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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MONTANA SHOOTING SPORTS ASSOCIATION, SECOND AMENDMENT FOUNDATION, INC. and GARY MARBUT, Plaintiffs, vs. ERIC HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, Defendant.	Cause No.: CV-09-147-M-DWM-JCL **AMICUS BRIEF OF WEAPONS COLLECTORS SOCIETY OF MONTANA IN SUPPORT OF PLAINTIFFS**

I. INTRODUCTION.

COMES NOW, Amicus Weapons Collectors Society of Montana (hereinafter referred to as "WCSM") and hereby files this Amicus Brief in support of Plaintiffs' Second Amended Complaint for declaratory and injunctive relief in

the above-captioned matter. This brief addresses the questions raised in the Plaintiffs' request for declaratory relief of whether the Tenth Amendment of the United States Constitution reserves to the State of Montana the right to regulate the manufacture and sale of arms for purely intrastate purposes, and whether the federal government's attempt to regulate such activities within the borders of Montana by means of forfeiture and criminal sanctions violates the compact the United States of America reached with the State of Montana and its citizens at the time Montana was admitted into the Union in 1889. *See,* Mont. Const. art. I.; 25 Stat. 676 (hereinafter referred to as "Compact"); *see also*, Ex. 1 attached hereto and incorporated herein.

WCSM's position is that the Montana Firearms Freedom Act (hereinafter referred to as "MFFA")[1] represents an effectuation of the constitutional balance of power between the federal government and the State of Montana, ensuring that the federal government's regulatory authority over firearms manufacturing and sales is properly limited in scope to interstate commerce, and that the State of Montana has the ability, pursuant to the Tenth Amendment and pursuant to the Compact it reached with the United States, to secure to its citizens the right to manufacture and sell arms without the fear of actual or attempted federal enforcement. The reach and meaning of the Tenth Amendment to the United States Constitution is, across

[1] *See*, Mont. Code Ann. § 30-20-101, *et. seq.*

the country, an emerging area of law and constitutional litigation. Consequently, WCSM has an interest in seeing that this case moves beyond the procedural challenge presented by the Defendant and proceed directly to an adjudication on the merits of the Plaintiffs' claims.

II. IDENTITY AND INTEREST OF AMICUS WCSM.

The WCSM is a non-profit corporation formed under the laws of the State of Montana. More specifically, WCSM is an association of hobbyists who have an interest in collecting and making firearms (ancient and modern), edged weapons, ammunition, Indian artifacts, curiosities, armor, weapon accoutrements, antiques, artifacts, military equipment, and other items gathered and collected for public display. Most gun shows in Montana are sponsored by WCSM. WCSM has a membership of approximately 1,136 persons who are located throughout Montana.

Members of the WCSM have a strong interest in promoting the hobby of gun and ammunition collecting. In addition, some WCSM members have an interest in making guns and ammunition for sale within the State of Montana. These manufacturing and selling activities are the types of activities that are at the heart of the present litigation. They are also the types of activities, which engaged in, subject WCSM members to regulation by federal authorities. As such, WCSM is dedicated to both promoting a proper understanding of the United States Constitution, particularly as to the jurisdictional limits of federal authority over

Montana citizens, and to protecting its members from burdensome federal government regulation of their firearms manufacturing, selling, and collecting-related activities. Consequently, WCSM has a substantial and ongoing interest in this case, and in federal laws that act as a barrier to the organization's mission and to the rights of its members to freely exercise their constitutional rights to make, own, sell, buy, and bear arms.

WCSM and its membership have a significant interest in upholding the MFFA because that statute is important to citizens of Montana who make, collect, keep, and bear arms by protecting them from federal registration requirements, fines, forfeitures, and criminal prosecution. WCSM and its membership submit this brief on the substance of the Plaintiffs' claims with the goal of assisting the Court in moving beyond the Defendant's procedural challenges so that the Court will make a determination upon the merits of the Plaintiffs' claims. Namely, determine whether the Tenth Amendment to the United States Constitution serves as a limitation on the federal government's authority to regulate an activity (firearm manufacturing and the intrastate sale of such manufactured guns and ammunition) the regulation of which was clearly reserved to the State of Montana and its citizens at the time Montana joined the Union, and determine whether the federal government's threat to fine and prosecute Montana citizens for engaging in those state-sanctioned activities is a breach of the Compact.

