No. 10-36094

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA SHOOTING SPORTS ASSOCIATION; SECOND AMENDMENT FOUNDATION, INC.; GARY MARBUT,

Plaintiffs-Appellants,

and

STEVE BULLOCK, Montana Attorney General,

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

BRIEF FOR APPELLEE

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STATEMENT OF JURISDICTION

Plaintiffs filed suit on October 10, 2009, seeking declaratory and injunctive relief permitting them to manufacture and sell firearms and ammunition under the Montana Firearms Freedom Act without complying with federal firearms laws. Plaintiffs invoked the district court's federal question jurisdiction under 28 U.S.C.

§ 1331. The district court entered a final order granting the government's motion to dismiss on October 18, 2010. GRE 8.[1] Plaintiffs filed a timely notice of appeal on December 2, 2010. ER 1; *See* Fed. R. App. P. 4(a)(1). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The Montana Firearms Freedom Act declares that a personal firearm or ammunition manufactured in Montana that remains within the borders of Montana is not subject to federal law. Plaintiffs seek a declaration that they may manufacture and sell firearms and ammunition within the scope of the Montana statute without complying with the requirements of federal law and seek an order that would enjoin any future prosecution for their violations of federal law. The questions presented are the following:

1. Whether plaintiffs have failed to demonstrate a genuine threat of imminent prosecution or tangible economic injury that would establish their standing to bring this pre-enforcement challenge.
2. Whether Congress may, in the exercise of its Commerce Clause power, regulate firearms and ammunition manufactured in Montana that have not crossed state lines.

[1] "ER" refers to Appellants Excerpts of Record. "GRE" refers to the Government's Supplemental Excerpts of Record.

STATEMENT OF THE CASE

The Montana Firearms Freedom Act states that "[a] personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of [C]ongress to regulate interstate commerce." Mont. Code Ann. § 30-20-104.

Plaintiffs in this action are an individual, Gary Marbut, and two organizations, the Montana Shooting Sports Association and the Second Amendment Foundation. They seek a declaratory judgment that Congress is without authority "to regulate the special rights and activities" described in the Act. GRE 22. Plaintiffs also seek to enjoin the "prosecuti[on] of any civil action, criminal indictment or information" under federal firearms laws against persons manufacturing and selling firearms as contemplated in the Act. *Ibid.* The State of Montana intervened under 28 U.S.C. § 2403(b) to defend the constitutionality of the Montana Firearms Freedom Act.

In August 2010, a magistrate judge recommended that the case be dismissed. The judge first concluded that plaintiff Marbut did not have standing because he had not demonstrated a credible threat of prosecution or an economic injury, ER 34-45, and that the two organizational plaintiffs had failed to demonstrate that any of their members would have standing in their own right, ER 46. The judge further concluded

that plaintiffs had failed to state a valid claim, explaining that the challenged firearms laws fell within Congress's Commerce Clause authority. *See* ER55-56.

The district court adopted the findings and recommendations of the Magistrate Judge. The court first noted that plaintiffs had not properly objected to the Magistrate Judge's findings and recommendations. Considering the issue raised by the State of Montana, the district court determined that the fact that guns manufactured in Montana would bear the stamp "Made in Montana" had no bearing on the Commerce Clause analysis as "guns manufactured in accordance with the Montana Firearms Freedom Act would be interchangeable economic substitutes with other firearms, regardless of the existence of a stamp indicating the weapon was 'Made in Montana.'" GRE 7. Plaintiffs filed a timely notice of appeal. ER 1.

STATEMENT OF THE FACTS

I. Statutory and Regulatory Background

A. Federal Firearms Regulation

Congress regulates the sale and manufacture of firearms and ammunition through a comprehensive national regulatory scheme put in place by the National Firearms Act and the Gun Control Act of 1968. The National Firearms Act, enacted in 1934, requires parties manufacturing or transferring firearms (as defined in the Act) to submit an application for such transactions. *See* 26 U.S.C. §§ 5811-22. The National Firearms Act also requires the registration of such firearms. 26 U.S.C. § 5841. In

enacting the National Firearms Act, Congress sought to target "lethal weapons . . . [that] could be used readily and efficiently by criminals or gangsters." H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), 1954 U.S.C.C.A.N. 4017, 4542 (amending provisions for registration and tax on National Firearms Act firearms).

In 1968, Congress enacted the Gun Control Act, 18 U.S.C. §§ 921 *et seq.*, to "regulate more effectively interstate commerce in firearms so as to reduce the likelihood that they fall into the hands of the lawless or those who might misuse them"; "assist the States and their political subdivisions to enforce their firearms control laws and ordinances"; and "help combat the skyrocketing increase in the incidence of serious crime in the United States." S. Rep. No. 1866, 89th Cong., 2d Sess. 1, at 1 (1966).

To these ends, the Gun Control Act requires that individuals "engag[ing] in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition" receive a license to do so from the Attorney General. 18 U.S.C. § 923(a). The Gun Control Act makes it unlawful for anyone other than a licensed firearms importer, manufacturer, or dealer to "engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce." 18 U.S.C.

§ 922(a)(1)(A)."[2] To become a licensed manufacturer or dealer, an individual must submit an application, including a photograph and fingerprints, to the Federal Firearms Licensing Center. *See* 27 C.F.R. §§ 478.41-.60. If the applicant meets the statutory requirements and pays the required fee (for example, $50 per year for a manufacturer of firearms that are not explosive devices, and $10 per year for a manufacturer of ammunition), the Attorney General grants the license and notifies the chief law enforcement officer in the State. *See* 18 U.S.C. §§ 923(a)(1), (d)(1)(A)-(G), (*l*); 27 C.F.R. § 478.47.

