No. 10-36094

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

BRIEF OF THE STATES OF UTAH, ALASKA, IDAHO, MICHIGAN, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

Appeal from the United States District Court for the District of Montana, Missoula Division, the Honorable Donald W. Molloy, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, and RULES

OTHER WORK CITED

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As permitted by Rule 29(a), Federal Rules of Appellate Procedure, Utah Attorney General Mark L. Shurtleff files this brief on behalf of the States of Utah, Alaska, Idaho, Michigan, Nebraska, South Carolina, South Dakota, West Virginia, and Wyoming as *amici curiae* in support of the Appellants' request for reversal of the district court's dismissal of their case in *Montana Shooting Sports Ass'n v. Holder*, 2010 WL 4102940 (D. Mont. Oct. 18, 2010).

STATEMENT OF THE CASE

The Montana Firearms Freedom Act ("MFFA"), Mont. Rev. Code §§ 30-20-101 to -106 (effective October 1, 2009), permits the manufacture of firearms, accessories, or ammunition within the State of Montana without being subject to federal laws or federal regulations as long as these activities are carried out solely within the political boundaries of the State of Montana and the product remains there. *Id.* § 30-20-104. In response to inquiries about the potential effects of the new law, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") issued an open letter to all Montana federal firearms licensees to inform them of their continuing obligations under federal law, which ATF stated continued to apply whether or not firearms or ammunition produced in accordance with the MFFA crossed state lines. Dkt. 33.

Plaintiff Gary Marbut then wrote to the local ATF field office, stating he wanted to manufacture firearms and seeking assurances that he would not be subjected to federal civil or criminal sanctions as long as he complied with the MFFA. Second Amended Complaint, ¶¶ 12-14; Dkt. 33. ATF's letter in response informed Marbut that he would still be subject to the Gun Control Act and the National Firearms Act and that, to the extent the MFFA contravenes federal law, it is superseded. Second Amended Complaint, ¶ 14; Dkt. 33.

Plaintiffs–Marbut and two organizations that advocate gun rights–then filed this suit, seeking review of the ATF's action under the Administrative Procedures Act and a declaration that: the MFFA is a valid exercise of Montana's and Montanans' rights under the Ninth and Tenth Amendments to the United States Constitution; the United States Constitution "confers no power on Congress to regulate the special rights and activities contemplated by the MFFA"; and federal law does not preempt the MFFA. They also sought a permanent injunction barring Defendant Holder or any United States agency from bringing civil or criminal enforcement actions against persons who are in compliance with the MFFA, including actions under the National Firearms Act, 26 U.S.C. §§ 5811-22, 5845, the Gun Control Act of 1968, 18 U.S.C. §§ 921 *et seq.*, or other federal laws or regulations. Second Amended Complaint, ¶ 14; Dkt. 33 at 14.

These federal statutes and their implementing regulations impose taxation, registration, licensing, marking, and recordkeeping requirements on firearms and ammunition manufacturers, dealers, and importers. *See* 26 U.S.C. §§ 5811-22, 5841; 18 U.S.C. §§ 922(a), 922(t), 923(a), 923(g), 923(i). They also provide for civil and criminal enforcement of the federal requirements. *See* 28 U.S. C. § 599A; 28 C.F.R. § 0.130.

Defendant Holder moved to dismiss the complaint under Rule 12(b), Federal

Rules of Civil Procedure, for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. The Magistrate Judge recommended that the motion be granted in its entirety, concluding (1) because the ATF letter did not constitute "final agency action" under the Administrative Procedures Act, the federal government had not waived its sovereign immunity and the federal court thus lacked subject matter jurisdiction to review that agency's action; (2) the Plaintiffs lack standing to assert their constitutional claims for declaratory and injunctive relief; and, in any event, (3) Congress's power under the Commerce Clause includes the power to regulate the manufacture and sale of firearms and ammunition, even if they involve only intrastate activities. *Montana Shooting Sports Ass'n v. Holder*, 2010 WL 3926029 (D. Mont. August 31, 2010); Appellants' Record Excerpts at 11-69.

On *de novo* review, the district court rejected plaintiffs' objections. The court adopted the Magistrate Judge's Findings and Recommendations in full, granting Defendant Holder's motion to dismiss. *Montana Shooting Sports Ass'n v. Holder*, 2010 WL 4102940 (D. Mont. Oct. 18, 2010).

The *amici* States file this brief in support of Appellants and reversal of the district court, addressing only the merits of the district court's ruling on Appellants' constitutional claims.

INTEREST OF *AMICI CURIAE* STATES

The *amici* States have a vital interest in the recognition and preservation of the rights reserved to them and to their citizens under the United States Constitution, including those under the Tenth Amendment. They also have a substantial, ongoing interest in cases that call into question the constitutionality of their statutes that regulate activities occurring solely within their own borders.

