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, the Attorney General of Montana,
Intervenor,
v.
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
Honorable Donald W. Molloy, Presiding District Judge

BRIEF AMICUS CURIAE OF WEAPONS COLLECTORS SOCIETY OF MONTANA IN SUPPORT OF PLAINTIFFS/APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Weapons Collectors Society of Montana states that is a nonprofit corporation organized under the laws of Montana and states further that it has no parent company and issues no stock.

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I. IDENTITY AND INTEREST OF WEAPONS COLLECTORS SOCIETY OF MONTANA

Pursuant to Fed. R. App. P. 29(a), counsel for all parties have been contacted and consent to the filing of this brief.

Weapons Collectors Society of Montana (hereinafter "WCSM") is a non-profit corporation formed under the laws of the State of Montana. Specifically, WCSM is an association of roughly 1,136 Montana hobbyists who have an interest in collecting and making firearms (ancient and modern), ammunition, weapon accoutrements, and other weaponry gathered and collected for public display and sale. WCSM sponsors most Montana gun shows. WCSM files this amicus brief in support of Appellants' appeal in the above-captioned matter.

WCSM members have an interest in making guns and ammunition for sale within the State of Montana. These manufacturing and selling activities are the types of activities that are at the heart of the present litigation. They are also the types of activities, which engaged in, subject WCSM members to regulation by federal authorities. As such, WCSM is dedicated to both promoting a proper understanding of the United States Constitution, particularly as to the jurisdictional limits of federal authority over Montana citizens, and to protecting its members from burdensome federal government regulation of their firearms manufacturing, selling, and collecting-related activities. Consequently, WCSM and its membership have a significant interest in upholding the Montana Firearms

Freedom Act (hereinafter "MFFA") (Mont. Code Ann. § 30-20-101, *et seq*. (2009) because that statute is important to the liberty interests of Montana citizens who make, collect, keep, and bear arms by protecting them from federal fines, forfeitures, and prosecution. WCSM and its membership participated in the lower court proceedings as an amicus party and, thus, cites to that participation as further authority for participating in the present action.

II. INTRODUCTION

This brief supports reversal of the District Court's order adopting the Magistrate Judge's findings and recommendations that granted the United States' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. *See*, Order, Cause No. CV 09-147-M-DWM-JCL (D.C. Mont. Sept. 29, 2010). This brief addresses the later legal point, arguing that Appellants have a cognizable claim for relief both under Amendment X of the United States Constitution (hereinafter "Tenth Amendment") and under the compact the United States of America reached with the State of Montana and its citizens at the time Montana was admitted into the Union in 1889. *See,* Mont. Const. Art. I.; 25 Stat. 676 (Feb. 22, 1889) (hereinafter "Compact").

WCSM submits this brief on the substance of the Appellants' claims with the goal of assisting this Court in moving beyond the Appellee's procedural challenges so that this Court will make a determination upon the merits of the

Appellants' Tenth Amendment claims. Namely, determine whether the Tenth Amendment serves as a limitation on the federal government's authority to regulate an activity (firearm manufacturing and the intrastate sale of such manufactured guns and ammunition), the regulation of which was clearly reserved to the State of Montana and its citizens at the time Montana joined the Union, and determine whether a federal agency's threat to fine and prosecute Montana citizens for engaging in lawful state-sanctioned activities is a breach of the Compact between the United States of America and Montana.

WCSM's position is that the MFFA represents a proper effectuation of the constitutional balance of power between the federal government and the State of Montana, ensuring that the federal government's regulatory authority over firearms manufacturing and sales is properly limited in scope to the historic understanding of the term "interstate commerce"[1], and that the State of Montana has the power, pursuant to the Tenth Amendment and pursuant to the Compact it reached with the United States, to secure to its citizens the right to lawfully manufacture and sell arms without the fear of federal enforcement.

