No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners, Gary Marbut, the Montana Shooting Sports Association, and the Second Amendment Foundation, seek reversal of the dismissal of their action challenging federal firearms regulations. Marbut wants to pursue his business of manufacturing firearms under the Montana Firearms Freedom Act, state legislation that declares that the manufacture and sale of certain firearms within the state is beyond the scope of Congress's commerce power.

The sole issue is whether federal preemption of Montana's regulation of its own intrastate firearms trade, as set forth in the Montana Firearms Freedom Act, exceeds Congressional power enumerated in the Interstate Commerce Clause of the U.S. Constitution.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding who are not listed in the caption.

CORPORATE DISCLOSURE

Montana Shooting Sports Association is a Montana non-profit corporation with no parent corporation, and no corporate members or owners. Second Amendment Foundation has no parent corporation. No publicly held corporation owns 10% or more of its stock.

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CITATIONS FOR OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975 (9th Cir. 2013). The decision of the district court (App. 18) was not formally reported, but can be found on-line at *Montana Shooting Sports Ass'n v. Holder*, CV 09-147-M-DWM-JCL, 2010 WL 4102940 (D. Mont. Oct. 18, 2010), *aff'd*, 727 F.3d 975 (9th Cir. 2013).

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit Court of Appeals issued its Opinion and judgment on August 23, 2013. This Court has jurisdiction pursuant to 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The action below was filed to challenge application of the Interstate Commerce Clause of Article I of the U.S. Constitution:

> The Congress shall have Power To . . . regulate Commerce . . . among the several States . . . ;

U.S. Const. art. I, § 8, cl. 3. The challenge is based in part on the Amendment of the Interstate Commerce Clause as set forth in the Ninth and Tenth

Amendments to the U.S. Constitution. The Ninth Amendment states:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. IX. The Tenth Amendment reads:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X. The challenged U.S. Statutes are the National Firearms Act, *see* 26 U.S.C.A. §§ 5842, 5843, and the Gun Control Act, *see* 18 U.S.C.A. § 921, whose provisions are set forth in the Appendix at App. 115-132, respectively, and which the Government contends preempt the Montana Firearms Freedom Act (MFFA). MFFA reads:

> A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce. It is declared by the legislature that those items have not traveled in interstate commerce. This section applies to a firearm, a firearm accessory, or ammunition that is manufactured in Montana from basic materials and that can be manufactured without the inclusion of any significant parts imported from

> another state. Generic and insignificant parts that have other manufacturing or consumer product applications are not firearms, firearms accessories, or ammunition, and their importation into Montana and incorporation into a firearm, a firearm accessory, or ammunition manufactured in Montana does not subject the firearm, firearm accessory, or ammunition to federal regulation. It is declared by the legislature that basic materials, such as unmachined steel and unshaped wood, are not firearms, firearms accessories, or ammunition and are not subject to congressional authority to regulate firearms, firearms accessories, and ammunition under interstate commerce as if they were actually firearms, firearms accessories, or ammunition. The authority of congress to regulate interstate commerce in basic materials does not include authority to regulate firearms, firearms accessories, and ammunition made in Montana from those materials. Firearms accessories that are imported into Montana from another state and that are subject to federal regulation as being in interstate commerce do not subject a firearm to federal regulation under interstate commerce because they are attached to or used in conjunction with a firearm in Montana.

MONT. CODE ANN. § 30-20-104 (2009).

STATEMENT OF THE CASE

The Montana Legislature passed the Montana Firearms Freedom Act (MFFA), which declares that a firearm or ammunition "manufactured . . . in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress *[sic]* to regulate interstate commerce." MONT. CODE ANN. § 30-20-104. It purports to authorize the manufacture and sale of firearms within the state, but imposes certain requirements for a firearm to qualify under the Act, notably that the words "Made in Montana" be "clearly stamped on a central metallic part." *Id.* § 30-20-106.

It was undisputed below, for the purposes of the Government's motion to dismiss, filed in the district court, for failure to state a claim, that Petitioner Gary Marbut owns a business that manufactures shooting range equipment for law enforcement agencies and is involved in a variety of gun-related organizations and activities. (App. 5, 14.) Marbut wishes to manufacture and sell firearms and ammunition to Montanans under the MFFA without complying with applicable federal laws regulating firearms. (*Id*.)

After the passage of the MFFA, the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") distributed an "Open Letter to All Montana Federal Firearm Licensees." (*Id*. at 6.) The letter stated that the MFFA conflicts with federal firearms laws, and that federal law supersedes the Act and continues to apply. Marbut subsequently sent a letter

to the ATF, asking whether he could manufacture firearms and ammunition under the MFFA without complying with federal statutes and without fear of criminal prosecution. In response, an ATF special agent wrote to Marbut that "unlicensed manufacturing of firearms [or] ammunition for sale . . . is a violation of Federal law and could lead to . . . potential criminal prosecution." (*Id*.)

Marbut, along with the Petitioners Montana Shooting Sports Association and the Second Amendment Foundation, filed for declaratory and injunctive relief. Petitioners requested a declaratory judgment that Congress has no power to regulate the activities contemplated by the MFFA and injunctive relief preventing the federal government from bringing civil or criminal actions under federal firearms law against Montana citizens acting in compliance with the MFFA. (*Id*. at 6-7.)

A federal magistrate judge recommended dismissing the suit because plaintiffs lacked standing and, in the alternative, because plaintiffs failed to state a claim in light of the Commerce Clause jurisprudence of the Supreme Court and this court. The federal district court adopted these recommendations in full and dismissed the case. Petitioners timely appealed to the U.S. Ninth Circuit Court of Appeals, which reversed the district court on standing, but affirmed the judgment of dismissal, on the merits, in an opinion entered on August 23, 2013. (*Id*. at 1-17.)

REASONS FOR GRANTING CERTIORARI

I. Statutes recently enacted by nearly a fifth of U.S. States, spanning the jurisdictions of four Circuit Courts of Appeals, are in direct conflict with the Court's Interstate Commerce Clause jurisprudence.

Nine states, spanning four federal appellate jurisdictions, have enacted statutes on the exact same federal principals upon which is based the Montana Firearms Freedom Act. Alaska Stat. Ann. § 44.99.500 (Ninth U.S. Circuit Court of Appeals); Ariz. Rev. Stat. Ann. § 13-3114 (Ninth Circuit); Idaho Code Ann. § 18-3315A (Ninth Circuit); KS ST 50-1204 (Eighth Circuit); Mont. Code Ann. § 30-20-101 (Ninth Circuit); Tenn. Code Ann. § 4-54-101 (Sixth Circuit); S.D. Codified Laws § 37-35-5 (Eighth Circuit); Utah Code Ann. § 53-5b-201 (Tenth Circuit); Wyo. Stat. Ann. § 6-8-402 (Tenth Circuit). Members of twenty-three other state legislatures have introduced their own version of the MFFA. (App. 133.)

One of the chief arguments brandished by opponents of these acts, of course, is their inefficacy under federal preemption. *See, e.g.*, http://www.nytimes.com/2010/03/17/us/17states.html. The preemption argument is now supported by the decision of the Ninth Circuit Court of Appeals in this case. Thus, in the Ninth Circuit, the federal court of appeals has dictated, as it were, to the state legislatures of four states (Alaska, Arizona, Idaho, and Montana) within its jurisdiction, that duly enacted statutes, passed by

their legislatures and signed by their governors, have no force or effect, note even within the borders of their own respective jurisdictions.

This is not, however, a criticism of the Court of Appeals as such. Its decision is based squarely on a fair interpretation of the most recent caselaw from this Court on the subject. *See Montana Shooting Sports Ass'n*, 727 F.3d at 981. Specifically, in *Gonzales v. Raich*, the Court held that Congress may regulate a commodity under the Commerce Clause, in that case marijuana, if there exists a rational basis for concluding that the activities at issue, taken in the aggregate, "substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 22 (2005). Here, the U.S. Congress has enacted regulations over the manufacture and sale of firearms, in the National Firearms Act, and the Gun Control Act, that conflict with the MFFA. But, as the Court's current case law provides, "Congress may regulate even ***purely*** intrastate activity 'if it concludes that the failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.'" *Id.* at 18 (emphasis added).

Petitioners acknowledge that their "reason for granting certiorari" do not fit squarely within those set forth under U.S. Sup. Ct. R. 10. But if the highest state courts of these nine states had decided the question presented here in the same way as have these nine state legislatures and governors, the issue would be on all fours with U.S. Sup. Ct. R. 10(c). The

combined population of Americans represented by these states include well over 22 million, and the nine comprise nearly 20% of U.S. states. (Alaska, .7 million; Arizona, 6.4 million; Idaho, 1.5 million; Kansas, 2.8 million; Montana, .9 million; Tennessee, 6.4 million; South Dakota, .8 million; Utah, 2.8 million; Wyoming, .6 million.)[1]

II. Plenary-power in the hands of Congress should be reconsidered, and Dual Sovereignty restored, because, as matters now stand, powerless and dependent States cannot fulfill their intended functions as bulwarks against tyranny.

A. Dual Sovereignty enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.

The Framers of the U.S. Constitution set up a federal form of government not just as an experiment in a novel form of self-government. Rather, they carefully crafted it with a specific design, consisting of various constituent parts, each with its own intended function, as a guard against tyranny. *See*, *e.g.*, *The Federalist Papers*, No. 47 (R.A. Ferguson, ed. 2006) (James Madison). Under the original federal system,

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[1] http://www.census.gov/popest/data/state/totals/2012/tables/NST-EST2012-01.csv, retrieved November 11, 2013.

there were two forms of federalism that were intended to prevent too much power from being concentrated into too few hands: Separation of Powers, and Dual Sovereignty. Under Separation of Powers, the national government was expressly divided into three co-equal branches: the legislative, the executive and the judiciary. *See* U.S. Const. art. I, II, III. Chief Justice Warren taught of this form federalism thus:

> The Constitution divides the National Government into three branches-Legislative, Executive and Judicial. This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.

United States v. Brown, 381 U.S. 437, 442-43 (1965).

The second kind of federalism that was part of our original form of government is embodied in the concept of Dual Sovereignty. As originally conceived, the government would consist of two sovereign powers, similar in kind, but of different extent, between the national government and the governments of the several states. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the

preservation of the Union and the maintenance of the National government." *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869). Functionally, this form of federalism was implemented by granting specific, enumerated – and therefore limited – powers to the national government. As the very first section of the very first article of the U.S. Constitution reads: "All legislative powers ***herein granted*** shall be vested in the Congress of the United States. . . ." U.S. Const. art. I, § 1 (emphasis added). Meanwhile, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. According to James Madison, the lawyer and statesman who, more than any other, is credited with composing the document, this means, "The powers delegated by the proposed Constitution to the federal government are ***few and defined***." *The Federalist Papers*, No. 45 (R.A. Ferguson ed. 2006) (emphasis added). Madison continued: "The powers ***reserved*** to the several States will extend to ***all*** the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Id.* (emphasis added).

The first Chief Justice of the Supreme Court understood Madison's view thus: "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803) (Marshall, C.J.).

> This government is acknowledged by all, to be one of ***enumerated*** powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.

M'Culloch v. Maryland, 17 U.S. 316, 405, 4 L.Ed. 579 (1819) (Marshall, C.J.) (emphasis added). It follows from the enumeration of specific powers that there are clear boundaries to what the Federal Government may do. "The enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L.Ed. 23 (1824). "Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, art. I, § 8, which implication was rendered expressed by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'" *Printz v. United States*, 521 U.S. 898, 919 (1997). "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000) (Rehnquist, C.J.). Ultimately, Congress had no power to act unless the Constitution authorized it to do so.

In thinking about this question, and whether *stare decisis* should give-way to the restoration of federalism, the Court is urged to consider the magnitude and effect of the Constitutional error. The Framers' original system of dual sovereignty was intended as a careful balance of power between the States and the national government. At one time it was considered axiomatic that "under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Indeed, without independent and formidable power residing in the States, there can be, by definition, no federalism:

> "[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," . . . "[W]ithout the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

White, 7 Wall. at 725, (quoting *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869)).

And the point here is not simply the notion of theoretical purity. The concern here is good government. The Court itself has identified many practical advantages inherent in vertical federalism:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). Just as important, however, is the protection federalism offers for ordered liberty. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our ***fundamental*** liberties.'" *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (emphasis added).

The principle was once as basic to that American system as is the separation and independence of this, the Judicial Branch of the federal government, from its co-equal branches. Just as an independent Judiciary acts as a bulwark in the service of liberty against the arrogation of excessive power in the Legislative or

Executive branches, a robust power residing in the States once served equally as an essential shield against government abuse. Thus, as Alexander Hamilton said, the federal system was designed to suppress "the attempts of the government to establish a tyranny":

> [A] confederacy of the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

The Federalist Papers, No. 28, p. 152 (R.A. Ferguson ed. 2006). Madison agreed:

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.

> The different governments will control each other, at the same time that each will be controlled by itself.

Id., No. 51, p. 290.

But "[t]hese twin powers will act as mutual restraints only if ***both*** are credible." *Ashcroft*, 501 U.S. at 459 (emphasis added). The power of the States must be restored to ensure "tension between federal and state power," and for each "distinct government" to fulfill their respective Constitutional roles. Consequently, the plenary-power case law should be reconsidered, and where necessary to restore credible power in the States, overruled.

The Government may argue that it is not, in its current incarnation, tyrannical. It usually abides by the law, typically protects its citizens' rights, and always celebrates in its peaceful transfers of power. Whatever fear Petitioners or anyone else may have of its becoming tyrannical, the Government may argue, is no more than disingenuous alarmism. Such an argument would be wrong.

The wholesale stripping of independent sovereignty from the States has destroyed the balance of power, and given the federal government advantages it demonstrably tends to abuse. The outrage that is our $\$$**17** ***trillion*** national debt[2] (which amounts to over

[2] http://www.usdebtclock.org/, retried November 19, 2013.

$149,000 per taxpayer) may be the worst example.[3] The borning cry of the American Revolution was "no taxation without representation!" *See, e.g.*, The Concept of Representation in the Age of the American Revolution – John Phillip Reid – Google Books. Books.google.com. Retrieved on 2013-09-15. By borrowing more money than the current generation can repay in our lifetimes, Congress leaves a legacy of debt for future generations. Our progeny did not consent to the monumental hole their parents are digging for them. Still, they will certainly be saddled with the duty to make good. This is tyranny. And the destruction of dual sovereignty – starting with the New Deal case law of *Wickard*, *supra*, and *United States v. Darby*, 312 U.S. 100, 109 (1941) – is at the root of it. Without the centralization of so much regulatory power in the federal government, tyranny would be a lot less likely to occur.

Finally, any doubt about the role of Dual Sovereignty as vital to the American form of government was dispelled once-and-for-all when the Court decided *Bond v. United States*, 131 S.Ct. 2355, 2361 (2011). Federalism serves both the human rights of individuals, which are preserved by the Ninth Amendment, and sovereign power in the States, enshrined in the Tenth Amendment. As the Court detailed:

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[3] For a graphic and startling illustration of a trillion dollars, *see* http://www.pagetutor.com/trillion/index.html, retrieved November 19, 2013.

The federal system rests on what might at first seem a counterintuitive insight, that "freedom is enhanced by the creation of two governments, not one." *Alden v. Maine*, 527 U.S. 706, 758, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.

* * *

Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (Blackmun, J., dissenting)).

* * *

Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. *See ibid*. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.

Bond, 131 S.Ct. at 2364-65. "When government acts in excess of its lawful powers, that liberty is at stake." *Id.*

B. By entrusting plenary-power to the United States Congress, the Court's construction of the Interstate Commerce Clause law has eliminated Dual Sovereignty from the American form of government.

The concept of Dual Sovereignty – unfortunately for the cause of individual liberty – no longer functions to preserve any authority in the States. One of the powers the Constitution was said to delegate to Congress was the regulation of what the Framers called commerce "among the several states." U.S. Const. art. I, § 8, cl. 3 ("Congress shall have the power to regulate commerce . . . among the several states. . . .") Under the Interstate Commerce Clause, again according to Madison, the States delegated to Congress "superintending authority over the reciprocal trade of confederated States." *The Federalist Papers*, No. 42, p. 236 (R.A. Ferguson ed. 2006). In other words, "the Commerce Clause was designed to give Congress jurisdiction over the law merchant insofar as it pertained to inter-jurisdictional activities." Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 St. John's L. Rev. 789, 846 (2006).

But this is no longer the law. Despite the original understanding, and the jurisprudence for the first

century and a half of the Republic,[4] federal courts now rule the commerce power to be "plenary, unsusceptible to categorical exclusions." *Morrison*, 529 U.S. at 640 (Souter, J., dissenting). The plenary-power view has held sway "throughout the latter part of the 20th Century in the substantial effects test." *Id*. The Supreme Court confirmed the 20th Century case law in 2005, holding that: "Congress can regulate purely intrastate activity that is not itself 'commercial.'" *Raich*, 545 U.S. at 18, *Wickard v. Filburn*, 317 U.S. 111, 128-129 (1942)). "Our case law firmly establishes Congress' power to regulate ***purely local*** activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17 (emphasis added). As a result, of "the notion of enumerated powers," little remains. *Raich*, 545 U.S. at 47 (O'Conner, J., joined by Rehnquist, C.J., and Thomas, J., dissenting). Indeed, as Justice Thomas's dissent stated more pointedly, under the Court's

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[4] *E.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468 (1935); *Schechter Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038 (1932); *Oliver Iron Co. v. Lord*, 262 U.S. 172, 178, 179, 43 S.Ct. 526, 529, 67 L.Ed. 929 (1923); *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259, 260, 43 S.Ct. 83, 86, 67 L.Ed. 237 (1922); *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918); *Howard v. Illinois Central R. Co.*, 207 U.S. 463, 28 S.Ct. 141, 52 L.Ed. 297 (1907); *United States v. Steffens*, 100 U.S. 82, 25 L.Ed. 550 (1879). Cf. *United States v. Dewitt*, 9 Wall. 41, 19 L.Ed. 593 (1869).

plenary-power construction of the Commerce Clause, "the Federal Government is no longer one of limited and enumerated powers." *Id.* at 58.

