Quentin M. Rhoades
State Bar No. 3969
SULLIVAN, TABARACCI & RHOADES, P.C.
1821 South Avenue West
Third Floor
Missoula, Montana 59801
Telephone: (406) 721-9700
Facsimile: (406) 721-5838
qmr@montanalawyer.com

Pro Querente

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

MONTANA SHOOTING SPORTS ASSOCIATION, SECOND AMENDMENT FOUNDATION, Inc., and GARY MARBUT, Plaintiffs, vs. **ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,** Defendant.	Cause No. CV-09-147-M-DWM-JCL ***PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO MOTION TO DISMISS***

Plaintiffs submit in opposition to Defendant's Motion to Dismiss, the following:

RESPONSE BRIEF

ISSUES

1. Plaintiffs have standing because they have actually suffered injury and an effective remedy is available.

2. Sovereign immunity is waived by the Administrative Procedures Act.

3. Preemption of the Montana Firearms Freedom Act ("MFFA")[1] is not within the Congressional powers enumerated in the Commere Clause of the U.S. Constitution.[2]

PROCEDURAL AND FACTUAL BACKGROUND

The MFFA declares that any firearms made and retained in-state are beyond the authority of Congress under its enumerated Constitutional power to regulate commerce among the states. Following Montana's

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[1] Title 30, Chapter 20, Part 1, MONT. CODE ANN.

[2] There are a number of authorities and arguments raised by amici in this case that address Issue 3. All such are adopted by Plaintiffs and incorporated herein by this reference.

enactment, virtually identical versions of the MFFA were adopted in Tennessee (SB1610); Utah (SB11);Wyoming (HB95); South Dakota (SB89); Arizona (HB 2307); and Idaho (HB589). Representing an emerging consensus among the states on the limits of federal power, virtually identical copies of the MFFA have also been introduced in the legislatures of twenty other states. (www.firearmsfreedomact.us)

Plaintiff Gary Marbut ("Marbut") and other members of Plaintiff Montana Shooting Sports Association and Plaintiff Second Amendment Foundation sent letters in 2009 to the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives, which is administered by Defendant Eric H. Holder, Jr., Attorney General (hereinafter, collectively, "the Government"), seeking a ruling on whether the Government would require Montanans to abide by U.S. law in order to take advantage of the MFFA. (Second Amended Complaint, Dkt. No. 33, ¶¶ 12-14.) Marbut has hundreds of customers who have offered to pay his stated asking price for both firearms and firearms ammunition manufactured under the MFFA. (*Id.*, ¶¶ 15-16.) In particular, Marbut has a substantial opportunity to market the "Montana Buckaroo," a youth model, single shot, bolt-action .22 caliber rifle, to hundreds of customers who have placed orders for several

hundred firearms. (*Id.*) These sales, however, are all specifically conditioned on the "Montana Buckaroo" being manufactured pursuant to the MFFA, without Gun Control Act ("GCA") and National Firearms Act ("NFA") licensing or, as the customers see it, federal interference. (*Id.*) The buyers do not want, have not ordered, and will not pay for the "Montana Buckaroo" if it is manufactured by federal firearms licensees. (*Id.*) The State of Montana has also expressed keen interest in buying non-lethal ammunition from Marbut for law enforcement and game enforcement purposes. (*Id.*)

The Government responded to the written requests on September 29, 2009, holding that "to the extent the [MFFA] conflicts with federal firearms laws and regulations, federal law supersedes the MFFA, and all provisions of the GCA and NFA, and their corresponding regulations, continue to apply." (*Id.*, ¶ 14.) The Government ruled that for Marbut or anyone else similarly situated to manufacture firearms, firearms accessories or ammunition under the MFFA, they are first required to file with the Government ATF Form 1 (for "National Firearms Act firearms") and/or ATF Form 7 (for other "firearms, firearms accessories, and ammunition"), succeed in having their applications approved under federal

law, and ultimately be licensed to do so by the Government. (*Id.*) This final agency action on the question is consistent with an "open letter" the Government issued to the general public on July 16, 2009, warning that the MFFA conflicts with federal firearms law and regulations, and that federal law therefore supersedes the MFFA. (*Id.*) But for the Government's ruling, Marbut and others similarly situated could sell their "Made In Montana" firearms to other Montanans for significant economic gain.

