No. _____

In The
Supreme Court of the United States

STATE OF MONTANA,

Petitioner,

v.

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

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Gonzales* v. *Raich*, after emphasizing the inherently fungible nature of marijuana and the fact that the entire interstate "marijuana market is an unlawful market that Congress sought to eradicate," this Court held that Congress's Necessary and Proper power allowed it to criminalize intrastate cultivation and possession of marijuana. The Court concluded that an inability to reach intrastate marijuana would obviously "leave a gaping hole" in Congress's attempt to completely "eradiate" the illegal interstate market.

Concerned about practically unrestrained federal intrusions into intrastate matters historically regulated by the states, and seeking to better secure and protect citizens' fundamental liberties, Montana and eight other states enacted laws stating that certain uniquely identifiable firearms manufactured and remaining solely within their state are not subject to federal regulation. Relying on *Raich* to apply a highly deferential and speculative form of rational basis review, the courts below struck down Montana's law as preempted. The question presented is:

Whether courts should more carefully scrutinize a purported exercise of Congress's Necessary and Proper power to regulate purely intrastate, non-fungible products whose effect on an interstate market is not obvious, especially where such federal regulation displaces States' traditional police power.

PARTIES TO THE PROCEEDING

Plaintiffs-Appellants below were the Montana Shooting Sports Association, Second Amendment Foundation, and Gary Marbut. Those parties filed a separate petition for a writ of certiorari on November 21, 2013 (Docket No. 13-634).

The State of Montana intervened in the district court proceedings below. On appeal in the Ninth Circuit, the State was included on the case docket and case caption as an intervenor, and filed an amicus brief.

Eric H. Holder, Jr., in his official capacity as the Attorney General of the United States, was the Defendant-Appellee below.

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PETITION FOR A WRIT OF CERTIORARI

The State of Montana respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (App. 1a-17a) are reported at *Montana Shooting Sports Ass'n* v. *Holder*, 727 F.3d 975 (9th Cir. 2013). The opinion of the district court (App. 19a-27a) is unreported, but available at *Montana Shooting Sports Ass'n* v. *Holder*, CV 09-147-M-DWM-JCL, 2010 U.S. Dist. LEXIS 110891 (D. Mont. Oct. 18, 2010). The findings and recommendations of the magistrate judge, which were adopted in full by the district court (App. 28a-29a), are unreported, but included in the appendix (App. 30a-87a).

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2013. A timely request for an extension was granted by Justice Kennedy, extending the time in which to file this petition until January 6, 2014. *Montana* v. *Holder*, No. 13A462 (Nov. 22, 2013). This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2403(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce and Necessary and Proper Clauses of the United States Constitution provide in relevant part:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . .

U.S. Const. art. I, § 8, cls. 3, 18.

Other constitutional provisions implicated by this case include the Second, Ninth, and Tenth Amendments to the United States Constitution:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II.

> 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 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 federal government argued, and the courts below held, that the Montana Firearms Freedom Act, Mont. Code Ann. §§ 30-20-101 *et seq*., is preempted by the National Firearms Act, 26 U.S.C. §§ 5801 *et seq.*, and the Gun Control Act of 1968, 18 U.S.C. §§ 921 *et seq*. Relevant portions of those statutes are provided in the appendix at App. 88a-93a.

STATEMENT

When nearly a fifth of the states pass laws to better secure fundamental liberties and push back on federal regulation of intrastate activities falling squarely within states' historic police power, and federal courts almost casually strike those laws as preempted because they believe their "'hands are tied'" by this Court's precedent, something is wrong. One of federalism's prime virtues – that "the independent power of the States also serves as a check on the power of the Federal Government," *NFIB* v. *Sebelius*, 132 S. Ct. 2566, 2578 (2012) – is in trouble.

This need not be, though. The lower courts' practical abdication of their responsibility to police the "distinction between what is truly national and what is truly local," *United States* v. *Morrison*, 529 U.S. 598, 617-18 (2000), is largely based on their over-reading and misapplication of one case: *Gonzales* v. *Raich*, 545 U.S. 1 (2005). To reverse this dangerous drift, this Court does not need to overrule *Raich*. All it must do is tell the lower courts what a majority of

the Court's current members have already said individually.

That is why Montana enacted the Montana Firearms Freedom Act (MFFA), and why this case was brought. This Court has long recognized that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). This case presents an ideal vehicle for clarifying the courts' vital role in refereeing that "healthy balance."