III. STATEMENT OF ISSUE.

Congress has enacted two major federal statutes to regulate the commerce in, and possession of, firearms in the United States. These statutes are: 1) the National Firearms Act of 1934 (26 U.S.C. § 5801 *et seq*.) (hereinafter referred to as "NFA") and; 2) the Gun Control Act of 1968, as amended (18 U.S.C. Chapter 44, § 921 *et seq*.) (hereinafter referred to as "GCA"). In short, the NFA compels the disclosure (through licensure and registration with the Attorney General of the United States) of the production and distribution of firearms from manufacturer to buyer. As amended, the GCA is the principal federal statutory scheme for regulating domestic commerce in small arms and ammunition. The GCA requires, in part, all persons manufacturing, importing, or selling firearms as a business to be federally licensed (and prohibits such activity absent federal permission), bans the interstate mail-order sale of all firearms, prohibits interstate sale of handguns generally, requires that dealers maintain records of all commercial gun sales, and requires federally licensed dealers to maintain records on all acquisitions and dispositions of firearms and to respond to federal agents requesting firearm tracing information within 24 hours of such request. Both the NFA and the GCA subject citizens of the State of Montana to federal filing and to federal licensure requirements. The failure by a citizen of Montana to comply with those federal requirements could lead to civil and criminal penalties under federal law, including

forfeiture of personal property and criminal prosecution. *See, e.g.*, 2nd Amend. Compl., Ex. A. The Bureau of Alcohol, Tobacco, and Firearms (hereinafter referred to as "ATF") is an agency of the United States and is, under the direction of Defendant, Eric H. Holder, responsible for enforcement of the NFA and the GCA.

Passed by the 2009 Montana legislature and enacted into law, the MFFA declares that small firearms, firearms accessories, and ammunition manufactured, sold, and maintained within the boundaries of the State of Montana (wholly intrastate activities) are not subject to federal laws, regulation, or jurisdiction, including provisions of the GCA and NFA. Plaintiffs have requested declaratory relief from this Court recognizing that federal law does not preempt the MFFA and, consequently, that federal law cannot be used to regulate or prosecute Montana citizens who comply strictly with the terms of the MFFA. *See*, 2nd Amend. Compl., 13-14. Plaintiffs have also requested injunctive relief in the form of an order enjoining the Defendant from bringing a civil or criminal action against a Montana citizen who acts in compliance with the MFFA within the boundaries of the State of Montana. *See*, *id.* at 14. This brief argues: 1) that the MFFA is a valid enactment under those powers reserved to Montana under the Tenth Amendment; 2) that the State of Montana's Compact with the United States imposes constraints on the Defendant's authority to regulate gun manufacturing

and sales that are wholly intrastate and; 3) that subjecting the citizens of Montana to federal criminal and civil sanctions for acting in compliance with the MFFA runs afoul of the Compact reached between the United States and the State of Montana.[2]

A. Under the Tenth Amendment, Montana has the right and duty as a sovereign to enact legislation that regulates wholly intrastate activities and to protect its citizens and residents from overreaching federal authority.

The United States Constitution delegates specific powers to the federal government and reserves to the states the powers not delegated. *See*, *U.S. v. Lopez*, 514 U.S. 549, 552 (1995). One of the powers specifically delegated to the federal government in the Constitution, as granted by the Commerce Clause, is the authority to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3; *Lopez*, 514 U.S. at 552-559. Congress' commerce powers are broad; however, such powers are not unlimited. The Commerce Clause itself imposes constraints on Congress' authority to regulate wholly intrastate activities. *See*, *Lopez*, 514 U.S. at 563-568; *U.S. v. Morrison*, 529 U.S 598, 612-613 (2000). The limitation of Congress' commerce powers described by the United States Supreme Court in its holdings in *Lopez* and *Morrison* are premised on the Supreme Court's

[2] WCSM notes at this point that § 927 (Effect on State Law) of the GCA states that no provision of the GCA indicates Congress' intent that the Act is to be construed to occupy the field in which such provision operates to the exclusion of the law of any state on the same subject matter unless a Court concludes that 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.

recognition of the constitutional balance of power between the federal government and the states, including the State of Montana.