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[1] In this, WCSM joins in Sections II and III of the Brief of Amicus Curiae Center for Constitutional Jurisprudence and Fifteen State Legislators (June 8, 2011), which asserts that the Framers had a much narrower intent for the scope of the Commerce Clause, Article I, Section 8, Clause 3, that intent being to prevent a state from laying duties on other states imports and exports and not as an independent source of power for purposes of the general government. *See*, Federalist No. 42 (J. Madison) (R.A. Ferguson ed. 2006).

Pursuant to Federal Rules of Appellate Procedure Rule 29(c)(5), the undersigned states that (1) a party or party's counsel did not author this brief in whole or in part; (2) a party or party's counsel did not pay for the costs associated with preparing/submitting this Brief; and (3) no other person, beyond amicus curiae, its members, or its counsel, contributed money to preparing this brief.

III. STATEMENT OF ARGUMENT

Congress has enacted two major federal statutes to regulate the commerce in, and possession of, firearms in the United States. These statutes are: 1) the National Firearms Act of 1934 (26 U.S.C. § 5801 *et seq*.) (hereinafter "NFA"); and 2) the Gun Control Act of 1968, as amended (18 U.S.C. Chapter 44, § 921 *et seq*.) (hereinafter "GCA"). Passed by the 2009 Montana legislature and enacted into law, the MFFA declares that small firearms, firearms accessories, and ammunition manufactured, sold, and maintained within the boundaries of the State of Montana (wholly intrastate activities) are not subject to federal laws, regulation, or jurisdiction, including provisions of the GCA and NFA.

This brief argues: 1) that the MFFA is a valid enactment under those powers reserved to Montana under the Tenth Amendment to regulate purely intrastate commercial activities and that, in light of those reserved powers, the Commerce Clause cannot, and should not, be read so broadly as to infringe on the right of Montana to exercise those powers; 2) that the State of Montana's Compact with the

United States imposes constraints on the Appellee's authority to regulate gun manufacturing and sales that are wholly intrastate; and 3) that subjecting Montana citizens to federal criminal and civil sanctions for acting in compliance with the MFFA runs afoul of the Compact reached between the U.S. and Montana.[2]

[2] WCSM notes that 18 U.S.C. § 927 (Effect on State Law) of the GCA states that no provision of the GCA indicates Congress' intent the Act is to be construed to occupy the field in which such provision operates to the exclusion of the law of any state on the same subject matter unless a Court concludes that there is a direct and positive conflict between such provision and the law of the state so that the two cannot be reconciled or consistently stand together. The lower court's decision concludes that there is a direct conflict between the MFFA and the GCA and the NFA. *See*, Findings & Recommendation of U.S. Mag. Judge, Cause No. CV-09-147-DWM-JCL, at 57 (Aug. 31, 2010). WCSM asserts this finding is error and joins in Parts 3B and 3C of Appellants' principal brief. In resolving this preemption question, the Court should ask itself this. Is the power granted to the federal government exclusively for the regulation of interstate commerce a power for the regulation of manufacturers? The statement of this question answers itself. A power granted for one specific purpose, regulation of goods passing between and among states, cannot be used to regulate another purpose – regulating the manufactures of goods made for wholly interstate purposes. Is not the act of manufacturing distinct from the act of selling goods into interstate commerce? If the acts are distinct, then how can the power to regulate one arise from a power to regulate the other? It is true that commerce and manufacturers are, or may be, intimately connected with each other. But, that is not the constitutional point at issue. The issue to be solved in Commerce Clause cases is whether Congress has the right to regulate that, which is not committed to it, under an enumerated power, which is committed to it, simply because there is, or may be, an intimate connection between the two powers. If this is admitted, the enumeration of congressional powers is wholly unnecessary and nugatory; and the result is that the powers of Congress embraces the widest extent of legislative functions, to the utter demolition of all constitutional boundaries between the state and national governments. *See*, Story, Joseph, Commentaries on the Constitution of the United States, Volume 2, § 1075 (1833).

A. Under the Tenth Amendment, Montana has the right and duty as a sovereign to enact legislation regulating wholly intrastate activities and to protect its citizens from overreaching federal authority.

