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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

MONTANA SHOOTING SPORTS ASSOCIATION, et al.,

Plaintiffs,

-V-

ERIC H. HOLDER, Jr.,

Defendant.

No. 09-CV-147-DWM-JLC

BRIEF OF AMICI CURIAE MONTANA LEGISLATORS OPPOSING DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

First, it should be said that the Montana Firearms Freedom Act (MFFA) is largely a truism. It is the Montana Legislature's expression that the mere fact that a manufactured good is a firearm or a firearm accessory

does not automatically subject it to federal regulation or to federal law. The MFFA carefully describes those firearms and accessories that the Legislature felt were not subject to federal law. That is, if these goods were manufactured within the State, were not assembled from components that moved in interstate commerce, and remained wholly within the state, then barring an exercise of a power set out in Article I of the United States Constitution, they would not be subject to federal law or regulation. Mont. Code Ann. §§ 30-20-103; -104 (2009). The MFFA excludes crew-served weapons, large caliber weapons, weapons that fire explosive rounds, and automatic weapons. Mont. Code Ann. § 30-20-104 (2009). Firearms subject to the MFFA must be stamped, "Made in Montana." Mont. Code Ann. § 30-20-105 (2009).

The Montana Legislature adopted the MFFA to enforce Section 12 of the Montana Declaration of Rights, and as an expression of their view of the Second, Ninth, and Tenth Amendments to the United States

Constitution. *See* Mont. Code Ann. § 30-20-102 (2009). It is to those provisions that the *amici* Legislators now turn.

INTEREST OF AMICI CURIAE

The Montana Legislators appearing as amici curiae in this action

voted to approve the MFFA. Because they discussed, debated and supported the MFFA, the Montana Legislators have a particular interest in seeing its implementation.

The Montana Legislators also have a vital interest in the recognition and preservation of the rights reserved to them and to Montana citizens under the United States Constitution, including those under the Ninth and Tenth Amendments. They have a substantial, ongoing interest in cases that call into question the constitutionality of their statutes that regulative activities within their own borders.

The law, as passed by the Montana Legislature, is intended to allow Montana citizens to engage within their State in constitutionally protected activity without burdensome federal oversight and regulation of their solely intrastate activities. The Montana Legislators believe that their perspective in passing the law in reliance on various constitutional provisions as a basis for doing so, and their comment on the relationship between the Commerce Clause and the rights reserved to the people and their States under the Ninth and Tenth Amendments to the United States Constitution are important to the Court's analysis of the issues in this case.

I.

IT IS QUESTIONABLE WHETHER CONGRESS'S AUTHORITY UNDER ITS CONDITIONAL SPENDING POWER OR ITS POWER TO REGULATE INTERSTATE COMMERCE EXTENDS TO MFFA FIREARMS

The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Amendment X, U.S. Const. (1791).

The delegations expressed by the Tenth Amendment were originally understood to refer to the various powers held by the state and federal governments within a federal system. See Burlington v. Day, 78 U.S. 113, 124-125 (1870) (noting that with respect to the powers not granted the national government, the states "are as independent of the general government as that government is of the states"), overruled on other grounds, Graves v. People ex rel. O'Keefe, 306 U.S. 466 (1939). The views that states held certain sovereign powers that could not be infringed by the national government and that certain activities were the province of the states was set out in National League of Cities v. Usery, 426 U.S. 833 (1976). United States v. Butler, 297 U.S. 1, 53-56 (1936), often cited as a Tenth Amendment decision, is not. It held that the power to regulate

agricultural *production* was inherently intra-state and therefore beyond the reach of Congress.

Butler's error was in conflating 1791 conditions and 1787 powers. Congress did not regulate agriculture in the 18th Century because the conditions ensured that nearly all agricultural markets were local. Cf., Brown v. Maryland, 25 U.S. 419, 445-449 (1827) (striking down Maryland tax on dry goods entering the state). (Brown's sweep has been limited to direct impediments on commerce. See, Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992).) The lack of speedy transportation and refrigeration meant that spoliation was a limit on interstate commerce of raw agricultural goods. (This rule would not necessarily apply to refined agricultural goods-sugar, molasses, indigo-which were not as subject to spoilage.) As a general proposition, the activity of agricultural production did not and could not have a substantial effect on interstate commerce. So the national government might have exclusive authority over interstate means of transport, Gibbons v. Ogden, 22 U.S. 1 (1824), and over direct burdens on interstate goods that would preclude Philadelphia from taxing the Camden farmer, Brown, above, but had no reason to regulate the farmer's transport of wheat to the local mill. Butler, although not a

Commerce Clause case, concluded incorrectly that the historical absence of federal regulation as a recognition that agricultural production was strictly an intrastate activity that was beyond the reach of Congress under any enumerated power. 297 U.S. at 74.