In *Lopez* and *Morrison*, the Supreme Court recognized that Congress does not have a general power to regulate all activities conducted within the United States. The Court also recognized that states retain authority to regulate essentially what are in essence local matters. As stated by Justice Kennedy in *Lopez*, "it was the insight of the Framers that freedom was enhanced by creation of two governments, not one". As Justice Kennedy stated also, "[t]he theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the federal government; the second between the citizens and the States." *Lopez*, 514 U.S. at 576. Thus, the Supreme Court determined in *Lopez* and *Morrison* that while the Commerce Clause grants Congress broad power to regulate interstate commerce, the Commerce Clause and other provisions of the United States Constitution limit Congress' regulatory powers in order to carry out the Framer's intent to ensure that each state of the union retained its sovereign powers to regulate and to protect the individual freedom, public health, and welfare of its citizens. *See, Printz v. U.S.*, 521 U.S. 898 (1997); *see, also*, Federalist No. 32 (A. Hamilton) (Discussing states retaining all the rights of sovereignty that are not exclusively delegated to the United States)

One of those other provisions is, of course, the Tenth Amendment of the United States Constitution. The Tenth Amendment restates the Constitution's principle of federalism by explicitly memorializing that powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States or to the people. The Tenth Amendment makes explicit: 1) the Framer's idea that the federal government is limited to only the powers delegated in the Constitution and 2) that individual states, such as Montana, retain the right to enact legislation that is both a valid exercise of their retained regulatory powers and that exempts its citizens from federal laws and regulations when such laws and regulations go beyond the reach of Congress's enumerated powers.[3] As the United States Supreme Court made clear in *U.S. v. Darby*, 312 U.S. 100, 124 (1941), the Tenth Amendment "states but a truism that all is retained which has not been surrendered." "There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers . . .". *U.S. v. Darby*, 312 U.S. at 124.

In the present case, the MFFA is a valid exercise of the State of Montana's

[3] Congress recognized this jurisdictional limitation when it included § 927 in the GCA–intent not to preempt state

retained powers under the Tenth Amendment both to regulate within its borders the commerce of the lawful and constitutionally protected activity of manufacturing and selling arms and ammunition and to protect its citizens from an unconstitutional overreach by the federal government by application of the provisions of the GCA and NFA to lawful activities carried out by Montana citizens when those activities are being conducted wholly within the boundaries of Montana. *See*, *e.g.*, *Printz*, 521 U.S. at 918-924, *citing* Federalist No. 39 (J. Madison) (While States surrendered powers to the federal government, states retained a "residuary and inviolable sovereignty which is reflected in the Constitution's text, namely the Tenth Amendment.") The MFFA should be seen for what it is not. The MFFA is not an attempt by the State of Montana to use the Tenth Amendment to nullify either the GCA or the NFA or any provisions thereof.[4] Rather, the MFFA is a law that allows Montana to regulate exclusively what the United States Supreme Court in *Lopez* would describe as a "local matter"–firearm production and trade within Montana's borders. It is on this basis that this Court should determine that the MFFA represents what Justice Kennedy described in *Lopez* as the "discernable line of political accountability" between the

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law.