The United States Constitution delegates specific powers to the federal government and reserves to the states the powers not delegated. *See*, *U.S. v. Lopez*, 514 U.S. 549, 552 (1995). One of the powers specifically delegated to the federal government in the Constitution, as granted by the Commerce Clause, is the authority to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3; *Lopez*, 514 U.S. at 552-559. Congress' commerce powers are broad; however, such powers are not unlimited. The Commerce Clause itself imposes constraints on Congress' authority to regulate wholly intrastate activities. *See*, *Lopez*, 514 U.S. at 563-568; *U.S. v. Morrison*, 529 U.S 598, 612-613 (2000). The limitation of Congress' commerce powers described by the United States Supreme Court in its holdings in *Lopez* and *Morrison* are premised on the Supreme Court's recognition of the constitutional balance of power between the federal government and the states, including the State of Montana.

In *Lopez* and *Morrison*, the Supreme Court recognized that Congress does not have a general power to regulate all activities conducted within the United States. The Court recognized also that states retain authority to regulate essentially what are in essence local matters. As stated by Justice Kennedy in *Lopez*, "it was the insight of the Framers that freedom was enhanced by creation of two

governments, not one". As Justice Kennedy stated also, "[t]he theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the federal government; the second between the citizens and the States." *Lopez*, 514 U.S. at 576. Thus, the Supreme Court determined in *Lopez* and *Morrison* that while the Commerce Clause grants Congress broad power to regulate interstate commerce, the Commerce Clause and other provisions of the United States Constitution expressly limit Congress' regulatory powers in order to carry out the Framer's intent to ensure that each state of the union retained its sovereign powers to regulate and to protect the individual freedom, public health, and welfare of its citizens. *See, Printz v. U.S.*, 521 U.S. 898 (1997); Federalist No. 32 (A. Hamilton).

One of those other provisions is, of course, the Tenth Amendment of the United States Constitution. The Tenth Amendment restates the Constitution's principle of federalism by explicitly memorializing that those powers not delegated to the United States, or prohibited by it to the States, are reserved to the States or to the people. The Tenth Amendment makes explicit: 1) the Framer's idea that the federal government is limited to only the powers delegated in the Constitution; and 2) that individual states, such as Montana, retain the right to enact legislation that is both a valid exercise of their retained regulatory powers and that exempts its citizens from federal laws and regulations when such laws and regulations go

beyond the reach of Congress's enumerated powers.[3] As the United States Supreme Court made clear in *U.S. v. Darby*, 312 U.S. 100, 124 (1941), the Tenth Amendment "states but a truism that all is retained which has not been surrendered." "There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers . . .." *Darby*, 312 U.S. at 124.

In the present case, the MFFA is a valid exercise of the State of Montana's retained powers under the Tenth Amendment both to regulate within its borders the commerce of the lawful and constitutionally protected activity of manufacturing and selling arms and ammunition and to protect its citizens from an unconstitutional overreach by the federal government by application of the provisions of the GCA and NFA to lawful activities carried out by Montana citizens when those activities are being conducted wholly within the boundaries of Montana. *See*, *e.g.*, *Printz*, 521 U.S. at 918-924, *citing* Federalist No. 39 (J.

[3] Congress recognized this jurisdictional limitation when it included § 927 in the GCA–intent not to preempt state law. So, too, should this Court recognize that Congress did not, in enacting the GCA and the NFA, intend to preempt state statutes, such as the MFFA, that are proper exercises of state power to regulate wholly intrastate commercial activities.

Madison) (While States surrendered powers to the federal government, states retained a "residuary and inviolable sovereignty which is reflected in the Constitution's text, namely the Tenth Amendment.")

