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11  
12 UNITED STATES DISTRICT COURT  
13 FOR THE DISTRICT OF MONTANA  
14 MISSOULA DIVISION

15  
16 MONTANA SHOOTING SPORTS )  
ASSOCIATION, INC., *et al.* )

17 Plaintiff, )

18 v. )

19 )  
20 ERIC HOLDER, JR., *et al.* )  
Defendants. )

) Case No.: 9:09-cv-00147-M-DWM-JCL

) **BRIEF AMICUS CURIAE OF CENTER**  
) **FOR CONSTITUTIONAL**  
) **JURISPRUDENCE AND LAWMAKERS**  
) **FROM 18 STATES IN OPPOSITION TO**  
) **MOTION TO DISMISS**

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**TABLE OF CONTENTS**

INTRODUCTION ..... 1

IDENTITY AND INTEREST OF AMICI CURIAE..... 1

ARGUMENT ..... 2

    I.    THE CONSTITUTION RECOGNIZES A SYSTEM OF DUAL  
          SOVEREIGNTY IN WHICH STATES RETAIN THE  
          GENERAL POLICE POWER..... 3

    II.   THE FEDERAL POWERS UNDER THE COMMERCE CLAUSE  
          DO NOT EXTEND TO LOCAL REGULATION OF WHOLLY  
          INTRASTATE COMMERCE..... 5

    III.  FEDERAL REGULATION OF INTRASTATE  
          MANUFACTURE AND SALE OF GUNS TO THE  
          EXCLUSION OF THE STATES IS NOT SUPPORTED BY AN  
          ENUMERATED CONSTITUTIONAL POWER ..... 8

    IV.  STATES HAVE THE POWER TO REGULATE INTRASTATE  
          COMMERCIAL ACTIVITY WITHOUT FEDERAL  
          INTERFERENCE..... 10

    V.   THE PURPOSE OF THE MONTANA FIREARMS FREEDOM ACT IS TO  
          REGULATE THE LOCAL MARKET FOR FIREARMS FOR THE  
          GENERAL WELFARE AS DETERMINED BY THE  
          MONTANA ..... 11

CONCLUSION..... 11

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 *Berman v. Parker*, 348 U.S. 26 (1954) ..... 10

4 *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) ..... 10

5 *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) ..... 10

6 *Gibbons v. Ogden*, 22 U.S. 1 (1824)..... 5, 6

7 *Gonzales v. Raich*, 545 U.S. 1 (2005)..... 2, 7

8 *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)..... 4, 5

9 *Jones v. United States*, 529 U.S. 848 (2000) ..... 8

10 *Rancho Viejo v. Norton*, 541 U.S. 1006 (2004) ..... 1

11 *Rapanos v. United States*, 547 U.S. 715 (2007)..... 1

12 *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001) .. 1

13 *Texas v. White*, 74 U.S. 700, 725 (1869) ..... 3

14 *United States v Lopez*, 514 U.S. 549 (1995)..... 2, 5, 6, 8

15 *United States v. Morrison*, 529 U.S. 598 (2000) ..... 1

16 *Wickard v. Filburn*, 317 U.S. 111 (1942) ..... 2, 6

17 **Federal Statutes**

18 18 U.S.C. § 925A ..... 1

19 28 U.S.C § 2201 ..... 1

20 28 U.S.C. § 2202..... 1

21 Agricultural Adjustment Act of 1933, 48 Stat. 31 ..... 6

22 Controlled Substances Act, 21 U.S.C. § 801 et seq ..... 7

23 Gun Control Act of 1968, 18 U.S.C. §§ 921 et seq ..... 8

24 Gun-Free School Zone Act of 1990, 18 U.S.C. § 922 (q) (1) (A) ..... 7

25 National Firearms Act of 1934, 26 U.S.C. §§ 5811-22 ..... 8

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**Other Authorities**

H. Rep. No. 90-1577, 1968 U.S.C.C.A.N. 4410, 4412..... 9  
Public Law 90-618 (1968) ..... 9  
The Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961) ..... 5

