Case No. 10-36094

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MONTANA SHOOTING SPORTS ASSOCIATION, et al,

Plaintiffs/Appellants,

vs.

ERIC H. HOLDER, JR.,

Defendant/Appellee.

BRIEF *AMICI CURIAE* OF THE GOLDWATER INSTITUTE AND CATO INSTITUTE IN SUPPORT OF PLAINTIFFS/APPELLANTS

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RULE 26.1 DISCLOSURE

Neither the Goldwater Institute nor the Cato Institute have any parent corporation. No publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

Rules

INTRODUCTION

This case does not involve a mere clash between state and federal law. It involves the federal government's effort to quash an exercise of state sovereignty that directly serves the structural purpose of federalism in our compound republic—the protection of individual liberty guaranteed by the Bill of Rights. Such federal overreaching must be rejected if the vertical separation of powers established by the letter and spirit of our Constitution means anything.

INTEREST OF AMICI CURIAE

Too often, lawyers and legislators alike forget the Tenth Amendment provides that powers not expressly delegated to the federal government have been reserved to the states "or to the people." The latter phrase underscores federalism's fundamental role in securing rightful liberty by diffusing power between the states and federal government. *Gregory v. Ashcroft*, 501 U.S. 452, 458-459 (1991). It also underscores that the purpose of securing rightful liberty is the true touchstone for harmonizing the enumerated powers of the federal government and the principles of state sovereignty. The undersigned *Amici* offer a distinct and valuable perspective on how the crucial constitutional issues raised in this case impact the Constitution's guarantee of individual liberty. All parties have consented to the filing of this brief.

The Scharf-Norton Center for Constitutional Litigation is a division of the Goldwater Institute, which is a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. The Goldwater Institute advances public policies that further the principles of limited government, economic freedom and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the features of our state and federal constitutions that directly and structurally protect individual rights, including the Bill of Rights, the doctrine of separation of powers and federalism. Most recently, the Goldwater Institute appeared before the United States Supreme Court in *McComish v. Bennett* (No. 10-239), and has filed amicus curiae briefings before the Court in *McDonald v. City of Chicago* (No. 08-1521) and *Northwest Austin Municipal Utility District Number One v. Holder* (No. 08-322), available for review at http://www.goldwaterinstitute.org/amicusbriefs. The Goldwater Institute states that it has no parent corporation and no publicly held corporation has a direct financial interest in the outcome of this litigation due to the participation of Cato.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional

government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files amicus briefs. The present case centrally concerns Cato because it represents an opportunity to clarify the limits that the Constitution places on federal power. Cato states that it has no parent corporation and only issues a handful of shares that are privately held by its directors. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the participation of Cato.

Amici are especially interested in seeing this case remanded so that it might proceed beyond pleadings motions to develop fully the factual record relative to the weightiness of the federal and state interests at issue. This interest arises from the observation that the parties stipulated to the facts in *Wickard v. Filburn*, 317 U.S. 111 (1942), and Justice Antonin Scalia's concurrence in *Gonzales v. Raich*, 545 U.S. 1 (2005), hinged on the lack of evidence for the claim that principles of state sovereignty had been violated. Plaintiffs should have a fair opportunity to develop the sort of "Brandeis brief" that brought the *Lochner* era to a close. *See, e.g., Muller v. Oregon*, 208 U.S. 412 (1908).

ARGUMENT

The Montana Firearms Freedom Act, Title 30, Chapter 20, Part 1, Mont. Code Ann. ("MFFA"), establishes a less restrictive regulatory regime than federal law for intrastate firearms manufacturing, possession and sales. In essence, Montana has exercised its sovereign police powers to facilitate the ability of individuals to exercise rights protected by the Second and Ninth Amendments within state boundaries. More than that; to the very extent that the liberty of Montana's citizens is threatened by federal gun regulations that violate the Second Amendment under *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008). Montana has done nothing more than act consistently with its constitutional obligations by enacting the Firearms Freedom Act. This is because the right to keep and bear arms is now recognized as a fundamental right that is binding on the States under the Fourteenth Amendment. *McDonald v. Chicago*, 130 S.Ct. 3020 (2010).

None of the cases cited by the district court upholds federal preemption of state laws that facilitate the intrastate exercise of enumerated constitutional rights. The district court was thus presented with a case of first impression: Whether it is consistent with the design of the Constitution for the federal government to claim implied power under the Commerce and Necessary and Proper Clauses to preempt state sovereignty when that sovereignty is wielded by the state to protect individual

liberty by checking and balancing federal power. Plaintiffs were, therefore, entitled to fresh judicial scrutiny of their claims.

