

STEVE BULLOCK  
Montana Attorney General  
CHRIS D. TWEETEN  
Chief Civil Counsel  
ANTHONY JOHNSTONE  
State Solicitor  
ZACK ZIPFEL  
Assistant Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
Telephone: 406-444-2026  
Fax: 406-444-3549  
ctweeten@mt.gov

COUNSEL FOR INTERVENOR STATE OF MONTANA

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

MONTANA SHOOTING SPORTS  
ASSOCIATION, SECOND  
AMENDMENT FOUNDATION,  
Inc., and GARY MARBUT

Plaintiffs,

STATE OF MONTANA,

Rule 5.1(c) Intervenor,

v.

ERIC H. HOLDER, JR., ATTORNEY  
GENERAL OF THE UNITED  
STATES OF AMERICA,

Defendant.

CV-09-147-DWM-JCL

**STATE OF MONTANA'S BRIEF  
IN INTERVENTION**

The State of Montana respectfully submits this brief pursuant to 28 U.S.C. § 2403(b) and Fed. R. Civ. P. 5.1(c) on the question of the constitutionality of the Montana Firearms Freedom Act, Mont. Code Ann. §§ 30-20-101 to -106 (“MFFA” or “the Act”).

### **STATEMENT OF THE CASE**

In 2009, the Montana Legislature enacted the MFFA. It consists of a lengthy set of legislative findings as to the Legislature’s constitutional power to adopt the Act, a set of definitions, and the following section entitled “Prohibitions”:

A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce. It is declared by the legislature that those items have not traveled in interstate commerce. This section applies to a firearm, a firearm accessory, or ammunition that is manufactured in Montana from basic materials and that can be manufactured without the inclusion of any significant parts imported from another state. Generic and insignificant parts that have other manufacturing or consumer product applications are not firearms, firearms accessories, or ammunition, and their importation into Montana and incorporation into a firearm, a firearm accessory, or ammunition manufactured in Montana does not subject the firearm, firearm accessory, or ammunition to federal regulation. It is declared by the legislature that basic materials, such as unmachined steel and unshaped wood, are not firearms, firearms accessories, or ammunition and are not subject to congressional authority to regulate firearms,

firearms accessories, and ammunition under interstate commerce as if they were actually firearms, firearms accessories, or ammunition. The authority of congress to regulate interstate commerce in basic materials does not include authority to regulate firearms, firearms accessories, and ammunition made in Montana from those materials. Firearms accessories that are imported into Montana from another state and that are subject to federal regulation as being in interstate commerce do not subject a firearm to federal regulation under interstate commerce because they are attached to or used in conjunction with a firearm in Montana.

Mont. Code Ann. § 30-20-104.

Plaintiffs seek a declaratory judgment that: (1) Congress lacks the power to regulate “the special rights and activities contemplated by the MFFA”; (2) the Tenth Amendment reserves to the States “all regulatory authority of all such activities within Montana’s political borders”; and (3) federal law does not preempt the MFFA or prevent Montana citizens from asserting its provisions as a complete defense to any criminal or civil action brought under federal firearms laws.

The First Amended Complaint alleges that Plaintiffs wish to manufacture and sell firearms and ammunition in Montana under the conditions specified in the Act, *i.e.*, made from “basic materials . . . without the inclusion of any significant parts imported from another state” with the intention that the firearm remain within the state of Montana. Mont. Code Ann. § 30-20-104. First Am. Compl., ¶ 10.

Plaintiffs buttress these allegations in the proposed Second Amended Complaint:

PLAINTIFF . . . has hundreds of customers who have offered to pay his stated asking price for both firearms and firearms ammunition

manufactured under the MFFA. In particular, [Plaintiff] has a substantial opportunity to market a “Montana Buckaroo” youth model, single shot, bolt-action .22 caliber rifle to hundreds of customers who have placed orders for many hundreds of firearms. These sales, however, are all specifically conditioned on the “Montana Buckaroo” being manufactured pursuant to the MFFA . . . .

Second Am. Compl., ¶ 14.

