IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 10-36094

MONTANA SHOOTING SPORTS ASSOCIATION, SECOND AMENDMENT FOUNDATION, Inc., and GARY MARBUT
Plaintiffs/Appellants,

and

STEVE BULLOCK, Montana Attorney General,
Intervenor,

vs.

ERIC H. HOLDER, Jr.,
Attorney General of the United States
Defendant/Appellee.

On Appeal from the United States District Court
For the District of Montana, Missoula Division
The Hon. Donald W. Molloy, Presiding District Judge

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STATEMENT OF APPELLATE JURISDICTION

The district court for the United States District of Montana had original jurisdiction of this civil action because it arises under the Constitution and laws of the United States. 28 U.S.C. § 1331. The Court of Appeals has jurisdiction because this is an appeal of a final judgment, disposing of all claims of all parties, entered by the district court for the United States District of Montana, on October 19, 2010. 28 U.S.C. § 1291. The appeal in this case was timely filed on December 2, 2010. 28 U.S.C. § 2107(b).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Appellants 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.

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

STANDARD OF REVIEW

The court below granted Appellee's motion to dismiss for failure to state a claim. The standard of review is therefore *de novo*, "accept[ing] all factual allegations in the complaint as true and constru[ing] the pleadings in the light most favorable to the nonmoving party." *Winn v. Arizona Christian Sch. Tuition Org.*, 562 F.3d 1002, 1007 (9th Cir. 2009).

STATEMENT OF THE CASE

This is an appeal in a declaratory judgment action, reversal of the Government's decision, as well as injunctive relief.

Upon service of Appellants' complaint, the Government moved for immediate dismissal under FED. R. CIV. P. 12(b)(6). Thereafter, the Court entered its Case Scheduling Order setting a deadline of April 12, 2010, for the amendment of pleadings and the joinder of parties, as well as for Appellants' response briefing on the motion to dismiss and any *amicus curiae* briefing. Appellants timely filed their Second Amended Complaint on April 9, 2010. The opposition briefs of Appellants, Amicus Curie parties and the State of Montana, as Intervenors, were timely

filed. On May 18, 2010, the Government then filed its Reply Brief in Support of its Motion to Dismiss. Appellants then filed a Motion to Strike Portions of the Government's Reply Brief, or in the alternative allow a sur-reply. The parties then filed the appropriate responses and replies with respect to Appellants' Motion to Strike. The court denied the Motion to Strike but granted Appellants an opportunity to file a sur-reply, which was then filed on July 6, 2010. The Government's filed a timely response to the sur-reply. The magistrate granted the Governments Motion to Dismiss and dismissed the case in its entirety on August 31, 2010.

Appellants and the State of Montana objected to the magistrates findings and recommendations and the Government objected to Appellant's and the State of Montana's objections. The court ultimately issued its Order Adopting Findings and Recommendations of the Magistrate on September 29, 2010. On October 18, 2010, the Court issued its Memorandum and Opinion Granting the Government's Motion to Dismiss. A written Judgment was entered on October 19, 2010, and this appeal ensued.

STATEMENT OF THE FACTS

The case below was decided on a FED. R. CIV. P. 12(b)(6) motion to dismiss. The facts alleged in the pleadings are therefore undisputed, at least for purposes of this appeal. Those facts are as follows:

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 enactment, virtually identical versions of the MFFA were adopted in Tennessee (SB1610); Utah (SB11);Wyoming (HB95); South Dakota (SB89); Arizona (HB 2307); Idaho (HB589); and Alaska (HB 186). 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 23 other states, for a total of 31 jurisdictions where it has been enacted or introduced. (www.firearmsfreedomact.us)

Appellant Gary Marbut ("Marbut") and other members of Appellant Montana Shooting Sports Association ("MSSA") and Appellant Second Amendment Foundation ("SAF") 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,¶¶ 12-14; Dkt. No. 33.) 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 economic 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. (Declaration of Marbut, ¶¶ 11-17, Dkt. No. 86.2.)

Of course, Appellants could simply acquiesce, and obtain a federal license. But neither Marbut nor the members of Appellant MSSA or Appellant SAF are willing to submit to federal licensing and registration procedures, record keeping requirements and marking mandates, prospective consent to random search of premises by federal authorities, 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 Amend. Compl., ¶ 16; Dkt. No. 33.) 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, Appellants filed this action seeking both a declaratory judgment and a reversal of the Government's decision, as well as injunctive relief.