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**INTRODUCTION**

The State of Montana enacted the Montana Firearms Freedom Act (MFFA or the Act) declaring that Montana, under its reserved police powers, has authority to regulate, free from federal firearms laws, the wholly intrastate production and sale of firearms. After the passage of the Act, the Bureau of Alcohol, Tobacco, Firearms, and Explosives advised businesses in Montana that the provisions of the Act freeing wholly intrastate transactions from federal regulation were superseded by federal regulation. Thereafter, the Montana Shooting Sports Association, Inc.; Second Amendment Foundation, Inc.; and Gary Marbut filed an action for declaratory judgment pursuant to 28 U.S.C §§ 2201 and 2202 and 18 U.S.C. § 925A that they may proceed under MFFA without fear of criminal prosecution or civil sanction. The United States has filed a Motion to Dismiss the Plaintiffs’ complaint for declaratory relief, arguing, among other things, that Congress has authority under the Commerce Clause to regulate wholly intrastate sales and manufacture of firearms, without regard to conflicting State laws. Amici join the Plaintiffs in opposing the motion to dismiss by the defendant. The sovereign police power retained by the States includes the power to regulate the manufacture of an item within State boundaries for use only within the State without federal influence.

**IDENTITY AND INTEREST OF AMICI CURIAE**

Amici, Center for Constitutional Jurisprudence and numerous legislators from eighteen States join together on this brief to uphold the principles of the American Founding, including the proposition that all powers not expressly conferred upon the United States were reserved for the States or the people. In addition to providing counsel for parties at all levels of State and federal courts, the Center has participated as amicus curiae before the Supreme Court in several cases of constitutional significance, including *Rancho Viejo v. Norton*, 541 U.S. 1006 (2004); *Rapanos v. United States*, 547 U.S. 715 (2007); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159 (2001); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Center believes the issue before this court is one of special importance to the principle of dual sovereignty and both the powers of States and the rights of the people protected by the

1 Constitution. Congress exceeds the limits of its power under Article I when it displaces State  
2 regulation in areas that are not within the “few and defined” constitutional powers of the federal  
3 government. Further, the Tenth Amendment expressly recognizes that the States and the people  
4 retain all powers which were not granted to the federal government under the Constitution. To  
5 permit the federal government to displace State regulation when regulation takes place entirely  
6 within the State would be to ignore the purpose of enumerated powers and the reserved State  
7 sovereignty recognized by the Tenth Amendment.

8 State legislator *amici* are also vitally interested in the issue before the Court because they  
9 have a duty under their respective oaths of office to uphold not only the Constitution of the United  
10 States but also their State constitutions. Additionally, *amici* legislators have a duty to promote the  
11 general welfare of their respective States, including protecting the rights of their constituents from  
12 the overreaching power of the federal government. *Amici* legislators are all from States that have  
13 either enacted or introduced the Firearms Freedom Act and have a valid interest in asking the Court  
14 to uphold the Montana law as a valid exercise of retained sovereign police power.

### 15 **ARGUMENT**

16 There is no doubt that States retain the police power to regulate purely intrastate economic  
17 activity. States remain free to exercise their sovereign authority over the activities taking place  
18 within the State, as long as there is no discrimination against or barrier to interstate commerce.

19 In this case, the federal government seeks to usurp those sovereign functions of the State.  
20 Based on findings that have nothing to do with “commerce,” the defendant claims authority to  
21 displace Montana’s sovereignty to regulate a wholly intrastate activity. The purpose for this  
22 legislation is not to preserve a national market, as in *Wickard v. Filburn*, 317 U.S. 111, 127 (1942),  
23 or to destroy such a market as in *Gonzales v. Raich*, 545 U.S. 1, 7 (2005), but rather to regulate  
24 against gun violence that has no effect on commerce – a claim of federal power that was rejected by  
25 this Court in *United States v Lopez*, 514 U.S. 549 , 561 (1995).