As discussed below, in challenging the constitutionality of federal firearms regulations that seek to preempt the MFFA, Plaintiffs' complaint plausibly applies current precedent. They should have been allowed to develop their constitutional claims through discovery and to present their case in light of tested evidence. For this basic reason, the district court should not have summarily dismissed this proceeding for failing to state a cognizable claim under Rule 12(b)(6), Fed. R. Civ. P.[1] The dismissal should be reversed.

I. Plaintiffs' Second Amended Complaint plausibly alleges that federal preemption of the Montana Firearms Freedom Act would violate the "letter and spirit" of the Constitution.

The viability of Plaintiffs' cause of action should be assessed exclusively under the "substantial effects" test of Commerce Clause jurisprudence.[2] The

[1] This brief does not address the issue of standing also relied upon by the district court in dismissing the complaint. *Amici* agree with Plaintiffs' analysis of that issue.

[2] By process of elimination, among the three possible Commerce Clause tests, only the "substantial effects" test is applicable here. This is because the district court should have construed the Second Amended Complaint in the light most favorable to Plaintiffs, assumed that all well-pled facts are true, and drawn all reasonable inferences in favor of sustaining Plaintiffs' cause of action. *Barker v. Riverside County Office of Educ*., 584 F.3d 821, 824 (9th Cir. 2009). Applying this legal standard, the viability of Plaintiffs' cause of action should be assessed from the premise that Plaintiffs will engage in *exclusively* intrastate firearms manufacturing, possession and sales activities under the authority of the Montana Firearms Freedom Act, as alleged in the Second Amended Complaint. By definition, such

threshold issue under the "substantial effects" test is whether preemption of the MFFA would violate the letter and spirit of the Constitution. This is because the test is aimed at assessing whether the federal government's commerce power extends to activities that are completely outside of interstate commerce. The test thus seeks to determine the scope of the federal government's *implied power* under the Commerce Clause, as confirmed by the Necessary and Proper Clause. *Raich*, 545 U.S. at 5, 22 ("The question presented in this case is whether the power vested in Congress ... 'to make all laws which shall be necessary and proper for carrying into execution' its authority 'to regulate commerce ... among the several states'" encompasses the power to regulate intrastate personal production and consumption of marijuana) (citing U.S. Const. art. I, sec. 8, clause 18; *Wickard*, 317 U.S. 111); *id.* at 34-35, 38-39 (Scalia, J., concurring).

Implicit in the "substantial effects" test is the same fundamental question posed by a review of federal law under the Necessary and Proper Clause itself: Does the challenged exertion of federal power violate the "letter and spirit" of the Constitution? *Id*. at 39 (Scalia, J. concurring) (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)). This question must be answered based on an independent analysis of the text, structure and purpose of the Constitution where, as here, a

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activities would *not* involve "the use of the channels of interstate commerce" or "the instrumentalities of interstate commerce, or persons or things in interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

challenge to federal preemption is premised on a direct clash between federal power and principles of state sovereignty. *Id.* (citing *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992)). Accordingly, the district court erred in dismissing Plaintiffs' case without independently considering whether federal preemption of the MFFA would violate the "letter and spirit" of the Constitution.

A. Principles of state sovereignty limit federal power.

Modern Supreme Court doctrine confirms that principles of state sovereignty limit the scope of implied federal power under the "letter and spirit" of the Constitution. In *National League of Cities v. Usery*, the Court decided that federal powers could not displace core aspects of state sovereignty because the Tenth Amendment guaranteed the preservation of a system of dual sovereignty in which state sovereignty was meant to check and balance federal power. 426 U.S. 833, 845, 852-54 (1976). For the first time in 40 years, the Court declared unequivocally that if federal laws "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Article 1, Section 8, Clause 3." *Id.* at 852. Accordingly, the Court ruled that a federal law violates principles of state sovereignty when it 1) regulates states as states, 2) concerns attributes of state

sovereignty; and 3) directly impairs a state's ability to restructure integral operations in areas of traditional government functions. *Id.* at 852-54.

Of course, *National League of Cities* was seemingly short-lived because it was overturned fewer than 10 years later by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, the Court rejected *National League of Cities* as unworkable because of the supposed difficulty in distinguishing between traditional and nontraditional state functions. *Id.* at 531, 546-47. It also reasserted that the protections of the Tenth Amendment were a mere tautology made unnecessary by an examination of the powers delegated to the federal government. *Id.* at 550-53. Finally, *Garcia* declared that the defense of state sovereignty should be mounted from within the political process at the federal level—in Congress—not within the court system. *Id.* at 554.