[4] It is a well-established that federal laws are rarely declared unconstitutional, and thus, null and void, for violating the Tenth Amendment. As a rule of thumb, the Supreme Court has generally held that federal laws are unconstitutional under the Tenth Amendment when such laws compel the states to enforce federal statutes. *See, e.g.*, *New York v. U.S.*, 505 U.S. 144 (1992) (Supreme Court invalidates a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on the grounds that the Act imposed an unconstitutional obligation on states

citizens of Montana and the State of Montana; as a valid exercise of the State of Montana's reserved powers under the Tenth Amendment to regulate a purely local matter; as outside the reach of Congress' Commerce Clause powers; and, consequently, as not preempted by federal law as Defendant's claim. *See*, *e.g.* *Printz*, 521 U.S. at 923-924 (When federal law that is passed under the guise of carrying out the execution of the Commerce Clause violates principle of state sovereignty, it is not a law proper for carrying into execution the Commerce Clause. Thus, the federal law is not enforceable under the Necessary and Proper Clause, Const. art. 1, § 8, cl. 3 & 18).

B. The federal government's attempt to regulate firearm manufacturing and sales conducted wholly within the borders of Montana by means of forfeiture and criminal sanctions breaches the Compact the United States of America reached with the State of Montana and its citizens at the time Montana was admitted into the Union in 1889, the terms of which incorporate all powers reserved under the Tenth and Ninth Amendments.[5]

As discussed above, the MFFA is a state legislative enactment that constitutes an express exercise of the powers reserved to the State of Montana by the Tenth Amendment. The terms of the MFFA are further authorized and protected from federal preemption under the conditions of the Compact that the State of Montana reached with the United States upon its admission into the Union

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to take title to any low-level radioactive waste within their borders that was not disposed of prior to a date certain and that made each state liable for all damages directly related to the waste).

in 1889.

Montana joined the Union by means of a Compact with the United States. That Compact is memorialized and preserved in Article I of the Constitution of the State of Montana. The Compact reads:

> All provisions of the enabling act of Congress (Approved February 22, 1889, 25 Stat. 676) as amended and of Ordinance No .1, appended to the Constitution of the State of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by an Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

Mont. Const. art. 1; Ex. 1. The Enabling Act of 1889 set forth the binding legal mechanism by which the people living in the territories of Montana, Dakota, and Washington could form constitutions and State governments and be admitted into the Union. *See*, 25 Stat. 676, as amend. (Feb. 22, 1889).

Montana's Compact with the United States is a bilateral, written contract or agreement which binds the parties, *i.e.*, the United States and the State of Montana, to the terms of that Compact and creates obligations and rights capable of being enforced. *See*, Black's Law Dictionary 351 (4th ed., West 1951). The terms "compact" and "contract" are synonymous. *See*, *Green v. Biddle*, 21 U.S. 1 (1823).

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[5] This argument represents a good-faith argument to extend Ninth and Tenth Amendment interpretation and meaning, and is further based on the Montana Legislature's invocation of the Compact theory and subsequent codification of the theory into Montana law.

Montana's Compact with the United States shares all points in common with a bilateral contract by and between private parties. That is, the Compact contains the contracting parties, the subject matter, consideration, mutuality of agreement, and mutuality of obligation. Montana's Compact with the United States is also analogous to a treaty, which is a binding agreement between nations or states, or between the treaty-making authorities of nations or states. *See*, Black's Law Dictionary 1674 (4th Ed. West 1951); "TREATY. An agreement or contract between two or more independent states, nations or sovereigns." It is a well-understood legal maxim that contracts must be interpreted to as to give credence to the intent of the contracting parties as that intent existed at the time of the contract and that the Court must give effect to that mutual intention. *See*, *Watson v. Dundas*, 2006 MT 104, ¶ 22, 332 Mont. 164, 136 P. 3d 973; s*ee, also*, Joseph Story, Nature of the Constitution–Whether a Compact, Bk. 3, ch. 3, § 331 ("One of the first elementary principles of all contracts is to interpret them according to the intentions and objects of the parties."). This basic interpretation principle applies as well to treaties. "Treaties should be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them." *See*, *DeGeofroy v. Riggs*, 133 U.S. 258, 271 (1890). While treaties are to be liberally construed, they are to be read in the light of the conditions existing when entered into, with a view to affecting the objects of the parties thereby contracting.