26 Montana seeks to regulate the production, sale, and registration of firearms and firearm  
27 accessories which are manufactured, bought, and sold within the State of Montana under the  
28

1 Montana Firearms Freedom Act. In sum, Montana seeks to regulate a purely intrastate activity  
2 without federal interference. The federal government in this case argues that Montana is irrelevant  
3 and that the federal government has the power to displace State regulation of purely intrastate  
4 activities. Montana’s law reaches only intrastate activities, a legitimate use of police power under its  
5 retained sovereignty. This activity is beyond congressional power to regulate for purposes of  
6 general crime control.

7 **I.**  
8 **THE CONSTITUTION RECOGNIZES A SYSTEM**  
9 **OF DUAL SOVEREIGNTY IN WHICH STATES**  
10 **RETAIN THE GENERAL POLICE POWER**

11 It has long been recognized by the Supreme Court that the Tenth Amendment affirms a  
12 reserved police power for the States and limited power of the federal government defined by the  
13 enumerated powers listed in the Constitution. U.S. Const. Amend 10 The Court has additionally  
14 recognized that the dual sovereignty protected by the Tenth Amendment is essential to the  
15 preservation of the Union and the strength of individual States.

16 Without the States in the union, there could be no such political body as the United  
17 States. Not only, therefore, can there be no loss of separate and independent  
18 autonomy to the States, thorough their union under the Constitution, but it may be not  
19 unreasonably said that the preservation of the States, and the maintenance of their  
20 governments, are as much within the design and care of the Constitution as the  
21 preservation of the Union and the maintenance of the National government. The  
22 Constitution, in all its provisions, looks to an indestructible Union, composed of  
23 indestructible States.

24 *Texas v. White*, 74 U.S. 700, 725 (1869) quoting *Lane County v. Oregon*, 74 U.S. 71, 76 (1869).

25 The unmistakable intent of the Founders, as expressed in the plain language of the  
26 Constitution, was to leave broad powers with the States, such that they were left to regulate the  
27 affairs within their borders and promote the general welfare of their people.

28 As James Madison put it: “The powers delegated by the proposed Constitution to the  
federal government are few and defined. Those which are to remain to the state  
governments are numerous and indefinite...The powers reserved to the several States  
will extend to all the objects which, the ordinary course of affairs, concern the lives,  
liberties and properties of the people, and the internal order improvement, and  
prosperity of the State.”

1 *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (*quoting* The Federalist No. 45, pp. 292-293 (C.  
2 Rossiter ed. 1961)).

3 The Framers never intended to authorize regulation of local matters by the federal  
4 government and instead reserved those matters to the individual States or to the people. Indeed the  
5 Supreme Court has adopted an expansive view of States’ powers and has noted the significance of  
6 these rights in the preservation of the Union. While the Constitution specifically delegates certain  
7 powers to the federal government, including the power to regulate commerce among the States, it is  
8 clear from the intent of the Founders and the language of the Constitution that federal powers should  
9 not be expanded to “the ordinary course of affairs...and the internal order improvement, and  
10 prosperity of the State.” *Id.*

11 While the numerous powers of the States clearly enhance efficiency, the Supreme Court has  
12 also emphasized that this structure of dual sovereignty is critical to the protection of the rights of the  
13 people.

14 It assures a decentralized government that will be more sensitive to the diverse needs  
15 of a heterogeneous society; it increases opportunity for citizen involvement in  
16 democratic process; it allows for more innovation and experimentation in  
government; and it makes government more responsive by putting States in  
competition for a mobile citizenry.

17 *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (citing See generally *McConnell, Federalism:*  
18 *Evaluating the Founders’ Design*, 5 U. Chi. L. Rev. 1484, 1491-1511 (1987), *Merritt, The*  
19 *Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-10  
20 (1988)). In recognizing the importance of a decentralized government for the preservation of the  
21 rights of the people, the Court further emphasized the importance of a limited federal government in  
22 this system of dual sovereignty.