Thus, under current case law, "***everything*** is subject to federal regulation under the Commerce Clause." *United States v. Stewart*, 348 F.3d 1132, 1135 (9th Cir. 2003), *abrogated, United States v. Stewart*, 451 F.3d 1071 (9th Cir. 2006) (emphasis added). This is true regardless of an activity's lack of any "commercial" element. *United States v. George*, 579 F.3d 962, 966 (9th Cir. 2009) (disapproving *United States v. Waybright*, 561 F.Supp.2d 1154 (D. Mont. 2008), case dismissed by *U.S. v. George*, 9th Cir. (Wash. March 7, 2012)); *United States v. Alderman*, 565 F.3d 641 (9th Cir. 2009), *rehearing and rehearing en banc*, 593 F.3d 1141 (9th Cir. 2010). Congress enjoys all power in every context "to displace state legislatures with the full weight of the federal government, a result as undesirable as it is unconstitutional." *United States v. Alderman*, 593 F.3d 1141, 1142 (9th Cir. 2010) (O'Scannlain, Circuit Judge, dissenting from the order denying rehearing *en banc*), cert. den., 131 S.Ct. 700, 178 L.Ed.2d 799 (2011).

An illustrative example of just how "unlimited" the Commerce Clause powers are today can be seen in the Ninth Circuit Court of Appeals' treatment of a decision reached by the District Court of Montana in *Waybright*. *Waybright*, 561 F. Supp. 2d 1154. In *Waybright*, Judge Molloy reasoned:

> Tracking sex offenders may enhance public safety and may in turn promote a more

> productive economy as explained by the court in *Passaro*. ***But, any effect on interstate commerce from requiring sex offenders to register is too attenuated to survive scrutiny under the Commerce Clause.*** *See Lopez*, 514 U.S. at 563-64, 115 S.Ct. 1624; *Morrison*, 529 U.S. at 617, 120 S.Ct. 1740. For these reasons, § 16913 is not a valid exercise of Congress' Commerce Clause power.

Id., 561 F.Supp.2d at 1164-65 (emphasis added). In a later case arising out of Oregon, this analysis was summarily rejected:

> [The defendant] cites [*Waybright*] which found that § 16913 was not constitutional because it (1) does not fit within the *Lopez* prongs, (2) is not economic in nature, and (3) created a separate statutory scheme of national regulation of sex offenders instead of facilitating implementation of a federal crime under § 2250. *Id.* at 1163-68. To the extent our reasoning in this opinion differs from the district court's decision in *Waybright*, we disapprove of that decision.

United States v. George, 625 F.3d 1124, 1131, fn. 2 (9th Cir. 2010). Plenary-power analysis thus holds that local sex offenses consist of "commerce among the several states." *See* U.S. Const. art. I, § 8.

A recent instance is even more absurd. In *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011), the Ninth Circuit Court of Appeals reasoned:

> The Supreme Court has never required that a statute be a "comprehensive economic regulatory scheme" or a "comprehensive regulatory scheme for economic activity" in order to pass muster under the Commerce Clause. Indeed, it has never used those terms. The only requirement "which was expressly detailed in *Raich*" is that the "comprehensive regulatory scheme" have a "substantial relation to commerce." *See Raich*, 545 U.S. at 17, 125 S.Ct. 2195. The statute need not be a purely economic or commercial statute, as [the appellants] would have us believe.

San Luis & Delta-Mendota Water Auth., 638 F.3d at 1177 (emphasis added). "In sum, Congress has the power to regulate ***purely intra***state activity as long as the activity is being regulated under a general regulatory scheme that bears a substantial relationship to interstate commerce." *Id.* at 175 (emphasis added). Thus, the "jury-rigging of new and different justifications" is required to "shore-up" *Wickard v. Filburn* and its plenary-power progeny. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring).

The language and original intent of the Commerce clause allows Congress the authority only to "regulate commerce among the several states." The profound flexibility of the current rules, however, allows the Commerce Clause to be shaped, flaked and molded to serve any Congressional rationale. *See United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005). Congress now enjoys an unfettered power, which, under

the Supremacy Clause, U.S. Const. art. IV, § 2, leaves the States helpless and impotent should they find themselves at odds with the United States Congress. "[T]he States as States retain no status apart from that which Congress chooses to let them retain." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting). With the States reduced to little more than administrators of Congressional will, the American form of government no longer includes Dual Sovereignty as a functional concept.

III. Dual Sovereignty can be restored by overruling the plenary-power construction and applying an intermediate scrutiny test when a purely intrastate activity conflicts with federal statutes.

A. Case law decided in error can be overruled.

If case law were sacrosanct, of course, this discussion would be over. Fortunately, however, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Case law can and should be overturned if it supports an erroneous proposition of law, especially in the Constitutional arena "because in such cases 'correction through legislative action is practically impossible.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996). It is one of the great strengths of our system that courts can correct their mistakes:

> [W]e must keep in mind that *stare decisis* ***is not an end in itself***. . . . Its greatest purpose is to serve a constitutional ideal – the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.

Citizens United, 130 S.Ct. at 920-21 (Roberts, C.J., concurring) (emphasis added).

Current Commerce Clause jurisprudence should be corrected. It allows Congress to exclusively regulate any purely non-commercial, intrastate matter – like purely local Sacramento River delta-smelt and purely local sex offenses – and in so doing wreaks havoc upon the "constitutional ideal" of federalism. *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1177; *George*, 625 F.3d at 1131, fn. 2. The 20th Century case law has simply excised dual sovereignty from the American form of government. *See, e.g.*, *Garcia*, 469 U.S. at 583-584 (O'Connor, J., dissenting). This effective repeal of this "vertical" balance of powers, as originally conceived for the American form of government, should be reconsidered and, to the extent the cases require preemption of the MFFA, overruled.

B. The Tenth Amendment should be applied to correct the Constitutional error.

One of the most basic canons of interpretation is "that 'a statute should be construed so that effect is given to all its provisions, so that no part will be

inoperative or superfluous, void or insignificant. . . .'" *Corley v. United States*, 556 U.S. 303 (2009); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). The same goes for Constitutional provisions. "It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 1 Cranch 137, 174, 2 L.Ed. 60 (1803). In other words, "what is not debatable is that it is not the role of this Court to pronounce the [Tenth] Amendment extinct." *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008). Thus, in interpreting the Constitution, "real effect should be given to all the words it uses." *Myers v. United States*, 272 U.S. 52, 151 (1926).

At the same time, it is also unavoidable that if there is a conflict between or among provisions of a co-equal body of law, the most recently-enacted controls. "*Leges posteriores, priores contrarias abrogant*." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 166, fn. 3 (1976).

> When there are two acts on the same subject, the rule is to give effect to both if possible. But, if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was

> intended as a substitute for the first act, it will operate as a repeal of that act.

Dist. of Columbia v. Hutton, 143 U.S. 18, 26-27 (1892). Without adherence to this principle, it would be impossible to amend or repeal any law once codified. Finally, "amendment" means, "specifically, change." Black's Law Dictionary (9th ed. 2009). Thus, whatever the original meaning and intent of Article I of the U.S. Constitution, which enumerates Congressional powers, that meaning is subject to – changed by – later amendments.

In this case, the U.S. Constitution was fully ratified in 1790. *Minor v. Happersett*, 88 U.S. 162, 176 (1874). The Ninth and Tenth Amendments, along with the other provisions of the Bill of Rights, were ratified in 1791. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 682 (1970). Enacted most recently, then, the first ten Amendments control application and construction of Article I, including the Interstate Commerce Clause. As Justice Goldberg wrote of the Ninth Amendment in his concurring opinion in *Griswold v. Connecticut*:

> The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many

> words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "(t)he enumeration in the Constitution, of certain rights shall ***not*** be construed to deny or disparage others retained by the people." (Emphasis added.)

Griswold v. Connecticut, 381 U.S. 479, 490-92 (1965). The Tenth Amendment, like the Ninth, is therefore something far more than a tautology.

This case represents an opportunity for the Court to re-invigorate Dual Sovereignty, and the purpose it serves in the American form of government. If the Court agrees with Petitioners – that it is unwise to rest plenary-power in the hands of the U.S. Congress – then this is a chance to redress the current Constitutional error, and return some independence of policy and action, if only a little, to the States.

C. Intermediate scrutiny should be adopted for Tenth Amendment review.

As it stands, Congressional action under the Commerce Clause is reviewed generally only under a "rational basis test." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). If the Tenth Amendment is to be given additional meaning beyond what is expressed in the body of the Constitution, courts should review Congressional action with a keener lens. Under a more exacting standard, if courts were to find more than one reasonable interpretation for the limits of a Congressional power enumerated by the Constitution, then they should adopt the construction that is more respectful of Dual Sovereignty. Given the importance of federalism for individual ordered liberty, at the very least, courts should review any Congressional action which may undermine federalism on something less permissive than a rational basis analysis. One reasonable option is intermediate scrutiny.

Intermediate scrutiny is a level of review somewhere between strict scrutiny and rationality review. The Supreme Court has used intermediate scrutiny in the contexts of the Equal Protection Clause and the First Amendment. In the Equal Protection context, the Court has applied intermediate scrutiny to, for example, to laws that discriminate on the basis of sex, in *United States v. Virginia*, 518 U.S. 515 (1996); and discrimination against aliens, *Application of*

Griffiths, 413 U.S. 717 (1973). In First Amendment cases, the Court has applied intermediate scrutiny to content-neutral regulations, *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997); time, place, and manner regulations, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); and regulations of commercial speech. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

"To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). It has been said that "[t]he most striking feature of intermediate scrutiny is that, unlike strict scrutiny or rationality review, the tier of scrutiny that the Court decides to apply does not predetermine the outcome of the case; with intermediate scrutiny, sometimes the state wins, and sometimes it loses." Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny As Judicial Minimalism*, 66 Geo. Wash. L. Rev. 298, 318 (1998).

IV. Applying a test of intermediate scrutiny, the MFFA is not preempted, and Petitioners should therefore prevail on the merits.

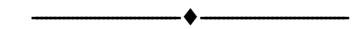
In this case, an intermediate scrutiny test would place the burden on the Government, as the regulating party, to establish that preempting the MFFA bears a substantial relationship to an important governmental objective. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980). Here, the Congressional findings in support of the National Firearms Act

(NFA) and the Gun Control Act (GCA) involve not the promotion or regulation of commercial markets and legitimate economic activity by business and consumers, but the assistance to ***local*** police with crime control. *See* H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), 1954 U.S.C.C.A.N. 4025, 4552; S. Rep. No. 1866, 89th Cong. 2d Sess. 1 (1966) (emphasis added). Congressional findings are clear that the NFA and GCA do not target commerce, but local police work. S. Rep. No. 1097, 9th Cong., 2d Sess. 1968, 1968 U.S.C.C.A.N. 2112, 2113-14. Congress enacted these statutes to aid local law enforcement in highly populated states where Congress saw crime skyrocketing. S. Rep. No. 1866, 89th Cong., 2d Sess. (1966).

There is, however, no finding by Congress to suggest that preemption of the MFFA will have any effect on – let alone a substantial relationship with – the local crimes that the NFA and GCA were enacted to fight. Moreover, since MFFA firearms can, under the law's own terms, be manufactured, transferred and possessed ***only*** in Montana, they do not fall within the category of guns Congress enacted the NFA and GCA to control. Mont. Code Ann. § 30-20-104. Congress has no power to target truly local criminal activity under the guise of controlling *interstate* traffic in guns. *See Morrison*, 529 U.S. at 617 and *Jones v. United States*, 529 U.S. 848, 858-59 (2000) (Congress has no power to make a federal crime of arson). Since the Congress has no authority to regulate local crime, there can be no "important interest" in doing so. Local policing is by definition not an important governmental objective of the U.S. Congress.

Finally, it is very important to note than nothing in Montana law purports to excuse anyone from complying with federal law if they leave the state of Montana with an MFFA firearm in their possession. Unless NFA and GCA standards have been met with the item, it plainly would be illegal under federal law, to place the firearm in the stream of interstate commerce by taking it out of Montana.

Because there is no substantial effect on an important Congressional interest in preempting the MFFA, the Government cannot satisfy the intermediate scrutiny test. As a result, in affirming the district court's dismissal of Petitioner's complaint on the merits, the Ninth Circuit Court of Appeals committed prejudicial error and should, therefore, be reversed.



CONCLUSION

Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA SHOOTING SPORTS ASSOCIATION; SECOND AMENDMENT FOUNDATION, INC.; GARY MARBUT, *Plaintiffs-Appellants*, and STATE OF MONTANA, *Intervenor*, v. ERIC H. HOLDER, JR., Attorney General, *Defendant-Appellee*.	No. 10-36094 D.C. No. 9:09-cv-00147-DWM OPINION

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Argued and Submitted
March 4, 2013 – Portland, Oregon

Filed August 23, 2013

Before: A. Wallace Tashima, Richard R. Clifton, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Clifton;
Partial Concurrence and Partial Dissent by Judge Bea

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OPINION

CLIFTON, Circuit Judge:

Plaintiffs Gary Marbut, the Montana Shooting Sports Association, and the Second Amendment Foundation appeal the dismissal of their action challenging federal firearms regulations. Marbut wants to manufacture firearms under the Montana Firearms Freedom Act, state legislation that declares that the manufacture and sale of certain firearms within the state is beyond the scope of Congress's commerce power. The district court dismissed the action because no plaintiff had standing to bring the claim and, in the alternative, because the complaint failed to state a claim in light of *Gonzales v. Raich*, 545 U.S. 1 (2005), and *United States v. Stewart*, 451 F.3d 1071 (9th Cir. 2006). On appeal, we conclude that Marbut has standing to sue, but we agree with the district court that Marbut has failed to state a claim. Thus, we affirm the judgment.

I. Background

The Montana Legislature passed the Montana Firearms Freedom Act ("MFFA" or "the Act"), which declares that a firearm or ammunition "manufactured . . . in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress [sic] to regulate interstate commerce." Mont. Code Ann. § 30-20-104. It purports to authorize the manufacture and sale of firearms within the state, but imposes certain requirements for a firearm to qualify under the Act, notably that the words "Made in Montana" be "clearly stamped on a central metallic part." *Id.* § 30-20-106.

Plaintiff Gary Marbut owns a business that manufactures shooting range equipment for law enforcement agencies and is involved in a variety of gun-related organizations and activities, including service as the president of the Montana Shooting Sports Association, another plaintiff. Marbut wishes to manufacture and sell firearms and ammunition to Montanans under the MFFA without complying with applicable federal laws regulating firearms.

In particular, Marbut wishes to manufacture and sell a .22 caliber rifle called the "Montana Buckaroo." Marbut has design plans for the rifle that are ready to load into machining equipment for production, and he has identified manufacturers that will supply the individual component parts. Several hundred Montanans have offered to purchase the Montana

Buckaroo at Marbut's asking price, but such sales are conditioned on Marbut winning this suit and not having to comply with federal licensing requirements. According to the complaint, these customers "do not want . . . and will not buy" the Montana Buckaroo if manufactured by a federal firearms licensee. Marbut has also developed ammunition that he wants to sell under the MFFA and that a state agency has expressed interest in purchasing.

After the passage of the MFFA, the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") distributed an "Open Letter to All Montana Federal Firearm Licensees." The letter stated that the MFFA conflicts with federal firearms laws, and that federal law supersedes the Act and continues to apply. Marbut subsequently sent a letter to the ATF, asking whether he could manufacture firearms and ammunition under the MFFA without complying with federal statutes and without fear of criminal prosecution. In response, an ATF special agent wrote to Marbut that "unlicensed manufacturing of firearms of [sic] ammunition for sale . . . is a violation of Federal law and could lead to . . . potential criminal prosecution."

Marbut, along with the Montana Shooting Sports Association and the Second Amendment Foundation, filed for declaratory and injunctive relief. The Montana Shooting Sports Association and the Second Amendment Foundation are non-profits dedicated to gun education and advocacy. Plaintiffs requested a declaratory judgment that Congress has no power to regulate the activities contemplated by the MFFA and

injunctive relief preventing the federal government from bringing civil or criminal actions under federal firearms law against Montana citizens acting in compliance with the MFFA.

A federal magistrate judge recommended dismissing the suit because plaintiffs lacked standing and, in the alternative, because plaintiffs failed to state a claim in light of the Commerce Clause jurisprudence of the Supreme Court and this court. The federal district court adopted these recommendations in full and dismissed the case. Plaintiffs timely appealed.

II. Standing

Plaintiffs argue that economic injury and the threat of criminal prosecution each provide a basis for standing. The district court held that none of the plaintiffs had standing. We review a motion to dismiss for lack of standing de novo, construing the factual allegations in the complaint in favor of the plaintiffs. *Tyler v. Cuomo*, 236 F.3d 1124, 1131 (9th Cir. 2000). On appeal, we conclude that Marbut has standing on account of economic injury and do not reach his alternative argument for standing. Neither do we reach the issue of whether the Montana Shooting Sports Association and the Second Amendment Foundation have organizational standing.

To have standing, a plaintiff must suffer an injury that is "actual or imminent" as opposed to "conjectural or hypothetical." *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). Because Marbut asks for injunctive relief, he must show "a very significant possibility of future harm." *Mortensen v. Cnty. of Sacramento*, 368 F.3d 1082, 1086 (9th Cir. 2004) (quoting *Bras v. Cal. Pub. Utils. Comm'n*, 59 F.3d 869, 873 (9th Cir. 1995)).

Economic injury caused by a proscriptive statute is sufficient for standing to challenge that statute. *See Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 855-56, *opinion amended in other respects on denial of reh'g*, 312 F.3d 416 (9th Cir. 2002). In *Davis*, for example, plaintiff animal trappers challenged a law prohibiting the use of certain types of traps. 307 F.3d at 842. The trappers alleged that they earned a living through trapping, had ceased trapping because of the law, would continue trapping if the law were declared invalid, and asked for declaratory and injunctive relief. *Id.* at 845, 855-56. The court concluded that the trappers had standing to challenge the law, noting that "the trappers' economic injury is directly traceable to the fact that [the challenged law] explicitly forbids the trapping they would otherwise do." *Id.* at 856.

