

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
MISSOULA, NEVADA

MONTANA SHOOTING SPORTS)
ASSOCIATION, et al.,)
) Docket No. 9:09-CV-0147-DWM-JCL
Plaintiffs,)
)
vs.)
)
ERIC H. HOLDER, JR., et al.,)
)
Defendants.) Missoula, Montana
) July 15, 2010
) 9:03 a.m.
And related cases and parties)

HEARING ON MOTIONS

THE HONORABLE JEREMIAH C. LYNCH PRESIDING
MAGISTRATE JUDGE OF THE U.S. DISTRICT COURT

COURT RECORDER:

ANNIE PUHRMANN
U.S. District Court

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9:09-CV-0147-DWM-JCL Montana Shooting v. Holder 7/15/10 **MOTIONS**

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1 MISSOULA, MONTANA

THURSDAY, JULY 15, 2010

2 PROCEEDINGS BEGAN AT 9:03:58 A.M.

3 THE COURT: This is the time set for hearing in the
4 Montana Shooting Sports Association, et al., versus Holder.
5 Civil number 9-147-Missoula.

6 I'm going to begin by asking counsel for the
7 principal parties, the Intervenor State of Montana and the
8 Amicus who will be participating today to identify themselves
9 for the record.

10 We'll begin with plaintiff and we'll go to defense
11 counsel, to the intervenor, to the amicus.

12 MR. RHOADES: Your Honor, Quentin Rhoades on behalf
13 of Montana Shooting Sports Association, Second Amendment
14 Foundation, and Gary Marbut.

15 THE COURT: Okay. Thank you.

16 MS. LEINWAND: Good morning, Your Honor. Jessica
17 Leinwand on behalf of the United States.

18 THE COURT: Good morning.

19 MR. TWEETEN: Good morning, Your Honor. Chris
20 Tweeten --

21 THE COURT: Good morning.

22 MR. TWEETEN: -- on behalf of the State of Montana.
23 Also in the courtroom today with me is Zach Zipfel, who is an
24 Assistant Attorney General who's on the brief for the State of
25 Montana.

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1 THE COURT: All right. Thank you.

2 MR. FOX: Your Honor, Tim Fox, local counsel for the
3 Goldwater Institute. Arguing this morning for the Goldwater
4 Institute is Nick Dranias.

5 THE COURT: Good morning.

6 MR. DRANIAS: Good morning, Your Honor. Nick
7 Dranias for the Goldwater Institute. Thank you.

8 THE COURT: And you'll be arguing today?

9 MR. DRANIAS: I will indeed. Thank you.

10 THE COURT: All right.

11 MR. JACKSON: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. JACKSON: Greg Jackson, local counsel for Gun
14 Owners of America. I'd like to introduce Herb Titus.

15 MR. TITUS: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. TITUS: I'm Herb Titus and I'm of the law firm
18 of William J. Olson, PC, and we represent Gun Owners of
19 America and Gun Owners Foundation.

20 THE COURT: All right. Thank you.

21 MR. JACKSON: Thank you, Your Honor.

22 THE COURT: I think we have -- have we covered --
23 oh, we've got Mr. Renz, I believe.

24 MR. RENZ: Good morning, Your Honor. I'm Jeffrey
25 Renz and I represent the Amicus Montana Legislatures. And

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1 also in the courtroom is Jennifer Bordy, who is co-author of
2 the brief.

3 THE COURT: All right. Thank you.

4 That being said, then I will give the floor to Ms.
5 Leinhart [sic] on behalf of the defendant, Eric Holder. As I
6 indicated in the order, you will have 50 minutes. You do not
7 have to use it all if you choose not to, but you can split it
8 in any manner that you deem appropriate for your opening and
9 rebuttal.

10 MS. LEINWAND: Thank you, Your Honor.

11 I'd like to reserve 15 minutes at the outset for
12 rebuttal.

13 THE COURT: 15?

14 MS. LEINWAND: Mm-hmm.

15 THE COURT: All right.

16 MS. LEINWAND: May it please the Court.

17 The Montana Firearms Freedom Act declares that
18 firearms made and sold within Montana are not subject to
19 federal regulation. Plaintiffs in this case, Mr. Marbut, the
20 Montana Shooting Sports Association, and the Second Amendment
21 Foundation filed suit seeking a declaration that they can
22 manufacture firearms under the MFFA without complying with
23 applicable federal firearms laws.

24 This suit raises sensitive issues. There have been
25 over fifteen briefs submitted, many words have been written.

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1 But really, Your Honor, this is an easy case, and it does
2 center on the issue of federal power. But not only the power
3 -- excuse me -- not only the power of the federal government
4 to regulate commercial activity, the buying and selling of
5 firearms under the Commerce Clause.

6 This suit is about the power of a Federal District
7 Court to hear a case in which the plaintiffs have no standing
8 and where applicable Ninth Circuit and Supreme Court precedent
9 directly controls the challenge on the merits.

10 In fact, plaintiff's claims can only succeed if
11 binding authority, Gonzales versus Raich and United States
12 versus Stewart is overturned. And regardless of plaintiff's
13 frustration or disagreement with those holdings, Stewart and
14 Raich remain good law. Asking this Court to revisit them
15 misunderstands the role of a Federal District Court in
16 interpreting and applying the law as it is.

17 Plaintiffs and Amicus have both referred to the MFFA
18 as a political statement, and so Montana and other states who
19 have passed similar legislation can try to amend federal gun
20 control laws in the political arena through their elected
21 senators and representatives in Congress, but this Court must
22 dismiss plaintiff's claims for lack of standing and for
23 failure to state a claim in light of the settled Commerce
24 Clause on point -- Commerce Clause laws on point.

25 Turning to those jurisdictional issues now, a

1 federal court can only hear live cases or controversies in
2 which the plaintiffs allege concrete and actual injury.
3 Plaintiffs bear the burden of establishing their standing to
4 challenge the federal firearms laws in light of the MFFA.
5 And plaintiffs have stated that were it not for the federal
6 firearms laws currently in place, they could immediately
7 manufacture and sell firearms under the MFFA. But they claim
8 they haven't done so out of fear of being prosecuted for
9 violating federal law.

10 Plaintiffs then are challenging laws before those
11 laws have been enforced against them. And to have standing in
12 the context of a pre-enforcement challenge, a plaintiff must
13 allege two things, an intention to engage in conduct
14 prohibited by a federal statute, and a creditable threat of
15 prosecution that is more than speculative.

16 And plaintiffs are unable to establish standing
17 under the Ninth Circuit's three part test announced in San
18 Diego County versus Reno. They can't allege a concrete
19 intention to violate federal firearms laws at a specific time
20 or place. They can point to no creditable threat of
21 prosecution on the part of the federal government. And they
22 haven't alleged a history or a pattern of prosecution by
23 federal authorities.

24 If we look at the first prong, intent, Plaintiff
25 Marbut has submitted evidence on his development of 12 gauge

1 round beanbag ammunition and the Montana Buckaroo Rifle. Mr.
2 Marbut clearly has a desire to manufacture and sell small
3 arms and ammunition under the MFFA. And he has the means to
4 complete a pilot project if the law is upheld. But he hasn't
5 alleged a plan to violate federal law at a particular time or
6 on a date certain. In fact he'll manufacture these firearms
7 only once this Court declares that the MFFA is valid.

8 So Mr. Marbut has no intention of violating federal
9 law. He's expressly refusing to violate the Gun Control Act,
10 and will produce and sell MFFA firearms someday when a
11 judicial decision says that he can.

12 And the Court in San Diego County found similar
13 facts to be troubling, stating that plaintiffs had to specify
14 a particular time or date on which they intend to violate a
15 statute because the acts necessary to trigger prosecution are
16 entirely within the plaintiff's control.

17 THE COURT: How do you respond to the plaintiff's
18 argument that the Court should not, in this instance, look to
19 the three part test of Thomas and San Diego because he's
20 alleged sufficient tangible economic entry? He contends he
21 has.

22 MS. LEINWAND: Well, Your Honor, if we look at
23 binding authority Ninth Circuit precedent on economic harm, we
24 see that the Ninth Circuit really requires the plaintiff to
25 allege tangible financial loss. So in National Audubon

1 Society versus Davis, for example, the Court found that
2 animal trappers who were utilizing certain traps had
3 standing to challenge a California law that banned those
4 trap's usage.

5 The plaintiffs were using these traps to hunt
6 animals and then they would sell their furs. So outlawing
7 the traps had a direct and substantial effect on their
8 livelihood.

9 Here plaintiffs can't allege that type of direct
10 financial injury because Mr. Marbut has future plans to
11 manufacture a quantity of firearms. And he claims that he's
12 lost money on these firearms that he's been unable to sell
13 since October 1st, 2009, or the date that the MFFA was
14 enacted. But he hasn't described production costs, pricing,
15 or demand for the firearms that he plans to sell. And so
16 without these facts it's impossible to determine his loss of
17 potential profit or whether he would have lost a profit at
18 all.

19 To assume that the plaintiff has incurred some kind
20 of economic injury, we'd have to pile inference on top of
21 inference on top of inference. We'd have to assume he was
22 able to produce these firearms, that he could produce them in
23 a manner that was efficient enough that he could actually
24 make a profit, that they were priced in a way that actually
25 satisfied demand, and then that these customers who -- and

1 I've seen Plaintiff Marbut's email submissions, but these
2 customers were responding to a help needed email solicitation
3 to establish standing for this lawsuit. And those emails
4 provided no enforceable assurances that they would actually
5 complete those sales. There was no down payment, there was
6 no credit card number, there -- you know, so really these
7 emails were no more than tentative expressions of interest.

8 THE COURT: Should he be given an opportunity to
9 present evidence since we're here on a motion to dismiss?

10 MS. LEINWAND: Well, Your Honor, I think even if he
11 did present evidence that there was some type of demand for
12 these firearms, if we look again at the case law, it really
13 requires that plaintiffs are engaging in a business that is
14 under -- that is experiencing some kind of harm as a result
15 of the application of federal law.

16 So in Navegar, which was the challenge in the DC
17 Circuit to the 1994 Assault Weapon Statute, that court found
18 that manufactures and dealers whose products were specifically
19 banned by a statute by name, and only those manufactures had
20 standing to challenge the law.

21 Similarly in the Six Circuit, National Rifle
22 Association versus McGraw, it was the same type of thing.
23 These plaintiffs were engaged in a particular type of
24 business, and the federal statute targeted and eliminated a
25 portion of the plaintiff's business.

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1 We don't have that here. If Mr. -- Mr. Marbut seeks
2 to create a business, and an unlawful business at that. But
3 he's really not suffering any type of concrete economic harm
4 at the operation of federal law, which was the standard
5 originally announced by the Supreme Court in Abbott Labs.

6 THE COURT: So it's your position that the
7 individual would have to actually be engaged in the prohibited
8 enterprise?

9 MS. LEINWAND: For economic injury, I think he --

10 THE COURT: For economic injury.

11 MS. LEINWAND: Mm-hmm. I think that the case law
12 clearly establishes that he would be -- he would need to be,
13 again, suffering some kind of concrete injury as a result of
14 federal law, which would indicate that he was suffering a
15 tangible financial loss at this moment, and loss of profit
16 doesn't suffice.