23 Therefore, in this dual sovereignty system, the federal government has specifically  
24 enumerated powers under the Constitution focused on those areas of regulation that the Framers  
25 believed were matters that could not be handled by the individual States. However, both precedent  
26 and original intent warn of great harm to the liberties of the people should these few federal powers  
27 be expanded to infringe upon the police powers of the States. When the federal government  
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1 exercises powers beyond those granted in order to regulate matters that concern affairs within the  
2 State, particularly in matters that the people of the State have addressed in State law, the rights  
3 intended to be protected under the system of dual sovereignty are threatened. *Gregory v. Ashcroft*,  
4 501 U.S. at 458-60.

5 To preserve the rights of the people, the system of dual sovereignty enumerates specific  
6 powers for the federal government. These powers do not extend to local regulation or to a general  
7 police power. *Id.* at 457-58 This ensures local activities meet “the diverse needs of a heterogeneous  
8 society.” *Id.* at 457.. The Founders intended to reserve the power of local regulation for the States  
9 and the people, recognizing both the threat of an over-reaching federal government and the  
10 efficiency of local control. The Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961). The Montana  
11 Act is consistent with the type of local regulation that was intended by the Tenth Amendment and  
12 the inherent limit within the Commerce Clause itself.

13 **II.**  
14 **THE FEDERAL POWERS UNDER THE COMMERCE CLAUSE**  
15 **DO NOT EXTEND TO LOCAL REGULATION OF WHOLLY INTRASTATE**  
16 **COMMERCE**

17 While the power to regulate commerce is an enumerated power of the federal government, it  
18 is not without its limits. “The Constitution delegates to Congress the power ‘to regulate Commerce  
19 with foreign Nations and *among* the several States, and with the Indian Tribes.’ Commerce Clause,  
20 Art. I, § 8, cl. 3.” *U.S. v. Lopez*, 514 U.S. at 552-53 (emphasis added). The Court in *Gibbons v.*  
21 *Ogden*, 22 U.S. 1, 189-90 (1824), stated “[c]ommerce, undoubtedly, is traffic, but it is something  
22 more: it is intercourse. It describes the commercial intercourse between nations, and parts of  
23 nations, in all its branches, and is regulated by prescribing rules for carrying on intercourse.” While  
24 the Court acknowledged the express right to regulate intercourse, it was also quick to point out the  
25 limitation “inherent in the very language of the Commerce Clause.” *U.S. v. Lopez*, 514 U.S. at 553.  
26 “Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which  
27 concerns more States than one.... The enumeration presupposes something not enumerated; and that  
28 something, if we regard the language, or the subject of the sentence, must be the exclusively internal

1 commerce of a State.” *Gibbons v. Ogden*, 22 U.S. at 194-95. No matter how broadly one may  
2 construe the Commerce Clause, it is plain that the Clause did not grant a general police power to the  
3 federal government. *United States v. Lopez*, 514 U.S. at 567.

4 If the Commerce Clause were to be interpreted to grant Congress the power to regulate  
5 wholly intrastate commercial activity that did not impact other States, the very purpose of the dual  
6 sovereignty system would be frustrated. Under that approach, States would possess no power to  
7 regulate the production, sale, or transportation of any good within their borders.

8 It is not intended to say that these words comprehend that commerce, which is  
9 completely internal, which is carried on between man and man in a State, or between  
10 different parts of the same State, and which does not extend to or affect other States.  
Such a power would be inconvenient, and it certainly unnecessary.

11 *Gibbons*, 22 U.S. at 194. In short, not only is federal regulation of wholly intrastate activities  
12 unnecessary, as the Court points out, but it is also an unconstitutional encroachment upon the  
13 reserved police powers of the States.

14 To determine whether Congress may regulate intrastate activity as part of interstate  
15 commerce, e.g., *Wickard* and *Raich*, the Court has often looked to the purpose behind the federal  
16 regulation. Even in *Wickard v. Filburn*, widely criticized as sanctioning power beyond the  
17 Constitution’s limits but at the very least acknowledged to be at the outer limit of constitutional  
18 power, the Court found that cultivation of wheat for personal consumption impacted the national  
19 market. Since the purpose of the federal law at issue, the Agricultural Adjustment Act of 1938, was  
20 “to increase the market price of wheat and to that end to limit the volume thereof that could affect  
21 the market,” regulation of cultivation for personal consumption was required to achieve the purpose  
22 of the law. *Wickard*, 317 U.S. at 128. In the 1933 Act, Congress sought to rescue the national  
23 agricultural market and “relieve the existing national economic emergency by increasing agricultural  
24 purchasing power.” Agric. Adjustment Act, 48 Stat. 31. Thus, the purpose of the regulation was  
25 plainly to preserve, and thus regulate, commerce in agriculture among the States.