Upon service of Appellants' 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 Appellants' response briefing on the motion to dismiss and any amicus curiae briefing. Appellants timely filed their Second Amended Complaint on April 9, 2010. (Dkt. No. 33.)

SUMMARY OF THE ARGUMENT

Appellants enjoy standing because without the Government's licensing requirement they could immediately begin serving an anxious local marketplace. The economic damage done to them is always sufficient to confer standing. In addition, Soverign immunity is waived

pursuant to the Administrative Procedures Act, and even if it had not been, Appellants would still be entitled to "non-statutory review."

Finally, as to the merits, it has been said that "[i]n the tension between federal and state power lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S. 452, 459, 111 S. Ct. 2395, 2400, 115 L. Ed. 2d 410 (1991) (O'Conner, J.) Despite the verity of these wise words, the Supreme Court's Commerce Clause jurisprudence has improvidently altered the very form of American government, reading out dual sovereignty, and stripping from the State's all independence of policy or action. This arrogation of power in the national government robs the States of their Constitutional role in maintaining the promise of liberty. Because the jurisprudence opens the door to tyranny, it should be overruled, and dual sovereignty restored to the American form of government. Under current case law, however, the powers arrogated by Congress under the Commerce Clause have become "numerous and indefinite," and, as compared with the States' authority, are no longer "defined and few." The plenary-power case law should be overturned because powerless and dependent states cannot fulfil their

Constitutional functions as bulwarks against tyranny. The plenary-power case law also indirectly undermines the separation of powers.

A more reasonable approach would be to adopt the familiar intermediate scrutiny test for Tenth Amendment review. Under such a review, preemption of the MFFA fails. The purpose of both the NFA and the GCA are to fight local crime. There has been no showing of a substantial relationship between preemption and this goal. In addition, local crime control may be an important government interest – but not for Congress. In does not even have the power to fight local crime. Thus, neither prong of the intermediate scrutiny test can be met.

Finally, if the Court is not inclined to adopt an intermediate test, there is still a principled analysis that can be undertaken in service of federalism. *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) can be limited to its facts, as a national defense rather than purely Commerce Clause decision, and *Stewart II* thereby overruled in this limited context. Under such an approach, appellants should prevail under the ruling in *Stewart I*.

ARGUMENT

1. Appellants enjoy standing because without the Government's licensing requirement they could immediately begin serving an anxious local marketplace.

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). Finally, economic injury is always enough to satisfy standing: "When such tangible economic injury is alleged, we need not rely on the three factor test applied in *Thomas* and *San Diego Guns*."[2] *National Audubon Society v. Davis*, 307 F.3d 835,

[2] Note that *San Diego Guns* is the principal authority upon which the Government relies to support its standing arguments.

855 (9th Cir. 2002). Given both the fear of prosecution and the undisputed economic harm, Appellants have standing to sue.

In *Raich*, the plaintiff had standing even though she had "not suffered any past injury." 500 F. 3d at 857. Still, as here, she was "faced with the threat that the Government would 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, Appellants 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 to 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 Appellants 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 Amend. Compl., Exhibit A, p. 2.) Finally, these "threatened" injuries are both traceable to the Government's decision, and a reversal would "redress [Appellants'] threatened injury." *Raich*, 500 F.3d at 857. Appellants therefore enjoy constitutional standing.

The case of *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996) is not to the contrary. In that case, however, not only was there no actual economic harm, but there was held to be no specific action taken by which could have resulted in the plaintiffs being harmed. *Id.* at 1126-27. Here, 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*, Appellants enjoy standing to sue because they have been harmed; they have suffered and continue to suffer injury;

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

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

By its terms, Administrative Procedures Act ("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, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (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, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (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.

Finally, the factual allegations regarding standing and the consent of the United States to be sued are set forth in the Second Amended Complaint. For the purposes of the Government's motion to dismiss under FED. R. CIV. P. 12(b)(6), the Court should assume all facts pled in the Second Amended Complaint to be true, should resolve all doubts and inference in the pleader's favor, and should view the pleading in the light most favorable to the non-moving party. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499,

168 L. Ed. 2d 179 (2007). The pleading of tediously detailed factual allegations is not required. *Ashcroft v. Iqbal*, ____ U.S. ____, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Moreover, the pleader's memorandum or brief can be used to clarify allegations of the pleading to flesh out inferences that can be reasonably drawn from the pleadings. *Pegram v. Herdrich*, 530 U.S. 211, 229, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000).