Like the plaintiffs in *Davis*, Marbut alleges an economic injury resulting from laws explicitly prohibiting a business activity that he would otherwise engage in. The magistrate judge distinguished *Davis* on the basis that the trappers, unlike Marbut, had a preexisting business that came to a halt after the law at issue was enacted. It is true that the court in *Davis*, in determining whether or not the trappers

would suffer future economic injury on account of the challenged law, noted that the "uncontested history of using the now-prohibited traps before the passage of [the challenged law], and their statements that they would continue trapping if not constrained by [that law], are enough to show they would resume trapping if [the] ban were declared invalid." *Id.* at 856. But having operated a business enterprise in the past based on a now-prohibited activity is not a necessary condition for standing.

Injunctive relief requires a showing of a significant likelihood of future injury. *See Mortensen*, 368 F.3d at 1086. Having engaged in a business activity in the past may make it less speculative that a plaintiff can and would do so again if the law were enjoined, but there is no bright line rule requiring past operation to establish standing. Rather, "determining 'injury' for Article III standing purposes is a fact-specific inquiry." *Lujan*, 504 U.S. at 606.

Construing Marbut's allegations in the light most favorable to him, we conclude that he would manufacture and sell unlicensed firearms should we declare federal regulations inapplicable to the Buckaroo. Marbut has not merely alleged a vague desire to manufacture and sell unlicensed firearms if he wins this lawsuit, but has made specific allegations substantiating this claim. He has a background in running his own shooting range equipment manufacturing business, has identified suppliers for the component parts of the Buckaroo, has design plans for the firearm ready to load into manufacturing

equipment, and has identified hundreds of customers who have ordered the Buckaroo at his asking price. Marbut has alleged much more than the "'some day' intentions . . . without any description of concrete plans" held insufficient for standing. *Lujan*, 504 U.S. at 564 (holding that a mere professed intent to visit a country was insufficient for standing, when plaintiffs had not purchased a plane ticket or even described when they would visit).

We are not persuaded by the government's argument that Marbut lacks standing because he could conduct his business through legal means by obtaining a federal license. The government provides no reason why we should not take Marbut's allegation that his customers "do not want, have not ordered, and will not buy the 'Montana Buckaroo' if it is manufactured by federal firearms licensees" as true, as we generally must in considering a dismissal under Federal Rule of Civil Procedure 12(b). Marbut has supported his allegation with evidence suggesting that much of the appeal of the Montana Buckaroo is that it is a Montana product purportedly not subject to federal gun laws, if for no other reason than the state pride and limited government symbolism associated with such a product. One customer, for example, ordered ten Buckaroos for teaching purposes and added to his order, "I can't think of a better way to teach Montana's shooting heritage than with a historic MFFA rifle." Another customer, ordering two Buckaroos, exclaimed, "I believe they would be a collector's item one day!"

Moreover, even if Marbut could conduct his business as a federal licensee without losing customers, he would nonetheless incur economic costs in complying with the licensing requirements. Marbut alleged that he is not willing "to pay the requisite . . . licensing fees and taxes" associated with complying with federal licensing requirements. The economic costs of complying with a licensing scheme can be sufficient for standing. *Ariz. Contractors Ass'n, Inc. v. Napolitano*, 526 F. Supp. 2d 968, 979 (D. Ariz. 2007) (holding that plaintiffs had demonstrated they would sustain economic injury if the law forced them to use E-Verify), *aff'd sub nom. Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *aff'd sub nom. Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 179 (2011).

Under the circumstances of this case and construing Marbut's allegations in the light most favorable to him, we conclude that Marbut has alleged economic injury sufficient for standing. Because Marbut has standing, and "the presence in a suit of even one party with standing suffices to make a claim justiciable," *Brown v. City of L.A.*, 521 F.3d 1238, 1240 n.1 (9th Cir. 2008), we need not address whether the Second Amendment Foundation and the Montana Shooting Sports Association satisfy the requirements for organizational standing. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (declining to address standing of additional plaintiffs "because the presence of one party

with standing is sufficient to satisfy Article III's case-or-controversy requirement").

III. Merits

The district court dismissed the complaint for failure to state a claim, concluding that Congress's commerce power permitted it to regulate the manufacture and sale of the Buckaroo. We review a dismissal for failure to state a claim de novo. *See Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

Marbut argues that the manufacture and sale of the Buckaroo are outside the scope of the Commerce Clause, and that federal licensing laws do not apply as a result. His primary argument is that an expansive interpretation of the Commerce Clause is inconsistent with dual sovereignty, and he laments the trajectory of the Supreme Court's Commerce Clause jurisprudence. Marbut argues, for example, that "the Supreme Court's Commerce Clause jurisprudence has improvidently altered the very form of American government, reading out dual sovereignty, and stripping from the States all independence of policy or action."

Whether or not Marbut is correct in his critique of that jurisprudence, we are not free to disregard it. To his credit, Marbut acknowledges as much, recognizing that this court's "hands are tied" with respect to binding precedent. Specifically, his opening brief states:

> Appellants realize that in many respects, as regards the arguments so far made, the Court's hands are tied. Appellants advocate for the case law being overturned, and an intermediate scrutiny test being applied. But the relevant case law has been promulgated by the Supreme Court, whose decision are controlling. *See e.g.*, *United States v. Stewart*, 451 F.3d 1071, 1076 (9th Cir. 2006). Thus, even if the Court agrees with the reasoning, there are few remedies the Court is able to offer. One, however, would be to limit *Raich* to its facts, and distinguish it on grounds of its national defense implications.

Turning to the precedent from the Supreme Court and our own court that we are bound to follow, we conclude that Congress's commerce power extends to the manufacture and sale of the Buckaroo, and that *Raich* cannot be read as limited to its facts, as Marbut urges.

In *Gonzales v. Raich*, the Court held that Congress may regulate a commodity under the Commerce Clause, in that case marijuana, if there exists a rational basis for concluding that the activities at issue, taken in the aggregate, substantially affect interstate commerce. 545 U.S. 1, 22 (2005). Congress may regulate even purely intrastate activity "if it concludes that the failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18. We applied this test to the possession of firearms in *United*

States v. Stewart, holding that Congress could prohibit the possession of a homemade machine gun because it could have rationally concluded that the possession of homemade machine guns would substantially affect the interstate market in machine guns. 451 F.3d 1071, 1077 (9th Cir. 2006); *see United States v. Henry*, 688 F.3d 637, 638 (9th Cir. 2012).

Under *Raich* and *Stewart*, the regulation of the Montana Buckaroo is within Congress's commerce power. Marbut intends to manufacture the Buckaroo under the Montana Firearms Freedom Act, which means that he will manufacture and sell it within the borders of Montana. *See* Mont. Code Ann. § 30-20-104. But even if Marbut never sells the Buckaroo outside of Montana, Congress could rationally conclude that unlicensed firearms would make their way into the interstate market. This result does not change because the Buckaroo will bear a "Made in Montana" stamp to distinguish it from firearms that may be sold in the interstate market. *See id.* § 30-20-106. Congress might reasonably determine that a "Made in Montana" stamp will not deter those seeking to purchase unregistered firearms in the interstate black market. *See Stewart*, 451 F.3d at 1077-78 (rejecting the argument that homemade machine guns were "unique" and so would not affect the market for commercial machine guns, noting that "those seeking [machine guns] care only whether the guns work effectively").

Plaintiffs' efforts to distinguish *Raich* are not convincing. Plaintiffs argue that *Raich*, which dealt

with Congress's power to regulate marijuana under the Commerce Clause, should be limited to the national defense concerns implicated in the "war on drugs." There is no language in *Raich* limiting its principles to "national defense" concerns, however, and *Raich* relies on *Wickard v. Filburn*, 317 U.S. 111 (1942), which dealt with Congress's power to regulate wheat. *See Raich*, 545 U.S. at 16. The attempt to read into *Raich* a distinction between the market for firearms and the market for marijuana has already been rejected by our court, as *Stewart* held that the principles of *Raich* apply to the market for firearms.[1]

Finally, plaintiffs have not pursued on appeal any argument that the individual right to bear arms recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), supports a different result. Even if they had advanced this argument, we have already held that *Heller* "has absolutely no impact on *Stewart*'s Commerce Clause holding." *Henry*, 688 F.3d at 642.

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[1] The history of *Stewart*, which involved homemade machine guns, further illustrates that the Supreme Court did not view *Raich* as narrowly limited to its facts. Our first decision in *Stewart* was filed in 2003, as *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003). It concluded that Congress could not, under its Commerce Clause power, prohibit mere possession of a homemade machine gun. The Supreme Court granted certiorari in that case, vacated the judgment, and remanded to this court for further consideration in light of *Raich*. *United States v. Stewart*, 545 U.S. 1112 (2005). On remand, our court issued the 2006 decision described in the text.

Congress could have rationally concluded that the manufacture of unlicensed firearms, even if initially sold only within the State of Montana, would in the aggregate substantially affect the interstate market for firearms. Under *Raich* and *Stewart*, that is enough to place the Buckaroo within reach of the long arm of federal law. Because the MFFA purports to dictate to the contrary, *see* Mont. Code Ann. 30-20-104 (providing that conduct conforming to the MFFA is "not subject to federal law or federal regulation"), it is necessarily preempted and invalid. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2254 (2013) (explaining that, to the extent a state law conflicts with federal law, "the state law . . . ceases to be operative" (internal quotation mark omitted)).

VI. Conclusion

Though we conclude that plaintiff Gary Marbut has standing, we affirm the dismissal of the action for failure to state a claim.

AFFIRMED.

BEA, Circuit Judge, concurring in part and dissenting in part:

I fully agree with the majority's conclusion that Gary Marbut is subject to federal licensing laws. *Gonzales v. Raich*, 545 U.S. 1 (2005), and *United States v. Stewart*, 451 F.3d 1071 (9th Cir. 2006),

foreclose Marbut's argument that Congress does not have the authority under the Commerce Clause to regulate the manufacture of unlicensed firearms, even if they are manufactured and initially sold within Montana only. Had the majority stopped there, I would join the opinion in full. However, the majority goes a step further and holds that the Montana Firearms Freedom Act is "necessarily preempted" because it purports to say that conduct conforming to the MFFA is not subject to federal regulation.[1] In my opinion, this section of the opinion is unnecessary. Once we decide, as we did, that Marbut's conduct falls within the scope of federal regulation, we do not need to pass upon the validity of the MFFA. True, Marbut attempts to use the MFFA as a shield against federal regulation. But, once we decide that Congress has authority to regulate Marbut's conduct, it is simply irrelevant whether Marbut attempts to cloak himself in the MFFA.

Therefore, I respectfully dissent from the portion of the majority's opinion holding that the MFFA is preempted by federal law.

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[1] Specifically, the MFFA declares that a firearm or ammunition "manufactured . . . in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress [sic] to regulate interstate commerce." Mont. Code Ann. § 30-20-104.

UNITED STATES DISTRICT COURT

DISTRICT OF MONTANA

MISSOULA DIVISION

Montana Shooting Sports Association**, et al.** **Plaintiffs,** **vs.** **Eric H. Holder, Jr., et al.** **Defendants.**	**JUDGMENT** **CV 09-147-M-DWM**

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.**

IT IS HEREBY ORDERED that judgment is entered in favor of the United States and against Plaintiffs in accordance with the Opinion entered 10/18/10.

Dated this 19th day of October, 2010.

PATRICK E. DUFFY, CLERK

By: B. Warren
Deputy Clerk

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

MONTANA SHOOTING SPORTS ASSOCIATION, SECOND AMENDMENT FOUNDATION, INC., and GARY MARBUT,	)	CV 09-147-M-DWM-JCL
Plaintiffs,	)	OPINION
vs.	)	
ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,	)	
Defendants.	)	

Plaintiffs Montana Shooting Sports Association, Second Amendment Foundation, and Gary Marbut seek declaratory and injunctive relief allowing them to manufacture and sell firearms free from the constraints imposed by federal firearm laws. Their central contention is that the Montana Firearms Freedom Act and the constitutional limitations on Congress' power to regulate intrastate activity preclude the application of the federal Gun Control Act and National Firearms Act to the manufacture and sale of firearms made exclusively in Montana from

materials originating in Montana and sold to customers in Montana.

The contentions in the Second Amended Complaint ask for administrative review of the United States Bureau of Alcohol, Tobacco, Firearms and Explosives' ("ATF") letters advising Plaintiffs that federal firearms laws remain in effect regardless of the passage of the Montana Firearms Freedom Act. Plaintiffs also want a declaratory judgment that (1) Congress lacks the constitutional authority to regulate the activity covered by the Montana Firearms Freedom Act; (2) The Ninth and Tenth Amendments confer all such regulatory authority upon the State of Montana; and (3) federal law does not preempt the Montana Firearms Freedom Act and cannot be invoked to regulate activity covered by the state law. Finally, Plaintiffs request an injunction forbidding the United States from taking any action against Montana citizens acting in compliance with the Montana Firearms Freedom Act.

Eric H. Holder, Jr., Attorney General of the United States of America ("United States") has filed a motion to dismiss the Second Amendment Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. United States Magistrate Judge Jeremiah C. Lynch issued Findings and Recommendations in which he recommended that the United States' motion to dismiss be granted. Judge Lynch concluded that the Court lacks subject matter jurisdiction over the administrative review claim because the ATF's letters

do not constitute final agency action and therefore the United States has not waived sovereign immunity under the Administrative Procedure Act, 5 U.S.C. § 702. Judge Lynch found no subject matter jurisdiction over the remaining constitutional claims because the individual Plaintiff and the organizational Plaintiffs lack standing. Plaintiff Marbut lacks standing, Judge Lynch determined, because he is not subject to a specific threat of imminent prosecution and because he has not alleged concrete plans to manufacture firearms in an existing business operation. Judge Lynch found the organizational Plaintiffs lack standing because they have not identified an individual member who meets the standing requirement.

Based his findings with respect to the Court's subject matter jurisdiction, Judge Lynch recommended that the United States' motion to dismiss be granted. Despite that recommendation, and because of the possibility that this Court might disagree with his conclusions on the question of subject matter jurisdiction, Judge Lynch then went on to consider the United States' argument for dismissal on the ground that the Plaintiffs have failed to state a claim upon which relief may be granted. Judge Lynch gave careful consideration to the existing case law discussing the limits of the Congress' power to regulate intrastate commercial activity that substantially affects interstate commerce, and concluded that Plaintiffs have failed to state a claim because the federal firearms laws are legitimate exercises of the commerce power as applied to the activity that Plaintiffs seek to have

protected from federal regulation. Judge Lynch then determined that the Plaintiffs' failure to state a claim provides an alternative basis for dismissal of the non-APA claims.

Plaintiffs filed nominal objections to Judge Lynch's Findings and Recommendations, as did Intervenor the State of Montana. Plaintiffs' objections consist of a list of 12 bullet points summarily describing aspects on Judge Lynch's analysis with which they disagree. The objections are not supported by any analysis or citation to legal authority, save for a generalized reference to the arguments presented before Judge Lynch. Plaintiffs conclude their objections with a citation to the recent United States Supreme Court case of *McDonald v. City of Chicago*, 561 U.S. ___, 130 S.Ct. 3020 (2010), and an argument that they should be granted leave to amend their pleadings a third time so that they may allege a Second Amendment claim.

A party filing objections to the findings and recommendations of a magistrate is entitled to do [sic] novo review of the issues that are "properly objected to." Fed. R. Civ. P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1). A party makes a proper objection by identifying the parts of the magistrate's disposition that the party finds objectionable and presenting legal argument and supporting authority, such that the district court is able to identify the issues and the reasons supporting a contrary result. It is not sufficient for the objecting party to merely restate arguments made before the magistrate or to incorporate

those arguments by reference. *Hagberg v. Astrue*, 2009 WL 3386595 at *1 (D. Mont. 2009). "There is no benefit if the district court[ ] is required to review the entire matter de novo because the objecting party merely repeats the arguments rejected by the magistrate. In such situations, this Court follows other courts that have overruled the objections without analysis." *Id*. Because the Plaintiffs made no effort to support their summary objections with argument or authority explaining why they disagree with Judge Lynch's disposition, their objections are reviewed for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc*., 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000).

As for the Plaintiffs' request that they be permitted to amend their pleadings, such a request is properly presented not in the Plaintiffs' objections to Judge Lynch's Findings and Recommendations, but rather in a motion made first before Judge Lynch, who is the presiding judge over such matters under 28 U.S.C. § 636(b)(1)(B). *See* Order dated February 11, 2010 (Doc. No. 20). Emboldened by a new Second Amendment history discovered in *Heller*,[1] and the Montana Legislature's prerogative to riddle the

[1] *District of Columbia v. Heller*, 554 U.S. ___, 130 S.Ct. 3020 (2008).

statutory code with "political statements,"[2] the Plaintiffs, having already twice amended their pleadings, failed to raise the Second Amendment issue until after Judge Lynch filed his Findings and Recommendations, despite being explicitly put on notice of the deficiency on May 18, 2010, when the United States noted in its Reply that the Second Amended Complaint does not allege a Second Amendment violation. Doc. No. 70 at 38.

The State of Montana's objections question Judge Lynch's determination that the application of the federal firearms laws to the intrastate manufacture and sale of firearms is a permissible exercise of the commerce power under *Gonzalez v. Raich*, 545 U.S. 1 (2005), and *United States v. Stewart*, 451 F.3d 1071 (9th Cir. 2006). Montana argues that *Raich* and *Stewart* are now distinguishable because unlike the marijuana and machine guns at issue in those cases, the guns manufactured under the Montana Firearms Freedom Act would be stamped with a "Made in Montana" logo. The State also argues *Stewart* was based on a faulty view of the Second Amendment.