Of course, Plaintiffs could simply acquiesce, and obtain a federal license. But neither Marbut nor the members of Plaintiff MSSA or Plaintiff SAF are willing to submit to federal licensing and registration procedures, record keeping requirements and marking mandates, or to pay the requisite licensing fees and taxes. Nor are they willing to submit to what they see as the Government's overreaching and arbitrary regulatory control, as set forth and required under the U.S. Code of Federal Regulations. (Second Amended Complaint, Dkt. No. 33, ¶ 16.) Absent such compliance, they have no opportunity to engage in MFFA commerce. Moreover, at least with respect to Marbut, none of his customers for the "Montana Buckaroo" will buy such an arm from a federal firearms licensee.

(*Id.*, ¶ 15.) Their interest in it is solely as an MFFA firearm. (*Id.*)

The Government's September 29, 2009, decision did not inform Marbut or anyone else of any right to an internal agency appeal of its decision. (*Id.*) Indeed, there are none provided under federal statutory law. With no other avenue of appeal or review open to them, Plaintiffs filed this action seeking both a declaratory judgment and a reversal of the Government's decision, as well as injunctive relief.

Upon service of Plaintiffs' complaint, the Government moved for immediate dismissal under FED. R. CIV. P. 12(b)(6). (Dkt. Nos. 10 and 11.) Thereafter, the Court entered its Case Scheduling Order (Dkt. No. 17) setting a deadline of April 12, 2010, for the amendment of pleadings and the joinder of parties, as well as for Plaintiffs' response briefing on the motion to dismiss and any *amicus curiae* briefing. Plaintiffs timely filed their Second Amended Complaint on April 9, 2010. (Dkt. No. 33.)

RULE 12(B)(6) STANDARDS

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, ___ U.S. ___ , 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). A complaint has

"facial plausibility" when it sets forth factual content that allows the court "to draw the reasonable inference" that the plaintiff is entitled to some relief. *Id.* at 1949.

DISCUSSION

1. Plaintiffs enjoy standing because without the Government's licensing requirement they could immediately begin serving an anxious local marketplace, without need for the Government's oversight, permission or licensing.

Constitutional standing exists where the plaintiff has "suffered, or [is] threatened with ... an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Raich v. Gonzales*, 500 F.3d 850, 857 (9th Cir. 2007). An injury-in-fact for purposes of Article III standing must be "(1) concrete and particularized, and (2) actual or imminent, not conjectural or hypothetical." *Id.* A plaintiff's injury is redressable where there is "a 'substantial likelihood' that the requested relief will remedy the alleged injury." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000).

In *Raich*, the plaintiff had standing even though she had "not suffered any past injury." 500 F. 3d at 857. She was, however, "faced

with the threat that the Government will seize her medical marijuana and prosecute her for violations of federal drug law." *Id.* The threat was "serious and concrete" because foregoing the medical marijuana treatment at issue might be fatal, and was not "speculative or conjectural" as law enforcement had previously seized and destroyed the medical marijuana, and they could have so again at any time. *Id.* Finally, it was clear that the plaintiff's "threatened injury may be fairly traced to the defendants, and that a favorable injunction from this court would redress Raich's threatened injury." *Id.* These factors left the Court "convinced that the requirements of constitutional standing have been met here." *Id.*

In this case, Plaintiffs have suffered past injury in the loss of economic opportunities since September 29, 2009, because they must apply to the Government in order to sell MFFA firearms to their fellow state-citizens. Consequently, they have already suffered economic harm, which is always enough confer standing. *Central Ariz. Water Conservation Dist. v. United States EPA*, 990 F.2d 1531, 1537 (9th Cir.), cert. denied, 510 U.S. 828 (1993). As in *Raich*, moreover, if Plaintiffs proceed to trade without licenses despite the Government's ruling, they and their fellow citizens face express threats of both "forfeiture of such items" and

"criminal prosecution under the GCA or NFA." (Second Amended Complaint, Exhibit A, p. 2.) Finally, these "threatened" injuries are both traceable to the Government's decision, and a reversal would "redress [Plaintiffs'] threatened injury." *Raich*, 500 F.3d at 857. Plaintiffs therefore enjoy constitutional standing.