The Government argues that the factual allegations of the Second Amended Complaint are insufficient to confer standing. In *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972), the Supreme Court upheld a standing based on claims that plaintiffs had chosen to forego recreational opportunities on the river in question, out of mere fear of exposure to pollution, even though the Court accepted the finding that there was, in fact, no basis for that fear. Thus, fear of prosecution, like a fear of pollution, results in standing. *See*, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 & n.14, 93 S. Ct. 2405, 37 L. Ed.

2d 254 (1973) and *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 231, n. 4, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986).

In this case, the fear of prosecution arises from the factual circumstances which Appellants have pled, and which underlay those facts. (*See* Sworn Declaration of Gary Marbut dated May 25, 2010, Dkt. 86.2.) Review of the declaration, and Exhibits attached thereto, makes clear that Appellant Marbut has the means and opportunity to manufacture firearms and ammunition under the MFFA. The correspondence he has received from the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives make clear that his fear has an objective basis. (*See*, Second Amend. Compl., Exhibits A and B; Dkt. No. 33.) It arises not only from his subjective reading of U.S. statutes, but from the reading of the executive agency charged with enforcement of the statutes, which has taken the time to communicate its views on prosecution of the actions he proposes to undertake.

These factual issues including the fear of prosecution, confer standing. *Sierra Club v. Morton*, 405 U.S. at 727. For example, *In Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (rev'd

on other grounds *sub nom. Washington v. Gluckburg*, 521 U.S. 702 (1997)), it was held that physicians had standing to contest an anti-euthanasia statute – even though there had been no threats to prosecute whatsoever. The physician cited *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973) and *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289 198-99 & 302, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979), correctly, for the proposition that no such threat was necessary.

B. Appellants are entitled to "non-statutory review."

The 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. § 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, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) (abrogated on other grounds, *Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (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 argued below that 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 failed to account, however, for non-statutory review under the APA of a 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, 112 S. Ct. 459, 116 L. Ed. 2d 358 (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 Appellants 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] [Appellants] 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

below, identified 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.

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3. Commerce Clause jurisprudence changed the very form of American government, reading out dual sovereignty, and stripping from the States all independence of policy or action. Because the jurisprudence opens the door for tyranny, it should be overruled, and dual sovereignty restored to the American form of government.

A. The powers granted to Congress under the Commerce Clause are now "numerous and indefinite," and, as compared with the States' authority, they are no longer "defined and few."

The Framers set up a federal form of government to guard against tyranny. *See, e.g., The Federalist Papers*, No. 47 (R.A. Ferguson, ed. 2006) (James Madison). Under the original federal system, there were two forms of federalism: horizontal and vertical. Under horizontal federalism, the national government was expressly divided into three coequal branches: the legislative, the executive and the judiciary. *See* Art. I, II and III, U.S. Const. The purpose was to prevent the concentration of unchecked power in the hands of an elite few. Chief Justice Warren taught of horizontal federalism thus:

> The Constitution divides the National Government into three branches-Legislative, Executive and Judicial. This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.

United States v. Brown, 381 U.S. 437, 442-43, 85 S. Ct. 1707, 1712, 14 L. Ed. 2d 484 (1965).

The second kind of federalism that was part of our original form of government was vertical, and is embodied in the concept of "dual sovereignty." As originally drafted, there was a separation of powers between the national government and the governments of the several states. "[T]he 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." *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869). Functionally, this form of federalism was implemented using a theory of enumerated powers. As the very first section of the of the very first article of the U.S. Constitution reads: "All legislative powers ***herein granted*** shall be vested in the Congress of the United States. ..." Art. I, § 1, U.S. Const. (emphasis added). Meanwhile, "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." Amend. X, U.S. Const. According to James Madison, the lawyer and statesman who, more than any other, is credited with composing the document, this means, "The powers delegated by the

proposed Constitution to the federal government are few ***and defined***." *The Federalist Papers*, No. 45, (R.A. Ferguson ed. 2006) (emphasis added). Madison continued: "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." *Id.* (emphasis added).