The MFFA should be seen for what it is not. The MFFA is not an attempt by the State of Montana to use the Tenth Amendment to nullify either the GCA or the NFA or any provisions thereof.[4] Rather, the MFFA is a law that allows

[4] It is a well-established that federal laws are rarely declared unconstitutional, and thus, null and void, for violating the Tenth Amendment. As a rule of thumb, the Supreme Court has generally held that federal laws are unconstitutional under the Tenth Amendment when such laws compel the states to enforce federal statutes. *See, e.g.*, *N.Y. v. U.S.*, 505 U.S. 144 (1992) (Supreme Court invalidates a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on the grounds that the Act imposed an unconstitutional obligation on states to take title to any low-level radioactive waste within their borders that was not disposed of prior to a date certain and that made each state liable for all damages directly related to the waste). However, it is also well-established that Congress has, with the all-too-eagerness, assistance, and blessings of the judicial branch of government, pushed its regulatory and legislative reach under the Commerce Clause well beyond the reach envisioned by the Founding Fathers. Starting with *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82 (1942) (Congress can regulate the class of activities at issue when the activities "taken in the aggregate" substantially affect interstate commerce), the Courts have allowed Congress to expand its powers, using the Commerce Clause, to reach every aspect and activity of our lives, including, perhaps a citizen's decision *not* to participate in commerce, interstate or otherwise. *See*, *Florida ex rel. McCollum v. U.S. Dept. of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (challenge to the constitutionality of the Patient Protection and Affordable Care Act [Obamacare] and, specifically, the Minimum Essential Coverage Provision). The Courts have abdicated their duty to protect the concept of Federalism, and the time has come for the Judicial Branch of government to use the Tenth Amendment as the authority to limit Congress' powers to regulate to those powers actually enumerated. It is for this reason that WCSM joins in support of Sections 3B and 3C of Appellants' principal brief that call for overturning the plenary-power line of Commerce Clause cases, and for

Montana to regulate exclusively what the United States Supreme Court in *Lopez* would describe as a "local matter" – firearm production and trade conducted within Montana's borders. It is on this basis that this Court should determine that the MFFA represents what Justice Kennedy described in *Lopez* as the "discernable line of political accountability" between the citizens of Montana and the State of Montana; as a valid exercise of the State of Montana's reserved powers under the Tenth Amendment to regulate a purely local matter; as outside the reach of Congress' Commerce Clause powers; and, consequently, as not preempted by federal law as Defendant's claim. *See*, *e.g., Printz*, 521 U.S. at 923-924 (When federal law that is passed under the guise of carrying out the execution of the Commerce Clause violates principles of state sovereignty, it is not a law proper for carrying into execution the Commerce Clause. Thus, the federal law is not enforceable under the Necessary and Proper Clause (Const. art. 1, § 8, cl. 3 & 18).

B. The federal government's attempt to regulate firearm manufacturing and sales conducted wholly within the borders of Montana by means of forfeiture and criminal sanctions breaches the Compact the United States of America reached with the State of Montana and its citizens at the time Montana was admitted into the Union in 1889, the terms of which incorporate all powers reserved under the Tenth and Ninth Amendments.[5]

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limiting Congress' powers to those affirmatively granted to them by the States and the People.

[5] This argument represents a good-faith argument to extend and give substance to Ninth (Amendment IX) and Tenth Amendment judicial interpretation and meaning, and is further based on the Montana Legislature's invocation of the

As discussed above, the MFFA is a state legislative enactment that constitutes an express exercise of the powers reserved to Montana by the Tenth Amendment. The terms of the MFFA are further authorized and protected from federal preemption under the conditions of the Compact that the State of Montana reached with the United States upon its admission into the Union in 1889.

Montana joined the Union by means of a Compact with the United States. That Compact is memorialized and preserved in Article I of the Constitution of the State of Montana. The Compact reads:

> All provisions of the enabling act of Congress (Approved February 22, 1889, 25 Stat. 676) as amended and of Ordinance No .1, appended to the Constitution of the State of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by an Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

Mont. Const. art. 1. The Enabling Act of 1889 set forth the binding legal mechanism by which the people living in the territories of Montana, Dakota, and Washington could form constitutions and State governments and be admitted into the Union. *See*, 25 Stat. 676, as amend. (Feb. 22, 1889).

