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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MONTANA SHOOTING SPORTS ASSOCIATION, et. al.,	
Plaintiffs,	**09-CV-147-DWM-JCL**
v.	**Reply Memorandum in Support of Defendant's Motion to Dismiss**
ERIC H. HOLDER, JR.,	
Defendant.	

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INTRODUCTION

Defendant submits this Reply to address arguments raised by plaintiffs Montana Shooting Sports Association, the Second Amendment Foundation, and Gary Marbut, as well as the eight amici that have filed statements in support of plaintiffs' position in this case.[1] Relying on principles of state sovereignty and federalism, plaintiffs and amici seek a declaration that plaintiffs can manufacture firearms pursuant to the Montana Firearms Freedom Act ("MFFA"), without complying with Federal licensing, record-keeping, and identification requirements. Nothing in plaintiffs' opposition to defendant's Motion to Dismiss or Second Amended Complaint, however, rectifies the jurisdictional and legal deficiencies that undermine their claims.[2]

While plaintiffs maintain that they are "threatened with . . . an actual injury traceable to the defendant," *see* Plaintiff's Opposition Brief ("Pl. Opp.") at 7

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[1] Amici participating in this suit include: the State of Montana; the Goldwater Institute, *et al.*; the States of Utah, Alabama, South Carolina, South Dakota, West Virginia, and Wyoming; the Weapons Collectors Society of Montana; the Gun Owners Foundation, *et al.*; the Paragon Foundation; the Center for Constitutional Jurisprudence; and various Montana Legislators.

[2] Plaintiffs amended their Complaint once, as of right, on December 14, 2009. This Amended Complaint served as the basis for defendant's Motion to Dismiss, filed on January 19, 2010. On April 9, 2010, plaintiffs amended their Complaint once more, without defendant's consent or leave of Court. Plaintiffs' opposition to defendant's Motion, filed on April 12, relied heavily on facts alleged for the first time in their Second Amended Complaint. Arguably, plaintiffs' Second Amended Complaint was not filed in accordance with Fed. R. Civ. P. 15(a), which states that a plaintiff may amend its pleading "once as a matter of course . . . (1) 21 days after serving it; *or* . . . (2) 21 days after service of a motion under 12(b). . . ." (emphasis added). In all other cases, a party may amend its pleading only with opposing counsel's consent or the Court's leave. *Id.*

(citing *Raich v. Gonzales*, 500 F.3d 850, 857 (9th Cir. 2007) ("*Raich II*")), they fail to pinpoint any credible or imminent threat of prosecution by the Federal government, and thus lack standing to challenge the conflict between the MFFA and Federal firearms laws. As discussed further below, plaintiffs' alleged economic harm, the loss of potential earnings from firearms manufactured and sold under the MFFA, is too speculative to confer standing.

Furthermore, plaintiffs have not shown that a valid waiver of sovereign immunity exists under the Administrative Procedure Act ("APA"), which permits challenges to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Plaintiffs point to a September 29, 2009 letter from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") addressing the relationship between the MFFA and Federal firearms laws. Because this letter provides an interpretation of existing law, it does not qualify as "final agency action," under § 704 of the APA. Plaintiffs have not established an entitlement to "non-statutory" review, as agency officials were not acting *ultra vires*, or beyond the scope of their statutory authority, when they explained the nature of plaintiffs' Federal obligations under existing law.

Plaintiffs fare no better on the merits. In fact, plaintiffs concede that this Court would have to overturn binding Ninth Circuit and Supreme Court precedent

— something this Court has no authority to do — to conclude that the Federal firearms laws at issue are beyond the scope of Congress's Commerce power in light of the MFFA. In the alternative, plaintiffs downplay or attempt to limit applicable legal authority regarding Congress's power to regulate an intrastate market for firearms. That authority makes clear that, to the extent any conflict exists between Federal firearms laws and the MFFA, Federal law prevails under the Supremacy Clause of the Constitution.

Amici in this suit did not respond to any of the jurisdictional issues addressed by the defendant in its Motion to Dismiss. Rather, their briefing emphasized plaintiffs' merits arguments under the Commerce Clause and further developed plaintiffs' Tenth, Second, and Ninth Amendment claims. Like the plaintiffs, amici fail to appreciate the binding precedent recognizing Federal authority to regulate an intrastate market in firearms and similarly disregard caselaw refuting their views of federalism and the right to bear arms. As plaintiffs and amici state, the MFFA is a "political statement." *See* State of Montana's Brief in Intervention ("Mont. Br.") at 5-6; Second Am. Compl. ¶ 10. It is in the political arena, through their elected senators and representatives, that Montana — and other States that have passed similar legislation — should direct their efforts to amend Federal gun control laws. As set forth in greater detail below, this Court

should dismiss plaintiffs' Complaint on jurisdictional grounds and for failure to state a claim upon which relief may be granted.

ARGUMENT

I. Plaintiffs Lack Standing to Bring this Pre-Enforcement Challenge Because They Fail to Establish a Credible and Imminent Threat of Prosecution and Suffer No Economic Harm.

A. Plaintiffs Do Not Face a Credible and Imminent Threat of Prosecution.

Plaintiffs allege that absent Federal firearm licensing, recording, and marking requirements, they could "immediately begin serving an anxious local marketplace" in firearms. Pl. Opp. at 7. They argue that proceeding to trade in firearms without complying with Federal requirements would result in threats of forfeiture of those items and potential criminal prosecution. *See id.* at 8-9. Accordingly, plaintiffs maintain that "under *Raich*, [p]laintiffs enjoy standing to sue because . . . they have suffered and continue to suffer injury." *Id.* at 10 (citing *Raich II*, 500 F.3d at 857).

To the extent plaintiffs assert that the mere existence of Federal firearms laws hinders their ability to manufacture and sell firearms under the MFFA, such an injury fails to confer Article III standing. The Ninth Circuit has repeatedly held that the existence of a proscriptive statute, which may or may not ever be applied

to plaintiffs, does not satisfy the case or controversy requirement of Article III. *See, e.g., San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996) (holding the "mere existence" of Federal law banning semiautomatic assault weapons is "not sufficient to create a case or controversy," nor is the mere "possibility of criminal sanctions applying") (internal citation omitted); *see also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000).

Moreover, plaintiffs in this case, unlike those in *Raich II*, have failed to demonstrate that they face an immediate threat of real or concrete injury.[3] They have not taken part in any activity threatened by Federal law enforcement and have no material plans to do so. In their Second Amended Complaint, plaintiffs allege for the first time that Mr. Marbut has "hundreds of customers who have offered to pay . . . for both firearms and firearms ammunition manufactured under the MFFA." *See* Second Amended Complaint ("Second Am. Compl.") ¶¶ 12-15. Plaintiffs also claim that interested customers have placed orders for the "Montana

[3] Plaintiff Raich had been using medical marijuana consistently for nearly eight years to treat symptoms associated with an inoperable brain tumor and chronic pain disorders. *See Raich II*, 500 F.3d at 855-56. Because Raich's caregivers cultivated medical marijuana and provided it to her free of charge, the plaintiff's treatment was dependent upon her access to locally-grown marijuana. *See id.* Enforcing Federal law to prohibit the cultivation and use of the drug may have proven "fatal." *Id.* at 855. That case did not involve a "hypothetical intent to violate the law." *See Thomas*, 220 F.3d at 1139. Rather, Raich's production and regular use of marijuana was actual and ongoing.