1. In 2009, the Montana Legislature enacted the MFFA, which, as relevant in this case, governs a firearm wholly "manufactured in Montana from basic materials. . . . that remains within the borders of Montana" and has "the words 'Made in Montana' clearly stamped on a central metallic part" of it. Mont. Code Ann. §§ 30-20-104 and -106. Firearms regulated by the MFFA are declared "not subject to federal law or regulation." *Id.* After Montana passed the MFFA, eight more states enacted similar laws. *See* Alaska Stat. Ann. § 44.99.500; Ariz. Rev. Stat. Ann. § 13-3114; Idaho Code Ann. § 18-3315A; Kan. Stat. Ann. §§ 50-1201 *et seq*.; S.D. Codified Laws §§ 37-35-1 *et seq*.; Tenn. Code Ann. §§ 4-54-101 *et seq*.; Utah Code Ann. §§ 53-5b-101 *et seq*.; Wyo. Stat. Ann. §§ 6-8-402 *et seq*.

2. Shortly after passage of the MFFA, Gary Marbut, together with the Montana Shooting Sports Association and the Second Amendment Foundation,

filed suit against United States Attorney General Holder in federal district court seeking a declaratory judgment that Mr. Marbut could manufacture and sell intrastate firearms under the MFFA without complying with federal firearms laws. App. 30a. Mr. Marbut, who has a background in building shooting equipment, developed specific plans to manufacture a .22 caliber intrastate rifle under the MFFA, and he had orders from hundreds of customers who were only willing to buy the rifle if it was not subject to federal regulations. App. 9a-10a. The State of Montana intervened in the lawsuit under 28 U.S.C. § 2403(b), and submitted a brief in support of the MFFA. App. 36a.

General Holder immediately moved to dismiss the lawsuit, on the bases that (1) the plaintiffs lacked standing, and (2) the MFFA was preempted by federal firearms laws. App. 31a. Federal Magistrate Judge Jeremiah Lynch issued findings and recommendations agreeing with General Holder on both counts. App. 30a-87a. As to the preemption issue, Judge Lynch noted that "the central question in this case is whether Congress has the power to regulate those activities" covered by the MFFA. App. 66a-67a. Recognizing that the MFFA only applies to intrastate activities, Judge Lynch determined that Congress could only regulate those activities if they fell within the "third and final *Lopez* category"; that is, if "'the regulated activity . . . substantially affect[s] interstate commerce.'" App. 67a (quoting *United States* v. *Lopez*, 514 U.S. 549, 558-59 (1995)).

Before applying the "substantial effects" test, however, Judge Lynch stressed how *Raich* had set the bar very low by utilizing "the rational basis standard." App. 68a n.15. According to Judge Lynch, the relevant question was not whether the intrastate activities "'substantially affected interstate commerce *in fact*, but only whether a "rational basis" existed for so concluding.'" App. 68a (quoting *Raich*, 545 U.S. at 22) (alteration marks omitted; emphasis added).

Applying that standard, Judge Lynch made no attempt to determine whether the activities regulated by the MFFA *actually* substantially affected interstate commerce. Indeed, that would have been impossible given the motion to dismiss posture of the case. Instead, Judge Lynch concluded that "[h]ere, as in *Raich*, Congress had a rational basis" because "'Congress *could have* rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.'" App. 71a-72a (quoting *Raich*, 545 U.S. at 32) (emphasis added). Judge Lynch expressly rejected the argument that the fungibility of the marijuana at issue in *Raich* played any role in the analysis or outcome there. *See* App. 77a ("The fact that the [MFFA] provides a means for distinguishing firearms manufactured in Montana from those manufactured elsewhere does not change matters.").

In short, Judge Lynch viewed this case as directly controlled by *Raich*. And as Judge Lynch explained, *Raich* and its Ninth Circuit progeny "'compel the conclusion that Congress'[s] power

under the Commerce Clause is almost unlimited where the prohibited product has significant economic value. . . .'" App. 73a (quoting *United States* v. *Rothacher*, 442 F.Supp.2d 999, 1007 (D. Mont. 2006) (Molloy, J.)). Accordingly, the non-fungible, intrastate nature of the products cordoned off by the MFFA was "'entirely irrelevant'"; "'when Congress makes an interstate omelet, it is entitled to break a few intrastate eggs.'" App. 77a (quoting *United States* v. *Stewart*, 451 F.3d 1071, 1075, 1077 (9th Cir. 2006)).

3. Both the plaintiffs and the State of Montana filed objections to Judge Lynch's Findings and Recommendations. *See* App. 22a. District Judge Donald Molloy rejected all objections, however, adopting Judge Lynch's conclusions in full. App. 28a.

