No. 10-36094

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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 Court of Montana, Missoula Division
The Hon. Donald W. Molloy, Presiding District Judge

AMICUS BRIEF FOR THIRTY MONTANA LEGISLATORS SUPPORTING REVERSAL

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GENERAL FACTS

The state of Montana made law House Bill 246, known as the Montana Firearms Freedom Act ("MFFA"), pursuant to powers granted to Montana under Article II, section II: "The people have the exclusive right of governing themselves as a free, sovereign, and independent state". Montana is a sovereign state subject to no authority over its own, other than federal laws made pursuant to the Constitution of the United States of America ("constitution").

The constitution enumerates the powers granted to the federal government, and under Article I, section 8, grants to Congress the power to regulate commerce among the states. The tenth amendment holds the constitutional principle that all powers not expressly delegated to the federal government are retained as originally possessed by the sovereign States.

The federal government made law making it unlawful for any person to engage in certain commercial activities within the interior of the several states, including Montana. Said federal law is United States Code Annotated, volume 26, chapter 5861, known as the National Firearms Act ("NFA"); and 18 U.S.C. § 44, known as The Gun Control Act of 1968 ("GCA"). Respectively, NFA and GCA make unlawful activities expressly exempted by MFFA. The federal government

expressed that those acting in pursuance to MFFA were still subject to arrest and prosecution.

Plaintiffs filed suit against the federal government in the United States District Court in Missoula, Montana seeking injunction and declaratory judgment against enforcement of federal laws opposing MFFA. The District Court in CV-09-147-DWM-JCL dismissed the Plaintiffs' suit upon several grounds, which included that MFFA violated a federal law passed pursuant to the commerce power of Congress. The District Court erred in its analysis and application of the commerce clause.

INTEREST OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a), Montana Legislators appear as amici curiae in this action; namely, Shannon Augare, Joe Balyeat, Joel Boniek, Taylor Brown, Roy Brown, Ed Butcher, Margarett Campbell, Jeff Essman, Gordon Hendrick, Greg Hinkle, Pat Ingraham, Verdell Jackson, Krayton Kerns, Deb Kottel, Gary MacLaren, Tom McGillvray, Robert Mehlhoff, Mike Miller, Michael More, Terry Murphy, Gary Perry, Ken Peterson, Lee Randall, Keith Regier, Cary Smith, Janna Taylor, Kendall Van Dyke, Wendy Warburton, Jeffrey Welborn, and Ryan Zinke. They have a substantial interest in implementing MFFA

and in the preservation of Montana's rights guaranteed in the constitution of the United States of America, including traditional police powers. The rights reserved to the States under the Tenth Amendment to the constitution are vitally important to the analysis of Congress' commerce power.

JURISDICTION STATEMENT

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).

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).

SUMMARY OF ARGUMENT

The constitution is a federal compact among sovereign States. The constitution was a delegation of limited power to the federal government. Sovereignty was reserved by the States, which cannot be implicitly waived and must be treated as inviolable. Rights under the tenth amendment are fundamental. Federal laws attempting to regulate purely internal affairs of States must be strictly scrutinized.

ARGUMENT

I. SOVEREIGN STATES CREATED THE CONSTITUTION

A. Constitution is Supreme Law of the Land

The Montana District Court incorrectly states, "[t]his Court is bound by the decisions of the United States Supreme Court and Ninth Circuit Court of Appeals"; and misstates the court's duty.[1] U.S. Const., Article VI, Section 2 states, "[t]his Constitution…shall be the supreme Law of the Land." To apply the supreme law, Article VI, Section 3 states, "[the] judicial Officers…shall be bound by Oath or Affirmation, to support this Constitution". These terms require the constitution to

[1] "Stare decisis is not…a universal, inexorable command." *Burnett*, 285 U.S. 393, 405-409 and notes (1932)(Dissent).

be the supreme law of the land; only laws passed pursuant to the constitution have constitutional supremacy.[2] Courts cannot adopt a judgment to the exclusion of the constitution's true meaning, as meant by the ratifying States.[3] The court must apply the correct *standard of review*.[4]

B. Court Must Find Constitution's Nature and Character

The court must find the true nature and character of the constitution,[5] the importance of which cannot be overstated.[6] Two theories exist:

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[2] "No legislative act…contrary to the Constitution, can be valid." Hamilton, Federalist Paper 78.