See, *Rocca v. Thompson*, 223 U.S. 317, 331-332 (1912).

As evidenced by the adoption of the Compact and by the Enabling Act, Montana and the United States reached mutual assent in 1889 as to the terms of Montana's incorporation into the Union. As discussed immediately above, that agreement was reduced to writing and is recorded as Article I of the Montana Constitution. As part of that contract, and as a condition of becoming a state of the Union, the Montana territorial legislature, acting on behalf of the people of Montana, was required to approve Constitutional Ordinance 1. *See*, Ex. 2, attached hereto and incorporated herein. In the fifth paragraph, Ordinance 1 declared, "Fifth. That on behalf of the people of Montana, we in convention assembled do adopt the Constitution of the United States." In the proclamation of Montana's statehood dated November 8, 1889, then President Benjamin Harrison specified and affirmed that Montana had, as a condition of statehood, been required to prepare a state constitution that "not be repugnant to the Constitution of the United States . . . ."

Two of the provisions of the agreement between Montana and the United States were the incorporated provisions of the Tenth Amendment of the United States Constitution[6] and the Commerce Clause as those provisions were understood in 1889. Just as with any contract term, the terms of the contract are to be

[6] The wording of the Tenth Amendment and the Commerce Clause is the same in 2010 as the wording was in 1889.

interpreted in light of the conditions existing when the contract was entered into. *See, Rocca*, 223 U.S. at 331-332. At the time of Montana's Compact with the United States, it is difficult to imagine that the parties to the contract understood the Commerce Clause to extend so far as to allow the federal government to regulate or prohibit firearm manufacturing and sales that occurred wholly within the State of Montana. In fact, it was not until some 40 years later, with the passage of the Federal Firearms Act of 1934, that the federal government first began to regulate the manufacture and transfer of firearms across state lines, which it did through taxing and registration requirements. *See*, 73rd Cong., Sess. 2, ch. 757, 48 Stat. 1236, enacted in 1934 and currently codified as amended as 26 U.S.C. ch. 53. Further, it was not until eighty years after the Compact that Congress enacted the Gun Control Act of 1968, which was the first federal law to broadly regulate the firearms industry, firearms owners and interstate commerce in gun manufacturing and dealing. *See*, P.L. No. 90-618, 82 Stat. 1213, enacted in 1968, and currently codified as amended as 18 U.S.C. ch. 44. Because these federal laws were both passed well after enactment of the Compact, the laws and their accompanying federal regulations could not have been and are not a part of the Compact. Consequently, there is neither an express basis under the Compact for the federal government to use those laws as the means to preempt, and thereby invalidate, the MFFA nor is there any basis for them to interpret the Compact to allow for that

action. *Accord*, *Printz*, 521 U.S. at 918 (historical record and understanding tends to negate the existence of the congressional power asserted by the federal government in this case).

Further, the Tenth Amendment was a part of the Constitution of the United States that was adopted and accepted by Montana in 1889 by means of Ordinance 1. The Tenth Amendment reserves to the State of Montana the ability and right to regulate intrastate commerce. As of 1889, the date of the execution of the Compact (and arguably as of 2010), Congress had not expressly preempted state regulation of intrastate commerce pertaining to the manufacture and sale of firearms, firearms accessories, and ammunition conducted wholly within the State of Montana. And, there is little question that residents and citizens of Montana were, at the time Montana became a state of the union, engaging in the manufacture and intrastate sale of firearms and ammunition. For example, historical research shows that Walter Cooper, an early Montana settler and businessman, established a rifle manufacturing and sporting goods business as far back as 1868. *See*, Walter Cooper and Eugene F. Bunker Papers, 1886-1956, Mont. St. U. Lib., Collection 1250. Also, Alexander D. McAusland arrived in Miles City, Montana Territory in 1879 and thereafter opened the Creedmoor Armory, which was a gunsmithing business. *See*, Samuel Gordon, Recollections of Old Milestown (1918).