17 THE COURT: All right.

18 MS. LEINWAND: To go back to the preenforcement
19 challenge, I had been discussing plaintiff's -- plaintiff's
20 plans to violate the law and how they really weren't
21 concrete. And again I think, and I won't go into the facts
22 of those cases again, but I think Navegar and National Rifle
23 Association are instructive because the plaintiffs were
24 engaging in conduct prohibited by law at the time the statute
25 was passed.

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1 Same is true in Gonzales versus Raich, which the
2 plaintiffs referenced in their brief. Plaintiff in that case
3 had been cultivating and using marijuana to treat symptoms
4 associated with brain cancer. So federal law has -- was
5 directly threatening conduct that she was currently engaging.

6 And those cases are very different than the facts
7 that are alleged in this case. They won't -- the plaintiffs
8 here again, won't violate the law unless and until the MFFA
9 is declared valid.

10 And so like the plaintiffs in San Diego County, or
11 if plaintiffs denied standing in Navegar and National Rifle
12 Association, because there were -- there were lines drawn in
13 those cases, and the individual plaintiffs who were denied
14 standing similarly expressed a desire to engage in certain
15 type of non-specific activity.

16 THE COURT: Well, let me ask you, if we assume for
17 purposes of a motion to dismiss that Mr. Marbut has the
18 wherewithal to start up this enterprise and actually the
19 enterprise would in fact be profitable or lucrative, but he
20 does not engage in the enterprise because of fear of
21 prosecution, is that -- does that satisfy the economic injury
22 question?

23 MS. LEINWAND: The economic injury question or the
24 first prong of the pre-enforcement challenge?

25 THE COURT: I'm asking about economic injury. He

1 doesn't engage in -- he doesn't engage in the process because
2 -- or in the enterprise because of a fear of prosecution.

3 MS. LEINWAND: I think --

4 THE COURT: He doesn't invest his monies.

5 MS. LEINWAND: -- I think again, I think Abbott
6 Labs is instructive here as well because in that case
7 plaintiffs were challenging a law that had a direct effect
8 again on their business. So the operation of federal law
9 would cause them to invest money and, you know, change a whole
10 portion of their business so that they complied. And in that
11 case the Supreme Court said well, you can challenge federal
12 law because if you don't you have to invest all of this money
13 and go through -- jump through all of these hoops and
14 foreseeably lose a lot of money in doing so, without a
15 declaration that the law is even valid. So in that case we
16 see how there was direct injury.

17 But again in this case we have the reverse.
18 Plaintiff wants to engage in a business, and maybe he'll
19 invest money to engage in that business, but in a sense we'd
20 be allowing him to create his own economic harm and then come
21 into court and sue. So no, I don't think that that would --

22 THE COURT: Well, he's prohibited -- arguably
23 prohibited from engaging in the enterprise because of the
24 fear of prosecution, or the existing federal regulations.

25 MS. LEINWAND: He's prohibited from engaging in the

1 actual manufacture and sale, but the -- you know, the prep
2 work that goes into that, if he did, you know, set up --
3 invest these -- this money in preparing these guns to be
4 manufactured, I still think he would need a preexisting
5 business under Navegar and National Rifle Association.

6 THE COURT: That's what I was getting to. It's your
7 position it has to be a preexisting business?

8 MS. LEINWAND: Under those cases.

9 THE COURT: He has to be actively engaged in the
10 business?

11 MS. LEINWAND: Yes, for economic injury.

12 THE COURT: All right.

13 MS. LEINWAND: I don't think that that's entirely
14 true in the pre-enforcement prong -- pre-enforcement context
15 because there are these other two prongs of that test. So
16 there's the concrete intention to violate federal law at a
17 specific time or date, but then you also need a credible
18 threat of prosecution on the part of the federal government
19 and a history and pattern of enforcement. And all of those
20 three -- the confluence of those three factors is what gives
21 rise to standing in that context.

22 And so there I think if plaintiff could allege a
23 concrete intention, which I don't think he has here, and he
24 demonstrate a creditable threat of prosecution, which he
25 clearly can't do in this case because all ATF did with their

1 September 29th, 2009 letter, was remind plaintiff of his
2 preexisting obligations under federal law. And as with any
3 federal law, should someone choose to violate that law, they
4 are subject to criminal and civil penalties. So there's no
5 creditable threat or concrete threat of prosecution in this
6 case, and plaintiff hasn't pointed to any history of
7 enforcement of the federal laws at issue, in light of the
8 MFFA. So I think under the three part test in San Diego
9 County, he fails all three prongs in fact.

10 And so when we consider the fact that he does not
11 have standing in the pre-enforcement context, and has no
12 preexisting business suffering any kind of concrete financial
13 injury and can't satisfy the economic basis for standing,
14 Plaintiff Marbut just doesn't have standing to bring this
15 lawsuit.

16 And in that case, the organizational plaintiffs in
17 this case, the Montana Shooting Sports Association and the
18 Second Amendment Foundation, these organizations would only
19 have standing to sue if their members have standing to sue in
20 their own right. And for the reasons I've discussed, the
21 individual plaintiffs don't have standing to sue in this case,
22 and thus the organizations don't either.

23 If this Court does find that Mr. Marbut has
24 standing to sue, none of the -- the Second Amendment
25 Foundation has offered no individual plaintiff expressing

1 any of the type of injuries that Mr. Marbut has alleged. So
2 they -- that organization clearly has no standing under this
3 test.

4 Plaintiff suffers from an additional jurisdictional
5 problem, and it's a technical one, but they haven't shown
6 that this Court has subject matter jurisdiction over their
7 claims. So plaintiffs are bringing suit under the
8 Administrative Procedure Act, which permits judicial review
9 and a waiver of sovereign immunity, only a final agency
10 action. And there's simply no final agency action for the
11 Court to review in this case.

12 Plaintiffs maintain that the government's decision
13 to require licenses of those who wish to proceed under the
14 MFFA was final agency action under Section 704. But for
15 action to be final it has to, first, mark the consummation of
16 the agency's decision making process. So it can't be just a
17 tentative step along the way.

18 And second, it has to have legal consequences. And
19 here those legal consequences are simply lacking because
20 again, the two letters from ATF that form the basis of this
21 lawsuit sought only to preserve the status quo. They offered
22 guidance to assist plaintiffs and the Montana Federal Firearm
23 licensees in meeting their obligations under federal law.

24 So federal law was the same the day before this
25 letter was sent out, and it was the same after this letter is

1 sent out -- was sent out. The letter did nothing and
2 constituted no new interpretation of federal firearms laws,
3 and it didn't change plaintiffs's ongoing obligations for
4 activities.

5 And so again, if we look at Ninth Circuit precedent,
6 there's a case called Air California versus United States
7 Department of Transportation, which similarly held that a
8 letter from the FFA -- FAA to a constituent merely interpreted
9 the federal law at issue and reminded the constituent what his
10 preexisting obligations were. And when plaintiff sued on the
11 basis of this letter, the Court said that that's just -- that
12 it didn't change anything. It didn't change the playing
13 field, it shouldn't have altered your behavior.

14 And in fact the Ninth Circuit said expressly that
15 they were loathed to find a test for final agency action that
16 centered on a regulated party's will to resist. So there
17 really is no final agency action for the Court to review in
18 this case.

19 And to the extent that plaintiffs argue that they're
20 entitled to non-statutory review, they really ignore the very
21 limited nature of the doctrine, even in the case that they
22 cite. The non-statutory review pertains only to cases where
23 agency officials are acting beyond the scope of their
24 statutory authority, or ultra vires.

25 And here's there no allegation that ATF officials

1 were acting beyond the scope of their delegated authority.
2 ATF is the agency that's responsible for enforcing the federal
3 firearms laws. And so in September of 2009 they took no
4 action beyond sending a letter, remind -- reminding the
5 firearm dealers that they remain subject to federal law.

6 But even if this Court finds that it has
7 jurisdiction to consider the merits of this suit, plaintiffs
8 admit that under binding Supreme Court and Ninth Circuit
9 precedent interpreting the commerce clause, quote:

10 "The MFFA is a dead letter."

11 And indeed, the Supreme Court's decision in
12 Gonzales versus Raich is both applicable and decisive in this
13 case. That decision affirmed Congress' power to regulate
14 purely local economic activity that has a substantial effect
15 on interstate commerce. And as such, Congress' Commerce
16 Clause authority included the power to prohibit the
17 cultivation and use of marijuana under California law.

18 The Court found that the federal statute at issue,
19 the Controlled Substances Act, regulated the production,
20 distribution, and consumption of a commodity for which there
21 was an established and lucrative market.

22 Congress had the power to regulate the possession
23 and consumption of home grown marijuana, which was purely
24 intrastate activity that was not in itself commercial because
25 they concluded that failure to regulate would undercut the

1 regulation of the interstate market in marijuana more
2 generally.

3 And according to the Raich decision, a court needs
4 to confirm only that Congress had a rational basis to conclude
5 that the intrastate activity would have a substantial effect
6 on interstate commerce. So Congress doesn't have to prove an
7 actual effect. They're entitled to make a rational basis
8 assumption.

9 And the Raich holding clearly applies to the
10 intrastate manufacture and sale of firearms, which is the
11 activity at issue here. Plaintiffs seek to manufacture and
12 sell firearms to others without any federal controls. No
13 record keeping requirements, no marking requirements,
14 including serial numbers, and no background checks.

15 And just looking at the activity at issue in this
16 case, the production and sale of guns, the point at which a
17 firearm enters the marketplace, it is more clearly commercial
18 than the possession of medical marijuana.

19 And just like the statute in Raich, the Gun Control
20 Act is concerned with regulating the interstate market in a
21 commodity that presents real law enforcement concerns.

22 And Congress enacted the Gun Control Act because
23 they wanted to keep firearms out of the hands of those not
24 legally entitled to possess them, dangerous and violent
25 persons, and to assist state and local law enforcement

1 authorities in combating crime.

2 And some of the Amicus' briefs tried to focus the
3 Court's attention on the law enforcement purposes of the Gun
4 Control Act, suggesting that this somehow detracted from the
5 government's Commerce Clause argument.

6 But these arguments miss the connection between the
7 regulation of traffic and firearms on one hand, who has the
8 ability to purchase and possess a dangerous weapon, and the
9 prevention of violent crime on the other. So as Congress
10 noted explicitly, these goals aren't mutually exclusive, but
11 interconnected.

12 And Congress found that only through adequate
13 control of interstate and foreign commerce and firearms, and
14 over all persons engaging in the business of dealing in
15 firearms, could the federal government effectively regulate.

16 THE COURT: Let me ask you, because the plaintiff,
17 as well as some of the Amicus seek to distinguish Raich on the
18 ground that the Raich, as well as Wickard on which it relied
19 dealt with fungible commodities.

20 MS. LEINWAND: Yes.

21 THE COURT: How do you respond to that?

22 MS. LEINWAND: Well, Your Honor, I think the
23 fungibility issue is an interesting one. And granted these
24 guns are distinguishable in the sense that they bear a stamp
25 made in Montana.

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1 But they don't have serial numbers. And there --
2 the federal government is unable to track them at all once
3 they leave the State of Montana and enter the stream of
4 interstate commerce.

5 And so from the federal government's perspective,
6 these guns are completely fungible and indistinguishable. And
7 I think given the illicit market for firearms that exists
8 nationwide, the fungibility issue -- the fungibility argument
9 kind of falls flat.