[3] "[Contemporaries of the Constitution] had the best…understanding of the framers of the constitution." See, *Ogden*, 25 U.S. 213, 290 (1827); *Powell*, 395 U.S. 486, 547 (1969); *Pollock* , 157 U.S. 429, 558 (1895); *South Carolina*, 199 U.S. 437, 448 (1905); *Mattox*, 156 U.S. 237, 243 (1895) (emphasis added). "[C]ourts must declare the sense of the law". Hamilton, Federalist Paper 7. "[W]e read [the constitution's] words…as the revelation of the great purposes which were intended". *Classic*, 313 U.S. 299, 316 (1941); "It is…duty of the judicial department to say what the law is." *Marbury*, 5 U.S. 137, 177-178 (1803). "[T]he people are entitled to rely upon the representations of the Founders and to repudiate them would constitution a fraud." Berger, *Federalism—The Founder's Design*, 5.

[4] "Laws are a dead letter without courts to expound and define their *true meaning and operation*." Hamilton, Federalist Paper 22 (Emphasis Added).

[5] "[Q]uestions of sovereignty are not the proper subjects of judicial investigation." Dillon, *Historical Evidence,* 20-21 (emphasis added).

[6] "[S]everal sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state." Vattel, *Law of Nations*, 85.

> "*First*. [T]he unit of sovereignty is the State [];the Constitution of the United States is a compact between the sovereign units [].
>
> "*Second*. [T]he Union is itself the unit of sovereignty, of which the States are subordinate parts".[7]

Congress' power to regulate purely internal affairs of the States is influenced by this determination.[8] Courts should find the constitution is a federal compact of sovereign States, which requires a strict scrutiny as shown herein.

C. Error: Constitution Formed by One Body-Politic

The one-body-politic theory has led to the "substantial affects" test and the elimination of the tenth amendment's purpose.[9] The Supreme Court wrongfully

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[7] Tucker, *The Constitution of the United States of America*, 178-179.

[8] "The great principles which Marshall developed [regarding] national power…were the following: '(1) *The constitution is an ordinance of the people of the United States, and not a compact of the states*…Of these several principles, *The first is obviously the most important and to a great extent the source of the others*." Corwin, *John Marshall and the Constitution*, 144-14 (emphasis added).

[9] Cp., "[State] government is to extend to every possible object[]: [] they have already delegated their sovereignty and their powers to their several [State] governments; and these cannot be recalled, and given to another, without an express act." 2 Jonathan Elliot, *The Debates In The Several State Conventions, On The adoption By The General Convention At Philadelphia In 1787* (Washington, D.C., 1836) supra note 9, at 362–63 (emphasis added) (Hamilton) (hereinafter "Debates"). U.S. Const., Art. I Sec. 8 Cl. 10, "Law of Nations".

expanded Congressional power using the one body-politic theory.[10] These courts undermined the expressed purpose of the tenth amendment, contradicting this principle: "this Court [cannot] pronounce the [Tenth] Amendment extinct."[11] The tenth amendment's purpose ensures the federal government does not encroach upon the States' rights.[12] Joseph Story expresses the incorrect position in *Martin v. Hunter's Lessee*,

> "The Constitution…was ordained and established not by the States in their sovereign capacities.***It is the voice of the whole American people."[13]

Federal power has reached levels which prove the "substantial affects" test is incorrect.[14] On this basis, Supreme Court decisions from the "Constitutional

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[10] "That the constitution was formed and adopted, not by the people of the United States at large, but by the people of the respective states…[is] difficult to sustain this proposition." *McCullough*, at 402-403 (emphasis added).

[11] *Heller*, 478 F. 3d 370 (2008).

[12] "It has been said that [Congress'] powers ought to be construed strictly. But why ought they to be so construed?" *Gibbons*, 22 U. S. 187 (1824). "[T]his supreme and irresistible power to make or to unmake [the constitution] resides only in the *whole body of the people, not in any subdivision of them.*" *Cohens,* 19 U.S. 264, 380, 389 (1821). (Emphasis added).

[13] 14 U. S. 304, 347 (1816); "Story['s position] is the correct one." *Butler*, 297 U.S. 1, 66 (1936).

[14] "It is very uncommon to see the laws and constitution of a state openly and boldly opposed: it is against silent and gradual attacks that a nation ought to be

Revolution of 1937" and thereafter eliminated the internal control by the States.[15] Political understanding in 1787 shows the error of the one-body-politic theory and consequently, the "substantial affects" rule as developed.

D. Constitution is a Federal Compact

The Supreme Court has observed the constitution was really formed by sovereign states creating a federation.[16] In *Collector v. Day*, the court observes,

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particularly on its guard." Vattel, *Law of Nations*, (London: Printed For G.G. And J. Robinson, Paternoster-Row. 1797). "[T]here is nowhere found upon the face of the constitution any clause intimating it to be a compact." *U.S. v. Cathcart*, 25 F.Cas. 344, 346 (C.C.Ohio 1864). "[T]he Tenth Amendment is not in itself a limitation on the otherwise constitutional powers of the United States." *U.S. v. Manning*, 215 F.Supp. 272, 283 (D.C.La. 1963).