This Compact was reached at a point in time well before the Supreme Court began to give the Commerce Clause an expansive reading, which culminated in the decision in *Wickard v. Filburn,* 317 U.S. 111 (1942). Prior to the date that the Supreme Court rendered its decision in *Wickard*, the WCSM is not aware of authority which held that the Commerce Clause reached so far as to allow Congress the legal and constitutional basis to preempt local and state firearms laws, similar to the MFFA at issue here, that were designed to promote the commercial availability of, and the ownership of, arms within a state. Consequently, applying general contract interpretation principles, because there was likely no understanding to the parties to the Compact that Congress had the authority to regulate the intrastate manufacturing and sale of arms and ammunition that was occurring within the boundaries of Montana in 1889, such federal authority is not a part of or a provision of the Compact.[7] Accordingly, the federal government's assertion that the GCA and NFA preempt and invalidate the MFFA is in conflict with the Compact agreed upon by and between the United States and

[7] The best indication of the parties understanding of the limited regulatory reach of the Commerce Clause to purely intrastate commercial activities as of 1889 is shown by the United States Supreme Court's decision in *A. L. A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935). There, the Supreme Court struck down the National Industrial Recovery Act as unconstitutional, in part, on the grounds that the Act exceeded the power of Congress to regulate interstate commerce and invaded the powers reserved exclusively to the States. The Court found that Defendants business acts of slaughtering chickens bought in a market supplied from other states and then selling them to local retailers which, in turn, sold them to consumers were business acts that only indirectly impacted interstate commerce. *See, id*. at 542. Therefore, the Court held that the regulation of that intrastate business activity was the exclusive providence of the State of New York, as to find otherwise would be to find that New York State's authority over domestic matters would exist only at the sufferance of the federal government. *See, id*. at 546.

Montana and, in fact, breaches the terms of that Compact. [8]

Further, there is no indication that the Montana territorial legislature, negotiating on behalf of the people of Montana, understood the Compact to allow the federal government to subject Montana citizens to federal civil and criminal penalties for engaging in the business of manufacturing firearms and ammunition for commercial sale wholly within Montana–as those penalties are contemplated and set forth in the GCA and NFA. In fact, the express terms of Montana's Constitution indicates otherwise.

When Montana entered into statehood and adopted the Compact as part of Montana's Constitution of 1889, the people of Montana, acting through their territorial representatives, included a provision guaranteeing every Montanan the right to bear arms. The State of Montana indicated its intent to reserve the right of its citizens to bear arms by adding Article III, Section 13 to the 1889 Montana Constitution. The language of Article III, Section 13 was exactly the same language as used in the territorial Montana Constitution of 1884. This language

[8] To state this argument more simply, it cannot be fairly disputed that firearms making and selling was occurring within the boundaries of Montana in 1889. Those activities were not regulated by the federal government at that time. Today, in order to engage in those activities, a Montana citizen would be required to obtain a federal license and permission under the GCA and NFA as such activities relate to the manufacture and sale of ammunition, and in regards at least to commercial gunsmithing, if not actual manufacturing and sale of whole firearms. It is difficult to envision that those who negotiated the terms of the Compact in 1889 did not understand that the State of Montana reserved the right to regulate those firearms manufacturing and selling activities within Montana at the time of the making of the Compact or agreed that the people of Montana had given up forever their ability to make and sell firearms and ammunition without first obtaining the permission of the federal government. It is unlikely that the negotiators to the Compact understood the text of the U.S. Constitution to allow the federal government to regulate in any way the right to make, keep, bear, and sell arms. Indeed, it could be argued that Montana would not have agreed to join the Union if the federal government had, at that time, suggested that it was going to enact legislation

was unchanged in the revision and ratification of the Montana Constitution in 1972, with the Right to Keep and Bear Arms provision being placed at Article II, Section 12.