26 Just as in *Wickard*, the Court in *Raich* looked to a Congressional purpose that demonstrated  
27 an intent to regulate (in that case prohibit or destroy) a national market. This purpose is found in the  
28

1 Controlled Substances Act, 21 U.S.C. § 801 et seq. The Court held that homegrown marijuana to be  
2 used under California’s Compassionate Use Act was subject to federal regulation because, like  
3 *Wickard*, the personal cultivation and use had an impact on the market. The ban on local possession  
4 and use was permissible because Congress was attempting to destroy a national market and “[a]  
5 major portion of the traffic in controlled substances flows through interstate and foreign commerce.”  
6 *Raich*, 545 at 13. Since “[c]ontrolled substances manufactured and distributed intrastate cannot be  
7 differentiated from controlled substances manufactured and distributed interstate,” Congress could  
8 not achieve its goal of destroying the national market unless it could also prohibit local markets in  
9 the product. *Id.* This is not the case with the federal regulatory scheme for firearms. Firearms can  
10 be easily distinguished by their make and manufacturer, thereby distinguishing the firearms that are  
11 manufactured intrastate from firearms distributed interstate. As noted below, Congress has not  
12 sought to “rescue” or “destroy” a national market with its firearms regulation. Indeed, the  
13 regulations have nothing at all to do with the regulation of commerce and everything to do with local  
14 crime control.

15 The limits of the commerce power were discussed in *United States v. Lopez*. In that case,  
16 the Court held that the Commerce Clause did not authorize a law to regulate gun possession on  
17 school grounds. The Court in *Lopez* found the Gun-Free School Zone Act of 1990 was outside of  
18 Congress’ commerce power because its purpose was criminal in nature, not commercial. The Gun-  
19 Free School Zone Act states:

20 (q)(1) The Congress finds and declares that – (A) crime, particularly crime involving  
21 drugs and guns, is a pervasive, nationwide problem; (B) crime at the local level is  
22 exacerbated by interstate movement of drugs, guns, and criminal gangs; (C) firearms  
23 and ammunition move easily in interstate commerce and have been found in  
24 increasing numbers in and around schools, as documented in numerous hearings in  
25 both the Committee on the Judiciary [of] the House Representatives and the  
26 Committee on the Judiciary of the Senate...(H) States, localities, and school systems  
27 find it almost impossible to handle gun-related crime by themselves – even States  
28 localities, and school systems that have made strong efforts to prevent, detect and  
punish gun-related crime find their efforts unavailing due in part to the failure or  
inability of other States or localities to take strong measures.

18 U.S.C. § 922(q)(1)(A)

1 The Court was not persuaded by the government’s contention that possession of a firearm in  
2 a school zone impacted interstate commerce because the cost of violent crimes are dispersed  
3 throughout the population through nationwide insurance programs and because violent crime in  
4 school zones deters movement between States and attendance in school, resulting in a less  
5 productive citizenry. *Lopez*, 514 U.S. 563-64. The Court held that the statute’s purpose was too  
6 strongly criminal to be supported by the federal government’s commerce power.

7 Thus, the Court has drawn a distinction between the regulation of intrastate activities that  
8 impact a Congressional program to support or prohibit a national market and those that do not.  
9 When, as here, a federal regulation’s purpose is crime control, the federal government may not rely  
10 upon the Commerce Clause to reach a wholly intrastate activity.

