

ALEXANDER K. HAAS  
U.S. Department of Justice  
P.O. Box 883  
Washington, D.C. 20044  
950 Pennsylvania Ave., N.W. – Ste. 2200C  
Washington, D.C. 20530  
Tel. (202) 307-3937 – Fax (202) 353-3880  
[alexander.haas@usdoj.gov](mailto:alexander.haas@usdoj.gov)

*Attorney for Federal Defendant*

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

---

<b>MONTANA SHOOTING SPORTS</b>	)	
<b>ASSOCIATION, et. al.,</b>	)	<b>09-CV-147-DWM-JLC</b>
	)	
<b>Plaintiffs,</b>	)	
	)	<b>Memorandum in Support of</b>
	)	<b>Defendant's Motion To</b>
	)	<b>Dismiss</b>
<b>v.</b>	)	
	)	
<b>ERIC H. HOLDER, Jr.</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

---

## INTRODUCTION

On October 1, 2009, the recently enacted Montana Firearms Freedom Act (MFFA or Act), *see* Mont. Rev. Code § 30-20-101, *et. seq.*, took effect. The MFFA declares that firearms, firearms accessories and ammunition made and sold within Montana are not subject to Federal regulation. Plaintiffs—one individual and two organizations (the Montana Shooting Sports Association and the Second Amendment Foundation)—filed this suit seeking a declaration that they can manufacture firearms within the State of Montana under the MFFA without complying with applicable Federal firearms laws. Plaintiffs seek to enjoin the United States from prosecuting any action under those laws against citizens of Montana acting in compliance with the MFFA. For several independent reasons, the Court cannot grant the requested relief and, instead, should dismiss this action.

First, binding precedent establishes that Plaintiffs lack standing to make a pre-enforcement challenge to the conflict between the MFFA and the Federal firearms laws because they have not established an imminent, credible threat of prosecution. Second, even if Plaintiffs could establish standing, they have not shown that subject matter jurisdiction *and* a valid waiver of sovereign immunity exists. Without both, this Court must dismiss this action for lack of jurisdiction. Finally, even if the Court were to

consider the merits of the suit, binding Supreme Court and Ninth Circuit precedent (as well as a prior ruling of this Court) establish that Congress' enactment of the Federal firearms laws, which include licensing, recordkeeping, and marking requirements from which the State seeks to exempt its citizens, are a valid exercise of Congress' Commerce power under the Constitution. As a result, to the extent any direct conflict exists between those Federal firearms laws and the MFFA, Federal law prevails under the Supremacy Clause of the U.S. Constitution, meaning that Plaintiffs fail to state a claim upon which relief may be granted. Dismissal of the Amended Complaint is the only proper result.

## **STATUTORY & REGULATORY BACKGROUND**

### **A. The National Firearms Act**

Congress enacted the National Firearms Act (NFA) in 1934 to require parties manufacturing or transferring “firearms”<sup>1</sup> to submit an application for such transactions and thereby impose taxation on them. *See* 26 U.S.C. §§ 5811-22. The NFA also requires the registration of such firearms. 26 U.S.C. § 5841. Congress sought to target “lethal weapons . . . [that] could

---

<sup>1</sup> The NFA defines “firearm” to include a shotgun having a barrel length of less than 18 inches or a weapon made from a shotgun with an overall length of less than 26 inches, a rifle having a barrel length of less than 16 inches or a weapon made from a rifle with an overall length of less than 26 inches, a machinegun, a silencer, and a destructive device; it excludes an antique firearm from the definition. 26 U.S.C. § 5845.

be used readily and efficiently by criminals or gangsters.” H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), 1954 U.S.C.C.A.N. 4025, 4542.

**B. The Gun Control Act**

Congress enacted the Gun Control Act of 1968 (GCA), 18 U.S.C. §§ 921 *et seq.*, as amended, to: “(1) regulate more effectively interstate commerce in firearms so as to reduce the likelihood that they fall into the hands of the lawless or those who might misuse them; (2) assist the States and their political subdivisions to enforce their firearms control laws and ordinances; and (3) help combat the skyrocketing increases in the incidence of serious crime in the United States.” S. Rep. No. 1866, 89th Cong., 2d Sess. 1 (1966). Congress included licensing provisions to strengthen Federal controls over interstate and foreign commerce in firearms to better assist State regulation of firearms traffic within State borders. Congress added recordkeeping requirements to help ensure that prohibited persons did not obtain firearms. Finally, Congress included marking requirements, *e.g.*, serial numbers, to create a chain of custody and thereby “combat crime” and “assist” law enforcement. *United States v. Mobley*, 956 F.2d 450, 454 (3d Cir. 1992). Congress granted ATF the authority to investigate criminal and regulatory violations of both the NFA and GCA. 28 U.S.C. § 599A; *see also* 28 C.F.R. § 0.130.