10 In fact, Judge Kozinski in the Stewart opinion
11 addressed fungibility head on when he was talking about the
12 ban on machine gun possession. And he said fungibility is a
13 matter of degree. And at some point everything is fungible.
14 And so when we think of someone who clearly wants to avoid a
15 background check and wants an untraceable weapon to use in a
16 crime, that person cares only that that gun fires bullets and
17 will work properly.

18 And so when we -- when you consider all of those
19 factors, I really don't think that the fungibility argument
20 holds any water. And --

21 THE COURT: Do you think Raich hinges on the
22 fungible nature of medical marijuana, or of marijuana?

23 MS. LEINWAND: I don't, because I think that Raich
24 discussed expressly the diversion of marijuana into illicit
25 channels. And I think that that concern is no less prevalent

1 here, because given the illicit market for firearms that
2 exists nationwide, again, it's unrealistic to think that these
3 guns won't leave the State of Montana, especially given the
4 nature that they're completely unregulated. There's no
5 licensing number, there's no record of that initial sale. So
6 often ATF agents will use that first record of when a dealer
7 sells to another person and then use the licensing number to
8 trace that gun. But here we're completely eliminating the
9 chain of custody. And so I think that these firearms are
10 again ideal for anyone who wishes to purchase a firearm but is
11 prohibited from doing so under federal law.

12 And to illustrate by a specific example, because I
13 think when I was thinking about this case it really helped me
14 to put it in more concrete terms. If we think of a convicted
15 felon out of state, in California for example, he can easily
16 make his way to Montana, buy a quantity of firearms to take
17 back to California with him, and once he does there's no way
18 for those firearms to be traced. There's no serial number,
19 there's no record of that initial sale.

20 And so I think given -- given these kinds of
21 hypotheticals and the fact that really Congress again only
22 needed a rational basis to conclude that there would be this
23 type of effect on interstate commerce, and they certainly have
24 evidence. There's been evidence submitted by state senators
25 and congressmen on the trafficking of firearms across state

1 lines, on gun runners, on the fact that four out of five
2 firearms used in a state like New York are from out of state.
3 I mean we clearly have tangible findings on this issue. And
4 so, again, I don't think that the fungibility issue has any
5 merit.

6 And again, these concerns are compounded when we
7 consider that six states have followed Montana's lead in
8 enacting virtually identical Firearms Freedom Acts. An
9 additional 22 have proposed similar legislation.

10 So the fact that up to 29 states might nullify
11 certain federal firearms laws would leave a gaping hole in
12 federal firearms regulation. And that hole would encompass
13 over half of the United States. So this would certainly
14 encourage the trading of unregulated firearms nationwide.

15 THE COURT: Now because you -- you still have some
16 time left but I want to get to a couple questions I have.

17 MS. LEINWAND: Of course.

18 THE COURT: How do you respond to the State of
19 Montana's contention that the absence of particularized
20 findings regarding the effect of firearms manufactured
21 intrastate is problematic?

22 MS. LEINWAND: Well, again, I think that Congress
23 only needs a rational basis under Raich. So findings --
24 specific findings of that nature are not required by the
25 Supreme Court. And to the extent that they are, the

1 congressional record is littered with references to -- to
2 the effect of -- to the transportation of guns across state
3 lines, and how that presents real law enforcement concerns.

4 So again, you know, Congress enacted the GCA
5 because it was concerned with keeping firearms out of the
6 hands of those not legally entitled to possess them, and that
7 was expressly in the preamble of the act.

8 In the house report it says that the principle
9 purpose of the GCA wedded two mutually supporting goals to
10 strengthen federal controls over interstate commerce in
11 firearms, and to assist states to effectively regulate
12 firearms traffic within their borders.

13 So there are all of these references to the
14 interstate market. And so while maybe they didn't expressly
15 deal with this very issue, there's also references to things
16 like Congress determined that the ease with which firearms
17 could be obtained contributed significantly to the prevalence
18 of lawlessness and violent crime in the United States.

19 THE COURT: Here where I was going with that, as
20 Montana points out in its brief, or I should say they seize
21 upon Justice Stevens statement that the courts never require
22 particularized findings unless there's a special concern,
23 such as free speech --

24 MS. LEINWAND: Right.

25 THE COURT: -- which brings us to -- even though

1 McDonald was decided after the briefing in this case, but
2 given the holding in McDonald, which I know you're familiar
3 with --

4 MS. LEINWAND: Right.

5 THE COURT: -- how does that -- how am I to
6 interpret Justice Stevens' statement there?

7 MS. LEINWAND: Well, I think that, you know,
8 McDonald may impact that footnoted language and Justice
9 Stevens' discussion of the need for congressional findings.
10 But I think that we have congressional findings here. I
11 think we have clear evidence on the effect of the interstate
12 -- of the transportation of firearms across state lines.

13 And so it's very easy to extrapolate that if you
14 produce weapons in state, they are transported, and there's
15 no real way to get around that.

16 And again, we do have reports -- I was looking at a
17 report by Senator Schumer which it was entitled "War Between
18 the States," and it discusses this very phenomenon how guns
19 from states with weaker gun control laws travel through
20 interstate commerce to states with stronger gun control
21 laws.

22 And so perhaps, you know, there isn't a finding
23 that says if a gun is manufactured in state it will -- but I
24 don't -- I think that that's, you know, really splitting
25 hairs when there's clear evidence on the congressional record

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1 itself that indicates that there -- that this is a real
2 concern for Congress and certainly an interstate issue.

3 THE COURT: All right.

4 MS. LEINWAND: Well, Your Honor, I can -- I can
5 discuss why Lopez and Morrison are inapplicable in this case
6 if you have any questions about that?

7 THE COURT: I don't think it's necessary for you to
8 discuss that. You do have 15 minutes remaining for your
9 rebuttal if that's what you wish to do.

10 MS. LEINWAND: Wonderful. Thank you so much, Your
11 Honor.

12 THE COURT: All right. Thank you.

13 Mr. Rhoades.

14 MR. RHOADES: Thank you, Your Honor. May it please
15 the Court.

16 I'm going to be arguing standing, the consent of
17 the sovereign to be sued, and some of the issues that have
18 been raised with respect to the case law under the Commerce
19 Clause.

20 Mr. Dranias will be arguing Tenth Amendment issues
21 and the role of state sovereignty and protecting individual
22 liberties.

23 And Mr. Titus will argue whether the Congress indeed
24 intended to preempt under the federal statutes at issue, and
25 if they did some argument about whether the Second Amendment

1 prohibits that preemption.

2 THE COURT: All right.

3 MR. RHOADES: But to begin with, standing -- there
4 are two basis for standing here. One is the pre-enforcement
5 challenge of a criminal law based on constitutional grounds,
6 and the second is the economic impact of the interplay between
7 the new state law and federal law.

8 Addressing the first, Justice White said in Babbitt
9 against United Farm Workers National Union, which is 442 U.S.
10 289 point cite 298, quote:

11 "When the plaintiff has alleged an intention to
12 engage in a course of conduct arguably effected with a
13 constitutional interest, but proscribed by a statute
14 and there exists a credible threat of prosecution
15 thereunder, he should not be required to await and
16 undergo a criminal prosecution as the sole means of
17 seeking relief."

18 In this case the facts fit this rule of law on all
19 fours. We don't have, for example, an alternative means to
20 challenge the interpretation by the ATF of the new law.

21 Now the argument has been that they've just
22 interpreted existing law and there's nothing new about the
23 interpretation that says that you folks in Montana can't
24 manufacture firearms without a federal license. Well,
25 that's true up to October 31, 2009. On that date the state

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1 of the law changed. On that date Montana's Firearms Freedom
2 Act went into effect, and consequently the agency has to come
3 up with an interpretation of how that new law interplays
4 with the existing law. And that's a new set of
5 circumstances, new law that has to be interpreted, and that's
6 what they did.

7 And they reached what we think is not an
8 interlocutory decision. And the reason we don't think it's
9 interlocutory is because in June of 2009, anticipating the
10 new law, they sent a letter that's attached to the second
11 amended complaint as Exhibit B, informing federal firearms
12 licensees of their interpretation of how federal law and the
13 new state law interplay.

14 And then in September, in response to a specific
15 question by citizens, they said again, in response to your
16 question about how the new law effects federal law, you folks
17 need a license.

18 And so at least two occasions the ATF is telling the
19 world what its interpretation is. It doesn't change. It
20 doesn't seem to be interlocutory in nature. It's not
21 preliminary, because the new law is not federal and the new
22 law doesn't ask the ATF to promulgate new regulations that
23 someday will become final and then we can challenge them
24 somehow.

25 The new law is a Montana state law, and the ATF

1 uses the only mechanism that I know of available to it to
2 interpret that law, and that is internally to review it and
3 issue its opinions to the public. So it is a new
4 interpretation. It's not interlocutory. And we think,
5 because of that, it's final.

6 Furthermore, the threat is credible. I mean if we
7 look at --

8 THE COURT: Let me interrupt you for a moment and
9 ask you --

10 MR. RHOADES: Yes, sir.

11 THE COURT: -- what is the individual constitutional
12 right that you're focusing upon with regard to the manufacture
13 of firearms?

14 MR. RHOADES: Your Honor, that arises under the
15 Second Amendment, in our view.

16 THE COURT: Manufacture does?

17 MR. RHOADES: Yes, sir. And the reason why we say
18 that is because we can't possess firearms unless someone can
19 manufacture them.

20 And I think that the Gun Owners Association points
21 out very well in its Amicus brief, the effect of federal
22 regulation on the availability of firearms to law abiding
23 citizens. There's hundreds of pages of interpretation and
24 regulation that a firearms licensee has to comply with in
25 order to manufacture and sell firearms to the people who are

1 ultimately going to exercise their second amendment rights
2 with those firearms, and it's an incredible burden on that
3 right.

4 And so consequently the availability of these MFA --
5 MFFA firearms for Montanans to exercise their Second Amendment
6 rights creates the nexus between the activity and the
7 constitutional right involved.

8 THE COURT: All right.

9 MR. RHOADES: Secondly, there's the economic
10 question. I mean this is a new law. We can't have had,
11 prior to October 31, 2009, businesses manufacturing MFFA
12 firearms. So we have -- we can't meet the standard under any
13 circumstances urged by the government that it has to be an
14 existing ongoing business.

15 But there is a marketplace. It's been developed.
16 It's been identified. There are actual orders pending. There
17 are actual contracts with customers pending, of course
18 conditioned on the outcome of this litigation, but
19 nevertheless, there's an actual marketplace that but for the
20 September letter of the ATF to Mr. Marbut and its creditable
21 threat that if you take advantage of the MFFA you will be
22 prosecuted, that Mr. Marbut and others like him could take
23 advantage of.

24 We have to assume for the sake of the argument that
25 all of the factors alluded to by the government in its

1 argument are true. There's a marketplace, there's lost
2 profits. Mr. Marbut has, besides the evidence that's in the
3 record and the allegations in the complaint, he actually has
4 the ability to meet this marketplace. All of those facts
5 that can be imagined and have been alluded to have to be
6 assumed to be true for the purposes of the motion to dismiss,
7 otherwise if they're material, and if they're being argued,
8 they must be material. And we should have at least a chance
9 to put on evidence to prove those facts. So we either assume
10 those facts to be true or we think we're entitled to an
11 opportunity to prove those facts to be true.