11 **III.**  
12 **FEDERAL REGULATION OF INTRASTATE MANUFACTURE**  
13 **AND SALE OF GUNS TO THE EXCLUSION OF THE STATES**  
14 **IS NOT SUPPORTED BY AN ENUMERATED CONSTITUTIONAL POWER**

15 The National Firearms Act of 1934, 26 U.S.C. §§ 5811-22, was enacted to create a system of  
16 federal gun control:

17 It has been frequently pointed out that there are limitations on the States, that the  
18 Federal Government has powers in the field, and that the evil needs a remedy. The  
19 growing frequency of crimes of violence in which people are killed or injured by the  
20 use of dangerous weapons needs no comment. The gangster as a law violator must be  
21 deprived of his most dangerous weapon, the machine gun.

22 *Id.* Congress noted the limits of States in handling the problem of firearms-related crimes and  
23 violence and openly relied on this as a rationale for taking over the police powers of the state. The  
24 purpose of the law was crime control, regardless of the effect on interstate commerce. *Cf. Jones v.*  
25 *United States*, 529 U.S. 848, 851-52 (2000).

26 The other federal law at issue in this case is the Gun Control Act of 1968, 18 U.S.C. §§ 921  
27 *et seq.*, which prohibits the importation, manufacturing, and dealing of firearms except between  
28 licensed persons and requires the maintenance of records of the production, shipment, and sale of  
firearms through the use of a mandatory serial number on each newly-produced weapon. This law is  
also a crime control measure: “The Congress hereby declares that the purpose of this title is to

1 provide support to Federal, State and local law enforcement officials in their fight against crime and  
2 violence...” Public Law 90-618 (1968). While Congress dutifully notes that “[t]he principle purpose  
3 of H.R. 177735, as amended, is to strengthens Federal controls over interstate and foreign commerce  
4 in firearms” it is immediately followed by the statement of the law’s primary purpose “to assist the  
5 States effectively to regulate firearms traffic within their borders.” Public Law 90-618 (1968).

6 The legislative history is rich with concerns that the State and local regulation of firearms  
7 was insufficient, making it necessary for the federal government to intervene with the Gun Control  
8 Act. “This increasing rate of crime and lawlessness and the growing use of firearms in violent crime  
9 clearly attest to a need to strengthen Federal regulation on interstate firearms traffic.” H. Rep. No.  
10 90-1577, 1968 U.S.C.C.A.N. 4410, 4412. Congress further noted:

11 Handguns, rifles and shotguns have been the chosen means to execute three-quarters  
12 of a million people in the United States since 1990. The use of firearms in violent  
13 crimes continues to increase today. Statistics indicate that 50 lives are destroyed by  
14 firearms each day. In the 13 months ending in September 1967 guns were involved in  
15 more than 6,500 murders, 10,000 suicides, 2,600 accidental deaths, 43,500  
16 aggravated assaults, and 50,000 robberies. No civilized society can ignore the  
17 malignancy which this senseless slaughter reflects.

18 *Id.* at 4413.

19 The stated purpose of this regulation is not related to interstate commerce. It is to prevent the  
20 use of firearms in crimes. Further, the Gun Control Act was Congress’ response to several high-  
21 profile, tragic deaths involving firearms. “President Kennedy, Martin Luther King, Jr., Medgar  
22 Evers, and the 16 dead and 31 wounded of the deranged man firing from the tower of the University  
23 of Texas were all shot by rifles or shot guns.” *Id.* Even if the regulation sought to prevent the use of  
24 guns involved in crime through the issuance of licenses and the documentation of serial numbers,  
25 reliance upon the Commerce Clause cannot support such crime-prevention regulation.

26 Like the criminalization of unlicensed sale or production of firearms under the Gun Control  
27 Act and the National Firearms Act, the regulation in *Lopez* sought to criminalize the possession of  
28 firearms on schools. The stated purpose of the Gun Control Act is to protect the same interest found  
to be unconstitutional in *Lopez*. If the Court was not persuaded by the *de minimis* relationship to

1 commerce put forth in the Gun-Free School Zone Act, this Court should be no more persuaded by  
2 the relationship between the purpose of the Gun Control Act and interstate commerce.

