpart (E) 11

27 C.F.R. § 179, Subpart (F) 10

27 C.F.R. § 179.62 2

27 C.F.R. § 179.63 *passim*

27 C.F.R. § 179.64 2

27 C.F.R. § 179.84 2, 10

27 C.F.R. § 179.85 *passim*

27 C.F.R. § 179.86 2

28 C.F.R. § 25.6(j) 23

LEGISLATIVE MATERIALS

Cong. Rec. 15

House Report No. 94-1380, U.S. Code Cong. & Admin. News 3356 (1976) 32

Rept. No. 1780, House Com. on Ways & Means, 73rd Cong., 2d Sess. (1934) 12

Senate Report No. 1097, U.S. Code Cong. & Admin. News 1968 (1968) 14

Senate Report 1501, 90th Cong., 2nd Session, Judiciary Committee (1968) 15

OTHER AUTHORITIES

50 F.R. 41681 (Oct. 15, 1985) 12

ATF Rulings 94-1, 94-2, 1994 ATF Quarterly Bulletin-1, 22 23

ATF Ruling 2001-1, 66 F.R. 9748 (Feb. 9, 2001) 23

S. Halbrook, “Congress Interprets the Second Amendment,”
62 Tennessee Law Review 597, 605-12 (Spring 1995) 12

T.D. ATF-270, 53 F.R. 10480 (Mar. 31, 1988) 22

GLOSSARY

<i>Term</i>	<i>Abbreviation</i>
Bureau of Alcohol, Tobacco and Firearms	ATF or BATF
Chief Law Enforcement Officer	CLEO
Federal Firearms License	FFL
Gun Control Act	GCA
Internal Revenue Code	IRC
Joint Appendix	JA
National Instant Criminal Background Check System	NICS
National Firearms Act	NFA
Omnibus Crime Control and Safe Streets Act	OCCSSA

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331, in that the matter in controversy arose under the Constitution and laws of the United States and was a controversy to which the United States was a party. This is an action for review under the Administrative Procedure Act, 5 U.S.C. § 702, for a declaratory judgment, 28 U.S.C. § 2201, and for a writ of mandamus, 28 U.S.C. § 1361.

This Court has jurisdiction under 28 U.S.C. § 1291. The district court rendered final judgment for the defendant on February 5, 2001. Joint Appendix (“JA”) 68. Plaintiffs filed a timely notice of appeal on April 3, 2001. JA 70. This appeal is from a final order by the United States district court that disposes of all claims with respect to the parties.

STATEMENT OF ISSUES

Chapter 53 of the Internal Revenue Code, the National Firearms Act, provides for the taxation and registration of the transfer and making of firearms as defined by the Act. 26 U.S.C. §§ 5812, 5822, and 5841. However, 27 C.F.R. §§ 179.63 and 179.85 require that applications submitted to the Secretary of Treasury to make, transfer, and register firearms include a certificate of the local chief of police or other local or State law enforcement official regarding the maker and/or transferee. The issues are as follows:

1. Whether the certificate requirement lacks statutory basis, is inconsistent with the Secretary’s statutory duty to administer the Act, seeks to evade judicial review under the APA, and is otherwise arbitrary, capricious, and contrary to law.

2. Whether the certificate requirement imposes duties, burdens, and accountability on local or State officials in violation of principles of federalism established in the United States Constitution, Articles I and II and Amendment X.

3. Whether requiring disclosure to local or State officials of applications to make, transfer, and register firearms, which are tax forms, violates the tax privacy protections of 26 U.S.C. § 6103.

STATUTES AND REGULATIONS

The following are in the Addendum: 26 U.S.C. §§ 5811, 5812, 5821, 5822, and 5841; 26 U.S.C. § 6103(a), (b), and (d); and 27 C.F.R. §§ 179.62, 179.63, 179.64, 179.84, 179.85, and 179.86.

STATEMENT OF THE CASE

Proceedings in the Court Below

This is an action to compel the Bureau of Alcohol, Tobacco and Firearms (“BATF”) of the U.S. Department of the Treasury to approve applications to transfer, make and register firearms pursuant to 26 U.S.C. §§ 5812, 5822 and 5841. Pursuant to 27 C.F.R. §§ 179.63 and 179.85, BATF refuses to approve such applications without the endorsement of local or State chief law enforcement officers. Plaintiffs-Appellants allege that they meet the statutory requirements for such applications and seek a declaration that the cited regulations are void.

Defendants-Appellees Secretary of the Treasury and Director of the BATF moved to dismiss pursuant to Rule 12(b)(1) and (6), F.R.Civ.P., alleging lack of subject matter jurisdiction and failure to state a claim on which relief can be granted. The district court determined that plaintiffs had standing, but that the complaint failed to state a claim. JA 58. Accordingly, on February 5, 2001, the court entered an order dismissing the complaint. JA 68. This appeal followed.

Facts

The plaintiffs (other than the two law enforcement plaintiffs) seek to make, transfer, receive, and register firearms pursuant to the National Firearms Act (“NFA”). All such plaintiffs are qualified and

eligible to possess the firearms at issue under the laws of the United States and of the States and localities of their respective residences.

The regulations at issue, 27 C.F.R. §§ 179.63 and 179.85, require a certificate by a local or State chief law enforcement officer (“CLEO certificate”) in order to secure BATF approval to make, transfer, receive, and register firearms. Plaintiffs have not obtained the CLEO certificates because the CLEOs in their jurisdictions refuse to sign the certificates even for legally-eligible persons or because plaintiffs do not wish to disclose the applications (which are tax forms) to the CLEOs. Accordingly, BATF has disapproved plaintiffs’ applications to make, transfer, and receive firearms. But for the CLEO-certificate requirement, BATF would approve plaintiffs’ applications to make, transfer, and receive firearms. BATF’s requirement for CLEO certificates is the proximate cause of injury to the non-CLEO plaintiffs, including loss of profits and inability to engage in the lawful collection and study of firearms. JA 25-26.¹

Plaintiff Lomont is a licensed firearm manufacturer and dealer and NFA special occupational taxpayer. Lomont has lost sales because eligible transferees cannot get CLEO certificates. JA 9,17.

Plaintiff Whelan is unwilling to waive his rights to privacy in his tax returns by seeking a CLEO certificate, and BATF failed to approve Whelan’s application (which included no CLEO certificate) to make a firearm. BATF encourages CLEOs in his jurisdiction not to sign certificates. JA 17.

Plaintiff Larson, an author and witness before congressional committees on NFA firearms, is a federally-licensed collector of “curio and relic” NFA firearms whose ability to buy and sell such items is impaired by the inability of others to obtain CLEO certificates. JA 19.

Plaintiff Kadison resides in Arlington, Virginia, the Chief of Police of which requires a search of an

¹ Citations concerning the facts refer to the Complaint.

applicant's home in order to sign a CLEO certificate. No other CLEO of that jurisdiction will sign a certificate. In 1998, the Chief refused to sign a certificate for Kadison because Kadison would not allow police to search his home. Kadison later submitted to BATF an application allowing him to receive a firearm, enclosing a State certification that he had no criminal record, and BATF approved the application. BATF later notified Kadison that the transfer had been approved in error, but that a BATF background check confirmed the lawfulness of the transfer, approval for which would not be revoked. JA 20.

In 1999, the Chief again refused to sign a CLEO certificate because Kadison would not consent to a house search. Kadison then unsuccessfully sought a CLEO certificate from the Sheriff of Arlington County, the Arlington County Commonwealth's Attorney, and the Judges of the Arlington County Circuit Court. An application, complete except that it had no CLEO certificate, was then submitted to BATF to transfer the firearm. BATF denied the application for lack of a CLEO certificate. JA 19.

Plaintiff O'Brien also resides in Arlington County, whose previous Police Chief approved CLEO certificates five times for him, resulting in BATF approval of his transfer applications. In 1998, O'Brien could not obtain a CLEO certificate because he refused permission for a police search of his home. O'Brien was refused CLEO certificates from the Sheriff, the Commonwealth's Attorney, and the Virginia State Police, each of which advised that it was their policy not to sign CLEO certificates. O'Brien then submitted to BATF a transfer application which was complete except for the CLEO certificate, which BATF thereby denied. JA 21.

In 1999, plaintiff Grimes was refused CLEO certificates from the Suffolk County, Virginia, Sheriff, Commonwealth's Attorney, Circuit Court, and Police Chief, as well as the Virginia State Police and Attorney General. No other officials in Grimes' jurisdiction will execute a CLEO certificate. Grimes

submitted a transfer application to BATF which was complete except for the CLEO certificate, which BATF failed to approve. JA 22.

Plaintiff Davis obtained CLEO certificates from a previous Police Chief of Anchorage, Alaska. The current Chief advised that, as a matter of policy, he does not sign CLEO certificates, but in fact signed certificates for cronies and friends. No other official is willing to execute a certificate. In 2000, BATF failed to approve a transfer application from Davis which was complete except for the CLEO certificate. JA 23.

Plaintiff Hose, Police Chief of Clinton, Indiana, is a “local chief of police,” and Plaintiff Dennis McClure, Sheriff of Orange County, Vermont, is a “sheriff of the county,” as those terms are used in 27 C.F.R. §§ 179.63 and 179.85. JA 10. These regulations empower Hose, McClure, and other CLEOs to refuse to sign certificates and thus to prohibit the making or transfer of firearms by their constituents. The regulations create the impression by their constituents that such CLEOs administer the regulations in an unlawful and injurious manner or fail to administer them altogether. JA 24.

SUMMARY OF ARGUMENT

Chapter 53 of the Internal Revenue Code, the National Firearms Act (“NFA”), is a regulatory scheme for the taxation and registration of the making and transfer of specified firearms. 26 U.S.C. § 5841 requires the Secretary of Treasury to maintain a central registry of firearms and provides for registration by makers and transferors of firearms. Sections 5812 and 5822 provide for transfer and making of firearms after the Secretary approves an application registering the firearm and including the tax payment, the registrant’s identification (including fingerprints and photograph), and identification of the firearm. Applications must be denied if the receipt or making would place the transferee or maker in

violation of law. *Id.*

However, 27 C.F.R. §§ 179.63 and 179.85 require that, in addition to the above, a maker or transferee include with the application a certificate of the local police chief, county sheriff, or other State or local chief law enforcement officer (“CLEO”), certifying that the fingerprints and photograph are valid, that the making or transfer would not place the person in violation of State or local law, and that no information exists that the person will use the firearm for other than lawful purposes.