12 THE COURT: How do you respond to the government's
13 argument that the business has to be preexisting?

14 MR. RHOADES: Well, once again, in this context it
15 cannot be preexisting. In other words, the MFFA was passed --
16 or came into law on October 31st, 2009. The ATF issued
17 letters in June and September of 2009, before it even came
18 into existence, telling folks that you can't have a
19 preexisting business after October 31, 2009, when it becomes
20 the law in Montana because we're telling you now that if you
21 take advantage of this law you're going to be prosecuted.

22 And once again, the Supreme Court has said as
23 recently as June 20th that that threat of prosecution gives
24 standing. And the government has not said, and this is
25 significant for both the Babbitt case to Justice White, and

1 more recently June 20th to the Supreme Court in Holder against
2 Humanitarian Law Project, which is 2010 Westlaw 2471055. The
3 government hasn't said we're not going to prosecute. In the
4 Humanitarian Law Project the quote is:

5 "The government has not argued to this Court that
6 plaintiffs will not be prosecuted if they do not -- if
7 they do what they say they wish to do." Unquote.

8 In other words, if the government doesn't come to
9 you and say we're not going to prosecute under any
10 circumstances, Your Honor, then they have standing to make
11 the challenge. And that goes back to 1979 with the Babbitt
12 against United Farm Workers.

13 We think under either the economic harm or the pre-
14 enforcement challenge rules Mr. Marbut has standing. And
15 furthermore, under the Ninth Circuit's rule in National
16 Association of Optometrists and Opticians LensCrafters against
17 Brown, 567 F.3d 521. If we can show any of our plaintiffs to
18 have standing then we don't have to show the organizational
19 plaintiffs to have standing, the Court can proceed. So we
20 think we've met that burden.

21 The second burden, of course, that we have to show
22 is your jurisdiction. There are two ways to jurisdiction on
23 this. The first is non-statutory review. And the government
24 points out, I think very correctly, that unless we can show
25 that the agency exceeded its authority, we are not entitled

1 to non-statutory review. But our argument on the merit is
2 precisely that. We argue on the merits that under the
3 Commerce Clause the Congress doesn't have the power to
4 regulate in this fashion, and so it cannot delegate to the
5 ATF the power to exercise the role that it has in this case.

6 In other words, you have to -- for non-statutory
7 review you have to address the merits. And only if you
8 disagree with us on the merits can you determine whether
9 we're entitled to non-statutory review. We're alleging that
10 the government agency has exceeded its authority, and
11 consequently we're entitled to that review.

12 Now the second --

13 THE COURT: But it's authority you can see that
14 under prevailing Commerce Clause jurisdiction that the MFFA is
15 dead letter.

16 MR. RHOADES: Well, June 28th --

17 THE COURT: So under current -- under prevailing
18 Commerce Cause jurisprudence, the ATF is not exceeding its
19 authority, is it?

20 MR. RHOADES: On June 28, 2010, the law changed
21 substantially. And in -- in the case of McDonald, which the
22 case has alluded to, the Court held, quote:

23 "In sum it is clear that the framers and ratifiers
24 of the Fourteenth Amendment counted the right to keep and
25 bear arms among those fundamental rights necessary to our

1 system of ordered liberty.”

2 And I pull that quote from -- excuse me, Judge --
3 page 11, I believe, of the Westlaw -- excuse me -- page 18 of
4 the Westlaw publication of that case.

5 And that is Justice -- excuse me -- that is Justice
6 Alito's statement of the conclusion of the question of whether
7 the second amendment right is a fundamental right.

8 THE COURT: Well, there's no doubt McDonald holds
9 that. But of concern here, isn't it, is caution that he again
10 emphasized, as the court did in Heller, that -- I'll quote
11 from him:

12 “We made it clear in Heller that our holding did not
13 cast out in such longstanding regulatory measures as
14 prohibitions on the possession of firearms by felons and
15 mentally ill, laws forbidding the carrying of firearms in
16 sensitive places, such as schools and government
17 buildings, most importantly for our purposes or laws
18 imposing conditions and qualifications on the commercial
19 sale of arms.”

20 MR. RHOADES: And I don't think that this case that
21 the holding in McDonald gives you a standard of review for
22 that particular question.

23 THE COURT: Well, I'm just trying to focus. I want
24 to -- and I'm sorry to interrupt you, but --

25 MR. RHOADES: Yes, sir.

1 THE COURT: -- I want to focus on -- I see this as
2 a Commerce Clause case. I asked the government's attorney
3 whether she believed McDonald had any effect upon the decision
4 to be made here. In other words, upon the application of
5 Raich and I'm asking you the same question.

6 MR. RHOADES: Well, in Stewart II, Your Honor, Judge
7 Kozinski, in footnote 6 and 7 said that:

8 "First of all, second amendment right under current
9 jurisprudence in this Circuit is not an individual
10 right." That's footnote 6.

11 And then he said in footnote 7 under his reading of
12 Raich:

13 "That if there was such a review there would be a
14 rational basis test employed."

15 That was the assumption that he made. And so
16 because of those two factors, and they're both set forth in
17 footnote 6 and 7, they didn't conduct this bare review we're
18 asking the Court now to conduct.

19 This is a case of first impression under current
20 law. In Stewart II we didn't have MFFA. We had an individual
21 proceeding on his own. And in Stewart II we didn't have
22 McDonald and we didn't have Heller. And we don't have today,
23 from the Supreme Court, a clear direction on the standard of
24 review for the question of what is the appropriate level of
25 regulation for a manufacturer of arms. But if it's a

1 fundamental right, then the inference to draw and the
2 guidance that we have from the courts in the Ninth Circuit and
3 the U.S. Supreme Court is that you should employ strict
4 scrutiny. And then if you do, the government bears the burden
5 of showing that these regulations are the least restrictive
6 means to serve a compelling government interest. They have to
7 show that the regulations are narrowly tailored to serve that
8 government interest by at least restrictive means, and they
9 haven't -- and in fairness, they didn't know before June 28th
10 that they might need to do this, but they haven't made any
11 effort to prove that to the Court.

12 THE COURT: So I take it you're withdrawing your
13 concession?

14 MR. RHOADES: Yes, sir, we're withdrawing our
15 concession.

16 Judge Kozinski said in that Stewart II case that
17 Congress is entitled to break a few intrastate eggs in order
18 to make an interstate omelet. And in our view of the
19 Commerce Clause, there's a distinction that is talked about in
20 Raich in recognizing Stewart along those lines, that in order
21 for the government to regulate under the Commerce Clause it
22 has to have an interstate object. And if it does then the
23 Necessary and Proper Clause allows it to pretty much do what
24 it wants to do with respect to intrastate activity.

25 But here we have the opposite. There's an

1 intrastate object in the firearms -- the Federal Firearms Act
2 and the Gun Control Act there's an intrastate object. That
3 exceeds the Commerce Clause power of Congress. And the
4 intrastate object is assisting local law enforcement in its
5 fight against violent crime.

6 Now if --

7 THE COURT: Well, also to ensure the states can
8 adequately control the flow of firearms within their own
9 borders. Correct?

10 MR. RHOADES: In order to fight crime locally. Yes,
11 sir.

12 THE COURT: But the first -- that's in the
13 congressional record too, isn't it, that it's designed to
14 assist the states in enforcing their gun regulation laws by
15 controlling the -- assisting in controlling the flow of
16 firearms.

17 MR. RHOADES: That's right. And we think that
18 exceeds the jurisdiction because unlike the Raich case where
19 the Controlled Substances Act was designed to regulate a
20 marketplace in a -- that was the object, to regulate the
21 industry, encourage the production of beneficial drugs,
22 discourage the production of harmful drugs. These commercial
23 type activities to protect consumers and protect patients. I
24 mean this is a bonafide interstate commerce object to protect
25 the manufacturers from having disparate rules from state to

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1 state.

2 What Congress did with the Controlled Substances
3 Act was repeal all of its drug control laws and replace them
4 with this comprehensive scheme.

5 Now Congress did the same thing with the Gun Control
6 Act and the Federal Firearms Act, but the object was not the
7 regulation of an industry or regulation of commerce. The
8 object was to help local police with what they perceive to be
9 the violent crime problems. So it wasn't the industry, it
10 wasn't the commerce that was at issue, it was local crime
11 fighting.

12 And the courts have said the federal government
13 doesn't have a general police power, but they passed this law
14 in order to help the states exercise their general police
15 powers. And --

16 THE COURT: Well, did you agree with me, I think
17 you've conceded it in your brief, that we're dealing here
18 with an economic activity, that being the manufacturer of
19 firearms --

20 MR. RHOADES: Yes.

21 THE COURT: -- and sale of firearms?

22 MR. RHOADES: It's a commercial activity. But the
23 object of the exercise is general police powers. And there --

24 THE COURT: But you do agree that the Gun Control
25 Act and the National Firearms Act are comprehensive regulatory

1 schemes?

2 MR. RHOADES: Yes, with the purpose of controlling
3 crime locally. And what the -- what the statute does is take
4 the -- I mean if the means are justified under the Commerce
5 Clause, the Necessary and Proper Clause allows almost any --
6 and even if it interferes with intrastate commerce.

7 THE COURT: Particularly when you're dealing with
8 economic activity. Correct?

9 MR. RHOADES: In particular. But --

10 THE COURT: And the -- the Lopez Morrison line of
11 cases, along with Jones, they dealt with non-economic
12 activity. Correct?

13 MR. RHOADES: They dealt with criminal activity.

14 THE COURT: And non-economic.

15 MR. RHOADES: And non-economic activity.

16 THE COURT: They drew a distinction -- the Court
17 drew a distinction between economic and non-economic.
18 Correct?

19 MR. RHOADES: Absolutely. But what Congress can't
20 do is use the economic activity as a pretext to exceed the
21 Commerce laws -- Clause. I mean it's using the regulation of
22 economic activity discern -- to serve a non-economic end.
23 And that --

24 THE COURT: Well, isn't it -- isn't the manufacture
25 and sale of firearms quite a lucrative economic activity?

1 MR. RHOADES: Yes, it is. But once again, the
2 object of Congress in doing this is to exercise a general
3 police power it doesn't have.

4 THE COURT: That's your conclusion?

5 MR. RHOADES: Yes, sir. And furthermore, with --

6 THE COURT: But I look at it as a rational basis.
7 Did Congress have a rational basis to enact this law for the
8 purpose of controlling the interstate economic activity of
9 manufacture and sale of arms?

10 MR. RHOADES: Well, they're using that pretext that
11 this is commercial in order to assist with --

12 THE COURT: How do I draw -- how do I, sitting here,
13 -- and I understand your argument, but how do I, sitting here,
14 what -- how am I at liberty to draw that conclusion?

15 MR. RHOADES: Well, that's one of the problems with
16 the rational basis test. But in this case we're not dealing
17 with that anymore. What we're dealing with is a strict
18 scrutiny test at least. If Heller tells us anything about
19 the test that's being employed, we know it's not rational
20 basis. And it may be intermediate scrutiny. We didn't know
21 whether it was strict scrutiny until June 28th when we found
22 out we're dealing with fundamental rights and then strict --
23 strict scrutiny is employed, and that gives the federal courts
24 the ability to look at what Congress did and see what the
25 object is.