Montana's Compact with the United States is a bilateral, written contract or agreement which binds the parties (*i.e.*, the United States and the State of

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Compact theory and subsequent codification of the theory into law. Though raised by Amicus herein, the District Court did not address this argument.

Montana), to the terms of that Compact and creates obligations and rights capable of being enforced. Black's Law Dictionary 351 (4th ed., West 1951). The terms "compact" and "contract" are synonymous. *See*, *Green v. Biddle*, 21 U.S. 1 (1823).

Montana's Compact with the United States shares all points in common with a bilateral contract by and between private parties. That is, the Compact contains the contracting parties, the subject matter, consideration, mutuality of agreement, and mutuality of obligation. Montana's Compact with the United States is also analogous to a treaty, which is a binding agreement between nations or states, or between the treaty-making authorities of nations or states. *See*, Black's Law Dictionary 1674; "TREATY. An agreement or contract between two or more independent states, nations or sovereigns." It is a well-understood legal maxim that contracts must be interpreted to as to give credence to the intent of the contracting parties as that intent existed at the time of the contract and that the Court must give effect to that mutual intention. *See*, *Watson v. Dundas*, 2006 MT 104, ¶ 22, 332 Mont. 164, 136 P. 3d 973; s*ee, also*, Joseph Story, Commentaries on the Constitution of the United States, Nature of the Constitution–Whether a Compact, Bk. 3, ch. 3, § 331 ("One of the first elementary principles of all contracts is to interpret them according to the intentions and objects of the parties at the time of making."). This basic interpretation principle applies as well to

treaties. "Treaties should be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them." *See*, *DeGeofroy v. Riggs*, 133 U.S. 258, 271 (1890). While treaties are to be liberally construed, they are to be read in the light of the conditions existing when entered into, with a view to affecting the objects of the parties thereby contracting. *See*, *Rocca v. Thompson*, 223 U.S. 317, 331-332 (1912).

As evidenced by the adoption of the Compact and by the Enabling Act, Montana and the United States reached mutual assent in 1889 as to the terms of Montana's incorporation into the Union. As discussed immediately above, that agreement was reduced to writing and is recorded as Article I of the Montana Constitution. As part of that contract, and as a condition of becoming a state of the Union, the Montana territorial legislature, acting on behalf of the people of Montana, was required to approve Constitutional Ordinance 1. In the fifth paragraph, Ordinance 1 declared, "Fifth. That on behalf of the people of Montana, we in convention assembled do adopt the Constitution of the United States." In the proclamation of Montana's statehood dated November 8, 1889, then President Harrison specified and affirmed that Montana had, as a condition of statehood, been required to prepare a state constitution that "not be repugnant to the United States Constitution . . .".

Two of the provisions of the agreement between Montana and the United States were the incorporated provisions of the Tenth Amendment of the United States Constitution[6] and the Commerce Clause as those provisions were understood in 1889. Just as with any contract term, the terms of the contract are to be interpreted in light of the conditions existing when the contract was entered into. *See, Rocca*, 223 U.S. at 331-332. At the time of Montana's Compact with the United States, it is difficult to imagine that the parties to the contract understood the Commerce Clause to extend so far as to allow the federal government to regulate or prohibit firearm manufacturing and sales that occurred wholly within the State of Montana. In fact, it was not until some 40 years later, with the passage of the Federal Firearms Act of 1934, that the federal government first began to regulate the manufacture and transfer of firearms across state lines, which it did through taxing and registration requirements. *See*, 73rd Cong., Sess. 2, ch. 757, 48 Stat. 1236, enacted in 1934 and currently codified as amended as 26 U.S.C. ch. 53. Further, it was not until eighty years after the Compact that Congress enacted the Gun Control Act of 1968, which was the first federal law to broadly regulate the firearms industry, firearms owners and interstate commerce in gun manufacturing and dealing. *See*, P.L. No. 90-618, 82 Stat. 1213, enacted in 1968, and currently codified as amended as 18 U.S.C. ch. 44. Because these federal laws were both

[6] The wording of the Tenth Amendment and the Commerce Clause is the same in

passed well after enactment of the Compact, the laws and their accompanying federal regulations could not have been and are not a part of the Compact. Consequently, there is neither an express basis under the Compact for the federal government to use those laws as the means to preempt, and thereby invalidate, the MFFA, nor is there any basis for them to interpret the Compact to allow for that action. *Accord*, *Printz*, 521 U.S. at 918 (historical record and understanding tends to negate the existence of the congressional power asserted by the federal government in this case).