Buckaroo Rifle," and that the State of Montana has expressed interest in purchasing non-lethal ammunition. Second Am. Compl. ¶¶ 15-16.

These details affirm a local interest in firearms produced under the MFFA, but they make plaintiffs' allegations no more definitive. Mr. Marbut has not claimed he has the means to manufacture MFFA-firearms, nor has he taken any steps toward realizing this commercial venture. He has provided no time-frame for firearm production and/or sale. And, while plaintiff Marbut may have hundreds of customers who have offered to pay and even placed orders for his firearms, whether these third parties will ever purchase a firearm from him is speculative. These allegations amount to precisely the kind of "'some day' intentions [without] any specification of when the some day will be," that are inadequate to show an actual or imminent injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992); *see also San Diego County*, 98 F.3d at 1127 (9th Cir. 1996) (claimants should specify a "particular time or date on which [they] intend to violate the [statute]," especially when "the acts necessary to make plaintiffs' injury — prosecution under the challenged statute — materialize are almost entirely within plaintiff's own control").

Plaintiffs have also failed to establish a concrete threat of forfeiture or criminal prosecution. Whereas in *Raich II*, plaintiffs brought suit in response to a

law enforcement raid on the home of another medical marijuana user, *see Raich II*, 500 F.3d at 857, there has been no law enforcement action in this case. Instead, plaintiffs maintain that the September 29, 2009 letter sent to plaintiffs by ATF constitutes a sufficient threat of prosecution. *See* Pl. Opp. at 9. This letter, however, responded to plaintiffs' own inquiry and only re-stated their obligations under Federal law. The agency notified plaintiffs 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 2 (emphasis added).

As defendant emphasized in its opening brief, "there was no specific threat to prosecute Mr. Marbut for any particular act at any particular time or place." Defendant's Memorandum in Support ("Def. Br.") at 12. Therefore, plaintiffs have no basis for pre-enforcement standing, which may only be found where a plaintiff is personally threatened with criminal penalties, or where a statute specifically targets the plaintiff for prosecution. *See Navegar, Inc. v. United States*, 103 F.3d. 994, 1001 (D.C. Cir. 1997). In *Navegar*, for example, gun manufacturers were permitted to challenge statutory bans on specific models and/or brands of firearms, as those provisions expressly identified by name certain weapons produced by the plaintiff manufacturers. *See id.* Conversely, the court

rejected manufacturers' standing arguments with respect to prohibitions on general classes of firearms because they did not threaten the plaintiffs' "engage[ment] in specified conduct." *Id.* *Accord Hodgkins v. Holder*, 677 F. Supp. 2d 202, 204 (D.D.C. 2010) (applying *Navegar* to deny standing to persons prohibited from purchasing firearms under Federal gun control restrictions). *See also Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 293-94 (6th Cir. 1997) (rejecting pre-enforcement challenge based on ATF agents' advice that questioned activity could prompt Federal prosecution); *Western Mining Council v. Watt*, 643 F.2d 618, 626 (9th Cir. 1981) (finding statement by agency official that "plaintiffs cannot dig in the ground" did not constitute a specific threat of prosecution); *Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 4 (9th Cir. 1974) (finding sheriff's statement that ordinance prohibiting gambling would be enforced within his jurisdiction did not constitute credible threat of prosecution).

Plaintiff's pre-enforcement challenge alleges a desire to engage in conduct proscribed by Federal firearms laws. Should plaintiffs decide to manufacture and sell firearms under the MFFA, they have asserted only the "possibility of their eventual prosecution." *San Diego County*, 98 F.3d at 1128. Under both *San Diego County* and *Raich II*, plaintiffs' threatened injuries are insufficient to establish standing and their claims must be dismissed for lack of jurisdiction.

B. Plaintiffs Do Not Suffer Economic Harm.

Plaintiffs articulate an alternative basis for standing in their opposition brief, claiming "economic injury" based on the new allegations set forth in their Second Amended Complaint. *See* Pl. Opp. 3-4, 8-10. Specifically, plaintiffs allege that prospective customers are unwilling to purchase Mr. Marbut's firearms if they are licensed and manufactured under Federal law, and argue that Mr. Marbut's "loss of economic opportunities" is sufficient to establish standing. *See id.* at 8, 9 (citing *Central Ariz. Water Conserv. Dist. v. EPA*, 990 F.2d 1531, 1537 (9th Cir. 1993)).

Labeling Mr. Marbut's injury "economic" does not change the speculative nature of his alleged harm. While "generally a legally protected interest," *Central Arizona*, 990 F.2d at 1537, economic harm, like any harm, must still be "concrete and particularized" for standing purposes. *See Abbott Labs v. Gardner*, 387 U.S. 136, 153 (1967) ("a possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action").

In contrast to plaintiff manufacturers permitted standing in *Navegar*, plaintiff Marbut is not currently producing prohibited weapons, and has no existing business being harmed by the application of Federal firearms laws. *See Navegar*, 103 F.3d at 1001 (permitting manufacturers to challenge only those

provisions that targeted weapons plaintiffs currently produced). Here, Mr. Marbut "wishes to manufacture and sell small arms and small arms ammunition to customers exclusively in Montana." Second Am. Compl. ¶ 11. Plaintiff has provided no details as to his capacity to manufacture firearms under the MFFA. He has failed to describe production costs and pricing for the firearms he plans to sell. Without these facts, it is difficult, if not impossible, to determine his loss of potential profit. Furthermore, and as discussed *supra* Part I.A, Mr. Marbut's reliance on customers pledging to order firearms produced under the MFFA is tentative at best. *See* Second Am. Compl. ¶ 15. Beyond placing an order for an item that has not yet been produced or definitively priced, these customers have provided no compensation or any assurances that they will complete their alleged orders. To find that plaintiffs have standing, the Court "would have to assume a number of elements in the causal chain between [d]efendant's action and [the plaintiffs'] asserted economic injury." *Regents of University of California v. Shalala*, 872 F. Supp. 728, 737 (C.D. Cal. 1994), *aff'd*, 82 F.3d 291 (9th Cir. 1996); *Longstreet Delicatessen, Fine Wines & Specialty Coffees, L.L.C., et al. v. Jolly*, No. 106-cv-00986, 2007 WL 2815022, at *18 (E.D. Cal. Sept. 25, 2007) ("Plaintiff . . . has made allegations of economic harm but has offered no evidence of actual harm suffered other than by potential lost sales."). *See also United*

Transp. Union v. I.C.C., 891 F.2d 908, 912 (D.C. Cir. 1989) (internal punctuation omitted) ("When considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events, especially future actions to be taken by third parties").[4]