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1 THE COURT: Why do you think Justice Alito
2 cautioned, by reference to Heller again, that laws imposing
3 conditions and qualifications on the commercial sale of arms
4 are not in peril? What am I to read into that?

5 MR. RHOADES: Well, they're subject to review. I
6 mean I don't think that McDonald says -- and that illusion
7 says there's no review -- there's still no review or there's
8 still a rational basis review. What it says is that, you
9 know, all of these laws are subject to review. We're not
10 just repealing them all today by the passage of McDonald.
11 There's got to be some kind of a test for each kind -- each
12 set of facts. But there is a test, and it --

13 THE COURT: And you -- certainly if it were
14 possession of a firearm it would be a strict scrutiny test
15 because it recognized as a fundamental right. Right?

16 MR. RHOADES: Yes, sir. And --

17 THE COURT: But here you're extending that to the
18 manufacture and sale of firearms. Correct?

19 MR. RHOADES: Yes, sir. And only because without
20 manufacture and sale of firearms we can't have possession.
21 Unless everybody who wants to exercise a Second Amendment or
22 her Second Amendment right has the ability to manufacture his
23 or her own firearm. If that's what the Second Amendment
24 means, then perhaps that would be the case. But we don't
25 think that's what it means.

1 We -- not -- in order to exercise a Second Amendment
2 right there has to be available to the right holder the means
3 to exercise that right. And the only way to get the means is
4 to have it manufactured by someone with the skill and
5 expertise.

6 THE COURT: That's not being done?

7 MR. RHOADES: Well, it's being done --

8 THE COURT: The last time I checked there were
9 plenty of firearms.

10 MR. RHOADES: Well, that's a very good point,
11 Judge, but there are less federal firearms licensees all the
12 time because the onerous regulation that's put upon them by
13 the ATF. I mean that's -- that may very well be the exercise
14 that the Court has to undertake is to look at the ATF
15 regulations that has effectively cut in half the number of
16 licensees holders in this century and see if that satisfies
17 the strict scrutiny test.

18 I mean when I --

19 THE COURT: So you agree that, at least under
20 current case law, that the Congress may consider the aggregate
21 effects of purely intrastate economic activity?

22 MR. RHOADES: If the object of their regulation is
23 commercial activity. If it's -- if it's an end run around
24 the fact that they don't have a general police power --

25 THE COURT: But this is -- they are dealing only

1 with commercial activity, are they not, these regulations that
2 were -- that are at issue here?

3 MR. RHOADES: They're dealing only with commercial
4 activity so that the Congress can use that as a pretext to
5 exercise a general police power it doesn't have.

6 THE COURT: How is that different from the
7 Controlled Substances Act?

8 MR. RHOADES: Because the bonafide -- the
9 regulation of intrastate activity under Raich is incidental
10 and ancillary from the object of the Congress to regulate the
11 national -- the national marketplace. It's a means and end.

12 The Necessary and Proper Clause says that if you
13 have a legitimate end then you can exercise means that
14 interfere with intrastate commerce. But if --

15 THE COURT: How about if we -- if there's a
16 manufacturer of a pacemaker and it's stamped "Made in Ohio,"
17 does that mean the federal government cannot reach those
18 devices through the Medical Device Act?

19 MR. RHOADES: It can, and that's what Raich stands
20 for because it's a commercial activity. They're not trying
21 to regulate -- they would not be, under that scenario, trying
22 to regulate pacemakers to serve a police power to help --

23 THE COURT: Well, a power historically with the
24 state, the welfare of the state's inhabitants. It's just
25 you're focusing -- if I -- I just want to understand your

1 argument very precisely, that it's because of the fundamental
2 nature of the right to possess a firearm, which is recognized
3 in McDonald, that that can be -- has to be extended to the
4 right to manufacture and sell firearms?

5 MR. RHOADES: Well, the scrutiny that's given rise
6 to by the ruling in McDonald --

7 THE COURT: Well, all right the --

8 MR. RHOADES: -- has to be applied to the
9 manufacture of firearms. Yes.

10 And in view of the Tenth Amendment, our argument is
11 the Tenth Amendment is an interpretive tool for the courts to
12 understand the meaning of the enumerated power set forth in
13 the constitution. And in view of the Tenth Amendment, when
14 you look at the Commerce Clause, do I -- do I interpret the
15 Commerce Clause broadly to give Congress powers that are
16 arguably within it, but aren't expressly and directly, or do
17 I interpret the Commerce Clause narrowly and only -- and look
18 with some skepticism of Congress' decision to act in a
19 particular field. And the Tenth Amendment says you should be
20 skeptical.

21 THE COURT: Well, of course I'm not here construing
22 the Tenth Amendment. I'm here to interpret existing case law.
23 Correct?

24 MR. RHOADES: Yes, sir.

25 THE COURT: And I've got -- obviously Raich is the

1 case we all have to be concerned with and how -- and by your
2 concession that under that law, I have no choice here but to
3 follow that law, unless your argument that McDonald somehow
4 changed the equation holds water. Right?

5 MR. RHOADES: Yes, sir. And that -- and that level
6 of scrutiny that you apply to the federal regulations, and in
7 particular -- I mean beyond the federal regulations, the
8 level of scrutiny that you apply to Congress' statement that
9 it has. I mean in the statutes themselves it says we're
10 exercising our prerogatives under the Commerce -- Commerce
11 Clause. And you're to review that now with McDonald under a
12 strict scrutiny analysis.

13 If you look at the legislative history of the Gun
14 Control Act in 1968, the Congress asked the justice
15 department, well, there's a Second Amendment involved here.
16 And the justice department's response was, well, the Second
17 Amendment doesn't apply to an individual right, so do what
18 you want. And that's different.

19 I mean that interpretation of the law was wrong,
20 and we think that the Court needs to look at what the law
21 actually is and look at what Congress is trying to do and see
22 if it had the power to actually do that, given what the state
23 of the law actually is.

24 THE COURT: Understood. You're making -- I just --
25 again, I want to understand your argument. I know we're

1 dealing with McDonald now and nobody had the opportunity to
2 fully brief that and so forth, but you're also arguing that
3 the state through the Tenth -- it's Ninth and Tenth
4 Amendment, reserve powers if you will, has the right to allow
5 to order -- not order, but allow this manufacture intrastate
6 in order to facilitate its inhabitants right to possess a
7 firearm.

8 MR. RHOADES: Yes, sir. And Mr. Dranias will -- can
9 address that in more detail, but in -- the theory behind
10 federalism, in our view, is that both the federal government
11 and the state governments were designed to protect the
12 individual. And in the Twentieth Century, for example, the
13 federal government was interceding on behalf of the individual
14 by -- against depredation by the states, I guess, their
15 rights. And now in the Twentieth Century the states are doing
16 the same thing, interceding on behalf of the individual and
17 the Second Amendment right against depredation as they see it
18 by the U.S. Government.

19 Ultimately that's the point of federalism. The end
20 of federalism is not to have this disorganized and difficult
21 to manage dual set of governments. The point of federalism
22 is to protect these individual rights. And in this case, a
23 right that we now see as a fundamental one.

24 THE COURT: All right.

25 MR. RHOADES: I have a little bit more on the APA if

1 you care to hear it, otherwise I'd urge the Court to deny the
2 motion to dismiss.

3 THE COURT: All right. Your time is up so I'll
4 listen from your Amicus.

5 MR. RHOADES: Thank you, Your Honor.

6 THE COURT: Thank you.

7 MR. DRANIAS: May it please the Court. Nicholas
8 Dranias on behalf of the Amici Goldwater Institute and
9 numerous Arizona representatives and political organizations.

10 Your Honor, if I may, I was about to begin this
11 argument by saying this is a case of first impression. Indeed
12 it used to be. There is now persuasive authority, in a
13 different outcome context, but persuasive authority on the
14 federalism issues that recently was decided on Thursday by the
15 United States District Court for the State of -- for the
16 District of Massachusetts. And of course I'm referring to the
17 now famous decision on the gay marriage rights of
18 Massachusetts citizens.

19 I believe, Your Honor, that this case lays out the
20 framework for thinking about the federalism issues in this
21 case. In fact, Your Honor, if you were to simply swap out the
22 statute that allowed and permitted gay marriage in
23 Massachusetts with the Montana Firearms Freedom Act, you would
24 see the parallelism between the two cases in terms of our
25 argument from federalism.

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1 And in that respect, Your Honor, I would like to
2 highlight the three analytical elements that derive from the
3 U.S. Supreme Court case of Hodel that really control the
4 outcome from a federalism perspective.

5 In other words, to show that it would violate the
6 Tenth Amendment for the federal government to preempt the
7 Montana Firearms Freedom Act, we must show the following.
8 One, the statute must regulate the states as states. Two,
9 it must concern attributes of state sovereignty. And three,
10 it must be of such a nature that compliance with it would
11 impair a state's ability to structure integral operations in
12 areas of traditional governmental functions.

13 Without a doubt all of these elements are present
14 here. And following Hodel and also the recitation of the
15 principles of protecting traditional attributes of state
16 sovereignty, which we see in New York, in Lopez, in Prince,
17 and in Morrison, we are compelled to reach the same outcome
18 with respect to the Montana Firearms Freedom Act, vis a vis
19 the Commerce Clause as Massachusetts' Gay Marriage Act
20 received vis a vis the Spending Clause.

21 First, Your Honor, this federal regulation clearly
22 regulates the states as states. It is seeking to override a
23 state statute, which was promulgated pursuant to the inherent
24 police power of the state to regulate the activities in
25 question.

1 Second, the federal regulation certainly concern
2 attributes of state sovereignty. If only and simply based on
3 the fact that the Montana constitution guarantees the
4 liberties protected by the Montana Firearms Freedom Act.

5 And third, there is no question that the state has
6 the primary responsibility, exclusive authority over police
7 powers. And therefore, the states should be the primary
8 determinant of how those police powers should be exercised to
9 regulate liberties.

10 And therefore, when a federal law overrides the
11 state's exercise of its police powers in that respect, it
12 necessarily impairs a state's ability to structure integral
13 operations in areas of traditional governmental functions.

14 So, Your Honor, in a sense, and I really don't mean
15 to be flippant because there are very complex issues in this
16 case, but when the other side, with the government side says
17 that this is an easy case for them, increasingly the
18 development of Tenth Amendment jurisprudence indicates this is
19 an easy case for state sovereignty and for protecting
20 individual liberty.

21 Now before I conclude, because I only reserved seven
22 and a half minutes, I wanted to emphasize one last point,
23 which is this. Raich does not control this case. I
24 respectfully disagree with my esteem colleague, Quentin
25 Rhoades. Raich does not control this case for a number of

1 reasons. Not just including the fact that we are now dealing
2 with a fundamental enumerator right. The real reason why
3 Raich does not apply to this case can be drawn from the
4 concurrence of Justice Scalia. The concurrence of Justice
5 Scalia, which was obviously unusual and unexpected -- the
6 concurrence of Justice Scalia emphasized that the plaintiffs
7 in Raich made no case that these federal regulations at issue
8 in any way violated principles of state sovereignty. And
9 therefore, he felt compelled to reach the same conclusion as
10 a majority.