The Gun Control Act also imposes record-keeping and identification requirements on federal firearms licensees. *See* 18 U.S.C. § 923(g)(1)(A); 27 C.F.R. §§ 478.121-.125. Each firearm imported or manufactured must be identified by a serial number, and a mark indicating the model of the firearm, the licensee's name or abbreviation, and the licensee's location. 18 U.S.C. § 923(i); 27 C.F.R. § 478.92(a)(1). Licensed importers, manufacturers, and dealers may not transfer a firearm to an unlicensed person unless they complete a Firearms Transaction Record (ATF Form 4473). 27 C.F.R. § 478.124. Form 4473 includes the purchaser's name, date and place of birth, residence address, and a certification from the purchaser that he or she is not

[2]A manufacturer "engage[s] in the business" of manufacturing firearms if he or she "devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured." 18 U.S.C. § 921(a)(21)(A).

a person prohibited from owning a firearm. *Id.* § 478.124(c). License holders must report the theft or loss of any firearm to both ATF and local law enforcement authorities and must respond to requests by the Attorney General made in the course of a criminal investigation for information concerning the disposition of a firearm, 18 U.S.C. § 923(g)(6), (7); moreover, all records must be available at the business premises for ATF compliance inspections. *See* 27 C.F.R. § 478.121(b).

Subject to the direction of the Attorney General, ATF has the authority to investigate criminal and regulatory violations of federal firearms laws. 28 U.S.C. § 599A; *see also* 28 C.F.R. § 0.130. The record-keeping and identification requirements of the Gun Control Act also enable ATF to assist State, local, and foreign law enforcement officials in tracing firearms used in the commission of crimes. *See* S. Rep. No. 1866, 89th Cong., 2d Sess. 1 (1966). Penalties for the violation of federal firearms laws include fine, imprisonment, and forfeiture. *See* 18 U.S.C. § 924.

B. The Montana Firearms Freedom Act

The Montana Firearms Freedom Act provides that a "personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law . . . [because] those items have not traveled in interstate commerce." Mont. Code Ann. § 30-20-104.[3]

[3]Seven other states have enacted similar laws. *See* Amicus Brief of the States 5 (Alaska, (continued...)

The statute declares that "[t]he authority of congress to regulate interstate commerce in basic materials does not include authority to regulate firearms, firearms accessories, and ammunition made in Montana from those materials." *Ibid.* To come within the terms of the statute, firearms, accessories, or ammunition must be "manufactured without the inclusion of any significant parts imported from another state," *ibid.*, and must have the "words 'Made in Montana' clearly stamped on a central metallic part." *Id.* § 30-20-106.

The Montana law does not impose record-keeping or other special licensing requirements on individuals manufacturing firearms and ammunition for sale within Montana.

II. Facts and Prior Proceedings

A. Plaintiffs are an individual, Gary Marbut, and two organizations, Montana Shooting Sports Association and Second Amendment Foundation.

In response to the enactment of the Montana Firearms Freedom Act, ATF sent an "open letter" in July 2009 to all Montana firearms licensees reiterating licensees' continuing obligations to abide by federal firearms laws regardless of where they manufacture and sell firearms. GRE 28.

Plaintiff Gary Marbut thereafter wrote to ATF inquiring whether he could permissibly manufacture firearms and ammunition for sale in Montana under the

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[3](...continued)
Arizona, Idaho, South Dakota, Tennessee, Utah, and Wyoming).

Montana Firearms Freedom Act without complying with federal law. ATF responded in September 2009, explaining that Marbut was required to abide by federal firearms laws because "[t]o the extent that the Montana Firearms Freedom Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act." GRE 26. ATF noted that the manufacture of guns and ammunition for personal use is not regulated under federal law except where the gun meets the definition of "firearm" in the National Firearms Act, 26 U.S.C. § 5845.[4] ATF explained, however, that Marbut would be required to obtain a federal firearms license if he intended to manufacture firearms or ammunition for sale. GRE 26.

B. Plaintiffs filed suit in October 2009. Plaintiffs' second amended complaint alleges that plaintiff Gary Marbut, along with unnamed members of the organizational plaintiffs, wish to manufacture and sell firearms and ammunition to customers in Montana without complying with federal firearms regulations. GRE 15-18, ¶¶ 11-13, 15. The gravamen of their complaint was that Congress lacks authority to regulate firearms and ammunition covered by the Montana statute. In addition to declaratory

[4]A "firearm" in the National Firearms Act "means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device." 26 U.S.C. § 5845. As a general matter, standard-length shotguns and rifles, and handguns without automatic capabilities, do not fall within the definition.

relief, plaintiffs sought to enjoin any agent of the United States "from prosecuting any civil action, criminal indictment or information" under federal firearms laws against persons taking actions contemplated under the Act. GRE 22. The State of Montana intervened to defend the constitutionality of its statute and has filed a brief as amicus curiae in this appeal.[5]

The United States moved to dismiss, and the Magistrate Judge recommended that its motion be granted. The judge first concluded that ATF's letter to plaintiff Marbut was not final agency action under the Administrative Procedure Act, and that plaintiffs' suit was a pre-enforcement challenge to a possible criminal prosecution. ER 27, 30. The Magistrate Judge next concluded that Marbut had not demonstrated the credible threat of prosecution required to assert such a challenge. ER 34-35. The judge also rejected Marbut's claims of economic injury, explaining that they amounted to "nothing more than a hypothetical injury, consisting only of theoretical lost profits from a non-existent business operation." ER 42. The judge then determined that the two organizational plaintiffs did not have standing because neither had demonstrated that any member would have standing in his or her own right. ER 46.