There is no basis in *Raich* or *Stewart* for the assumption that the addition of a logo specifying the origin of the product would have led to a different result. It is clear from *Stewart* that the focus is not on the uniqueness of the product, but rather on its

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[2] *See* Judge Lunch's [sic] Findings and Recommendations, Doc. No. 103 at 57 n.18.

potential to affect interstate commerce. To the *Stewart* court, the fact that the machine guns at issue there had never traveled in interstate commerce was "entirely irrelevant." 451 F.3d at 1077. The court went on to explain:

> Neither the fully mature homegrown marijuana at issue in *Raich* nor the harvested wheat at issue in *Wickard* had ever crossed state lines either. Nor does it matter that Stewart's activities alone did not have a substantial effect on interstate commerce. Since *Wickard*, it has been well established that we aggregate intra-state activities in as-applied Commerce Clause challenges. After *Raich*, the proper focus in that inquiry is not Stewart and his unique homemade machineguns, but all homemade machineguns manufactured intrastate. Moreover, we do not require the government to prove that those activities actually affected interstate commerce;[3] we merely inquire whether Congress had a rational basis for so concluding.

Id. (emphasis in original).

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[3] This point disposes of the State of Montana's objection faulting Judge Lynch for denying the Plaintiffs the opportunity to present proof of the nature of the intrastate market for firearms in Montana. Whether such a market exists goes to the *actual* affect of the proposed activity on interstate commerce; such proof is not necessary to the determination whether Congress had a rational basis for concluding that the activity would affect interstate commerce in the aggregate.

Like the machine guns in *Stewart*, guns manufactured in accordance with the Montana Firearms Freedom Act would be interchangeable economic substitutes with other firearms, regardless of the existence of a stamp indicating the weapon was "Made in Montana." The origin of the firearm is of no importance to a customer whose primary concern is that it functions properly, and is especially irrelevant to the buyer whose primary purpose is to avoid federal regulation and registration because he is prohibited from possessing firearms under federal law. The State has failed to distinguish *Raich* and *Stewart* in a meaningful way, and Judge Lynch's application of them to this case is correct.

Having reviewed de novo those aspects of Judge Lynch's analysis that were properly objected to, and having reviewed the remainder of his analysis for clear error, the Court adopts Judge Lynch's Findings and Recommendations (Doc. No. 103) in full.

Accordingly, IT IS HEREBY ORDERED that the United States' motion to dismiss is GRANTED, and this case is DISMISSED due to lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

The Clerk of Court is directed to enter judgment in favor of the United States and against Plaintiffs in accordance with this Opinion.

/s/ Donald W. Molloy
DONALD W. MOLLOY,
DISTRICT JUDGE
UNITED STATES
DISTRICT COURT

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

MONTANA SHOOTING SPORTS ASSOCIATION, SECOND AMENDMENT FOUNDATION, INC., and GARY MARBUT, Plaintiffs, vs. ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, Defendants.	CV 09-147-M-DWM-JCL ORDER

The Court having reviewed Magistrate Judge Jeremiah C. Lynch's Findings and Recommendations together with the objections of the Plaintiffs and Intervenor and the response filed by the Defendant, and having conducted a de novo review as required by 28 U.S.C. § 636(b)(1),

IT IS HEREBY ORDERED that Judge Lynch's Findings and Recommendations (Doc. No. 103) are adopted in full, and the Defendant's motion to dismiss for lack of subject matter jurisdiction and failure to

state a claim (Doc. No. 10) is GRANTED. The case will be dismissed and judgment entered upon the filing of a forthcoming explanatory opinion.

DATED this 29th day of September, 2010.

/s/ Donald W. Molloy
Donald W. Molloy, District Judge
United States District Court

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

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

Plaintiffs,

vs.

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

Defendant.

CV-09-147-DWM-JCL

FINDINGS &RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiffs Montana Shooting Sports Association, Second Amendment Foundation, and Gary Marbut bring this declaratory judgment action seeking a determination that they may manufacture and sell firearms under the recently enacted Montana Firearms Freedom Act without complying with Federal firearms laws. They invoke federal question jurisdiction under 28 U.S.C § 1331. Defendant Eric H. Holder, Jr., Attorney General of the United States of America ("United States"), has moved under Federal Rule of Civil Procedure 12(b) to dismiss for lack of

subject matter jurisdiction and failure to state a claim upon which relief may be granted.

To the extent Plaintiffs seek judicial review under the Administrative Procedures Act, they have not shown final agency action. Furthermore, because Plaintiffs do not have standing to pursue their claims for declaratory and injunctive relief, this case should be dismissed in its entirety for lack of subject matter jurisdiction. Even if presiding United States District Court Judge Donald W. Molloy were to disagree, and conclude on review of the undersigned's Findings and Recommendation that there is subject matter jurisdiction, Plaintiffs have failed to state a claim upon which relief may be granted and their Second Amended Complaint should be dismissed.

I. Background

The Montana Firearms Freedom Act ("the Act"), Mont Code Ann. § 30-20-101, et seq., is a product of Montana's 2009 legislative session. The Act, which went into effect on October 1, 2009, declares that "[a] personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress [sic] to regulate interstate commerce." Mont. Code Ann. § 30-20-104.

In the months preceding the Act's effective date, the United States Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") received a number of inquiries from firearms industry members as to the potential effects of Montana's new law on their business activities. Dkt. 33-2. In light of those inquiries, the ATF authored a July 16, 2009, open letter to all Montana Federal Firearms Licensees for the purpose of providing guidance regarding their continuing obligations under federal law. Dkt. 33-2. The ATF explained that "because the Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the Gun Control Act and the National Firearms Act, and their corresponding regulations, continue to apply." Dkt. 33-2. The ATF indicated that any Federal requirements and prohibitions would "apply whether or not the firearms or ammunition have crossed state lines." Dkt. 33-2, at 2.

In August 2009, Plaintiff Gary Marbut wrote to the resident agent in charge of the ATF field office in Billings, Montana, seeking similar guidance. Marbut indicated that he wanted to manufacture firearms, firearms accessories, or ammunition consistent with the Act and asked whether it would be permissible under federal law for him to do so. Dkt. 33-1. The ATF responded by letter on September 29, 2009, identifying various requirements under federal firearms laws. Dkt. 33-1. The ATF cautioned Marbut that a violation of the Gun Control Act or the National Firearms Act "could lead to . . . potential criminal

prosecution." Dkt. 33-1. In closing, the ATF stated once again that to the extent "the Montana Firearms Freedom Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the [Gun Control Act] and [National Firearms Act], and their corresponding regulations, continue to apply." Dkt. 33-1.

Unsatisfied with that response, Marbut commenced this declaratory judgment action on October 1, 2009, along with fellow Plaintiffs the Montana Shooting Sports Association[1] and the Second Amendment Foundation.[2] Dkt. 1. Plaintiffs have amended their complaint twice since then, most recently on April 9, 2010.[3] Dkt. 6, 33. Plaintiffs explain that

[1] Gary Marbut is the president of the Montana Shooting Sports Association, which is a non-profit corporation organized for the purpose of supporting and promoting firearm use and safety, as well as educating its members on their constitutional right to keep and bear arms. Dkt. 33, at 2-3.

[2] The Second Amendment Foundation is a State of Washington non-profit organization with members nationwide, similarly dedicated to promoting the constitutional right to keep and bear firearms.

[3] Plaintiffs amended their Complaint once as a matter of course on December 14, 2009. *See* Fed. R. Civ. P. 15(a)(1). After the United States moved to dismiss, Plaintiffs filed a Second Amended Complaint primarily to bolster their allegations relating to the questions of standing and final agency action. Dkt. 33. As the United States notes, however, Plaintiffs filed their Second Amended Complaint without first obtaining the opposing party's written consent or leave of court as required by Fed. R. Civ. P. 15(a). Dkt. 70, at 11 n. 2. Nevertheless, the United States has not moved to strike the Second Amended Complaint

(Continued on following page)

Marbut and other individuals want to be able to manufacture and sell small arms and small arms ammunition to customers in Montana pursuant to the Act without complying with the National Firearms Act, the Gun Control Act of 1968, or any other applicable federal laws. Dkt. 33, at 7-8. According to Marbut, he "has hundreds of customers who have offered to pay his stated asking price for both firearms and firearms ammunition manufactured under the [Act]," but those sales "are all specifically conditioned on the [firearms] being manufactured pursuant to the [Act], without [National Firearms Act] or [Gun Control Act] licensing, or as the customers see it, [ATF] interference." Dkt. 33, ¶ 15.

Citing the ATF's September 29, 2009 letter, however, Plaintiffs maintain the ATF has made clear that "no Montanan who wishes to proceed under the [Act] can do so without becoming licensed by [ATF], and without fear of federal criminal prosecution and/or civil sanctions. . . ." Dkt. 33, ¶ 16. This presents a potential problem for the Plaintiffs, who indicate they do not want to pay the requisite ATF licensing fees and taxes, and do not want to submit to National Firearms Act or Gun Control Act licensing

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and has had the opportunity to address Plaintiffs' newly amended pleading in its reply brief and at oral argument. Accordingly, and bearing in mind that leave to amend shall be freely given under Fed. R. Civ. P. 15(a)(2), the Court will consider Plaintiffs' Second Amended Complaint as the operative pleading from this point forth. Dkt. 33.

and registration procedures, record keeping requirements, and marking mandates. Dkt. 33, ¶ 16. Plaintiffs allege that the threat of federal criminal prosecution and/or civil action is effectively preventing them "and all law abiding citizens from exercising their rights under and otherwise benefitting from the" Act. Dkt. 33, ¶ 22.

Plaintiffs bring this action for declaratory and injunctive relief in an effort to have those rights adjudicated. They ask the Court to declare that: (1) the United States Constitution confers no power on Congress to regulate the special rights and activities contemplated by the Act; (2) under the Ninth and Tenth Amendments of the United States Constitution, all regulatory authority of all such activities within Montana's political borders is left in the sole discretion of the State of Montana; and (3) federal law does not preempt the Act and cannot be invoked to regulate or prosecute Montana citizens acting in compliance with the Act. Dkt. 33, at 14. Plaintiffs also seek injunctive relief to that effect, asking that the Court permanently enjoin the United States "and any agency of the United States of America from prosecuting any civil action, criminal indictment or information under the [National Firearms Act] or the [Gun Control Act], or any other federal laws and regulations, against Plaintiffs or other Montana citizens acting solely within the political borders of the State of Montana in compliance with the [Act]." Dkt. 33, at 14.

The United States has moved under Federal Rule of Civil Procedure 12(b) to dismiss this entire action for lack of standing, lack of subject matter jurisdiction, and failure to state a claim upon which relief may be granted. After the United States filed its motion, the State of Montana intervened as of right in this matter and submitted a brief in support of the Act. Dkt. 46, 47. Also contributing to the current discussion are the several amici curiae who have filed briefs in support of either the Plaintiffs or the United States.[4]

Having reviewed the briefs and materials of record, and having heard oral argument on July 15, 2010, the Court turns now to the question of whether Plaintiffs' Second Amended Complaint is sufficient to withstand the United States' motion to dismiss.

II. Legal Standards – Motion to Dismiss

A. Rule 12(b)(1)

A motion to dismiss under Rule 12(b)(1) challenges the court's subject matter jurisdiction over the

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[4] The following Amici have appeared in support of the Plaintiffs: Goldwater Institute Scharf-Norton Center for Constitutional Government, *et al.*; Weapons Collectors Society of Montana; the States of Utah and other States; several members of the Montana Legislature; the Paragon Foundation; the Center for Constitutional Jurisprudence and several state lawmakers from seventeen states; and the Gun Owners Foundation *et al.*

The following Amici have appeared in support of the United States: The Brady Center to Prevent Gun Violence *et al.*

claims asserted. "Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Rattlesnake Coalition v. United States Environmental Protection Agency*, 509 F.3d 1095, 1102 n. 1 (9th Cir. 2007).

A defendant may pursue a Rule 12(b)(1) motion to dismiss for lack of jurisdiction either as a facial challenge to the allegations of a pleading, or as a substantive challenge to the facts underlying the allegations. *Savage v. Glendale Union High School, Dist. No. 205, Maricopa County*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). A facial challenge to the jurisdictional allegations is one which contends that the allegations "are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The success of a facial challenge to jurisdiction depends on the allegations in the complaint, and does not involve the resolution of a factual dispute. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). In a facial challenge the court must assume the allegations in the complaint are true and it must "draw all reasonable inferences in [plaintiff's] favor." *Wolfe*, 392 F.3d at 362.

"By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone*, 373 F.3d at 1039. In resolving such a factual attack, the court "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe*

Air for Everyone, 373 F.3d at 1039. If the moving party has "converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Safe Air for Everyone*, 373 F.3d at 1039 (quoting *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003)). In looking to matters outside the pleadings, the Court must "resolve all disputes of fact in favor of the non-movant . . . similar to the summary judgment standard." *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996). As with a motion for summary judgment, the party moving to dismiss for lack of subject matter jurisdiction "should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Casumpang v. Int'l Longshoremen's & Warehousemen's Union*, 269 F.3d 1042, 1060-61 (9th Cir. 2001).

B. Rule 12(b)(6)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Black*, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This means that the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949.

While the court must accept all factual allegations in the complaint as true and construe them in the light most favorable to the plaintiffs, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555. "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049, 1055 (9th Cir. 2008). Assessing a claim's plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950.

III. Discussion

The United States argues that this declaratory judgment action should be dismissed for lack of subject matter jurisdiction because Plaintiffs have not established a waiver of sovereign immunity under the Administrative Procedure Act, 5 U.S.C. § 551 et

seq., and have not demonstrated that they are entitled to non-statutory review of a non-final agency action. The United States also maintains that subject matter jurisdiction is lacking because Plaintiffs have not shown an economic injury or credible threat of imminent prosecution sufficient to confer standing for purposes of pursuing their pre-enforcement constitutional challenge. Even if the Court does have subject matter jurisdiction, the United States argues that Plaintiffs have failed to state a claim upon which relief may be granted under binding United States Supreme Court and Ninth Circuit precedent.

A. Sovereign Immunity

"Federal courts are courts of limited jurisdiction," having the power to hear cases only as authorized by the Constitution and by Congress. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Pursuant to 28 U.S.C. § 1331, Congress has authorized the federal courts to exercise federal question jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Plaintiffs have invoked this jurisdictional provision, and ask the Court to answer such federal questions as whether the United States Constitution gives Congress the power to regulate the intrastate firearms commerce activities contemplated by the Act. Dkt. 33, at 4 & 14. While Plaintiffs' lawsuit can thus be said to arise under federal law for § 1331 purposes, the United States nevertheless argues the Court is

without subject matter jurisdiction because the government has not waived its sovereign immunity.

The doctrine of sovereign immunity operates as "an important limitation on the subject matter jurisdiction of federal courts." *Dunn & Black, P.S. v. U.S.*, 492 F.3d 1084, 1087 (9th Cir. 2007) (*quoting Vacek v. U.S. Postal Service*, 447 F.3d 1248, 1250 (9th Cir. 2006)). As a sovereign, the United States "is immune from suit unless it has expressly waived such immunity and consented to be sued." *Dunn & Black*, 492 F.3d at 1087-88 (*quoting Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985)). Absent an unequivocally expressed waiver, there is no federal court jurisdiction. *Dunn & Black*, 492 F.3d at 1088.

Plaintiffs bear the burden of showing that the United States has waived its sovereign immunity. *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995). Citing the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701 et seq., Plaintiffs allege the United States has unequivocally waived its immunity with respect to their claims. Dkt. 33, ¶ 7. Section 702 of the APA indeed waives sovereign immunity for certain nonmonetary claims against the United States, providing as it does that

> [a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency . . . acted or failed to act . . . shall not be dismissed nor relief therein be denied on the ground that it

> is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702.

As with any waiver of sovereign immunity, however, the waiver set forth in § 702 is to be strictly construed in favor of the United States. *See e.g. Dunn & Black*, 492 F.3d at 1088; *Vacek*, 477 F.3d at 1250. Consistent with this principle, the United States argues that § 702 does not provide a waiver of sovereign immunity in this case because judicial review under the APA is limited to final agency action, and there has been no such final decision here.[5]

The APA provides the procedural mechanism by which "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," may obtain "judicial review thereof." 5 U.S.C. § 702. By its terms, the APA limits this right of judicial review to "final agency action for which there is no other adequate remedy in a court."[6] 5 U.S.C. § 704. *See Lujan v. National Wildlife Federation*, 497

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[5] This amounts to a factual attack on jurisdiction, whereby the United States challenges the Plaintiffs' allegations regarding final agency action. Because the United States has mounted a factual attack, the Court may look to matters outside the pleadings for purposes of resolving the motion.

[6] The APA also provides for judicial review of an "[a]gency action made reviewable by statute." 5 U.S.C. § 704. Because neither party points to any agency action made reviewable by statute, this provision is not implicated here.

U.S. 871, 882 (1990). In other words, the APA provides for judicial review of agency action, but only if that action is final. *See Lujan*, 497 U.S. at 882; *Rattlesnake Coalition v. EPA*, 509 F.3d 1095, 1103 (9th Cir. 2007).

Plaintiffs allege that the ATF's September 29, 2009, letter to Marbut constituted "final agency action" within the meaning of the APA. Dkt. 33, ¶¶ 14-16. The ATF wrote the letter in response to an inquiry from Marbut as to whether it would be permissible under federal law for him to engage in the firearms manufacturing activities authorized by the Act. Dkt. 33-1. The ATF's letter explained that the manufacture of certain firearms, even for personal use, would require ATF approval, and advised Marbut that "[t]he manufacture of firearms or ammunition for sale to others in Montana requires licensure by [the] ATF." Dkt. 33-1. The ATF cautioned Marbut "that any unlicensed manufacturing of firearms or ammunition for sale or resale, or the manufacture of any [National Firearms Act] weapons, including sound suppressors, without proper registration and payment of tax, is a violation of Federal law and could lead to the forfeiture of such items and potential criminal prosecution under the [Gun Control Act] or the [National Firearms Act]." Dkt. 33-1. In closing, the ATF stated that to the extent "the Montana Firearms Freedom Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the [Gun Control Act] and

[National Firearms Act], and their corresponding regulations, continue to apply." Dkt. 33-1.