The first Chief Justice of the Supreme Court shared Madison's view: "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803) (Marshall, C. J.).

> This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.

M'Culloch v. Maryland, 17 U.S. 316, 405, 4 L. Ed. 579 (1819) (Marshall, C. J.). It follows from the enumeration of specific powers that there are

boundaries to what the Federal Government may do. *See, e.g.*, *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L.Ed. 23 (1824) ("The enumeration presupposes something not enumerated ..."). "Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered expressed by the Tenth Amendment's assertion that "[t]he 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."

Printz v. United States, 521 U.S. 898, 919, 117 S. Ct. 2365, 2376-77, 138 L. Ed. 2d 914 (1997). "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607, 120 S. Ct. 1740, 1748, 146 L. Ed. 2d 658 (2000) (Rhenquist, C.J.). Ultimately, Congress had no power to act unless the Constitution authorized it to do so.

The concept of dual sovereignty, however, no longer functions to preserve any authority in the States. One of the powers the

Constitution was said to delegate to Congress was the regulation of what the Framers called commerce "among the several states." Art. I. § 8, U.S. Const. ("Congress shall have the power to regulate commerce ... among the several states...") Under the Commere Clause, again according to Madison, the States delegated to Congress "superintending authority over the reciprocal trade of confederated States." *The Federalist Papers*, No. 42, p. 236 (R.A. Ferguson ed. 2006). In other words, "the Commerce Clause was designed to give Congress jurisdiction over the law merchant insofar as it pertained to inter-jurisdictional activities." Robert G. Natelson, *The Legal Meaning of 'Commerce' in the Commerce Clause*, 80 *St. John's L. Rev.* 789, 846 (2006).

But this is no longer the law. Despite the original understanding, and the jurisprudence for the first century and a half of the Republic,[3]

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[3] *E.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936)*; Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468 (1935); *Schechter Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038 (1932); *Oliver Iron Co. v. Lord*, 262 U.S. 172, 178, 179, 43 S.Ct. 526, 529, 67 L.Ed. 929 (1923); *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259, 260, 43

federal courts now insist the commerce power is "plenary, unsusceptible to categorical exclusions." *Morrison*, 529 U.S. at 640; 120 S. Ct. at 1766 (Souter J., dissenting). The plenary-power view has held sway "throughout the latter part of the 20th Century in the substantial effects test." *Id.* The Supreme Court confirmed the 20th Century case law in 2005, holding that: "Congress can regulate purely ***intra***state activity that is not itself 'commercial.'" *Gonzales v. Raich*, 545 U.S. 1, 18, 125 S. Ct. 2195, 2206, 162 L. Ed. 2d 1 (2005) (emphasis added) (citing *Wickard v. Filburn*, 317 U.S. 111, 128-129, 63 S.Ct. 82, 87 L.Ed. 122 (1942)). "Our case law firmly establishes Congress' power to regulate ***purely local activities*** that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.*, at 17, 125 S. Ct. at 2205 (emphasis added). As a result, "little may be left to the notion of enumerated powers." *Raich*, 545 U.S. at 47, 125 S. Ct. at 2223 (O'Conner, J., joinied by Rhenquist, C.J., and Thomas, J.,

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S.Ct. 83, 86, 67 L.Ed. 237 (1922); *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918); *Howard v. Illinois Central R. Co.*, 207 U.S. 463, 28 S.Ct. 141, 52 L.Ed. 297 (1907); *United States v. Steffens*, 100 U.S. 82, 25 L.Ed. 550 (1879). Cf. *United States v. Dewitt*, 9 Wall. 41, 19 L.Ed. 593 (1869).

dissenting.) Indeed, as Justice Thomas's dissent stated more pointedly, under the Court's plenary-power construction of the Commerce Clause, "the Federal Government is no longer one of limited and enumerated powers." *Id.*, at 58, 125 S. Ct. at 2229.