Judge Molloy also wrote a short opinion specifically addressing Montana's argument that fungibility had significantly influenced the analysis and outcome in *Raich*. Applying Ninth Circuit precedent, Judge Molloy rejected that argument. *See* App. 24a-25a ("It is clear from *Stewart* that the focus is not on the uniqueness of the product. . . ."). Judge Molloy also reiterated that *Raich*'s rational basis standard means the federal government need not show that regulated intrastate activities "'*actually* affected interstate commerce'" – a merely "rational" possibility is sufficient. App. 25a & n.3 (quoting *Stewart*, 451 F.3d at 1077) (emphasis added).

4. On appeal, the Ninth Circuit reversed the district court on standing, concluding that Mr.

Marbut clearly "has standing to sue." App. 4a. A majority of the panel agreed with the district court, however, that Montana's law is preempted. App. 16a. Emphasizing that its "'hands are tied'" by *Raich* and *Stewart*, App. 12a, the majority concluded it makes no difference that MFFA firearms can be "distinguish[ed] . . . from firearms that may be sold in the interstate market," App. 14a. Nor was the federal government required to make any showing that MFFA firearms will *actually* "substantially affect the interstate market." App. 16a. All that matters is that "Congress *could have* rationally concluded" they might – "[u]nder *Raich* and *Stewart*, that is enough." *Id.* (emphasis added).

Judge Bea issued a short separate opinion dissenting in part. He agreed with the majority that *Raich* and *Stewart* "foreclose [the] argument that Congress does not have the authority . . . to regulate" unique intrastate firearms. App. 16a-17a. But Judge Bea dissented from the majority's ruling that the MFFA is preempted, on the ground that it was unnecessary to preempt the state law. App. 17a.

REASONS FOR GRANTING THE PETITION

The MFFA, and the similar laws enacted by almost a fifth of the states, obviously target a Congress widely perceived as exercising essentially unchecked power. But these state laws should not be unexpected or disparaged; they embody the genius of

our Founders in a principle long recognized by this Court: "In the *tension* between federal and state power lies the promise of liberty." *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) (emphasis added) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)).

This sort of power struggle between the states and the federal government about an issue touching on a fundamental enumerated right is thus encouraging, because it demonstrates that liberty-enhancing federalism still holds widespread promise. James Madison's hope that federalism would provide "a double security to the rights of the people" because the "different governments will control each other" endures. The Federalist No. 51, at 323 (J. Madison) (C. Rossiter ed. 1961), *quoted in Lopez*, 514 U.S. at 576 (Kennedy, J., concurring). Indeed, only eighteen months ago this Court reemphasized that in our federalist system the "independent power of the States . . . serves as a check on the power of the Federal Government." *NFIB*, 132 S. Ct. at 2578.

But therein lies the rub. If the states are to serve as a real "check" or "control" on federal overreaching, then this Court's Commerce Clause jurisprudence – or more specifically, its Necessary and Proper Clause jurisprudence – must provide enforceable limits that are more than just hortatory. This is especially true at the "outer limits" where, as here, Congress tries to regulate purely intrastate activity in the "areas of criminal law and social policy, where 'States lay claim by right of history and expertise.'" *Raich*, 545 U.S. at

42, 48 (2005) (O'Connor, J., dissenting) (quoting *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)).

A majority of the members of this Court have repeatedly recognized this. "What is absolutely clear, . . . is that there are structural limits upon federal power – upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States." *NFIB*, 132 S. Ct. at 2643 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); *see also id.* at 2592 (Roberts, C.J.). If the "Necessary and Proper Clause does not give Congress *carte blanche*," then it is imperative that this Court establish and "enforce compliance with th[ose] limit[s]." *United States* v. *Comstock*, 560 U.S. 126, 154 (2010) (Alito, J., concurring).

Yet even though a majority of the members of this Court have repeatedly voiced the presence and importance of such limits, their existence in actual cases continues to be illusive at best. As Judge O'Scannlain has observed, even though "[t]he Supreme Court has told us with increasing fervor that there are limits to the power of Congress to federalize regulation of personal conduct," his colleagues have nonetheless "failed to perceive the constitutional limits on Congress's power recognized by the Court." *United States* v. *Alderman*, 593 F.3d 1141, 1141-42 (9th Cir. 2010) (O'Scannlain, J., dissenting from the order denying rehearing en banc).

There is one basic reason for the lower courts' refusal to enforce any meaningful limits to Congress's

power: *Gonzales* v. *Raich*. Nowhere is that more powerfully illustrated than in this case, where the district court judge, the magistrate judge, and the federal government all agreed that *Raich* "'compel[s] the conclusion that Congress'[s] power under the Commerce Clause is almost unlimited where the prohibited product has significant economic value. . . .'" App. 73a (quoting *Rothacher*, 442 F.Supp.2d at 1007); *see also* Mot. Dismiss at 26, *Mont. Shooting Sports Ass'n* v. *Holder*, CV 09-147-M-DWM-JCL (D. Mont Jan. 19, 2010) (same). And the Ninth Circuit panel agreed that its "'hands [we]re tied'" by *Raich*. App. 12a.