Usery's and Butler's views were respectively overruled by Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), which held that the states do not enjoy "reserved" or sovereign powers but only that the federal Constitution grants limited powers, and, effectively, by Wickard v. Filburn, 317 U.S. 111 (1942), which recognized that the flow of agricultural products in interstate commerce had become substantial.

We recognize that the national government's power to regulate directly interstate commerce is plenary, *United States v. State of California, State Water Resources Control Board*, 694 F.2d 1171 (9th Cir. 1982), as is its power to regulate indirectly intrastate commerce by means of the federal spending power. *See Butler*, 297 U.S. at 53-56; *Steward Machine v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

On the other hand, where a power had not been granted exclusively to the national government or, where generally granted, had not been exercised, see Worcester v. Georgia, 31 U.S. 515 (1832) (holding that state could not exercise power over an Indian tribe in violation of the United States' exclusive power to regulate relations with foreign sovereigns), the states retain freedom to legislate.

Of course, the power to tax is the power to destroy, see M'Culloch v. Maryland, 17 U.S. 316, 321 (1819), and it is without question that should the United States Congress wish to tax firearms, whether they are in the stream of commerce or not, it is free to do so. Sonzinsky v. United States, 300 U.S. 506 (1937). Nevertheless the power to tax for revenue even if it has the secondary effect of regulation, is different from the power to regulate by means of a duty, excise, or impost. See Jeffrey T. Renz, What Spending Clause?, 33 John Marshall L. Rev. 81, 88-95 (1999) (discussing the framers' understanding of the difference between a tax for regulation and a tax for revenue); Gary Lawson, Discretion as Delegation: The Proper Understanding of the Non-delegation Doctrine, 73 Geo. Wash. L. Rev. 235, 251 (2005) (stating it is "especially odd" to treat taxes, duties, excises, and imposts as redundant). And calling a penalty a "tax" will not confer power on Congress. If it is not a tax but a regulation, it must be justified by a source of authority in the Constitution that is independent of the tax clause. Bailey v. Drexel Furniture Co., 259 U.S. 20, 38 (1922) (holding that "excise tax" imposed on knowing use of child labor but excused for lack of knowledge, did not fall within taxing power); cf., United States v. Kahrigar, 345 U.S. 22, 30-32 (1953) (holding that a tax that raises revenue will not be deemed regulatory simply because it appears to regulate or discourage the activity taxed), overruled on other grounds, Marchetti v. United States, 390 U.S. 39 (1968). This establishes the difference between taxation, which may have the secondary effect of regulation, and regulation, which may have the secondary effect of bringing revenue. The first needs no specific power. The second does.

Whether we conclude that the Tenth Amendment cabins federal powers vis-a-vis the states to those powers granted by the Constitution or conclude that the Tenth Amendment is merely a recognition that the organization of the national Constitution cabins federal powers vis-a-vis the states, see New York v. United States, 505 U.S. 144, 156-157 (1992) (stating that the Tenth Amendment is a tautology); Butler, 297 U.S. at 68 (noting that the Tenth Amendment was adopted to reiterate the proposition that the national government is a government of limited powers), is immaterial. If a power has not been granted or if a granted power has not been

exercised, the states are generally free to act. The states may not engage in activities that would frustrate or limit federal power, *M'Culloch*, *above*, that are prohibited to the states by the Constitution, *The Legal Tender Cases*, 110 U.S. 421, 442-443 (1884), or that impose upon an exclusive power of the national government. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

In light of these principles, there is nothing in the MFFA that should offend the powers of the national government. The MFFA is a tautology that gives guidance and direction to Montana's state and local officials with respect to Congressional attempts to regulate purely intrastate firearms and accessories. See Printz v. United States, 521 U.S. 898 (1997) (upholding sheriff's objections to Congress's attempt to compel him to enforce a federal firearm registration program). Should Congress enact a law that appears to conflict with the guidance in the MFFA, the courts may then determine whether Congress has acted within the scope of its delegated powers as limited by later amendments, see Amendment II, U.S. Const. (1791); District of Columbia v. Heller, ____ U.S. ____, 128 S.Ct. 2783 (2008), or as expanded by later amendments. See Amendment XIV, § 5, U.S. Const. (1868). The courts may then determine the extent to which Congress's enactment has abrogated the State's exercise of power within

the same sphere. Similarly, should Montana enact legislation to carry out the intent of the MFFA, the courts may then determine whether that legislation overlaps and interferes with a power reserved to or exercised by the national government. *See Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945).

