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11 **IN THE UNITED STATES DISTRICT**
12 **COURT DISTRICT OF MONTANA**
13 **MISSOULA DIVISION**

14
15 MONTANA SHOOTING SPORTS)
16 ASSOCIATION, SECOND)
17 AMENDMENT FOUNDATION,)
18 Inc., and GARY MARBUT,)
19 Plaintiffs,) Civil Action No. 09-CV-00147-DWM-
20 vs.) JCL
21)
22) **AMICUS BRIEF OF THE**
23) **GOLDWATER INSTITUTE, 1 U.S.**
24) **CONGRESSMAN, 8 ARIZONA**
25) **SENATORS, 26 ARIZONA**
26) **REPRESENTATIVES, 2 ARIZONA**
27) **POLITICAL ORGANIZATIONS**
28) **AND 1 ARIZONA BOOK**
) **PUBLISHER OPPOSING**
) **DEFENDANT’S MOTION TO**
) **DISMISS**
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1 **Introduction**

2 This case does not involve a mere clash between state and federal law. It
3 involves the federal government’s effort to quash an exercise of state sovereignty
4 that directly serves the structural purpose of federalism in our compound
5 republic—the protection of individual liberty guaranteed by the Bill of Rights.
6 Such federal overreaching must be rejected if the vertical separation of powers
7 established by the letter and spirit of our Constitution means anything.
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9 **Argument**

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11 The Montana Firearms Freedom Act establishes a less restrictive regulatory
12 regime than federal law for intrastate firearms manufacturing and sales. (Motion
13 to Dismiss Memo., pp. 2-7.) The Act thereby facilitates the exercise of the
14 individual right to keep and bear arms under the Second Amendment by
15 promising to enhance the availability of firearms within the State of Montana. *See*
16 *generally District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). And when
17 coupled with the foregoing Second Amendment right, the personal right to engage
18 in firearms manufacturing and sales under the Act should be regarded as among
19 the rights reserved to the people under the Ninth Amendment. *Compare*
20 *Massachusetts v. Upton*, 466 U.S. 727, 737 (1984) (Stephens, J., concurring)
21 (observing that Ninth Amendment protects rights created by state law); *Acme, Inc.*
22 *v. Besson*, 10 F. Supp. 1, 6 (D. N.J. 1935) (indicating the “local, intimate, and
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1 close relationships of persons and property which arise in the processes of
2 manufacture” are protected by the Ninth Amendment); *Magill v. Brown*, 16 F.
3 Cas. 408, 428 (E.D. Pa. 1833) (observing “personal rights are protected by . . . the
4 9th amendment”) with *Slaby v. Fairbridge*, 3 F. Supp. 2d 22, 30 (D.D.C. 1998)
5 (observing “[t]he Ninth Amendment is not a source of substantive rights, *unless it*
6 *is coupled with the denial of other fundamental rights*”) (emphasis added) (citing
7 *United States v. Vital Health Products, Ltd.*, 786 F. Supp. 761, 777 (E.D. Wis.
8 1992), *aff’d United States v. LeBeau*, 985 F.2d 563 (7th Cir. 1992)). In short,
9 Montana has exercised its sovereign police powers to facilitate the ability of
10 individuals to exercise their enumerated constitutional rights within state
11 boundaries.

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16 None of the precedent cited by Defendant upholds federal preemption of
17 state laws that facilitate the intrastate exercise of *enumerated* constitutional rights.
18 This proceeding thus presents a case of first impression. Plaintiffs are therefore
19 entitled to fresh judicial scrutiny of the federal government’s asserted supremacy
20 over purely intrastate firearms manufacturing and sales. As discussed below, this
21 entitlement precludes granting Defendant’s Rule 12(b)(6) motion to dismiss.¹
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28 ¹ This brief does not address Defendant’s Rule 12(b)(1) motion.