[15] *NLRB*, 301 U.S. 1 (1937); *Davis*, 301 U.S. 548 (1937). Cp., "[T]hat the sovereign position of the States must find its protection in the will of a transient majority of Congress is…a negation of our constitutional system…The Constitution is a compact between sovereigns." *New York*, 326 U.S. 572, 594, 595 (1946) (Justices Douglas and Black dissent); "[T]he States and their institutions [must be] left free to perform their separate functions in their separate ways." *Younger*, 401 U.S. 37, 44-45 (1971).

[16] *Hammer*, 247 U.S. 251 (1918); A.L.A. *Schechter Poultry Corp.*, 295 U.S. 495 (1935); *Butler*, 297 U.S. 1 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936); *Parrish*, 300 U.S. 379 (1937). "'[N]otion of National-State equality became in due course a part of the constitutional creed of the Taney Court'." *Manning*, 215 F.Supp. 272, 282 (D.C.La. 1963). "Counties and other municipal corporations were created by the States; but the States were not created by the United States". Dillon, *Historical Evidence,* 28 (Justice Nathan Clifford). "Declaration of Independence was the joint and several act of the Colonies, and its effect was to constitute each separate colony a free and independent State." *Ibid*., 27 (Professor George Sharswood).

"we find a distinct grant from the States to the United States of sovereignty".[17] People comprise a State;[18] a specific society having borders, constitution and government; possessing sovereignty; and governing itself under the principles in the Declaration of Independence.[19] The Supreme Court says, "[t]his Union…is a union of States…[A] state may [not] be deprived of any of the power constitutionally possessed".[20] Other courts recognized the constitution as a *federal* compact.[21] To apply the proper standard of review then, the conclusion revolves around "*whether [the law] is consistent with the system of dual sovereignty established by the Constitution*."[22]

James Madison confirms the constitution was formed by States in their sovereign capacities, not one body politic. Responding to concerns that the constitution would replace the Articles of Confederation federal form with a national government, Madison rebuts, "by what authority this bold and radical

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17 78 U.S. 113, 116, 121 (1870).

18 "[S]tates are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage". Vattel, *Law of Nations*, 67.

19 "This is the broad basis on which our independence was placed: on the same certain and solid foundation this system is erected." Debates, 427 (James Wilson).

20 *Coyle v. Smith*, 221 U.S. 559 (1911) (emphasis added).

21 "[T]he Constitution established a system of dual sovereignty." *Printz*, 521 U.S. 898, 918 (1997) (Justice Antonia Scalia). "[T]he Tenth Amendment affirms…the Federal Government is one of enumerated, hence, limited, powers." *Id*., at 93 (Justice Thomas). See, *Hammer*, 247 U.S. 275 (1918).

22 *Condon*, 155 F.3d 453, 458 (4th Cir. 1998) (emphasis added).

innovation was undertaken?"[23] The constitution kept a federal form as in Articles of Confederation.[24]

The States were still not satisfied expressing the like: "[the necessary and proper clause is] ambiguous, and that ambiguity may injure the States…[I]t will by gradual accessions gather to a dangerous length."[25] Madison concludes thus,

> "[T]he Constitution is…founded on the assent and ratification of the people…composing the distinct and independent states to which they respectively belong…[T]he Constitution, will not be a NATIONAL, but a FEDERAL act."[26]

Madison recognizes the "principles of the Constitution [are] the *expansion of principles which are found in the Article of Confederation*."[27] Hamilton[28] reflects in Federalist Paper 85, "[the constitution] would still be an association of states, or

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[23] Madison, Federalist Paper 3 (Emphasis added). "[T]here is a great majority against the Constitution." 4 Debates, at 225, 226 (Samuel Johnston).

[24] "[The constitution] secures the liberty of *Virginia*, and of the United States". Debates, (emphasis added) (Richard Henry Lee).

[25] Debates, Edmond Randolph, supra note 85, at 1338, 1348 ("Is it not then fairly deducible, that [the federal government] has no power but what is expressly given it?").

[26] Madison, Federalist Paper 39.

[27] Madison, Federalist Paper 40 (emphasis added).

[28] "[The formation of the constitution] will therefore require the concurrence of thirteen States." Hamilton, Federalist Paper 85.

a confederacy…[with the states possessing] certain exclusive and very important portions of sovereign power."[29]

The constitution confirms its federal nature throughout. Given the constitution's federal form, "[t]he State government [should] have the advantage of the Federal government".[30] This reflected the political maxim: "[e]very nation that governs itself…is a sovereign state…[I]t govern[s] itself by it[s] own authority and laws."[31] The ratifying States felt the same: "as the states were the pillars upon which the general government must ever rest, their state governments must remain."[32]

II. STRICT REVIEW STANDARD REQUIRED

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[29] Hamilton, Federalist Paper 9 (emphasis added). "[T]wo thirds of the legislatures of the states in the confederacy may require Congress to call a convention to propose amendments…Without adoption we are not a member of the confederacy." Debates, (William Davie).