Plaintiffs further allege that they have sought “permission and assurances” from the appropriate federal regulatory agency that they may do so without prosecution under federal firearms laws and have received neither permission nor assurances. First Am. Compl. ¶ 10. Plaintiffs allege that without a declaratory judgment from this Court their rights guaranteed under the Act will be violated.

The United States has moved to dismiss the First Amended Complaint. The Government asks the Court to invalidate the Act only “to the extent any direct conflict exists” between federal and state law. Fed. Br. at 2. Its brief concedes that the federal law enforcement agency with jurisdiction, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“BATFE”), has stated that “the manufacture of firearms, accessories, or ammunition for personal use does *not* generally require a license under the Federal firearms laws.” (Emphasis added.) Fed. Br. at 8. The Government postulates, contrary to the Complaint’s allegations, that “[t]here is no purely intrastate firearms market in this country,” Fed. Br. at 14 n.2, and that “[i]t would be unreasonable to expect that Montana will remain an island unto itself in

respect to ‘made in Montana’ firearms.” Fed. Br. at 25 n.3. The Government disclaims any attempt by the BATFE to adapt federal law to the unique legal posture taken by the Act. Fed. Br. at 18-19. The Government asserts that, despite the contested nature of Plaintiffs’ factual allegations, dismissal under Rule 12(b)(6) is required.

In its motion to dismiss, the Government has questioned the constitutionality of the Act, and notified the Montana Attorney General of the question, which this Court has subsequently certified pursuant to Fed. R. Civ. P. 5.1(b). The State’s intervention, and this brief, address the constitutional questions raised by the United States.

## **ARGUMENT**

### **I. THE POWERS RESERVED TO THE STATES UNDER THE TENTH AMENDMENT INCLUDE THE POWER TO ENACT THE MFFA.**

The MFFA is principally a political statement by the Montana legislature setting forth its conception of the interplay between the powers granted to Congress by the Commerce Clause and the powers retained by the states and the people pursuant to the Tenth Amendment. It does not require officers of the Executive Branch of Montana’s government to intercede to prevent enforcement of federal law. The First Amended Complaint makes this clear:

The activity authorized under the MFFA is primarily political. It has a commercial element, but the legislative purpose is to allow Montanans who wish to avoid interference by the United States government in their legitimate and constitutionally-protected activity (specifically, manufacturing and selling small arms and small arms ammunition) to do so if they strictly confine such activity to the political boundaries of their own state.

First Am. Compl., ¶ 9.

The Tenth Amendment reserves to the States or to the people all powers not specifically granted to the federal government. U.S. Const. amend. X. The countervailing power of Congress to enact “the supreme Law of the Land” pursuant to its enumerated powers binds “the Judges in every State,” not the people themselves or their elected legislators. U.S. Const. art. VI, cl. 2 (emphasis added). The state legislature retains the sovereign authority to express its view of the powers reserved to it without interference from the federal government. Therefore, while it may ultimately be the province of the judicial branch to determine “what the law is,” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), the States are free to speak to that question through legislative enactments such as the MFFA. It is not the role of Congress, or any federal executive branch officer, to insist otherwise. Printz v. United States, 521 U.S. 898, 912 (1997) (“state legislatures are *not* subject to federal direction,”) citing New York v. United States, 505 U.S. 144 (1992). (Emphasis in original.)

**II. THE COURT SHOULD DISTINGUISH THIS CASE FROM RAICH AND STEWART.**

The United States principally relies on the Supreme Court's decision in Gonzales v. Raich, 545 U.S. 1 (2005), and a Ninth Circuit case that applies it, United States v. Stewart, 451 F.3d 1071 (9th Cir. 2006). In Raich, the Court held that the Commerce Clause supported the application of the federal Controlled Substances Act to marijuana grown and consumed wholly within the State of California pursuant to that state's law governing use of marijuana for medicinal purposes. Stewart applies the reasoning in Raich to uphold convictions under federal statutes prohibiting possession of a machine gun.