11 That is obviously not the case here. From the
12 abundance of Amici briefs who can see the numerous ways in
13 which state sovereignty is being violated, if the federal
14 government were able to preempt the Montana Firearms Freedom
15 Act.

16 The other way in which Raich is distinguishable
17 here, is -- and I -- respectfully, again, this may be a point
18 of disagreement, but really on Raich and Wickard, these are
19 cases not so much about the Commerce Clause per se, but about
20 the Necessary and Proper Clause.

21 Again, if we look to the concurrence of Justice
22 Scalia, he focuses on the fact that we are not dealing with
23 something that is actually interstate commerce, that is an
24 instrumentality of interstate commerce. What was at issue in
25 Raich was the implied power to regulate things that were

1 necessary and proper to regulating interstate commerce.

2 And, Your Honor, if you go back to Wickard, Wickard
3 itself was a decision both on the Commerce Clause and the
4 Necessary and Proper Clause. And in the seminal part of the
5 holding it referred to an earlier case that talked about how
6 it would be appropriate to reach things that had a substantial
7 effect on interstate commerce when exercising the Commerce
8 Clause power.

9 All of these cases, the history that counsel for
10 government relies upon, are actually founded more on the
11 Necessary and Proper Clause than the Commerce Clause. And the
12 reason why this is critical is --

13 THE COURT: I was hoping you'd get to that.

14 MR. DRANIAS: The reason why that is critical is
15 there are two components in the Necessary and Proper Clause,
16 which we have not discussed. The Proper Clause, the proper
17 portion of the Necessary and Proper Clause guarantees our
18 system of dual sovereignty. It ensures that whatever powers
19 the federal government claims, cannot violate principles of
20 state sovereignty because that would be improper.

21 And this interpretation was embraced in Prince.
22 Little known is the fact that Prince cited to a Duke Law
23 Journal study of the meaning of a Necessary and Proper Clause,
24 and we cite it in our brief. And I've recently read it and
25 reread it, and this law journal points out that the proper

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1 element of the Necessary and Proper Clause is the thing that
2 guarantees our system of dual sovereignty. It is the point
3 of reference for jurists, such as yourself, to review any
4 purported exercise of federal power to see that it stays
5 within the boundaries of a division of power between the
6 state and federal government.

7 And lastly, Your Honor, if I may, it is simply not
8 true that the new federalism cases are all focused on non-
9 economic activity. New York versus United States dealt with
10 questions of property title. It clearly involved economic
11 activities in terms of where the hazardous waste would go and
12 how it would be taken.

13 So there's a bigger principle at issue with New
14 York, with Morrison, with Lopez, with Prince, and it goes to
15 courts recognizing that they have a role in policing the
16 structural differences between the powers of the federal
17 government and the states, that no deference is accorded to
18 Congress when they are patrolling those structural differences
19 because the states don't have a voice in Congress any longer,
20 only the people do.

21 And therefore, the courts appropriately seek to
22 ensure that our dual system of sovereignty is maintained.
23 And especially in a case like this where individual liberty
24 is at issue. A fundamental right. The idea that federal
25 supremacy in a system that created dual sovereignty for the

1 purpose of protecting individual liberty, the idea that
2 federal supremacy could squash that individual liberty in the
3 name of federalism is simply an outrage respectfully, Your
4 Honor.

5 Thank you very much.

6 THE COURT: Well, hold on.

7 MR. DRANIAS: Okay.

8 THE COURT: Now you don't dispute that Congress has
9 the authority under the Commerce Clause and Necessary and
10 Proper Clause to regulate the flow of interstate -- or
11 interstate flow of firearms, do you?

12 MR. DRANIAS: If it's in the actual flow then you
13 wouldn't even have to go to the Necessary and Proper Clause.
14 It would be within the Interstate Commerce Clause.

15 THE COURT: And so when we're talking about
16 intrastate -- controlling intrastate manufacture and sale of
17 firearms, that's where you draw the line?

18 MR. DRANIAS: That's correct. And I think
19 interestingly for --

20 THE COURT: Notwithstanding if all 50 states
21 enacted, or a great majority of those states enacted laws
22 similar to the Montana Freedom Firearm Act, but some states
23 didn't and some states had strict gun regulation that
24 Congress cannot act to control the interstate -- interstate
25 flow of firearms of regulating the intrastate flow --

1 MR. DRANIAS: Not under the --

2 THE COURT: -- in order to --

3 MR. DRANIAS: Yeah.

4 THE COURT: -- in order to preserve in this federal
5 system the interaction between the states, and to assist those
6 states which wish to have gun control or regulations
7 controlling the manufacture and sale, that their efforts in
8 that regard are not inhibited.

9 MR. DRANIAS: Well, Your Honor, I would say under
10 the Commerce Clause if it's not in instrumental -- in
11 instrumentality of commerce -- of interstate commerce, if it's
12 not in the actual flow of interstate commerce then the only
13 source of power for Congress is the Necessary and Proper
14 Clause.

15 And it may be needful. In other words, I'm not
16 disputing that it would be convenient to reach out and
17 regulate intrastate activities to ensure a uniform interstate
18 rule, but we cannot forget the proper clause -- the proper
19 element of the Necessary and Proper Clause, which in Prince,
20 by virtue of the Supreme Court's embrace of the Duke Law
21 Journal study, means that courts have to examine the
22 proprietariness or the appropriateness from the perspective
23 of the structure of our kind of government, whether that
24 particular --

25 THE COURT: True. I agree wholeheartedly. So if

1 State A has absolutely no regulation of gun manufacturing
2 sales or anything else, but State B truly wants to have that
3 and does have that, that Congress and controlling -- in order
4 to control the interstate flow to serve obviously the
5 interest of B, it can control intrastate manufacture and
6 sales, can it not?

7 MR. DRANIAS: Not when it goes into the core area
8 of state sovereignty, which involves, as I've gone through the
9 Hodel elements, if you would disrupt states as states, the
10 exercise of their police powers, and if you were to disrupt
11 the purpose of federalism, which is to protect the individual
12 liberty, and particularly enumerated rights, then I would have
13 to say that that could not happen.

14 Now the devil is in the details. If we're dealing
15 with things that are not related to fundamental enumerated
16 rights, if we're dealing with regulations by states that
17 don't go to the core of their traditional functions, then a
18 different analysis would apply under the Necessary and Proper
19 Clause on the proper side of it. But in this case, when
20 we're dealing with a fundamental right --

21 THE COURT: So McDonald -- as I asked Mr. Rhoades,
22 McDonald effects your position in the case?

23 MR. DRANIAS: Absolutely. And so does the findings
24 relative to Massachusetts' gay marriage statute because in
25 both cases we have an exercise of traditional state powers,

1 the power to regulate marriage on one side, the power to
2 engage in police powers on the other, which displaces
3 contrary federal law because it would be improper,
4 considering the scheme of our system, for the federal
5 government to disrupt states when they're exercising their
6 core attributes of state sovereignty to protect the
7 individual liberty.

8 THE COURT: All right.

9 MR. DRANIAS: So Your Honor, if you have more
10 questions I'm free to -- I'm happy to take them, but I think I
11 may get into somebody's time.

12 THE COURT: I'll consider -- I'll consider the
13 Massachusetts District Court decision, but certainly I'm no
14 way bound by that. You agree to that?

15 MR. DRANIAS: I would agree it's that binding, but
16 it certainly makes this case now not one of first impression
17 but one of closely related impression.

18 THE COURT: I see. Thank you.

19 MR. DRANIAS: Thank you.

20 THE COURT: Good morning.

21 MR. TITUS: Good morning again, Your Honor. Again,
22 my name is Herb Titus and I'm here on behalf of the Gun Owners
23 of America, Gun Owners Foundation, and the Virginia Citizens
24 Defense League.

25 It's a well established rule of judicial restraint

1 that this Court should not reach the interesting and complex
2 and controversial questions of constitutionality when there
3 is an alternative way to resolve this case and to deny the
4 United States Government's motion, based upon a careful
5 reading of the relevant statutes.

6 The problem with the government's argument is that
7 they take the Raich case, and like a magic wand paint the
8 Gun Owners Control Act to prohibit the same kinds of economic
9 activities that the controlled substances statute
10 prohibited.

11 But as clearly recognized in the controlled
12 substance statute, it is both plenary and comprehensive,
13 whereas with regard to the Gun Control Act it is not plenary
14 but rather limited, and indeed differently focused.

15 THE COURT: So you two disagree with --

16 MR. TITUS: Now the government would have you
17 believe --

18 THE COURT: -- you two disagree with Mr. Rhoades?

19 MR. TITUS: Well, I'm suggesting here that if you
20 look at the statutory provisions that are at issue here that
21 you wouldn't have to reach the Raich question, you wouldn't
22 have to reach the Commerce Clause question or the Necessary
23 and Proper Clause question.

24 And, Your Honor, as a friend of the Court in
25 support of Mr. Rhoades' position, we believe that it's

1 important for us to submit to the Court an alternative way
2 by which you could resolve this case in Gary Marbut's favor
3 without having to reach the constitutional questions under
4 the Commerce Clause or any of the other clauses.

5 And let me point out two very important distinctions
6 between the Gun Control Act and the controlled substances law.
7 The first one is, as the government points out, it says it's
8 a dual purpose to govern the interstate commerce of foreign
9 -- and foreign commerce and firearms, and to assist the states
10 in their enforcement of the criminal law.

11 Now it has to serve a dual purpose. If you take
12 the government's position you will no longer have a law that
13 assists the states in enforcing the criminal law, but you will
14 have a law that displaces the states. And therefore, would
15 not serve the purpose of the Gun Control Act as it is
16 articulated because after all, the Montana Firearms Freedom
17 Act has to do with the State of Montana determining what its
18 policy should be with regard to firearms in relationship to
19 defending one's home and defending one's property and so
20 forth.

21 More significantly, Your Honor, is that the
22 government completely omits from consideration the FOPA, the
23 Firearm Owners Protection Act, that was passed in 1986. And
24 in that act they actually narrowed, they cut back the
25 authority that was being assumed by federal authorities under

1 the prior statute to deal with economic activities with
2 respect to the manufacturer and dealing of firearms.

3 Added to the Gun Control Act was Section 921(a)21
4 and 22, which required, before you could impose the federal
5 licensing requirement on a personal buying or selling or
6 manufacturing a firearm, it required two things. They had to
7 be engaged in the business of, and that this was their
8 livelihood.

9 In other words, there's a lot of economic activity
10 that is not governed by the federal firearms licensing
11 statute. You can engage in buying and selling and
12 manufacturing a firearm, so long as it's not your business by
13 which you're making your livelihood. And so this is very
14 different from the Controlled Substances Act where even non-
15 economic activity was covered by that particular statute.
16 That's not true here.

17 Now why is this important? It's important because
18 Section 927 of Title 18 has a specific rule with regard to
19 preemption. And this rule, Congress has indicated to the
20 courts, this is our intention with regard to occupying the
21 field. And the first thing they say is that nothing in this
22 act should be construed to occupy the field. Yet that's the
23 very thing the United States Government is arguing is that the
24 Gun Control Act occupies the field. That's directly contrary
25 to the statute as it's stated in Section 927.

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1 Not only that, but 927 indicates that unless there
2 is a direct --

3 THE COURT: Well, I'm not sure -- I'm not sure
4 they're making that argument. There's nothing that prohibits
5 the state from enacting regulations regarding gun control,
6 registration, et cetera, that are stricter than the federal
7 government, is there?