Plaintiffs overstate the economic basis for standing, claiming that "loss of economic opportunities" is "always enough." Pl. Opp. at 8. In fact, economic harm confers standing only where plaintiffs suffer a tangible pecuniary loss. In *Central Arizona*, for example, plaintiffs suffered concrete financial harm, as they were required to repay up to twenty-four percent of the cost of installing and maintaining required emission controls. *See* 990 F.2d at 1537. *See also Nat'l Audubon Society, Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002) (animal trappers who utilized certain "leg-hold" trap had standing to challenge California law banning the trap's usage due to economic harm suffered); *Fair v. EPA*, 795 F.2d 851 (9th Cir. 1986) (plaintiffs had standing to challenge Federal regulation requiring them to finance construction of a sewer). In *National Audubon*, the Ninth Circuit

[4] At most, plaintiff Marbut asserts that Federal firearm regulation chills his own business plan. However, the "existence of a 'chilling effect' . . . has never been considered a sufficient basis, in and of itself for prohibiting state action" outside the context of protected speech under the First Amendment. *Younger v. Harris*, 401 U.S. 37, 51 (1971). Thus, plaintiff Marbut's allegation that he is unable to further develop his MFFA firearm products until the Court finds Federal firearm laws do not apply is not a sufficient direct injury or threat of specific future harm. *See San Diego County*, 98 F.3d at 1129-30 (rejecting plaintiffs' argument that chilling of their "desire and ability to purchase outlawed firearms" constituted an injury-in-fact).

distinguished the circumstances in both *Thomas* and *San Diego County*, stating that "the core of the trappers' injuries is not a hypothetical risk of prosecution but rather actual, ongoing economic harm resulting from [plaintiffs'] cessation of trapping." *Nat'l Audubon*, 307 F.3d at 855. Under that standard, plaintiffs' alleged desire to manufacture and sell weapons under the MFFA, and their inability to reap a theoretical profit on those future sales, is insufficient "economic injury" to establish standing.

C. The Organizational Plaintiffs Do Not Have Standing.

The Montana Shooting Sports Association ("MSSA") and the Second Amendment Foundation ("SAF") lack standing because "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." *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000). Because the members of these organizations lack standing to sue, for reasons identical to those of plaintiff Marbut, the organizational plaintiffs cannot satisfy the requirements of Article III.

Even if Mr. Marbut has standing based on threatened prosecution or alleged economic injury, the Second Amendment Foundation has made no such allegations on behalf of any of its members. Because its members do not have standing, the Second Amendment Foundation as an organization does not have

standing. *See Hodgkins*, 677 F. Supp. 2d at 206 (denying the Second Amendment Foundation standing to sue because none of its members had standing, and because the increase in constituents' questions about the challenged statute did not constitute an injury-in-fact on the part of SAF itself); s*ee also Magaw*, 132 F.3d at 294-95 (because organizations' individual members had not alleged sufficient economic injury to confer standing in their own right, organizations did not have standing).

II. Plaintiffs Have Not Established A Waiver of Sovereign Immunity Under the APA, Nor Have They Shown Entitlement to Non-Statutory Review.[5]

A. The September 29, 2010 Letter From ATF Does Not Constitute "Final Agency Action" Under § 704 of the APA.

Without referring to any legal support, plaintiffs maintain that the government's decision to require licenses of those who wish to proceed under the MFFA was "final agency action" under § 704 of the APA. *See* Pl. Opp. at 13-14. According to plaintiffs, the September 29, 2009 letter from ATF was "neither tentative nor interlocutory, and expresses the Government's firm and final position." *Id.* at 14.

[5] Plaintiffs have apparently abandoned 18 U.S.C. § 925A as a jurisdictional basis in their Second Amended Complaint. Therefore, defendant will not address it further. *See* Def. Br. at 15.

For agency action to be final for purposes of obtaining judicial review, 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 omitted). As defendant noted in its opening brief, ATF's correspondence in this case was not intended to change the status quo. *See* Def. Br. at 17. The letter did not constitute a new interpretation of Federal firearms laws, nor did it alter plaintiffs' ongoing obligations or activities. *C.f. Alaska Dep't of Envtl. Conserv. v. EPA*, 540 U.S. 461 (2004) (holding that EPA's order under the Clean Air Act prohibiting the Alaskan Department of Environment from issuing permits to Zinc Mining Company was a final agency action because the order effectively halted construction of the mine); *Nevada Airlines v. Bond*, 622 F.2d 1017, 1019-20 (9th Cir. 1980) (FAA emergency revocation order, which had the effect of immediately suspending air carrier's ability to conduct business was deemed reviewable).

Plaintiffs cannot distinguish the Ninth Circuit's decision in *Air California v. United States Department of Transportation*, 654 F.2d 616, 620-21 (9th Cir. 1981). In that case, the FAA sent a letter to an individual constituent indicating

that the airport's obligations under Federal law prohibited it from granting "'exclusive right' of airport use" to certain air carriers. *See id.* at 618. The letter expressed the FAA's intention to pursue administrative and legal penalties if the constituent did not comply with Federal law. *See id.* at 620-21. The court determined that "the effect of the FAA's actions . . . was not direct and immediate," because the airport was able to determine whether or not to follow the FAA's directive, an action that would then trigger judicial review. *Id.* at 621. The Ninth Circuit was "loath to recognize a test of final agency action which would turn upon a regulated party's will to resist." *Id.* Similarly, plaintiffs initiated this action after receiving ATF's statement — in response to plaintiffs' own inquiry — of their continuing legal obligations. *See City of San Diego v. Whitman*, 242 F.3d 1097, 1101-02 (9th Cir. 2001) (finding no final agency action where the EPA's letter simply responded to the City's request for assistance regarding permit renewal conditions). They too could have opted to ignore ATF's guidance, but failing that, cannot obtain judicial review thereof. *See Air California*, 654 F.2d at 621.

As to the *Bennett* test's second prong, ATF's letters to plaintiffs bore no legal consequences. The letters restated firearm licensee requirements under Federal law and confirmed that plaintiffs would remain subject to regulation.

Similarly, in *Goldman & Zimmerman, LLC v. Domenech*, plaintiffs challenged ATF's interpretation of the Gun Control Act through an answer to a "frequently asked question." The court found that the agency's response was not final agency action because, while it might "inform the regulated community of what violates the law," its purpose "is simply to inform licensees of what the law, previously enacted or adopted, is, and its publication did not itself alter the legal landscape." *Zimmerman*, 599 F.3d 426, 432-33 (4th Cir. 2010). In re-affirming plaintiffs' existing obligations, ATF's September 29 letter had no "direct and immediate effect on the day to day business of the complaining party." *Hecla Mining Co. v. EPA*, 12 F.3d 164, 165 (9th Cir. 1993).

Because plaintiffs have offered no response to caselaw indicating they cannot satisfy either prong of the *Bennett* test for "final agency action," the APA's waiver of sovereign immunity is inapplicable.