The Magistrate Judge also recommended, in the alternative, that plaintiffs' suit be dismissed for failure to state a claim. Citing *Gonzales* v. *Raich*, 545 U.S. 1 (2005), and

[5]The State's amicus brief supports "reversal only to the extent the District Court's decision calls into question the constitutionality of the Montana Firearms Freedom Act." State of Montana Amicus Brief 1 n.1. Thirty Montana Legislators filed an amicus brief in support of reversal. *See* Amicus Brief for Thirty Montana Legislators, at p. 10 of 35.

this Court's decision in *United States v. Stewart*, 451 F.3d 1071, 1077 (9th Cir. 2006), the Magistrate Judge concluded that the challenged federal firearms laws were valid exercises of Congress's commerce power, ER 55-56, and that Congress can regulate the production and intrastate sale of firearms even if a firearm is manufactured in the state of sale.

The judge next considered the State of Montana's argument that in light of *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), Congress was required to make specific findings regarding the constitutionality of its firearms laws. The judge found no basis for that argument, and noted that neither *Heller* nor *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3047 (2010), cast doubt upon longstanding regulations of the commercial sale of firearms. ER 65. The Magistrate Judge noted that, in any event, "[p]laintiffs have not pled a Second Amendment claim in this case." ER 65.

The district court adopted the findings and recommendations of the Magistrate Judge. The court noted that "[b]ecause the Plaintiffs made no effort to support their summary objections with argument or authority explaining why they disagree with [the magistrate judge's] disposition," it would review the Magistrate Judge's report only for clear error. GRE 5. In response to the State of Montana's objections, the court held that the stamp "Made in Montana" had no bearing on its Commerce Clause analysis as "guns manufactured in accordance with the Montana Firearms Freedom Act would

be interchangeable economic substitutes with other firearms, regardless of the existence of a stamp indicating the weapon was 'Made in Montana.'" GRE 7.

SUMMARY OF THE ARGUMENT

Federal law regulates the manufacture and sale of firearms and ammunition. Montana has declared those laws inoperative with respect to firearms and ammunition manufactured and sold within its borders. Citing that declaration, plaintiffs argue that Congress lacked authority under the Commerce Clause to regulate the intrastate manufacture and sale of firearms and ammunition.

1. Plaintiffs have failed to demonstrate the bedrock requirements of Article III standing. In a pre-enforcement challenge of this kind, a plaintiff must demonstrate a credible threat of imminent prosecution. Plaintiff Marbut argues that he satisfies this requirement because he was informed by ATF, in response to a query, that he would be required to comply with federal licensing requirements if he manufactured firearms and ammunition for sale. This restatement of the terms of the federal statutes and regulations was not a "threat of a prosecution." Nor has Marbut demonstrated cognizable economic injury resulting from the statute. Marbut has not previously produced firearms and ammunition for sale, and he does not allege that he has the means to produce those items for commercial sale – or to profit from his endeavors – if permitted to do so without regard to the requirements of federal law.

2. If the Court were to conclude that plaintiff Marbut has demonstrated standing, it should dismiss for failure to state a claim. Plaintiffs' challenge to Congress's Commerce Clause authority is foreclosed by the uniform precedent of the Supreme Court and this Court. In *Raich* the Supreme Court held that the Controlled Substances Act applied to possession of homegrown marijuana intended for personal use permitted by a statute. In light of that decision, this Court in *Stewart* concluded that the federal ban on possession of a machinegun applied even to a gun assembled at home and not intended for sale. It follows *a fortiori* from these decisions that the requirements of the Gun Control Act governing the manufacture and sale of firearms and ammunition are properly applied to intra-state as well as inter-state sales.

STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss *de novo*. *See Tyler* v. *Cuomo*, 236 F.3d 1124, 1131 (9th Cir. 2000). This Court "may affirm on any ground supported by the record." *Ibid.*

ARGUMENT

I. The District Court Properly Dismissed Plaintiffs' Claims for Lack of Standing.

A. "As the parties invoking federal jurisdiction, plaintiffs bear the burden of establishing their standing to sue." *San Diego County Gun Rights Committee* v. *Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). Plaintiffs have failed to demonstrate any imminent,

concrete injury resulting from the existence of the federal regulatory scheme governing manufacturers and dealers of firearms and ammunition.

In a pre-enforcement challenge of this kind, "the mere 'possibility of criminal sanctions applying does not of itself create a case or controversy,'" and "'speculative fear'" or a "general threat of prosecution is not enough to confer standing." *San Diego County Gun Rights*, 98 F.3d at 1126, 1127 (quoting *Boating Industry Ass'ns* v. *Marshall*, 601 F.2d 1376, 1385 (9th Cir. 1979), and *Darring* v. *Kincheloe*, 783 F.2d 874, 877 (9th Cir. 1986)); *see also Thomas* v. *Anchorage Equal Rights Commission*, 220 F.3d 1134, 1140 (9th Cir. 2000) ("The threat of enforcement based on a future violation – which may never occur – is beyond speculation."). Instead, a plaintiff must demonstrate a "'genuine threat of imminent prosecution.'" *San Diego County Gun Rights*, 98 F.3d at 1126 (quoting *Washington Mercantile Ass'n* v. *Williams*, 733 F.2d 687, 688 (9th Cir. 1984)).

To support his claim of imminent prosecution, plaintiff Marbut relies on ATF's response to his letter inquiring whether he could manufacture firearms and ammunition for sale in Montana without complying with federal law.[6] *See* Pl. Br. 13, 18. In response, ATF explained that persons planning to manufacture firearms and

[6]Plaintiffs have not argued on appeal that any plaintiffs aside from plaintiff Marbut have standing in this case. *See* Pl. Br. 11-14. The argument is therefore waived. *See Smith* v. *Marsh,* 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived."). In any event, the organizational plaintiffs' standing depends on the standing of their members, and they have not even attempted to show that any member – aside from plaintiff Marbut – has suffered any concrete injury-in-fact.

ammunition for sale are subject to licensing requirements under federal law, and that "any unlicensed manufacturing of firearms or ammunition for sale or resale . . . without proper registration and payment of tax, is a violation of Federal law and could lead to the forfeiture of such items and potential criminal prosecution." GRE 26.