In addition, Utah and some of the other *amici* States have a particular interest in the issues presented in Plaintiffs' Complaint. Seven States besides Montana (i.e., Alaska, Arizona, Idaho, South Dakota, Tennessee, Utah, and Wyoming) have recently enacted statutes similar to the Montana Firearms Freedom Act that deem certain firearms manufactured and kept within their own borders as exempt from federal regulation.[1] Many other States have similar bills under consideration by their respective legislatures. *See* www.firearmsfreedomact.com. These laws are intended to allow their respective citizens to engage within their States in constitutionally protected activity without burdensome federal oversight

[1]Alaska Stat. § 44.99.500 (2010) (eff. Aug. 25, 2010); Ariz. Rev. Stat. Ann. § 13-3114 (2010) (eff. Oct. 1, 2010); Idaho Code Ann. § 18-3315A (2010) (eff. July 1, 2010); S.D. Codified Laws §§ 37-35-1 to -5 (2010) (eff. July 1, 2010); Tenn. Code Ann. §§ 4-54-101 to-106 (West 2009) (eff. June 19, 2009); Utah Code Ann. §§ 53-5b-101 to -202 (eff. Feb. 26, 2010); Wyoming Stat. Ann. §§ 6-8-402 to -406 (2010) (eff. March 11, 2010).

and regulation of their solely intrastate activities. With few viable avenues to assert their political will, States that have enacted laws similar to Montana's Firearms Freedom Act are clamoring to restore the proper balance between State and federal government power.

This case presents the first opportunity for an appellate court to determine whether such new state laws are valid exercises of rights retained by the States under the Tenth Amendment or are preempted by federal statutes and implementing regulations that impose taxation, registration, licensing, marking, and recordkeeping requirements on all firearms and ammunition manufacturers, dealers, and importers regardless of the intrastate nature of their activity. It is important that the States' voices be heard as the Court considers this important constitutional question. This brief by the *amici* States is meant to provide the Court with their unique perspective on the interplay between the power granted to the federal government under the Commerce Clause and the rights reserved to the States or to their people under the Tenth Amendment to the United States Constitution.

ARGUMENT

I. THE TENTH AMENDMENT LIMITS THE POWER OF THE FEDERAL GOVERNMENT TO REGULATE PURELY INTRASTATE ACTIVITIES

Issues of federalism and the Tenth Amendment have reached the United States Supreme Court framed in two different ways. A determination of "whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment" requires the Court to examine the scope of the particular incident of state sovereignty at issue. *New York v. United States*, 505 U.S. 144, 155-56 (1992). On the other hand, a question of "whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I" necessitates an inquiry into the scope of Congress's enumerated powers. *Id.*

Here, Plaintiffs framed the first type of federalism question in its Tenth Amendment claim.[2] The *amici* States agree with Plaintiffs that Montana, like all States, retains under the Tenth Amendment the right to control purely intrastate

[2]The district court, taking Defendant Holder's lead, chose to reframe Plaintiffs' Tenth Amendment claim by addressing initially the second type of federalism question, i.e., whether Congress's power under the Commerce Clause encompasses the power to regulate the manufacture, sale, and possession of firearms and ammunition even if they occur solely within the manufacturing state. *Montana Shooting Sports Ass'n v. Holder*, 2010 WL 3926029, at *23 (D. Mont. August 31, 2010). The district court's affirmative answer to this question led to peremptory treatment of the Tenth Amendment claim.

activities, including the local manufacture of firearms, accessories, and ammunition that remain out of interstate commerce.

The proper division of authority between the Federal Government and the States is said to be one of the oldest questions of constitutional law. *Id.* at 149. James Madison famously wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting *The Federalist No. 45*, 292-93 (C. Rossiter ed. 1961)). Prior to the ratification of the Bill of Rights, there was disagreement between the Federalists and Anti-Federalists as to the need for such amendments in order to protect the division between State and Federal power. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 568-70 (1985) (Powell, J., dissenting). Widespread concern about the necessity of a bill of rights protecting the States' reserved powers led "the Federalists [to] eventually concede[] that such provisions were necessary." *Id.* at 569. Thus, adoption of the amendments now known as the Bill of Rights, which included the Tenth Amendment, became one of the first matters of business for the First Congress. *Id.* "Indeed, the Tenth Amendment was adopted specifically to ensure that the

important role promised the States by the proponents of the Constitution was realized." *Id.* at 568.

The Tenth Amendment to the Constitution 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." U.S. Const. amend. X. The Supreme Court has consistently recognized that States retain significant sovereign authority to the extent that the Constitution has not transferred such authority to the Federal Government. *New York*, 505 U.S. at 156. In one sense, "[t]he [Tenth] amendment states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 123-24 (1941). But that is not to say that States merely retain authority over that which Congress has chosen, as "a matter of legislative grace," not to regulate. *United States v. Morrison*, 529 U.S. 598, 616 (2000). Rather, the Court's decisions in *Lopez*, *Morrison*, and *New York* represent a narrowed construction of federal power textually grounded in the federalism embodied by the Tenth Amendment. *See Lopez*, 514 U.S. 566-68; *New York*, 505 U.S. at 174-77; *Morrison*, 529 U.S. at 615-19. In other words, while providing no substantive limits of its own, the Tenth Amendment can be a tool of judicial construction that serves to ensure that constitutional limits on the powers of the federal government are respected. While some have argued that the political

position of the States within the federal system is sufficient to guard against expansive federal power, *Garcia*, 469 U.S. at 551-54, the more realistic view recognizes that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

The *amici* States ask this Court to honor that essential part of our constitutional structure and recognize that the Tenth Amendment is not an empty promise to the States, but a vital guarantor of rights retained by the States, including the right to regulate purely intrastate activities.

