UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA SHOOTING SPORTS ASSOCIATION, Inc., and GARY MARBUT, Plaintiffs/Appellants, and STEVE BULLOCK, Montana Attorney General, Intervenor, v. ERIC H. HOLDER, Jr., Attorney General of the United States Defendant/Appellee.	No. 10-36094 D.C. No. CV-00147-DWM District of Montana (Missoula)

BRIEF OF AMICUS CURIAE STATE OF MONTANA

On 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

FEDERAL MATERIALS

TABLE OF AUTHORITIES
(Cont.)

MONTANA MATERIALS

INTEREST OF AMICUS CURIAE

The State of Montana, through the Office of the Attorney General, respectfully submits this Amicus Brief pursuant to Fed. R. App. P. 29(a). As Chief Legal Officer of the State, the Attorney General is responsible for enforcing the state's laws and defending the constitutionality of state statutes.[1]

SUMMARY OF THE ARGUMENT

In granting the United States' motion to dismiss, the District Court issued a ruling that was broader than necessary given the circumstances. In doing so, it used a largely hypothetical scenario to call into question the validity of the MFFA and the Montana Legislature's authority to enact it. The District Court also incorrectly relied on this Court's holding in United States v. Stewart, 451 F.3d 1071 (9th Cir. 2006), as well as the United State Supreme Court's holding in Gonzales v. Raich, 545 U.S. 1 (2005), both of which can be distinguished from the present case.

[1] The State of Montana intervened in this proceeding at the District Court level. The State did not appeal the judgment against Plaintiffs. It appears on appeal as amicus curiae supporting reversal only to the extent the District Court's decision calls into question the constitutionality of the Montana Firearms Freedom Act.

ARGUMENT

In 2009, the Montana Legislature enacted the Montana Firearms Freedom Act ("MFFA" or "the Act"). The Act explains that, "The 10th amendment to the United States constitution guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution," Mont. Code Ann. § 30-20-102(1), and that, "The guaranty of those powers is a matter of contract between the state and people of Montana and the United States." Id. It also posits that "The regulation of intrastate commerce is vested in the states under the 9th and 10th amendments to the United States constitution, particularly if not expressly preempted by federal law." Id.

Along these lines, the MFFA seeks to eliminate from the interstate market all firearms manufactured in Montana from local materials, by providing "A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce." Mont. Code Ann. § 30-20-104. In essence, the MFFA is a declaration "by the legislature that those items have not traveled in interstate commerce." Id. By its terms, however, the MFFA only applies to firearms made in Montana, "from basic materials," and while they are located within the state of Montana. Id. Finally, the Act requires

that all Montana-made firearms bear a stamp clearly indicating they are "Made in Montana." Mont. Code Ann. § 30-20-106.

In its Order granting the United States' motion to dismiss the District Court expressed a troubling attitude toward the Montana Legislature's view of state sovereignty and the United States Constitution's Commerce Clause. For instance, in footnote 18 the Court indicated, "[I]t is indeed the prerogative of the Montana Legislature to riddle the statutory code with 'political statements' if the Legislature deems it prudent to do so." See D.C. Order, fn. 18, p. 57 (Aug. 31, 2010) (Order). The Court further indicated that the MFFA is "in clear conflict with Federal firearms laws,"
Order, p. 57, and that Montana's attempt to excise the intrastate manufacture of firearms from a larger regulatory framework "cannot stand." Order, p. 42.

The result of the District Court's dismissive attitude toward the Montana Legislature's deliberative democratic process of enacting the MFFA was to call into question the continued viability of the law itself. The District Court went far beyond what was necessary given the procedural setting and record before the Court. As explained below, the scenario before the Court was largely a hypothetical one. Rather than constraining its opinion to the theoretical scenario presented by the Plaintiffs, however, the District Court took it upon itself to call

into question the validity of the MFFA. In so doing, the District Court ruling was far broader than necessary.

The District Court likewise erred by relying on Gonzales v. Raich, 545 U.S. 1 (2005), and United States v. Stewart, 451 F.3d 1071 (9th Cir. 2006), for its authority. The present case is distinguishable from Raich and Stewart, both of which were decided after the development of an extensive factual record and, in some respects, could be considered as-applied challenges. Specifically, the District Court relied on language from Raich expressing doubt that a state could "excise" a discrete local activity from a comprehensive regulatory framework. The District Court picked up this notion and ran with it, ultimately concluding that Montana's attempt (through the MFFA) "to similarly excise a discrete local activity… cannot stand." Order, pp. 42.