[30] Madison, Federalist Paper 45. "[T]he general government rests upon the state governments for its support." Debates, (Richard Law). "[T]he state governments must exist, or the general governments must fall amidst their ruins." Debates, (James Wilson).

[31] Vattel, *Law of Nations*, 83.

[32] 4 Debates, 256 (Charles Pinckney).

That a State may regulate its internal affairs is conclusive.[33] Congress' commerce power cannot destroy the States' internal control.[34] States are superior to Congress regarding their purely internal affairs.[35] Congress has no authority to judge their laws.[36] The State has the power; it may use its own means.[37] The Supreme Court ruled, "within the sphere of their jurisdiction, the States are [] independent of the Federal government."[38] "[W]here to draw the line" is crucial.[39]

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[33] Treaty of Paris 1783 and the U.S. Const., Amend. 10. "[T]he States should be regarded as distinct and independent sovereigns[.]" Madison, Federalist Paper 40. "The completely internal commerce of a State…may be considered as reserved for the State." *Gibbons*, 22 U. S. 194-195 (1824).

[34] "The one first and most sensibly felt [inconvenience of the Articles of Confederation] was the destruction of our commerce". 4 Debates, 253 (Charles Pinckney).

[35] "The two governments [state and federal] are upon an equality." *Collector*, 78 U.S. 113, 126 (1870).

[36] "Whether the policy…pursued by the State is wise or unwise…is not the province of the national authorities to determine." *Patterson*, 97 U.S. 501, 504 (1878); "Whether such regulations are wise and politic is not a question for this Court." *Brown*, 25 U. S. 419, 457 (1827).

[37] "All governments…must possess within themselves the means of…enforcing, their own laws." *Osborn*, 22 U. S. 818-819 (1824). "State governments…are invested with complete sovereignty." Hamilton, Federalist Paper 31. "[T]he United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a States…except [where] expressly granted." *Pollard*, 44 U.S. 212, 223 (1845). "[I]n a confederacy the people…[are] entirely the masters of their own fate." Hamilton, Federalist Paper 2. "[T]he power of a state to protect the lives, health, and property of its citizens…is a power originally and always belonging to the states…and essentially exclusive." *E.C. Knight Co.*, 156 U.S. 1, 11 (1895).

[38] *Collector* , 78 U.S. 113, 116 (1870); "The general government, and the States…are separate and distinct sovereignties, acting separately and independently

The States never even implicitly waived the right to regulate purely local activity,[40] including commerce. Recent Supreme Court decisions confirm "*the* ***'substantial effects' test should be reexamined***."[41]

A. Constitutional Standard Applies Ratifying States' Intent

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of each other, within their respective spheres." *Ableman*, 62 U. S. 516 (1858). "To [the states] nearly the whole charge of interior regulation is committed or left." *Lane County*, 74 U.S. (7 Wall.) 71, 76 (1868) (emphasis added).

[39] "That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." See, "where is the line?" *N.L.R.B.*, 301 U.S. 1, 30 (1937).See, 25 U. S. 453. "[T]he line cannot be drawn with sufficient distinctness." *Gibbons*, 22 U. S. 238.

[40] "[The federal government's] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." Madison, Federalist Paper 39. "[T]he congressional authority is to be collected, ***not from tacit implication***, *but from the* ***positive grant, expressed*** *in the [constitution]*." *The Bill of Rights and the States,* James Wilson on October 6, 1787, 26.

[41] *Lopez*, 514 U.S. 549, 589 (1995) (Thomas concurring) (emphasis added). See, "[T]he Constitution would [not] have been recommended by the Convention, much less ratified, if…the Commerce Clause embodied the National Government's 'central mission,'…at the expense of regulating the personnel practices of state and local governments." *EEOC*, 460 U.S. 226, 269 (1983) (Dissent Justice Thomas). See, *Garcia*, 469 U.S. 528, 560 (1985) (Dissent opinion of Justice Thomas); "The spirit of the Tenth Amendment…is that the States will retain their integrity…to protect the States. In the process, the Court opines that unwarranted federal encroachments on state authority are and will remain 'horrible possibilities that never happen in the real world.'" *Id*., at 558-559 (Dissent Justice O'Connor). "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory*, 501 U.S. 452, 457 (1991). "States are not mere political subdivisions of the United States". *New York*, 505 U.S. 144, 188 (1992).