II. CONGRESS'S ENUMERATED POWER UNDER THE COMMERCE CLAUSE SHOULD NOT EXTEND TO PURELY INTRASTATE ACTIVITIES

The district court concluded that Congress has not exceeded its Article I Commerce Clause authority by regulating purely intrastate manufacture of firearms. *Montana Shooting Sports Ass'n v. Holder*, 2010 WL 3926029, at **15 - 21 (D. Mont. August 31, 2010). The *amici* States, though mindful of adverse precedent that is discussed below and that was relied on by the district court in reaching this conclusion, believe that the federal firearms statutes at issue here exceed Congress's enumerated power under the Commerce Clause, as properly construed, insofar as they reach purely intrastate activities.

The Constitution provides that Congress "shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. Art. I, § 8, cl. 3. According to Justice Frankfurter the Commerce Clause "has throughout the Court's history been the chief source of its adjudications regarding federalism." *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring) (quoting Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* 66 (1937)).

States cannot successfully reassert the powers they retain under the Tenth Amendment until the courts revisit and alter their expansive reading of the "commerce" that Congress may properly regulate exercising its Article I, section 8 power. Supreme Court precedent has construed Congress's authority to regulate interstate commerce as allowing regulation of purely intrastate, private, non-commercial activity, as long as the regulated activity substantially affects interstate commerce. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *Lopez*, 514 U.S. at 555-57; *Wickard v. Filburn*, 317 U.S. 111 (1942).[3]

[3]Relying on this line of cases, this Court has rejected a Commerce Clause challenge to a federal statute criminalizing possession of homemade machine guns, which the defendant claimed was purely an intrastate activity. *United States v. Stewart*, 451 F.3d 1071, 1074 (9th Cir. 2006).

The "substantial effects" test is a 20th century innovation with no textual basis in the Constitution. It has enabled a sweeping expansion of Congress's Commerce Clause powers since the time of the New Deal. *See Lopez*, 514 U.S. at 596 (Thomas, J., concurring); *Morrison*, 529 U.S. at 607-08; U.S. Const. Art. I, § 8, cl. 3. The test, derived from the Necessary and Proper Clause, allows Congress to regulate **intrastate** activities in order to make effective a regulation of **interstate** commerce. *Raich*, 545 U.S. at 34-35 (Scalia, J., concurring); *see also Garcia*, 469 U.S. at 585-86 (O'Connor, J., dissenting). But in doing so, the Court has effectively eliminated any requirement that acts of Congress be a regulation of interstate commercial activity. "Commerce" is expansively defined in a way that "threatens to sweep all of productive human activity into federal regulatory reach." *Raich*, 545 U.S. at 49 (O'Connor, J., dissenting).

In addition, the Court has abandoned any meaningful standard for the substantiality of an intrastate activity's effects on interstate commerce, requiring only that Congress "draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce" in order to regulate it under its Article I, section 8 authority. *Lopez*, 514 U.S. at 600-01 (Thomas, J., concurring). By applying this "rootless and malleable" substantial effects standard for over half a century "the Court has encouraged the Federal

Government to persist in its view that the Commerce Clause has virtually no limits." *Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *see also Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring).

The Supreme Court's construction of congressional authority to regulate interstate commerce "[comes] close to turning the Tenth Amendment on its head" and the "case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution." *Lopez*, 514 U.S. at 589 (Thomas, J., concurring). The substantial effects test has expanded congressional Commerce Clause authority far beyond the incidental powers contemplated by the Necessary and Proper Clause. *See Raich*, 545 U.S. at 58-66 (Thomas, J., dissenting). Interpretation of the Commerce Clause to permit federal regulation of any activity that substantially affects interstate commerce has transformed the purpose of the clause –regulation of commerce "among the several States" as an end in and of itself–into a means for Congress to appropriate States' police powers. *See Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring). The "substantial effects" test is, therefore, repugnant to the federalism embodied by the Constitution. *See Lopez*, 514 U.S. at 584-85, 600-01 (Thomas, J., concurring); *Raich*, 545 U.S. at 67-74 (Thomas, J., dissenting). Accordingly, the Tenth Amendment mandates a judicial standard that yields a

construction of congressional authority consistent with the text and the original meaning of the Commerce Clause. *See Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring).

CONCLUSION

For the foregoing reasons, the *amici* States urge this Court to reverse the district court.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, I certify that this brief, written in proportionally spaced 14 point typeface, is 3413 words long and thus complies with the word limit listed in Rule 32(a)(7)(A).

/s/ Mark L. Shurtleff
MARK L. SHURTLEFF

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served on counsel of record by filing it through the Court's CM/ECF system this 13th day of June, 2011.

/s/ Mark L. Shurtleff
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