In Raich, the Supreme Court was faced with at least one defendant who had actually cultivated and used marijuana plants for medicinal purposes under the auspices of California's Compassionate Use Act and in violation of the federal Controlled Substances Act. It was only after the defendant's home was raided and her marijuana plants seized that she raised the California Compassionate Use Act as a defense. Likewise, in Stewart, the defendant was found in actual possession of homemade firearms in violation of the 18 U.S.C. 922. Only after he was arrested, charged, and on trial did he challenge Congress's authority under the Commerce

Clause to enact 18 U.S.C. 922 as a defense to his prosecution. Thus, in each instance, it was only *after* the defendants had violated the law, were prosecuted (or threatened with prosecution, as in Raich), and subsequently raised their defenses that the court could rule on the validity of those defenses. Here, however, the District Court applied Raich and Stewart's as-applied analysis to, in essence, strike down the MFFA on its face.

Raich is also distinguishable based on what the Supreme Court did *not* do. Unlike the District Court here, in Raich the Court did not question the California Legislature's authority to enact the Compassionate Use Act. At no point, did the Raich Court dismiss the California Legislature's deliberative process of enacting a law it felt best suited the needs of California citizens. More importantly, at no point did the Supreme Court in Raich call into question the validity of the California's Compassionate Use Act.

In light of the slim record, the District Court–like the Court in Raich--should have avoided opining on the validity of the MFFA and the Legislature's Tenth Amendment power to enact it. While the Constitution's Supremacy Clause holds that federal law is "the supreme Law of the Land," that authority binds "the Judges in every State"--not the people themselves or their elected legislators. U.S. Const. art. VI, cl. 2. Thus, while it may ultimately be the province of the judicial branch to determine "what the law is," Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177

(1803), the Montana Legislature is free to pronounce its view by enacting the MFFA. "State legislatures are not subject to federal direction." Printz v. United States, 521 U.S. 898, 912 (1997), citing New York v. United States, 505 U.S. 144 (1992). As Plaintiffs' Amended Complaint says, the MFFA is largely a "political" statement. First Am. Compl. ¶ 9. The Montana Legislature is free to pronounce its view of the interplay between the States and the federal government, the Commerce Clause and the Tenth Amendment without running afoul of the United States Constitution. Whether the Legislature's view of these relationships is correct is irrelevant – the fact that the Montana Legislature had the Constitutional authority to enact the MFFA as a "policy statement," however, is beyond question. Indeed, the District Court and the United States essentially agreed with this point, as noted in footnote 18, where the Court said, "Intervenor State of Montana accurately notes that the Supremacy Clause is directed to the judges of every state, and does not operate to circumscribe the state legislatures--or the people--from expressing their views. . . . The United States is not suggesting otherwise, as it is indeed the prerogative of Montana's Legislature to riddle the statutory code with 'political statements' if the Legislature deems it prudent to do so." Order, pp. 57, footnote 18. This being the case, the Court incorrectly took it upon itself to suggest that the MFFA "cannot stand," particularly in considering the United States' motion to dismiss. Order, pp. 42.

The District Court took a largely hypothetical factual scenario and used it as an opportunity to question the legitimacy of a law duly enacted by the Montana Legislature. In doing so, it relied on Raich and Stewart--cases in which an actual controversy was presented to the court. Accordingly, in reaching its decision, the District Court was forced to "pile inference upon inference" in order to find a substantial effect on interstate commerce from the completely intrastate manufacture of firearms contemplated under the MFFA--precisely the exercise cautioned against in United States v. Lopez, 514 U.S. 549 (1995).

CONCLUSION

The Attorney General of the State of Montana respectfully requests this Court distinguish Raich and Stewart and hold that the Montana legislature acted within its Tenth Amendment power when it enacted the Montana Firearms Freedom Act.

Respectfully submitted this 13th day of June, 2011.

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By: /s/ Zach Zipfel
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STATEMENT OF RELATED CASES

Appellees are unaware of any related cases pending before this Court.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2011, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 10-36094

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is

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Date: June 13, 2011 /s/ Zach Zipfel
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