For an agency action like this letter to be considered final for purposes of the APA, it must satisfy the following two criteria: (1) "the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature;" and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted). "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Oregon Natural Desert Association v. United States Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006) (citation and quotation omitted).

The ATF's letter to Marbut does not satisfy either of the *Bennett* criteria. With respect to the first requirement, there is nothing to suggest that the letter marks the consummation of the ATF's decisionmaking process. In fact, there is nothing to suggest that the ATF engaged in any decisionmaking process at all. The letter simply restates the requirements of federal firearms laws and reiterates well-established principles of federal supremacy and conflict preemption. *See Golden and Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432 (4th Cir. 2010) (concluding "there was simply no decisionmaking process" involved in the publication of an ATF

reference guide that did nothing more than restate the requirements of federal firearms laws in response to frequently asked questions).

Even assuming the letter did somehow mark the consummation of the ATF's decisionmaking process, it does not satisfy the second prong of the *Bennett* finality test, which requires that the agency's action "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (internal quotations omitted). In other words, the specific action challenged must have some "legal effect." *Oregon Natural Desert Association v. United States Forest Service*, 465 F.3d 977, 987 (9th Cir. 2006). In determining whether an agency action satisfies this second *Bennett* criteria, the court may properly consider whether the action "has a direct and immediate effect on the day-to-day business of the subject party," whether it "has the status of law or comparable legal force, and whether immediate compliance with its terms is expected." *Oregon Natural Desert Association*, 465 F.3d at 987.

The ATF's letter to Marbut did not have any such legal effect. The letter did not impose any new obligations on Marbut, deny him a right, or otherwise fix some legal relationship. The letter simply restated Marbut's obligations under longstanding federal firearms laws. Even if the ATF had not written the letter, Marbut would still have been required to comply with those federal firearms laws. In other words, any legal consequences in this case emanate

not from the ATF's letter, but from applicable federal firearms laws and their implementing regulations. *See Golden and Zimmerman*, 599 F.3d at 433.

At oral argument, Plaintiffs maintained that the ATF's letter did more than just restate Marbut's obligations under federal firearms laws. According to Plaintiffs, the letter had the legal effect of clarifying Marbut's obligations under those federal laws in light of Montana's newly passed Firearms Freedom Act. The ATF did advise Marbut that "[t]o the extent that the Montana Firearms Freedom Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the [Gun Control Act] and [National Firearms Act], and their corresponding regulations, continue to apply." Dkt. 33-1. But because that statement did nothing to in any way alter Marbut's pre-existing obligations under those federal firearms laws, it was of no concrete legal effect. Because the ATF's letter did not impose any obligation, deny a right, or have any legal effect on Marbut, the letter does not satisfy the second *Bennett* criteria for final agency action.

Even assuming they cannot show the requisite final agency action, Plaintiffs argue they are entitled to relief under the narrow doctrine of non-statutory review. "The basic premise behind non-statutory review is that, even after the passage of the APA, some residuum of power remains with the district court to review agency action that is ultra vires." *Rhode Island Dept. of Environmental Management v. United States*, 304 F.3d 31, 42 (1st Cir. 2002). A

plaintiff requesting non-statutory review of a non-final decision must show that the agency acted "in excess of its delegated powers and contrary to a specific prohibition [that] is clear and mandatory." *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

As they articulated it at oral argument, Plaintiffs' theory that the ATF was acting in excess of its delegated powers is inextricably intertwined with the merits of their constitutional challenge. On the merits, Plaintiffs argue that Congress exceeded its powers under the Commerce Clause by enacting federal firearms laws regulating the intrastate firearms activities contemplated by the Act. Assuming the federal firearms laws Congress has charged the ATF with enforcing are unconstitutional, Plaintiffs maintain that any actions taken by the ATF to enforce those unconstitutional laws can only be considered ultra vires.[7] This argument is inescapably circular. Under Plaintiffs' approach, the Court would not be able to determine the threshold jurisdictional question of whether Plaintiffs are entitled to non-statutory review without first conducting that review and addressing the merits of their constitutional claims.

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[7] Plaintiffs have not cited any authority for the proposition that such conduct is properly described as "ultra vires." Nevertheless, there is authority to support the general notion that sovereign immunity does not bar an action for judicial review of an agency decision where a government officer acts "pursuant to an unconstitutional grant of power from the sovereign." *State of Alaska v. Babbitt*, 38 F.3d 1068, 1076 (9th Cir. 1994).

It is this Catch-22 that best illustrates why Plaintiffs' argument regarding non-statutory review of non-final agency action is misplaced. Plaintiffs first developed this argument in response to the United States' motion to dismiss, which understandably characterized Plaintiffs' action as one brought for judicial review of a final agency action under the APA. Plaintiffs' First Amended Complaint, which was the operative pleading when the United States filed its motion to dismiss, alleged jurisdiction "based generally on § 704," which provides for judicial review of final agency action, but said nothing about an alleged waiver of sovereign immunity or anything further about an alleged final agency action. Dkt. 6, ¶ 6. Presumably construing Plaintiffs' jurisdictional allegation as a request for judicial review under the APA, the United States moved to dismiss on the ground that it had not waived its sovereign immunity under § 702, because there was no final agency action. After the United States filed its motion to dismiss, Plaintiffs amended their complaint a second time to specifically allege a waiver of sovereign immunity under § 702, and that the ATF's September 29, 2009, letter to Marbut constituted "final agency action" within the meaning of the APA. Dkt. 33, ¶¶ 7, 14-16.

As discussed above, however, the ATF's September 29, 2009, letter does not constitute final agency action within the meaning of the APA. Consequently, Plaintiffs are not entitled to judicial review under the APA. This does not mean, however, that Plaintiffs'

entire lawsuit should be dismissed on that basis alone, as the United States suggests.

Plaintiffs' lawsuit is not simply one for judicial review of agency action under the APA. Rather, the suit seeks declaratory and injunctive relief to prevent the United States from enforcing what Plaintiffs allege are unconstitutional federal firearms laws.[8] For example, Plaintiffs' Second Amended Complaint asks the Court to declare that the United States Constitution confers no power on Congress to regulate the special rights and activities contemplated by the Act. Dkt. 33, at 14. The Second Amended Complaint also seeks injunctive relief enjoining the United States "and any agency of the United States of America from prosecuting any civil action, criminal indictment or information under the [National Firearms Act] or the [Gun Control Act], or any other federal laws and regulations, against Plaintiffs or other Montana citizens acting solely with the political borders of the States of Montana in compliance with the [Act]." Dkt. 33, at 14.

[8] As noted above, while Plaintiffs' first two complaints alleged jurisdiction based on § 704 of the APA, they contained no allegations of final agency action and did not specifically allege a waiver of sovereign immunity. *See* Dkt. 1 & 6. It may well be that Plaintiffs simply intended to rely on the waiver of sovereign immunity set forth in § 702 of the APA for purposes of pursuing their constitutional challenge, over which the Court would have federal question subject matter jurisdiction.

These claims fall within a well-established exception to the doctrine of sovereign immunity. Federal courts have long recognized that the doctrine of sovereign immunity is inapplicable "in declaratory and/or injunctive relief suits against federal entities or officials seeking to enjoin the enforcement of an unconstitutional statute." *Kelley v. United States*, 69 F.3d 1503, 1507 (10th Cir. 1995). *See also Entertainment Network, Inc. v. Lappin*, 134 F.Supp.2d 1002, 1009 (S.D. Ind. 2001); *Tenneco Oil Co. v. Sac and Fox Tribe*, 725 F.2d 572, 574 (10th Cir. 1984) (claim that law is unconstitutional falls within exception to doctrine of sovereign immunity). As the United States Supreme Court once explained it, the doctrine does not apply in such cases because "the conduct against which specific relief is sought is beyond the officer's power and is, therefore, not the conduct of the sovereign." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949). Consequently, there is an exception to sovereign immunity in a suit for declaratory and/or injunctive relief against federal officials where the plaintiff "alleges that the statute conferring power upon the officers is unconstitutional." *Kozero v. Spirito*, 723 F.2d 1003, 1008 (1st Cir. 1983). *See also Clinton v. Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999). "Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it did not possess." *Kelley*, 69

F.3d at 1507 (quoting *Tenneco Oil Co.*, 725 F.2d at 574).[9]

Because the doctrine of sovereign immunity does not apply to Plaintiffs' claims for declaratory and injunctive relief to prevent the United States from enforcing allegedly unconstitutional federal firearms laws, it would not be appropriate to dismiss this entire case based on Plaintiffs' failure to establish a valid waiver. Of course, Plaintiffs must still demonstrate that they have standing under Article III of the United States Constitution to pursue their pre-enforcement challenge. This brings the Court to the United States' next argument, which is that Plaintiffs' pre-enforcement challenge should be dismissed for lack of subject matter jurisdiction based on lack of standing.

B. Standing

The United States argues that subject matter jurisdiction is lacking in this case because Plaintiffs

[9] Many courts have essentially read the APA's waiver of sovereign immunity for nonmonetary actions against the United States as a codification of that common law rule. *See e.g. Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996). This may well be why Plaintiffs cited the APA in the first instance. As noted above, however, they alleged jurisdiction based on § 704 of the APA, and did not allege a waiver of sovereign immunity under § 702 until after their lawsuit had been understandably construed as one seeking judicial review under § 704.

have not shown an economic injury or credible threat of imminent prosecution sufficient to confer standing.[10]

Article III of the United States Constitution "limits the jurisdiction of federal courts to 'cases' and 'controversies.'" *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). Standing is an "essential and unchanging part" of this case-or-controversy requirement. *Wolfson v. Brammer*, 2010 WL 3191159 * 5 (9th Cir. 2010). As the party invoking federal jurisdiction, a plaintiff bears the burden of establishing standing to sue. *San Diego County*, 98 F.3d at 1126.

At an "irreducible constitutional minimum," Article III standing requires proof "(1) that the plaintiff suffered an injury in fact that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical;' (2) of a causal connection between the injury and the complained-of conduct; and (3) that a favorable decision will likely redress the alleged injury."[11] *Alaska Right to Life Political*

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[10] The United States' motion to dismiss for lack of standing constitutes a factual challenge to the subject matter jurisdiction of this Court. To determine whether Plaintiffs have established standing based on economic injury or threat of prosecution, the Court properly looks outside the pleadings to the other materials of record.

[11] The doctrine of prudential standing "supplements the requirement of Article 3 constitutional standing" and may require that the Court consider a number of other factors when assessing standing. *Get Outdoors II, LLC v. City of San Diego,*

(Continued on following page)

Action Committee v. Feldman, 504 F.3d 840, 848 (9th Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). And where, as here, "plaintiffs seek declaratory and injunctive relief only, there is a further requirement that they show a very significant possibility of future harm." *San Diego County*, 98 F.3d at 1126. The United States maintains that Plaintiffs cannot make it over the threshold hurdle of establishing that they have suffered an injury in fact for purposes of satisfying the first element of Article III standing.

Plaintiffs claim to have suffered two types of injury sufficient to confer standing.[12] First, Plaintiffs maintain that as a result of the ATF's September 29, 2009 letter, they face an imminent and credible threat of prosecution under Federal firearms laws. Second, Plaintiffs allege economic injury because the United States has effectively prevented them from manufacturing firearms under the Act and in turn selling those firearms to prospective customers. The Court will address each of these alleged injuries in turn.

Cal., 506 F.3d 886, 891 (9th Cir. 2007). Because Plaintiffs lack Article III standing for the reasons set forth below, those prudential concerns are not implicated here.

[12] As briefed, Plaintiffs collectively claim to have standing. As the ensuing discussion reflects, however, their arguments regarding threat of prosecution and economic standing pertain solely to Marbut. Thus, for purposes analyzing these two issues, the Court will refer only to Marbut. The Court will address the standing of the two organizational plaintiffs separately.

1. Threat of prosecution

Marbut's claims for declaratory and injunctive relief are, in substance, a pre-enforcement challenge to the Federal firearms laws they maintain are unconstitutional. To demonstrate an injury in fact when bringing such a pre-enforcement challenge, a plaintiff must show that "there exists a credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). This does not mean that a plaintiff must go so far as to "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute." *Babbitt*, 442 U.S. at 298. *See also Holder v. Humanitarian Law Project*, ___ U.S. ___, 2010 WL 2471055 * 11 (2010). By the same token, however, "the mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *San Diego County*, 98 F.3d at 1126 (citation and quotations omitted). A plaintiff is thus tasked with showing that he faces a "genuine threat of imminent prosecution." *San Diego County*, 98 F.3d at 1126.

When evaluating the credibility of a threat of prosecution in any given case, the court is to consider (1) "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question," (2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and (3) "the history of past prosecution or enforcement under

the challenged statute."[13] *Thomas v. Anchorage Equal Rights Comm'n.*, 220 F.3d 1134, 1139 (9th Cir. 2000). Assuming Marbut could establish – which he most likely would – a history of Federal government enforcement of the various mandates of the National Firearms Act and Gun Control Act, he has failed to show the remaining two factors.

a. Concrete plan to violate federal law

To demonstrate a concrete plan, a plaintiff must point to "something more than a hypothetical intent to violate the law." *Thomas*, 220 F.3d at 1139. "A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan." *Thomas*, 220 F.3d at 1139. "Such 'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

Furthermore, if "[t]he acts necessary to make plaintiffs' injury – prosecution under the challenged statute – materialize are almost entirely within

[13] This test "coincides squarely with" the ripeness inquiry. *Thomas*, 220 F.3d at 1138. Regardless of whether the jurisdictional inquiry is framed "as one of standing or of ripeness, the analysis is the same." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1093 (9th Cir. 2003).

plaintiffs' own control," then the "high degree of immediacy" necessary for purposes of establishing standing is not present. *San Diego County*, 98 F.3d at 1127. Thus, plaintiffs who merely "wish and intend to engage in activities prohibited" by existing law cannot be said to have articulated a concrete plan to violate the law. *San Diego County*, 98 F.3d at 1127.

While Marbut would clearly like to manufacture firearms in accordance with the Act, that is not sufficient for purposes of articulating a concrete plan to violate the law. *San Diego County*, 98 F.3d at 1127. Marbut claims he has the means to manufacture a .22 caliber rifle he proposes to call the Montana Buckaroo, and has presented some evidence in an attempt to establish that this is so, but he has correspondingly indicated that he has no concrete plans to manufacture those firearms if doing so means he will be in violation of federal law. In February 2010, for example, Marbut sent an email to members of the Montana Shooting Sports Association, soliciting customers for his "not-yet-available" Montana Buckaroo. Dkt. 86-18 at 1. Marbut advised the prospective customers that he "may only make these" rifles "IF we win the lawsuit, and IF I can actually produce them." Dkt. 86-18, at 1. Thus, while Marbut states in his sworn declaration that he "wishes to pursue this commercial activity," he has not expressed any intent to actually do so in violation of the federal firearms laws he claims are unconstitutional.

Whether Marbut will ever face prosecution under Federal firearms law is at this point almost entirely

within his own control, depending in the first instance on whether he decides to manufacture firearms in accordance with the Act. Because the acts necessary to make Marbut's injury materialize are almost entirely within his control," the "high degree of immediacy" necessary for purposes of establishing standing is lacking. *San Diego County*, 98 F.3d at 1127.

Because Marbut has not "articulated a 'concrete plan' to violate the law in question," he cannot show that he faces a credible, genuine threat of imminent prosecution. *Thomas*, 220 F.3d at 1139. Even if the Court were to conclude otherwise and find that Marbut had articulated sufficiently concrete plans to violate the Federal firearms laws in question, he has not shown that he faces a specific threat of prosecution.

b. Specificity of threat

To establish standing based on the threat of prosecution, Marbut must show that the federal firearms laws at issue are "actually being enforced" against him. *San Diego County*, 98 F.3d at 1127. Under this standard, "a general threat of prosecution is not enough to confer standing." *San Diego County*, 98 F.3d at 1127. Marbut must instead show "[a] specific warning of an intent to prosecute under a criminal statute . . . " *San Diego County*, 98 F.3d at 1127. This entails showing something more than a general assertion by prosecuting officials that they

intend to enforce particular laws. *See e.g. Poe v. Ullman*, 367 U.S. 497, 499 (1961); *Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 5-6 (9th Cir. 1974) Such general assertions lack the "immediacy" necessary to give rise to a justiciable controversy. *Poe*, 367 U.S. at 501.

Marbut argues that a specific threat of prosecution can be found in the ATF's September 29, 2009, letter. As noted above, however, the ATF simply identified various requirements under current federal firearms laws, and cautioned Marbut "that any unlicensed manufacturing of firearms or ammunition for sale or resale, or the manufacture of any [National Firearms Act] weapons, including sound suppressors, without proper registration and payment of tax, is a violation of Federal law and could lead to the forfeiture of such items and potential prosecution under the [Gun Control Act] or the [National Firearms Act]." Dkt. 33-1. This statement amounts to nothing more than a general assertion that anyone who violates the nation's federal firearms statutes may be subject to criminal prosecution. Such a general statement is not a specific threat of an imminent intent to prosecute Marbut as required for purposes of establishing standing.[14] *See National Rifle Ass'n. v. Magaw*, 132

[14] To the extent any of the Plaintiffs might argue that the ATF's July 2009 open letter to all Montana federal firearms licensees constitutes a specific threat of prosecution, that argument would fail for the same reasons. The July 2009 letter was even more general, written as it was for the public at large.

F.3d 272, 293-94 (6th Cir. 1997) (concluding that "plaintiffs who telephoned BATF agents, submitted a hypothetical question, and received an answer that the questioned activity could subject them to federal prosecution does not confer standing"); *Kegler v. U.S. Dept. Of Justice*, 436 F.Supp.2d 1204, 1212-19 (D. Wyo. 2006); *Crooker v. Magaw*, 41 F.Supp.2d 87, 91-92 (D. Mass. 1999). Absent a specific threat of prosecution, Marbut cannot establish that he has standing to pursue his pre-enforcement challenge.