Raich is footed on the Court's decision in Wickard v. Filburn, 317 U.S. 111 (1942). In Wickard, the Court upheld application of a federal statute regulating the harvesting of wheat to a small crop produced by a farmer for his own consumption and not for market. The federal statute sought to support the price of wheat in the national market by restricting the supply to prevent glutting the market. The Court held that the Commerce Clause reaches such local activities when it can be shown that they have a substantial effect on interstate commerce such that it would be appropriate for Congress to regulate them. 317 U.S. at 125 (“[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still,

whatever its nature, be reached by Congress if it exerts a *substantial economic effect on interstate commerce . . .*”). (Emphasis added.)

The Raich Court found no material distinction between wheat grown for local consumption and marijuana grown for local consumption. Both wheat and marijuana are a “fungible commodity for which there is an established . . . market.” 545 U.S. at 18. The Court held that Congress enacted the Controlled Substances Act to control the supply and demand for both legal and illegal drugs and that it could rationally have concluded that “leaving home-grown marijuana outside federal control would similarly affect price and market conditions.” Id. at 19.

In Stewart, a panel of the Ninth Circuit reversed its pre-Raich decision, holding that the Commerce power justified federal prohibition of possession of a homemade machine gun. The Court viewed the federal regulation of machine gun possession as a comprehensive scheme to control the interstate market in such guns, and found no reason to distinguish the effect of homemade machine guns on the national machine gun market from the effect of marijuana grown for personal use on federal control of the marijuana market.

The Stewart panel made several observations that distinguish that case from this one. For example, “Raich stands for the proposition that Congress can ban possession of an object where it has a rational basis for concluding that the object might bleed into the interstate market and affect supply and demand, especially in

an area where Congress regulates comprehensively.” 451 F.3d at 1076-77. While Congress has attempted comprehensive regulation of firearms that affect interstate commerce, the United States has not established that firearms manufactured and traded within Montana under the conditions stated in the MFFA will have any such effects.

The United States asserts in its brief that “[t]here is no purely intrastate firearms market in this country,” Fed. Br. at 14 n.2, but under Rule 12 standards that assertion can be given no weight, since the Court must assume the allegations of the complaint are true, Bell Atlantic v. Twombly, 550 U.S. 544, 556 (2007) (court must assume “that all the allegations in the complaint are true (even if doubtful in fact) . . .”). The MFFA by its terms limits the market for Montana-made firearms in several ways. Most obviously, it only applies to firearms as long as they are located within the boundaries of the State. Mont. Code Ann. § 30-20-104 (applying the MFFA to a firearm “that remains within the borders of Montana”). Further, it limits its reach to a firearm that “is manufactured in Montana from basic materials.” Id. While the Act does not define “basic materials” other than to include within the term “unmachined steel and unmade wood,” in the context of a pre-enforcement facial challenge such as this one the Court must presume that the term will be defined in a manner that supports, rather

than impairs, the MFFA's constitutionality. See Arizonans for Official English v. Arizona, 520 U.S. 43, 78-79 (1997) ("Federal courts, when confronting a challenge to the constitutionality of a federal statute, follow a 'cardinal principle': They 'will first ascertain whether a construction . . . is fairly possible' that will contain the statute within constitutional bounds.") (Citations omitted.) Not only must the firearm be manufactured from basic materials and kept in Montana, it may not include any "significant parts imported from another state" other than "generic and insignificant parts that have other manufacturing or consumer product applications . . . ." Mont. Code Ann. § 30-20-104.

Wickard, Raich, and Stewart all concern items that are fungible in the sense that it is impossible to distinguish in the stream of commerce an item that has traveled interstate from one that has not. Wickard, 317 U.S. at 128-29 (noting that homegrown wheat "overhangs the market" in that when the price rises it can enter the market to compete with wheat in interstate commerce); Raich, 545 U.S. at 30-31 (noting interrelationship between interstate marijuana market and marijuana dispensed under California medical marijuana law); see also id. at 40 (Scalia, J., concurring) ("Drugs like marijuana are fungible commodities."); Stewart, 451 F.3d at 1077-78 (noting that even "unique" home-made machine guns can readily enter the stream of commerce and be indistinguishable from all others). The reach of the MFFA is different. It applies only to a distinct market in guns

that are manufactured “without the inclusion of any significant parts imported from another state” and have never traveled interstate. And, by requiring Montana-made guns to be marked, it allows them to be readily identified whenever they have exited the State, which can assist federal authorities in tracing guns to manufacturers whose products are entering the stream of interstate commerce.