This case is not an exception; it is the norm. In *NFIB*, for example, the "case upon which the Government principally relie[d] to sustain the Individual Mandate . . . [wa]s *Gonzales* v. *Raich*." *NFIB*, 132 S. Ct. at 2646 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). As one commentator has observed:

> While lower courts already demonstrated some reluctance to take seriously the standards articulated in *Lopez* and *Morrison*, *Raich* confirmed their doubts about the lasting effects of the "Rehnquist Revolution.". . . . The progeny of *Gonzales* v. *Raich* demonstrates that meaningful judicial review of laws enacted under the Commerce Clause may be at an end.

Brandon J. Stoker, Note and Comment, *Was* Gonzales v. Raich *the Death Knell of Federalism? Assessing*

Meaningful Limits on Federal Intrastate Regulation in Light of U.S. v. Nascimento, 23 B.Y.U. J. Pub. L. 317, 340, 348 (2010).

The problem is not that the holding or rationale of *Raich* demands abdication of the judiciary's role in policing the "distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. The problem is that lower courts have overextended certain aspects of the *Raich* decision so that other important instructions in *Raich* and other cases are simply ignored or violated. For example, in applying the "substantial effects" test, instead of requiring some showing or evidence of *actual* substantial interstate effects to trigger Congress's Necessary and Proper power, courts have over-read *Raich*'s "rational basis" language as allowing entirely unsupported conjecture about what Congress "*could have*" concluded, App. 16a (emphasis added) – whether or not such speculation has any basis in reality. It takes little imagination to see how this misapplication of *Raich* has driven lower courts to "'pile inference upon inference,'" in clear defiance of this Court's earlier warnings in *Lopez* and *Morrison*. *Raich*, 545 U.S. at 35 (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514 U.S. at 567).

This need not be. This Court does not need to disturb the core holding or outcome in *Raich* to reverse a "tacit[ ] . . . nullification of [its] recent Commerce Clause jurisprudence." *Alderman* v. *United States*, 131 S. Ct. 700, 700 (2011) (Thomas, J., joined by Scalia, J., dissenting from the denial of certiorari).

Rather, this Court – as *the Court* – simply needs to retell lower courts what a majority of the Court's current members have already individually said.

Specifically, the Court needs to make clear that "[a]t the outer edge of the commerce power" – or more precisely, when Congress is purporting to exercise its Necessary and Proper power in service of the Commerce Clause – "*careful scrutiny* of regulations that do not act directly on an interstate market or its participants" is required. *NFIB*, 132 S. Ct. at 2643 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (emphasis added); *see also id*. at 2591-92 (Roberts, C.J.). Thus, the "rational basis [standard] referred to in the Commerce Clause context" demands more than a "mere conceivable rational relation"; it requires a "tangible link to commerce. . . . a demonstrated link in fact, based on empirical demonstration." *Comstock*, 560 U.S. at 152 (Kennedy, J., concurring). This careful scrutiny is of "'fundamental importance'" where "'essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause.'" *NFIB*, 132 S. Ct. at 2592 (Roberts, C.J.) (quoting *Comstock*, 560 U.S. at 153 (Kennedy, J., concurring)).

The Court also needs to emphasize that the *Raich* case, like *Wickard* v. *Filburn*, 317 U.S. 111 (1942), really is "the *ne plus ultra* of expansive Commerce Clause jurisprudence." *NFIB*, 132 S. Ct. at 2643 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Lower courts therefore should

not conclude their "'hands are tied'" by *Raich* whenever Congress attempts to regulate intrastate matters of traditional state concern. App. 12a. Courts should instead recognize, as a majority of the members of this Court have, that the outcome in *Raich* (and *Wickard*) was decisively influenced by the fungible nature of the intrastate commodity in that case. As the Chief Justice recently explained:

> We denied any exemption [in *Raich*] on the ground that marijuana is a fungible commodity, so that any marijuana could be readily diverted into the interstate market. Congress's attempt to regulate the interstate market for marijuana would therefore have been substantially undercut if it could not also regulate intrastate possession and consumption.

NFIB, 132 S. Ct. at 2593 (Roberts, C.J.); *see also id.* at 2647 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (similar).