When all is said and done, Marbut has not shown that he faces a genuine threat of imminent prosecution, which in turn means he has not satisfied the injury in fact requirement for purposes of Article III standing. While Marbut's threat of prosecution argument thus fails, he claims in the alternative to have standing based on economic injury. *See National Audubon Society, Inc. V. Davis*, 307 F.3d 835, 855 (9th Cir. 2002) (economic injury and threat of prosecution are alternate theories by which a plaintiff may establish standing)

2. Economic harm

Marbut alleges he has suffered, and will continue to suffer, economic injury because the United States has effectively prevented him from manufacturing firearms under the Act and in turn selling those firearms to prospective customers. Dkt. 33, ¶ 15.

A plaintiff may satisfy the injury-in-fact prong of the constitutional standing analysis by demonstrating economic injury. *Central Arizona Water Conservation Dist. v. United States Environmental Protection Agency*, 990 F.2d 1531, 1537 (9th Cir. 1993). As with any injury that is alleged for purposes of establishing standing, such an economic injury must be "concrete and particularized and actual or imminent, not conjectural or hypothetical." *Central Arizona Water*, 990 F.2d at 1537. *See also*, *National Audubon Society*, 307 F.3d at 856 (economic harm must be "actual, discrete, and direct").

Marbut claims to have "suffered past injury in the loss of economic opportunities" since the effective date of the Act because he has not been able to do as he would like, which is to manufacture and sell firearms under the Act without complying with federal firearms laws. Dkt. 51-1, at 8. According to Marbut, the fact that he has "already suffered economic harm" should be "enough [t]o confer standing." Dkt. 51-1, at 8.

Marbut is mistaken for two reasons. First of all, his allegations of past economic harm amount to nothing more than a hypothetical injury, consisting only of theoretical lost profits from a non-existent business operation. There is nothing concrete, particularized, or actual about such an alleged economic injury. Even if Marbut did have some plausible basis upon which he might claim past economic injury, that would not be sufficient to confer standing under the circumstances. Because Marbut is

seeking "declaratory and injunctive relief only," he needs to do more than demonstrate past economic injury. *Bras v. California Public Utilities Commission*, 59 F.3d 869, 873 (9th Cir. 1995). He must instead "show actual present harm or a significant possibility of future harm in order to demonstrate the need for pre-enforcement review." *National Rifle Ass'n of America v. Magaw*, 132 F.3d 272, (6th Cir. 1997) (*citing Bras*, 59 F.3d at 873).

Marbut does allege that he is suffering ongoing economic harm, and will continue to suffer that economic harm in the future, because the United States is effectively preventing him from manufacturing and selling firearms under the Act "for significant economic gain." Dkt. 33, ¶ 15. In an effort to demonstrate that this alleged economic injury is more than just hypothetical and speculative, Marbut has presented evidence of his proposed plans for manufacturing the Montana Buckaroo. Dkt. 86-2, ¶ 15; 86-6. For example, Marbut indicates he has identified third-party commercial entities that can assist him with various aspects of the manufacturing process, and has solicited a number of prospective customers who will buy the Montana Buckaroo if it becomes available. Dkt. 86-2, ¶ 15; 86-6, 86-18. Marbut maintains that the evidence he has presented is sufficient to show that, were it not for the federal firearms laws he claims are unconstitutional, he would be reaping significant financial gain and is therefore suffering an ongoing economic injury.

The Ninth Circuit has long recognized the principle that a plaintiff whose pre-existing business activities are adversely affected by newly enacted legislation or other government action may have standing based on economic injury. In *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 856 (9th Cir. 2002), for example, the court held that animal trappers whose commercial trapping activities were prohibited under newly enacted state law had standing based on economic injury to challenge the law. Similarly, in *Central Arizona*, 990 F.2d at 1537-38, the court held that a water district that was contractually obligated to repay a federal agency for a portion of the cost of complying with a final rule imposed by the Environmental Protection Agency had standing based on economic injury to challenge the rule.

Unlike the plaintiffs in *National Audubon* and *Central Arizona*, however, Marbut is not now, and has never been, engaged in a commercial activity that is suffering, or is likely to suffer, any economic harm as a result of the federal firearms laws he is attempting to challenge. At this point, Marbut is claiming nothing more than hypothetical lost profits from a hypothetical and illegal business enterprise. As such, the ongoing and future economic harm Marbut claims is far too speculative to constitute an injury in fact for purposes of establishing standing. *See e.g. Regents of University of California v. Shalala*, 872 F.Supp. 728, 737 (C.D. Cal. 1994) (concluding that "assertions of possible economic injury are too conjectural and hypothetical" to establish an injury in fact); *Abbott*

Labs v. Gardner, 387 U.S. 136, 153 (1967) (explaining that "a possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action"); *Longstreet Delicatessen, fine Wines & Specialty Coffees, L.L.C. v. Jolly*, 2007 WL 2815022 (E.D. Cal. 2007) (allegations of economic harm are insufficient where plaintiff "has offered no evidence of actual harm suffered other than by potential lost sales). Regardless of the specificity of Marbut's proposed manufacturing plan, the fact remains that the business is nothing more than a theoretical one, as are the "significant economic gains" he claims he would be realizing if his proposed illegal business was up and running.

Marbut fails to cite any authority for the proposition that a plaintiff who wishes he could start an illegal business, and would do so but for the fact that the idea he proposes is illegal, can claim to be suffering actual economic harm in the form of unrealized profits for purposes of establishing standing. While such a plaintiff might be able to establish standing if he proceeded with his plans to the point where he found himself faced with a credible threat of prosecution, that is not the situation here.

Simply put, there is nothing concrete, particularized, actual, or imminent about the economic injury Marbut alleges in this case. Nor has Marbut shown that he faces a credible threat of imminent prosecution. Marbut has thus failed to establish an injury in fact for purposes of satisfying the first element of Article III standing.

3. Organizational Plaintiffs

An organization or association like the Montana Shooting Sports Association or Second Amendment Foundation "has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000). While Marbut is a member of Montana Shooting Sports Association, he has failed to demonstrate that he has standing to bring this action in his own right. Consequently, the Montana Shooting Sports Association also lacks standing. *See Cetacean Community v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004) (concluding that organization lacked standing where it failed to identify a member who had standing in his or her own right). Similarly, the Second Amendment Foundation lacks standing because it has not identified any member of its organization that might have standing in his or her own right.

Because Plaintiffs lack constitutional standing, this case should be dismissed for lack of subject matter jurisdiction. In the event the presiding judge, United States District Court Judge Donald W. Molloy, were to disagree with this recommendation, it would be necessary to turn to the United States' final argument and determine whether Plaintiffs have stated a claim upon which relief may be granted. In the interest of judicial economy, the Court will address that final argument now and consider whether Plaintiffs' Commerce Clause challenge states a claim upon

which relief may be granted in light of controlling United States Supreme Court and Ninth Circuit caselaw.

C. Commerce Clause

The operative portion of Montana's Firearms Freedom Act provides, in part, that "[a] personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress [sic] to regulate interstate commerce." Mont. Code Ann. § 30-20-104. The Act expressly declares "that those items have not traveled in interstate commerce," and by its terms "applies to a firearm, a firearms accessory, or ammunition that is manufactured in Montana from basic materials and that can be manufactured without the inclusion of any significant parts imported from another state." Mont. Code Ann. § 30-20-104. The Act excepts certain firearms from its protective scope, such as those "that cannot be carried and used by one person," and requires that "[a] firearm manufactured or sold in Montana under this part must have the words 'Made in Montana' clearly stamped on a central metallic part, such as the receiver or frame." Mont. Code Ann. §§ 30-20-105, 106.

To that end, the Act includes several '[l]egislative declarations of authority," which specify that the

Montana Legislature's authority to promulgate such a statutory scheme comes from the Second, Ninth, and Tenth Amendments to the United States Constitution, and from that portion of the Montana Constitution guaranteeing the citizens of this state the right to bear arms. Mont. Code Ann. § 30-20-102. These legislative declarations state, for example, that "[t]he regulation of intrastate commerce is vested in the states under the 9th and 10th amendments to the United States constitution, particularly if not expressly preempted by federal law," and note that "Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearms accessories, and ammunition." Mont. Code Ann. § 30-20-102(3). Intervenor State of Montana ("State of Montana") emphasizes that the Montana Legislature, in its normal deliberative manner, enacted the Act as "principally a political statement . . . setting forth its conception of the interplay between the powers granted to Congress by the Commerce Clause and the powers retained by the states and the people pursuant to the Tenth Amendment." Dkt. 47, at 5. Consistent with the Montana Legislature's reading of the United States Constitution, Plaintiffs ask the Court to declare, among other things, that Congress does not have the power "to regulate the special rights and activities contemplated by the [Act]." Dkt. 33, at 14.

As the nature of Plaintiffs' request for declaratory relief reflects, the central question in this case is whether Congress has the power to regulate those

activities the Act purportedly exempts from federal law, namely, the intrastate manufacture and sale of firearms, firearms accessories, and ammunition. Article I, § 8 of the United States Constitution enumerates the powers granted to Congress, including the power "[t]o regulate Commerce . . . among the several States" and to "[t]o make all Laws which shall be necessary and proper for carrying [that power] into Execution." The United States Supreme Court has long held that the Commerce Clause vests Congress with the authority to regulate three types of economic activity: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce" and (3) "those activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). *See also Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *United States v. Stewart*, 451 F.3d 1071, 1073 (9th Cir. 2006).

Because the Act purports to exempt only the intrastate manufacture and sale of firearms, ammunition, and accessories from federal regulation, the first two categories of economic activity are not implicated here. This means that whether Congress has the power to regulate the intrastate activity contemplated by the Act is properly analyzed under the third and final *Lopez* category. To fall within Congress' Commerce Clause power on this basis, "the regulated activity must substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59.

Applying this standard, the United States Supreme Court has repeatedly held that even purely

local activities are subject to the regulatory powers of Congress if those activities "are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). In *Raich*, the Supreme Court considered whether Congress could, in the exercise of its powers under the Commerce Clause, apply the Controlled Substances Act to prohibit the purely local production and medical use of marijuana authorized by state law. *Raich*, 545 U.S. at 5-8.

The Court answered this question in the affirmative, holding that the Controlled Substances Act constituted a valid exercise of federal commerce power even as applied to the purely local activity at issue. *Raich*, 545 U.S. at 9. Harkening back to its decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), the *Raich* majority reiterated that "Congress can regulate purely intrastate activity" even if that activity is not itself commercial, "if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 18. The Court explained that it was not required to determine whether the local "activities, taken in the aggregate, substantially affect[ed] interstate commerce in fact, but only whether a 'rational basis' exist[ed] for so concluding."[15] *Raich*, 545 U.S. at 22.

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[15] The *Raich* Court thus looked to the rational basis standard for purposes of determining whether Congress had acted

(Continued on following page)

As the *Raich* Court discussed at some length, the Controlled Substances Act provided a "comprehensive framework for regulating the production, distribution, and possession" of the controlled substances, including marijuana. *Raich*, 545 U.S. at 24. Citing "the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere," along with "concerns about diversion into illicit channels," the Court had "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacturing and possession of marijuana would leave a gaping hole in the [Controlled Substances Act]." *Raich*, 545 U.S. at 22. In doing so, the Court emphasized the fact that the regulatory scheme "ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22.

In the end, the Court rejected Raich's attempt to excise individual applications of [the] concededly valid statutory scheme" established by way of the Controlled Substances Act. *Raich*, 545 U.S. at 23. As

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within its Commerce Clause powers. At oral argument, Plaintiffs cited the United States Supreme Court's recent decision in *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020 (U.S. 2010) and argued that federal firearms laws should be subjected to strict scrutiny because they regulate what has now been classified as an individual's fundamental right to possess a handgun in the home for the purpose of self defense. As discussed below, however, Plaintiffs have not pled a Second Amendment claim in this case. Nor have Plaintiffs established that they have a fundamental Second Amendment right to manufacture and sell firearms. For these reasons *McDonald* is inapposite.

the Court explained it, "[t]he notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected." *Raich*, 545 U.S. at 30. Particularly when "[t]aking into account the fact that California [was] only one of at least nine states to have authorized the medical use of marijuana," the *Raich* majority found that "Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision [was] unquestionably substantial." *Raich*, 545 U.S. at 32.

Under *Raich*, Montana's attempt to similarly excise a discrete local activity from the comprehensive regulatory framework provided by federal firearms laws cannot stand. As did the federal statute at issue in *Raich*, the federal firearms laws from which Plaintiffs seek to be exempted regulate the production and distribution "of commodities for which there is an established, lucrative interstate market." *Raich*, 454 U.S. at 26. The Ninth Circuit has specifically recognized the corollary between the regulatory framework of the Controlled Substances Act and that provided by federal firearms laws, noting that "[g]uns, like drugs, are regulated by a detailed and comprehensive statutory regime designed to protect individual firearm ownership while supporting 'Federal, State and local law enforcement officials in their fight against crime and violence.'" *United States v.*

Stewart, 451 F.3d 1071, 1076 (9th Cir. 2006) (*quoting* Gun Control Act of 1968, Pub. L. No. 90-168, § 101, 82 Stat. 1213, 1213). To that end, the National Firearms Act and Gun Control Act set forth various firearms registration, licensing, record keeping, and marking requirements. *See generally*, 26 U.S.C. § 5801 et seq.; 18 U.S.C. § 921 et seq.

In Congress' view, the Gun Control Act was necessary to keep firearms "out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime in the United States." S. Rep. No. 1097, 90th Cong., 2nd Sess. 1968, 1968 U.S.C.C.A.N. 2112, 2113-2114. Congress found that "[o]nly through adequate Federal control over interstate and foreign commerce in firearms, and over all persons engaging in the business of importing, manufacturing, or dealing in firearms can this problem be dealt with, and effective State and local regulation of the firearms traffic be made possible." *Id.* at 2114.

Here, as in *Raich*, Congress had a rational basis for believing that failure to regulate the intrastate manufacture and sale of firearms, ammunition, and accessories "would leave a gaping hole" in the National Firearms Act and Gun Control Act, thereby undercutting federal regulation of the interstate market in those commodities. *Raich*, 545 U.S. at 18, 22. The size of the "gaping hole" that would be left in the federal regulatory scheme were Montana able to

exempt the intrastate activities contemplated by the Act is of particular concern when taking into account the fact that, as of this writing, virtually identical Firearms Freedom Act legislation has been enacted in six more states and proposed in twenty-two others. *Raich*, 545 U.S. at 32. Taking this into account, "Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial." *Raich*, 545 U.S. at 32.

As *Raich* instructs, the fact that federal firearms laws "ensnare some purely intrastate activity," such as the manufacturing and sales activity purportedly exempted from regulation by the Act, "is of no moment." *Raich*, 545 U.S. at 22. Under *Raich*, the National Firearms Act and Gun Control Act constitute a valid exercise of federal commerce power, even as applied to the purely intrastate manufacture and sale of firearms contemplated by the Act.

That this is so is even more clear in light of the fact that the Ninth Circuit has since applied *Raich* to hold that a statute criminalizing machine gun possession constitutes a valid exercise of Congressional power under the Commerce Clause, even as applied to purely intrastate activities. *United States v. Stewart*, 451 F.3d 1071, 1078 (9th Cir. 2006). As in *Raich*, the defendant in *Stewart* argued that "his possession [fell] within a subgroup of purely intrastate activities that [could] easily be cordoned off from those Congress may constitutionally control." *Stewart*, 451 F.3d at 1074.

The Ninth Circuit rejected that argument, noting that "[l]ike the possession regulation in the Controlled Substance Act [at issue in *Raich*], the machine gun possession ban fit[ ] within a larger scheme for the regulation of interstate commerce in firearms." *Stewart*, 451 F.3d at 1076. Citing *Raich* and *Wickard*, the Court found the fact that the guns had not traveled in interstate commerce was "entirely irrelevant." *Stewart*, 451 F.3d at 1077. Observing that "[t]he market for machineguns [was] established and lucrative, like the market for marijuana," the Court determined there was "a rational basis to conclude that federal regulation of intrastate incidents of transfer and possession [was] essential to effective control of the interstate incident of such traffic." *Stewart*, 451 F.3d at 1077.

Read together, *Stewart* and *Raich* thus "compel the conclusion that Congress' power under the Commerce Clause is almost unlimited where the prohibited product has significant economic value such as with drugs or guns." *United States v. Rothacher*, 442 F.Supp.2d 999, 1007(D. Mont. 2006). Plaintiffs do not disagree, and in an attempt to reverse the course of current Commerce Clause jurisprudence take the novel approach of asking this Court to overrule the United States Supreme Court and Ninth Circuit. Dkt. 51-1, at 18-23.

But this Court is not at liberty to do what Plaintiffs ask. This Court is bound by the decisions of the United States Supreme Court and Ninth Circuit Court of Appeals. *Hart v. Massanari*, 266 F.3d 1155,

1170 (9th Cir. 2001). "[C]aselaw on point *is* the law," and "[b]inding authority must be followed unless and until overruled by a body competent to do so." *Hart*, 266 F.3d at 170. This Court is thus bound by *Raich*, and must leave to the United States Supreme Court "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). This Court is likewise bound to follow existing Ninth Circuit precedent, and could disregard *Stewart* only if the decision was "clearly irreconcilable" with "intervening higher authority." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). That is not the case here. *Raich* and *Stewart* remain good law, and control this Court's analysis.

Plaintiffs argue in the alternative that *Raich* is distinguishable, and maintain that under the circumstances it would be appropriate for this Court to return to the United States Supreme Court's pre-*Raich* Commerce Clause jurisprudence as set forth in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Jones v. United States*, 529 U.S. 848 (2000). Particularly in light of the Ninth Circuit's decision in *Stewart*, however, Plaintiffs attempts to distinguish *Raich* are unavailing.