Montana's reservation of the right of its citizens to keep and bear arms is consistent with the Second Amendment of the United States Constitution, as that latter Amendment was understood in 1889, to allow for the individual right to bear arms free from federal government regulation, thereby giving further evidence of Montana's intent to reserve to itself in the Compact the power granted by the Tenth Amendment to right to regulate the manufacture and sale of arms and ammunition free from federal intrusion. Montana's admission into the union was premised on the understanding that the people of Montana would benefit from an individual right to bear arms as protected by the Second Amendment and by the Montana Constitution, and that the State would, under the Tenth Amendment, retain its police power to regulate the intrastate manufacture and sale of guns and ammunition, such as by means of the MFFA. It was also premised on an understanding that the ability of Montana's citizens to engage in such commercial activity would be protected from federal government encroachment due to the rights reserved to the people under the Ninth Amendment *See*, *e.g. Acme, Inc. v. Besson*, 10 F. Supp. 1, 6 (D.N.J. 1935). The Defendant's threat to fine and

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similar to the GCA or NFA that subjected Montana citizens to federal criminal prosecution and civil penalties for

prosecute Montana citizens for manufacturing and selling firearms in a manner that complies with the provisions of the MFFA[9] both conflicts with the intent of the makers of the Compact and constitutes a breach of the terms of that Compact.

The MFFA can be viewed as a simple exercise of its sovereign authority, authority which Montana retained under the Compact with the United States as authorized by the Tenth Amendment.[10] That is, the Act can be seen both as an exercise of the right reserved to Montana in the Compact to exercise its enumerated power to regulate the intrastate dealing of firearms and ammunition and a demand that the federal government, acting through the ATF, recognize that right by withdrawing its assertion that it has the authority to regulate firearm production and trade wholly occurring within Montana. The Court should recognize that Montana's compact is a contractual limitation on the Defendant's authority under the Commerce Clause and the Necessary and Proper Clause to displace a Montana law premised on the exercise of enumerated constitutional rights reserved to the State of Montana by that Compact, and thereby reject the Defendant's constitutional challenge to the MFFA. *See*, *e.g*. J. Powell's dissent in *Garcia v. San Antonio Metropolitan Transit Authority, et al*. 469 U.S. 528 (1985), wherein Justice Powell criticizes both the majority's failure to recognize any

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engaging in local firearms dealing.

[9] *See*, 2nd Amend. Compl., Ex. A.

[10] The MFFA can also be viewed as Montana's demand for the contract remedy of specific performance of the terms of the Compact by the United States. That is, it is a demand the Defendant recognize the sovereign authority

limiting role of the Tenth Amendment and the Court's reading of the Commerce Clause as to be so broad as to allow the federal government to intrude into areas of regulation traditionally left to the states.[11]

C. **When considering the merits of the Defendant's Rule12(b)(6) Motion, the Court should take note of the nationwide interest in both the merits of Plaintiff's claims as well as the renewed public interest in the meaning of the Tenth Amendment and its application as a limitation on federal regulatory power.**

Montana is the first State of the Union to pass and enact the Firearms Freedom Act. Consequently, this case is the first case to determine the constitutionality of the MFFA. However, the Court should take note of the fact that some six other states[12] have, since the inception of this case, passed similar or identical legislation to the MFFA. In addition, twenty other state legislatures are now considering MFFA-type legislation. Given these facts, WCSM believes there is strong public interest in having this case result in a decision on the merits of Plaintiffs' constitutional claims, a decision which will provide guidance to other courts and to other states considering this and similar legislation. In addition, this

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reserved by Montana in the Compact to regulate the activity of firearms manufacturing and selling conducted wholly within Montana.