This is the right case for the Court to communicate these modest but vitally needed course corrections to the lower courts. Nine states have passed these laws precisely for that purpose. *See* Joseph Luppino-Esposito, Comment, *Four Shots at the Commerce Clause: The Firearms Freedom Act and the Unarticulated Products Category of the Commerce Power*, 7 Seton Hall Cir. Rev. 229, 232 (2010) ("The MFFA is not merely the work of the pro-gun lobby, nor is it an issue that is isolated to a few states. The MFFA is a larger movement – a deliberate effort to

challenge congressional authority."). The courts below held Montana's law was preempted on a motion to dismiss, without requiring a shred of actual evidence or findings that the non-fungible intrastate products regulated by the MFFA would really "substantially affect" any legitimate interstate regulation. Simply remanding this case with a clarification of *Raich*, and with instructions to apply more "careful scrutiny," would alleviate "much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design [of federalism] contemplated by the Framers." *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring).

I. THE COURT SHOULD CLARIFY THAT FEDERAL REGULATION OF DISTINCTIVE INTRASTATE PRODUCTS IS SUBJECT TO MORE "CAREFUL SCRUTINY."

Properly speaking, this is not a Commerce Clause case. As Justice Scalia has explained, "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." *Raich*, 545 U.S. at 34 (Scalia, J., concurring in the judgment); *see also id*. at 5 ("The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution '[t]o make all Laws which shall be necessary and proper. . . .'").

That distinction is important, because as a majority of the members of this Court have emphasized in or since *Raich*, there are important additional "restraints upon the Necessary and Proper clause authority." *Id.* at 39 (Scalia, J., concurring in the judgment). Even when the ultimate purpose of an exercise of Congress's Necessary and Proper power "is constitutional and legitimate" – as here, where intrastate products are controlled to supposedly support legitimate interstate regulation – "the means must be 'appropriate' and 'plainly adapted' to that end." *Id.* (quoting *McCulloch* v. *Maryland*, 17 U.S. 316, 421 (1819)); *see also Comstock*, 560 U.S. at 154 (Alito, J., concurring).

Accordingly, as members of this Court have made clear since *Raich*, purported exercises of Congress's Necessary and Proper power should be reviewed with more "careful scrutiny." "At the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants." *NFIB*, 132 S. Ct. at 2643 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); *see also id.* at 2592 (Roberts, C.J.).

Thus, when courts apply so-called "rational basis" review to exercises of Congress's Necessary and Proper power, that standard should be "different from the rational-basis test" applied in other contexts. *Comstock*, 560 U.S. at 152 (Kennedy, J., concurring). "The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based

on empirical demonstration." *Id.* In *Raich* and this Court's other Necessary and Proper precedents, it "require[d] a tangible link to commerce, not a mere conceivable rational relation" as would suffice under the rational basis test applied in different contexts. *Id.*; *see also Lopez*, 514 U.S. at 559 ("the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce").

The importance of this distinction cannot be overstated, because the federal government has always, and will always, argue that any intrastate product or activity (or inactivity) "substantially affects" interstate commerce. *See*, *e.g.*, *Lopez*, 514 U.S. at 563 ("The Government's essential contention, *in fine*, is that . . . possession of a firearm in a local school zone does indeed substantially affect interstate commerce."); *Morrison*, 529 U.S. at 609 (same regarding gender-motivated violence); *NFIB*, 132 S. Ct. at 2584 ("The Government advances. . . . [the] theory [that] Congress may order individuals to buy health insurance because the failure to do so affects interstate commerce. . . ."); *United States* v. *Alderman*, 565 F.3d 641, 646-47 & n.4 (9th Cir. 2009) (accepting federal government's argument that mere possession of body armor meets the "substantial effects" requirement).

And the federal government will always be able to supply a theoretical chain of causality providing a "*conceivable* rational relation" between intrastate and interstate regulations. *Comstock*, 560 U.S. at 152 (Kennedy, J., concurring) (emphasis added). "In a

sense any conduct in this interdependent world of ours" is rationally related to interstate commerce. *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). There is always available "'a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce.'" *Morrison*, 529 U.S. at 616 n.6 (citations omitted). Allowed to speculate, "one always can draw the circle broadly enough." *Lopez*, 514 U.S. at 600 (Thomas, J., concurring).