The Secretary, acting through BATF, disapproves transfer and making applications which have no CLEO certificate. CLEOs have no legal duty to execute such certificates. Some plaintiffs filed applications with the Secretary lacking certificates because the pertinent CLEOs refused to sign certificates. Others filed applications without certificates because the application is a tax form which some plaintiffs do not wish to disclose to the CLEO. The applications were all denied.

The NFA is based on Congress’ power under Article I, § 8 of the Constitution, “to lay and collect taxes.” Its registration provisions are “supportable as in aid of a revenue purpose. On its face it is only a taxing measure” *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937). However, NFA information requirements may not violate the Constitution. *Haynes v. United States*, 390 U.S. 85 (1968).

In 1968, Congress considered and ultimately rejected a CLEO certificate. The Omnibus Crime Control and Safe Streets Act, P.L. 90-351, 82 Stat. 197 (1968), enacted 18 U.S.C. § 924(b)(4), which required a local CLEO certificate for receipt of NFA firearms. Following objections that the duty could not be imposed on the States and that it provided for no judicial review, the provision was amended to impose that duty on the Secretary. Gun Control Act, P.L. 90-618, 82 Stat. 1213 (1968). The previous NFA regulation requiring a CLEO certificate was declared invalid in *Weyer v. United States*, 429 F.2d

74, 76-77 (5th Cir. 1970).

The CLEO-certificate requirement is arbitrary, capricious, and contrary to law. It has no statutory basis, defeats the aims of the NFA to register and tax firearms, purports to insulate administration of the NFA from judicial review, irrationally delegates administration of the NFA to persons who have no such duty, and allows persons who are not federal agents to impose non-statutory requirements (such as waiver of Fourth Amendment rights).

Sections 5812(a) and 5822 provide for the Secretary's approval of firearm transfer and making if the NFA's requirements are met. *See F.J. Vollmer Co., Inc. v. Higgins*, 23 F.3d 448 (D.C. Cir. 1994), *later proceeding, F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591 (D.C. Cir. 1996). The only reason for denial authorized by law is that the transfer or making would place the applicant in violation of law, not that such person did not submit a CLEO certificate. Administration of these provisions is delegated to the Secretary, who has no authority to empower non-federal CLEOs, who have no such duty, essentially to veto the registration and taxation of firearms.

Since the NFA clearly provides that its provisions shall be administered by the Secretary, it cannot be contended that, as a policy matter, CLEOs could administer the transfer and making provisions better than the Secretary. It would be strange to suggest that CLEOs with no duty to check identifications and conduct the other investigations described in the regulations, and who in fact refuse to do so, are somehow better at the job.

Congress did not intend to make refusals to register firearms non-reviewable under the Administrative Procedure Act. The actions of a local CLEO, however, are not subject to the APA. The Secretary cannot exempt his statutory duty to register firearms from judicial review by transferring the

power to a non-federal party who is not answerable to the Secretary and whose action or inaction is not subject to APA review.

Some CLEOs impose arbitrary conditions for execution of a certificate, such waiver of Fourth Amendment rights. Congress did not empower to the Secretary to grant *carte blanche* to every CLEO in the United States to decide how or even if the NFA would be administered.

The CLEO-certificate requirement violates 26 U.S.C. § 6103(a), which provides that “[tax] returns and return information shall be confidential,” and that no federal official “shall disclose any return or return information obtained by him in any manner in connection with his service as such” “The term ‘disclosure’ means the making known to any person *in any manner whatever* a return or return information.” § 6103(b)(8). The NFA transfer and making applications are tax returns, and the regulations at issue require them to be disclosed to CLEOs either before submitting them to BATF or after rejection by BATF for lack of a certificate.

The CLEO-certificate requirement unconstitutionally imposes duties on State and local CLEOs. Even if interpreted as voluntary, the regulation forces unwanted political accountability onto State and local CLEOs in violation of basic principles of federalism and of the separation-of-powers doctrine. No constitutional or statutory authority authorizes the Secretary to impose and delegate administration of any part of the NFA to the States. *See Printz v. United States*, 521 U.S. 898, 935 (1997).

The federal government has not deputized any CLEO to execute NFA certificates, and no State has volunteered to do so. CLEOs are not authorized by State law to execute certificates, and many States preempt local authorities from any form of firearms regulation. Accordingly, the regulations compel State

and local CLEOs to administer a federal regulatory program, in violation of principles of federalism and separation of powers.

ARGUMENT

Standard of Review

As the issues here are questions of law, this Court conducts a *de novo* review. *Berger v. Iron Workers Reinforced Rodmen*, 170 F.3d 1111, 1125 (D.C. Cir. 1999).

I. THE NATIONAL FIREARMS ACT IS A REVENUE MEASURE NOT SUBJECT TO STATE OR LOCAL VETO

A. Statutory and Regulatory Background

Chapter 53 of the Internal Revenue Code, known as the National Firearms Act (“NFA”), 26 U.S.C. § 5801 *et seq.*, is administered by the Secretary of the Treasury, who delegated his authority to the Bureau of Alcohol, Tobacco and Firearms (“BATF”). Treasury Dept. Order 120.01 (1972). The NFA is a comprehensive regulatory scheme to tax the making and transfer of “firearms” as defined in § 5845(a).²

In order to facilitate collection of the taxes, firearms must be registered as provided by § 5841:

(a) Central registry. -- The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include –

- (1) identification of the firearm;
- (2) date of registration; and
- (3) identification and address of person entitled to possession of the firearm.

² As narrowly defined therein, “firearm” runs the gamut from a pistol with a smooth bore (but not one with a rifled bore) to a machinegun (or certain parts thereof). *See* § 5845(a)-(f).

(b) By whom registered. -- Each . . . maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) How registered. -- . . . Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

Section 5811(a) provides that “[t]here shall be levied, collected, and paid on firearms transferred a tax at the rate of \$200” (\$5 for a §5845(e) firearm). Section 5821 imposes a \$200 tax to make a firearm. A firearm may be transferred as provided in § 5812 (a):

A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; and (6) the application form shows that the Secretary has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.

Section 5822 provides similar procedures for making a firearm.

Regulations concerning the transfer of firearms are provided in 27 C.F.R. Part 179, Subpart F.

Section 179.84 provides for transfer of a firearm as follows:

[N]o firearm may be transferred in the United States unless an application, Form 4 (Firearms), Application for Transfer and Registration of Firearm, in duplicate, executed under the penalties of perjury to transfer the firearm and register it to the transferee has been filed with and approved by the Director. The application, Form 4 (Firearms), shall be filed by the transferor and shall identify the firearm to be transferred The application, Form 4 (Firearms), shall identify the transferor by name and address; shall identify the transferor's Federal firearms license and special (occupational) Chapter tax stamp, if any; and if the transferor is other than a natural person, shall show the title or status of the person executing the application. The application also shall identify

the transferee by name and address, and, if the transferee is a natural person not qualified as a manufacturer, importer or dealer under this part, he shall be further identified in the manner prescribed in § 179.85. The application also shall identify the special (occupational) tax stamp and Federal firearms license of the transferee, if any. Any tax payable on the transfer must be represented by an adhesive stamp of proper denomination being affixed to the application, Form 4 (Firearms), properly canceled.

27 C.F.R. § 179.85, which is entitled “Identification of transferee,” provides the following further requirements, including the CLEO certificate:

If the transferee is an individual, such person shall securely attach to each copy of the application, Form 4 (Firearms), in the space provided on the form, a photograph of the applicant The transferee shall attach two properly completed FBI Forms FD-258 (Fingerprint Card) to the application. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them. *A certificate of the local chief of police, sheriff of the county, head of the State police, State or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director, shall be completed on each copy of the Form 4 (Firearms). The certificate shall state that the certifying official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying official has no information indicating that the receipt or possession of the firearm would place the transferee in violation of State or local law or that the transferee will use the firearm for other than lawful purposes.* (Emphasis added.)

Comparable regulations for an application to make a firearm (ATF Form 1) are provided in 27 C.F.R. Part 179, Subpart E. Section 179.63, entitled “Identification of applicant,” concludes:

A certificate of the local chief of police, sheriff of the county, head of the State police, State or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director, shall be completed on each copy of the Form 1 (Firearms). The certificate shall state that the certifying official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying official has no information indicating that possession of the firearm by the maker would be in violation of State or local law or that the maker will use the firearm for other than lawful purposes.

As originally promulgated in 1934, the regulations provided that a U.S. Attorney or U.S. Marshal as well as a police chief or sheriff could execute the CLEO certificate. Treasury Regulation No. 88, Art.

65 (1934). Authorization for these (or any) federal official to execute a CLEO certificate was eliminated in 1985.³

**B. The NFA is a Tax Statute Not Subject to Administration
or Nullification by State or Local CLEOs**

The NFA’s registration and taxation requirements are an exercise of Congress’ power “to lay and collect taxes, duties, imposts, and excises.” U.S. Const., art. I, § 8. The NFA was intended to “provid[e] for the taxation of fire-arms and for procedure under which the tax is to be collected.” Rept. No. 1780, House Com. on Ways & Means, 73rd Cong., 2d Sess., 2 (1934).⁴

The NFA is *not* based on some undefined federal power to enact general criminal laws. The Constitution “withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.” *United States v. Lopez*, 514 U.S. 549, 566 (1995) (invalidating Gun Free School Zones Act). Indeed, *Sonzinsky v. United States*, 300 U.S. 506, 512 (1937), rejected the argument “that the present [NFA] levy is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms,” and held:

The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations. . . . Nor is the subject of the tax described or treated as criminal by the taxing statute. . . . Here Section 2 contains no regulations other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose. On its face it is only a taxing measure

³ “The Executive Office for United States Attorneys and the United States Marshals Service advised ATF that they would no longer execute the law enforcement certification and requested the references to United States Attorneys and United States Marshals be deleted” 50 F.R. 41681 (Oct. 15, 1985).