Thus, under current case law, "***everything*** is subject to federal regulation under the Commerce Clause." *United States v. Stewart*, 348 F.3d 1132, 1135 (9th Cir. 2003), abrogated *United States v. Stewart*, 451 F.3d 1071 (9th Cir. 2006) (emphasis added). This is true regardless of an activity's lack of any "commercial" element. *United States v. George*, 579 F.3d 962, 966 (9th Cir. 2009) (disapproving *United States v. Waybright*, 561 F.Supp.2d 1154 (D. Mont. 2008)); *United States v. Alderman*, 565 F.3d 641 (9th Cir. 2009), rehearing and rehearing *en banc* 593 F.3d 1141 (9th Cir. 2010). 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." *Alderman*, 593 F.3d at 1142 (O'Scannlain, Circuit Judge, dissenting from the order denying rehearing *en banc*), cert. den., 131 S. Ct. 700, 178 L. Ed. 2d 799 (2011).

An illustrative example of just how "unlimited" the Commerce Clause powers are today can be seen in the Ninth Circuit Court of Appeals' treatment of a decision reached by the District Court of Montana in *Waybright*. *Waybright*, 561 F. Supp. 2d 1154. In *Waybright*, Judge Molloy 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.

Id., 561 F.Supp.2d at 1164-65 (emphasis added). But in a later case arising out of Oregon, this analysis was summarily rejected:

> [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.

United States v. George, 625 F.3d 1124, 1131, fn. 2. Plenary-power analysis thus holds that local sex offenses are "commerce among the several states." *See* Art. I, § 8, U.S. Const.

The most recent instance is *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011):

> The Supreme Court has never required that a statute be a "comprehensive economic regulatory scheme" or a "comprehensive regulatory scheme for economic activity" in order to pass muster under the Commerce Clause. Indeed, it has never used those terms. The only requirement "which was expressly detailed in *Raich*" is that the "comprehensive regulatory scheme" have a "substantial relation to commerce." *See Raich*, 545 U.S. at 17, 125 S.Ct. 2195. The statute need not be a purely economic or commercial statute, as [the appellants] would have us believe.

San Luis & Delta-Mendota Water Auth., 638 F.3d at 1177 (emphasis added). "In sum, Congress has the power to regulate ***purely intra***state activity as long as the activity is being regulated under a general regulatory scheme that bears a substantial relationship to interstate

commerce." *Id.,* at 175 (emphasis added). Thus, the "jury-rigging of new and different justifications" is required to shore-up *Wickard v. Filburn* and its plenary-power progeny. *See Citizens United v. Federal Election Commission*, ___ U.S. ___, ___, 130 S.Ct. 876, 920-21 (2010) (Roberts, C.J., concurring).

The language and original intent of the Commerce clause allows Congress the authority only to "regulate commerce among the several states." The profound flexibility of the current rules, however, allows the Commerce Clause to be shaped, flaked and molded to serve any Congressional rationale. *See United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005). Congress now enjoys an unfettered plenary power, which, under the Supremacy Clause, Art. IV, § 2, U.S. Const., leaves the States helplessly impotent should they find themselves at odds with the United States Congress. "[T]he States as States retain no status apart from that which Congress chooses to let them retain." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588, 105 S. Ct. 1005, 1037, 83 L. Ed. 2d 1016 (1985) (O'Connor, J., dissenting). The American form

of government, therefore, no longer includes the concept of dual sovereignty.

B. The plenary-power case law should be overturned because powerless and dependent States cannot fulfil their intended functions as bulwarks against tyranny.

If case law were sacrosanct, of course, this discussion would be over. Fortunately, however, "*stare 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). Case law can and should be overturned if it supports an erroneous proposition of law, especially in the Constitutional arena "because in such cases 'correction through legislative action is practically impossible.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63, 116 S. Ct. 1114, 1127, 134 L. Ed. 2d 252 (1996). It is one of the great strengths of our system that courts can correct their mistakes:

> [W]e 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 should be corrected. It allows Congress to exclusively regulate any purely non-commercial, intrastate matter – like Sacramento River delta-smelt and local sex offenses – and in so doing wreaks havoc upon the "constitutional ideal" of federalism. *San Luis & Delta-Mendota Water Auth.,* 638 F.3d at 1177; *George*, 625 F.3d at 1131, fn. 2. Indeed, the 20th Century case law has simply overturned dual sovereignty. *See* e.g., *Garcia,* 469 U.S. at 583-584 (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.