The constitution is to be applied based upon the intentions of those who *ratified* the constitution: (1) sovereignty cannot be delegated except by *express conveyance*; (2) any interpretation of the delegated authority is to be strictly construed in favor of the principal;[42] (3) the States were assured the powers of the federal government would be strictly construed; (4) without inviolable sovereignty, the States would become mere political subdivisions of the federal government; (5) inviolable sovereignty violates the *Law of Nations* principle that "[o]f all rights that can belong to a nation, sovereignty is, doubtless, the most precious, and that which other nations ought the most scrupulously to respect, if they would not do her an injury".[43] Madison admits, "we must look for [the constitution's meaning]…in the State Conventions, which accepted and ratified the Constitution."[44] Local verses national matters were identifiably different:[45] "[T]here cannot be two sovereign

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[42] "[Sovereignty] can never [be given away] without the express and unanimous consent of the citizens." Vattel, *Law of Nations*, 123.

[43] *Ibid.*, 289.

[44] Lash, *Meaning of an Omission*, citing, 5 ANNALS OF CONG. 776 (1796) (Madison) (emphasis added).

[45] "[N]o more power was to be exercised than [the States] had delegated. And the ninth and tenth amendments to the Constitution were designed to include the reserved rights of the States [and] to bind the authorities." *Scott*, 60 U.S. 393, 511 (1856). "[C]omplete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts." *Carter*, 298 U.S. 238, 295 (1936); "I am as much opposed as anyone can be to any interference by the general government with the just powers of the State governments." *Collector*, 78 U.S. 113, 129 (1870) (Dissent Justice Bradley). "Were it proposed by the plan

powers on the same subject."[46] The provision, "among the states," in the commerce clause confirms the *local-verses-national* characterization.

B. States Reserved Sovereignty

States expressly reserved sovereignty for assurance.[47] Without constitutional amendments, Federalists proposed Congress would be *strictly restricted*.[48] Federalists proposed and the States accepted Congress would be limited in

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of the convention to abolish the governments of the particular States, its adversaries would have some ground for their objection." Madison, Federalist Paper 1. "The powers reserved to the several States will extend to all the objects which…concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." Madison, Federalist Paper 40. "[T]he people will be disinclined to the exercise of federal authority in any matter of an internal nature." Hamilton, Federalist Paper 27.

[46] Debates, (James Wilson).

[47] "[T]here are great and important powers, which were not…given up to the general government by this Constitution". Debates (George Mason). "[T]here is a great proportion of the people in the adopting states averse to [the constitution]." 4 Debates, 210 (Joseph M'Dowall). "There was a very ***necessary clause*** in the Confederation[,] ***declaring that every power, &c., not given to Congress, was reserved to the states***." 4 Debates, 206 (William Lenoir).

[48] "A proposition…that we were throwing into the general government every power not expressly reserved by the people, would have been spurned at…with the greatest indignation…In a government possessed of enumerated powers, such a measure would be not only unnecessary, but preposterous and dangerous." Debates, (James Wilson). "There are two kinds of government — that where general power is intended to be given to the legislature, and that where the powers are *particularly enumerated*. In the last case, the implied result is, that *nothing more is intended to be given than what is so enumerated*." Debates, (James Wilson).

authority and States would maintain an inviolable line of sovereignty.[49] Federalist Robert Goodloe Harper says,

> "[T]he essence of such a grant [in the constitution] to be ***construed strictly***, and to leave in the grantors all the powers, ***not expressly****…granted away*."[50]

John Adams expressed the *strict construction* method regarding Congress' powers:

> "'[A]ll powers not ***expressly*** delegated to Congress, are reserved to the several States'[:] *It is* ***consonant with the second article in the present Confederation****, that each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation* ***expressly*** *delegated to the United States*."[51]

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[49] "To argue upon abstract principles that this co-ordinate authority [of the states] cannot exist, is to set up supposition and theory against fact and reality." Hamilton, Federalist Paper 34; "Not less arduous must have been the task of marking the proper line of partition between the authority of the general and that of the State governments." Madison, Federalist Paper 37.

[50] Lash, *Meaning of an Omission*.

[51] Debates, 233 (emphasis added).

The Federalists advocated the constitution would remain in like nature as the Articles of Confederation.[52] Hamilton says, "*the State governments would clearly retain all the rights of sovereignty…which were not…**EXCLUSIVELY delegated** to the United States*."[53] James Iredell described Congress' powers to be more defined than the Articles of Confederation saying, "[the powers of Congress] are better defined than the powers of any government."[54] James Wilson thought the "states, will *enjoy as much power*, and more dignity, happiness, and security, than they have hitherto done [under the Articles of Confederation and prior]."[55]

Despite Federalists' objections to the tenth amendment, States declared, "Congress shall exercise no power but what is ***expressly*** delegated."[56] Good faith was not sufficient to restrain Congress' power.[57] Adams admits before ratification, "each state retains its sovereignty, freedom and independence, and every power,

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[52] "[T]he great principles of the Constitution…are found in the articles of Confederation." Madison, Federalist Paper 40.