3 Unlike in *Wickard* and *Raich*, the federal statutes at issue here are neither an attempt to  
4 rescue and promote a national market nor an attempt to destroy and prohibit a national market.  
5 Instead, these federal laws merely seek to resolve the problem of the use of firearms in local crimes,  
6 just as the Gun-Free School Zone Act did in *Lopez*.

7  
8 **IV.**  
9 **STATES HAVE THE POWER TO REGULATE**  
10 **INTRASTATE COMMERCIAL ACTIVITY**  
11 **WITHOUT FEDERAL INTERFERENCE**

12 A founding principle of our system of dual sovereignty is that the power of the States and the  
13 rights of the people must be preserved, and often there is no better area for the exercise of such  
14 powers and rights than the regulation of local activities. Nowhere can this be more true than in the  
15 area of a State’s regulation of intrastate commerce.

16 The Supreme Court has recognized that the sovereignty retained by the States includes the  
17 power to regulate local commercial activity. “States are accorded wide latitude in the regulation of  
18 their local economies under their police powers.” *City of New Orleans v. Dukes*, 427 U.S. 297, 303  
19 (1976). While States may not use their police power to discriminate against interstate commerce,  
20 *see Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978), they are free to regulate local  
21 markets and promote commercial interests within the State, *cf.*, *Berman v. Parker*, 348 U.S. 26, 32-  
22 33 (1954) (explaining the reach of police power as empowering States to determine the public  
23 welfare, which includes commercial interests).

24 If States have the power to determine and promote general welfare by regulating local  
25 commerce, *Exxon*, 437 U.S. at 127, then regulation of purely intrastate commercial activity was not  
26 an enumerated power granted to Congress in the Constitution. State and local governments have  
27 authority under their retained police powers to regulate local commerce and the federal  
28 government’s authority under the Commerce Clause does not reach the structure of local retail

1 markets. Congress' power is to regulate *commerce* among the States. It has no power to displace  
2 local regulation of intrastate markets for the purpose of controlling local criminal activity.

3 **V.**

4 **THE PURPOSE OF THE MONTANA FIREARMS FREEDOM ACT**  
5 **IS TO REGULATE THE LOCAL MARKET FOR FIREARMS FOR THE**  
6 **GENERAL WELFARE AS DETERMINED BY THE MONTANA LEGISLATURE**

7 To date, five States have passed the Firearms Freedom Act, legislation exempting them from  
8 federal regulation of the production, sale, and registration of firearms within their respective States.  
9 In addition to Montana, Wyoming, Utah, South Dakota, and Tennessee have passed this act in an  
10 exercise of their retained sovereignty, recognized in the Tenth Amendment. An additional twenty-  
11 two States have introduced similar laws. In total, twenty-seven States are taking action to exempt  
12 themselves and their citizens from the federal firearms regulation of purely local manufacture and  
13 sales of firearms.

14 The purpose of the Montana Firearms Freedom Act is to regulate the production and sale of  
15 small firearms and firearms accessories within the State of Montana in the manner chosen by the  
16 Montana Legislature. Montana and four other States have determined that the federal regulation of  
17 purely local activity does not serve the interests of the people within their States. In response to the  
18 needs of their own States, these Legislatures have enacted legislation to take over regulation of their  
19 local production and sale of firearms and accessories.

20 Montana and other States merely seek to regulate that which is purely local. In doing so,  
21 they do not disrupt commerce among the States. Instead, they seek only to take over the regulation  
22 of purely intrastate manufacture and sale of a particular product. This is plainly within their retained  
23 sovereign police power.

24 **CONCLUSION**

25 Montana is acting fully within their expansive police powers in accordance with their  
26 retained sovereignty. The Tenth Amendment recognizes these powers retained by the States and the  
27 courts have noted that the purpose of this federalist structure was to preserve individual liberty  
28 through a vertical separation of powers.

1 Congress' concern with local crime is laudable. However, that concern cannot find purchase  
2 in the Commerce Clause to displace State regulation of purely local activity. The motion of the  
3 United States to dismiss this action should be rejected, and the Court should issue the declaratory  
4 judgment as prayed for in the complaint.

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6 DATED: April 19, 2010.

7 Respectfully submitted,

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