In thinking about this question, and whether *stare decisis* should give-way to the restoration of federalism, the Court is urged to consider the magnitude and effect of the Constitutional error. The Framers' original system of dual sovereignty was intended as a careful balance of power between the States and the national government. At one time it

was considered 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, 110 S. Ct. 792, 795, 107 L. Ed. 2d 887 (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.

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

The Supreme Court itself has identified many practical advantages inherent in vertical 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, 111 S. Ct. 2395, 2399, 115 L. Ed. 2d 410 (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 Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 3147, 87 L. Ed. 2d 171 (1985) (emphasis added).

The principle was once as basic to that American system 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 arrogation of excessive power in the Legislative or Executive branches, a robust power residing in the States once served equally as an essential shield against government 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, p. 152 (R.A. Ferguson ed. 2006) (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. 290 (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 restored to ensure "tension between federal and state power," and for each "distinct government" to fulfil their respective Constitutional roles. Consequently, the plenary-power case law should be reconsidered, and where necessary to restore credible power in the States, overruled.

The Government may argue that it is not, in its current incarnation, tyrannical. The national government usually abides by the law, typically protects its citizens' rights, and always celebrates in its peaceful transfers of power. Whatever fear Appellants or anyone else may have of its becoming tyrannical, the Government may argue, is no more than disingenuous alarmism. Such an argument would be wrong.

The wholesale stripping of independent sovereignty from the States has destroyed the balance of power, and given the federal government advantages it demonstrably tends to abuse. The outrage that is our $14.5 ***trillion*** national debt[4] may be the worst example.[5] The borning cry of the American Revolution was "no taxation without representation!" By borrowing more money than the current generation

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[4] http://www.usdebtclock.org/

[5] For a graphic and startling illustration of a trillion dollars, see http://www.pagetutor.com/trillion/index.html

can repay in our lifetimes, Congress leaves a legacy of debt for future generations. Our progeny did not vote for the monumental hole their parents are digging for them. Still, they will certainly be saddled with the duty to make good. This is tyranny. And the destruction of dual sovereignty – starting with the New Deal case law of *Wickard*, *supra*, and *United States v. Darby*, 312 U.S. 100, 109, 61 S. Ct. 451, 454, 85 L. Ed. 609 (1941) – is at the root of it. Without the centralization of so much regulatory power in the federal government, it would be a lot less likely to occur.

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C. The plenary-power case law should be overturned because it indirectly undermines the separation of powers.

There is a second destructive result from the judiciary's willingness to change our form of government by fiat. The unconstitutional approach undermines the people's faith in their courts. "Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." *Planned Parenthood*

of Se. Pennsylvania v. Casey, 505 U.S. 833, 866, 112 S. Ct. 2791, 2814, 120 L. Ed. 2d 674 (1992). This too weakens federalism, because in the long run, if trust is lost in the courts, judicial authority will be diminished as the people become less willing to accept and live by the courts' decisions. *Id.* Thus, the judiciary's willingness to amend our form of government by decree erodes the horizontal federalism embodied in the separation of powers too – and ultimately the indispensable protections to individual freedom and the rule of law offered so singularly by the courts.

Granted, there are established academic principles that favor concentrating all economic power in Washington D.C., where officials can tinker with fiscal dials and monetary levers to keep the national economic engine humming. But that is not what the Framer's had in mind. More important, if those modern economic ideas are believed by the people to be beneficial, the Framers built into the Constitution specific, express mechanisms by which they could choose to hand power over to the central government Art. V, U.S. Const.; see Amend. I-XXVII, U.S. Const.

The Framer's federal form of government, with robust and ***independent*** powers resting with all the various governmental branches – both vertical and horizontal – is well worth any theoretical cost to macroeconomic efficiency. Indeed, federalism is recognized as "the unique contribution of the Framers to political science and political theory." *United States v. Lopez*, 514 U.S. 549, 575, 115 S. Ct. 1624, 1638, 131 L. Ed. 2d 626 (1995) (Kennedy, J. concurring). Individual freedom and the rule of law are served when different branches of government can compete for the people's allegiance, and if need be, intercede against branches that might abuse their power. *Gregory*, 501 U.S. at 459, 111 S. Ct. at 2400. A balance of powers requires the various constituencies to compromise, and it guards against their trampling on one another's Constitutional rights to freedom, due process and property. Whatever benefit we might gain by centralizing all power in the hands of a comparative few public servants in Washington, it is not worth the cost.