As to the specific question presented by this case, the MFFA does not offend Congress's power to regulate interstate commerce, as that power was defined in *Wickard v. Filburn*, above. *Wickard* upheld, against a Tenth Amendment challenge, federal legislation that limited the amount of wheat that a farmer might produce. Roscoe Filburn argued that, because he had grown the wheat at issue for his own consumption, Congress had attempted to regulate intrastate commerce without Constitutional authority. The Supreme Court noted that Congress could exercise power to reduce the amount of wheat in interstate commerce in order to increase prices because such power was within the scope of the commerce clause, *Wickard*, 317 U.S. at 128, and that the means extended to the intrastate regulation of farmers like Filburn.

But one key to *Wickard*, and the key here, is "leakage." *Wickard* reasoned that Filburn's consumption of his own excess wheat, if carried out

by all, would depress prices. *Wickard*, 317 U.S. at 128. The opinion also recognized that wheat grown for home consumption could nevertheless flow into the interstate market and depress prices. *Wickard*, 317 U.S. at 129. This would, of course, defeat Congress's effort to regulate interstate commerce in wheat.

A review of Congressional exercise of its power to regulate intrastate and interstate commerce reveals some principles to guide us here. First, consider the spectrum of Congressional power. Congress has the power to regulate the means (navigation, for example) of conducting interstate commerce. *Ogden*, 22 U.S. at 190; see The Daniel Ball, 77 U.S. 557 (1870) (holding that Congress has the power to regulate intrastate shipping that was carrying goods that traveled in interstate commerce). Congress has the power to regulate goods as they move in interstate commerce. The Lottery Cases, 188 U.S. 321 (1903). Congress has the power to regulate activities that produce goods intended for interstate commerce. *United States v*. Darby, 312 U.S. 100 (1941). Finally, Congress has the power to regulate intrastate activities that substantially affect interstate commerce. Wickard, 317 U.S. at 125. Nevertheless, "the power to regulate interstate commerce, though broad indeed, has limits. . . . " Maryland v. Wirtz, 392 U.S. 183, 196 (1968), overruled on other grounds, Usery, above, overruled, Garcia, above. It is at this point–regulation of intrastate activities that substantially affect interstate commerce—that the power of Congress is at its lowest. Compare Paul v. Virginia, 75 U.S. 168 (1868) (holding policies of insurance issued intra-state are not part of interstate commerce), with *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944) (upholding federal regulation of interstate insurance policies and overruling Paul, in part); see Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that discriminatory policies of hotel, 75% of whose registered guests are from out-of-state, substantially affected interstate commerce). Beyond those activities, "The activities that are beyond the reach of Congress are 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of government." Katzenbach v. McClung, 379 U.S. 294, 302 (1964) (quoting Ogden). In this light, Wickard "is perhaps the most far reaching example of Commerce Clause authority over intrastate activity." Lopez, 514 U.S. at 560.

Only the unique facts of *Wickard* explain its reach. First, the goods

produced by the sought-to-be regulated intrastate activity are typically fungible. A grain of Roscoe Filburn's wheat was indistinguishable from any other wheat. A leaf of marijuana is indistinguishable from any other leaf of marijuana. Gonzales v. Raich, 545 U.S. 1, 22 (2005) (holding that "Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere" Congress had a rational basis to conclude that failure to regulate intrastate marijuana would weaken the regulatory scheme); see United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) (upholding federal regulation of price of milk produced and sold intra-state). State and federal regulation of rates charged by transport companies deal with fungible dollars. See Shreveport Rate Cases, 234 U.S. 342 (1914) (upholding Congress's power to regulate the rates charged by railroads for intrastate transport).

Second, in *Wickard* Congress sought to regulate prices. This raises the question of the rational connection between the valid exercise of the power to regulate the prices of interstate goods and the means to carry out that power—regulation of the intrastate activity. Although the grant of power under the commerce clause is plenary, neither the power itself nor its exercise by Congress is free of limitation. "Commerce clause" is not a

mantra. There must be a rational connection between the intrastate activity that Congress seeks to regulate and its exercise of its power to regulate interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995) (concluding that there was no connection between intrastate possession of a firearm near a school and interstate commerce).