Plaintiffs first claim that *Raich* is distinguishable because it involved the market for illegal drugs, and argue its holding should be limited accordingly. But there is nothing in *Raich* to suggest that the Court meant for its holding to apply only to commerce in

illegal drugs. Any argument to the contrary is put to rest by *Stewart*, in which the Ninth Circuit likened the regulatory scheme governing interstate commerce in drugs with that governing interstate commerce in firearms and applied *Raich* accordingly. *Raich*, 451 F.3d at 1076-78.

Plaintiffs also argue that *Raich* should not be viewed as controlling because, unlike the medical marijuana statute at issue there, the Act specifically states that it applies only to intrastate firearms commerce and provides a means for identifying those firearms that come within its protective scope. By its terms, the Act indeed applies only to those firearms, firearms accessories, and ammunition that are manufactured in Montana and that remain within the borders of this state. Mont. Code Ann. § 30-20-104. And as Plaintiffs note, the Act requires that any firearms "manufactured or sold in Montana under this part must have the words 'Made in Montana' clearly stamped on a central metallic part, such as the receiver or frame." Mont. Code Ann. § 30-20-106. Presumably, the statute at issue in *Raich* did not similarly specify that it applied only to marijuana grown and used within the state of California, and did not provide a means for distinguishing locally cultivated marijuana from that cultivated elsewhere. Under the *Raich* Court's analysis, however, neither of these distinctions is material.

Even assuming, as Plaintiffs allege in their Second Amended Complaint, it is possible to have a purely intrastate firearms market,[16] the fact that the Act purports only to exempt activities within that intrastate market from federal regulation is of no consequence. While California's medical marijuana statute might not have specified that it was to be applied only to intrastate activity, that was the only type of activity at issue in *Raich*. As the *Raich* Court framed it, the question presented was whether Congress had authority under the Commerce Clause to "prohibit the local cultivation and use of marijuana in compliance with California law." *Raich*, 545 U.S. at 5. It was undisputed that the marijuana at issue had been cultivated locally for personal use within California and had never entered the stream of interstate commerce. *Raich*, 454 U.S. at 5-7. Upholding the Controlled Substances Act even as applied to that purely local activity, the Court found the fact that the statute's regulatory framework "ensnare[d] some

[16] Under *Iqbal*, this Court need not accept as true those allegations that are facially implausible. *Iqbal*, 129 S.Ct. at 1949. This Court is not convinced it is plausible that firearms could be manufactured and sold in Montana without ever thereafter leaving the state. *See e.g. Raich*, 545 U.S. at 30 (finding "[t]he notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition. . . ."). The Court will nevertheless assume for present purposes that Plaintiffs' allegations are plausible and will proceed on that assumption.

purely intrastate activity [was] of no moment." *Raich*, 545 U.S. at 22.

That the intrastate firearms commerce contemplated by the Act falls within the reach of Congress' Commerce Clause power is even more clear in the wake of the Ninth Circuit's decision in *Stewart*. Applying *Raich*, the *Stewart* court concluded that whether or not the machineguns at issue there had traveled in interstate commerce was "entirely irrelevant." *Stewart*, 451 F.3d at 1077. As the Ninth Circuit summed it up, "when Congress makes an interstate omelet, it is entitled to break a few intrastate eggs." *Stewart*, 451 F.3d at 1075.

The fact that the Act provides a means for distinguishing firearms manufactured in Montana from those manufactured elsewhere does not change matters. As Plaintiffs note, the Act requires that any firearms manufactured or sold under its protective umbrella be clearly stamped with the words "Made in Montana." Mont. Code Ann. § 30-20-106. In Plaintiffs' myopic view, this case is thus different from *Raich*, where there was no such mechanism for distinguishing locally cultivated marijuana in the stream of commerce. The *Raich* Court indeed cited the [sic] "the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere" as one reason for finding "that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [Controlled Substances Act]." *Raich*, 545 U.S. at

23. But marijuana's fungibility was only a part of the *Raich* Court's explanation.

The *Raich* Court did not intend for its discussion "of the effect of intrastate marijuana use on national drug prices" to limit Congress' Commerce Clause power "to the sale of fungible goods." *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1276 (11th Cir. 2007). Rather, "the Court's discussion of commodity pricing in *Raich* was part of its explanation of the rational basis Congress had for thinking that regulating home-consumed marijuana was an essential part of its comprehensive regulatory scheme aimed at controlling access to illegal drugs." *Alabama-Tombigbee Rivers Coalition*, 477 F.3d at 1276.

The *Raich* Court also cited "concerns about diversion into illicit channels" – concerns that would remain in this case regardless of whether or not firearms manufactured under the Act bear a "Made in Montana" stamp. *Raich*, 545 U.S. at 23. Even more importantly, the *Raich* majority focused on the aggregate effect of medical marijuana use in the nine states with similar statutes and found that "Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial." *Raich*, 545 U.S. at 32.

The same can be said here. Congress could rationally have concluded that allowing local firearms commerce to escape federal regulation would severely

undercut the comprehensive regulatory scheme set in place by federal firearms laws. The rationality of this conclusion is evidenced by the number of states that have already enacted or are contemplating enacting similar Firearms Freedom Act legislation. This is so regardless of whether or not those locally manufactured firearms were to be emblazoned with a marker identifying the state of manufacture, or whether they ever enter the stream of interstate commerce.

Adding its voice to that of Plaintiffs, State of Montana attempts to distinguish *Raich* and *Stewart* on one more basis. The State of Montana begins by pointing to the *Raich* Court's discussion regarding the necessity of congressional findings. The respondents in *Raich* argued that the Controlled Substances Act could not "be constitutionally applied to their activities because Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market." *Raich*, 545 U.S. at 21.

The Court rejected that argument, explaining that "absent a special concern such as the protection of free speech," Congress need not "make particularized findings in order to legislate." *Raich*, 545 U.S. at 21. Elaborating further, the Court stated that "[w]hile congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider

congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate." *Raich*, 545 U.S. at 21.

Based on *Raich*, the Ninth Circuit in *Stewart* placed no significance on the apparent absence of specific congressional findings regarding the effects of homemade weapons on the interstate market. *Stewart*, 451 F.3d at 1075. In doing so, the Court noted there was no special concern that might necessitate particularized findings. The Court reasoned "that since the Second Amendment does not grant individual rights" it could not rely on that constitutional provision "as a basis for requiring Congress to make specific findings in legislation touching on firearms." *Stewart*, 451 F.3d at 1075 n. 6. The State of Montana argues the *Stewart* panel's logic is now flawed in view of the United States Supreme Court's decisions in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

Heller made clear that the Second Amendment does in fact confer an individual right to keep and bear arms, subject to certain limitations. *Heller*, 128 S.Ct. at 2799. Characterizing the right to keep and bear arms as one that is related to the inherent right of self-defense, *Heller* described the individual right conferred by the Second Amendment as the right of "law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 128 S.Ct. at 2817, 2821.

The fact that *Heller* recognized a Second Amendment right to possess firearms in the home for self-defense does not mean that Congress must have made particularized findings in order to enact a comprehensive regulatory scheme encompassing the intrastate manufacture and sale of firearms. *Heller* specifically contemplated that "the right secured by the Second Amendment is not unlimited," and is subject to regulation. *Heller*, 128 S.Ct. at 2816. The Court cautioned, for example, that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 128 S.Ct. at 2816-17. In fact, the prohibitions are "presumptively lawful regulatory measures." *Heller*, 128 S.Ct. At 2817, n. 26. The federal firearms laws at issue here do just what *Heller* considered appropriate – they impose conditions and qualifications on the manufacture and sale of arms.

Even more importantly, the specific Second Amendment right recognized by *Heller* is simply not implicated in this case. *Heller* recognized that the Second Amendment guarantees the individual right to keep and bear arms, subject to certain limitations. But Plaintiffs are not individuals seeking to enforce their constitutionally protected right to keep and bear arms as articulated in *Heller*. Instead, they are individuals who essentially claim they have the right to

manufacture and sell firearms within the state of Montana without interference from the federal government. *Heller* said nothing about extending Second Amendment protection to firearm manufacturers or dealers. If anything, *Heller* recognized that firearms manufacturers and dealers are properly subject to regulation by the federal government under existing federal firearms laws.[17] *Heller*, 128 S.Ct. at 2816-17 (emphasizing that its holding should not be seen as casting doubt on laws imposing conditions and qualifications on the commercial sale of arms).

The United States Supreme Court reaffirmed this notion in the even more recent case of *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020 (2010). The Court held in *McDonald* that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right to possess a handgun in the home for the purpose of self-defense. *McDonald*, 130 S.Ct. at 3050. In doing so, the Court repeated the assurances it had made in *Heller*, explaining that its holding "did not cast doubt on such longstanding regulatory measures as . . . 'laws imposing conditions and qualifications on the commercial sale of arms.'"

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[17] Consistent with *Heller*, a number of lower courts have previously determined or assumed that there is "no Second Amendment right to be a firearm manufacturer or dealer." *Olympic Arms v. Magaw*, 91 F.Supp.2d 1061, 1071 (E.D. Mich. 2000), *aff'd Olympic Arms, et al. v. Buckles*, 301 F.3d 384 (6th Cir. 2002). *See also United States v. King*, 532 F.2d 505, 510 (5th Cir. 1976); *Gilbert Equip. Co. v. Higgins*, 709 F.Supp. 1071, 1080-81 (S.D. Ala. 1989).

McDonald, 130 S.Ct. at 3047 (*quoting Heller*, 128 S.Ct. at 2816-17).

At oral argument, Plaintiffs maintained that in light of the fundamental nature of the Second Amendment right recognized in *McDonald*, this Court should apply strict scrutiny to its review of federal firearms laws rather than the rational basis standard applied by the United States Supreme Court in *Raich*. But Plaintiffs have not pled a Second Amendment claim in this case. Dkt. 33. Plaintiffs do not allege that their Second Amendment rights have been violated, and their prayer for declaratory relief does not even mention the Second Amendment. Dkt. 33. Because Plaintiffs have not pled a Second Amendment claim, *McDonald* does not apply.

Even if Plaintiffs had alleged a Second Amendment violation, *McDonald* says nothing about extending Second Amendment protection to firearm manufacturers or dealers. Because the United States Supreme Court did not intend for its holding in *McDonald* and *Heller* to undermine existing laws regulating the manufacture and sale of firearms, *Raich* and *Stewart* control. Congress was not required to make particularized findings that the intrastate manufacture and sale of firearms, if performed under the constraints set forth in the Act, would substantially affect the interstate market.

For all of the above reasons, this Court concludes that under *Raich* and *Stewart*, the National Firearms Act and Gun Control Act constitute a valid exercise of

Congress' Commerce Clause power, even as applied to the purely intrastate manufacture and sale of firearms contemplated by the Act.

C. The Supremacy Clause and the Tenth Amendment

The Supremacy Clause to the United States Constitution reads, in its entirety, as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

In other words, "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Raich*, 545 U.S. at 29. "It is beyond peradventure that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be." *Raich*, 545 U.S. 29 (*quoting Maryland v. Wirtz*, 392 U.S. 183, 196 (1968)). It is well-established that State and Federal law conflict "where it is impossible for a private party to comply with both State and Federal requirements or

where State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

The Act is in clear conflict with Federal firearms laws, including the Gun Control Act and National Firearms Act. The Act purports to exempt Montana small arms manufacturers and dealers, whose activities are confined within the state of Montana, from requirements imposed by federal law. In fact, it is the conflict between these state and federal statutory schemes that prompted this litigation. Because the Federal firearms laws are a valid exercise of Congressional power under the Commerce Clause, even as applied the Plaintiffs' intrastate activities, those federal laws prevail to the extent the Act conflicts with them.[18]

To the extent Plaintiffs argue this results in a Tenth Amendment violation, they are mistaken. The Tenth Amendment provides that "[t]he powers not

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[18] Intervenor State of Montana accurately notes that the Supremacy Clause is directed to the judges of every state, and does not operate to circumscribe the state legislatures – or the people – from expressing their views. *Printz v. United States*, 521 U.S. 898, 912 (1997). The United States is not suggesting otherwise, as it is indeed the prerogative of Montana's Legislature to riddle the statutory code with "political statements" if the Legislature deems it prudent to do so. The issue at hand, however, is whether the Act may be relied upon to prevent enforcement of the Federal firearms laws in relation to a firearm manufactured and sold intrastate.

delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." U.S. Const. amend X. The Tenth Amendment thus reserves to the states those powers not specifically delegated to the federal government.

Where, as here, a federal statute "is within the powers granted to Congress under the Commerce Clause, it cannot constitute an exercise of power reserved to the states." *Columbia River Gorge United – Protecting People and Property v. Yeutter*, 960 F.2d 110, 114 (9th Cir. 1992). If Congress has acted within its power under the Commerce Clause, "the Tenth Amendment expressly disclaims any reservation of power to the States." *New York v. United States,* 505 U.S. 144, 156 (1992). In other words, a valid exercise of Congress' Commerce Clause power is not a violation of the Tenth Amendment.[19] *See e.g. United States v. Collins*, 61 F.3d 1379, 1384 (9th Cir. 1995); *Garcia v. San Antonio Metropolitan Trans. Auth.*, 469 U.S. 528 (1985). Because federal firearms laws are a valid exercise of Congress' power under the Commerce Clause as applied to the intrastate

[19] Plaintiffs also make a cursory reference to the Ninth Amendment, which provides that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend IX. *See* Dkt. 51-1, at 30-31. The Ninth Amendment does not, as suggested by Plaintiffs, independently secure "any constitutional rights for purposes of making out a constitutional violation." *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991).

activities contemplated by the Act, there is no Tenth Amendment violation in this case.

IV. Conclusion

For all of the above reasons,

IT IS RECOMMENDED that the United States' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which [sic] may be granted be GRANTED and this case be dismissed in its entirety.

DATED this 31st day of August, 2010

/s/ Jeremiah C. Lynch
Jeremiah C. Lynch
United States Magistrate Judge

The Constitution of the United States

Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I. – The Legislative Branch

Section 1 – The Legislature

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2 – The House

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

(Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.) **(The previous sentence in parentheses was modified by the 14th Amendment, section 2.)** The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3 – The Senate

The Senate of the United States shall be composed of two Senators from each State, (*chosen by the Legislature thereof*,) **(The preceding words in parentheses superseded by 17th Amendment, section 1.)** for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; (*and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.*) **(The preceding words in parentheses were superseded by the 17th Amendment, section 2.)**

No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4 – Elections, Meetings

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall (*be on the first Monday in December*) **(The preceding words in parentheses were superseded by the 20th Amendment,**

section 2.) unless they shall by Law appoint a different Day.

Section 5 – Membership, Rules, Journals, Adjournment

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two-thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6 – Compensation

(The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.) **(The preceding words in parentheses were modified by the 27th Amendment.)** They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7 – Revenue Bills, Legislative Process, Presidential Veto

All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the

United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8 – Powers of Congress

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and Post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9 – Limits on Congress

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

(No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.) **(Section in parentheses clarified by the 16th Amendment.)**

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from,

one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Section 10 – Powers prohibited of States

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the

United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II. – The Executive Branch

Section 1 – The President

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

(The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not lie an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each;

which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.) **(This clause in parentheses was superseded by the 12th Amendment)**

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

(In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.) **(This clause in parentheses has been modified by the 20th and 25th Amendments.)**

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2 – Civilian Power over Military, Cabinet, Pardon Power, Appointments

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3 – State of the Union, Convening Congress

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4 – Disqualification

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III. – The Judicial Branch

Section 1 – Judicial powers

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good

Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

Section 2 – Trial by Jury, Original Jurisdiction, Jury Trials

(The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof and foreign States, Citizens or Subjects.) **(This section in parentheses is modified by the 11th Amendment.)**

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in

the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3 – Treason

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article. IV. – The States

Section 1 – Each State to Honor all others

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2 – State citizens, Extradition

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

(No Person held to Service or Labour in one State, under the Laws thereof escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, But shall be delivered up on Claim of the Party to whom such Service or Labour may be due.) **(This clause in parentheses is superseded by the 13th Amendment.)**

Section 3 – New States

New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting

the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4 – Republican government

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article. V. – Amendment

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the

first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. Const. amend. 27 – Limiting Congressional Pay Increases. Ratified 5/7/1992.

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

5 U.S.C. §702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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5 U.S.C. §704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

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28 U.S.C. §1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

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28 U.S.C. §1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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28 U.S.C. §2107. Time for appeal to court of appeals

* * *

(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is –

(1) the United States;

(2) a United States agency;

(3) a United States officer or employee sued in an official capacity; or

(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

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28 U.S.C. §2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes

other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

MT Code § 30-20-104. Prohibitions. A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce. It is declared by the legislature that those items have not traveled in interstate commerce. This section applies to a firearm, a firearm accessory, or ammunition that is manufactured in Montana from basic materials and that can be manufactured without the inclusion of any significant parts imported from another state. Generic and insignificant parts that have other manufacturing or consumer product applications are not firearms, firearms accessories, or ammunition, and their importation into Montana and incorporation into a firearm, a firearm accessory, or ammunition manufactured in Montana does not subject the firearm, firearm accessory, or ammunition to federal regulation. It is declared by the legislature that basic materials, such as unmachined steel and unshaped wood, are not firearms, firearms accessories, or ammunition and are not subject to congressional authority to regulate firearms, firearms accessories, and ammunition under interstate commerce as if they were actually firearms, firearms accessories, or ammunition. The authority of congress to regulate interstate commerce in basic materials does not include authority to regulate firearms, firearms accessories, and ammunition made in Montana from those materials. Firearms accessories that are

imported into Montana from another state and that are subject to federal regulation as being in interstate commerce do not subject a firearm to federal regulation under interstate commerce because they are attached to or used in conjunction with a firearm in Montana.

MT Code § 30-20-106. Marketing of firearms. A firearm manufactured or sold in Montana under this part must have the words "Made in Montana" clearly stamped on a central metallic part, such as the receiver or frame.