This statement adds nothing to the explicit terms of the statute and regulations. The letter does not threaten Marbut with prosecution for any current or imminent activity. Nor does the recitation of the requirements of federal law constitute a threat to prosecute Marbut. Indeed, even if ATF had explicitly declared an intention to enforce the terms of the statute that statement would not have singled out Marbut with a credible threat of prosecution. *See, e.g., Rincon Band of Mission Indians* v. *County of San Diego*, 495 F.2d 1, 4 (9th Cir. 1974) (finding sheriff's statement that ordinance prohibiting gambling would be enforced within his jurisdiction did not constitute credible threat of prosecution); *Nat'l Rifle Ass'n* v. *Magaw*, 132 F.3d 272, 293-94 (6th Cir. 1997) (rejecting as a basis for standing ATF's statement that plaintiffs' proposed conduct might subject plaintiffs to federal prosecution because "[t]he threat of prosecution against these plaintiffs is still abstract, hypothetical, and speculative").

Moreover, Marbut has alleged no "concrete plans to violate" federal firearms laws that would trigger enforcement action. He has simply alleged a desire to manufacture rifles and ammunition for sale to others in Montana without a federal firearms license, and, indeed, has stated that he will not manufacture rifles and

ammunition if doing so violates federal law. *See San Diego*, 98 F.3d at 1126-27; *see also Thomas*, 220 F.3d at 1139 ("A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan."); *Nat'l Rifle Ass'n*, 132 F.3d at 293-94 (6th Cir. 1997) ("Plaintiffs' assertions that they 'wish' or 'intend' to engage in proscribed conduct is not sufficient to establish an injury-in-fact.").

This case thus stands in stark contrast to *Raich* v. *Gonzales*, 500 F.3d 850 (9th Cir. 2007) (cited at Pl. Br. 12-14), in which plaintiffs were currently violating the Controlled Substances Act and had already been subject to raids by federal officials. Plaintiffs' reliance on *Compassion in Dying* v. *Washington*, 79 F.3d 790 (9th Cir. 1996), is similarly misplaced. That decision was reversed in *Washington* v. *Glucksberg*, 521 U.S. 702 (1997), decided before *Steel Co.* v. *Citizens for Better Environment*, 523 U.S. 83 (1998), and the Supreme Court did not consider the question of standing. In any event, the allegations that this Court found sufficient to confer standing have no counterpart in this case. The physician-plaintiffs in that case actively cared for terminally ill patients who wished to commit suicide, and this Court found that these doctors "r[an] a severe risk of prosecution under the Washington statute, which proscribes the very conduct in which they seek to engage." *Compassion*, 79 F.3d at 795-96. In this case, by contrast, plaintiffs allege only a future and speculative desire to manufacture firearms and ammunition without abiding by federal firearms laws.

Marbut does not advance his argument by attempting to characterize ATF's response to his inquiry as "final agency action" within the meaning of the Administrative Procedure Act. *See* Pl. Br. 16. The letter merely noted the obligations explicitly imposed by federal statute and regulations. The letter thus resulted in no injury that could provide Article III standing. By the same token, as the Magistrate Judge explained, the letter was plainly not the type of "final agency action" "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 177-78 (1997) (internal citations omitted); *see also Air California* v. *U.S. Dep't of Trans.*, 654 F.2d 616, 620-21 (9th Cir. 1981); *City of San Diego* v. *Whitman*, 242 F.3d 1097, 1101-02 (9th Cir. 2001).

B. Plaintiff Marbut has similarly failed to demonstrate cognizable economic injury that would provide standing. Marbut does not allege that he has ever engaged in the manufacture of firearms or ammunition for sale to others. *See, e.g.,* ER 172-175 (Marbut's resume) (describing his experience as a firefighter, paramedic, firearms safety instructor, and owner of a business that manufactures shooting range equipment); ER177 (describing Marbut's development of "beanbag" non-lethal ammunition, and his declining to sell that ammunition because he lacks a federal firearms license).

Although he is not in the business of manufacturing or selling firearms or ammunition, Marbut alleges that he has "hundreds of customers who have offered to

pay . . . for both firearms and firearms ammunition manufactured under the [Montana Firearms Freedom Act]." *See* GRE 16-18, ¶¶ 12-15. Marbut also claims that interested customers have placed orders for the "Montana Buckaroo Rifle," and that the State of Montana has expressed interest in purchasing non-lethal ammunition. GRE 17-19, ¶¶ 15-16.[7]

Marbut has not even alleged, however, that he has the means to manufacture firearms or ammunition for commercial sale or the means to realize economic benefit from his endeavors. As Marbut himself stressed in a message to potential customers, he was seeking evidence that customers would buy his rifles "IF we win the lawsuit and IF I can actually get them into production." ER209. As the Magistrate Judge concluded, "Marbut is not now, and has never been, engaged in a commercial activity that is suffering, or is likely to suffer, any economic harm as a result of the federal firearms laws he is attempting to challenge." ER 43-44.