## 1. Licensing

Under the GCA, “[n]o person shall engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing firearms ammunition, until he has filed an application with and received a license to do so from the Attorney General.” 18 U.S.C. § 923(a); 18 U.S.C. § 921(a)(21) (defining “engaged in the business”). Moreover, it is “unlawful for any person 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.” 18 U.S.C. § 922(a)(1)(A).

The licensing process begins when the applicant submits to the National Licensing Center ATF Form 7, including a photograph and fingerprints, and a fee for each location in which the applicant intends to do business. *See* 27 C.F.R. § 478.41; 18 U.S.C. § 923(a); *see also* 27 C.F.R. § 478.50. Approval of an application is required if the applicant meets statutory requirements. *See* 18 U.S.C. § 923(d)(1)(a)-(g). The Attorney General must notify the chief law enforcement officer in the State or local jurisdiction of the names and addresses of all licensees in that State. *Id.* § 923(l).

## 2. Recordkeeping

Federal law requires FFLs to maintain records of importation, production, shipment, receipt, sale, or other disposition of firearms at their place of business for such duration and in such form as the Attorney General prescribes. 18 U.S.C. § 923(g)(1)(A); 27 C.F.R. §§ 478.121-25. The specific reporting requirements depend on the type of license held. *See* 27 C.F.R. §§ 478.122(a) (importing requirements); 478.123(a) (manufacturing requirements); 478.125(e) (dealer requirements); 478.125(f) (licensed collector requirements). Most significantly, licensed importers, manufacturers, and dealers are prohibited from selling or otherwise disposing of any firearm to an unlicensed person without completing ATF Form 4473, *i.e.*, a Firearms Transaction Record. 27 C.F.R. § 478.124. Form 4473 includes, among other things, the purchaser's name, date and place of birth, and residence address, and a certification from the purchaser that he is not a prohibited person. *Id.* § 478.124(c). Before making any over-the-counter firearms transaction, the FFL must verify the purchaser's identity and conduct a background check through the National Instant Criminal Background Check System (NICS). 18 U.S.C. § 922(t); 27 C.F.R. §§ 478.102, 478.124(c).

In addition, FFL records must be available at the business premises for annual ATF compliance inspections. *See* 27 C.F.R. § 478.121(b). FFLs also must report the theft or loss of any firearm to both ATF and the local authorities and are obligated to respond after receiving a request for information concerning the disposition of a firearm in criminal investigations. 18 U.S.C. § 923(g)(6) & (7). These recordkeeping requirements enable ATF to carry out one of the GCA's principal purposes—assisting State, local, and foreign law enforcement officials in tracing firearms used in the commission of crimes. *See* S. Rep. No. 1866, 89th Cong., 2d Sess. 1 (1966).

### **3. Markings**

Federal law requires that each firearm imported or manufactured be identified by means of a serial number engraved, stamped, or cast on the receiver or frame of the weapon. 18 U.S.C. § 923(i). FFLs are also required to mark the specific model of the firearm, caliber or gauge, the FFL's name or abbreviation, and the FFL's geographic location. 27 C.F.R. § 478.92(a)(1). A licensed importer or manufacturer must therefore place its own serial number or other required markings on each firearm even if another manufacturer marked the firearm.

### **C. The Montana Firearms Freedom Act**

Citing the Second, Ninth and Tenth Amendments of the U.S. Constitution as well as Montana's Constitution, the Montana Firearms Freedom Act (MFFA) 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 . . . [because] those items have not traveled in interstate commerce." MFFA § 4, attached hereto. These items must be "manufactured without the inclusion of any significant parts imported from another state" and must have the "words 'Made in Montana' clearly stamped on a central metallic part." *Id.* § 6. However, the MFFA—by its own terms—anticipates the movement of firearms accessories throughout the country: "[f]irearms 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." *Id.* § 4.

### **FACTUAL BACKGROUND**

On July 16, 2009, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) sent an open letter to all FFLs in Montana explaining that because the MFFA "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.” As such, all firearms manufactured by a licensee must still be properly marked and all record keeping and background check requirements remained in effect. *See* July 16, 2009 Letter, attached to Amended Complaint.