[53] Hamilton, Federalist Paper 3 (emphasis added).

[54] 4 Debates. "The powers of the government are particularly enumerated and defined: they can claim no others but such as are so enumerated…[T]hey are excluded as much from the exercise of any other authority as they could be by the strongest negative clause that could be framed." Ibid., at 220.

[55] 4 Debate, (emphasis added).

[56] Debates (emphasis added)

[57] "I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities." Hamilton, Federalist Paper 17.

jurisdiction, and right, which is not, by this Confederation, expressly delegated to the United States Congress assembled."[58] In Virginia, delegates recognized, "if each power is *confined within its proper bounds*, and to its proper objects, an *interference can never happen*…[A]s long as they are limited to the different objects, *they can no more clash than two parallel lines can meet*."[59] Upon this assurance, proponents of the constitution supported it:

> "The Constitution effectually secures the states in their several rights…[The States] are the pillars which uphold the general system…[I]t seems impossible that the rights either of the states or of the people should be destroyed."[60]

This security comes by clear lines of separation regarding what is State-internal, as George Mason states,

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58 Debates, 178. "[Our founders] formed the design of a great Confederacy." Madison, Federalist Paper 1.

59 Debates, (Mr. Pendleton) (emphasis added).

60 Debates, (Oliver Wolcott).

> "[W]hat powers are reserved to the state governments, and *clearly discriminate* between them and those which are given to the general government…*to prevent future disputes and clashing of interests*."[61]

The tenth amendment would be non-effectual if Congress' power to regulate States' purely internal matters were not strictly construed.

C. Tenth Amendment Fundamentally Limits Congress

Without the tenth amendment's inclusion, the constitution's proponents knew Congress' powers were only those *expressly granted* by the States and would be *strictly construed* against them favoring the States.[62] James Iredell took the Federalist position: the tenth amendment was not needed given the strict construction standard regarding Congress' power. The Justice says,

> "[C]an a bill of rights be in this Constitution, where the people ***expressly declare*** *how much power they do give*, and consequently

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[61] Debates, (emphasis added).

[62] "[S]hould Congress attempt to exercise any powers…not expressly delegated to them, their acts would be considered as void, and disregarded." White, *To the Citizens of Virginia*. "Congress can have no power but what we expressly give them." 4 Debates, supra note 9, at 140–41 (Archibald Maclaine). "Congress cannot assume any other powers than those expressly given them, without a palpable violation of the Constitution". *Id*. at 142 (Samuel Johnston).

> *retain all they do not*?…[N]o power can be exercised, but what is ***expressly given***."[63]

Richard Henry Lee reflects, "the federal government [was] vested with *certain defined powers*[;] what were not delegated to those rulers were retained by the people."[64] Hamilton recognized a strict construction too, saying, "*whatever is not* ***expressly*** *given to the federal head, is reserved to the members*."[65]

The Federalists notwithstanding,[66] States believed a strict construction argument would not adequately protect them. Thomas Tredwell said,

> "The…misleading[] principle on which the advocates for this system of unrestricted powers must chiefly depend for its support, is that…whatever powers are not expressly granted or given the government, are reserved to the people."[67]

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63 4 Debates, supra note 9, at 148–49 (emphasis added).

64 Ibid.

65 2 Debates, 362.

66 "[I]n [state governments] no powers could be executed, or assumed, but such as were expressly delegated; [in the federal government], the indefinite power was given to the government, except on points that were by express compact reserved to the people." 4 Debates, supra note 9, at 259–60.

67 Debates.

Thus, John Lansing moved to amend the constitution: "no power shall be exercised by Congress, but such as is *expressly* given by this Constitution; and all others, not *expressly* given, shall be *reserved to the respective states*, to be by them exercised."[68] Ratifying States never thought Congress' powers would be construed liberally.[69] Imposing a loose construction upon Congress' regulation of purely internal affairs violates constitutional principles on which the States relied.[70]

III. "SUBSTANTIAL AFFECTS" VIOLATES CONSTITUTION

A. Original Understanding of Congress' Power to Regulate Commerce Among States

The tenth amendment was a final safeguard against federal encroachment on state sovereignty.[71] This is expressed by the Supreme Court.[72] In the first notable

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[68] Debates.

[69] "[N]or do I doubt that every amendment…principally calculated to guard against misconstruction the real liberties of the people, will be readily obtained." 4 Debates, at 223 (Iredell).