⁴ On the NFA’s adoption, *see* S. Halbrook, “Congress Interprets the Second Amendment,” 62 *Tennessee Law Review* 597, 605-12 (Spring 1995).

Id. at 513.

Given that the NFA is a revenue measure and not an attempted exercise of undelegated power,

Sonzinsky refused to speculate as to why Congress taxed certain firearms:

Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts. . . . They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. . . .

Here the annual tax of \$200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power.⁵

Id. at 513-14. The CLEO-certificate requirement is just such “an offensive regulation” which prevents the NFA from “operat[ing] as a tax.”

Haynes v. United States, 390 U.S. 85, 87 (1968), described the NFA as “an interrelated statutory system for the taxation of certain classes of firearms.” “All these taxes are supplemented by comprehensive requirements calculated to assure their collection.” *Id.* at 88. Invalidating certain NFA registration requirements as in violation of the right against self-incrimination, *Haynes* commented:

We do not doubt, as we have repeatedly indicated, that this Court must give deference to Congress' taxing powers, and to measures reasonably incidental to their exercise; but we are no less obliged to heed the limitations placed upon those powers by the Constitution's other commands. We are fully cognizant of the Treasury's need for accurate and timely information, but other methods, entirely consistent with constitutional limitations, exist by which such information

⁵ *Sonzinsky* has stood the test of time. *United States v. Kahrigier*, 345 U.S. 22, 25-26 (1953) (tax on gamblers does not infringe on States' police power); *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 781 (1994) (invalidating punitive tax on drug law violators); *United States v. Ferguson*, 788 F. Supp. 580, 581 (D. D.C. 1992) (“the NFA “requires firearms to be registered so that taxes may be assessed on them. . . . [T]he registration requirement is valid under the Constitution only because it is an integral part of Congress’s revenue scheme.”), *aff'd*, 1 F.3d 45 (D.C. Cir. 1993) (table).

may be obtained.

Id. at 98. The same could be said about the CLEO requirement here.

Haynes and its two companion cases criticized an IRC section providing that persons who paid NFA and gambling taxes would be reported to State and local prosecutors.⁶ This could have raised questions about the CLEO-certificate requirement, although it was not an issue in *Haynes*.

In response to *Haynes* and as part of a broader revision, the NFA was amended and reenacted as Title II of the Gun Control Act (“GCA”), P.L. 90-618, 82 Stat. 1213 (1968). Neither Titles I nor II of the GCA contain anything authorizing the Secretary to require a CLEO certificate. However, Title I, § 102 of the GCA completely replaced, before it became effective, Title IV of the Omnibus Crime Control and Safe Streets Act (“OCCSSA”), P.L. 90-351, 82 Stat. 197 (1968). The OCCSSA enacted a CLEO-certificate requirement in 18 U.S.C. § 924(b)(4), which made it unlawful for a licensed firearms dealer to sell or deliver—

To any person any destructive device, machinegun (as defined in section 5843 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, unless he has in his possession a sworn statement executed by the principal law enforcement officer of the locality wherein the purchaser or person to whom it is otherwise disposed of resides, attesting that there is no provision of law, regulation, or ordinance which would be violated by such person’s receipt or possession thereof, and that he is satisfied that it is intended by such person for lawful purposes
.....

This was criticized in the Individual Views of Messrs. Dirksen, Hruska, Thurmond, and Burdick, in Senate Report No. 1097, in U.S. Code Cong. & Admin. News 1968, 2112, 2294 (1968), as follows:

Senator Dodd introduced, on behalf of the Administration, a highly controversial and strongly objectionable feature of S.1, Amendment 90 (which is incorporated into Title IV) which would

⁶ *Haynes*, 390 U.S. at 99-100 & n.14; *Grosso v. United States*, 390 U.S. 62, 66, 69 (1967); *Marchetti v. United States*, 390 U.S. 39, 58-59 (1968).

control destructive devices by requiring prior approval of local police in the form of a sworn statement before a person could purchase one of these weapons. First, it must be questioned whether or not the federal government can constitutionally impose a duty on a state or local official to perform an affirmative act, such as the execution of a sworn statement. Yet this is what the provision apparently requires. In response, it may be argued that there is no burden to act imposed on the law enforcement official, but that the burden is placed only on dealers and purchasers who must obtain the statements. This may be technically correct, but the practical effect is to place a burden on the local police.

However, the provision is strongly objectionable, since there is no requirement that an officer act upon the request for the required statement, nor is there any appeal procedure even if he does respond.

In debate, Senator Hansen queried, “what recourse would a potential purchaser have if the local police refused to sign such a statement; and second, if it refused to process an application at all?” 114 Cong. Rec. 13353 (May 15, 1968). Dodd “suppose[d] that he would have recourse to the courts.” *Id.* When Hansen noted that no such provision existed in the bill, Dodd replied that “the Administrative Procedure Act would cover certain situations relating to licensees under title IV.” *Id.* However, the memorandum Dodd then inserted into the record stated that only an “agency,” such as the Secretary, is subject to the APA, since “‘agency’ means each authority of the Government of the United States” *Id.* at 13354, quoting 5 U.S.C. § 551(1). Judicial review would have been unavailable under the bill if a local CLEO refused to sign or even consider a certificate.

Reflecting the above defects, the CLEO-certificate provision in OCCSSA was deleted in the GCA. The GCA’s version of § 922(b)(4), which is still law today, provides that a licensee may not transfer the listed NFA firearms “except as specifically authorized by the Secretary consistent with public safety and necessity.”

Moreover, the GCA responded to *Haynes* and its companion cases by repealing the provision for

notice to local and State authorities of NFA and gambling taxpayers. Senate Report 1501, 90th Cong., 2nd Session, Judiciary Committee, 52 (1968), explained:

This section provides for the repeal of section 6107 of the Internal Revenue Code of 1954 relating to disclosure of the identify of persons paying special (occupational) tax which was subjected to criticism in the three cases handed down by the Supreme Court on January 29, 1968. The repeal of this section should make it completely clear that it is not the desire or intent of the Congress that the entire system of Federal taxation be rendered impotent or ineffectual because a State or local jurisdiction has a law rendering aspects of the activity illegal. The Federal taxing power is of such fundamental importance that it is difficult to conceive that it was the intent of the framers of the Constitution that the act of a State or local government could thwart the effective operation of the internal revenue laws of the United States. Since the section no longer serves any useful purpose and since it now jeopardizes the effective operation of the internal revenue laws, it should be repealed.

If federal notification to CLEOs was inconsistent with the tax power, so too is the CLEO-certificate requirement, which allows a CLEO to veto federal taxes altogether.

Thus, Congress enacted in OCCSSA and then repealed in the GCA, before it became effective, a CLEO-certificate requirement for NFA firearms. This clarifies Congress' intent that the GCA does not authorize such a requirement.⁷

No reference to the pre-GCA regulation requiring a federal, State or local CLEO certificate for NFA transfers could be located in the legislative history. However, that regulation was held to be void in *Weyer v. United States*, 429 F.2d 74, 76 (5th Cir. 1970), as follows:

There remains an inconsistency between the provisions of the statute and those of the implementing regulations. . . . The regulations supplement the statute by requiring that the Director of the Alcohol and Tobacco Tax Division approve any transfer, 26 C.F.R. § 179. As a prerequisite to that approval the regulations required a statement of a law enforcement officer

⁷ “The most telling historical evidence of the content of the [requirement at issue] is found by comparing the GCA to the OCCSSA which it replaced.” *National Coalition to Ban Handguns v. BATF*, 715 F.2d 632, 636 (D.C. Cir. 1983) (opinion by then Circuit Judge Scalia).

certifying that he is satisfied that the fingerprints and photograph appearing on the application are those of the applicant and that the firearm is intended by the applicant for lawful purposes.

26 C.F.R. § 179.99 (1966).

Referring to “the specific provision in § 5814 authorizing regulations establishing procedures for determination of the identity of applicants,” *Weyer* explained:

It should be noted that this provision in the firearms act does not authorize the Secretary to reject an application once identity is determined. Nowhere does the statute indicate that a transfer under such circumstances may be barred rather than taxed. Reading the terms of the firearms act in place of those of the Marijuana Tax Act, we find the language of the Supreme Court in *Leary v. United States*, 395 U.S. 6, 26 (1969)] fully applicable to the instant case.

Id. at 76. Since a CLEO has no duty to administer NFA provisions, the same regulation continues to allow transfers to be barred rather than taxed.

Weyer inserted bracketed items relevant to the NFA and the invalid CLEO-certificate regulation into the following quote from *Leary*:

The foregoing shows that at the time petitioner acquired [a firearm] he was confronted with a statute which on its face permitted him to acquire the [weapon] legally provided he paid the [\$200] transfer tax and gave incriminating information, and simultaneously with a system of regulations which, according to the Government, prohibited him from acquiring [machine guns] under any conditions. We have found those regulations so out of keeping with the statute as to be *ultra vires*.

Weyer, 429 F.2d at 76-77, quoting *Leary*, 395 U.S. at 26. The regulations at issue here depart more radically from applicable constitutional and statutory provisions than these original *ultra vires* regulations.²⁰

²⁰ Aside from its invalidity under *Haynes* and *Weyer*, the original regulation sheds no light on the current version’s validity. If federal attorneys and marshals originally had a legal duty to execute certificates, acceptance of certificates from local CLEOs would have just been an added convenience to taxpayers. The federalism issue did not exist until 1985, when federal attorneys and marshals were removed from the CLEO list. Section 6103 did not become pertinent until enactment of the Tax Reform Act of 1976.

The face of the statute, the legislative history, and constitutional constraints make clear that a State or local official cannot be empowered to veto the NFA tax. This is especially the case in light of the unqualified duty of the Secretary to collect NFA taxes in particular and generally to collect all taxes due, *see* 26 U.S.C. § 6301.

II. THE REQUIREMENT IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW

A. The Secretary Has a Statutory Duty to Approve Applications for Qualified Taxpayers and Has No Authority to Delegate a Veto to State and Local CLEOs

The CLEO-certificate requirement is arbitrary, capricious, and contrary to law. It has no statutory basis, defeats the aims of the statute to register and tax firearms, purports to insulate administration of the NFA from judicial review, irrationally delegates administration of the NFA to persons who have no such duty, and allows persons who are not federal agents to impose non-statutory requirements (such as waiver of Fourth Amendment rights).