But even if the people ultimately disagree with the form of government designed by the Framers, the decision to change the form

is properly left with the people – and the express provisions within the Constitution allowing for its amendment – which they have accomplished many times. *See* Art. V, and Amend. XXVII, U.S. Const. It should not be undertaken by the federal judiciary, the branch of government ***least*** accountable to the people, by jury-rigging the Commerce Clause.

D. The intermediate scrutiny test should adopted for Tenth Amendment review, which test preemption of the MFFA fails.

Revisiting the case law will also have the benefit of honoring the Tenth Amendment. Chief Justice Marshall once observed: ""It cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury*, 5 U.S. (1 Cranch) at 174. As Justice Scalia recently remarked in a similar context: "what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct." *Dist. of Columbia v. Heller*, 554 U.S. 570, 636, 128 S. Ct. 2783, 2822, 171 L. Ed. 2d 637 (2008). The current approach to the Commerce Clause acknowledges that the Constitution is one of enumerated powers, and does not depend at all on the Tenth Amendment to

substantiate this conclusion. *Raich*, 545 U.S. at 38-39, 125 S. Ct. at 2218-19, 162 L. Ed. 2d 1.

Presuming Congressional action under the Commerce Clause is reviewed generally only under a "rational basis test." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16 (1973). If the Tenth Amendment is given additional meaning beyond what is expressed in the body of the Constitution, courts should take care to use a narrower lense and, if it finds more than one reasonable interpretation for the limits of an enumerated power, it should adopt the construction that is more respectful of the States' sovereignty. Given the importance of that federalism for individual ordered liberty, at the very least, courts should review any Congressional action which may undermine federalism on something less permissive than a rational basis analysis. One reasonable option is intermediate scrutiny.

Intermediate scrutiny is a level of review somewhere between strict scrutiny and rationality review. The Supreme Court has used intermediate scrutiny in context of Equal Protection Clause and First

Amendment. In the Equal Protection context, the Court has applied intermediate scrutiny to, for example, to laws that discriminate on the basis of sex, in *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996); and discriminations against aliens, *Application of Griffiths*, 413 U.S. 717, 93 S. Ct. 2851, 37 L. Ed. 2d 910 (1973). In First Amendment cases, the Court has applied intermediate scrutiny to content-neutral regulations, *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997); time, place, and manner regulations, *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); and regulations of commercial speech. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).

"To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 1914, 100 L. Ed. 2d 465 (1988). It has been said that "[t]he most striking feature of intermediate scrutiny is that, unlike strict scrutiny or rationality review, the tier of scrutiny that the Court decides to apply does not

predetermine the outcome of the case; with intermediate scrutiny, sometimes the state wins, and sometimes it loses." Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny As Judicial Minimalism*, 66 Geo. Wash. L. Rev. 298, 318 (1998).

In this case, an intermediate scrutiny test would place the burden on the Government, as the regulating party, to establish that preempting the MFFA bears a substantial relationship to an important governmental objective. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980). Here, the Congressional findings 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). Congressional findings are clear that the NFA and the GCA do not target commerce, but local police work. S. Rep. No. 1097, 9th Cong., 2nd Sess. 1968, 1968 U.S.C.C.A.N. 2112, 2113-14. Congress enacted these statutes to aid local law enforcement in highly populated states

where Congress saw crime skyrocketing. S. Rep. No. 1866, 89th Cong., 2d Sess. (1966).

There is, however, no finding by Congress, or evidence offered by the Government, to suggest that preemption of the MFFA will have any effect on – let along a substantial relationship with – the local crimes that the NFA and GCA were enacted to fight. Moreover, since MFFA firearms can, under the law's own terms, be manufactured, transferred and possessed ***only*** in Montana, they do not fall within the category of guns Congress enacted NFA and GCA to control. Congress has no power to target truly local criminal activity under the guise of controlling *interstate* traffic in guns. *See Morrison*, 529 U.S. at 617 and *Jones,* 529 U.S. at 858-59 (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). Since the Congress has no authority to regulate local crime, there can be no "important interest" in doing so. Local policing is not an important governmental objective of the U.S. Congress. Because there is no substantial effect on an important

Congressional interest in preempting the MFFA, the Government cannot satisfy the intermediate scrutiny test.