Moreover, although Marbut would prefer not to comply with federal licensing requirements, there is no indication that he would be unable to comply with federal regulations and avail himself of whatever economic opportunities he wishes to pursue. His injury turns on the assertion that his prospective customers will only purchase his products if he does not comply with federal laws imposing licensing, identification,

[7]Marbut attached a series of emails from potential customers as an exhibit to his declaration in district court. *See* ER 209. Those messages were received as responses to Marbut's request for evidence to support his standing in this lawsuit.

and record-keeping requirements. He alleges that these customers "do not want, have not ordered, and will not buy the 'Montana Buckaroo' if it is manufactured by federal firearms licensees." GRE 18, ¶ 15. Marbut cannot establish economic injury resulting from federal licensing laws by asserting that his target market would refuse to make purchases from federal licensees. Marbut's hypothetical business could be conducted through legal means; he cannot create economic injury simply by asserting that some customers prefer not to do business with properly licensed federal firearms dealers.

Marbut's allegations contrast in all respects with those found sufficient to provide standing in *Nat'l Audubon Society, Inc.* v. *Davis,* 307 F.3d 835 (9th Cir. 2002). In that case, plaintiffs alleged a direct financial loss traceable to a newly enacted ban on trapping, a business in which they had been profitably engaged. This Court observed that "the trappers' economic injury is directly traceable to the fact that [the new statute] explicitly forbids the trapping they would otherwise do." *Id.* at 856. Marbut, in contrast, alleges "nothing more than a hypothetical injury, consisting only of theoretical lost profits from a non-existent business operation," ER 42, that is not, in any event, precluded by federal law.

II. Even Assuming Plaintiff Marbut Has Standing, He Has Failed To State A Claim Because The Challenged Firearms Laws Are Within Congress's Commerce Clause Authority.

A. The Challenged Federal Firearms Laws Are Valid Exercises of Congress's Commerce Power.

"The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Raich*, 545 U.S. at 29. Although the Montana Firearms Freedom Act declares that "[a] personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation," individuals in Montana must comply with federal firearms regulations. Thus, as plaintiffs recognize, their claim requires this Court to conclude that Congress lacked constitutional authority to regulate the intrastate manufacture and sale of firearms and ammunition.[8]

The federal firearms laws challenged in this case – which require individuals who seek to manufacture firearms and ammunition for sale to be licensed and abide

[8] Amicus Gun Owners of America cite 18 U.S.C. § 927 for the proposition that Congress did not intend to make federal law applicable if a State declares federal law inapplicable. As amicus recognizes, plaintiffs have not raised this contention. *See* Gun Owners of America, Inc., Brief 22-23 ("[T]his Court should direct the parties to submit briefing on the application and effect of 18 U.S.C. § 927 on this case."). Section 927 provides that provisions of the Gun Control Act should not be construed to indicate "an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict[.]" Where a state declares federal law inapplicable, there is, of course, a very direct and positive conflict.

by federal regulations – were enacted as valid exercises of Congress's Commerce power, and plaintiffs do not seriously attempt to argue that either this Court's precedent or Supreme Court precedent supports their position. Pl. Br. 47 (recognizing that "in many respects, as regards the arguments so far made, the Court's hands are tied"). Instead, they launch a wide-ranging attack on that precedent. *See, e.g.*, Pl. Br. 38-39 (arguing that Commerce Clause jurisprudence leads to tyranny); Pl. Br. 39 (arguing that Commerce Clause jurisprudence has "undermine[d] the people's faith in their courts").

Plaintiffs' silence on the matter concedes what is correct: controlling Supreme Court decisions make plain that federal firearms laws requiring firearms manufacturers and dealers to be licensed and abide by record-keeping requirements are valid exercises of Congress's Commerce power even with respect to intra-state sales.

1. The Constitution grants Congress power to "regulate Commerce . . .among the several States," U.S. Const. art. I, § 8, cl. 3, and to "make all Laws which shall be necessary and proper" to the execution of that power, *id.* cl. 18. This grant of authority allows Congress not only to regulate interstate commerce but also to address other conduct that "substantially affect[s] interstate commerce." *Raich*, 545 U.S. at 16-17. In assessing those substantial effects, Congress's focus is necessarily broad. Congress may consider the aggregate effect of a particular form of conduct, and need

not predict case by case whether and to what extent particular individuals in the class will contribute to those aggregate effects. *Id.* at 22.

Moreover, in reviewing the validity of legislation enacted under the Commerce power, a court's task "is a modest one." *Ibid.* The court "need not determine" whether the regulated conduct, "taken in the aggregate, substantially affect[s] interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Ibid.*

2. The validity of the statutes at issue in this case follows *a fortiori* from the decisions in *Raich* and *United States* v. *Stewart*, 451 F.3d 1071, 1077 (9th Cir. 2006). Plaintiffs in *Raich* asserted that Congress could not regulate their possession of marijuana grown at home solely for personal medical use as sanctioned by state law. *Id.* The Supreme Court concluded that the Controlled Substances Act properly applied to a homegrown product that would not be sold even in the intra-state market. In reaching its conclusion, the Court relied on *Wickard* v. *Filburn*, 317 U.S. 111 (1942), which upheld federal regulation of home-grown wheat intended for home consumption. The Court explained that Congress could regulate intra-state activity, "if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 18.

Following the Supreme Court's decision, this Court in *Stewart* held that the federal ban on possession of machineguns properly applies to a machinegun assembled at home that is not intended for sale. This Court held that "Congress could

have rationally concluded that home made machineguns would affect the national market," explaining that "[t]he market for machineguns is established and lucrative, like the market for marijuana," and the "'regulation of intrastate incidents of transfer and possession is essential to effective control of the interstate incidents of such traffic.'" 451 F.3d at 1077 (quoting *United States* v. *Rambo*, 74 F.3d 948, 952 (9th Cir. 1996)). *See also Huddleston* v. *United States*, 415 U.S. 814, 833 (1974) ("Congress intended, and properly so, that §§ 922(a)(6) and (d)(1) [of the Gun Control Act] … were to reach transactions that are wholly intrastate . . . on the theory that such transactions affect interstate commerce.") (quotation marks omitted); *United States* v. *Petrucci*, 486 F.2d 329, 331 (9th Cir. 1973) ("Illegal intrastate transfer of firearms is part of a pattern which affects the national traffic and Congress can validly enact a comprehensive program regulating all transfers of firearms.").