Section 5812(a) provides for transfer of a firearm if (1) the transferor has filed an application “on the application form prescribed by the Secretary,” (2) the tax is paid “as evidenced by the proper stamp affixed to the original application form,” (3) the transferee is identified in the form “in such manner as the Secretary may by regulations prescribe,” including fingerprints and photograph, (4) the transferor “is identified in the application form in such manner as the Secretary may by regulations prescribe,” (5) the firearm “is identified in the application form in such manner as the Secretary may by regulations prescribe,” and (6) “the application form shows that the Secretary has approved the transfer and the registration of the firearm to the transferee.” “Applications shall be denied if the transfer, receipt, or possession of the firearm

would place the transferee in violation of law.”¹⁴ *Id.*

Unlike the authority to establish procedures “as the Secretary may by regulations prescribe” in the first, long sentence, the second, short sentence includes no authority to prescribe regulations, and simply authorizes denial of the application if the firearm would “place the transferee in violation of law.”¹⁵ However, since CLEOs have no duty to make that determination, the CLEO-certificate requirement results in rejection of applicants who would *not* be in violation of law simply because the CLEO does not issue certificates.

27 C.F.R. § 179.85 requires a certificate that the CLEO is satisfied that the fingerprints and photograph are those of the applicant, the CLEO has no information that “the receipt or possession of the firearm would place the transferee in violation of State or local law,” and the CLEO has no information “that the transferee will use the firearm for other than lawful purposes.” *See also* § 179.63 (same for making firearm).

Yet Congress delegated the administration of the NFA, like the rest of the Internal Revenue Code, to the Secretary, not to State and local officials. The regulation arbitrarily delegates to the CLEO a veto on a person’s ability to register and pay the tax on a firearm, even where the person would be in full compliance with federal, State, and local law. *See Hochstein v. United States*, 900 F.2d 543, 549 (2nd Cir. 1990) (“New York simply could not criminalize the collection and payment of federal withholding

¹⁴ Section 5822 has similar language for the making of a firearm.

¹⁵ The pre-GCA version of the NFA provided: “The Secretary or his delegate shall prescribe such regulations as may be necessary for carrying the provisions of this chapter into effect.” I.R.C. § 5847 (1954). The GCA repealed this provision and enacted the more specific grants of power. Title II, P.L. 90-618, 82 Stat. 1216 (1968).

taxes”).

Section 5841 provides that (a) “the Secretary *shall* maintain a central registry of all firearms,” (b) each maker “*shall* register each firearm he . . . makes” and “each firearm transferred *shall* be registered to the transferee by the transferor,” and (c) each such person “*shall* . . . obtain authorization,” and “such authorization *shall* effect the registration of the firearm required by this section.”

Where the statutory requirements are met, the Secretary has a duty to authorize the transfer of firearms and to register them.¹⁶ *F.J. Vollmer Co., Inc. v. Higgins*, 23 F.3d 448 (D.C. Cir. 1994), *later proceeding, F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591 (D.C. Cir. 1996). *Vollmer I* held that, in denying an NFA transfer application, “the Bureau made no findings of fact and offered no reasoned explanation on the subject. This alone would warrant setting aside the agency’s action and remanding the case.” 23 F.3d at 451. *Vollmer II* awarded EAJA fees based on the holding that “the Bureau’s action was inconsistent with the governing statute and would have produced an ‘incredible’ result.” 102 F.3d at 593. BATF has a statutory duty to approve transfer applications to applicants who met the legal standards. *Id.* at 599 (“because *Vollmer* successfully challenged the denial of that application, it was able to sell the weapons”).¹⁷

BATF seeks deference for its longstanding interpretation. However, as noted above, the regulation as it existed between 1934 and 1985 allowed U.S. Attorneys and U.S. Marshals, not just State and local

¹⁶ See *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 507 (1992) (noting §5841’s requirement that firearms be registered); *Weyer*, 429 F.2d at 76 (“this provision in the firearms act does not authorize the Secretary to reject an applicant once identity is determined”).

¹⁷ See *Davis v. Erdmann*, 607 F.2d 917, 920 (10th Cir. 1979) (“denial of the permit appears to be a classic example of agency ‘nitpicking,’ and an arbitrary and capricious action”; BATF required to approve application to import NFA firearm as curio or relic).

CLEOs, to complete the certificate. As for the post-1985 version, in the words of *Vollmer II*: “Although . . . the Bureau had followed its interpretation of the Firearms Act since at least the early 1980s, we do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation.” 102 F.3d at 598.

Nor is the regulation authorized by 26 U.S.C. § 7805(a), which provides that “the Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title” The NFA specifies the qualifications to register a firearm. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982), explains:

The framework for analysis is refined by consideration of the source of the authority to promulgate the regulation at issue. The Commissioner has promulgated [a regulation] interpreting this statute only under his general authority to “prescribe all needful rules and regulations.” 26 U.S.C. Section 7805(a). Accordingly, “we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision.”

The regulation “purports to do no more than add a clarifying gloss on a term . . . that has already been defined with considerable specificity by Congress. The commissioner’s authority is consequently more circumscribed” *Id.*

BATF has no authority to sever the NFA from its roots in the Internal Revenue Code to allow local CLEOs to ban lawful firearms. “Neither we nor the Commissioner may rewrite the statute simply because we may feel that the scheme it creates could be improved upon.” *United States v. Calamaro*, 354 U.S. 351, 357 (1957). “The statute was passed, and its constitutionality was upheld, as a revenue measure, . . . [and] in construing it we would not be justified in resorting to collateral motives or effects which, standing

apart from the federal taxing power, might place the constitutionality of the statute in doubt.”¹⁸ *Id.* at 358.

Congress passed the NFA under its tax power, and 26 U.S.C. § 6301 provides that “[t]he Secretary shall collect the taxes imposed by the internal revenue laws.” In violation of this duty, the Secretary conceded in the final rule promulgating 27 C.F.R. §§ 179.63 and 179.85 that the CLEO certificate has no revenue purpose and delegates an absolute power to CLEOs to veto collection of the tax: “these officials [CLEOs] have the discretion to execute or not execute the required certifications.” T.D. ATF-270, 53 F.R. 10480, 10488 (Mar. 31, 1988).

The NFA imposes squarely on the Secretary the duties of verification of the fingerprints and photographs and disapproving applications that would place a person in violation of law. BATF makes the *policy* argument that local CLEOs could perform these functions better, but local CLEOs have no legal duty to administer the NFA and in fact refuse to do so.

Besides ignoring the existence of local BATF offices, the argument assumes the feudalistic notion that persons live in the same vicinity all their lives. However, to determine whether a current resident is a convicted felon, an official must be able to interpret the laws of any one of the 50 States where that person could have a conviction.¹⁹

BATF regularly advises CLEOs that whether they should sign ATF Forms 1 and 4 is entirely

¹⁸ The regulation in that case pre-existed the reenactment of the statute, but “we cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there,” and “there is nothing to indicate that it was ever called to the attention of Congress.” *Id.* at 359.

¹⁹ *See* 18 U.S.C. § 921(a)(20) (“What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.”). *E.g.*, *United States v. Oman*, 91 F.2d 1320, 1322 (9th Cir. 1996) (Arizona court must determine whether civil rights restored under Massachusetts law); *United States v. Indelicato*, 97 F.3d 627, 630-31 (1st Cir. 1996) (citing cases).

discretionary even if the transfer or making of the firearm is lawful under federal, State, and local law. JA 36. The certificate requirement is a policy decision to delegate to CLEOs the power to prohibit the transfer or making of a firearm where such is *not* contrary to law.

The Secretary is competent to fulfill the tasks assigned by Congress. The National Instant Criminal Background Check System (“NICS”), maintained by the FBI under the direction of the Attorney General, is available to the Secretary to conduct background checks on persons who apply to transfer or make a firearm under the NFA.²⁰ Information sources include, but are not limited to, the Treasury Enforcement Computer System (“TECS”), the National Crime Information Center (“NCIC”), and criminal and investigative files of the Customs Service, the Secret Service, and BATF itself.

The Secretary is well acquainted with State laws and local ordinances since he is required to publish in the Federal Register and to provide to all federal firearms licensees an annual “compilation of the State laws and published ordinances” pertinent to compliance with the Gun Control Act. § 110(a), P.L. 99-308, 100 Stat. 449, 460-61 (1986); 18 U.S.C. § 921(a)(19). *See* ATF Publication 5300.5, *State Laws and Published Ordinances -- Firearms*.

When it chooses to do so, the BATF ignores the requirement of a CLEO certificate. Besides approving the transfer to plaintiff Kadison of a firearm without a certificate, JA 20, BATF registered some 8,200 firearms without any CLEO certificate. *See* ATF Rulings 94-1, 94-2, 1994 ATF Quarterly Bulletin-

²⁰ *See* §§ 102(b) and 103 of the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (1993), and 28 C.F.R. Part 25, which provide for NICS background checks and access to federal and State criminal records. 28 C.F.R. § 25.6(j) provides that NICS checks may be used to provide federal agencies information regarding permits or licenses to acquire or transfer a firearm and responding to ATF enquires in regard to the NFA.

1, 22-24 (reclassifying certain shotguns as “firearms” under the NFA); ATF Ruling 2001-1, 66 F.R. 9748 (February 9, 2001); JA 39. Clearly, BATF’s own background checks suffice without any CLEO certificate.

BATF is well aware that many CLEOs impose arbitrary conditions on execution of the certificate. The Police Chief of Arlington, Virginia, refuses to sign ATF Form 4 certificates for plaintiffs unless they waive their Fourth Amendment rights and permit police inspections of their homes. BATF knows of this policy and that the Police Chief is the only available CLEO signatory for Arlington residents. JA 39-40.

The Secretary may not require through a CLEO surrogate that a person waive a constitutional right in order to exercise a right or privilege allowed by law. “The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve that which it may not command directly.” *Elrod v. Burns*, 427 U.S. 347, 361 (1976). “We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions.” *Department of Defense v. FLRA*, 510 U.S. 487, 501-02 (1994).