[70] "When those anxious to preserve broad autonomy over local self-government insisted that the Constitution granted only expressly enumerated powers, they were repeating the assurances of the advocates of the proposed Constitution. This…*is reliance*." Lash, *Meaning of an Omission*, 1920.

[71] "[A] negative or exclusive sense must be given to them or they have no operation at all." *Marbury*, 5 U.S. 137, 174 (1803).

[72] "[The states can] establish certain limits not to be transcended by those departments. The government of the United States is of [this] description." *Marbury,* 5 U.S. 137, 176 (1803); "This government is acknowledged…to be one

Supreme Court case on this issue, John Marshall explained the division between Congressional power and state sovereignty: "[Congress power] must be where the power is ***expressly given*** *for a special purpose.*"[73] This conclusion came even from the one-body politic presumption. Were the court to apply the federal theory, the conclusion would not expand Congress power any more than Marshall.[74] The interstate commerce clause expressly recognizes the States' right to regulate their internal commerce.[75] Thus, the Supreme Court should strike down federal laws

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of enumerated powers." *McCulloch*, 17 U.S. 316, 405; "'[T]hat the federal government is composed of powers specifically granted, with the reservation of all others to the states or to the people.' are propositions which lie at the beginning of any effort rationally to construe the Constitution." *Myers*, 272 U.S. 52, 63 (1926); "[O]ur Constitution is one of particular powers." *Knapp,* 357 U.S. 371, 375, 377 (1958); "[T]he limitation of congressional authority is not solely a matter of legislative grace." *Morrison*, 529 U.S. 598, 616 (2000); See, *Lopez*, 514 U.S. 549, 564 (1995). "[T]he powers which the general government may exercise are only those specifically enumerated." *Carter*, 298 U.S. 238, 291 (1936); "The power of the general government is only to be exercised for certain purposes, and then only under certain conditions." *Collector*, 78 U.S. 113, 117 (1871).

[73] *Gibbons*, 22 U. S. 204 (1824).

[74] "The completely internal commerce of a State [is] reserved for the State itself." *Id.*, 22 U.S. 1 (1824). "[I]f Congress can…regulate matters entrusted to local authority…our system of government [will] be practically destroyed." *Hammer*, 247 U.S. 251, 277 (1918). "[P]owers [will] often be of the same description, and might sometimes interfere. This…does not prove that the one is exercising, or has a right to exercise, the powers of the other." *Gibbons*, 22 U. S. 205 (1824).

[75] "[T]he framers of the Constitution did not intend to restrain the states in the regulation of their…internal government." *Woodward*, 17 U.S. (4 Wheat.) 518 (1819). "[A]uthority of the states over matters purely local is [] essential to the preservation of our institutions." *Hammer*, 247 U.S. 251, 275 (1918). "The power

which usurp State reserved powers.[76] However, a "new era" developed a constitutional rule mocking the nature of the constitution, turning the tenth amendment on its head.

B. 'Substantial Affects' Standard Is Erroneous

The recent rule expressed regarding Congress' power to regulate purely internal affairs of a State is discussed in *Raich*: "Congress has the power to regulate activities that substantially affect interstate commerce".[77] The "substantial affects" test has been used since 1937; was developed during a "new era"; and created a new constitutional standard. Its error is apparent considering the court's deference to Congressional findings, showing a liberal scrutiny standard.[78] What the constitution attempted to do by locking Congress in a place of limited power,

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of the states to regulate their purely internal affairs…is inherent and has never been surrendered." *Id.*, 275.

[76] "[T]hose [powers] not expressly granted…are reserved to the states." *Butler*, 297 U.S. 1, 68 (1936). "Congress is not empowered to [regulate] for those purposes…within the exclusive province of the States." *Gibbons*, 9 Wheat. 1, 199 (1824).

[77] *Raich*, 545 U.S. 1 (2005).

[78] "We have never required Congress to legislate with scientific exactitude. When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Raich*, 545 U.S. 1 (2005).

the "substantial affects" test provided the key to unlock, "superseding all local control or regulation of the affairs or concerns of the states."[79]

The Supreme Court should hold, "[the tenth amendment] is to be *considered fairly and liberally* so as to give effect to its scope and meaning".[80] Where the tenth amendment is to be construed *liberally*, Congress' power to regulate those affairs must be construed strictly. The Supreme Court observes,

> "[T]hat there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers…With equal determination, the framers intended that no such assumption should ever find justification in the organic act."[81]

The "substantial affects" test, coupled with the federal courts' deference to Congressional findings, is unconstitutional.

CONCLUSION

79 *Butler*, 77-78.
80 *Colorado*, 206 U. S. 90-91 (1907).
81 206 U. S. 90 (1907).