Plaintiffs acknowledge the Government's reliance on *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996). In that case, however, there was held to be no specific action taken by the which could have resulted in the plaintiffs being harmed. *Id.* at 1126-27. On the other hand, in this case, Marbut has already secured hundreds of committed customers who are not merely willing to buy the Montana Buckaroo youth rifle, but who have already placed bona fide orders for it (conditioned of course on reversal of the Government's ruling by this Court). Marbut's actual economic injury is sufficient for standing. *Central Ariz. Water Conservation Dist.*, 990 F.2. at. 1537. Moreover, in *San Diego*, the Court found significant the fact there had been no threat of forfeiture or prosecution by law enforcement. *Id.* at 1127. Here, however, the Government has specifically threatened, in its September 29, 2009, ruling, that Marbut faces both civil forfeiture and criminal prosecution should he

attempt to fill his customers' orders under the MFFA. And there is a remedy. Reversal of the Government's ruling will yield for Marbut a right to enjoy significant economic opportunity. *Vermont Agency of Natural Res.*, 529 U.S. at 771. Ultimately, the 1996 case of *San Diego* does not control under these facts, the 2007 case of *Raich* does. Under *Raich*, Plaintiffs enjoy standing to sue because they have been harmed; they have suffered and continue to suffer injury; and the Court can fashion for them an effective form of relief.

2. Soverign immunity is waived pursuant to the Administrative Procedures Act.

A. Plaintiffs are entitled to "non-statutory review."

The Administrative Procedures Act ("APA") grants judicial review to a person who claims to have suffered a legal wrong from action taken by a federal agency. 5 U.S.C.A. § 702. The APA establishes a strong presumption of judicial reviewability of agency action. *American Fed'n of Gov. Employees Local 1 v. Stone*, 502 F.3d 1027, 1034-35 (9th Cir. 2007).

> [W]here a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other

unusual circumstance.

Abbott Laboratories v. Gardner, 387 U.S. 136, 152 (1967) (abrogated on other grounds, *Lifano v. Sanders*, 430 U.S. 99, 105 (1977)). Where there are no intra-agency appeals or remedies available upon a final agency decision, resort to district court is then immediately available. *Mejia Rodriguez v. U.S. Dept. of Homeland Sec.*, 562 F.3d 1137, 1145 (11th Cir. 2009).

The Government insists its letter to Marbut (and others) of September 29, 2009, is not a "final agency action" under the APA, and it therefore invoked sovereign immunity. It fails to account, however, for non-statutory review under the APA of s non-final agency action. The First Circuit Court of Appeals explained the doctrine thus:

> The basic premise behind nonstatutory review is that, even after the passage of the APA, some residuum of power remains with the district court to review agency action that is ultra vires. See *Dart v. United States*, 848 F.2d 217, 224 (D.C.Cir.1988). Such claims usually take the form of a suit seeking an injunction, often accompanied by a request for relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. See *Clark Byse & Joseph v. Fiocca*, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L.Rev. 308, 322 (1967). The nonstatutory review action finds its jurisdictional toehold in the general grant of federal-question jurisdiction of 28 U.S.C. § 1331. *Maxon Marine, Inc. v. Dir., Office of Workers' Comp. Programs*, 39 F.3d 144, 146

(7th Cir.1994).

Rhode Island Dept. of Environmental Management v. U.S., 304 F.3d 31, 41, 42 (1st Cir. 2002) (footnote omitted).

There are two elements to be considered in applying non-statutory review. *Id.* First, "the agency's ***non-final*** action must 'wholly deprive the [party] of a meaningful and adequate means of vindicating its...rights.'" *Id.* (quoting *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin. Inc.*, 502 U.S. 32, 43 (1991) (emphasis added)). Second, Congress must not have clearly intended to preclude review of the agency's particular determination. *Id.* Where both elements are satisfied, court review of an agency action is available, whether or not such action is deemed "final." *Id.*

The Government offers no alternative under which Plaintiffs could have appealed its requirement that they be licensed under U.S. law before they avail themselves of the MFFA. The Government's decision therefore has "wholly deprive[d] [Plaintiffs] of a meaningful and adequate means of vindicating [their] rights." *Rhode Island Dept. of Environmental Management,* 304 F.3d at 42. Moreover, neither the Government's letter of September 29, 2009, nor the Government's brief, identify any other

means of obtaining review of its decision on MFFA preemption. The sole alternative would be to proceed in defiance of what amounts to a Government order, and face criminal prosecution. Likewise, there is no evidence, and the Government does not argue, that Congress intended to prevent judicial review in this context. Thus, both elements of nonstatutory review are fulfilled. In such cases, effected parties are entitled to court review under the APA. *E.g., Abbott Labs.*, 387 U.S. at 152. Sovereign immunity is therefore waived.

B. Plaintiffs are entitled to APA review because the Government's decision is a "final agency action."

By its terms, the APA permits review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court..." 5 U.S.C. § 704. Where, as here, no specific statutory judicial review provision exists, the APA applies to any "final agency action." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). An agency action will be deemed "final" if:

(1) The action must mark the "consummation" of the agency's decision making process it must ***not*** be of a merely tentative or interlocutory nature; and

(2) The action must be one by which "rights or obligations have been determined," ***or*** from which "legal consequences will

flow."