BATF is also well aware that many CLEOs arbitrarily refuse to execute the certificate for anyone at all or for persons who are not friends, cronies, or political supporters. There are about 30,000 local and State CLEOs in the United States. Citizens of identical qualifications located in different places, or sometimes in the same place, receive disparate treatment in seeking CLEO certificates. JA 40-41. Congress did not empower to the Secretary to create anarchy in the administration of the Internal Revenue Code by granting carte blanche to every CLEO in the United States to decide how or even if the NFA would be administered.

In sum, the NFA requires the Secretary to approve applications to make or transfer a firearm to an applicant who meets the requirements established by law. The Secretary has no authority, as he unlawfully does through §§ 179.63 and 179.85, to deny an NFA application for lack of a certificate by a person who is not a federal employee and who has no duty to do anything in relation to the NFA.

B. Congress Intended that Administration of the NFA Be Subject to Judicial Review Under the APA, Precluding Reliance on Non-Federal CLEOs

Congress did not intend to make refusals to register firearms non-reviewable under the Administrative Procedure Act. The actions of a local CLEO, however, are not subject to the APA. The Secretary seeks to alienate his power to administer the NFA to a non-federal official and thereby to make administration of the NFA not subject to judicial review.

If the Secretary simply refused to process an application, accepted applications only from friends and cronies but not from ordinary citizens, required a search of one's home before accepting an application, or disapproved an application without stating a reason, such action would be subject to APA review. The identification of photographs and fingerprints, and the determination of whether an NFA firearm would place an applicant in violation of law, are objective, factual determinations of the type that are subject to judicial review to correct abuse of authority or refusal to act. By irrevocably delegating the requirement of a certificate to CLEOs, the Secretary automatically shields such actions from APA review.

APA review applies to BATF's refusal to register firearms. *F.J. Vollmer Co.*, 23 F.3d 448; *Police Automatic Weapons Service v. Benson*, 837 F. Supp. 1070, 1073-75 (D. Ore. 1993). However, there can be no APA review of a CLEO's action because no "agency action" is involved. 5 U.S.C. § 701 begins:

- (a) This chapter applies, according to the provisions thereof, except to the extent that –
 - (1) statutes preclude judicial review; or
 - (2) agency action is committed to agency discretion by law.
- (b) For the purposes of this chapter –
 - (1) “agency” means each authority of the Government of the United States

A local or State CLEO is not an “agency” as defined.²¹ “[A]gency action’ includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act” § 701(b)(2), incorporating § 551(13). Section 706 provides in pertinent part:

The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

By purporting to assign his legal duty to a local CLEO over which he has no control, the Secretary has insulated from APA review his own actions which are subject to APA review. If this gimmick was lawful, federal officials could avoid APA review over any of their actions or failures to act simply by irrevocably delegating their power to an officer of a non-federal sovereign.²²

²¹ See *Fund for Animals, Inc. v. Florida Game & Fresh Water Fish Com.*, 550 F. Supp 1206, 1208 (S.D. Fla. 1982) (“the APA is restricted to federal action and thus cannot be extended to cover the proposed deer hunt by the [State] Commission, because, no agency of the Federal Government participated in this proposed hunt”); *BAM Historic Dist. Assn. v. Koch*, 723 F.2d 233, 237 (2nd Cir. 1983) (“The Fourteenth Amendment does not impose upon states and localities . . . an Administrative Procedure Act Whether notice and hearing procedures should be instituted . . . remains a matter for consideration by state and local legislative bodies.”).

²² See *Dillard v. Baldwin County Commissioners*, 225 F.3d 1271, 1282 (11th Cir. 2000) (“We cannot shield federal court orders from constitutional challenge simply because the federal court's orders

Under the APA, “the legality of an agency action is presumptively subject to judicial review In order to ensure that an agency's decision has not been arbitrary, we require the agency to have identified and explained the reasoned basis for its decision.” *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C. Cir. 1996), citing *F.J. Vollmer Co.*, 23 F.3d at 451. *Bruno v. Albright*, 197 F.3d 1153, 1157 (D.C. Cir. 1999), explains:

Numerous opinions, of the Supreme Court and of the lower federal courts, speak in terms of the APA’s “presumption” of judicial review of agency action. [Citations omitted.] The presumption is said to derive from APA § 702: a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof,” 5 U.S.C. § 702. There are two notable qualifications. The validity of agency action may not be tested in court if “statutes preclude judicial review” or if “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(1)-(2).

Here “there is most certainly no ‘showing of “clear and convincing evidence” of a . . . legislative intent’ to restrict access to judicial review.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). “[N]either the statute's text, structure, nor legislative history supplies the requisite ‘clear and convincing evidence’ of a preclusive purpose. . . . [U]nder the Administrative Procedure Act, *it is only statutes, not agency regulations, that can preclude otherwise available judicial review.*” *Ramirez v. Reich*, 156 F.3d 1273, 1276 (D.C. Cir. 1998) (emphasis added). The CLEO-certificate regulation purports to create a non-reviewable decision, but nothing in the NFA suggests non-reviewability.²³

are being implemented by local officials”).

²³ See *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) (“the reason for this rule is that we ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive violates such a command”); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (the APA “embodies the basic presumption of judicial review”); *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) (“When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority. Rarely,

In sum, the Secretary seeks to exempt his statutory duty to register firearms from judicial review under the APA by transferring the power to a non-federal party who is not answerable to the Secretary and whose action or inaction is not subject to APA review. In the absence of clear and convincing evidence that Congress intended this result, the NFA must not be interpreted to delegate such power to the Secretary.

III. REQUIRING AN APPLICANT TO DISCLOSE NFA TAX FORMS TO A CLEO VIOLATES PRIVACY PROTECTIONS UNDER 26 U.S.C. § 6103

The CLEO-certificate requirement violates the tax privacy protections of 26 U.S.C. § 6103. The Secretary cannot require a person to disclose a tax return to a CLEO.²⁴

26 U.S.C. §§ 5811 and 5821 impose taxes on the transfer and making of firearms. ATF Form 1 (application to make firearm) and Form 4 (application to transfer firearm) are tax returns and contain return information and taxpayer return information. The compelled disclosure of federal tax returns and return information to CLEOs, which is required by 27 C.F.R. §§ 179.63 and 179.85, circumvents and violates 26 U.S.C. § 6103.

26 U.S.C. §6103(a) provides the general prohibition as follows:

Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States . . . shall disclose any return or return

if ever, has Congress withdrawn courts' jurisdiction to correct such lawless behavior”).

²⁴ Since such compelled disclosure is injury per se, plaintiffs who declined to disclose their NFA forms to CLEOs have standing to maintain this action. As the district court found: “Whelan's alleged privacy injury arises when he discloses his transfer or manufacture application to any one of the CLEOs. Thus Whelan has standing to assert the claim set forth in Count I.” JA at 60.

information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

Requiring the CLEO certificate violates both the rule that returns “shall be confidential” and the prohibition on disclosure by any federal officer of any return or return information. *Gardner v. United States*, 213 F.3d 735, 738 (D.C. Cir. 2000), explains:

This general ban on disclosure provides essential protection for the taxpayer; it guarantees that the sometimes sensitive or otherwise personal information in a return will be guarded from persons not directly engaged in processing or inspecting the return for tax administration purposes. The assurance of privacy secured by § 6103 is fundamental to a tax system that relies upon self-reporting.

Id., quoting *National Treasury Employees Union v. Federal Labor Relations Board*, 791 F.2d 183, 184 (D.C. Cir. 1986).

Applications to transfer or make NFA firearms are tax returns. “The term ‘return’ means any tax or information return . . . required by, or provided for or permitted under, the provisions of this title [Title 26 U.S.C.] which is filed with the Secretary by, on behalf of, or with respect to any person” § 6103(b)(1). Moreover, the information on such applications is return information. Section 6103(b)(2)(A) provides:

The term “return information” means – (A) a taxpayer’s identity, . . . tax liability, . . . or tax payments, whether the taxpayer’s return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared for, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax²⁵

²⁵ See *Ryan v. Bureau of Alcohol, Tobacco and Firearms*, 715 F.2d 644, 646-647 (D.C. Cir. 1983) (opinion by Circuit Judge Scalia) (form giving notice of intent to manufacture liquor bottles is “return information” protected from disclosure).

Similarly, the information on applications to make or transfer firearms meets the following further definition: “The term ‘taxpayer return information’ means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.” § 6103(b)(3).

BATF agrees that NFA forms are tax returns prohibited from disclosure to CLEOs.²⁶ *Firearms Enforcement Program*, ATF Order 3310.4B, at 47 (2/8/89)²⁷ states: “The disclosure of information from the NFRTR [National Firearms Registration and Transfer Record] is severely restricted by the provisions of 26 U.S.C. section 6103. Disclosure may be made only to Federal agencies and then only for official duties.” Under § 6103, “disclosures to State or local agencies are prohibited.” *Id.* at 48.

“The term ‘disclosure’ means the making known to any person *in any manner whatever* a return or return information.” § 6103(b)(8) (emphasis added). Requiring execution of the CLEO certificate constitutes “disclosure” of a return and return information as defined.

BATF argued in the court below that the applicant, not BATF, must disclose the tax return to the CLEO and thus the disclosure is somehow “self-disclosure.” Yet where Congress authorizes an activity if one pays a tax and is in compliance with the law, the Secretary cannot impose additional requirements and then claim that the taxpayer somehow “volunteered” to meet those requirements. Indeed, the applicant

²⁶ *United States v. Hunter*, 863 F. Supp. 462, 476 n.22 (E.D. Mich. 1994), takes notice of the following BATF opinions: “Chief Counsel Op. 22541 (refusing to give the registration status of a firearm registered with ATF because the registration was a ‘return’ protected by § 6103); Chief Counsel Op. 22889 (holding, inter alia, that transferee's identity on transfer forms was tax return information under § 6103).”

²⁷ Cited as authority in *Vollmer*, 23 F.3d at 451.

acts as the Secretary's agent in disclosing the form to the CLEO, inasmuch as the Secretary requires the CLEO certificate supposedly to assist him in carrying out the background check.²⁸

The Secretary is prohibited by § 6103 from requiring a person to disclose any tax return to a CLEO prior to the processing of such form by the Secretary. Section 6103 also prohibits the Secretary from rejecting any tax return a taxpayer files without a CLEO certificate and returning it to the applicant with instructions that the return will not be processed without first disclosing it to the CLEO. BATF has no more authority than would IRS to require a taxpayer to disclose a tax return to local police before the agency processes the form, or to return the return to the taxpayer requiring such disclosure. It would be frivolous to argue that one could avoid the disclosure simply by not earning income and thus not being subject to income tax. The disclosure does not become "voluntary" simply because the taxpayer chooses to earn income and thus must file a tax return. Yet BATF argues the equivalent of that here.