In August 2009, the ATF field office in Billings, Montana received three similar letters stating the authors’ desire to manufacture firearms, accessories, or ammunition consistent with the MFFA. Specifically, the letters asked whether it was permissible under Federal law to either manufacture items solely for personal use in Montana, or manufacture items for sale to others only within Montana. By letters dated September 29, 2009, ATF responded that the manufacture of firearms, accessories, or ammunition for personal use does *not* generally require a license under the Federal firearms laws. ATF cautioned, however, that if the firearm was of a type defined in the NFA, an ATF Form 1 must be submitted and ATF must issue an approval before manufacture begins. As for the manufacture of firearms or ammunition for sale to others, the ATF letter stated that a license was required pursuant to the GCA. The letters noted that the unlicensed manufacturing of firearms could lead to the “forfeiture of such items and

potential criminal prosecution” and reiterated that the Federal firearms laws continued to apply despite the passage of the MFFA. *See* September 29, 2009 Letter, attached to Amended Complaint.

## ARGUMENT

### **I. Because Plaintiffs Fail To Establish A Credible and Imminent Threat of Prosecution, They Lack Standing to Bring This Pre-Enforcement Challenge**

Under the Constitution, Federal courts are courts of limited jurisdiction confined “to adjudicating actual ‘cases’ and ‘controversies.’” *Allen v. Wright*, 468 U.S. 737, 750 (1984). The standing doctrine “is an essential and unchanging part of the case-or-controversy requirement.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Hodgkins v. Holder*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 26443 (D.D.C. Jan. 5, 2010) (dismissing on standing and venue grounds pre-enforcement challenges to certain Federal gun control restrictions). “As the parties invoking federal jurisdiction, plaintiffs bear the burden of establishing their standing to sue.” *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (“*San Diego County*”).

To have standing, the alleged injury must be “concrete” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95,

101-02 (1983)). This “imminence requirement ensures that courts do not entertain suits based on speculative or hypothetical harms.” *Lujan*, 504 U.S. at 564. In the context of a pre-enforcement challenge to a criminal statute, a plaintiff must “allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute,” and demonstrate a “credible threat of prosecution” that is more than “speculative” to establish standing. *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979). Thus, absent a credible threat of prosecution, a bare intention to violate Federal law would not establish standing. *See id.*

Ninth Circuit precedent squarely establishes that Plaintiffs here lack standing because they ask this Court to address the facial conflict between the Federal firearms laws and the MFFA. In *San Diego County*, plaintiffs, pointing to the existence of a Federal law to which they objected, challenged a ban on certain semiautomatic assault weapons. 98 F.3d at 1121. The Ninth Circuit rejected their pre-enforcement challenge on standing grounds because the “mere existence” of Federal law is “not sufficient to create a case or controversy within the meaning of Article III.” *Id.* at 1126; *see also Thomas v. Anchorage Equal Rights Comm.*, 220 F.3d 1134, 1139 (9th Cir. 2000). Like Plaintiffs here, the *San Diego County* plaintiffs claimed that

they “intend[ed] to engage in conduct beyond Congress’s authority to regulate under the Commerce Clause, but proscribed by” Federal firearms laws, and argued they “should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.” 98 F.3d at 1126. But the Ninth Circuit reasoned that “plaintiffs must show a ‘*genuine* threat of *imminent* prosecution’” to have standing, and that the “‘mere possibility of criminal sanctions applying does not of itself create a case or controversy.’” *Id.* at 1126-27 (emphases in original); *see also id.* at 1127-28 (noting the lack of “even a general threat against them” and no threat of “arrest, prosecution or incarceration”).

Here, the Plaintiffs’ allegations suffer from deficiencies identical to those the Ninth Circuit found legally insufficient to confer standing in *San Diego County*. The individual plaintiff, Mr. Marbut, cites his “desire[] to manufacture and sell small arms and ... ammunition per the Montana Firearms Freedom Act” but that he cannot “without fear of federal criminal prosecution and/or civil sanctions, including fines and/or forfeiture.” *See* Amended Complaint (Am. Compl.) ¶¶ 3, 14; *see also id.* ¶ 19 (referencing the “threat of federal civil action and/or criminal prosecution”). “In evaluating the genuineness of a claimed threat of prosecution, [courts] look to whether the plaintiffs have articulated a ‘concrete plan’ to violate the law

in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute.” *Thomas*, 220 F.3d at 1139. As in *San Diego County*, however, Plaintiffs “‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* that some day will be—do not support a finding of the ‘actual or imminent’ injury . . . require[d].” 98 F.3d at 1127.