Further, the Tenth Amendment was a part of the Constitution of the United States that was adopted and accepted by Montana in 1889 by means of Ordinance 1. The Tenth Amendment reserves to the State of Montana the ability and right to regulate intrastate commerce. As of 1889, the date of the execution of the Compact (and arguably as of 2011), Congress had not expressly preempted state regulation of intrastate commerce pertaining to the manufacture and sale of firearms, firearms accessories, and ammunition conducted wholly within the State of Montana. And, there is little question that residents and citizens of Montana were, at the time Montana became a state of the union, engaging in the manufacture and intrastate sale of firearms and ammunition. For example, historical research shows that Walter Cooper, an early Montana settler and

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2011 as the wording was in 1889.

businessman, established a rifle manufacturing and sporting goods business as far back as 1868. *See*, Walter Cooper and Eugene F. Bunker Papers, 1886-1956, Mont. St. U. Lib., Collection 1250. Also, Alexander D. McAusland arrived in Miles City, Montana Territory in 1879 and thereafter opened the Creedmoor Armory, which was a gunsmithing business. *See*, Samuel Gordon, Recollections of Old Milestown (1918).

The United States/Montana Compact was reached at a point in time well before the Supreme Court began to give the Commerce Clause an expansive reading, which culminated in the decision in *Wickard v. Filburn,* 317 U.S. 111 (1942). Prior to the date that the Supreme Court rendered its decision in *Wickard*, the WCSM is not aware of authority which held that the Commerce Clause reached so far as to allow Congress the legal and constitutional basis to preempt local and state firearms laws, similar to the MFFA at issue here, that were designed to promote the commercial availability of, and the ownership of, arms within a state.

Consequently, applying general contract interpretation principles, because there was likely no understanding to the parties to the Compact that Congress had the authority to regulate the intrastate manufacturing and sale of arms and ammunition that was occurring within the boundaries of Montana in 1889, such

federal authority is not a part of or a provision of the Compact.[7] Accordingly, the federal government's assertion that the GCA and NFA preempt and invalidate the MFFA is in conflict with the Compact agreed upon by and between the United States and Montana and, in fact, breaches the terms of that Compact.[8]

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[7] The best indication of the parties understanding of the limited regulatory reach of the Commerce Clause to purely intrastate commercial activities as of 1889 is shown by the United States Supreme Court's decision in *A. L. A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935). There, the Supreme Court struck down the National Industrial Recovery Act as unconstitutional, in part, on the grounds that the Act exceeded the power of Congress to regulate interstate commerce and invaded the powers reserved exclusively to the States. The Court found that Defendants business acts of slaughtering chickens bought in a market supplied from other states and then selling them to local retailers which, in turn, sold them to consumers were business acts that only indirectly impacted interstate commerce. *See, id*. at 542. Therefore, the Court held that the regulation of that intrastate business activity was the exclusive providence of the State of New York, as to find otherwise would be to find that New York State's authority over domestic matters would exist only at the sufferance of the federal government. *See, id*. at 546.