But this Court has repeatedly emphasized that "the but-for causal chain must have its limits in the Commerce Clause area," *Morrison*, 529 U.S. at 616 n.6, which is why the Court has never accepted the federal government's mere theorizing as to "substantial effects." The same cannot be said, however, for the lower courts. Far from requiring a "demonstrated link in fact, based on empirical demonstration," *Comstock*, 560 U.S. at 152 (Kennedy, J., concurring), here, for example, the Ninth Circuit and district court applied the most deferential and speculative form of rational basis review. *See* App. 16a ("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. . . ."); App. 25 n.3 ("Whether such a market exists goes to the *actual* affect [sic] of the proposed activity on interstate commerce; such proof is not necessary to the determination whether Congress had a rational

basis. . . ."); App. 71 ("Here, as in *Raich*, Congress had a rational basis. . . .").

It is long past time for the federal government and the lower courts to stop using *Raich* as a license to engage in pure conjecture as to "substantial effects" on interstate commerce. More "careful scrutiny" is required if the "'constitutionally mandated balance of power' between the States and the Federal Government" is to continue "to ensure the protection of 'our fundamental liberties.'" *NFIB*, 132 S. Ct. at 2643 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); *Morrison*, 529 U.S. at 616 (quoting *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985)). This is the case in which to send that important message.

II. THE COURT SHOULD CLARIFY IMPORTANT LIMITATIONS ON THE HOLDING IN *RAICH*.

In addition to correcting the standard of review in Necessary and Proper cases, this Court should also use this case to address key distortions of the *Raich* case. Confusion about *Raich* is the driving force behind the lower court's practical abandonment of their proper role in monitoring the federal-state balance of power.

Two common misconceptions about *Raich* in particular should be addressed. First, the Court should reemphasize that the outcome in *Raich* was strongly influenced by two unique factors: (1) the

inherent fungibility of marijuana, and (2) the exceedingly broad nature of the interstate regulation presented in *Raich* – Congress was trying to completely "eradicate" an *illegal* interstate market. Second, the Court should reiterate that "substantial effects" is not the only relevant concern courts must weigh when reviewing exercises of Congress's Necessary and Proper power. Courts must also take into account whether essential attributes of state sovereignty are compromised, whether the exercise of national power seeks to intrude upon an area of traditional state concern, whether federal regulation of intrastate activities is narrow in scope and seeks to accommodate States' interests, and whether the federal-state power struggle implicates a special concern such as a fundamental liberty interest.

A. Fungibility and Congress's Legitimate Aim of Eradicating an Illegal Interstate Market Drove the Result in *Raich*.

Until directly addressed by this Court, misapplications of *Raich* will continue to distort Necessary and Proper cases. This was vividly illustrated recently, where *Raich* was the centerpiece for the federal government's failed argument that the Affordable Care Act's Individual Mandate was a valid exercise of Congress's Necessary and Proper power. *See NFIB*, 132 S. Ct. at 2592 (Roberts, C.J.) ("The Government relies primarily on our decision in *Gonzales* v. *Raich*."); *id.* at 2646 (joint opinion of Scalia, Kennedy,

Thomas, and Alito, JJ., dissenting) (similar). But the federal government can hardly be faulted for continuing to rely on *Raich* as effectively sanctioning unlimited federal power. Even a quick look at post-*Raich* lower court decisions in this area – including the decisions in this case – reveals a breathtaking deference to federal power. Lower courts rush to speculate about a "rational" reason Congress "could have" supposed about substantial effects. In so doing, courts believe they are faithfully following *Raich*.

But *Raich* did not involve the kind of rampant speculation about substantial effects that has since become the norm in the lower courts. First, as the Court in *Raich* expressly noted, in that case it "ha[d] before [it] findings by Congress . . . establish[ing] the causal connection between the production for local use and the national market" for marijuana. *Raich*, 545 U.S. at 20. Even more importantly, as the Court was careful to explain in *Raich*, the fungible nature of the commodity there made the substantial effects inquiry obvious and easy in that case. The link between intrastate and interstate marijuana is "not only rational, but 'visible to the naked eye.'" *Id.* at 28-29 (citation omitted). "Not only is it impossible to distinguish 'controlled substances manufactured and distributed intrastate' from 'controlled substances manufactured and distributed interstate,' but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities." *Id.* at 40 (Scalia, J., concurring in the judgment).

Because fungibility made the interstate effects of intrastate marijuana obvious, it was not necessary for the *Raich* Court to more carefully scrutinize *actual* interstate effects in that case. Over and over again in *Raich* and cases since, this Court has emphasized that fungibility drove the Court's approach to "substantial effects" in *Raich*. As the *Raich* Court explained:

> The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. . . . Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding 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 CSA.

Id. at 18, 22 (citations omitted). The key significance of fungibility in *Raich* was recently reemphasized by a majority of the members of this Court in *NFIB*:

> *Raich* is far different from the Individual Mandate in another respect. . . . Intrastate marijuana could no more be distinguished from interstate marijuana than, for example, endangered-species trophies obtained before

> the species was federally protected can be distinguished from trophies obtained afterwards – which made it necessary and proper to prohibit the sale of all such trophies.