Marbut, in contrast, claims that Congress lacks authority to regulate the commercial manufacture and sale of firearms and ammunition, proposing a limitation on the Commerce Clause power far more draconian than those rejected in *Raich* and *Stewart* (which did not involve the commercial sale of marijuana or machineguns). The intrastate manufacture and commercial sale of firearms and ammunition substantially affects the interstate firearms market. Moreover, because a market for illicit firearms exists nationwide, a "gaping hole" in federal firearms regulation would be created if Congress lacked authority to regulate firearms and ammunition manufacture and sale

until a firearm or ammunition crossed state lines. *Raich*, 545 U.S. at 22. Plaintiffs' theory, moreover, would deprive Congress of authority to regulate the intrastate sale of firearms and ammunition in any state, not merely in Montana or in the seven other States that have enacted laws similar to the Montana Firearms Freedom Act.[9]

Plaintiffs nevertheless argue that *Raich* is inapplicable because of the "national defense implications" associated with the "war on drugs," and because marijuana is illegal. Pl. Br. 47-48. Nothing in the Supreme Court's opinion in *Raich* suggests that it is limited to illegal drugs; indeed, the opinion relies heavily on *Wickard* v. *Filburn*, which concerned regulation of wheat, a legal commodity. 317 U.S. 111 (1942).

Plaintiffs also fail to explain how the regulation of marijuana is more central to law enforcement concerns or national security than the regulation of firearms. "Guns, like drugs, are regulated by a detailed and comprehensive statutory regime," *Stewart*, 451 F.3d at 1076, and Congress enacted the Gun Control Act of 1968 to keep firearms "out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities . . . in combating the increasing prevalence of crime in the United States." S. Rep. No. 1097, 90th Cong., 2nd Sess. (1968), 1968 U.S.C.C.A.N. 2112, 2113-4.

Plaintiffs argue that firearms with the label "Made in Montana" can be distinguished from other firearms, whereas the marijuana and wheat at issue in *Raich*

[9] Similar legislation has been proposed in 23 additional states. *See* Amicus Brief of the States 5 (citing www.firearmsfreedomact.com).

and *Wickard* are fungible commodities. The Court in *Raich* accepted that the marijuana at issue would not be sold either intra-state or inter-state. It was also not disputed in *Wickard* that the wheat at issue had never left the state and would never be sold. In both cases, the Supreme Court recognized that the intra-state consumption of home-grown commodities would, in the aggregate, have a substantial effect on the interstate market for those commodities. That reasoning is even more clearly applicable to the intra-state *sale* and *manufacture for sale* of a product for which there is a national market. Moreover, if it were relevant, the contention that guns marked "Made in Montana" would remain within the State is implausible. And, in the absence of federal regulation, such guns would be largely untraceable when they appeared at crime scenes or in the hands of criminals in other states or countries.

Plaintiffs and amici's reliance on *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), is similarly unavailing. Pl. Br. 46-47; Brief of the States 9; Weapons Collectors Society Brief 6-7. Neither *Lopez* nor *Morrison* involved regulation of economic activity and neither involved activity that substantially affected interstate commerce.[10] Nor did either decision address the

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[10]Amici Pacific Legal Foundation urges that this Court erred in *San Luis & Delta-Mendota Water Auth.* v. *Salazar*, 638 F.3d 1163 (9th Cir. 2011). *See* Pacific Legal Foundation Brief 10-11 n.1. This Court explained that 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." *Id.* at 1177. Even if *San Luis* were incorrect, the question addressed in *San Luis* is not presented in this case because the regulation of the manufacture and

(continued...)

regulation of conduct that was integral to a comprehensive scheme to regulate activities in interstate commerce. *Lopez* involved a challenge to the Gun-Free School Zones Act of 1990, "a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone." *Raich*, 545 U.S. at 23. The prohibition against possessing a gun was not "'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Id.* at 24 (quoting *Lopez*, 514 U.S. at 561). Therefore, the law could not "'be sustained under [the Court's] cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.'" *Id.* at 24 (quoting *Lopez*, 514 U.S. at 561). Likewise, the provision at issue in *Morrison* created a civil remedy for victims of gender-motivated violent crimes. *Id.* at 25. Gender-motivated violent crimes are not themselves economic activity, nor was Congress attempting to punish violent crimes as part of a larger regulation of economic activity. *See Morrison*, 529 U.S. at 615.

Here, in contrast, federal firearms laws regulate the manufacture, distribution, and acquisition of firearms and ammunition. Those laws impose requirements on federally-licensed firearms dealers and manufacturers at the point at which a weapon enters the stream of commerce, and regulate commercial activities. *See Huddleston*, 415

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[10](...continued)
sale of firearms is plainly regulation of economic activity. *See* Pl. Br. 53 ("Here the regulated activity is indisputably commercial.").

U.S. at 825. And, as explained earlier, there can be no doubt that intrastate firearms transactions substantially affect the interstate market for firearms, both legal and illicit.

3. Both plaintiffs and amici Goldwater Institute suggest that Congress's Commerce Clause authority is constricted because the challenged laws involve regulation of firearms. Goldwater Amicus Brief 4, 20-21 (arguing that "the district court should have applied heightened scrutiny to Defendant's claim under the Necessary and Proper Clause that the activities regulated by the [Montana Firearms Freedom Act] would have substantial effects on interstate commerce"); Pl. Br. 44-45 (arguing that the government should bear the burden of showing that "preempting the [Montana Firearms Freedom Act] bears a substantial relationship to an important governmental objective").