National Firearms Act, 26 U.S.C.A. § 5842 (West):

> (a) Identification of firearms other than destructive devices. – Each manufacturer and importer and anyone making a firearm shall identify each firearm, other than a destructive device, manufactured, imported, or made by a serial number which may not be readily removed, obliterated, or altered, the name of the manufacturer, importer, or maker, and such other identification as the Secretary may by regulations prescribe.(b) Firearms without serial number. – Any person who possesses a firearm, other than a destructive device, which does not bear the serial number and other information required by subsection (a) of this section shall identify the firearm with a serial number assigned by the Secretary and any other information the Secretary may by regulations prescribe.(c) Identification of destructive device. – Any firearm classified as a destructive device shall be identified in such manner as the Secretary may by regulations prescribe.

National Firearms Act, 26 U.S.C.A. § 5843 (West):

> Importers, manufacturers, and dealers shall keep such records of, and render such returns in relation to, the importation, manufacture, making, receipt, and sale, or other disposition, of firearms as the Secretary may by regulations prescribe.

Gun Control Act, 18 U.S.C.A. § 923:

(a) No person shall engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition, until he has filed an application with and received a license to do so from the Attorney General. The application shall be in such form and contain only that information necessary to determine eligibility for licensing as the Attorney General shall by regulation prescribe and shall include a photograph and fingerprints of the applicant. Each applicant shall pay a fee for obtaining such a license, a separate fee being required for each place in which the applicant is to do business, as follows:

(1) If the applicant is a manufacturer –

(A) of destructive devices, ammunition for destructive devices or armor piercing ammunition, a fee of $1,000 per year;

(B) of firearms other than destructive devices, a fee of $50 per year; or

(C) of ammunition for firearms, other than ammunition for destructive devices or armor piercing ammunition, a fee of $10 per year.

(2) If the applicant is an importer –

(A) of destructive devices, ammunition for destructive devices or armor piercing ammunition, a fee of $1,000 per year; or

(B) of firearms other than destructive devices or ammunition for firearms other than destructive devices, or ammunition other than armor piercing ammunition, a fee of $50 per year.

(3) If the applicant is a dealer –

(A) in destructive devices or ammunition for destructive devices, a fee of $1,000 per year; or

(B) who is not a dealer in destructive devices, a fee of $200 for 3 years, except that the fee for renewal of a valid license shall be $90 for 3 years.

[(C) Repealed. Pub.L. 103-159, Title III, § 303(4), Nov. 30, 1993, 107 Stat. 1546]

(b) Any person desiring to be licensed as a collector shall file an application for such license with the Attorney General. The application shall be in such form and contain only that information necessary to determine eligibility as the Attorney General shall by regulation prescribe. The fee for such license shall be $10 per year. Any license granted under this subsection shall only apply to transactions in curios and relics.

(c) Upon the filing of a proper application and payment of the prescribed fee, the Attorney General shall issue to a qualified applicant the appropriate license which, subject to the provisions of this chapter and other applicable provisions of law, shall entitle the

licensee to transport, ship, and receive firearms and ammunition covered by such license in interstate or foreign commerce during the period stated in the license. Nothing in this chapter shall be construed to prohibit a licensed manufacturer, importer, or dealer from maintaining and disposing of a personal collection of firearms, subject only to such restrictions as apply in this chapter to dispositions by a person other than a licensed manufacturer, importer, or dealer. If any firearm is so disposed of by a licensee within one year after its transfer from his business inventory into such licensee's personal collection or if such disposition or any other acquisition is made for the purpose of willfully evading the restrictions placed upon licensees by this chapter, then such firearm shall be deemed part of such licensee's business inventory, except that any licensed manufacturer, importer, or dealer who has maintained a firearm as part of a personal collection for one year and who sells or otherwise disposes of such firearm shall record the description of the firearm in a bound volume, containing the name and place of residence and date of birth of the transferee if the transferee is an individual, or the identity and principal and local places of business of the transferee if the transferee is a corporation or other business entity: Provided,

That no other record keeping shall be required.

(d)(1) Any application submitted under subsection (a) or (b) of this section shall be approved if –

(A) the applicant is twenty-one years of age or over;

(B) the applicant (including, in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, or association) is not prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under section 922(g) and (n) of this chapter;

(C) the applicant has not willfully violated any of the provisions of this chapter or regulations issued thereunder;

(D) the applicant has not willfully failed to disclose any material information required, or has not made any false statement as to any material fact, in connection with his application;

(E) the applicant has in a State (i) premises from which he conducts business subject to license under this chapter or from which he intends to conduct such business within a reasonable period of time, or (ii) in the case of a collector, premises from which he conducts his collecting subject to license under this chapter or from which he intends to

conduct such collecting within a reasonable period of time;

(F) the applicant certifies that –

(i) the business to be conducted under the license is not prohibited by State or local law in the place where the licensed premise is located;

(ii)(I) within 30 days after the application is approved the business will comply with the requirements of State and local law applicable to the conduct of the business; and

(II) the business will not be conducted under the license until the requirements of State and local law applicable to the business have been met; and

(iii) that the applicant has sent or delivered a form to be prescribed by the Attorney General, to the chief law enforcement officer of the locality in which the premises are located, which indicates that the applicant intends to apply for a Federal firearms license; and

(G) in the case of an application to be licensed as a dealer, the applicant certifies that secure gun storage or safety devices will be available at any place in which firearms are sold under the license to persons who are not licensees (subject to the exception that in any case in which a secure gun storage or safety device is temporarily unavailable because of theft, casualty loss, consumer sales, backorders from a manufacturer, or any

other similar reason beyond the control of the licensee, the dealer shall not be considered to be in violation of the requirement under this subparagraph to make available such a device).

(2) The Attorney General must approve or deny an application for a license within the 60-day period beginning on the date it is received. If the Attorney General fails to act within such period, the applicant may file an action under section 1361 of title 28 to compel the Attorney General to act. If the Attorney General approves an applicant's application, such applicant shall be issued a license upon the payment of the prescribed fee.

(e) The Attorney General may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has willfully violated any provision of this chapter or any rule or regulation prescribed by the Attorney General under this chapter or fails to have secure gun storage or safety devices available at any place in which firearms are sold under the license to persons who are not licensees (except that in any case in which a secure gun storage or safety device is temporarily unavailable because of theft, casualty loss, consumer sales, backorders from a manufacturer, or any other similar reason beyond the control of the licensee, the dealer shall not be considered to be in violation of the requirement to make available such a device). The

Attorney General may, after notice and opportunity for hearing, revoke the license of a dealer who willfully transfers armor piercing ammunition. The Attorney General's action under this subsection may be reviewed only as provided in subsection (f) of this section.

(f)(1) Any person whose application for a license is denied and any holder of a license which is revoked shall receive a written notice from the Attorney General stating specifically the grounds upon which the application was denied or upon which the license was revoked. Any notice of a revocation of a license shall be given to the holder of such license before the effective date of the revocation.

(2) If the Attorney General denies an application for, or revokes, a license, he shall, upon request by the aggrieved party, promptly hold a hearing to review his denial or revocation. In the case of a revocation of a license, the Attorney General shall upon the request of the holder of the license stay the effective date of the revocation. A hearing held under this paragraph shall be held at a location convenient to the aggrieved party.

(3) If after a hearing held under paragraph (2) the Attorney General decides not to reverse his decision to deny an application or revoke a license, the Attorney General shall give notice of his decision to the aggrieved party. The aggrieved party may at any time within sixty days after the date notice was

given under this paragraph file a petition with the United States district court for the district in which he resides or has his principal place of business for a de novo judicial review of such denial or revocation. In a proceeding conducted under this subsection, the court may consider any evidence submitted by the parties to the proceeding whether or not such evidence was considered at the hearing held under paragraph (2). If the court decides that the Attorney General was not authorized to deny the application or to revoke the license, the court shall order the Attorney General to take such action as may be necessary to comply with the judgment of the court.

(4) If criminal proceedings are instituted against a licensee alleging any violation of this chapter or of rules or regulations prescribed under this chapter, and the licensee is acquitted of such charges, or such proceedings are terminated, other than upon motion of the Government before trial upon such charges, the Attorney General shall be absolutely barred from denying or revoking any license granted under this chapter where such denial or revocation is based in whole or in part on the facts which form the basis of such criminal charges. No proceedings for the revocation of a license shall be instituted by the Attorney General more than one year after the filing of the indictment or information.

(g)(1)(A) Each licensed importer, licensed manufacturer, and licensed dealer shall maintain such records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe. Such importers, manufacturers, and dealers shall not be required to submit to the Attorney General reports and information with respect to such records and the contents thereof, except as expressly required by this section. The Attorney General, when he has reasonable cause to believe a violation of this chapter has occurred and that evidence thereof may be found on such premises, may, upon demonstrating such cause before a Federal magistrate judge and securing from such magistrate judge a warrant authorizing entry, enter during business hours the premises (including places of storage) of any licensed firearms importer, licensed manufacturer, licensed dealer, licensed collector, or any licensed importer or manufacturer of ammunition, for the purpose of inspecting or examining –

(i) any records or documents required to be kept by such licensed importer, licensed manufacturer, licensed dealer, or licensed collector under this chapter or rules or regulations under this chapter, and

(ii) any firearms or ammunition kept or stored by such licensed importer, licensed

manufacturer, licensed dealer, or licensed collector, at such premises.

(B) The Attorney General may inspect or examine the inventory and records of a licensed importer, licensed manufacturer, or licensed dealer without such reasonable cause or warrant –

(i) in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the licensee;

(ii) for ensuring compliance with the record keeping requirements of this chapter –

(I) not more than once during any 12-month period; or

(II) at any time with respect to records relating to a firearm involved in a criminal investigation that is traced to the licensee; or

(iii) when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation.

(C) The Attorney General may inspect the inventory and records of a licensed collector without such reasonable cause or warrant –

(i) for ensuring compliance with the record keeping requirements of this chapter not more than once during any twelve-month period; or

(ii) when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation.

(D) At the election of a licensed collector, the annual inspection of records and inventory permitted under this paragraph shall be performed at the office of the Attorney General designated for such inspections which is located in closest proximity to the premises where the inventory and records of such licensed collector are maintained. The inspection and examination authorized by this paragraph shall not be construed as authorizing the Attorney General to seize any records or other documents other than those records or documents constituting material evidence of a violation of law. If the Attorney General seizes such records or documents, copies shall be provided the licensee within a reasonable time. The Attorney General may make available to any Federal, State, or local law enforcement agency any information which he may obtain by reason of this chapter with respect to the identification of persons prohibited from purchasing or receiving firearms or ammunition who have purchased or received firearms or ammunition, together with a description of such firearms or ammunition, and he may provide information to the extent such information may be contained in the records required to be maintained by this chapter, when so requested by any Federal, State, or local law enforcement agency.

(2) Each licensed collector shall maintain in a bound volume the nature of which the Attorney General may by regulations prescribe, records of the receipt, sale, or other disposition of firearms. Such records shall include the name and address of any person to whom the collector sells or otherwise disposes of a firearm. Such collector shall not be required to submit to the Attorney General reports and information with respect to such records and the contents thereof, except as expressly required by this section.

(3)(A) Each licensee shall prepare a report of multiple sales or other dispositions whenever the licensee sells or otherwise disposes of, at one time or during any five consecutive business days, two or more pistols, or revolvers, or any combination of pistols and revolvers totaling two or more, to an unlicensed person. The report shall be prepared on a form specified by the Attorney General and forwarded to the office specified thereon and to the department of State police or State law enforcement agency of the State or local law enforcement agency of the local jurisdiction in which the sale or other disposition took place, not later than the close of business on the day that the multiple sale or other disposition occurs.

(B) Except in the case of forms and contents thereof regarding a purchaser who is prohibited by subsection (g) or (n) of section 922 of this title from receipt of a firearm, the department of State police or State law

enforcement agency or local law enforcement agency of the local jurisdiction shall not disclose any such form or the contents thereof to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received. No later than the date that is 6 months after the effective date of this subparagraph, and at the end of each 6-month period thereafter, the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall certify to the Attorney General of the United States that no disclosure contrary to this subparagraph has been made and that all forms and any record of the contents thereof have been destroyed as provided in this subparagraph.

(4) Where a firearms or ammunition business is discontinued and succeeded by a new licensee, the records required to be kept by this chapter shall appropriately reflect such facts and shall be delivered to the successor. Where discontinuance of the business is absolute, such records shall be delivered within thirty days after the business discontinuance to the Attorney General. However, where State law or local ordinance requires the delivery of records to other responsible authority, the Attorney General may arrange for the delivery of such records to such other responsible authority.

(5)(A) Each licensee shall, when required by letter issued by the Attorney General, and

until notified to the contrary in writing by the Attorney General, submit on a form specified by the Attorney General, for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the Attorney General in such letter may specify.

(B) The Attorney General may authorize such record information to be submitted in a manner other than that prescribed in subparagraph (A) of this paragraph when it is shown by a licensee that an alternate method of reporting is reasonably necessary and will not unduly hinder the effective administration of this chapter. A licensee may use an alternate method of reporting if the licensee describes the proposed alternate method of reporting and the need therefor in a letter application submitted to the Attorney General, and the Attorney General approves such alternate method of reporting.

(6) Each licensee shall report the theft or loss of a firearm from the licensee's inventory or collection, within 48 hours after the theft or loss is discovered, to the Attorney General and to the appropriate local authorities.

(7) Each licensee shall respond immediately to, and in no event later than 24 hours after the receipt of, a request by the Attorney General for information contained in the records required to be kept by this chapter as may be required for determining the

disposition of 1 or more firearms in the course of a bona fide criminal investigation. The requested information shall be provided orally or in writing, as the Attorney General may require. The Attorney General shall implement a system whereby the licensee can positively identify and establish that an individual requesting information via telephone is employed by and authorized by the agency to request such information.

(h) Licenses issued under the provisions of subsection (c) of this section shall be kept posted and kept available for inspection on the premises covered by the license.

(i) Licensed importers and licensed manufacturers shall identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer.

(j) A licensed importer, licensed manufacturer, or licensed dealer may, under rules or regulations prescribed by the Attorney General, conduct business temporarily at a location other than the location specified on the license if such temporary location is the location for a gun show or event sponsored by any national, State, or local organization, or any affiliate of any such organization devoted to the collection, competitive use, or other sporting use of firearms in the community, and such location is in the State which is

specified on the license. Records of receipt and disposition of firearms transactions conducted at such temporary location shall include the location of the sale or other disposition and shall be entered in the permanent records of the licensee and retained on the location specified on the license. Nothing in this subsection shall authorize any licensee to conduct business in or from any motorized or towed vehicle. Notwithstanding the provisions of subsection (a) of this section, a separate fee shall not be required of a licensee with respect to business conducted under this subsection. Any inspection or examination of inventory or records under this chapter by the Attorney General at such temporary location shall be limited to inventory consisting of, or records relating to, firearms held or disposed at such temporary location. Nothing in this subsection shall be construed to authorize the Attorney General to inspect or examine the inventory or records of a licensed importer, licensed manufacturer, or licensed dealer at any location other than the location specified on the license. Nothing in this subsection shall be construed to diminish in any manner any right to display, sell, or otherwise dispose of firearms or ammunition, which is in effect before the date of the enactment of the Firearms Owners' Protection Act, including the right of a licensee to conduct "curios or relics" firearms transfers and business away from their business premises with another licensee without regard as to whether the location

of where the business is conducted is located in the State specified on the license of either licensee.

(k) Licensed importers and licensed manufacturers shall mark all armor piercing projectiles and packages containing such projectiles for distribution in the manner prescribed by the Attorney General by regulation. The Attorney General shall furnish information to each dealer licensed under this chapter defining which projectiles are considered armor piercing ammunition as defined in section 921(a)(17)(B).(l) The Attorney General shall notify the chief law enforcement officer in the appropriate State and local jurisdictions of the names and addresses of all persons in the State to whom a firearms license is issued.

Proposed Legislation:

Ala. Sen. 43, 2013 Reg. Sess. (Feb. 5, 2013); Ark. Sen. 1088, 89th Gen. Assembly, 2013 Reg. Sess. (Mar. 11, 2013); Colo. Sen. 10-092, 67th Gen. Assembly, 2d Reg. Sess. (Jan. 22, 2010); Fla. Sen. 98, 2010 Reg. Sess. (Mar. 1, 2010); Ga. H. 89, 2013-2014 Reg. Sess. (Jan. 17, 2013); Ind. Sen. 130, 118th Gen. Assembly, 1st Reg. Sess. (Jan. 7, 2013); Iowa H. File 121, 84th Gen. Assembly (Jan. 26, 2011); Ky. H. 222, Gen. Assembly, 12 Reg. Sess. (Jan. 6, 2012); La. H. 45, 2013 Reg. Sess. (Feb. 17, 2013); Mich. Sen. 63, 97th Leg., 2013 Reg. Sess. (Jan. 16, 2013); Minn. H. File 2376, 86th Leg. (May 7, 2009); Miss. H. 501, 2013 Reg. Sess. (Jan. 21, 2013); Mo. H. 170, 97th Gen. Assembly, 1st Reg. Sess. (Jan. 15, 2013); Neb. Leg. 602, 103d Leg., 1st Sess. (Jan. 23, 2013); N.H. H. 125, 2011 Sess. (Jan. 6, 2011); N.C. H. 518, Gen. Assembly, 2013 Sess. (Apr. 2, 2013); Ohio H. 340, 130th Gen. Assembly, 2013-2014 Reg. Sess. (Nov. 7, 2013); Okla. H. 2021, 54th Leg., 1st Sess. (Mar. 8, 2013); Or. H. 2796, 76th Leg. Assembly, 2011 Reg. Sess. (Jan. 11, 2011); Pa. H. 475, Gen. Assembly, 2013-2014 Reg. Sess. (Feb. 4, 2013); S.C. Sen. 85, 120th Gen. Assembly (Jan. 8, 2013); Tex. H. 145, 82d Reg. Sess. (Nov. 8, 2010); Va. H. 1731, 2011 Sess. (Jan. 10, 2011); Wash. H. 1371, 63d Leg., 2013 Reg. Sess. (Jan. 24, 2013); W. Va. H. 2705, 2011 Reg. Sess. (Jan. 21, 2011); Wis. L.R.B. 2036, 2013-2014 Leg. (2013).