132 S. Ct. at 2647 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); *see also id.* at 2592 (Roberts, C.J.) ("In *Raich*. . . . [w]e denied any exemption, on the ground that marijuana is a fungible commodity. . . .").

Raich is also far different from most Necessary and Proper cases – and especially this case – in yet another important way. *Raich* involved the most extreme interstate regulatory scheme imaginable: a total ban. The interstate "marijuana market is an unlawful market that Congress sought to *eradicate*." *Raich*, 545 U.S. at 19 n.29 (emphasis added). This also strongly influenced the ease with which the Court found the substantial effects requirement met in *Raich*. "One need not have a degree in economics to understand" that a total interstate ban on a commodity will be substantially affected by an intrastate exception for the same, indistinguishable commodity. *Id.* at 28. But where Congress is not trying to completely "eradicate" an interstate market, the effect of related but distinguishable intrastate products on that market is much less obvious, and bears closer scrutiny.

In short, the relatively undemanding approach to substantial effects in *Raich* should not be applied uncritically in cases involving a *non*-fungible

intrastate product where Congress has not completely banned – indeed, cannot completely ban under the Second Amendment – the interstate market in related products. Because "*Raich* is far different" from this type of case, the Court should use this case to instruct the lower courts to stop misreading *Raich* to require less than "careful scrutiny of regulations that do not act directly on an interstate market or its participants." *NFIB*, 132 S. Ct. at 2643, 2647 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

B. "Substantial Effects" Is Not the Only Limitation on Congress's Necessary and Proper Power.

Following the trend since *Raich*, the courts below also erred by treating "substantial effects" as the only relevant consideration in this type of case. By focusing strictly on whether there is a minimally "rational" basis to extend Congress's Necessary and Proper power, they failed to consider whether basic principles of federalism provide a countervailing reason not to. "[T]he precepts of federalism embodied in the Constitution [must] inform which powers are properly exercised by the National Government in the first place." *Comstock*, 560 U.S. at 153 (Kennedy, J., concurring). Otherwise, judicial review becomes a one-way ratchet ever increasing Congress's Necessary and Proper power.

Accordingly, in cases like this one, "'[i]t is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause. . . .'" *NFIB*, 132 S. Ct. at 2592 (Roberts, C.J.) (quoting *Comstock*, 560 U.S. at 153 (Kennedy, J., concurring)). "[I]f so, that is a factor suggesting that the power is not one properly within the reach of federal power." *Comstock*, 560 U.S. at 153 (Kennedy, J., concurring).

Relatedly, courts should consider whether Congress is purportedly exercising its Necessary and Proper power "to intrude upon an area of traditional state concern." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). Of special concern here are states' traditional police powers – including "the suppression of violent crime" – "which the Founders denied the National Government and reposed in the States." *Morrison*, 529 U.S. at 618. Courts should be particularly wary of applying the substantial effects test in a way that "appears to grant Congress a police power over the Nation." *Lopez*, 514 U.S. at 600 (Thomas, J., concurring).

When, like here, a federal statute runs up against traditional state police powers, Courts should consider "the statute's accommodation of state interests." *Comstock*, 560 U.S. at 149. Where a federal statute "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise," that weighs against its constitutionality – especially

if Congress *could* accommodate states' interests. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Similarly, courts should consider whether federal interference with states' police powers have been kept "narrow [in] scope." *Comstock*, 560 U.S. at 149. Even where an exercise of Congress's power is "necessary" to effectuate its Commerce power, it is only "proper" where it is "'plainly adapted' to that end." *Raich*, 545 U.S. at 39 (Scalia, J., concurring in the judgment) (quoting *McCulloch*, 17 U.S. at 421). When Congress is using its Necessary and Proper power to encroach on states' traditional domain, it should be required to tread lightly. Even if there is some truth to the statement that "'when Congress makes an interstate omelet, it is entitled to break a few intrastate eggs,'" App. 77a (quoting *Stewart*, 451 F.3d at 1075), it should only be allowed to break those eggs that are necessary. *See Comstock*, 560 U.S. at 154 (Alito, J., concurring).