Applications to transfer or make a firearm are not subject to any of the exemptions set forth in § 6103. Disclosure of certain returns and return information, excluding taxes imposed by Chapter 53 of the Internal Revenue Code, to State tax officials is permitted only for tax administration purposes, and only if State law guarantees confidentiality. § 6103(d)(1), (p)(8). The only exception for CLEOs is provided by § 6103(i)(3)(B), which is clearly not met here: "Under circumstances involving an imminent danger of death or physical injury to any individual, the Secretary may disclose return information to the extent necessary to apprise appropriate officers or employees of any Federal or State law enforcement agency of such

²⁸ Moreover, the transfer form discloses to the CLEO the identities of both the transferor and the transferee. Assuming that the transferee discloses the form to the CLEO in hopes of obtaining the CLEO's endorsement, it cannot be said that the transferor has consented to the disclosure.

circumstances.”

Section 6103(l), “Disclosure of returns and return information for purposes other than tax administration,” has no provision for disclosure to a CLEO. Section 6103(o)(1) provides:

Returns and return information with respect to taxes imposed by subtitle E (relating to taxes on alcohol, tobacco, and firearms) shall be open to inspection by or disclosure to officers and employees of a Federal agency whose official duties require such inspection or disclosure.

Subtitle E includes I.R.C. Chapter 53, i.e., the NFA.

The rules governing the disclosure of tax returns and return information are strictly construed. *Tierney v. Schweiker*, 718 F.2d 449, 455-56 (D.C. Cir. 1983).²⁹ “In 1976, when expanding the confidentiality provisions as part of the Tax Reform Act of 1976, Congress made clear that tax information was to be absolutely confidential, subject to certain explicit exceptions.”³⁰ *Id.* at 454. *Tierney* explains:

The purpose of the confidentiality clause of the Tax Reform Act of 1976 was to protect individual taxpayers from unauthorized disclosure of their tax return information. In particular, Congress was concerned about the potential widespread availability of individual tax information to government agencies. . . . The legislative history of section 6103 demonstrates that Congress intended to limit disclosure of tax return information except under narrowly defined circumstances.

Id. at 455.

Tierney rejected an IRS interpretation that would “circumvent the general rule of confidentiality

²⁹ “We must be ever mindful that when Congress enacts a statute designed to limit government intrusion in the private affairs of its citizens, the statutory provisions must be followed scrupulously.” *United States v. Bachelor*, 611 F.2d 443, 447 (3d Cir. 1979) (construing § 6103(a)). See *United States v. Lavin*, 604 F.Supp. 350, 356 (E.D. Pa. 1985) (§ 6103 “must be strictly construed” against disclosure of taxpayer information to the FBI); *United States v. Chemical Bank*, 593 F.2d 451, 456-7 (2nd Cir. 1979) (unlawful for Secretary to disclose information to Task Force).

³⁰ “The information the American citizen is compelled by our tax laws to disclose to the Internal Revenue Service was entitled to essentially the same degree of privacy as those private papers maintained in the home.” House Report No. 94-1380, in 1976 U.S. Code Cong. & Admin. News 3356, 3757.

established by Congress.”³¹ *Id.* at 456. Here, the Secretary seeks to circumvent the prohibition on disclosing tax returns by requiring the applicant to act as the Secretary’s messenger in disclosing the returns to CLEOs.

“The overriding purpose of the confidentiality provisions of Section 6103 was to protect tax returns and return information from misuse by . . . government entities.” *McSurely v. McAdams*, 502 F.Supp. 52, 56 (D. D.C. 1980). “The confidentiality provisions of Section 6103 evince one additional legislative purpose: federal tax administration should not be seriously impair[ed] by the disclosure of return information.” *Id.* at 57.

The disclosure of tax returns, return information and taxpayer return information is both a felony, 26 U.S.C. § 7213, 18 U.S.C. § 1905, and a statutory tort, 26 U.S.C. § 7431. Under § 7431(c), a finding of liability for a disclosure entitles the plaintiff to an amount equal to the greater of \$1000 or actual damages for each act of unauthorized inspection or disclosure. Thus, disclosure in violation of § 6103 is considered injury per se. *Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992), recognized the violation of privacy in tax return information to be injury:

Moreover, even if the Government retains only copies of the disputed materials, a taxpayer still suffers injury by the Government’s continued possession of those materials, namely, the affront to the taxpayer’s privacy. A person’s interest in maintaining the privacy of his “papers and effects”

³¹ “Although a knowing and intelligent waiver of rights by Benefits recipients might permit the IRS to release those individuals’ tax return information, the form used in this case makes a mockery of the consent requirement. The form itself contained poorly-veiled threats that the recipients’ benefits would be terminated if they failed to sign the forms” *Id.* at 456. Similarly, the “consent” here is coercive: BATF will not approve the application without the CLEO certificate.

is of sufficient importance to merit constitutional protection.³²

The CLEO-certificate requirement impairs federal tax administration by allowing local CLEOs to defeat NFA taxes altogether. It is a roadblock to the proper processing of tax returns with the Secretary.³³ Moreover, a taxable event occurs where a person makes or transfers a firearm without the Secretary's authorization because a CLEO certificate could not be obtained. In such instance, the regulation has obviously allowed the CLEO to impair the collection of the tax.³⁴

In sum, by requiring the disclosure of tax returns to CLEOs, the regulation runs afoul of § 6103. The Secretary may neither disclose NFA tax forms directly to a CLEO nor may he circumvent § 6103 by requiring the taxpayer to do so.

IV. THE REQUIREMENT IS AN UNCONSTITUTIONAL IMPOSITION ON STATE AND LOCAL OFFICERS

The CLEO-certificate requirement unconstitutionally imposes duties on State and local CLEOs. Even if interpreted as purely discretionary, the regulation unlawfully forces unwanted political accountability onto State and local CLEOs in violation of basic principles of federalism and of the separation-of-powers

³² See *Department of Defense v. FLRA*, 510 U.S. 487, 501-02 (1994) (persons protected by privacy provisions “have some nontrivial privacy interest in nondisclosure” of their addresses, which “can lessen the chance of such unwanted contacts”); *Alexander v. FBI*, 971 F. Supp. 603, 609 (D. D.C. 1997) (FBI “files, although not in plaintiffs’ direct control, were still a part of their private and secret concerns”).

³³ *United States v. Sheriff, City of New York*, 330 F.2d 100, 101 (2nd Cir.), *cert. denied*, 379 U.S. 929 (1964), notes: “Disclosure by the taxpayer himself of his copies of returns is not an unauthorized disclosure, even though it be made by reason of legal compulsion.” That case concerned compelled disclosure of tax returns to a grand jury investigating corruption. By contrast, the regulation here compels the applicant to disclose the return to the CLEO while acting as the agent of the Secretary.

³⁴ Of course, that would be a criminal violation which plaintiffs would not commit. § 5861. Nonetheless, the regulations at issue encourage such violation.

doctrine. No constitutional or statutory provision authorizes the Secretary to impose and delegate administration of any part of the NFA to State and local CLEOs.

The certificate under 27 C.F.R. § 179.63 must state “that the certifying official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying official has no information indicating that the receipt or possession of the firearm would place the transferee in violation of State or local law or that the transferee will use the firearm for other than lawful purposes.” Section 179.85 imposes similar requirements.

In order to make this certificate, the CLEO must examine and render judgments about the applicant, the fingerprints, and the photograph. The CLEO must research criminal records and other applicable records and make determinations about the applicability of State or local law to such records. Finally, the CLEO must determine whether information exists that “the transferee will use the firearm for other than lawful purposes,” which requires the CLEO to investigate, and subjectively to judge the motives and purposes of, the transferee.

The Secretary lacks authority under the U.S. Constitution or any statute to conscript State and local CLEOs to act as his agents to administer the Internal Revenue Code. The President, not the States, is required faithfully to execute the laws passed by Congress, and federal officers are appointed to assist him in doing so. The regulations at issue seek to circumvent these constitutional requirements by commandeering State and local officers to administer federal law but without making them accountable to anyone.

Printz v. United States, 521 U.S. 898, 903 (1997), invalidated the Brady Act command that

CLEOs “make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.” *Printz* decided:

We held in *New York [v. United States]*, 505 U.S. 144, 188 (1992) that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States’ officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Printz, 521 U.S. at 935.

The mandate to CLEOs violated the division of power between State and federal governments. *Id.* at 922. It also violated the separation of powers within the federal government (which the regulation at issue here violates even if it does not require the CLEO to act):

The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, “shall take Care that the Laws be faithfully executed,” Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the “Courts of Law” or by “the Heads of Departments” who are themselves presidential appointees), Art. II, § 2. The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive--to insure both vigor and accountability--is well known.³⁵

³⁵ “The vesting of the executive power in the President was essentially a grant of the power to execute the laws.” *Myers v. United States*, 272 U.S. 52, 163-4 (1926). The Execution of Laws Clause implies that “as part of his executive power he would select those who were to act for him under his direction in the execution of the laws.” *Id.* The President's executive power includes “the general administrative control of those executing the laws.” *Id.* See *Morrison v. Olson*, 487 U.S. 654, 692 (1988) (lack of removal power would leave “no means for the President to ensure the ‘faithful execution’ of the laws.”).

Id.

Printz squarely addresses the unconstitutional imposition of political accountability which would exist even if the CLEO certificate here is voluntary. It states:

And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. . . . Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error . . . that causes a purchaser to be mistakenly rejected.

Id. at 930.