But the majority opinion in *Garcia* was not the last word on whether the Court would enforce principles of state sovereignty against federal overreach. In his dissent, Justice Lewis Powell retorted:

> The Framers believed that the separate sphere of sovereignty reserved to the States would serve as an effective "counterpoise" to the power of the Federal Government.... [F]ederal overreaching under the Commerce Clause undermines the constitutionally mandated balance of powers between the States and the Federal Government, *a balance designed to protect our fundamental liberties.*

Id. at 571-72 (Powell, J., dissenting) (emphasis added). Justice Powell's dissent foreshadowed subsequent developments in the law.

In *New York*, 505 U.S. 144, the Supreme Court held that Congress may not "commandeer" state legislatures by requiring them to legislate as directed by the federal government. *City of Boerne v. Flores*, 521 U.S. 507 (1997), ruled that a remedial civil rights law that invades state sovereignty must be closely drawn to remedy actual civil rights violations—it cannot effectively manufacture new civil rights. Then the Court in *Printz*, 521 U.S. 898, held that Congress may not evade separation of powers and "commandeer" state executive officials by ordering them to conduct background checks of purchases of firearms under the Brady Bill. In *United States v. Morrison*, 529 U.S. 598 (2000), the Court held Congress may not regulate and criminalize wholly intrastate criminal activities with no economic aspect. Finally, in *Alden v. Maine*, 527 U.S. 706, 713-14 (1999), the Court ruled that states could not exist as autonomous sovereign governments subject to the risk that the federal government could subject them to damages claims in their own courts for failing to pay overtime to their employees.

Justice Powell has had the last laugh. As originally held in *National League of Cities*, it is now readily apparent that Congress is *not* the sole venue for states to seek protection from federal overreach. Current binding precedent recognizes that the judiciary must protect the existence of exclusive and autonomous state sovereignty as a limit on federal power. With the Supreme Court's clear and repeated blessing, the judiciary now properly patrols the boundaries between state

sovereignty and federal power without deferring to Congress. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 895-97 (4th Cir. 1999), *aff'd*, *M*orrison, 529 U.S. 598 (observing "[t]he judiciary rightly resolves structural disputes"). *Garcia*'s holding to the contrary is incongruous in light of every Supreme Court case addressing federalism in the past two decades. Moreover, *Garcia*'s insistence on deference to Congress cannot be revived through the expansive view of federal power enforced in *Raich* or *Comstock* because principles of state sovereignty were not implicated by either case. *United States v. Comstock*, 130 S. Ct. 1949, 1962-63 (2010); *id.* at 1968 (Kennedy, J., Alito, J., concurring); *Raich*, 545 U.S. at 41 (Scalia, J., concurring).

Not surprisingly, jurists and scholars across the jurisprudential spectrum agree that the Supreme Court has effectively overruled *Garcia* and reinstated *National League of Cities*' legal framework of limiting federal power by principles of state sovereignty. *See, e.g.*, *Massachusetts v. Sebelius*, 698 F. Supp. 2d 234, 249 n. 142, 252 n. 154 (D. Mass 2010) (citing *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997)); *Z.B. v. Ammonoosuc Cmty. Health Servs.*, 2004 U.S. Dist. LEXIS 13058, at *15 (D. Me. July 13, 2004)); Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review Sovereign Immunity and the Rehnquist Court*, 33 Loyola L.A. L. Rev. 1299, 1283 (June 2000) ("*Alden* effectively overrules *Garcia* and reinstates *National League of Cities*"). This

conclusion is most directly supported by the fact that *New York*, 505 U.S. at 161-66, approvingly cites to *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 287-88 (1981), which applied the three-part test of *National League of Cities* for assessing whether a federal law violates the Tenth Amendment. And it is confirmed expressly in *Printz*:

> When a "Law . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty . . . it is not a "Law . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] act of usurpation" which "deserves to be treated as such."

521 U.S. at 924 (citing *The Federalist* No. 33; Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 297-326, 330-33 (1993)) (emphasis added). Consequently, as discussed below, the district court committed reversible error when it dismissed Plaintiffs' cause of action without considering principles of state sovereignty or the legal framework of *National League of Cities*.