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (emphasis added).

In this case, the Government's decision to require licenses of those who wish to proceed under the MFFA is a final decision. It is the consummation of the Government's review of the written requests for a decision on the MFFA's preemption. Its September 29, 2009, decision is neither tentative nor interlocutory, and expresses the Government's firm and final position. Moreover, it is one from which "rights or obligations" under the MFFA "have been determined," and/or from which "legal consequences [of prison and forfeiture] will flow." *Bennett,* 520 U.S. at 177-78. Finally, there is no alternative means to seek appellate or other review in an alternative forum.

The Government's decision to require NFA and GCA licensing for those who wish to avail themselves of the MFFA is, therefore, a final agency action, subject to judicial review under the APA. As such, sovereign immunity is waived.

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3. Although current case law supports the Government's preemption argument, the case law should be reconsidered, and the MFFA upheld.

A. Under current Commerce Clause case law, the MFFA is a dead letter, promulgated in vain by local authorities impotent to implement any public policy tailored, in their judgment, to their constituents' needs.

Plaintiffs do not disagree that under current case law, generally speaking, "***everything*** is subject to federal regulation under the Commerce Clause." *U.S. v. Stewart*, 348 F.3d 1132, 1135 (9th Cir. 2003), abrogated *U.S. v. Stewart*, 451 F.3d 1071 (9th Cir. 2006) (emphasis added). This is true regardless of an activity's lack of any "commercial" element. *U.S. v. George*, 579 F.3d 962, 966 (9th Cir. 2009) (disapproving *U.S. v. Waybright*, 561 F.Supp.2d 1154 (D.Mont. 2008)); *U.S. v. Alderman*, 565 F.3d 641 (9th Cir. 2009), rehearing and rehearing *en banc* 593 F.3d 1141 (9th Cir. 2010). In short, under the current case law, Congress enjoys all power in any context "to displace state legislatures with the full weight of the federal government, a result as undesirable as it is unconstitutional." *U.S. v. Alderman*, 593 F.3d 1141, 1142 (9th Cir. 2010) (O'Scannlain, Circuit Judge, dissenting from the order denying rehearing *en banc*). As this Court has recognized:

> This tenet from *New York* [505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992)] coupled with the holdings in *Raich* and recent Ninth Circuit decisions such as *Stewart*, compel the conclusion that Congress' power under the Commerce Clause is almost ***unlimited*** where the prohibited product has significant economic value such as with drugs or guns. Moreover, as Justice Stevens stated in *Raich*, the primacy of the Supremacy Clause is such that it authorizes congressional commerce power to override state law even when the State is "provid[ing] for the welfare of necessities of their inhabitants however legitimate or dire those necessities may be."

U.S. v. Rothacher, 442 F.Supp.2d 999, 1007 (D. Mont. 2006) (emphasis added).

Another example of just how "unlimited" the Commerce Clause powers are now can be seen in the Ninth Circuit Court of Appeals' treatment of the conclusion this Court reached in *Waybright.* In *Waybright*, this Court reasoned:

> Section 16913 has nothing to do with commerce or any sort of economic enterprise; ***it regulates purely local, non-economic activity.*** ... Even though the Adam Walsh Act regulates some sex offenses that are commercial (e.g., the distribution of child pornography), its regulation of sex offenders is not indispensable to the success of its other provisions. Unlike § 2250(a), § 16913 has no express jurisdictional element to limit its reach to sex offenders connected with or affecting interstate commerce. SORNA'S legislative history contains no express congressional findings regarding the effects of sex offender registration on interstate commerce. Tracking sex offenders may enhance public safety and may in turn promote a more productive economy as explained by the court in *Passaro*. ***But, any effect on***

> ***interstate commerce from requiring sex offenders to register is too attenuated to survive scrutiny under the Commerce Clause.*** See *Lopez*, 514 U.S. at 563-64, 115 S.Ct. 1624; *Morrison*, 529 U.S. at 617, 120 S.Ct. 1740. For these reasons, § 16913 is not a valid exercise of Congress' Commerce Clause power.

Waybright, 561 F.Supp.2d at 1164-65 (emphasis added). But in a later case arising out of Oregon, the Ninth Circuit Court of Appeals summarily rejected *Waybright*'s careful and principled analysis:

> [The defendant] cites [*Waybright*] which found that § 16913 was not constitutional because it (1) does not fit within the *Lopez* prongs, (2) is not economic in nature, and (3) created a separate statutory scheme of national regulation of sex offenders instead of facilitating implementation of a federal crime under § 2250. *Id.* at 1163-68. To the extent our reasoning in this opinion differs from the district court's decision in *Waybright*, we disapprove of that decision.