Lastly, courts should take into account whether a federal-state power struggle implicates "some special concern" such as a fundamental liberty interest. *Raich*, 545 U.S. at 21 (noting that "protection of free speech" would be one such concern). Here, Montana and the eight other states that passed these laws expressly did so to better secure the Second Amendment rights of their citizens. *See*, *e.g.*, Mont. Code Ann. § 30-20-102(4). Yet the Ninth Circuit has repeatedly held that Second Amendment concerns can have "'absolutely no impact'" on the reach of federal gun laws, even where, as here, states have tried to

create breathing room for clearly lawful exercises of that right. App. 15a (citation omitted). This is odd, given that the very purpose of federalism is "to ensure protection of our fundamental liberties." *Lopez*, 514 U.S. at 552.

The Court should grant review in this case to return the courts to their proper role of protecting dual sovereignty, thereby ensuring the continuation of "a double security . . . to the rights of the people." The Federalist No. 51, at 323.

III. THE BROAD IMPACT AND "EXCEPTIONAL IMPORTANCE" OF THIS CASE URGE IMMEDIATE REVIEW.

Because of the "exceptional importance" of the issues presented in many Commerce Clause cases, this Court usually does not wait until a circuit split develops to weigh in. *See*, *e.g.*, Pet. Writ Cert. at 7-18, *United States* v. *Morrison*, No. 99-5 ("Certiorari is warranted . . . to consider a question of exceptional importance concerning the scope of Congress's constitutional powers. . . ."); *Raich*, 545 U.S. at 9 ("The obvious importance of the case prompted our grant of certiorari."); *Lopez*, 514 U.S. at 552 ("Because of the importance of the issue, we granted certiorari. . . ."). When a "statute . . . upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power," the Court's immediate "intervention is required." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

The Court's intervention is especially warranted here. With its ruling in this case, the Ninth Circuit did not merely strike one state's law. It effectively nullified similar laws in four different states in the Ninth Circuit. And by also clouding the laws in at least five more states outside the Ninth Circuit, the decision below directly and adversely affected almost 20 percent of the states.

Nor can the decisions below be dismissed as outliers. While the lower courts' analyses in this case run against what a majority of this Court's justices have said in various separate opinions, the courts below did faithfully apply *Raich* just as it has been over-read and extended by most lower courts. *See* Ilya Somin, Gonzales v. Raich: *Federalism as a Casualty of the War on Drugs*, 15 Cornell J. L. & Pub. Pol'y 507, 523 (2006) ("Post-*Raich* Court of Appeals decisions confirm the view that congressional power is now virtually limitless."). Pure speculation as to whether an intrastate activity might "substantially affect" interstate commerce, and extreme deference to what Congress "could have" intended, are now the norm – indeed, binding circuit precedent – after *Raich*. *See*, *e.g.*, *Stewart*, 451 F.3d at 1077; *Alderman*, 565 F.3d at 647 (finding "substantially affects" requirement met based solely on a jurisdictional hook in a federal statute banning body armor possession).

That is why the federal government and lower court judges in this case could confidently agree that "[r]ead together, *Stewart* and *Raich* . . . 'compel the conclusion that Congress'[s] power under the

Commerce Clause is almost unlimited where the prohibited product has significant economic value. . . .'" App. 73a (citation omitted). And that is why the Ninth Circuit panel in this case agreed that its "'hands are tied' with respect to binding precedent." App. 12a.

That is also why it makes no sense for this Court to wait for a circuit split on the important issues squarely presented in this case. Montana is not aware of any suit similar to this one in any other circuit. And if one ever materializes, the circuit courts' almost monolithic over-reading of *Raich* makes it unlikely any circuit will reach a different result. This case presents a unique and timely opportunity for this Court to rectify the federalism imbalance that has arisen in the wake of *Raich*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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 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.

DATED this 18th day of October, 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,	CV 09-147-M-DWM-JCL
Plaintiffs,	ORDER
vs.	
ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,	
Defendants.	

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

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[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.

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[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

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[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 91995), *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

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[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

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[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

Relevant Statutory Provisions

Mont. Code Ann. § 30-20-104 provides:

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.

Mont. Code Ann. § 30-20-106 provides:

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.

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18 U.S.C. § 922(a)(1) provides:

18 U.S.C. § 922 – Unlawful acts

(a) It shall be unlawful –

(1) for any person –

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or

receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

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18 U.S.C. § 923(a) provides in relevant part:

18 U.S.C. § 923 – Licensing

(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.

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26 U.S.C. § 5841 provides in relevant part:

26 U.S.C. § 5841 – Registration of firearms

(a) Central registry

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

(1) identification of the firearm;

(2) date of registration; and

(3) identification and address of person entitled to possession of the firearm.

(b) By whom registered

Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) How registered

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

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26 U.S.C. § 5842(a) provides:

26 U.S.C. § 5842 – Identification of firearms

(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.

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26 U.S.C. § 5843 provides:

26 U.S.C. § 5843 – Records and returns

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.