B. Plaintiffs Are Not Entitled to Non-Statutory Review.

Citing no precedent from this Court or within the Ninth Circuit, plaintiffs maintain that the defendant fails to account for non-statutory review of non-final agency action. *See* Pl. Opp. at 10-13. However, non-statutory review is extremely limited in scope. *See Staacke v. U.S. Sec'y of Labor*, 841 F.2d 278, 281 (9th Cir. 1988); *see also Freeman v. Barnhart*, No. C 06-04900, 2007 WL 1455912, at *2

(N.D. Cal. May 16, 2007) (discussing the limited application of *Leedom v. Kyne*, 358 U.S. 184 (1958) to suits in which agency officials acted beyond their statutory powers). A plaintiff requesting non-statutory review must show that the agency has acted in "excess of its delegated powers and contrary to a specific prohibition [that] is clear and mandatory." *Leedom*, 358 U.S. at 188.

The case plaintiffs rely upon illustrates this principle, as it involved a Federal agency official acting beyond the scope of his statutory authority. *See* Pl. Opp. at 12 (citing *Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 41-42 (1st Cir. 2002) (finding that the Department of Labor's adverse determination of Rhode Island's sovereign immunity was reviewable in court because the agency's action was *ultra vires*)). *See also Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (upholding challenge to Secretary of Labor's order to disqualify employers who hire permanent replacement workers from certain Federal contracts because this action exceeded the Secretary's statutory authority); *Dart v. United States*, 848 F.2d 217, 222 (D.C. Cir. 1988) (when Secretary of Commerce exercised functions not specified in Export Administration Act, such functions were subject to limited judicial review). According to the D.C. Circuit, the message of these cases is clear: "[C]ourts will ordinarily presume that Congress intends the executive to obey its statutory commands and,

accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Chamber of Commerce,* 74 F.3d at 1328 (quotation marks omitted).

As the caselaw demonstrates, plaintiffs here are not entitled to non-statutory review. The ATF's issuance of letters — one to Montana Federal firearm licensees ("FFLs") and three in response to citizen inquiries restating the requirements of the National Firearm Act ("NFA") and Gun Control Act ("GCA") — was in no way *ultra vires* or in excess of delegated powers. Congress has granted ATF the authority to implement and enforce the criminal and regulatory provisions of both the NFA and GCA. *See* 28 U.S.C. § 599A; 28 C.F.R. § 0.130. This authority permitted ATF to advise plaintiffs of their legal obligations under the Federal firearms laws. ATF did not violate a specific prohibition of either statute, or any of the statutes' implementing regulations. Because there is no allegation that agency officials acted *ultra vires*, non-statutory review does not permit plaintiffs to evade the APA's "final agency action" requirement. *See* 5 U.S.C. § 704.

Plaintiffs' and amici's description of the MFFA as a "political statement" on federalism by the Montana Legislature, *see* Mont. Br. at 5-6 (citing First Am. Compl. ¶ 19), only strengthens defendant's jurisdictional arguments. The

Constitution limits the jurisdiction of the Federal courts to "[c]ases" and "[c]ontroversies," *see* U.S. Const. art. III, § 2, and neither plaintiffs' speculative plans nor the Federal action at issue suffice. The Complaint should be dismissed for lack of jurisdiction.

III. Congress Has the Authority to Regulate the Manufacture and Sale of Firearms Substantially Affecting Interstate Commerce.

A. Plaintiffs Concede that Under Current Commerce Clause Caselaw, Federal Firearm Laws Are Constitutional as Applied to the MFFA.

Plaintiffs acknowledge that under binding Supreme Court and Ninth Circuit precedent interpreting the Commerce Clause, "the MFFA is a dead letter." Pl. Opp. at 15.

The Constitution grants Congress the power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, and to "make all laws which shall be necessary and proper" to the execution of that power. *Id.* cl. 18. This broad grant of power is not limited to the direct regulation of interstate commerce. Congress also may "regulate activities that substantially affect interstate commerce," *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005), or form part of a larger regulatory scheme. *Id.* at 24. According to *Raich*, "when Congress decides that the total incidence of a practice poses a threat to a national market, it may regulate the entire class." *Id.* at 17 (quotation marks omitted). Moreover,

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.* (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)).

In *Raich*, the Court sustained Congress's authority to prohibit the possession of home-grown marijuana intended solely for personal use. The Court found that the Controlled Substances Act ("CSA") regulated the "production, distribution and consumption of commodities for which there is an established, and lucrative, interstate market." *Raich*, 545 U.S. at 26. As with the CSA, the NFA and GCA bear a "substantial relation to commerce" as they regulate the business of manufacturing and selling firearms. In fact, plaintiffs are not restricted by the GCA from manufacturing firearms or ammunition for their own use or for occasional sale to others. *See* 18 U.S.C. § 921(a)(21). The regulatory provisions of the GCA are triggered when persons are "engaged in the business" of manufacturing or selling firearms. 18 U.S.C. § 923(a).

As the Court in *Raich* also noted, "[i]n assessing the scope of Congress's authority under the Commerce Clause," "the task" before the Court "is a modest one." *Raich*, 545 U.S. at 22. The Court need not determine whether the regulated activities, "taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* (quoting *United*

States v. Lopez, 514 U.S. 549, 557 (1995)). Here, Congress rationally concluded that the manufacture and sale of firearms, a highly regulated commodity, substantially affects commerce. Because an illicit market for firearms exists nationwide, a "gaping hole" in Federal firearm regulation would persist if firearms made and sold in Montana were exempted from compliance. *Compare Raich*, 545 U.S. at 22 (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 Federal drug law).[6]

Moreover, six States have followed Montana's lead in enacting "virtually identical" Firearms Freedom Acts, and an additional twenty-two have proposed similar legislation. *See* Pl. Opp. at 3; Brief of Center for Constitutional Jurisprudence, *et al.*, ("Ctr. for Const. Jur. Br.") at 11. The fact that up to twenty-nine States may essentially "opt out" of certain Federal firearms laws would have an indisputable effect on interstate commerce. The "gaping hole" in Federal firearm regulation would encompass over half of the United States and encourage the trading of unregulated firearms nationwide. In addition, if each of these States

[6] Amici point to the lack of congressional findings regarding the MFFA's effect on the interstate market in firearms and the "crime problems that motivated the Federal findings." Mont. Br. at 12. However, specific findings of this nature are not required under *Raich*'s "rational basis" standard. *See Raich*, 545 at 21 (refusing to impose a heightened burden on Congress to make detailed findings proving "that each activity regulated within a comprehensive statute is essential to the statutory scheme").

adopted a unique version of the MFFA, a patchwork of differing state schemes would emerge to defeat the comprehensive reach of both the GCA and NFA. *See Raich*, 545 U.S. at 32 (noting that at least nine states adopted medical marijuana statutes).

For these reasons, the Ninth Circuit has re-affirmed *Raich*'s holding as applied to firearms and the Gun Control Act, concluding 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, 1077 (9th Cir. 2006) (quotation marks omitted). *See also United States v. Rothacher*, 442 F. Supp. 2d 999, 1007 (D. Mont. 2006) (Molloy, J.) (finding that the Commerce Clause power is almost unlimited where "the prohibited product has significant economic value such as with drugs or guns").[7]

Plaintiffs concede that binding precedent undermines the basis of their suit and demand that *Raich* be overturned as an "erroneous proposition of law." Pl. Opp. at 18; *see generally* Pl. Opp. 15-23. *See also* Brief of the Paragon

[7] Similarly, this Court has extended *Raich*'s reasoning to uphold Federal statutes that criminalize the possession of child pornography, finding that plaintiffs were "cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market." *United States v. Gallenardo*, 540 F. Supp. 2d 1172, 1174 (D. Mont. 2007) (Molloy, J.); *see also United States v. Overton*, No. CR 07-28, 2007 WL 2815986 (D. Mont. Sept. 26, 2007) (Molloy, J.).