George, 579 F.3d at 966, fn. 2.

Thus, as the Government demonstrates skillfully in its brief, current Commerce Clause jurisprudence allows the supreme Congressional will to quash the upstart MFFA, and any other attempt by local jurisdictions to overcome federal "one size fits all" public policy, with little ceremony or ado.

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B. The case law should be re-examined, and to the extent the cases mandate preemption of the MFFA, they should be overruled.

Given the current state and the case law, the question is not whether the MFFA is preempted. If case law were sacrosanct, the discussion would be over.

But case law can and should be overturned if it supports an erroneous proposition of law. *Citizens United v. Federal Election Commission*, ___ U.S. ___, ___, 130 S.Ct. 876, 920-21 (2010). "*[s]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940). Thus, courts are allowed to correct their mistakes:

> In conducting this balancing, we must keep in mind that *stare decisis* is not an end in itself. ... Its greatest purpose is to serve a constitutional ideal – the rule of law. ***It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.***

Citizens United, 130 S.Ct. at 920-21 (Roberts, C.J., concurring, emphasis added).

Current Commerce Clause jurisprudence, which allows Congress to

regulate any activity, even those without any commercial or interstate elements, does grave damage to the "constitutional ideal" of the rule of law within a framework of federalism. Indeed, the prevailing precedents simply overturn federalism. *See* e.g., *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 583-584 (1985) (O'Connor, J., dissenting). This effective repeal of the vertical balance of powers, as originally conceived for the American form of government, should be reconsidered and, to the extent the cases require preemption of the MFFA, overruled.

The Framers adopted a Constitutional system of dual sovereignty, carefully balancing power between the States and the Central government. It is therefore axiomatic "that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Indeed, without independent and formidable power residing in the States, there can be, by definition, no federalism:

> "[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,'... '[W]ithout the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and

> independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Texas v. White, 7 Wall. 700, 725, 19 L.Ed. 227 (1869) (quoting *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869)).

The Constitution, moreover, grants the federal government only limited powers. "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., Amdt. 10. The States thus retain substantial sovereign authority under our Constitutional system. James Madison, the lawyer and statesman who, more than any other, is credited with composing the Constitution, put it this way:

> 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. ... ***The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.***"

The Federalist Papers, No. 45, pp. 292-293 (C. Rossiter ed. 1961)

(emphasis added). The Supreme Court itself has identified many practical advantages in federalism:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). More important, however, is the protection federalism offers for ordered liberty. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

The principle is as fundamental to our systems as is the separation and independence of this, the Judicial Branch of the federal government, from its coequal branches. Just as an independent Judiciary acts as a bulwark in the service of liberty against the accumulation of excessive power in the Legislative or Executive branches, a robust power residing in the States is equally an essential shield against tyranny and abuse. Thus,

as Alexander Hamilton said, the federal system was designed to suppress "the attempts of the government to establish a tyranny:"

> [A] confederacy of the people, without exaggeration, may be said to be entirely the masters of their own fate. ***Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.*** The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

Federalist Papers, No. 28, pp. 180-181 (emphasis added). Madison agreed:

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; ***and the usurpations are guarded against by a division of the government into distinct and separate departments.*** In the compound republic of America, the power surrendered by the people ***is first divided between two distinct governments,*** and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id., No. 51, p. 323 (emphasis added).

But "[t]hese twin powers will act as mutual restraints only if both are credible." *Aschcroft*, 501 U.S. at 459. The power of the States must be husbanded jealousy to ensure "tension between federal and state power," and for each to fulfil their respective Constitutional role. *Id.* The

evisceration of this "promise of liberty" under current Commerce Clause jurisprudence supplies the compelling basis necessary to overcome *stare decisis*.

C. If *Raich* is limited to its facts, and *Stewart II* thereby overruled, Plaintiffs should prevail under the ruling in *Stewart I*.