Following *Printz*, “States remain free . . . voluntarily to cooperate with federal law enforcement efforts.” *United States v. Nathan*, 202 F.3d 230, 233 (4th Cir. 2000) (local police may refer felons in possession of firearms for federal prosecution). However, no State has volunteered to administer the CLEO-certificate regulation. Indeed, it may be unlawful under State law, either because not authorized by law or because (as in *Printz*) explicitly preempted by statute.³⁶

Koog v. United States, 79 F.3d 452, 455 (5th Cir. 1996), declared the Brady Act unconstitutional in part because it was inconsistent with CLEO duties under State law, and the same reasoning applies here:

The CLEOs’ offices are created by state law, . . . and the state criminal codes prescribe the CLEOs’ duties and powers Following the Act, the federal government imposes additional

³⁶ In *Printz*, “both CLEOs before us here assert that they are prohibited from taking on these federal responsibilities under state law. That assertion is clearly correct with regard to Montana law, which expressly enjoins any ‘county . . . or other local government unit’ from ‘prohibit[ing] . . . or regulat[ing] the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, [or] possession . . . of any . . . handgun,’” *Id.* at 934 n.18.

duties on the CLEOs beyond those prescribed by state statute – namely, to use federally-specified law enforcement methods (i.e., background checks . . .) to execute and administer a federal policy to prevent the acquisition of handguns by disqualified individuals, a duty which is found in no state legislation. Simply put, the interim duties imposed by the Brady Act constitute an edict to CLEOs that substantively enlarges the duties and authority given the CLEOs by the States, without the States’ consent or participation.

Id. at 458-59. The regulations here are even more inconsistent with State law, for they authorize a CLEO to do nothing and thus to prevent the acquisition of firearms by *qualified* individuals.

The federal government has not deputized any CLEO to execute NFA certificates,³⁷ and no State has undertaken to do so. *Dixson v. United States*, 465 U.S. 482, 510 (1984) (O’Conner, J., dissenting on other grounds), explains:

A proper respect for the sovereignty of States requires that federal programs not be interpreted to deputize States or their political subdivisions to act on behalf of the United States unless such deputy status is expressly accepted or, where lawful, expressly imposed. It would be inconsistent with the general relationship between the Federal and State Governments to conclude, absent such express actions, that a State is acting in effect as an agent of the United States.

City of New York v. United States, 179 F.3d 29 (2nd Cir. 1999), upheld a federal law forbidding States from prohibiting their employees from voluntarily informing INS about immigration status of aliens. However, Congress “may not directly shift to the states enforcement and administrative responsibilities allocated to the federal government by the Constitution.” *Id.* at 34. The court added, 179 F.3d at 34 n.4:

This prohibition stands even if state officials “consent” to such federal directives. *See New York*, 505 U.S. at 182 (“Where Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials. . . . State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.”).

³⁷ *Cf.*, e.g., 42 U.S.C. § 14081(b) (“the Attorney General may deputize State and local law enforcement officers”).

Thus, even if the CLEO-certificate requirement is optional, it still imposes unconstitutional injuries on the States and localities, including CLEOs. The CLEO who executes such certificates offends constituents who dislike firearms or object to expenditure of resources for purposes not within the CLEO's duties. The CLEO who refuses offends constituents who thereby cannot get their applications approved, who sense unfairness, and who perceive the CLEO as violating the right to keep arms. Either policy exposes the CLEO to political injuries, lawsuits, and questions about suitability for office. JA 31-32.

For purposes of both the merits and standing, the plaintiff CLEOs here suffer injury for the same reasons as the CLEOs in the Brady Act decisions. *See Koog*, 79 F. 3d at 460 (the Act “blurs accountability” and laid responsibilities “on the CLEO’s political doorstep”), *aff’d McGee v. United States*, 863 F. Supp. 321, 325 (S.D. Miss. 1994) (“The voters could hold him [the sheriff] accountable for this. That is also a threat of actual injury.”), *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994),³⁸ *rev’d on other grounds, Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995), *rev’d, Printz v. United States*, 521 U.S. 898 (1997). *Romero v. United States*, 883 F. Supp. 1076, 1080 (W.D. La. 1995), explained:

The parties have stipulated to the harm actually caused and threatened by the Brady Act. The law creates a political dilemma for Sheriff Romero. “[The Brady Act] puts him in the middle of the conflict between those citizens of Iberia Parish who firmly believe that the provisions of the Brady Handgun Control Act unconstitutionally infringes [sic] upon their right to bear arms and those who feel it is a legitimate exercise of Congressional authority.” This is precisely the type of injury which the Supreme Court has recognized that the Tenth Amendment and the constitutional structure are designed to avoid. Sheriff Romero has Hobson’s Choice of either being a law enforcement officer

³⁸ “CLEOs make up the visible front line of administrators of the Act. Thus, they could . . . bear the brunt of its unpopularity. CLEOs will also bear the brunt of any incorrect determinations they make.” *Id.* at 1514-15.

not enforcing the law, or enforcing a law he and many of his constituents believe is unconstitutional.

The district court agreed that “[t]he law enforcement officer plaintiffs have standing to bring the Tenth Amendment challenge set forth in Count II.” JA 60. All of the other plaintiffs have standing as well. If a regulation prevents persons from enjoying a right or privilege and if the regulation is unconstitutional, the regulation is the proximate cause of their injury and such persons have standing.³⁹

In sum, 27 C.F.R. §§ 179.63 and 179.85 compel State and local CLEOs to administer a federal regulatory program, in violation of constitutional principles of federalism and separation of powers. Even if the duties are optional, the regulations unconstitutionally impose unwanted political accountability on CLEOs. Accordingly, the CLEO-certificate requirement is void.

CONCLUSION

The Court should reverse the judgment of the district court, declare as void the CLEO certificate required by 27 C.F.R. §§ 179.63 and 179.85, and direct that BATF process and approve the applications to make, transfer, and register firearms which are the subject of this litigation.

³⁹ An individual has standing to mount a Tenth Amendment challenge to a Gun Control Act provision, invalidation of which would enable the person to obtain a firearm. *Gillespie v. City of Indianapolis*, 185 F.3d 693, 700-03 (7th Cir. 1999). See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79 (1978) (“We . . . cannot accept the contention that, outside the context of taxpayers' suits, a litigant must demonstrate something more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the ‘case or controversy’ requirement of Art. III.”); *New York*, 505 U.S. at 181-82 (“the Constitution divides authority between federal and state governments for the protection of individuals.”).

CERTIFICATE OF COMPLIANCE

Compliance with F.R.App.P. 32(a)(7)(B) has been met, in that the brief contains 13,471 words.

Respectfully submitted,

KENT A. LOMONT, *et al.*, Appellants
By Counsel

Stephen P. Halbrook
Suite 404
10560 Main St.
Fairfax, VA 22030
(703) 352-7276

James H. Jeffries, III
3019 Lake Forest Drive
Greensboro, North Carolina 27408
(336) 282-6024

Counsel for Appellants

A D D E N D U M

PROVISIONS OF TITLE 26, UNITED STATES CODE

§ 5811. Transfer tax

(a) **Rate.** -- There shall be levied, collected, and paid on firearms transferred a tax at the rate of \$200 for each firearm transferred, except, the transfer tax on any firearm classified as any other weapon under section 5845(e) shall be at the rate of \$5 for each such firearm transferred.

(b) **By whom paid.** -- The tax imposed by subsection (a) of this section shall be paid by the transferor.

(c) **Payment.** -- The tax imposed by subsection (a) of this section shall be payable by the appropriate stamps prescribed for payment by the Secretary.

§ 5812. Transfers

(a) **Application.** — A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; and (6) the application form shows that the Secretary has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.

(b) **Transfer of possession.** — The transferee of a firearm shall not take possession of the firearm unless the Secretary has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.

§ 5821. Making tax

(a) **Rate.** -- There shall be levied, collected, and paid upon the making of a firearm a tax at the rate of \$200 for each firearm made.

(b) **By whom paid.** -- The tax imposed by subsection (a) of this section shall be paid by the person making the firearm.

(c) **Payment.** -- The tax imposed by subsection (a) of this section shall be payable by the stamp prescribed for payment by the Secretary.

§ 5822. Making

No person shall make a firearm unless he has (a) filed with the Secretary a written application, in duplicate, to make and register the firearm on the form prescribed by the Secretary; (b) paid any tax payable on the making and such payment is evidenced by the proper stamp affixed to the original application form; (c) identified the firearm to be made in the application form in such manner as the Secretary may by regulations prescribe; (d) identified himself in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; and (e) obtained the approval of the Secretary to make and register the firearm and the application form shows such approval. Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law.

§ 5841. Registration of firearms

(a) **Central registry.** -- The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include:

- (1) identification of the firearm;
- (2) date of registration; and
- (3) identification and address of person entitled to possession of the firearm.

(b) **By whom registered.** -- Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) **How registered.** -- Each manufacturer shall notify the Secretary of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

(d) **Firearms registered on effective date of this act.** -- A person shown as possessing a firearm by the records maintained by the Secretary pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968 shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being

in his possession.

(e) Proof of registration. -- A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary upon request.

* * * *

§ 6103 [subsections (a), (b), and (d) only]

(a) General rule. Returns and return information shall be confidential, and except as authorized by this title--

- (1) no officer or employee of the United States,
- (2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section, and
- (3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (6), (12), or (16) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n), shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) Definitions. For purposes of this section--

- (1) Return. The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.
- (2) Return information. The term "return information" means--
 - (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,
 - (B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,
 - (C) any advance pricing agreement entered into by a taxpayer and the Secretary and any

background information related to such agreement or any application for an advance pricing agreement, and (D) any agreement under section 7121, and any similar agreement, and any background information related to such an agreement or request for such an agreement, but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

(3) Taxpayer return information. The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

(4) Tax administration. The term "tax administration"--

(A) means--

(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

(5) State. The term "State" means--

(A) any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and

(B) for purposes of subsections (a)(2), (b)(4), (d)(1), (h)(4), and (p) any municipality--

(i) with a population in excess of 250,000 (as determined under the most recent decennial United States census data available),

(ii) which imposes a tax on income or wages, and

(iii) with which the Secretary (in his sole discretion) has entered into an agreement regarding disclosure.

(6) Taxpayer identity. The term "taxpayer identity" means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof.

(7) Inspection. The terms "inspected" and "inspection" mean any examination of a return or return information.

(8) Disclosure. The term "disclosure" means the making known to any person in any

manner whatever a return or return information.

(9) Federal agency. The term "Federal agency" means an agency within the meaning of section 551(1) of title 5, United States Code.