Foundation, Inc. ("Paragon Br.") at 9; Brief of Utah, *et al.*, ("Utah, *et al.* Br.") at 11. In addition, plaintiffs extrapolate that an overruling of *Raich* would necessitate re-visiting the Ninth Circuit's analysis in *Stewart*, 451 F.3d at 1071. *See* Pl. Opp. at 17-23.

By advocating a re-examination of *Raich*, plaintiffs misunderstand the role of this Court in interpreting and applying the law. According to the Supreme Court, lower courts "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express*, Inc., 490 U.S. 477, 484 (1989). Lower courts are bound not only to apply *Raich*'s holding to future Commerce Clause issues, but also its "explications of the governing rules of law." *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J. concurring).

In addition, regardless of plaintiffs' disagreement with *Stewart*'s holding, that decision remains the law of the Ninth Circuit. According to *Miller v. Gammie*, an *en banc* decision that clarified circuit and district courts' approach to interpreting precedent, *Stewart* may be overturned only where "intervening higher authority . . . is clearly irreconcilable" with its analysis or ultimate disposition. *Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*). *See also, e.g.*, *Day v.*

Apoliona, 496 F.3d 1027, 1031 (9th Cir. 2007) (citing *Gammie*, 335 F.3d at 900) ("a district court or three judge panel of this court can disregard circuit precedent . . . [w]here intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority"); *Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2005) (characterizing *Gammie* as announcing a rule to guide three-judge panels and district courts in deciding which precedents were binding on them). Because plaintiffs ask that this Court decide an issue governed by binding authority, this Court is bound to reach the same result. *See Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001). Whether or not plaintiffs and amici approve of the rule announced in *Raich* and applied in *Stewart*, "caselaw on point is the law." *Id.*

B. Plaintiffs' Attempt to Limit and/or Distinguish *Raich* Is Unpersuasive and Unworkable.

Plaintiffs and amici maintain, in the alternative, that *Raich* can be limited to its facts and should not govern this Court's interpretation of the MFFA. *See* Pl. Opp. 23-26; *see also, e.g.*, Mont. Br. at 7-11; Amicus Brief of the Goldwater Institute, *et al.*, ("Goldwater Br.") at 3-7. Their arguments emphasize three basic, and ultimately unpersuasive, distinctions: (1) *Raich* dealt with an illegal market in drugs, rather than firearms; (2) the MFFA, in contrast to the statute at issue in *Raich*, contains ample safeguards against interstate trading in firearms; (3)

firearms, unlike marijuana, are easily identifiable in the event they leave Montana.[8]

Citing the government's "hard fought 'war on drugs'" plaintiffs assert that *Raich* is inapplicable because it "involved the only law enforcement concern sufficiently grave to jeopardize national security." Pl. Opp. at 24-25. They point to no language in the opinion, however, to suggest that *Raich*'s holding was limited to illegal drugs. Plaintiffs also fail to explain how, from a law enforcement standpoint, the regulation of marijuana, as opposed to the regulation of firearms, permits a different outcome. In fact, 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 combating the increasing prevalence of crime in the United States." S. Rep. No. 1097, 90th Cong., 2nd Sess. 1968, 1968

[8] The Goldwater Institute also asserts that the "substantial [e]ffects" test is inapplicable, as this case involves a "clash between principles of state sovereignty and the Federal government's asserted power to regulate intrastate activities." Goldwater Br. at 4. This argument ignores the nexus between state sovereignty under the Tenth Amendment and Congress's enumerated powers under Article I. *See infra* Part IV. Moreover, *Raich* involved a similar state sovereignty argument, in which plaintiffs maintained that Federal control over the intrastate production of marijuana for personal use was not necessary to effectively regulate the interstate market. Concurring in *Raich*, Justice Scalia disposed of this point, noting that regulation of the activities permitted by California's Compassionate Use Act was "sufficiently necessary to be 'necessary and proper' to Congress's regulation of the interstate market." *Raich*, 545 U.S. at 42 (Scalia, J. concurring). This case raises identical questions of state sovereignty vis-a-vis Congress's Commerce Power. Therefore, the "substantial effects" test, as set out in *Raich*, is directly on point.

U.S.C.C.A.N. 2112, 2113-4. These law enforcement priorities are directly tied to regulating the market in firearms. Congress found that "[o]nly through adequate Federal control . . . over *all* persons engaging in the business of importing, manufacturing, or dealing in firearms, can . . . effective State and local regulation of the firearms traffic be made possible." *Id.* at 2114 (emphasis added).[9] *See also Huddleston v. United States*, 415 U.S. 814, 833 (1974) ("Congress intended, and properly so, that §§ 922(a)(6) and (d)(1) [of the GCA] … were to reach transactions that are wholly intrastate . . . on the theory that such transactions affect interstate commerce.") (quotation marks omitted); *United States v. Petrucci*, 486 F.2d 329, 331 (9th Cir. 1973) ("Illegal intrastate transfer of firearms is part of a pattern which affects the national traffic and Congress can validly enact a comprehensive program regulating all transfers of firearms.").

To avoid the implications of this authority, plaintiffs highlight provisions of the MFFA that ensure Montana-made firearms remain in state. For example, the MFFA by its terms, "only applies to firearms as long as they are located within the

[9] Amici also attempt to distinguish the Gun Control Act as a law enforcement measure designed solely to reduce violent crime and keep firearms "out of the hands of certain undesirable persons." Brief of Gun Owners Foundation, *et al.*, ("Gun Owners Found. Br.") at 4-5, 12-13; *see also, e.g.*, Ctr. for Const. Jur. Br. at 9 (arguing the GCA is a criminal statute enacted to "prevent the use of firearms in crimes"). This characterization similarly ignores the link between violent crime and the regulation of traffic in firearms. Like the CSA, the GCA is a comprehensive statute that imposes criminal sanctions and also contains regulatory elements. The two Acts monitor the manufacture and distribution of commodities in interstate commerce to achieve their stated law enforcement purposes.

boundaries of the State," and "limits its reach to a firearm that is manufactured in Montana from basic materials." Mont. Br. at 9. Plaintiffs point out that the state statute in *Raich*, in contrast, contained no "limit on interstate traffic in the local drug," and did not "ban the use of marijuana from other [S]tates." Pl. Opp. at 25. Plaintiffs overlook the fact that the marijuana in *Raich* was intended for personal use only, and did not contemplate the production and sale to others. If anything, plaintiffs' desire to manufacture and sell firearms to others is more directly "affecting" commerce than the activity in *Raich*.

Moreover, while the MFFA may only apply to guns made and sold in Montana, it is unreasonable to expect that these firearms will not leave the State. The idea that a commodity will remain in one particular State, and thus is not "an essential part of a larger regulatory scheme," was rejected in *Raich*. 545 U.S. at 30 ("The 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.").