By attaching the ATF’s correspondence, Plaintiff Marbut presumably argues he has been sufficiently threatened with prosecution. But “a *general* threat of prosecution is not enough,” nor is the general presumption that the Government will enforce criminal laws. *San Diego County*, 98 F.3d at 1127 (emphasis added). The ATF open letter was not addressed specifically to Plaintiffs and provided guidance to all Montana licensees on their continuing legal obligations notwithstanding the MFFA’s passage. The subsequent letter, responding to Mr. Marbut’s own inquiry, stated that “any unlicensed manufacturing of firearms or ammunition for sale or resale . . . is a violation of Federal law and could lead to the forfeiture of such items and *potential* criminal prosecution.” September 29 Letter at 1 (emphasis added). But there was no specific threat to prosecute Mr. Marbut for any particular act at any particular time or place. *See National Rifle Ass’n v. Magaw*, 132 F.3d

272, 293-94 (6th Cir. 1997) (holding 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”). *Accord Kegler v. U.S. Dept. of Justice*, 436 F. Supp. 2d 1204, 1212-19 (D. Wyo. 2006) (rejecting pre-enforcement challenge based on ATF letters due to lack of standing); *Crooker v. Magaw*, 41 F. Supp. 2d 87, 92 (D. Mass. 1999) (holding that plaintiff, who solicited and received a written ATF opinion, did not have standing). Because Plaintiff Marbut simply stated his desire possibly to take actions that might be deemed to violate the GCA, he has not taken any “acts necessary” to prove the requisite injury and thus has “failed to show the high degree of immediacy that is necessary under these circumstances.” *Id.*

The organizational Plaintiffs’—the Montana Shooting Sports Association and the Second Amendment Foundation—claims for standing fare no better than those of Plaintiff Marbut. As the Ninth Circuit has made clear when considering organizational standing claims on behalf of members:

An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 181 (2000); *see also National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 848 (9th Cir. 2002) (stating same). Here, because the members of these organizations lack standing to sue in their own right, for reasons identical to those of Plaintiff Marbut, the organizational plaintiffs cannot satisfy the first prong of the standing analysis.<sup>2</sup>

**II. Even If Plaintiffs Had Standing, They Have Not Established Both A Valid Jurisdictional Basis And A Waiver of Sovereign Immunity For This Suit.**

As with standing, it is Plaintiffs' burden to establish that this Court has subject matter jurisdiction over this suit, *see Kootenai Canyon Ranch, Inc. v. U.S. Forest Service*, 338 F. Supp. 2d 1129, 1131 (D. Mont. 2004) (Molloy, J.), and that a waiver of sovereign immunity exists. *See West v. Federal Aviation Admin.*, 830 F.2d 1044, 1046 (9th Cir. 1987). Because Plaintiffs fail to establish both prerequisites to suit, the Amended Complaint

---

<sup>2</sup> To the extent that Plaintiffs assert standing resulting from economic harm caused by the Federal firearms laws, such a claim would be wholly speculative and would appear to conflict with the character of the Complaint. *See* Compl. ¶ 9 (noting that the MFFA is "primarily political"). While direct and tangible actual economic harm can take the standing analysis outside the *San Diego County* analysis, *see National Audubon Society*, 307 F.3d at 855, Plaintiffs have no existing businesses, or even concrete plans to create such business, that are harmed as a result of the application of Federal firearms laws. There is no purely intrastate firearms market in this country and no allegation by Plaintiffs concerning such a market. As a result, any claimed economic harm asserted by Plaintiffs would be speculative and hypothetical and could therefore not serve as a basis for Article III standing.

must be dismissed. *See Arford v. United States*, 934 F.2d 229, 231 (9th Cir. 1991); *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 & n.2 (9th Cir. 2007).

**A. Section 925A Of Title 18 Does Not, On Its Face, Confer Subject Matter Jurisdiction**

Plaintiffs claim that 18 U.S.C. § 925A(2) “expressly confer[s]” jurisdiction, *see* Am. Compl. ¶ 6, but they are mistaken. Section 925A provides in relevant part that:

Any person denied a firearm *pursuant to subsection (s) or (t) of section 922---* (2) who was not prohibited from receipt of a firearm . . . may bring an action . . . against the United States  
.....