(10) Chief executive officer. The term "chief executive officer" means, with respect to any municipality, any elected official and the chief official (even if not elected) of such municipality.

(d) Disclosure to State tax officials and State and local law enforcement agencies.

(1) In general. Returns and return information with respect to taxes imposed by chapters 1, 2, 6, 11, 12, 21, 23, 24, 31, 32, 44, 51, and 52 and subchapter D of chapter 36 shall be open to inspection by, or disclosure to, any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws, including any procedures with respect to locating any person who may be entitled to a refund. Such inspection shall be permitted, or such disclosure made, only upon written request by the head of such agency, body, or commission, and only to the representatives of such agency, body, or commission designated in such written request as the individuals who are to inspect or to receive the returns or return information on behalf of such agency, body, or commission. Such representatives shall not include any individual who is the chief executive officer of such State or who is neither an employee or legal representative of such agency, body, or commission nor a person described in subsection (n). However, such return information shall not be disclosed to the extent that the Secretary determines that such disclosure would identify a confidential informant or seriously impair any civil or criminal tax investigation.

(2) Disclosure to State audit agencies.

(A) In general. Any returns or return information obtained under paragraph (1) by any State agency, body, or commission may be open to inspection by, or disclosure to, officers and employees of the State audit agency for the purpose of, and only to the extent necessary in, making an audit of the State agency, body, or commission referred to in paragraph (1).

(B) State audit agency. For purposes of subparagraph (A), the term "State audit agency" means any State agency, body, or commission which is charged under the laws of the State with the responsibility of auditing State revenues and programs.

(3) Exception for reimbursement under section 7624. Nothing in this section shall be construed to prevent the Secretary from disclosing to any State or local law enforcement agency which may receive a payment under section 7624 the amount of the recovered taxes with respect to which such a payment may be made.

(4) Availability and use of death information [Caution: For postponement of effective date of this paragraph with respect to certain States, see P.L. 103-66, Sec. 13444(b), which appears as a note to this section.].

(A) In general. No returns or return information may be disclosed under paragraph (1) to any agency, body, or commission of any State (or any legal representative thereof) during any period during which a contract meeting the requirements of subparagraph (B) is not in effect between such State and the Secretary of Health and Human Services.

(B) Contractual requirements. A contract meets the requirements of this subparagraph if--

(i) such contract requires the State to furnish the Secretary of Health and Human Services information concerning individuals with respect to whom death certificates (or equivalent documents maintained by the State or any subdivision thereof) have been officially filed with it, and

(ii) such contract does not include any restriction on the use of information obtained by such Secretary pursuant to such contract, except that such contract may provide that such information is only to be used by the Secretary (or any other Federal agency) for purposes of ensuring that Federal benefits or other payments are not erroneously paid to deceased individuals. Any information obtained by the Secretary of Health and Human Services under such a contract shall be exempt from disclosure under section 552 of title 5, United States Code, and from the requirements of section 552a of such title 5.

(C) Special exception. The provisions of subparagraph (A) shall not apply to any State which on July 1, 1993, was not, pursuant to a contract, furnishing the Secretary of Health and Human Services information concerning individuals with respect to whom death certificates (or equivalent documents maintained by the State or any subdivision thereof) have been officially filed with it.

(5) Disclosure for certain combined reporting project. The Secretary shall disclose taxpayer identities and signatures for purposes of the demonstration project described in section 976 of the Taxpayer Relief Act of 1997. Subsections (a)(2) and (p)(4) and sections 7213 and 7213A shall not apply with respect to disclosures or inspections made pursuant to this paragraph.

PROVISIONS OF PART 179, CODE OF FEDERAL REGULATIONS

§ 179.62 Application to make.

No person shall make a firearm unless the person has filed with the Director a written application on Form 1 (Firearms), **Application to Make and Register a Firearm**, in duplicate, executed under the penalties of perjury, to make and register the firearm and has received the approval of the Director to make the firearm which approval shall effectuate registration of the weapon to the applicant. The application shall

identify the firearm to be made by serial number, type, model, caliber or gauge, length of barrel, other marks of identification, and the name and address of original manufacturer (if the applicant is not the original manufacturer). The applicant must be identified on the Form 1 (Firearms) by name and address and, if other than a natural person, the name and address of the principal officer or authorized representative and the employer identification number and, if an individual, the identification must include the date and place of birth and the information prescribed in § 179.63. Each applicant shall identify the Federal firearms license and special (occupational) tax stamp issued to the applicant, if any. The applicant shall also show required information evidencing that making or possession of the firearm would not be in violation of law. If the making is taxable, a remittance in the amount of \$200 shall be submitted with the application in accordance with the instructions on the form. If the making is taxable and the application is approved, the Director will affix a National Firearms Act stamp to the original application in the space provided therefor and properly cancel the stamp (See § 179.67). The approved application will be returned to the applicant. If the making of the firearm is tax exempt under this part, an explanation of the basis of the exemption shall be attached to the Form 1 (Firearms).

§ 179.63 Identification of applicant.

If the applicant is an individual, the applicant shall securely attach to each copy of the Form 1 (Firearms), in the space provided on the form, a photograph of the applicant 2 X 2 inches in size, clearly showing a full front view of the features of the applicant with head bare, with the distance from the top of the head to the point of the chin approximately 1 1/4 inches, and which shall have been taken within 1 year prior to the date of the application. The applicant shall attach two properly completed FBI Forms FD-258 (Fingerprint Card) to the application. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them. A certificate of the local chief of police, sheriff of the county, head of the State police, State or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director, shall be completed on each copy of the Form 1 (Firearms). The certificate shall state that the certifying official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying official has no information indicating that possession of the firearm by the maker would be in violation of State or local law or that the maker will use the firearm for other than lawful purposes.

§ 179.64 Procedure for approval of application.

The application to make a firearm, Form 1 (Firearms), must be forwarded directly, in duplicate, by the maker of the firearm to the Director in accordance with the instructions on the form. The Director will consider the application for approval or disapproval. If the application is approved, the Director will return the original thereof to the maker of the firearm and retain the duplicate. Upon receipt of the approved application, the maker is authorized to make the firearm described therein. The maker of the firearm shall not, under any circumstances, make the firearm until the application, satisfactorily executed, has been forwarded to the Director and has been approved and returned by the Director with the National Firearms

Act stamp affixed. If the application is disapproved, the original Form 1 (Firearms) and the remittance submitted by the applicant for the purchase of the stamp will be returned to the applicant with the reason for disapproval stated on the form.

§ 179.84 Application to transfer.

Except as otherwise provided in this subpart, no firearm may be transferred in the United States unless an application, Form 4 (Firearms), Application for Transfer and Registration of Firearm, in duplicate, executed under the penalties of perjury to transfer the firearm and register it to the transferee has been filed with and approved by the Director. The application, Form 4 (Firearms), shall be filed by the transferor and shall identify the firearm to be transferred by type; serial number; name and address of the manufacturer and importer, if known; model; caliber, gauge or size; in the case of a short-barreled shotgun or a short-barreled rifle, the length of the barrel; in the case of a weapon made from a rifle or shotgun, the overall length of the weapon and the length of the barrel; and any other identifying marks on the firearm. In the event the firearm does not bear a serial number, the applicant shall obtain a serial number from the Regional director (compliance) and shall stamp (impress) or otherwise conspicuously place such serial number on the firearm in a manner not susceptible of being readily obliterated, altered or removed. The application, Form 4 (Firearms), shall identify the transferor by name and address; shall identify the transferor's Federal firearms license and special (occupational) Chapter tax stamp, if any; and if the transferor is other than a natural person, shall show the title or status of the person executing the application. The application also shall identify the transferee by name and address, and, if the transferee is a natural person not qualified as a manufacturer, importer or dealer under this part, he shall be further identified in the manner prescribed in § 179.85. The application also shall identify the special (occupational) tax stamp and Federal firearms license of the transferee, if any. Any tax payable on the transfer must be represented by an adhesive stamp of proper denomination being affixed to the application, Form 4 (Firearms), properly cancelled.

§ 179.85 Identification of transferee.

If the transferee is an individual, such person shall securely attach to each copy of the application, Form 4 (Firearms), in the space provided on the form, a photograph of the applicant 2 x 2 inches in size, clearly showing a full front view of the features of the applicant with head bare, with the distance from the top of the head to the point of the chin approximately 1 1/4 inches, and which shall have been taken within 1 year prior to the date of the application. The transferee shall attach two properly completed FBI Forms FD-258 (Fingerprint Card) to the application. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them. A certificate of the local chief of police, sheriff of the county, head of the State police, State or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director, shall be completed on each copy of the Form 4 (Firearms). The certificate shall state that the certifying official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying

official has no information indicating that the receipt or possession of the firearm would place the transferee in violation of State or local law or that the transferee will use the firearm for other than lawful purposes.

§ 179.86 Action on application.

The Director will consider a completed and properly executed application, Form 4 (Firearms), to transfer a firearm. If the application is approved, the Director will affix the appropriate National Firearms Act stamp, cancel it, and return the original application showing approval to the transferor who may then transfer the firearm to the transferee along with the approved application. The approval of an application, Form 4 (Firearms), by the Director will effectuate registration of the firearm to the transferee. The transferee shall not take possession of a firearm until the application, Form 4 (Firearms), for the transfer filed by the transferor has been approved by the Director and registration of the firearm is effectuated to the transferee. The transferee shall retain the approved application as proof that the firearm described therein is registered to the transferee, and shall make the approved Form 4 (Firearms) available to any ATF officer on request. If the application, Form 4 (Firearms), to transfer a firearm is disapproved by the Director, the original application and the remittance for purchase of the stamp will be returned to the transferor with reasons for the disapproval stated on the application. An application, Form 4 (Firearms), to transfer a firearm shall be denied if the transfer, receipt, or possession of a firearm would place the transferee in violation of law.

CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the Brief for Appellants to be hand delivered on this ____ day of October, 2001, to the following:

Mark B. Stern
Michael S. Raab
Attorneys, Appellate Staff
Civil Division, Room 9530
U.S. Department of Justice
601 D Street, N.W.
Washington, D.C. 20530-0001
Counsel for Defendant-Appellee

Stephen P. Halbrook