The Magistrate Judge correctly rejected these arguments, ER61-66; although the connection between the intrastate conduct at issue in this case and the interstate market would satisfy any level of review, no heightened scrutiny is necessary or appropriate in this case, nor are particular congressional findings required. As the Supreme Court has explained, an analysis of Congress's commerce power does not require this Court to determine whether the conduct, "taken in the aggregate, substantially affect[s] interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Raich*, 545 U.S. at 22. The Supreme Court has "never required Congress to make particularized findings in order to legislate . . . absent a

special concern such as the protection of free speech." *Raich*, 545 U.S. at 21. No such "special concern" is present here: plaintiffs have not raised a Second Amendment challenge in this case,[11] and any such challenge would not require heightened scrutiny under this Court's precedent.[12]

As the Magistrate Judge recognized, no Second Amendment rights are infringed through the operation of federal firearms laws regulating the commercial manufacture and sale of firearms and ammunition. In *McDonald*, the Supreme Court reiterated that its holding in *Heller* "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the

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[11]Any Second Amendment challenge to federal licensing and record-keeping requirements is forfeit, as that claim was not raised in plaintiffs' complaint or in the district court. As the Magistrate Judge correctly noted, plaintiffs never moved for leave to amend their complaint to add a Second Amendment claim, and plaintiffs' second amended complaint mentions the Second Amendment only once, and solely to provide background on the passing of the Montana Firearms Freedom Act. *See* ER 65; GRE 13-14, ¶ 9.

[12] In *Stewart*, this Court rejected the argument that specific findings were required based on its prior holding that the Second Amendment does not grant individual rights. *See* 451 F.3d at 1075 & n.6. As explained *infra*, even though the Supreme Court has now held that the Second Amendment protects an individual right of "law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller*, 554 U.S. at 635, that holding does not entail heightened scrutiny for all regulation of commercial sale of firearms. *See* ER63 (recognizing that "[t]he fact that *Heller* recognized a Second Amendment right to possess firearms in the home for self-defense does not mean that Congress must have made particularized findings in order to enact a comprehensive regulatory scheme encompassing the intrastate manufacture and sale of firearms").

commercial sale of arms.'" *McDonald*, 130 S. Ct. at 3047 (quoting *Heller,* 554 U.S. at 626-27).

Applying these decisions, this Court in *Nordyke* v. *King*, No. 07-15763 (May 2, 2011), *available at* 2011 WL 1632063, explained that "heightened scrutiny does not apply unless a regulation substantially burdens the right to keep and to bear arms for self-defense." *Id.* at *3. "[W]hen deciding whether a restriction on gun sales substantially burdens Second Amendment rights, we should ask whether the restriction leaves law-abiding citizens with reasonable alternative means for obtaining firearms sufficient for self-defense purposes." *Id.* at *7. As this Court recognized, "a law does not substantially burden a constitutional right simply because it makes the right more expensive or more difficult to exercise." *Id.* at *8. Plaintiffs have not alleged that federal firearms laws deprive them of the means to obtain firearms in Montana – nor could they reasonably do so.[13]

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[13]The Weapons Collectors Society's contention that Montana's Compact with the United States – signed at the time Montana joined the Union in 1889 – limits Congress's Commerce power to the understanding of that power in 1889, finds no basis in law or logic. *See* Weapons Collectors Society Brief 14. Nor has it been raised by plaintiffs. The Supreme Court has consistently explained that once admitted into the Union, states are on "equal footing" with states already admitted; the doctrine "negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State." *United States* v. *Texas*, 339 U.S. 707, 717-18 (1950) (plurality opinion); *see also Pollard* v. *Hagan*, 44 U.S. 212, 229 (1845); *Bolln* v. *Nebraska*, 176 U.S. 83, 87-88 (1900); *Nevada* v. *Watkins*, 914 F.2d 1545, 1555 (9th Cir. 1990). ""This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle* v. *Smith*, 221 U.S. 559, 567 (1911). Montana entered the Union on equal footing with those states

(continued...)

B. Because The Challenged Firearms Laws Are Valid Exercises of the Authority Delegated to Congress In The Commerce Clause, Plaintiffs Can State No Tenth Amendment Violation.

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Under Supreme Court precedent, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York* v. *United States*, 505 U.S. 144, 156 (1992). "It is in this sense that the Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'" *Id.* (quoting *United States* v. *Darby*, 312 U.S. 100, 124 (1941)). As this Court has explained, "if Congress acts under one of its enumerated powers, there can be no violation of the Tenth Amendment." *United States* v. *Jones,* 231 F.3d 508, 515 (9th Cir. 2000); *see also United States* v. *Comstock*, 130 S. Ct. 1949, 1962 (2010); *United States* v. *Collins*, 61 F.3d 1379, 1384 (9th Cir. 1995) ("Because [18 U.S.C. § 922(g)(1)] is a valid exercise of Congress'

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[13](...continued)
already admitted, and Montana now stands in the same relationship with the United States as do all other states. Montana's Compact does not alter the balance of sovereignty between the states and the federal government.

commerce authority, we conclude that the statute does not violate the Tenth Amendment.").

Thus, because Congress may regulate the intrastate manufacture and sale of firearms under the Commerce Clause – as we have demonstrated – plaintiffs can state no Tenth Amendment violation.