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

Appellants realize that in many respects, as regards the arguments so far made, the Court's hands are tied. Appellants advocate for the case law being overturned, and an intermediate scrutiny test being applied. But the relevant case law has been promulgated by the Supreme Court, whose decision are controlling. *See e.g.*, *United States v. Stewart*, 451 F.3d 1071, 1076 (9th Cir. 2006). Thus, even if the Court agrees with the reasoning, there are few remedies the Court is able to offer. One, however, would be to limit *Raich* to its facts, and distinguish it on grounds of its national defense implications.

To review the backdrop before which *Raich* was decided, beginning in 1995 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." The triumvirate of *Lopez*, 514 U.S. 575, 115 S. Ct. 1624;

Morrison, 529 U.S. 598, 120 S. Ct. 1740; and *Jones v. United States*, 529 U.S. 848, 120 S. Ct. 1904, 146 L. Ed. 2d 902 (2000). marked a remedial departure wholesale expansion of federal power, under the guise of the Commerce Clause, that had, as discussed above, left State sovereignty moribund. *See Wickard, supra; Darby, supra*. 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 appeared to change course again, turning back in the direction of absolute national government 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 international 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 involves more than

commerce, but also, in a very real sense expressly recognized by the Congress, 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 sufficiently dangerous to national security to require deployment of the U.S. military in aid of law enforcement, *id.,* it can 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 U.S. 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 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 in the differnce of the holdings in *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003) cert. granted, judgment vacated, 545 U.S. 1112, 125 S. Ct. 2899, 162 L. Ed. 2d 291 (2005)("*Stewart I*") and *Stewart*, 451 F.3d at 1076 ("*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, the judgment vacated, and the case 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 ruling in *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, under Montana law, leave the State of Montana legally, 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, as is discussed above, the Congressional findings and statements of power and purpose involve only the assistance of local policing. *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). Any invocation of Congressional power to control "commerce" in this context is simply a pretext relied upon to control strictly 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.

Since MFFA firearms are legally manufactured, transferred and possessed only in Montana, they do not fall within the category of guns Congress enacted NFA and GCA to control. If Congressional intent here is was to control "truly local" ***intra***state criminal activity – under the guise of controlling ***inter***state traffic in guns, it has overstepped its authority. *See Morrison*, 529 U.S. at 617 and *Jones,* 529 U.S. at 858-59.

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.

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 Amendments are intended to courter-balance the Supremacy Clause, and should lead courts to undertake a more serous review of powers claimed to be enumerated under the Commerce Clause. Indeed, it is the plenary-power 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 – has been materially weakened, and with it, a substantial portion of America's promise of liberty. *Gregory*, 501 U.S. at 459, 111 S. Ct. at 2400.

CONCLUSION

Accordingly, the Court is respectfully requested to:

1. Overrule the district court's decision to affirm the Attorney General's ruling that the Montana Firearms Freedom Act is preempted by the Gun Control Act and the National Firearms Act;

2. Remand the case, with directions to enter a declaratory judgement in favor of Appellants, and enjoin the Attorney General from prosecuting anyone who acts in compliance with the MFFA; and

3. Grant Appellants such other relief as may be apt in the circumstances.

DATED this 6th day of June, 2011.

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

By: */s/ Quentin M. Rhoades*
Quentin M. Rhoades
For Appellants

STATEMENT OF RELATED CASES

Appellant has/ has not found other cases in this Court deemed related to this matter.

DATED this 6th day of June, 2011.

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

By: */s/ Quentin M. Rhoades*
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CERTIFICATION OF COMPLIANCE REQUIRED BY CIRCUIT RULE 32(e)(4)

Pursuant to FED. R. APP. P. 28.1(e)(2) and 32(a)(7)(C) and Ninth Circuit Rule 32-1, the undersigned certifies that the attached Principal Brief is proportionately spaced, has a typeface of Century 14 points or more and contains 10,968 words and no more than 157 words per page.

DATED this 6th day of June, 2011.

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

By: */s/ Quentin M. Rhoades*
Quentin M. Rhoades
For Appellants

CERTIFICATE OF SERVICE

This is to verify that on this 6th day of June, 2011, a copy of the foregoing was duly served on the following persons by the following means:

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2	Mail
	Overnight Delivery Service
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