Price regulation and fungibility are inter-related. The prices of oranges will not generally affect the prices of apples. The price of one good, however, affects the price of another indistinguishable good. Yet even where goods are fungible, before Congress may act to regulate the intrastate activity that produces those goods, the effect upon interstate commerce must be substantial. Otherwise every regulation of intrastate activities could be justified.

Firearms manufactured intrastate under the rules set out by the MFFA are not fungible commodities. Bearing a unique stamp, they are distinguishable from other firearms in the stream of interstate commerce. Because of the unique nature of each firearm in general and the particularly unique nature of a firearm produced solely for the purpose of intrastate sale, it cannot be said that the production, purchase or possession of a firearm or accessory defined by the MFFA will have an effect (much less a

"substantial" effect, see Lopez, 514 U.S. at 557) on interstate commerce.

That is not to say that the movement of an MFFA firearm into interstate commerce is beyond regulation. At the moment it crosses a state line, an MFFA firearm is a good in interstate commerce and is subject to whatever regulation Congress thinks proper. And that is the distinction here: the good versus the activity.

Considering *Raich* and its reliance on *Wickard*, we should ask, what is the potential effect of failure to regulate intrastate production and possession of MFFA firearms? It appears that the two federal regulations at issue are the National Firearms Act, 26 U.S.C. §§ 5811-22, and the Gun Control Act, 18 U.S.C. §§ 921 *et seq*.

The National Firearms Act imposes a \$200 excise on the transfer of sawed-off shotguns, sawed-off rifles, automatic weapons, and bombs and the means of launching them. 26 U.S.C. §§ 5811, 5845. (Hereinafter, "banned weapons.") The MFFA does not appear to offend the National Firearms Act.

The Gun Control Act, however, seeks to regulate all firearms, regardless of their length or cycle of fire. Its very purpose, according to the United States here, is to keep guns from moving interstate into the hands of

criminals. Def.'s Memo. in Support of Motion to Dismiss 3, *citing* S. Rep. No. 1866, 89th Cong., 2d Sess. 1 (1966). Under the Gun Control Act no one may manufacture or enter into the business of selling a firearm without the approval of the United States. 18 U.S.C. §§ 922(a)(1); 923. The scope of the Gun Control Act is limited. It does not pre-empt state law "unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together." 18 U.S.C. § 927.

The Gun Control Act is therefore not an act to control prices of interstate firearms. Whether many or no MFFA firearms enter the intrastate stream of commerce will not substantially affect a national pricing scheme because there is no such scheme.

Congress may regulate the flow of firearms themselves in interstate commerce. It does so directly in other parts of the Gun Control Act. 18 U.S.C. § 922 (prohibiting unlicensed dealers from sending or receiving firearms and ammunition interstate or in foreign commerce). Here again, it appears that the MFFA does not conflict. If the MFFA firearm moves into interstate commerce, if the MFFA manufacturer sends an MFFA firearm to another state, the firearm and the manufacturer become subject to the Gun

Control Act. The question therefore is limited to whether Congress may reach the intrastate activity of manufacturing and dealing of MFFA firearms. And this is the question of "leakage."

Will intrastate manufacture and sale of MFFA firearms lead to the introduction of MFFA firearms into the stream of interstate commerce? Possibly. But, will the flow of MFFA firearms into interstate commerce be so substantial as to defeat the Congressional scheme? We must remember that the MFFA firearms are clearly marked. The Plaintiffs should be permitted to offer evidence that demonstrates that firearm purchasers and owners do not treat firearms as fungible commodities in general and will not treat MFFA firearms in particular as fungible-that the purchase or ownership of an "intrastate firearm" does not individually or collectively satisfy demand for or increase the supply of "interstate firearms." Cf., *United States v. Jones*, 231 F.3d 508, 513-514 (9th Cir. 2000) (holding that commerce clause power was not at issue with respect to the felon-inpossession law, 18 U.S.C. § 922(g), because statute required proof of the interstate commerce nexus); contra United States v. Rothacher, 442 F. Supp. 2d 999, 1007 (D. Mont. 2006) (reluctantly holding that interstate commerce is affected when an item has "significant economic value").

Second, we must remember that we are speaking of classes and subclasses of firearms. First, there is the class of all firearms. It is large and its members are numerous. Within that class is the subclass of non-banned weapons. The members of that subclass are numerous. Within that subclass are state FFA firearms, which are not numerous. Among the FFA firearms are those few that may actually enter into interstate commerce and of those, fewer still that may find their way into the hands of a criminal.