8 MR. TITUS: Yes. But at the same time there's
9 nothing in the Gun Control Act which indicates that states
10 couldn't enact laws that are less restrictive than the federal
11 statute.

12 It's important to understand that the rule of
13 Section 927 says that the government -- it should not be
14 construed to occupy the field. And indeed goes on to say
15 that there should be only a -- where there's a direct and
16 positive conflict, and where it cannot be reconciled. Now
17 notice in Section 922(a)(1), which is a specific regulation
18 having to do with licensed firearm dealers and manufacturers,
19 that that particular prohibition applies only to interstate
20 and foreign commerce.

21 Now if you look at Section 922(1)(2), you will see
22 that interstate commerce is defined in such a way as to
23 specifically and exclude intrastate commerce. Because that
24 is such an important statute, let me -- let me just read to
25 you the exact language, which says -- and this is 921(a)(2).

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1 It says:

2 "The term interstate or foreign commerce includes
3 commerce between anyplace in a state, and anyplace
4 outside of that state, or with any possession of the
5 United States, or the District of Columbia, but such
6 term does not include commerce between places within the
7 same state."

8 So Congress had in mind that the intrastate
9 commerce still remained in the hands of the state, and it was
10 not to be construed as occupying the field. So it's
11 extremely important to see that in 922(a)(1) the only thing
12 that's prohibited of a licensed dealer is an interstate
13 activity, not an intrastate activity.

14 Now the Stewart case and the -- I hope I pronounce
15 this correct --

16 THE COURT: You've got about -- you've got -- I'm
17 going to have you have about two more minutes. I've given
18 this --

19 MR. TITUS: Okay. The Stewart case and the Rahaker
20 [phonetic] case are not in any way opposed to this because
21 they didn't deal with licensing, they dealt with a
22 prohibition in 922(g). And notice if you look at 922(g) you
23 will see they used the word "affecting commerce." That's the
24 only place that's used is "affecting commerce," which is a
25 different jurisdictional claim for the federal government

1 than is the one with regard to licensing generally.

2 Now let me just make a couple of remarks with
3 regard to the Second Amendment. If you believe that you
4 can't resolve this case without addressing the constitutional
5 question, I would pose this point to you with regard to the
6 application of the Second Amendment to manufacturers and
7 sellers of firearms. Does not the First Amendment, freedom
8 of speech and freedom of the press, apply to publishers of
9 magazines and sellers of magazines? Of course, because they
10 recognize that the freedom of speech of the people depends
11 upon the availability of books and magazines and newspapers.
12 It's the same thing with regard to the Second Amendment right
13 to keep and bear arms. And so it applies to dealers and
14 manufacturers of firearms just the same as the First Amendment
15 does to the publishers and sellers of books.

16 THE COURT: All right. Thank you.

17 MR. TITUS: Thank you.

18 THE COURT: And Mr. Tweeten on behalf of the State
19 of Montana.

20 MR. TWEETEN: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. TWEETEN: The State of Montana is in this case
23 in order to defend the constitutionality of the statutes that
24 -- statute that has been enacted by our legislature. And in
25 my -- in my brief I've argued two different points, and one

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1 of them has to do directly with the question of the
2 constitutionality of the statute. The second has to do with
3 the status of the lawsuit that's before the Court today and
4 whether it ought to be dismissed on motion as opposed to
5 following further proceedings to develop a factual record.

6 With respect to the first point, this is an -- this
7 is an odd statute in -- and I mean that in the sense that it
8 constitutes a political statement on the part of the
9 legislature with respect to the relationship between certain
10 activities that are contemplated to be carried on in the
11 State of Montana and the federal constitution.

12 Those activities could be undertaken without the
13 enactment of the statute. In other words, the statute doesn't
14 -- isn't the mode by which it's permitted that guns are
15 manufactured in the State of Montana. That activity exists
16 as a matter of commercial law, free and clear of the
17 activities of the State of Montana to authorize it.

18 So the statute isn't operative in the sense that it
19 permits the manufacturing of firearms. What it says is that
20 if firearm --

21 THE COURT: I agree with you on that point.

22 MR. TWEETEN: -- if firearms are manufactured under
23 certain conditions, it's the view of the Montana legislature
24 that those activities can be undertaken without regulation by
25 the federal government because of, first of all, the limited

1 reading of the Commerce Clause, and second, the effect of the
2 Ninth and Tenth Amendments.

3 It's the position of the State of Montana that our
4 legislature, under the Tenth Amendment, has retained the
5 authority to make those kinds of political statements, even
6 if the Congress of the United States, or even if the federal
7 courts disagree with the philosophical positions that are
8 taken in those statutes.

9 The -- I guess maybe the clearest way to look at
10 this would be that the -- this lawsuit could exist and the
11 very same claims could be brought, and the very same legal
12 issues would be presented whether this statute existed or
13 not. The rights that the plaintiffs claim are rights that
14 exist under the provisions of the constitution protecting the
15 right to bear arms under the Second Amendment under the
16 Doctrine of Retained Sovereignty for the State of Montana,
17 under the Tenth Amendment, and the reserved powers of the
18 people in the Ninth Amendment.

19 And the plaintiffs contend that those -- that a
20 coalescence of those constitutional rights create their
21 opportunity to manufacture these firearms without federal
22 regulation. It's not something that exists solely as a result
23 of this statute. So --

24 THE COURT: So you don't view it the same as Mr.
25 Rhoades that the state is undertaking to ensure that its

1 citizens have sufficient access to firearms, or do you?

2 MR. TWEETEN: That's one of the -- one of the
3 objectives that's stated in the findings, but that's not how
4 the operative provisions of the statute work. So in that
5 sense, it's our position that as a philosophical statement
6 it's entirely within the powers of the State of Montana under
7 the Tenth Amendment to make such a statement. And the fact
8 that such a statement argues for an extension or change in
9 the existing prevailing decisions of the United States
10 Supreme Court, does not render the statute itself
11 unconstitutional, i.e., it doesn't say that the state did not
12 have the authority to make that statement in the first
13 instance.

14 THE COURT: I agree with you on that point.

15 MR. TWEETEN: So what this case is really about is
16 not the Montana Firearms Freedom Act. What this case is about
17 is the question of whether, under the Commerce Clause, the
18 United States has the authority to regulate the conduct that
19 the plaintiff, Mr. Marbut, wishes to engage in. And it's
20 controlled by constitutional principles that deal with the
21 individual right of Mr. Marbut to engage in those -- in those
22 behaviors and not anything that has to do specifically with
23 the statute.

24 THE COURT: Right.

25 MR. TWEETEN: Now with respect to the second point,

1 this case is very different from any of the other cases that
2 have been discussed today that have been decided by the
3 United States Supreme Court. Wickard and Raich were decided
4 on the basis of a more or less well developed factual record
5 with respect to the actual behavior that was subject of
6 regulation.

7 And also in the case of Wickard, with respect to a
8 fairly lengthy and detailed stipulation with respect to the
9 nature of the federal market in wheat, which Justice Jackson
10 referred to in extensive detail in reaching his conclusion
11 that the individual that's growing and harvesting wheat for
12 individual use could effect the national market.

13 We don't have any such factual development on the
14 record before the Court this morning. And so we don't know
15 the extent to which the manufacturer of a few hundred firearms
16 in the State of Montana, under the conditions that are
17 described by the Montana Firearms Act, may have any effect on
18 the interstate marketing of guns at all.

19 THE COURT: But the --

20 MR. TWEETEN: Even if you were assume that all of
21 them went into interstate commerce.

22 THE COURT: -- but the Congress -- the Congress is
23 fairly -- or is -- can consider the aggregate effect of not
24 just -- I don't know, maybe it's a minimal amount to Montana
25 theoretically that would be produced, but it can, on a

1 rational basis at least, conclude that the aggregate effect
2 of a large -- a number of states engaged in the similar type
3 of manufacturing provides a sufficient basis to regulate that
4 intrastate activity. Correct?

5 MR. TWEETEN: Yeah, I think that Congress could
6 take that into consideration if it had before it facts that
7 describe the particular kind of manufacturing activities
8 being undertaken under the Montana Firearms Freedom Act where
9 you're dealing with firearms that are built entirely from
10 intrastate materials and that are marked as being specifically
11 manufactured and intended for use within the State of Montana
12 or the State of Tennessee or whatever other state might have
13 it. The question of what effect those kinds of manufacturing
14 activities might have on interstate commerce is something that
15 Congress didn't opine on at all.

16 And I guess in light of Mr. Rhoades' concession,
17 I'm not sure how important this argument is anymore because
18 our position is that the case law -- that it's not clear that
19 the federal case law governs this activity, and it won't be
20 clear until there's more factual development. But in Mr.
21 Rhoades' concession it -- the only thing that stands between
22 this case and Raich is the -- is the decision of McDonald.
23 I'm not -- in McDonald I'm not sure that this argument really
24 has a lot of -- has a lot of traction anymore.

25 But, Your Honor, it is the State's position that

1 should the case turn on the operation of Raich that at least
2 the plaintiffs ought to be given the opportunity to make
3 their proof before the Court were to take the fairly drastic
4 step of dismissing on the pleadings.

5 THE COURT: Understood. All right. Thank you.

6 Mr. Renz.

7 MR. RENZ: Good morning, Your Honor. And thank you.
8 And I would also like to thank Attorney General Steve Bullock
9 for conceding some of their time to me.

10 I think I want to go directly to some of the
11 questions that you posed both to the United States and to the
12 Amici and to the defendant. And the first one I want to think
13 about is this question of fungibility.

14 The United States agreed that yes, Mr. Marbut's
15 firearms would be distinguishable, and in that sense they're
16 somewhat unique relative to other firearms. But they say --
17 but they say because they don't have necessarily serial
18 numbers attached to them, that has an impact upon our ability
19 to trace them should they go into the stream of interstate
20 commerce.

21 Now that's an interesting point. I mean if we look
22 at this carpet we can't tell one fiber from another. And so
23 the United States would be correct to say, yes, we've got to
24 put a serial number on each fiber so that we can tell them
25 apart.

1 But Marbut's firearms aren't different only
2 because they have a stand. They're different because he
3 manufactures them in a certain way. So his firearms are
4 distinguishable from other MFFA firearms because of the way
5 he makes them.

6 So what does that mean for us? Well, what it means
7 is that if that man from California comes up to Montana and
8 says to Gary Marbut I'd like about a hundred of those fine
9 looking weapons that you've got, and Gary says sure, and Gary
10 says give me your check, and it's from California, looks at
11 the plates and he's from California, says it's great seeing
12 you, have a good trip back to Sacramento. At this point the
13 United States has a case. Gary Marbut has violated federal
14 law by sending those arms into interstate commerce.

15 THE COURT: Well, he would tell the person you can't
16 take these across the border, I'm sure.

17 MR. RENZ: That's the point, isn't it. But that is
18 the point, you see, because -- because if he did violate the
19 law the United States can backtrack. The impact to which
20 scheme is not significant, and that's the question that we
21 have to ask.

22 Remember in Wickard the question was if everyone
23 consumes their own wheat we won't be able to raise the price
24 of wheat, and our objective is to raise the price of wheat.
25 Here the objection is altogether different. The objective is

1 to ensure that firearms that are used in unlawful ways can be
2 traced in some way.