The Stewart panel also looked past the absence of explicit Congressional findings regarding the effects of homemade weapons on the interstate market based on its view that the Second Amendment did not create the kind of “special concern” that would require some specific statement of Congress’s grounds for regulating. 451 F.3d at 1075 & n.6, citing Raich, 545 U.S. at 21 (“[W]e have never required Congress to make particularized findings to legislate, absent a special concern such as free speech.”). The panel erred in doing so, however, since it relied on the now-discredited notion that the Second Amendment confers no individual rights. Cf. District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008) (Second Amendment confers individual rights and renders unconstitutional District of Columbia “prohibition of handguns held and used for self-defense in the home.”). Needless to say, no federal gun control statute is accompanied by specific findings that manufacture and intrastate sale of firearms under the constraints provided in the MFFA could substantially affect the interstate market in

firearms generally, let alone specifically contribute to the crime problems that motivated the federal statutes.

The United States asks this Court to rule on the application of federal law to conduct that complies with the MFFA in a factual vacuum on the bare basis of the pleadings. This stands in stark contrast to Wickard, Raich, and Stewart, in which the Court considered more or less fully-developed factual records. It also contradicts United States v. Lopez, 514 U.S. 549 (1995), in which the Supreme Court rejected an extension of the Commerce Clause power to regulate certain firearms, refusing in the process to “pile inference upon inference” to support a finding of a substantial effect on interstate commerce.

In Wickard, Justice Jackson wrote that “[t]he Court’s recognition of the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible.” If this phrase retains any meaning, the application of federal firearms regulations to activities conducted in compliance with the MFFA must be rejected. A firearm manufactured and traded under the conditions stated in the MFFA cannot affect interstate commerce, and the statute cannot impede federal efforts to regulate any firearms not made in compliance with the statute. Congress obviously could not have had a reasonable basis for otherwise concluding. If any doubt

exists about the effect of the MFFA, Plaintiff should be allowed the opportunity to put on their proof.

This Court has recognized that Commerce Clause principles, perhaps more than other constitutional tenets, are susceptible to possible shifts and nuances at the margin. United States v. Rothacher, 442 F. Supp. 999, 1004 (D. Mont. 2006) (Molloy, J.). It would be error to assume that, after Heller and under the MFFA, Raich and Stewart together create unlimited reach to Congress' power to regulate firearms. These cases therefore are not controlling as to the question of whether the conduct covered by the MFFA is within the Commerce Clause power of Congress.

### **CONCLUSION**

The State files this brief pursuant to Fed. R. Civ. P. 5.1(c) to address the issues presented in the United States' motion to dismiss regarding the constitutionality of the MFFA. Given the limited scope of the State's intervention under the rule, the State takes no position with respect to the questions presented by the United States as to whether a statutory basis exists for this Court to exercise jurisdiction, whether the United States has waived its immunity from suit, or whether the First Amended Complaint presents a justiciable controversy. Should the Court reach the constitutional challenge posed by the United States, the Court

should reject it, especially in the context of this 12(b)(6) motion. The Commerce Clause power of Congress does not intrude on the power, reserved under the Tenth Amendment, of the Montana legislature to enact the MFFA.

Respectfully submitted this 12th day of April, 2010.

STEVE BULLOCK  
Montana Attorney General  
CHRIS D. TWEETEN  
Chief Civil Counsel  
ANTHONY JOHNSTONE  
State Solicitor  
ZACK ZIPFEL  
Assistant Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

By: /s/ Chris D. Tweeten  
CHRIS D. TWEETEN  
Chief Civil Counsel  
Attorney for Intervenor State of Montana