18 U.S.C. § 925A (emphasis added). Thus, a necessary antecedent to invoke Section 925A is that a person is denied a firearm “pursuant to subsection (s) or (t) of section 922,” *i.e.*, firearms denials resulting from NICS background checks. Because Plaintiffs have not alleged that any attempted purchase of a firearm has been denied as a result of a NICS background check, Section 925A cannot create jurisdiction by its express terms.

**B. The APA Does Not Confer Subject Matter Jurisdiction**

Plaintiffs cite to 5 U.S.C. § 704 as conferring jurisdiction. *See* Am. Compl. ¶ 6. The Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et.*

*seq.*, provides for judicial review only of “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. Judicial review under the APA “is expressly conditioned, under § 704, on the existence of a ‘final’ agency action.” *Gros Ventre Tribe v. United States*, 344 F. Supp. 2d 1221, 1226 (D. Mont. 2004) (Molloy, J.) (holding that lack of final agency action barred the APA’s application). For agency action to be final and reviewable under the APA, it must: (1) “mark the consummation of the agency’s decision-making process – it must not be of a merely tentative or interlocutory nature;” and (2) “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); *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). *Accord Hecla Mining Co. v. EPA*, 12 F.3d 164, 165 (9th Cir. 1993) (holding that “[f]inality of an agency action turns on whether the action was a definitive statement of the agency’s position, had a direct and immediate effect on the day-to-day business of the complaining party, had the status of law[,], and whether immediate compliance with the decision is expected.”) (citations omitted).

Courts will not, however, review non-final agency actions because “[n]o one is entitled to judicial relief for a supposed or threatened injury

until the prescribed administrative remedy is exhausted.” *Bakersfield City Sch. Dist. v. Boyer*, 610 F.2d 621, 626 (9th Cir. 1979). Here, it is undisputed that Plaintiffs have not submitted the necessary forms and other paperwork required under Federal law to become licensed manufacturers of firearms. Because Plaintiffs have not engaged ATF in that effort, it should be apparent that Plaintiffs have not exhausted their administrative remedies. Thus, unless Plaintiffs can show that ATF’s July 16th and September 29th letters—the only administrative actions by ATF that Plaintiffs cite—qualify as final agency action, the APA would not confer subject matter jurisdiction and this case would therefore need to be dismissed. *See City of San Diego v. Whitman*, 242 F.3d 1097, 1101-02 (9th Cir. 2001) (vacating a decision against the EPA because the district court lacked subject matter jurisdiction when there was no final agency action for judicial review).

Under the *Bennett* test’s first prong, ATF’s correspondence in this case does not mark the consummation of ATF’s decision-making process. Rather, an agency’s decision-making process becomes reviewable when the agency action is the product of a reasoned and deliberate decision *intended to change the status quo*. Thus, in *Air California v. United States Department of Transportation*, 654 F.2d 616, 620-21 (9th Cir. 1981), the FAA sent a letter to an individual constituent indicating a violation of

Federal statutes governing the use of FAA-administered Federal funds and expressed the FAA's intention to pursue sanctions if the constituent did not comply with Federal law. *Id.* When the individual sued, the Ninth Circuit found that the FAA letter was not final agency action because it represented a mere interpretation of existing law, not a new pronouncement of additional legal obligations or consequences that would mark the consummation of the agency's decision-making process. *See id.*

Under this standard, ATF's letters would not constitute a new or onerous interpretation of the Federal firearms laws; rather, the letters merely restate requirements under existing Federal firearms laws and the well-settled principle that under the Supremacy Clause of the Constitution Federal law preempts State laws where a conflict exists. ATF's letters thus seek only to preserve the status quo by offering guidance to assist Plaintiffs and Montana FFLs in meeting their obligations under Federal law.