B. Federal preemption of the Montana Firearms Freedom Act would violate the letter and spirit of the Constitution under the legal framework of *National League of Cities*.

As illustrated by the recent holding of *Sebelius*, 698 F.Supp.2d at 235-36, Plaintiffs have alleged a plausible claim that preemption of the MFFA would violate principles of state sovereignty under the legal framework of *National League of Cities*. *Sebelius* involves a lawsuit brought by Massachusetts attorney

general Martha Coakley against the federal government, claiming that the Defense of Marriage Act, 1 U.S.C. § 7 (Lexis 2010) ("DOMA"), violated the exclusively reserved power of the states under the Tenth Amendment to define and regulate marriage. DOMA excluded gay marriage from the definition of marriage for purposes of federal programs and thereby required states to refrain from extending married homosexuals the same benefits in federally funded programs as married heterosexuals. *Id.* at 236-39. This resulted in gay married couples being denied benefits under MassHealth, a state-operated Medicaid program, and under a burial program for Massachusetts veterans and their spouses in cemeteries owned and operated by the Massachusetts Department of Veterans' Services.

The attorney general argued that the Massachusetts state constitution's equal protection clause was interpreted to prohibit such discrimination and, therefore, DOMA's effort to condition federal funding on discrimination against homosexual marriage interfered with Massachusetts' sovereign authority to define and regulate the marital status of its residents. The district court agreed, ruling that DOMA was unconstitutional because it interfered with the traditionally reserved power of the states to regulate marriage and forced Massachusetts to discriminate against its own citizens in violation of its constitution. *Id.* at 236-43. The court further ruled that DOMA impaired Massachusetts' ability to structure integral operations because such impairment is shown when a "federal regulation affects basic state

prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its separate and independent existence." *Id*. at 252-53. Such impairment was shown, according to the court, because DOMA forced Massachusetts to choose between honoring its state constitution and federal law, which undermined the state's "basic ability to govern itself." *Id.* at 253. The district court reached this decision, in substantial part, based on the recognition that the commandeering case of *New York* actually stood for the wider principle of protecting state sovereignty from federal interference when states act within the scope of traditionally reserved powers. According to the district court, "the federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and in doing so, offends the Tenth Amendment. For that reason, the statute is invalid." *Id.* at 253.

The reasoning in *Sebelius* compels the conclusion that Plaintiffs' Second Amended Complaint alleges a viable cause of action. To at least the same extent as DOMA threatened Massachusetts law, federal regulatory preemption of the MFFA would 1) regulate "states as states," 2) concern attributes of state sovereignty, and 3) impair the state's ability to structure integral operations in areas of traditional governmental functions.

Federal preemption of the MFFA "would impair a state's ability to structure integral operations in areas of traditional governmental functions" because, like

family law, the regulation of firearms possession, intrastate manufacturing and commerce has long been recognized as within the reserved powers of the states. Robert G. Natelson, *The Enumerated Powers of the States*, 3 Nev. L.J. 469, 483-88 (Spring 2003). Moreover, just as Massachusetts' constitution was interpreted as furnishing heightened protection for nondiscrimination principles in family law under its equal protection clause, Montana's constitution arguably furnishes heightened protection for the right to keep and bear arms, as well as for economic liberty, such as the right to manufacture and sell lawful goods. *See* Mont. Const., Art. 2, §§ 3, 12, 17, 34; *Garden Spot Mkt., Inc. v. Byrne*, 378 P.2d 220, 231 (Mont. 1963) (striking down economic regulation restricting business practices); *Union Carbide & Carbon Corp. v. Skaggs Drug Ctr., Inc.*, 359 P.2d 644, 654 (Mont. 1961) (striking down economic regulation restricting freedom of contract); *State v. Gleason*, 277 P.2d 530, 533-34 (Mont. 1954) (striking down economic regulation restricting occupational freedom); *State v. Rathbone*, 100 P.2d 86, 90 (Mont. 1940) (observing with respect to Mont. Const. Art. 2, §§ 3, 12, "[t]hese constitutional provisions . . . are absolute and self-executing in so far as they limit the power of the legislature to restrict these rights of the people").

Preemption of the MFFA would thus prevent the State of Montana from governing itself under its own state constitution with respect to its reserved powers at least as much as DOMA prevented the State of Massachusetts from governing

itself. Following *Sebelius'* application of *National League of Cities*, therefore, federal preemption of the Montana Firearms Freedom Act would both "concern attributes of state sovereignty" and regulate "states as states." Accordingly, Plaintiffs' Second Amended Complaint advances a plausible cause of action that federal preemption of the MFFA violates principles of state sovereignty and is, thus, inconsistent with the "letter and spirit" of the Constitution. The district court should have allowed Plaintiffs to develop this theory beyond pleadings motions.