1 **I. Defendant’s Rule 12(b)(6) motion to dismiss should be denied because**
2 **the “substantial affect” test does not apply to Plaintiffs’ cause of action.**

3 Under Fed. R. Civ. P. 8(a) and 12(b)(6), the court should construe the
4 Complaint in the light most favorable to Plaintiffs, assume that all well-pled facts
5 are true, and draw all reasonable inferences in favor of sustaining Plaintiffs’ cause
6 of action. *Barker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir.
7 2009). Applying this legal standard, the court should assume Plaintiffs will
8 engage in exclusively intrastate firearms manufacturing and sales activities under
9 the authority of the Montana Firearms Freedom Act. Such activities would not
10 involve “the use of the channels of interstate commerce” or “the instrumentalities
11 of interstate commerce, or persons or things in interstate commerce.” *Quoting*
12 *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Therefore, among the three
13 tests advanced by Defendant to determine whether federal regulation of intrastate
14 firearms manufacturing and sales activities falls within the scope of the
15 Commerce Clause, only the “substantial affect” test should be regarded as
16 contestable on the face of the pleadings pursuant to Fed. R. Civ. P. 8(a) and
17 12(b)(6). *Barker*, 584 F.3d at 824.

18 The “substantial affect” test, however, does not govern cases, such as this
19 one, that allege a direct clash between principles of state sovereignty and the
20 federal government’s asserted power to regulate intrastate activities. *Gonzales v.*
21 *Raich*, 545 U.S. 1, 39 (2003) (Scalia, J., concurring). This is because the
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1 “substantial affect” test determines whether the *Necessary and Proper Clause*
2 authorizes the federal regulation in question under the Commerce Clause. *Raich*,
3 545 U.S. at 22 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)); *id.* at 34-35
4 (Scalia, J., concurring). The “substantial affect” test, like the Necessary and
5 Proper Clause itself, cannot sustain exertions of federal power that are inconsistent
6 with the “letter and spirit of the constitution” or otherwise “prohibited.” *Id.* at 39
7 (Scalia, J. concurring) (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).
8 Where, as here, federal preemption is challenged as inconsistent with the “letter
9 and spirit of the constitution” or otherwise “prohibited,” the court must
10 independently analyze the text, structure and purpose of the constitution to
11 evaluate whether the exertion of federal power is within the scope of the
12 Necessary and Proper Clause. *Id.* (citing *Printz v. United States*, 521 U.S. 898
13 (1997); *New York v. United States*, 505 U.S. 144 (1992)). As discussed below,
14 this analysis precludes granting Defendant’s Rule 12(b)(6) motion to dismiss.
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16 **II. Defendant’s Rule 12(b)(6) motion to dismiss should be denied because**
17 **Plaintiffs’ claim that federal preemption of the Montana Firearms**
18 **Freedom Act violates the “letter and spirit of the constitution” is viable.**
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20 The letter and spirit of the constitution guarantees the preservation of state
21 sovereignty by requiring the maintenance of a “compound republic” that vertically
22 separates powers between the states and the federal government. *See* U.S. Const.
23 art. I, § 8 (enumerating congressional powers); *id.* art. I, § 10 (limiting powers of
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1 the states); *id.* art. IV, § 4 (guaranteeing states a republican form of government);
2 *id.* art. V (incorporating states and Congress into the amendment process); *id.* art.
3 VI (making federal law supreme); *id.* amend. X (reserving to states powers not
4 delegated); *id.* amend. XI (making states immune to suit in federal court); *Printz*,
5 521 U.S. at 921-23 (citing Federalist No. 51); *Lopez*, 514 U.S. at 552; *New York*,
6 505 U.S. at 187-88; *Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991). Moreover,
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8 by expressly reserving powers to the states or the people, the Tenth Amendment
9 substantively reinforces the letter and spirit of the constitution by prohibiting any
10 constitutional interpretation of the Necessary and Proper Clause that could
11 consolidate all governmental power in the federal government or otherwise render
12 states political non-entities. *Printz*, 521 U.S. at 923-24 (citing Federalist No. 33;
13 Lawson & Granger, *The “Proper” Scope of Federal Power: A Jurisdictional*
14 *Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 297-326, 330-333
15 (1993)).