3 And so if the seller of an MFFA firearm is going to
4 violate federal law by sending -- and violate the MFFA for
5 that matter by sending those firearms into interstate
6 commerce, the government still has the control. It still has
7 means to enforce its scheme.

8 THE COURT: How about on the front end? Aren't some
9 of these regulations designed to act on the front end of the
10 sale?

11 MR. RENZ: In what way do you mean?

12 THE COURT: Well, to ensure that a felon isn't
13 getting a -- a convicted felon isn't getting a firearm?

14 MR. RENZ: Sure. Sure. And that's unlawful, isn't
15 it?

16 THE COURT: Last time I checked it was.

17 MR. RENZ: Yeah. And so, you know, Mr. Marbut,
18 should he know that the man is a convicted felon, and it's
19 easy to find out because everyone now except in one state is
20 on a state database, for example the Montana Con Web.

21 So, again, the seller has no excuse. And the
22 government is in a position to enforce its scheme in that way,
23 even with respect to an MFFA firearm.

24 THE COURT: So the federal government is required
25 to rely upon the resources of Mr. Marbut and his good

1 intentions when he makes the sale?

2 MR. RENZ: The firearm is -- the United States is
3 going to rely upon not the good intentions of Mr. Marbut but
4 Mr. Marbut's fear of being prosecuted for violating federal
5 law by sending those arms in interstate commerce. And Mr.
6 Marbut's fear of losing his opportunity to engage in MFFA
7 manufacturing by violating the MFFA itself.

8 And then you did speak about the footnote, and how
9 I would submit that what the Court was saying there is we
10 don't -- we don't reach the Natural Firearms Act because it's
11 not before us. That's a question for the future, and this
12 case happens to be the future.

13 So the court in McDonald said the Second Amendment
14 is a fundamental right, and because it is a fundamental right
15 any attempt to regulate that fundamental right is subject to
16 strict scrutiny.

17 Now we talked about economic activity, but when we
18 say that what we're talking about is an economic transaction.
19 The transaction between Mr. Marbut who makes the firearms and
20 the transaction between the customer who's got the Second
21 Amendment right to bear those firearms.

22 And just as -- as we speak about the interaction
23 between a woman and her doctor, we're talking about the same
24 sort of transaction, although we're not talking about
25 necessarily the privacy right that attaches to that

1 transaction. But if doctors can't perform abortions because
2 it's outlawed, it's not the doctor's right that's impacted
3 it's the woman's right, and it's the same thing.

4 THE COURT: So you agree that the -- that the right
5 to manufacture and sell firearms is subject to strict
6 scrutiny, the purported right to manufacture and sell?

7 MR. RENZ: Yes, in the same -- in the same way that
8 the transaction between a woman and her doctor, subject to
9 strict scrutiny, and the effort to regulate that transaction
10 is subject to strict scrutiny.

11 Now what does that mean? Well, that means I think
12 that we're probably going to engage down the line in a
13 question of significant burden. Does the regulation in some
14 way significantly burden the exercise of the right. That's
15 my guess as to how these things are going to play out, and
16 then this is the case where they may begin to play out.

17 But what that means, of course, is that at this
18 stage it's going to require evidence. I mean we're not in a
19 position to say if there's a significant burden or not
20 without evidence. And this is the preliminary stage, the
21 motion to dismiss. And that's why the legislatures agree
22 with the state that the case ought to pass through the motion
23 to dismiss stage, and the Court ought to hear evidence with
24 respect to what Mr. Marbut intends to do, with respect to
25 what the United States would do with respect to what he does,

1 and then make the determination as to whether or not there's
2 a significant burden on the Second Amendment right, and make
3 the determination as to whether or not the United States'
4 scheme to regulate interstate transactions and firearms is
5 significantly frustrated.

6 THE COURT: All right. Thank you.

7 Ms. Leinhart [sic], you get to mop up.

8 MS. LEINWAND: Okay. Thank you, Your Honor.

9 Your Honor, I'd like to discuss the arguments that
10 were raised with respect to the Tenth Amendment and the Second
11 Amendment.

12 As an initial matter I just wanted to clarify that
13 the government recognizes 18, U.S.C., 927 and is not arguing
14 that there's field preemption in this case. We are saying
15 that there's a clear conflict here between the federal
16 firearms laws, which impose various licensing, record
17 keeping, and marking requirements, and the MFFA, which
18 simultaneously exempts Montana Firearms dealers from those
19 same requirements.

20 And according to well settled preemption law,
21 interpreting the supremacy clause, if there is any conflict
22 between federal law and state law, federal law shall
23 prevail.

24 THE COURT: Well, just so we're all -- or at least
25 I'm clear, you don't disagree with the State's argument that

1 its Ninth and Tenth Amendment powers allows it to pass this
2 political statement, and certainly they have that right -- the
3 State has that right. And what we're talking about is the
4 federal government's position that it has a right to enforce
5 the gun regulations in federal statute and regulations
6 promulgated thereunder?

7 MS. LEINWAND: Exactly.

8 THE COURT: Okay.

9 MS. LEINWAND: And to the extent that there is a
10 conflict, federal law preempts state law in this issue.

11 In terms of the Tenth --

12 THE COURT: Supercede probably is better. Under the
13 Supremacy Clause is what your arguing, is that correct?

14 MS. LEINWAND: Right. Supercedes.

15 THE COURT: All right.

16 MS. LEINWAND: The plaintiffs and the amici also
17 maintain that federal law superceding state law in this case
18 also violates the Tenth Amendment. And I think the Tenth
19 Amendment argument and the reference to the Defensive Marriage
20 Act decision ignores the relationship between a state's
21 authority under the Tenth Amendment and congressional power
22 under the Commerce Clause.

23 And there's a principle of dual sovereignty at play,
24 which the Supreme Court has discussed in Garcia versus
25 Metropolitan Transit Authority and New York versus the United

1 States, and that the Ninth Circuit recognized in Stewart and
2 that this Court recognized in Rahaker [phonetic], which is
3 that where Congress has the power to legislate, pursuant to
4 an enumerated power, the states don't have control. So to
5 the extent that this Court decides that Congress has the
6 power to regulate the manufacture and sale of firearms under
7 the commerce clause, which Raich and Stewart has clearly said
8 it does, there is no Tenth Amendment violation.

9 And the Defensive Marriage Act that the Goldwater
10 Institute referenced actually is not intention with this
11 principle because in that case the first question that the
12 Court had to answer was whether Congress has the authority to
13 pass the Defensive Marriage Act under the spending clause.
14 And so it ran through its whole spending clause analysis and
15 concluded that it didn't have that power. And once it did not
16 have that power it then continued on and considered the Tenth
17 Amendment issues in that case.

18 And there's confusing language in that decision
19 that sort of reverts back to the traditional state function
20 language that was overruled by Garcia, and so I'm not going
21 to get into kind of the intricacies of their Tenth Amendment
22 analysis because for our purposes the first prong of the test
23 is what's important. And here because it's a very clear
24 question that Congress does have this power under the Commerce
25 Clause, the Tenth Amendment argument falls flat.

1 Moving on to the Second Amendment, I just want to
2 point out that plaintiffs haven't raised a Second Amendment --
3 a Second Amendment claim in their complaint. They have
4 referenced it in terms of the authority and context for the
5 MFFA, but they didn't bring a claim expressly under the
6 Second Amendment itself. And in the prayer for relief they
7 asked the Court to declare the MFFA constitutional under the
8 Ninth and Tenth Amendments, but they don't ask for this
9 relief under the Second Amendment. So while the Second
10 Amendment was a central point in many of the amicus briefs as
11 we've seen, the amici really can't raise claims on behalf of
12 the plaintiffs.

13 But in any event, it's the federal government's
14 position that a Second Amendment challenge wouldn't survive
15 scrutiny, even under the recent Supreme Court decisions of
16 Heller versus the District of Columbia, and McDonald versus
17 Chicago. And as this Court recognized in Vanderhule, Heller
18 was a very limited and fact specific decision.

19 And in both Heller and McDonald we were dealing
20 with absolute bans on the possession of handguns. So that's
21 just an initial distinction. But the Supreme Court did
22 consider whether a person who was lawfully entitled to
23 possess firearms generally could possess a handgun for self-
24 defense. In Heller it was in his home. And in holding that
25 he could, obviously the court invalidated a D.C. gun control

1 law that prohibited the possession of handguns generally,
2 and a requirement that said all firearms have to be kept
3 unloaded and inoperable in the home. And the Court expressly
4 tied these absolute bans to the right of a person to self-
5 defense.

6 And I think Your Honor recognized this in your line
7 of questioning that what's important about Heller and
8 McDonald, for our purposes, is how the Court defined the
9 individual right itself. And the restrictions on that right
10 that the Supreme Court expressly said remain lawful. Because
11 the Court set out in dicta to guide lower courts in
12 interpreting the Second Amendment after Heller, and they
13 noted that the right is not unlimited. And in their non-
14 exhaustive list of permissible limitations, they mentioned
15 gun ownership on the part of felons or the mentally ill, but
16 most importantly laws imposing conditions on the commercial
17 sale of firearms.

18 So again, this is the Supreme Court expressly
19 saying that the activity at issue in this case should not be
20 called into question after Heller.

21 And again, it's probably most important to remember
22 that the Second Amendment's right to bear arms has never been
23 interpreted to include the right to manufacture and sell
24 firearms.

25 THE COURT: So you disagree with the argument that

1 the Court should employ some sort of strict scrutiny to the
2 manufacturer?

3 MS. LEINWAND: Well, first of all, Heller and
4 McDonald didn't discuss scrutiny at all, so there's no
5 relevant precedent to interpret from the Supreme Court in
6 that area.

7 But that aside, I do because I think that the right
8 at issue here is very different from the right to bear arms,
9 subject to some absolute ban, which was at issue in Heller
10 and McDonald. And I think looking at the right to
11 manufacture and sell firearms, and many of the amici who
12 argued tied the right to manufacture and sell to the right to
13 possess and bear arms, saying that you can't have one without
14 the other.

15 But federal firearm licensees are producing
16 firearms right now, and these firearms are available for
17 purchase. And all the federal government is doing is
18 regulating them to an extent. And so I think when we look at
19 all of that we see that the -- while McDonald and Heller are
20 certainly -- they color the arguments, but they're -- they're
21 really in no way decisive.

22 And finally, just as a brief aside because I know
23 some of amicus briefs also referenced the Ninth Amendment,
24 sort of this idea that the Ninth Amendment takes the
25 individual right to bear arms and then provides a sort of

1 independent right to manufacture and sell arms, and the
2 Ninth Amendment has never been interpreted to confer
3 individual rights, a rule of reading the constitution. So I
4 think any reference to the Ninth Amendment as a source of
5 rights is just -- it's not a -- that argument has no merit.

6 And that's all I have today, so thank you very much
7 for your time.

8 THE COURT: All right. Thank you.

9 I thank all of the individuals who argued today. I
10 will issue a decision as soon as practicable.

11 The Court stands in recess.

12 THE CLERK: All rise.

13 COUNSEL: Thank you for hearing us, Your Honor.

14 THE COURT: You're welcome.

15 PROCEEDINGS CONCLUDED AT 10:46:39 A.M.

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CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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