Beginning in 1995, and until the 2005 decision in *Raich*, it appeared the Supreme Court had finally recognized that its long drift away from federalism had upset the originally intended constitutional balance of powers between Congress and "the Several States." *See, Rothacher*, 442 F.Supp.2d at 1000-03 (reviewing developments in Commerce Clause jurisprudence over the last decade and a-half). The triumvirate of *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*; 529 U.S. 598 (2000); and *Jones v. United States*, 529 U.S. 848 (2000) marked a remedial departure from some 50 years of politically motivated, wholesale expansion of federal power, under the guise of the Commerce Clause, that had left State sovereignty moribund. See *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *Heart of Atlanta, Inc. v. United States*,

379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964).[3] At last, it looked as if the Supreme Court had recognized that returning to the "'intrinsically sounder' doctrine established in prior cases" would "better serv[e] the values of *stare decisis* than would following [the] more recently decided cases inconsistent with the decisions that came before it." *Citizens United,* 130 S.Ct. at 920-21.

Then, in *Raich*, the Supreme Court changed course, turning again in the direction of absolute federal power. *Raich*, however, was an illegal drug case. Given the Government's expensive, long running and hard fought "war on drugs," 545 U.S. at 10, n. 9, illegal drugs invoke a peculiarly national concern. Because most of the drugs marketed in the U.S. are imported by violent foreign criminal organizations, often in cooperation with foreign government officials, the drug war involved more than commerce, but also national defense. *See*, Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, § 1971, 100 Stat. 3207-59, Title II, Part A, and *National Security Decision Directive 221,* "Narcotics and National Security" (April 8, 1986). As *Raich* involved the only law enforcement concern

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[3] For a sketch of the politics driving theses decisions, see *Rothacher*, 552 F.Supp.2d at 1001, n. 9.

sufficiently grave to jeopardize national security, and to require the deployment of the U.S. military, *id.,* it should be limited to its factual circumstances.

It is distinguishable in other ways as well. In *Raich*, it was held that state laws allowing the local use of medical marijuana were preempted by federal laws criminalizing such activities. The local law in question, however, the California Compassionate Use Act of 1996, West's Ann. Cal. Health & Safety Code § 11362.5, *et seq.*, included no means of distinguishing local marijuana possessed for compassionate use from marijuana found in interstate commerce. See *Raich*, 545 at 29-30. More significantly, it did not contain any state law limit on interstate traffic in the local drug. *Id.* at 30. The Compassionate Use Act likewise did not ban the use of marijuana from other states for medical purposes in California, and therefore it was held "that the California exemptions will have a significant impact on both the supply and demand sides of the [national] market for marijuana." *Id.* As a result of these key distinctions all of which differ from the MFFA, *Raich* does not control. While California law contradicted the federal Controlled Substances Act by condoning and stimulating ***inter***state commerce in a marijuana, Montana law expressly does not protect firearms

in interstate commerce (MONT. CODE ANN. § 30-20-104); it provides a means to uniquely identify them as solely ***intra***state firearms MONT. CODE ANN. § 30-20-106); and does not stimulate demand for other guns in interstate commerce. In the event someone might leave Montana in possession of an MFFA firearm, moreover, nothing in Montana law purports to interfere with a federal prosecution of them for transporting, transferring or possessing such an item in actual interstate commerce without a federal license. MONT. CODE ANN. § 30-20-104. Thus, none of the Congressional purposes or concerns so central to the decision in *Raich* are present in this case.

Finally, if *Raich* is understood to control, and if under it, MFFA is preempted, it should be overruled in favor of the direction taken in *Lopez*, 514 U.S. 549; *Morrison*, 529 U.S. 598; and *Jones,* 529 U.S. 848. The crippling damage done by *Raich* to the resurgence of State power is illustrated vividly by the holdings of *Stewart*, 348 F.3d 1132 ("*Stewart I*") *and Stewart*, 451 F.3d 1071 ("*Stewart II*"). In *Stewart I*, the Court applied *Lopez* and *Morrison* to reverse a conviction for possession of a homemade machine gun, which the defendant had crafted entirely in intrastate commerce, as beyond the reach of the Commerce Clause. *Stewart I*, 348

F.3d at 1134-1138. But *certiorari* was granted, and it was remanded for reconsideration upon the Supreme Court's disposition of *Raich*. The new case law was determinative: "In our earlier opinion, we concluded that section 922(o) was quite similar to the statute at issue in *Lopez*." *Stewart II*, 451 F.3d at 1076. "But *Raich* forces us to reconsider." *Id.* Thus, limiting *Raich* to its fact or distinguishing it – and in effect overruling *Stewart II* – would place the MFFA, under the guidance of *Stewart I*, beyond Congressional reach.