[11] As an example of Justice Powell's criticism, Powell writes: "The Tenth Amendment was invoked to prevent Congress from exercising its "power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." "This Court has recognized repeatedly that state sovereignty is a fundamental component of our system of government. More than a century ago, in *Lane County v. Oregon,* 74 U.S. 71 (1869), the Court stated that the Constitution recognized "the necessary existence of the States, and, within their proper spheres, the independent authority of the States. "It concluded, as [James] Madison did, that this authority extended to "nearly the whole charge of interior regulation . . . ; to [the States] and to the people all powers not expressly delegated to the national government are reserved." *Id.* at 74 U. S. 76. *See, Garcia*, 469 U.S. at 573 (J. Powell dissenting).

case presents a case of first impression of whether a state law that is an express exercise of a state's sovereign powers and that is designed to protect an enumerated power can be and is preempted by federal law. This is a question that deserves judicial scrutiny and decision. Further, as shown by the enactment of the MFFA and similar legislation, as well as by the nullification bills being introduced in state legislatures throughout the country[13], there is a renewed interest in the Tenth Amendment and its substantive meaning. The United State's Supreme Court's decision in *Garcia* (*supra*) stands as the last meaningful decision on the analytic framework to be applied to state sovereignty challenges and whether the Tenth Amendment serves as a substantive limitation on the reach of Congress' power under the Commerce Clause.[14] There, the United States Supreme Court left it to future courts, such as this one, to determine whether a particular federal regulation may be "destructive of state sovereignty or violative of any constitutional provision". *Garcia*, 469 U.S. at 554. WCSM respectfully suggests the Defendant's assertion the MFFA is preempted by the NFA and the GCA presents just such a case relating to the destruction of Montana's state sovereignty

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[12] Utah, Tennessee, Wyoming, South Dakota, Arizona, and Idaho.

[13] As of April 2010, state sovereignty resolutions (Tenth Amendment Resolutions) were being considered by the legislatures of 19 states, five of which have passed and four states are considering intrastate commerce regulation nullification bills. *See*, Tenth Amendment Center webpage http://www.tenthamendmentcenter.com/the-10th-amendment-movement/#ffa

[14] *Garcia* involved the question of whether a local public transit authority was immune from federal minimum wage and overtime pay provisions. However, as discussed extensively in the three dissenting opinions, the case implicated the larger questions of the concept and structure of federalism and whether state sovereignty and the division of regulating authority between the federal and state governments under the Tenth Amendment serve as a limitation on the reach of regulation passed under the authority of the Commerce Clause.

and rights reserved by the Compact and by the Tenth Amendment.

IV. CONCLUSION.

The MFFA is a valid exercise of Montana's Tenth Amendment reserved power. This power being the right to regulate wholly intrastate commerce and to protect its citizens' enumerated Second Amendment right to bear arms and Ninth Amendment reserved right to engage in firearms manufacturing and sales activities within the State of Montana as those rights are set forth in the MFFA free from overreaching government regulation. These powers were reserved to the people and State of Montana as a matter of contract through creation and adoption of the Compact with the United States that is recorded at Article I of the Montana Constitution. At the time of its making in 1889, it was the understanding of the parties that the United States Constitution would not be construed by the federal government to deny or disparage the rights reserved by the people of Montana and by the State of Montana, including the right to regulate and engage in the intrastate manufacture and sale of guns and ammunition. The Compact states on its face that it may not be amended without consent of both the State of Montana and the United States, acting through its agents. The Defendant's assertion that the MFFA is preempted by federal law is an attempt to unilaterally amend that contract to vitiate the State of Montana's power to regulate wholly intrastate commerce and is, therefore, unenforceable. The Defendant's attempt to regulate such activities

within the borders of Montana by means of asserting forfeiture and criminal sanctions under the GCA and NFA is a breach of the Compact, the remedy for which is dismissal of the defendant's constitutional challenge.

DATED this 12th day of April, 2010.

/s/ John E. Bloomquist
John E. Bloomquist
Attorney for Amicus Weapons Collectors Society of Montana

CERTIFICATE OF SERVICE

I hereby certify that, on April 12, 2010, a copy of the foregoing A*micus Brief of Weapons Collectors Society of Montana in Support of Plaintiff* was served on the following by the following means:

1-10, 13 CM/ECF
_____ Hand Delivery
11, 12 Mail
_____ Overnight Delivery
_____ Fax
_____ E-Mail

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