Plaintiffs and amici argue, however, that *Raich* concerned a fungible item that was impossible to distinguish in the stream of commerce. *See* Pl. Opp. at 25; *see also* Mont. Br. at 10; Brief of Montana Legislators ("Mont. Leg. Br.") at 13.

Firearms manufactured under the MFFA, in contrast, will be labeled as such. This distinction ignores the "concern about [marijuana's] diversion into illicit channels" emphasized by the Majority in *Raich*, 545 U.S. at 22. That concern is no less important here, where an illegal market for firearms exists across state lines. Although stamped "Made in Montana," firearms produced and sold under the MFFA may be diverted into the hands of those otherwise prohibited by Federal law, whether within Montana or outside its borders. Once these firearms leave Montana, nothing beyond their "Made in Montana" label permits tracing by the Federal government. *See* Mont. Br. at 11. The firearms need no serial number, and no records of sale, receipt, or transport. In essence, Montana will create weapons that are readily accessible to those who seek to avoid a background check, with no record of transaction and no traceable markings. And Montana is not alone. Once the six states that have enacted similar statutes begin producing firearms, a steady supply of untraceable weapons will infiltrate the interstate market — an ideal opportunity for anyone wishing to purchase a firearm but prohibited from doing so under Federal law. It is difficult to see how the MFFA, by potentially stimulating the illicit interstate market in firearms, does not "substantially affect" commerce.[10]

[10] In addition, the MFFA, by its very 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

C. The Supreme Court's Analysis in *Raich* Is Controlling Because this Case Involves Economic Activity.

Plaintiffs and amici suggest that if *Raich* cannot be overturned or distinguished, it should be treated as an anomaly. They urge the Court to instead follow *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), even though *Raich* is more recent than either of those cases. *See* Pl. Opp. at 23, 26; s*ee also* Weapons Collectors Society Br. at 7-8, 10; Br. of Utah, *et al.*, at 9-11.

Unlike *Raich*, and unlike this case, however, neither *Lopez* nor *Morrison* involved regulation of economic activity. Nor did either decision address a measure that was integral to a comprehensive scheme to regulate activities in interstate commerce. *Lopez* involved a challenge to the Gun-Free School Zones Act of 1990, "a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone." *Raich*, 545 U.S. at 23. Possessing a gun in a school zone is not economic activity. The prohibition against possessing a gun was not "'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Id.* at 24 (quoting *Lopez*, 514 U.S. at 561). Therefore, the gun law

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firearm to Federal regulation under interstate commerce . . . because they are attached to or used in conjunction with a firearm in Montana." Mont. Code Ann. § 30-20-104. The MFFA also contemplates the importation into Montana of "generic and insignificant parts that have other manufacturing or consumer product applications." *Id.*; *see also* Mont. Br. at 10.

could not "'be sustained under [the Court's] cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.'" *Id.* at 24 (quoting *Lopez*, 514 U.S. at 561). Likewise, the provision at issue in *Morrison* simply created a civil remedy for victims of gender-motivated violent crimes. *Id.* at 25. Gender-motivated violent crimes, too, are not an economic activity, and the statute at issue focused on violence against women, not on any broader regulation of economic activity.

Here, conversely, Federal firearms laws monitor the production, distribution, and acquisition of firearms. *Id.* at 26. The regulations focus on the actions of the Federally licensed firearms dealer, and the point at which a weapon is placed into the stream of commerce. *See Huddleston*, 415 U.S. at 825. There is no doubt, as explained earlier, that intrastate firearms transactions substantially affect the illicit interstate market for weapons. Federal monitoring of these transactions is an essential part of the broader regulatory scheme.

In addition, the production of firearms that are exempt from Federal regulation will, in the aggregate, influence supply and demand for FFL-manufactured firearms. These aggregate effects are all that the Commerce Clause requires. *Raich*, 545 U.S. at 16-17; *Wickard v. Filburn*, 317 U.S. 111, 128 (1942).

Plaintiffs themselves allege that potential buyers of the Montana Buckaroo "do not want, have not ordered, and will not pay for the 'Montana Buckaroo' if it is manufactured by Federal firearms licensees." Pl. Opp. at 4. The unregulated sale of this firearm will thus adversely affect Federal firearms licensees, because as plaintiffs state, Montana residents will not purchase such a firearm from the regulated interstate market. *See id.*

Wickard is instructive in this regard. The Court there upheld a scheme that targeted the farmer as a consumer as well as a producer, requiring him to purchase wheat on the open market rather than grow it himself. *Wickard*, 317 U.S. at 128. The Court reasoned that "[h]ome-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon." *Id.* at 128; *see also id.* at 127 ("The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs."). *See also Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (Commerce Clause reaches decisions not to engage in transactions with persons with whom plaintiff did not wish to deal); *Daniel v. Paul*, 395 U.S. 298 (1969) (same). While amici argue "that the purchase or ownership of an 'intrastate firearm' does not individually or collectively satisfy

demand for or increase the supply of 'interstate firearms,'" Mont. Leg. Br. at 17, it may well — according to plaintiffs — *decrease* the demand and supply of interstate firearms.

As discussed *supra* Part III.A, six States have already enacted identical Firearms Freedom Acts, and another twenty-two are considering similar versions of the MFFA. *See* Pl. Opp. at 3; Ctr. for Const. Jur. Br. at 11. Firearms produced in these States would, in the aggregate, have a significant effect on supply and demand for firearms manufactured pursuant to Federal law. Furthermore, a collection of individual State markets would diminish interstate trade in firearms produced and sold under Federal law, while increasing the availability of unregulated weapons. *See Raich*, 545 U.S. at 32 (noting that at least nine states adopted medical marijuana statutes). As in *Wickard* and *Raich*, "the aggregate impact on the national market of all the transactions exempted from Federal supervision is unquestionably substantial." *Id.*

IV. Because the MFFA Conflicts with Federal Firearms Laws, It Is Preempted Under the Supremacy Clause of the Constitution.

Under the Supremacy Clause, the MFFA is preempted by the Federal firearms laws it seeks to circumvent. *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.

Amici point out that 18 U.S.C. § 927 expressly affirms that Federal firearms laws will not automatically preempt state law on the same subject matter. *See* Gun Owners Found. Br. at 7-9. In addition, plaintiffs contend that the MFFA, by deliberately limiting itself to firearms manufactured and sold within Montana, is in "harmony with the purpose and intent of the NFA and GCA." Pl. Opp. at 30. These arguments ignore well-settled preemption law, which states 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) (internal citations and quotation marks omitted). Plaintiffs and amici fail to acknowledge the conflict between the GCA, which imposes obligations on Federal firearm licensees, and the MFFA, which purports to exempt Montana firearms dealers from those requirements.

Furthermore, plaintiffs and amici do not respond to defendant's argument that these intrastate exemptions would undermine the Federal scheme of firearm regulation and hinder the government's ability to monitor those engaging in the business of dealing, manufacturing, and importing firearms. Because the MFFA "cannot be reconciled" with applicable Federal requirements, the MFFA is

preempted by Federal firearms law. *See Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1039 (9th Cir. 2007) (citation omitted) (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 [the] [C]ongressional [C]ommerce power to override State law.").