ATF's letters also fail to satisfy *Bennett's* second prong because they express a general restatement of law that does not impose an obligation, deny a right, or fix some legal relationship. *See Oregon Natural Desert Ass'n v. United States Forest Serv.*, 465 F.3d 977, 986-87 (9th Cir. 2006) (affirming that the second prong of *Bennett* is satisfied if the agency action has a direct and immediate effect on day-to-day business, carries the status

of law, and commands immediate compliance). “Even final agency rules may not be fit for judicial review unless the rule has been concretely applied to the plaintiff[s].” *Association of American Medical Colleges v. United States*, 217 F.3d 770, 780 (9th Cir. 2000). The ATF letters do not direct recipients to undertake any new or additional obligations; the letters merely remind the recipients of their obligations under Federal law. Nor is there a direct or immediate effect *upon the Plaintiffs* specifically because Plaintiff Marbut’s own inquiry prompted the September 29th letter. *See City of San Diego*, 242 F.3d at 1102 (finding the failure to satisfy the second *Bennett* prong where the “EPA’s letter simply responds to the City’s request for ‘assistance’ on the issue of whether it can expect the EPA to apply [certain] conditions to its application for renewal of its . . . permit”). Because Plaintiffs cannot satisfy either prong of the *Bennett* test, they cannot show the requisite final agency action, consequently, the Court lacks subject matter jurisdiction under the APA.

**C. Section 1331, Though Providing Subject Matter Jurisdiction, Does Not Waive Sovereign Immunity**

“It is well settled that the United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued.” *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985). As a result, courts cannot award relief against officials of the United

States unless a statute expressly waives the Federal Government's sovereign immunity. *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001) (“suits against officials of the United States . . . in their official capacity are barred if there has been no waiver [of sovereign immunity]”). The terms of the United States' waiver of sovereign immunity “is an important limitation on the subject matter jurisdiction of federal courts.” *See Dunn & Black*, 492 F.3d at 1088 & nn.2-3 (quoting *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006)). Absent an explicit waiver, a court lacks subject matter jurisdiction over any claim against the United States. *See id.*

The only valid jurisdictional statute Plaintiffs cite is Federal question jurisdiction under 28 U.S.C. § 1331, which grants Federal courts jurisdiction over cases arising under the Constitution or Federal law. But Section 1331 does not waive sovereign immunity of the United States, as the Ninth Circuit has clearly held. *See id.* Indeed, Section 1331 could not “be construed as authorizing suits of this character against the United States, else the exemption of sovereign immunity would become meaningless.” *Id.* (citation omitted). Because Plaintiffs' sole valid basis for establishing subject matter jurisdiction does not waive sovereign immunity, the United States is immune from suit and this Court should dismiss this action on jurisdictional grounds. *See Pit River Home & Agr. Co-op. Ass'n v. United*

*States*, 30 F.3d 1088, 1100 (9th Cir. 1994) (“sovereign immunity is a jurisdictional defect, . . . [it] may be asserted by the parties at any time or by the court sua sponte”). *See also* Fed. R. Civ. P. 12(h)(3).

**III. Because The Constitution Vests Congress With The Power Under The Commerce Clause to Regulate Interstate and Intrastate Manufacture and Sale of Firearms, Those Federal Laws Preempt Conflicting State Laws, Such As The MFFA, By Operation of the Supremacy Clause.**

**A. Congress has Authority to Regulate the Interstate and Intrastate Manufacture and Sale of Firearms.**

Plaintiffs ask the Court to declare that the “United States Constitution confers no power on Congress to regulate the special rights and activities contemplated by the MFFA.” *See* Am. Compl., Prayer for Relief. But the Supreme Court and Ninth Circuit have repeatedly held that even purely *intrastate* activities, such as those the MFFA purports to exempt from Federal law, do affect *interstate* commerce and thus are within Congress’ power to regulate. As a result, even if Plaintiffs had standing and jurisdiction existed, Plaintiffs’ Amended Complaint fails to state a claim and must be dismissed.

In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court squarely held that the Commerce Clause authority included the power to prohibit the local cultivation and use of marijuana in compliance with California law. The Court reiterated the “three general categories of regulation in which

Congress is authorized to engage under its commerce power:” (i) the channels of interstate commerce; (ii) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (iii) “activities that substantially affect interstate commerce.” *Id.* at 17. The *Raich* Court stated that “case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.” *Id.* (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)). When “a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.” *Id.* Moreover, courts “need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.” *Id.* at 22. The Court held that the Controlled Substances Act “regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of any article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.” *Id.* at 26.

*Raich*’s holding applies here. Both the GCA and NFA “regulate[] the production [and] distribution ... of commodities for which there is an

established, and lucrative interstate market.” *Id.* Moreover, regulating the “intrastate possession or manufacture” of an article of commerce such as firearms “is a rational . . . means of regulating commerce in that product.”

*Id.* Congress enacted the GCA because it was concerned with keeping 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, 2113-14.