The court states in *Raich*, Congress need only have a "rational basis" in determining whether an activity would have a "substantial affect" on commerce among the States. The District Court states in our case at hand, "*Raich* and *Stewart* remain good law, and control this Court's analysis" (p. 46); and consequently, "Congress' power under the Commerce Clause is almost unlimited'" (p. 45). Fundamental rights expressed in the bill of rights encroached upon by Congress must be reviewed under strict standards of review. The tenth amendment is no less important than any other fundamental right[82] and cannot have a lesser standard of scrutiny. It must limit Congress from encroaching upon the States' sovereignty in like manner as any other test of strict scrutiny limits Congress from violating individual rights.

/s/ Timothy Baldwin
Timothy Baldwin, amicus attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 6,971 words.

[82] "The law of nations is…as much superior to the civil law, as the proceedings of nations and sovereigns are more momentous in their consequences than those of private persons." Vattel, *Law of Nations*, 18.

/s/ Timothy Baldwin
Timothy Baldwin, amici attorney

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae thirty state legislators, state they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

CERTIFICATE OF SERVICE

This is to verify that on this 13th day of June, 2011, a copy of the foregoing was duly served on the following persons by the following means: CM/ECF and Mail.

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No. 10-36094

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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 Court of Montana, Missoula Division
The Hon. Donald W. Molloy, Presiding District Judge

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

The Applicants, Shannon Augare, Joe Balyeat, Joel Boniek, Taylor Brown, Roy Brown, Ed Butcher, Margarett Campbell, Jeff Essman, Gordon Hendrick, Greg Hinkle, Pat Ingraham, Verdell Jackson, Krayton Kerns, Deb Kottel, Gary MacLaren, Tom McGillvray, Robert Mehlhoff, Mike Miller, Michael More, Terry Murphy, Gary Perry, Ken Peterson, Lee Randall, Keith Regier, Cary Smith, Janna Taylor, Kendall Van Dyke, Wendy Warburton, Jeffrey Welborn, and Ryan Zinke (hereinafter referred to as "Montana Legislators"), file this motion for leave to participate as amici curiae in support of Appellants in this matter. The amici curiae counsel has consent of Quentin Rhoades, attorney for Appellant, to file this amicus brief, but amici curiae does not know the position of the attorney for the United States. The Montana Legislators respectfully pray the Court grants this Motion and allow them to appear as amici curiae.

INTEREST OF APPLICANTS

The Applicants are members of the Montana Legislature who voted to approve the Montana Firearms Freedom Act, Section 30 20-101 to -106, MCA (2009) (hereinafter "MFFA"). The Applicants are both Republicans and Democrats. Some are attorneys. Various of the Applicants have been perceived as

liberals and as conservatives. Because they discussed, debated and supported the MFFA, the Montana Legislators have a particular interest in seeing its implementation.

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

The law, as passed by the Montana Legislature, is intended to allow Montana citizens to engage within their State in constitutionally protected activity without burdensome federal oversight and regulation of their solely intrastate activities. The Montana Legislators believe that their perspective in passing the law in reliance on various constitutional provisions as a basis for doing so, and their comment on the relationship between the Commerce Clause and the rights reserved to the people and their States under the Tenth Amendments to the United States Constitution are important to the Court's analysis of the issues in this case.

ARGUMENT

Reasons Why A Brief of Amici Curiae Is Desirable

"The district court has broad discretion to appoint (9th amici curiae. Hoptowit v. Ray, 682 F.12d 127, 1260 Cir. 1982) (inmates moved for appointment of amici, which the Court granted). In *Montana Shooting Sports Ass'n, Inc. v. Holder* (see district court case, No. CV-09-147-DWM-JCL, 2010 U.S. Dist. LEXIS 104301 (D. Mont. Aug. 31 2010), the Applicants would discuss the true meaning of the Tenth Amendment and the federal nature of the constitution, which led them to support the MFFA. They will also address the standard of review regarding the commerce clause relative to the States' internal police power in light of constitutional requirements. Section 30-20-102, MCA (2009) confirms the Applicants' findings in this regard.

Thus, The Montana Legislators' Participation would assist the Court to determine the commerce power issue in this case, which is vital not only to this state in this case, but to all the states for future laws and cases. The amici curiae brief is filed contemporaneously with this motion.

CONCLUSION

For the foregoing reasons, the Montana Legislators ask this Court to grant this Motion and permit them to appear as amici curiae in this case.

RESPECTFULLY SUBMITTED this 13th day of June, 2011.

/s/ Timothy Baldwin
Timothy Baldwin

CERTIFICATE OF SERVICE

This is to verify that on this 13th day of June, 2011, a copy of the foregoing was duly served on the following persons by the following means: CM/ECF and Mail.

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