Under *Stewart I*, Congress is allowed to regulate three categories of activity via the commerce power: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce." *Stewart I*, 348 F.3d at 1134 (citing *Lopez*). Congressional power should have limits, and courts should therefore not "'obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Lopez*, 514 U.S. at 557. *Stewart I* therefore ruled that intrastate firearms manufacture involves neither (1) or (2) of the commerce power test. Here, only

intrastate firearms commerce is legal under the MFFA. And because MFFA firearms cannot leave the State of Montana, they involve neither the instrumentalities of interstate commerce nor persons traveling interstate.

Stewart I then sets outs the test, based on *Morrison*, for determining whether a regulated activity "substantially affects" interstate commerce sufficiently to be regulated under the Commerce Clause. *Stewart I*, 348 F.3d at 1136-37. Courts should consider whether:

> (1) The regulated activity is commercial or economic in nature;
>
> (2) An express jurisdictional element is provided in the statute to limit its reach;
>
> (3) Congress made express findings about the effects of the proscribed activity on ***inter***state commerce; and
>
> (4) The link between the prohibited activity and the effect on interstate commerce is attenuated.

Id. (emphasis added).

Here the regulated activity is indisputably commercial. On the other hand, there is no express jurisdictional element in either the NFA or the GCA to limit their reach to strictly interstate activity. Moreover, the Congressional findings and statements of power and purpose on this point involve not the promotion or regulation of commercial markets and

legitimate economic activity by business and consumers – but the assistance of ***local*** police with crime control. *See*, H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), 1954 U.S.C.C.A.N. 4025, 4552; S. Rep. No. 1866, 89th Cong. 2d Sess. 1 (1966) (emphasis added). Any invocation of Congressional power to control "commerce" in this context is simply a pretext relied upon to reach criminal conduct. *See, M'Culloch v. Maryland*, 4 Wheat. 316, 17 U.S. 316, 423 (1819) (rejecting congressional use of the Necessary and Proper Clause, "under the pretext of executing its powers, [to] pass laws for the accomplishment of objects not intrusted to the government"). Congressional findings are clear that the NFA and the GCA do not target ***intra***state commerce. S. Rep. No. 1097, 9th Cong., 2nd Sess. 1968, 1968 U.S.C.C.A.N. 2112, 2113-14. Rather, Congress described its objective as "adequate Federal control over ***inter***state and foreign commerce in firearms." *Id.* (emphasis added).

Since MFFA firearms are manufactured, transferred and possessed only in Montana, they do not fall within the category of guns Congress enacted NFA and GCA to control. Moreover, if Congressional intent was to control "truly local" ***intra***state criminal activity – under the guise of controlling ***inter***state traffic in guns – it has plainly overstepped its

authority. See *Morrison*, 529 U.S. at 617 and *Jones v. United States*, 529 U.S. 848, 858-59 (2000) (Congress has no power to make a federal crime of arson, even if the affected building is subject to a mortgage held by a bank in another state).

Finally, any Government argument to link the purely intrastate activities that may be taken in compliance with the MFFA and interstate commerce in general is both terribly attenuated and based on nonexistent evidence. By law, MFFA firearms cannot leave Montana. They are sought by – and allowed only to – Montanans who wish to buy "Made in Montana" firearms free from burdensome federal regulation intended by Congress to aid local law enforcement in highly populated states where Congress saw crime "skyrocketing." S. Rep. No. 1866, 89th Cong., 2d Sess. (1966). The intrastate market in MFFA firearms does not reach beyond Montana's borders because the MFFA itself, in remarkable harmony with the purpose and intent of the NFA and the GCA, expressly limits itself only to guns not in interstate commerce. This preemption of MFFA does not serve the express Congressional intent.

Finally, this interpretation is supported fully by the Ninth and Tenth Amendments. The Ninth Amendment provides: "The enumeration in the

Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Tenth Amendment similarly makes clear that the States and the people retain all those powers not expressly delegated to Congress. Thus, "the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people." *Griswold v. Connecticut*, 381 U.S. 479, 491 and fn. 5 (1965) (Goldberg, J., concurring.)

These strictures courter-balance the Supremacy Clause, and should lead courts to take a skeptical view of powers claimed to be enumerated under the Commerce Clause. Indeed, it is the expansive views of *Wickard* and its progeny that have created the current crisis of federalism in which the concept, so central to the framing of the Constitution, has all but disappeared from the jurisprudence. Interstate commerce in guns is plainly within the Congressional ambit, and when it rules in that arena, it is obviously supreme. But its laws are designed and adopted to address crime control elsewhere. If Montana wishes to set its own rules for transactions that do not involve crossing state boundaries, a limited and more reasonable interpretation of "commerce," as suggested by the Ninth and Tenth amendments, should prevail over that articulated in *Raich*.