We see, then, that the analysis in *Rothacher* can be revised. Congress did not seek to regulate the value of firearms when it enacted the Gun Control Act. It sought to limit their uncontrolled flow across state borders. Therefore, it is not unreasonable to say that regulating the activities of manufacturing and dealing in firearms is rationally related to the Congressional power. It is, however, unreasonable to say that a state scheme that seeks to keep one intrastate form of firearm manufacturing and dealing directly conflicts with the Gun Control Act.

There is, of course, the matter of *United States v. Stewart*, 451 F.3d 1071 (9th Cir. 2006), a rule that this Court felt compelled the result in *Rothacher*. 442 F. Supp. at 1000. We would first observe that one of the

bases for *Stewart*'s holding, that the Court could not rely on the Second Amendment in its analysis of Congress's power to regulate possession of firearms, *Stewart*, 451 F.3d at 1075 n.6, has since been decided differently by the United States Supreme Court. *Heller*, above.

The key to *Stewart* (if not *Raich*) is its conclusion that "'[p]rohibiting the intra-state possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.' "*Stewart*, 451 f3d at 1076 (quoting *Raich*, 545 U.S. at 26). The Ninth Circuit concluded that a prohibition on the manufacture and possession of machine guns was a rational means of regulating interstate commerce in machine guns because, whether unique or not, the market demand was not for a given machine gun but for a gun that spewed bullets at a high rate with one pull of the trigger. *Stewart*, 451 F.3d at 1078.

This reasoning is extended too far when it is applied to intrastate firearms in general and to MFFA firearms in particular. Here, this Court would have to conclude that the market demand is not for a particular, unique firearm, but for a device that fires a bullet when a trigger is pulled. Reaching for the lowest possible common denominator to define market demand would grant Congress unlimited power to regulate intrastate

commerce, something that the Constitution does not authorize and, as the Tenth Amendment reminds us, is not permitted.

The Plaintiffs may fail to offer evidence sufficient to persuade this Court that firearms and accessories described in the MFFA will not move into or substantially affect inter-state commerce. That, however, is not a matter to be decided in a motion to dismiss.

II.

THE MFFA IS EXPRESSLY SUPPORTED BY THE RIGHTS RESERVED BY THE NINTH AMENDMENT.

Montana Legislators expressly designated in the MFFA the authority upon which they considered and passed the Act. In addition to the Tenth Amendment, the Legislators also cited the Ninth Amendment to the United States Constitution. Mont. Code Ann. § 30-20-102(2). The original Complaint omits reference to this authority, but Plaintiff rectified that in the Second Amended Complaint. Defendant's Memorandum in Support of Motion to Dismiss likewise ignored the Ninth Amendment, but this Court should nonetheless consider its import to decide whether the Complaint should be summarily dismissed.

The Ninth Amendment specifies that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage

others retained by the people." It was included in the Bill of Rights in response to the concern that "affirmation of particular rights implies a negation of those not expressly defined." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579 n. 15 (1980); see Massachusetts v. Upton, 466 U.S. 727, 737 (1984)(Stevens, J., concurring); *Griswold v. Connecticut*, 381 U.S. 479, 488-90 (1965)(Goldberg, J. concurring).

Courts have rarely relied upon the Ninth Amendment as the source for unenumerated rights, however. This may be because of the opinion that the Ninth Amendment does not confer any substantive rights. *See, e.g., Roe v. Wade*, 410 U.S. 179, 210 (1973)(Douglas, J., concurring). Yet,

While this Court has had little occasion to interpret the Ninth Amendment, '(i)t cannot be presumed that any clause in the constitution is intended to be without effect.' *Marbury v*. *Madison*, 1 Cranch 137, 174, 2 L.E. 60. In interpreting the constitution, 'real effect should be given to all the words it uses.' *Myers v. United States*, 227 U.S. 52, 151, 47 S.Ct. 21, 37, 71 L.Ed. 160.

Griswold, 381 U.S. at 490-91 (1965)(Goldberg, J. concurring).

The Defendant relies heavily upon *Raich* to analogize the impact of medical marijuana on interstate commerce to the production of Montanamade firearms. Interestingly, in *Raich*, on remand to the Ninth Circuit, the Court examined our unenumerated rights.

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. Poe v. Ullman, 367 U.S. 497, 543, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting) (citations omitted); see also Casey, 505 U.S. at 849, 112 S.Ct. 2791 (noting that Justice Harlan's position was adopted by the Court in *Griswold* v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)). These contentions find support in the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

. . .