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20 The constitution’s guarantee of a vertical separation of powers, of course, is
21 not an end-in-itself. *New York*, 505 U.S. at 181. The Founders intended for
22 federalism to prevent the abuse of power by diffusing concentrations of power.
23 *Id.* at 187-88 (observing the constitution “divides power among sovereigns and
24 among branches of government precisely so that we may resist the temptation to
25 concentrate power in one location as an expedient solution to the crisis of the
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1 day”); *Gregory*, 501 U.S. at 458. Consequently, the most fundamental purpose of
2 our federalist structure is to protect individual liberty. *Id.* at 181-82 (citing
3 Federalist No. 51; *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J.
4 dissenting); *Gregory*, 501 U.S. at 458). As held in *New York*:

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6 The Constitution does not protect the sovereignty of States for the
7 benefit of the States or state governments as abstract political entities,
8 or even for the benefit of the public officials governing the States.
9 To the contrary, the Constitution divides authority between federal
10 and state governments for the protection of individuals. State
11 sovereignty is not just an end in itself: ‘Rather, federalism secures to
12 citizens the liberties that derive from the diffusion of sovereign
13 power.’ ‘Just as the separation and independence of the coordinate
14 branches of the Federal Government serve to prevent the
15 accumulation of excessive power in any one branch, a healthy
16 balance of power between the States and the Federal Government
17 will reduce the risk of tyranny and abuse from either front.’

18 *Id.* The letter and spirit of the constitution thus requires our system of federalism
19 to protect individual liberty and to prohibit any effort to consolidate power in a
20 way that would undercut this basic structural purpose.

21 In the present case, federal preemption of the Montana Firearms Freedom
22 Act would not merely displace state law. Drawing every reasonable inference in
23 favor of Plaintiffs, such preemption would diminish individual liberty and
24 substantially restrict the opportunities Montanans would otherwise have to
25 exercise and enjoy their Second and Ninth Amendment rights. (Motion to
26 Dismiss Memo., pp. 2-7.) This is because it is reasonable to infer that Plaintiffs’
27 activities under the Act would result in greater availability of firearms to Plaintiffs
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1 and other Montanans than federal law allows. Of necessity, the Act would allow
2 more Montanans to exercise and enjoy their individual right to keep and bear arms
3 under the Second Amendment and their related personal right to manufacture and
4 sell firearms under the Ninth Amendment. Consequently, Plaintiffs' complaint
5 supports a reasonable inference that federal preemption of the Act would undercut
6 the fundamental structural purpose of preserving state sovereignty in our federalist
7 system—protecting individual liberty from the concentration of power in the
8 federal government.

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12 If, as held in *Printz*, it violates the “very principle of separate state
13 sovereignty” for Congress “to compromise the structural framework of dual
14 sovereignty,” 521 U.S. at 932, it would be a far greater violation of that principle
15 for Congress to prohibit state sovereignty from serving its basic structural purpose
16 of protecting individual liberty. Because federal preemption of the Montana
17 Firearms Freedom Act would do just that, Plaintiffs' cause of action should be
18 sustained. Simply put, when such structural principles are at issue, the judiciary
19 must not defer to congressional judgments about the scope of implied federal
20 power. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 895-
21 97 (4th Cir. 1999), *aff'd*, *United States v. Morrison*, 529 U.S. 598 (2000)
22 (observing “[t]he judiciary rightly resolves structural disputes”).
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1 **Conclusion**

2 Above and beyond the “great latitude” the states enjoy in the exercise of
3 their police powers over public health and safety, *Gonzales v. Oregon*, 546 U.S.
4 243, 270 (2006), our federalist system guarantees the states (and the people)
5 decentralized autonomy to experiment with heightened protections of individual
6 liberty. *Gregory*, 501 U.S. at 458; *see generally* William Brennan, *State*
7 *Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489
8 (1977). From this perspective, it is totally inconsistent with the letter and spirit of
9 the constitution for the federal government to claim the implied power to preempt
10 the Montana Firearms Freedom Act. For this reason, Defendants’ Rule 12(b)(6)
11 motion to dismiss should be denied.

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16 **RESPECTFULLY SUBMITTED** on this 9th day of April, 2010 by:

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CERTIFICATE OF COMPLIANCE WITH L.R. 7.1(D)(2)(E)

The undersigned certifies that this brief contains 1,766 words, excluding signatures, caption and certificates of service and compliance.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the following individuals by ECF this 9th day of April, 2010.

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