Indeed, 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; *see also Scarborough v. United States*, 431 U.S. 563, 572 n.10 (1977) (noting that the Omnibus Crime Control Act (the GCA’s predecessor) contained congressional findings “that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes . . . a burden on commerce

or threat affecting the free flow of commerce.”); *Navegar, Inc. v. United States*, 192 F.3d 1050, 1055 (D.C. Cir. 1999). To achieve this goal, Congress put in place a comprehensive scheme to regulate the movement of firearms in commerce. *See United States v. Mobley*, 956 F.2d 450, 453 (3d Cir.1992) (“By channeling the sales of firearms through federally licensed dealers, the Act sought to ‘insure that, in the course of sales or other dispositions by these dealers, weapons could not be obtained by individuals whose possession of them would be contrary to the public interest.’”). Thus, as with the Controlled Substances Act, the Federal firearms laws are “comprehensive legislation to regulate the interstate market in a fungible commodity.” *Raich*, 545 U.S. at 22.

If anything, Plaintiffs’ desired activities—manufacturing and selling firearms, firearm accessories, and ammunition to others, *see* Am. Compl. ¶¶ 10, 11—are much closer to “affecting” commerce than those in *Raich* where the plaintiff wanted to locally grow marijuana for her own consumption. The activities at issue here obviously have some commercial character. *See id.* ¶ 9. Indeed, citing the MFFA, Plaintiffs seek to manufacture and sell firearms to others without any of the requisite Federal controls—no

recordkeeping requirements, no marking requirements (including serial numbers), and no background checks.<sup>3</sup>

If any doubt remained, the Ninth Circuit has applied *Raich* to uphold the Federal firearms laws. In *United States v. Stewart*, the defendant was convicted of violating 18 U.S.C. § 922(o), which generally prohibits the possession of post-1986 machineguns, and appealed his conviction arguing that section 922(o) was an invalid exercise of Congress' commerce power. 451 F.3d 1071, 1073 (9th Cir. 2006). Stewart argued that "his possession falls within a subgroup of purely intrastate activities that can easily be cordoned off from those Congress may constitutionally control." *Id.* at 1074. Citing *Raich*, the Ninth Circuit disagreed and concluded that "[g]uns, like drugs, are regulated by a detailed and comprehensive statutory regime designed to protect individual firearm ownership while supporting 'Federal,

---

<sup>3</sup> It would be unreasonable to expect that Montana will remain an island unto itself in respect to its "made in Montana" firearms. In fact, the MFFA specifically provides "[f]irearms accessories that are *imported into Montana from another state and that are subject to federal regulation . . . do not subject a firearm to federal regulation . . . because they are attached to or used in conjunction with a firearm in Montana.*" (emphasis added). Moreover, there is nothing to prevent a buyer "in Montana" from taking the firearm outside of the state. Once these firearms cross state lines, and indeed while they remain "in Montana," there is no way to trace them should they be used in a crime. Finally, if other states enact similar legislation each state will have its own set of "exemptions" for firearms that may, or may not, stay within their borders. This is exactly the type of "aggregate" effect to which *Raich* referred. See 545 U.S. at 22. Indeed, Tennessee has already enacted such a law and Utah is considering similar legislation. That a particular "made in Montana" firearm is manufactured, sold and may remain in perpetuity in the state does not vitiate Congress' Commerce Clause authority. "That the regulation ensnares some purely intrastate activity is of no moment." *Id.*

State and local law enforcement officials in their fight against crime and violence.” *Id.* at 1076. As a result, the Ninth Circuit held that Congress had a “rational basis to conclude that federal regulation of intrastate incidents of transfer and possession [of firearms] is essential to effective control of the interstate incidents of such traffic.” *Id.* at 1077. Moreover, this Court recognized that “Congress’ power under the Commerce Clause is almost unlimited where the prohibited product has significant economic value such as with drugs or guns.” *See United States v. Rothacher*, 442 F. Supp. 2d 999, 1007 (D. Mont. 2006) (Molloy, J.). Plaintiffs therefore ask this Court for relief it simply cannot grant after *Raich*, *Stewart*, and *Rothacher* because the Federal firearms laws are a valid exercise of Federal power that, shown below, operate to preempt the MFFA to the extent that a conflict exists. *Raich*, 545 U.S. at 29 (“state action cannot circumscribe Congress’ plenary commerce power”).