The Supreme Court has a long history of recognizing unenumerated fundamental rights as protected by substantive due process, even before the term evolved into its modern usage. See, e.g., Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (to have an abortion); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (same); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (to use contraception); Griswold, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (to use contraception, to marital privacy); Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (to marry); Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (to bodily integrity); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655

(1942) (to have children); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (to direct the education and upbringing of one's children); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (same).

Raich v. Gonzales, 500 F.3d 850, 862-63 (9th Cir. 2007), on remand from United States Supreme Court, supra. The Ninth Circuit went on, however, to conclude that a right to use medical marijuana to preserve bodily integrity, avoid pain, and preserve life was not fundamental. 500 F.3d at 866.

The rights at issue here are unquestionably fundamental. The United States Supreme Court recently affirmed that the Second Amendment was premised upon a "pre-existing," "natural" right of self-defense, also described as the "first law of nature" and darn near eternal. *Heller*, 128 S.Ct. at 2797, 2798, 2805, 2809, 2817. The Second Amendment, however, does not mention a right of self-defense. It is among those unenumerated rights preserved by the Ninth Amendment and plausibly derived from the Second Amendment.

The *Heller* Court called upon numerous sources, including state constitutions, to reach its conclusion that the Second Amendment addresses an individual right rather than one tied to military service. In a similar vein as the states that included a more explicit right to bear arms

than the federal constitution, numerous states are now joining Montana by passing their own firearms freedom act to strengthen and insure a healthy and balanced right to bear arms, to protect themselves, and to carry out those rights in purely intrastate commerce without the overbearing interference of the federal government.

Heller yielded one other, oft-cited judicial truth which bears on the rationale of *amici* Montana Legislators in passing the MFFA: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." 128 S.Ct. at 2821. The Legislators emphasized Montana's compact with the United States to enter statehood in four of the five authorities cited to support its enactment. Mont. Code Ann. § 30-20-102(1), (2), (4), (5). Montana was required to adopt the federal constitution, and authorized to form its own, which it did. Enabling Act, 25 U.S. Stat. 676, §4. See also Mont. Const. Art. I. The Second Amendment's right to bear arms was understood at that time just as the Heller Court found it to be, and Montana's more specific version of the Second Amendment remained unchanged when a new state constitution was adopted in 1972. The right to self-defense was what

Montana knew when it became a state, and what the Legislators relied upon when they protected, enhanced and removed roadblocks to exercise of the right solely within the boundaries of Montana.

The Constitution via the Commerce Clause grants Congress the power to regulate only *interstate* commerce. The Montana Legislators exercised their express powers to pass a law regulating *intra*state commerce. Mont. Code Ann. § 30-3-102(3). Thus, the Supremacy Clause does not supercede the MFFA, as argued by Defendant, because only laws made in pursuance of the Constitution constitute the supreme law of the land. And to the extent that Congress has usurped states' Ninth and Tenth Amendment powers with the federal courts' blessing, the issue should be revisited in a case just such as this – where a state legislature has passed a specific, limited exercise of its reserved powers to protect and strengthen the rights of its citizens.

The MFFA preserves for the enjoyment of Montana's citizens their right to bear arms under the Second Amendment, their right to self protection under the Ninth Amendment and Montana's constitution and their unenumerated (Ninth Amendment) right to engage in purely intrastate commerce without overbearing federal involvement. As the

Heller Court finally iterated, these blessings are at the core of our liberty and should not be disparaged by Congress's overreaching exercise of power under the Commerce Clause.

Most of all, this Court should not disparage those rights solely on the basis of the pleadings. Plaintiffs should be given the opportunity to develop the necessary factual record, for a full, comprehensive examination of the Montana Legislators' proper exercise of their authority to regulate firearms manufactured and sold within Montana's borders. Here, as in *Lopez*, *supra*,

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. [Reference omitted.] The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. *Gibbons v. Ogden, supra,* at 194, and that there never will be a distinction between what is truly national and what is truly local, cf. *Jones & Laughlin Steel, supra,* at 30, 57 S.Ct. at 621. This we are unwilling to do.

514 U.S. at 567-68.

This Court should also be unwilling to do so, without taking evidence.

CONCLUSION

The Montana Legislators defined something truly local in the MFFA.

They relied upon the unenumerated rights specifically envisioned by the framers in crafting the Ninth Amendment. The Defendant's Motion to Dismiss should be denied.

RESPECTFULLY SUBMITTED this 24th day of April, 2010.

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DATED: April 24, 2010

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