[8] To state this argument more simply, it cannot be fairly disputed that firearms making and selling was occurring within the boundaries of Montana in 1889. Those manufacturing activities were not regulated by the federal government at that time. Today, in order to engage in those activities, a Montana citizen would be required to obtain a federal license and permission under the GCA and NFA as such activities relate to the manufacture and sale of ammunition, and in regards at least to commercial gunsmithing, if not actual manufacturing and sale of whole firearms. It is difficult to envision that those who negotiated the terms of the Compact in 1889 did not understand that the State reserved the right to regulate those firearms manufacturing/selling activities within Montana at the time of the making of the Compact or had agreed the People of Montana had given up forever their ability to make and sell firearms without first obtaining the federal government's permission. It is unlikely that the negotiators to the Compact understood the text of the U.S. Constitution to allow the federal government to regulate in any way the right to make, keep, bear, and sell arms. Indeed, it could be argued that Montana would not have agreed to join the Union if the federal

Further, there is no indication that the Montana territorial legislature, negotiating on behalf of the people of Montana, understood the Compact to allow the federal government to subject Montana citizens to federal civil and criminal penalties for engaging in the business of manufacturing firearms and ammunition for commercial sale wholly within Montana–as those penalties are contemplated and set forth in the GCA and NFA. In fact, the express terms of Montana's Constitution indicates otherwise.

When Montana entered into statehood and adopted the Compact as part of Montana's Constitution of 1889, the people of Montana, acting through their territorial representatives, included a provision guaranteeing every Montanan the right to bear arms. Montana indicated its intent to reserve the right of its citizens to bear arms by adding Article III, Section 13 to the 1889 Montana Constitution. The language of Article III, Section 13 was exactly the same language as used in the territorial Montana Constitution of 1884. This language was unchanged in the revision and ratification of the Montana Constitution in 1972, with the Right to Keep and Bear Arms provision being placed at Article II, Section 12.

Montana's reservation of the right of its citizens to keep and bear arms is consistent with the Amendment II (hereinafter "Second Amendment") of the

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government had, at that time, suggested that it was going to enact legislation similar to the GCA or NFA that subjected Montana citizens to federal criminal prosecution and civil penalties for engaging in local firearms dealing.

United States Constitution, as that latter Amendment was understood in 1889, to allow for the individual right to bear arms free from federal government regulation, thereby giving further evidence of Montana's intent to reserve to itself in the Compact the power granted by the Tenth Amendment to right to regulate the manufacture and sale of arms and ammunition free from federal intrusion. Montana's admission into the union was premised on the understanding that the people of Montana would benefit from an individual right to bear arms as protected by the Second Amendment and by the Montana Constitution, and that the State would, under the Tenth Amendment, retain its police power to regulate the intrastate manufacture and sale of guns and ammunition, such as by means of the MFFA. It was also premised on an understanding that the ability of Montana's citizens to engage in such commercial activity would be protected from federal government encroachment due to the rights reserved to the people under the Ninth Amendment *See*, *e.g. Acme, Inc. v. Besson*, 10 F. Supp. 1, 6 (D. N.J. 1935). The Appellee's threat to fine and prosecute Montana citizens for manufacturing and selling firearms in a manner that complies with the provisions of the MFFA[9] both conflicts with the intent of the makers of the Compact and constitutes a breach of the terms of that Compact.

[9] *See*, 2nd Amend. Compl., Ex. A; Dkt. No. 33 (letter from ATF to Marbut).

The MFFA can be viewed as a simple exercise of its sovereign authority, authority which Montana retained under the Compact with the United States as authorized by the Tenth Amendment.[10] That is, the Act can be seen both as an exercise of the right reserved to Montana in the Compact to exercise its enumerated power to regulate the intrastate dealing of firearms and ammunition and a demand that the federal government, acting through the ATF, recognize that right by withdrawing its assertion that it has the authority to regulate firearm production and trade wholly occurring within Montana. The Court should recognize that Montana's Compact is a contractual limitation on the Appellee's authority under the Commerce Clause and the Necessary and Proper Clause to displace a Montana law premised on the exercise of enumerated constitutional rights reserved to the State of Montana by that Compact, and thereby reject the Appellee's MFFA preemption challenge. *See*, *e.g.*, J. Powell's dissent in *Garcia v. San Antonio Metro. Transit Auth., et al*. 469 U.S. 528 (1985) (wherein Justice Powell criticizes both the majority's failure to recognize any limiting role of the Tenth Amendment and the Court's reading of the Commerce Clause as to be so broad as to allow the federal government to intrude into areas of regulation