V. Preemption of the MFFA Does Not Violate the Tenth Amendment.

According to plaintiffs and many amici, preemption of the MFFA under the Commerce Clause would violate the Tenth Amendment. *See* Pl. Opp. at 20; *see also, e.g.*, Utah, *et. al.* Br. at 5-8; Goldwater Inst. Br. at 6-8; Weapons Collector Society Br. at 8-10; Ctr. for Const. Juris. Br. at 3-4; Paragon Br. at 9 (predicting that the "Federal government will no doubt argue that the . . . Tenth Amendment [is a] dead letter").

The Tenth Amendment "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 156 (1992). The Amendment applies, however, to those "powers not delegated to the United States by the Constitution." U.S. Const. Amend. X. Where power is allocated to Congress under the Commerce Clause, "the Tenth Amendment expressly disclaims any reservation of

that power to the States." *New York*, 505 U.S. at 156. Logically, then, it is improper to frame the underlying issue in this suit as one concerning the Tenth Amendment, rather than Congress's power under the Commerce Clause. *See* Br. of Utah, *et al.*, at 5-6 (arguing that the Court should analyze Montana's Tenth Amendment authority to pass the MFFA, rather than examine the scope of Congress's Commerce power). If Congress may regulate the intrastate manufacture and sale of firearms under the Commerce Clause, there is no Tenth Amendment violation. *See Garcia v. San Antonio Metropolitan Trans. Auth.*, 469 U.S. 528 (1985) (holding that while States retain a significant measure of sovereign authority, they do so only to the extent the Constitution does not vest that power in the hands of the Federal government). The seven States that join this suit as amici concede as much, acknowledging that "States retain significant sovereign authority *to the extent* that the Constitution has not transferred such authority to the Federal Government." Utah, *et al.* Br. at 7 (emphasis added).

The Supreme Court's expansive interpretation of the Commerce Clause has affected its perception of the States' corresponding Tenth Amendment authority. *See* Utah, *et al.* Br. at 9 (discussing the relationship between the power that the States retain under the Tenth Amendment and courts' expansive reading of commerce under Article I). In *New York*, for example, the Court noted that "as

interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy . . . and have . . . come within the scope of Congress's commerce power." 505 U.S. at 158. Here, because of the reasons outlined *supra* Part III, the Federal firearms laws at issue are a valid exercise of Congress's power to regulate commerce, and plaintiffs cannot establish a Tenth Amendment violation.[11]

Amici's emphasis on Federal encroachment of Montana's police powers to "establish a wholly intrastate market in firearms," is unavailing. *See* Gun Owners Found. Br. at 3, 14; *see also, e.g.*, Ctr. for Const. Juris. Br. at 5. The Supreme Court has held that no Tenth Amendment violation will be found where Congress "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); *Raich II*, 500 F.3d at 867 (9th Cir. 2007) (finding that the Commerce power will "trump[] a competing claim based on a state's police powers"); *United States v. Collins*, 61 F.3d 1379, 1384 (9th Cir.

[11] Amici's reliance on *Printz v. United States*, 521 U.S. 898 (1997), is misplaced. *See, e.g.*, Goldwater Br. at 5-8; Mont. Leg. Br. at 9; Weapons Collectors Br. at 10. *Printz* involved challenges to the constitutionality of certain Brady Act interim provisions, which required state law enforcement officers to assist in preventing firearm sales to prohibited persons under Federal law. *See Printz*, 521 U.S. at 903-04. The Supreme Court held these provisions unconstitutional, as they amounted to impermissible "commandeering" of state officers by the Federal government. *See id.* at 914, 925. Because plaintiffs do not allege commandeering of Montana, or any State officials under Federal firearms laws, the analysis in *Printz* is inapplicable to plaintiffs' Tenth Amendment claims.

1995) (holding that 18 U.S.C. § 922(g)(1) was a valid exercise of Congress's Commerce power and did not violate the Tenth Amendment).

VI. Preemption of the MFFA Does Not Violate the Ninth and/or Second Amendments.

Plaintiffs and amici allege violations of the Ninth Amendment, which addresses the rights of the people that are not specifically enumerated in the Constitution. These allegations ignore decades of precedent and legal scholarship finding that the Ninth Amendment does not independently "[secure] constitutional rights for purposes of making out a constitutional violation." *See Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991). Indeed, when confronted with an individual's right to bear firearms, the Ninth Circuit held that the Ninth Amendment is "*not* a source of rights as such; it is simply a rule about how to read the Constitution." *San Diego County*, 98 F.3d at 1125 (emphasis in original) (internal citation omitted).

As defendant argued previously, Congress acted pursuant to its Commerce Clause power in enacting Federal firearms laws. Because plaintiffs assert no "'specific limitation' [on that power] independent of the Ninth Amendment," their claim must fail. *See Stubblefield v. Gonzales*, 150 Fed. Appx. 630, 632 (9th Cir. 2005) (finding that the Controlled Substances Act did not exceed Congress's

power under the Commerce Clause and that appellants had no Ninth Amendment right to manufacture and possess marijuana for medicinal purposes).

Plaintiffs' Second Amended Complaint also references the right to bear arms, perhaps in an effort to color their Ninth Amendment argument. To the extent plaintiffs are explicitly bringing a Second Amendment challenge, their claim has not been properly raised. Plaintiffs' Complaint mentions the Second Amendment once, and solely to provide background on the authority for passing the MFFA. *See* Second Am. Compl. ¶ 9. Furthermore, plaintiffs ask this Court to declare the MFFA constitutional under the Ninth and Tenth Amendments but have sought no such relief under the Second Amendment itself. *See* Second Am. Compl. ¶ 21. Plaintiffs, then, have failed to provide defendant with "fair notice of what the plaintiff"s claim is and the grounds upon which it rests," *Pickern v. Pier 1 Imps.* (U.S.) *Inc*., 457 F.3d 963, 968 (9th Cir. 2006), and the Court should refuse to "award relief on an unpleaded cause of action." *Orange St. Partners v. Arnold,* 179 F.3d 656, 665 (9th Cir. 1999).

Nor can amici effectively add arguments to the Complaint through their memoranda. Six of the eight amicus briefs discuss the applicability of the Second Amendment to this case, particularly in light of the Supreme Court's decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). *See, e.g.*, Mont. Br. at 11

(calling for a re-examination of *Stewart*, 415 F.3d at 1071, because *Stewart* pre-dates *Heller*); Goldwater Inst. Br. at 2 (arguing that the MFFA facilitates the exercise of the individual right to keep and bear arms under the Second Amendment after *Heller*); Paragon Found. Br. at 5 (finding "ample support" in *Heller* to uphold the MFFA); Gun Owners Found. Br. at 17-18 (stating that federal law requiring licensing of all firearms manufacturers violates the Second Amendment).