**B. To the Extent the MFFA Conflicts with Federal Law, the Supremacy Clause Preempts the MFFA.**

To the extent that the MFFA conflicts with Federal law by purporting to allow Montana citizens to “opt out of” the GCA and NFA’s requirements, it is hornbook law that Federal law prevails under the Supremacy Clause. *See* U.S. Const., art. VI, cl.2. “The 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; *see also* 18 U.S.C. § 927 (providing that “a direct and positive conflict between [Federal law] and the law of the State so that the two cannot be reconciled or consistently stand together” results in the preemption of State law).

State and Federal law directly 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) (internal citations and quotation marks omitted). Here, it would be impossible for a citizen of Montana to be both subjected to the Federal firearms laws and excused from those laws, as the MFFA purports to do. Additionally, the MFFA stands as an obstacle to Congress’ express purpose in enacting the GCA: aiding the States by providing “adequate Federal control” over commerce in firearms and those engaging in the business of dealing, manufacturing and importing firearms. Because the MFFA conflicts with the Federal firearms laws, the MFFA is preempted. *See Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1039 (9th Cir. 2007) (the Supremacy Clause “invalidates state laws that ‘interfere with, or are contrary to,’ federal law,”); *Rothacher*, 442 F.

Supp. 2d at 1007 (“the primacy of the Supremacy Clause is such that it authorizes congressional commerce power to override state law”).

#### **IV. Plaintiffs Cannot Establish A Tenth Amendment Violation**

Where Congress is acting within its constitutional powers, Congress may “impose its will on the States” without violating the Tenth Amendment. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *see also New York v. United States*, 505 U.S. 144, 156 (1992) (“[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States”). Thus, when Congress acts pursuant to valid Commerce Clause power, no Tenth Amendment violation can be established. *See Raich v. Gonzales*, 500 F.3d 850, 867 (9th Cir. 2007) (“[A] power granted to Congress trumps a competing claim based on a state’s police powers.”). Indeed, the Supreme Court “long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States’ exercise of their police powers.” *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 291 (1981); *United States v. Collins*, 61 F.3d 1379, 1384 (9th Cir. 1995) (“Because [18 U.S.C. § 922(g)(1)] is a valid exercise of Congress’ commerce authority, we conclude that the statute does not violate the Tenth

Amendment.”); *Columbia River Gorge United-Protecting People & Property v. Yeutter*, 960 F.2d 110, 114 (9th Cir. 1992) (statute does not violate the Tenth Amendment when it does not violate the Commerce Clause). Here, because the Federal firearms laws are a valid exercise of Congress’ power to regulate commerce, *see supra* Part III, Plaintiffs cannot establish a Tenth Amendment violation.

### CONCLUSION

For the foregoing reasons, the Court should dismiss the Amended Complaint either for lack of jurisdiction or for failure to state a claim under Rules 12(b)(1) and 12(b)(6), respectively.

Dated: January 19, 2010

Respectfully Submitted,

TONY WEST  
Assistant Attorney General

MICHAEL COTTER  
United States Attorney

SANDRA SCHRAIBMAN  
Assistant Director, Federal Programs Br.

/s/ Alexander K. Haas  
ALEXANDER K. HAAS (CA 220932)  
U.S. DEPARTMENT OF JUSTICE  
P.O. BOX 883  
WASHINGTON, D.C. 20044  
Tel. (202) 307-3937 – Fax (202) 353-3880  
[alexander.haas@usdoj.gov](mailto:alexander.haas@usdoj.gov)

OF COUNSEL:

MELISSA ANDERSON, ESQ.  
BUEARU OF ALCOHOL, TOBACCO, FIREARMS  
& EXPLOSIVES  
99 New York Avenue, NE  
Washington, D.C. 20226  
(202) 648-7056  
DC Bar # 472274

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Local Civil Rule 7.1(d)(2)(E), I certify that this memorandum is 6,476 words and thus complies with the word limit listed in Rule 7.1(d)(2)(A).

/s/ Alexander K. Haas  
ALEXANDER K. HAAS

### **CERTIFICATE OF SERVICE**

I hereby certify that, on January 19, 2010, a copy of the foregoing document was served on counsel of record by filing it though the Court's CM/ECF system.

I also certify that, on January 19, 2010, a copy of the foregoing document was sent by certified mail and electronically to:

Attorney General Steve Bullock  
Office of the Attorney General  
Attn: Chris D. Tweeten, Chief Civil Counsel  
Justice Building, Third Floor  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
contactdoj@mt.gov

/s/ Alexander K. Haas  
ALEXANDER K. HAAS