Otherwise, one of the "checks and balances" against centralized power – which is the true genius of the Constitution – will be lost, and with it, eventually, a substantial portion of America's "promise of liberty."

CONCLUSION

The motion to dismiss should be denied. Plaintiffs enjoy standing because they have suffered actual damage for which there is a remedy. Soverign immunity is waived under the APA, moreover, on principles of "non-statutory review," as well as the presence of a "final agency action."

Finally, although current case law supports the Government's argument, the case law should be reconsidered. The prevailing Commerce Clause jurisprudence, which destroys the "vertical balance of powers" so fundamental to the American form of government should be overturned and the MFFA, which concerns solely intrastate commerce, should be allowed to stand.

Dated this 12th day of April, 2010.

Respectfully Submitted,
SULLIVAN, TABARACCI & RHOADES, P.C.

By: */s/ Quentin M. Rhoades*
Quentin M. Rhoades
Pro Querente

CERTIFICATION OF COMPLIANCE
REQUIRED BY LOCAL RULE 7.1(d)(2)(E)

Pursuant to Local Rule 7.1(d)(2)(E) and 10.1(a), the undersigned certifies that the attached *PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO MOTION TO DISMISS* is proportionately spaced, has a typeface of Tahoma 14 points or more and contains 6,316 words and no more than 197 words per page.

Dated this 12th day of April, 2010.

Respectfully Submitted,
SULLIVAN, TABARACCI & RHOADES, P.C.

By: */s/ Quentin M. Rhoades*
Quentin M. Rhoades
Pro Querente

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2010, I served a true and correct copy of the foregoing on the following persons by the following means:

1	CM/ECF
	Hand Delivery
2	Mail
	Overnight Delivery Service
	Fax
	E-Mail

1. Alexander Kenneth Haas
   U.S. DEPARTMENT OF JUSTICE
   P.O. Box 883
   Washington, D.C. 20530
   Representing Defendant Eric H. Holder, Jr.

1. James Edward Brown
   John E. Bloomquist
   DONEY CROWLEY BLOOMQUIST & PAYNE UDA, P.C.
   Diamond Block ,Suite 200
   44 West Sixth Avenue
   P.O. Box 1185
   Helena, MT 59624
   Representing Weapons Collectors Society of MT (Amicus)

1. Mark L. Shurtleff
   OFFICE OF THE ATTORNEY GENERAL
   P.O. Box 142320
   Salt Lake City, UT 84114-2320
   Representing State of Utah & Other States (Amicus)

///

CERTIFICATE OF SERVICE
(continued)

1. Patrick T. Fox
DOUBEK & PYFER
P.O. Box 236
Helena, MT 59624
Representing State of Utah & Other States (Amicus)

1. Jeffrey T. Renz
CRIMINAL DEFENSE CLINIC
School of Law
32 Campus Drive
University of Montana
Missoula, MT 59812
Representing Montana Legislators (Amicus)

1. Jennifer W. Bordy
ATTORNEY AT LAW
7720 A Shedhorn Drive
PMB 132
Bozeman, MT 59718
Representing Montana Legislators (Amicus)

1. Duncan Scott
SCOTT & KIENZEL
1001 South Main Street
Kalispell, MT 59901
Representing Paragon Foundation, Inc. (Amicus)

1. Arthur V. Wittich
WITTICH LAW OFFICE
602 Ferguson Avenue
Suite 5
Bozeman, MT 59718
Representing Center for Constitutional Jurisprudence & Lawmakers from 17 States (Amicus)

CERTIFICATE OF SERVICE
(continued)

2. Anthony T. Caso
LAW OFFICE OF ANTHONY T. CASO
8001 Folsom Blvd
Suite 100
Sacramento, CA 95826
Representing Center for Constitutional Jurisprudence & Lawmakers from 17 States (Amicus)

1. Nicholas C. Dranias
GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
Representing Goldwater Institute Scharf-Norton Center for Constitutional Gov't., et al. (Amicus)

1. Timothy C. Fox
GOUGH SHANAHAN JOHNSON & WATERMAN
P.O. Box 1715
Helena, MT 59624-1715
Representing Goldwater Institute Scharf-Norton Center for Constitutional Gov't., et al. (Amicus)

1. Chris D. Tweeten
OFFICE OF THE MONTANA ATTORNEY GENERAL
P.O. Box 201401
Helena, MT 59620-1401
Representing Montana Attorney Gen Steve Bullock (Intervenor)

By: */s/ Quentin M. Rhoades*
Quentin M. Rhoades
Pro Querente