Amici's reliance on *Printz* v. *United States*, 521 U.S. 898 (1997), and *New York* v. *United States*, 505 U.S. 144 (1992), is wholly misplaced. *See, e.g.,* Goldwater Amicus Brief 18-20. In *Printz*, local officials challenged the constitutionality of Brady Act interim provisions requiring state law enforcement officers to determine whether proposed firearms transactions were lawful. *See Printz*, 521 U.S. at 903-04. The Supreme Court explained that "the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." *Id.* at 904. These provisions thus amounted to unconstitutional "commandeering" of state officers by the Federal government. *See id.* at 914, 925.

By contrast, the laws challenged in this case are federal laws "to be implemented by federal authorities"; they do "not attempt to force the states or state officers to enact or enforce any federal regulation." *Jones*, 231 F.3d at 515. No state officials are commandeered under federal firearms laws that regulate the manufacture and sale of firearms and ammunition by private parties.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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JULY 2011

STATEMENT OF RELATED CASES

Counsel for appellees are not aware of any related cases as defined in Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief contains 7,824 words from its Statement of Jurisdiction to its Conclusion, and is presented in proportionally spaced 14-point Garamond typeface. The brief was prepared using WordPerfect X5.

s/ Abby C. Wright

_____

Abby C. Wright

Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2011, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

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June 17, 2011

Via Email & ECF
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Re: *Montana Shooting Sports* v. *Holder*, No. 10-36094

Dear Mr. Rhoades:

I am writing to notify you that I have requested and been granted a 14-day extension for filing the government's brief in the above-captioned case. Per our email exchange of June 16, 2011, you indicated that plaintiffs consented to the extension. The new due date for the government's brief is now July 21, 2011.

Sincerely,

/s/ Abby C. Wright

Abby C. Wright
Attorney, Appellate Staff
Civil Division

Montana Firearms Freedom Act

Montana Code Annotated

§ 30-20-101

This part may be cited as the "Montana Firearms Freedom Act".

§ 30-20-102. Legislative declarations of authority

The legislature declares that the authority for this part is the following:

(1) The 10th amendment to the United States constitution guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution and reserves to the state and people of Montana certain powers as they were understood at the time that Montana was admitted to statehood in 1889. The guaranty of those powers is a matter of contract between the state and people of Montana and the United States as of the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.

(2) The ninth amendment to the United States constitution guarantees to the people rights not granted in the constitution and reserves to the people of Montana certain rights as they were understood at the time that Montana was admitted to statehood in 1889. The guaranty of those rights is a matter of contract between the state and people of Montana and the United States as of the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.

(3) The regulation of intrastate commerce is vested in the states under the 9th and 10th amendments to the United States constitution, particularly if not expressly preempted by federal law. Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearms accessories, and ammunition.

(4) The second amendment to the United States constitution reserves to the people the right to keep and bear arms as that right was understood at the time that Montana was admitted to statehood in 1889, and the guaranty of the right is a matter of contract between the state and people of Montana and the United States as of the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.

(5) Article II, section 12, of the Montana constitution clearly secures to Montana citizens, and prohibits government interference with, the right of individual Montana citizens to keep and bear arms. This constitutional protection is unchanged from the 1889 Montana constitution, which was approved by congress and the people of Montana, and the right exists as it was understood at the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.

§ 30-20-103. Definitions

As used in this part, the following definitions apply:

(1) "Borders of Montana" means the boundaries of Montana described in Article I, section 1, of the 1889 Montana constitution.

(2) "Firearms accessories" means items that are used in conjunction with or mounted upon a firearm but are not essential to the basic function of a firearm, including but not limited to telescopic or laser sights, magazines, flash or sound suppressors, folding or aftermarket stocks and grips, speedloaders, ammunition carriers, and lights for target illumination.

(3) "Generic and insignificant parts" includes but is not limited to springs, screws, nuts, and pins.

(4) "Manufactured" means that a firearm, a firearm accessory, or ammunition has been created from basic materials for functional usefulness, including but not limited to forging, casting, machining, or other processes for working materials.

§ 30-20-104. Prohibitions

A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce. It is declared by the legislature that those items have not traveled in interstate commerce. This section applies to a firearm, a firearm accessory, or ammunition that is manufactured in Montana from basic materials and that can be manufactured without the inclusion of any significant parts imported from another state. Generic and insignificant parts that have other

manufacturing or consumer product applications are not firearms, firearms accessories, or ammunition, and their importation into Montana and incorporation into a firearm, a firearm accessory, or ammunition manufactured in Montana does not subject the firearm, firearm accessory, or ammunition to federal regulation. It is declared by the legislature that basic materials, such as unmachined steel and unshaped wood, are not firearms, firearms accessories, or ammunition and are not subject to congressional authority to regulate firearms, firearms accessories, and ammunition under interstate commerce as if they were actually firearms, firearms accessories, or ammunition. The authority of congress to regulate interstate commerce in basic materials does not include authority to regulate firearms, firearms accessories, and ammunition made in Montana from those materials. Firearms accessories that are imported into Montana from another state and that are subject to federal regulation as being in interstate commerce do not subject a firearm to federal regulation under interstate commerce because they are attached to or used in conjunction with a firearm in Montana.

§ 30-20-105. Exceptions

Section 30-20-104 does not apply to:

(1) a firearm that cannot be carried and used by one person;

(2) a firearm that has a bore diameter greater than 1 1/2 inches and that uses smokeless powder, not black powder, as a propellant;

(3) ammunition with a projectile that explodes using an explosion of chemical energy after the projectile leaves the firearm; or

(4) a firearm that discharges two or more projectiles with one activation of the trigger or other firing device.

§ 30-20-106. Marketing of firearms

A firearm manufactured or sold in Montana under this part must have the words "Made in Montana" clearly stamped on a central metallic part, such as the receiver or frame.