In any event, a Second Amendment challenge could not survive scrutiny. The *Heller* opinion clarified that the Second Amendment guarantees an individual right to keep and bear arms subject to certain well-established limitations. The Supreme Court examined a District of Columbia statute that, "among other things, prohibited registration of handguns and required firearms to be kept unloaded and inoperable in the home." *Van der Hule v. Holder*, No. 05-cv-190, slip. op. at 16 (Sept. 15, 2009) (Molloy, J.) As this Court observed in *Van der Hule*, "the facts of Heller drive that decision." *Id.* Furthermore, *Van der Hule* appreciated the narrowness of *Heller*'s holding, which stated only that:

> the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.

Id. (quoting *Heller*, 128 S. Ct. at 2821-22).

Amici assume that the Court's interpretation of the Second Amendment as conferring an *individual* right to bear arms, also supports a State statute that wholly deregulates the manufacture and sale of firearms to *others*. However, this expansive reading of *Heller* finds no support in the language of that decision, which reaffirmed that restrictions on the manufacture and sale of firearms were "presumptively lawful." *Id.* at 2816-17. In fact, the Court devoted one section of its opinion to emphasizing permissible limitations on the right to bear arms: "Nothing in our 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 or government buildings, *or laws imposing conditions and qualifications on the commercial sale of arms*." *Id.* at 2816-17 (emphasis added). Presumably, the Court included these restrictions to guide lower courts in interpreting the Second Amendment after *Heller*. "The right," noted the Court, is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 2816.

The Majority's list of "presumptively lawful regulatory measures," *id.* at 2817, then, was necessary to define the scope of the individual right to bear arms. However, even if the Court finds these statements were not central to *Heller*'s

holding, "the Ninth Circuit has cautioned that even dicta by the Supreme Court should be regarded seriously." *Van der Hule,* No. 05-cv-190, slip. op. at 19 (citing *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1058, n. 1 (9th Cir. 2004) ("[W]e have long adhered to the practice that Supreme Court dicta is not to be lightly disregarded, and that it must be treated with due deference.")).

Amici also suppose that *Heller* deemed the right to bear arms fundamental, a conclusion the Court declined to reach. Although Justice Scalia referred to 18th-Century English subjects' right to bear arms as a "fundamental" and "natural" right, *Heller*, 128 S. Ct. at 2798, 2799, he did not describe the right under the Second Amendment as "fundamental." *See id.* at 2817-18. For this reason, the Paragon Foundation's lengthy discussion of strict scrutiny analysis is inapplicable. *See* Paragon Br. at 5. In fact, Justice Breyer discussed the Majority's implicit rejection of strict scrutiny in his dissent, highlighting the Majority's approval of "a set of laws-prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right . . . and governmental regulation of commercial firearm sales — whose constitutionality under a strict scrutiny standard would be far from clear." *Heller*, 128 S. Ct. at 2851 (Breyer, J. dissenting).

Finally, it is important to note that *Heller* did nothing to disturb prior holdings refusing to extend Second Amendment protection to firearm manufacturers. Before the Supreme Court's decision in *Heller*, courts assumed that there was "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). While the court in *Olympic Arms* noted that the Second Amendment did not, at that time, confer an individual benefit, *see Olympic Arms*, 91 F. Supp. at 1071, this distinction did not affect the court's definition of the underlying right itself. The right to "bear" arms did not also include the right to manufacture and sell them. *See id.*; *see also United States v. King*, 532 F.2d 505, 510 (5th Cir. 1976) (defendant who was convicted of manufacturing and selling firearms without a license could not contend that statutes violated his right to bear arms); *Gilbert Equip. Co. v. Higgins*, 709 F. Supp. 1071, 1080-81 (S.D. Ala. 1989) (plaintiff did not have the right to import firearms because the right to keep and bear arms under the Second Amendment does not include the right to produce and acquire them). The *Heller* decision established only an individual right to possess a firearm for self-defense in the home. It did not overturn the above caselaw nor imply the

broad interpretation of the Second Amendment advanced by plaintiffs and amici in this case.[12]

In short, *Heller* does not undermine the MFFA's preemption by Federal firearms laws. Rather, the decision supports defendant's argument that Federal regulation of the intrastate manufacture and sale of firearms is lawful.

VII. The Weapons Collectors Society's Theory that the Government Is in Breach of the 1889 Compact with Montana Is Baseless.

The Weapons Collectors Society suggests that Montana's Compact with the United States, signed at the time Montana joined the Union, imposes a contractual limitation on Congress's Commerce power. *See* Weapons Collectors Society Br. at 18-20. This theory was rejected by the Supreme Court as early as 1849. *See Pollard v. Hagan*, 44 U.S. 212, 223 (1845) (finding that Alabama's Compact conferred no more rights than those guaranteed to the original thirteen States and

[12] Accordingly, firearm manufacturers lack standing to assert that federal preemption of the MFFA violates the Second Amendment right to bear arms. Without an individual right to produce and sell firearms, manufacturers can allege no injury-in-fact, and are similarly unable to assert third-party standing on behalf of potential purchasers. *See Kowalski v. Tesmer*, 543 U.S. 125, 130-31 (2004) (attorneys lacked third-party standing to assert rights of indigent defendants because attorneys lacked sufficiently close relationship with defendant right-holders, and there was no "hindrance" to indigent defendants' ability to protect their own interests). Aside from an alleged promise to order firearms, the manufacturers in this case have no established relationship with persons interested in purchasing weapons produced under the MFFA. Further, individual purchasers may assert Second Amendment rights in the event that they are prosecuted for violating Federal firearms laws. *C.f. Eisenstadt v. Baird*, 405 U.S. 438, 445-46 (permitting distributor of contraceptives to challenge statute that denied single persons the ability to purchase birth control. The statute did not subject prospective purchasers to prosecution, leaving them without a forum in which to vindicate their rights).

did not affect Congress's power under the Commerce Clause); *Bolln v. Nebraska*, 176 U.S. 83 (1900) (once admitted into the Union, the power of the State is limited by the Bill of Rights and those powers conferred to Congress under the Constitution).

Pursuant to its Compact with the United States, Montana entered the Union on equal footing with those States already admitted, s*ee Nevada v. Watkins*, 914 F.2d 1545, 1555 (9th Cir. 1990), and the rights guaranteed under that contract are co-extensive with Montana's powers under the Constitution. *See id.* ("The equal footing doctrine, however, 'negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State.'" (quoting *United States v. Texas*, 339 U.S. 707, 717 (1950))). As such, Montana possesses those rights and powers not expressly delegated to Congress under Article I, and may not pass any law that conflicts with the constitutional powers of the United States. *See id.* Here, because the MFFA conflicts with Federal firearms laws passed under Congress's Commerce power, it is void.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Second 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: May 18, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(d)(2)(E), I certify that this Reply Memorandum is 10,792 words and thus complies with Rule 7.1(d)(2)(C) and this Court's Order granting defendant leave to file a Reply Memorandum of up to 12,000 words.

s/ Jessica B. Leinwand
JESSICA B. LEINWAND

CERTIFICATE OF SERVICE

I hereby certify that, on May 18, 2010, a copy of this Reply Memorandum in Support of Defendant's Motion to Dismiss was served upon counsel of record by electronic means through electronic filing.

s/ Jessica B. Leinwand
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