[10] The MFFA can also be viewed as Montana's demand for the contract remedy of specific performance of the terms of the Compact by the U.S. That is, it is a demand that the Appellee recognize the sovereign authority reserved by Montana in the Compact to regulate the activity of firearms manufacturing and selling conducted within Montana.

traditionally left to the states.)[11]

As shown by the enactment of the MFFA and similar legislation, there is a renewed interest in the Tenth Amendment and its substantive meaning. The United State's Supreme Court's decision in *Garcia* (*supra*) stands as the last meaningful decision on the analytic framework to be applied to state sovereignty challenges and whether the Tenth Amendment serves as a substantive limitation on the reach of Congress' power under the Commerce Clause.[12] There, the United States Supreme Court left it to future courts, such as this one, to determine whether a particular federal regulation may be "destructive of state sovereignty or violative

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[11] As an example of Justice Powell's criticism, Powell writes: "The Tenth Amendment was invoked to prevent Congress from exercising its "power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." "This Court has recognized repeatedly that state sovereignty is a fundamental component of our system of government. More than a century ago, in *Lane Co. v. Or.,* 74 U.S. 71 (1869), the Court stated that the Constitution recognized "the necessary existence of the States, and, within their proper spheres, the independent authority of the States. "It concluded, as [James] Madison did, that this authority extended to "nearly the whole charge of interior regulation . . . ; to [the States] and to the people all powers not expressly delegated to the national government are reserved." *Id.* at 74 U. S. 76; *Garcia*, 469 U.S. at 573 (J. Powell dissenting).

[12] *Garcia* involved the question of whether a local public transit authority was immune from federal minimum wage and overtime pay provisions. But, as discussed in the three dissenting opinions, the case implicated the larger questions of the concept of Federalism and whether state sovereignty and the division of regulating authority between the federal and state governments under the Tenth Amendment serve as a limitation on the reach of regulation passed under the authority of the Commerce Clause.

of any constitutional provision". *Garcia*, 469 U.S. at 554. WCSM respectfully suggests the Appellee's assertion the MFFA is preempted presents just such a case relating both to the destruction of Montana's sovereignty and to liberty rights reserved by the Compact and by the Tenth Amendment.

IV. CONCLUSION

The MFFA is a valid exercise of Montana's Tenth Amendment reserved power. This power being the right to regulate wholly intrastate commerce and to protect its citizens' enumerated Second Amendment right to bear arms, and Ninth Amendment reserved right to engage in firearms manufacturing and sales activities within Montana as those rights are set forth in the MFFA free from overreaching government regulation.

These powers were further reserved to the People and the State as a matter of contract through creation and adoption of the Compact with the United States that is recorded at Article I of the Montana Constitution. At the time of its making in 1889, it was the understanding of the parties that the United States Constitution would not be construed by the federal government to deny or disparage the rights reserved by the people of Montana and by the State, including the right to regulate and engage in the intrastate manufacture and sale of guns and ammunition. The Compact states on its face that it may not be amended without consent of both the State of Montana and the United States, acting through its agents. The Appellee's

assertion the MFFA is preempted by federal law is an attempt to unilaterally amend that contract to vitiate the State of Montana's power to regulate wholly intrastate commerce and is, therefore, unenforceable. The attempt by the Appellee to regulate such activities within the borders of Montana by means of asserting forfeiture and criminal sanctions under the GCA and NFA is a breach of the Compact, the remedy for which is upholding the MFFA.

DATED: June 13, 2011.

s/ John E. Bloomquist
John E. Bloomquist
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CERTIFICATE OF COMPLIANCE

1. This amicus brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,547 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii).

2. This amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in font style Times New Roman and font size 14.

DATED: June 13, 2011.

s/ John E. Bloomquist
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CERTIFICATE OF SERVICE

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

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

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