C. Federal preemption of the Montana Firearms Freedom Act violates the letter and spirit of the Constitution by preventing state sovereignty from serving its appointed role as an effective check and balance on federal power.

Even though the Justice Department reportedly abandoned its related appeal, *Sebelius* remains merely persuasive foreign precedent. Consequently, it is important to underscore that Plaintiffs have an independently plausible cause of action under binding Supreme Court precedent, which establishes that the functional purpose of federalism—dividing power to prevent tyranny and the abuse of power—defines the exclusive scope of state sovereignty with respect to the exercise of reserved powers.

In *New York*, 505 U.S. at 177, and *Printz*, 521 U.S. at 923-24, the Supreme Court emphasized that principles of state sovereignty preclude the federal government from directly commanding state legislatures and executive officials to fulfill federal dictates. But the Court's rejection of "commandeering" was not

merely an instance of turf protection. It was a conscious application of federalism's functional purpose of preventing the concentration of excessive power in any one government, which is intended to secure individual liberty by reducing "the risk of tyranny and abuse." *New York*, 505 U.S. at 181, 187-88. Indeed, *Printz* specifically emphasized that "the power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States." *Id* at 922.

That rationale extends much further than the specific holding that the federal government may not commandeer a state's legislative or executive departments. Tyranny and the abuse of power are also threatened by federal laws that prohibit states from affirmatively wielding their sovereign powers to protect constitutional liberty. Consequently, an application of *New York* and *Printz* logically leads to the conclusion that the federal government does not have implied power to enact laws that would prevent states from protecting constitutional liberty through the exercise of their reserved powers. And this conclusion, in turn, establishes that Plaintiffs have plausibly alleged that principles of states sovereignty stand against federal preemption of the MFFA.

The MFFA, after all, establishes a less restrictive regulatory regime than federal law for intrastate firearms manufacturing and sales. The Act thereby facilitates the exercise of the individual right to keep and bear arms under the

Second Amendment by promising to enhance the availability of firearms within the State of Montana. The Act also facilitates the exercise of Ninth Amendment rights because the personal right to engage in firearms manufacturing and sales under state law is among the continuum of liberty interests protected by the Ninth Amendment. *Massachusetts v. Upton*, 466 U.S. 727, 737 (1984) (Stevens, J., concurring) (observing that Ninth Amendment protects rights created by state law); *Griswold v. Connecticut*, 381 U. S. 479, 484 (1964); *id.* at 486-87(Goldberg, J., concurring) (contending the freedom to prescribe and sell contraceptive devices has been regarded as within the continuum of liberty interests protected by the Fourteenth Amendment's incorporation of the Ninth Amendment); *Slaby v. Fairbridge*, 3 F. Supp. 2d 22, 30 (D.D.C. 1998) (observing "[t]he Ninth Amendment is not a source of substantive rights, unless it is coupled with the denial of other fundamental rights") (emphasis added) (citing *United States v. Vital Health Products, Ltd.*, 786 F. Supp. 761, 777 (E.D. Wis. 1992), *aff'd United States v. LeBeau*, 985 F.2d 563 (7th Cir. 1992)); *Acme, Inc. v. Besson*, 10 F. Supp. 1, 6 (D. N.J. 1935) (indicating the "local, intimate, and close relationships of persons and property which arise in the processes of manufacture" are protected by the Ninth Amendment); *Magill v. Brown*, 16 F. Cas. 408, 428 (E.D. Pa. 1833) (observing "personal rights are protected by . . . the 9th amendment").

Taken together, federal preemption of the MFFA would not merely displace competing state firearms regulations, it would override state sovereignty in such a way that constitutional liberty is diminished, necessarily increasing the risk of tyranny and abuse of power. Under the rationale of *New York* and *Printz*, the "letter and spirit" of the Constitution thus prohibits such preemption to the extent that it is premised on the implied power confirmed by the Necessary and Proper Clause.

One criticism of the foregoing theory might be that principles of state sovereignty under the progeny of *National League of Cities*, including *New York* and *Printz*, only limit federal laws that regulate "states as states;" and a federal law that would override the MFFA primarily aims to regulate people, not states as such. But this criticism fails to appreciate that "the Constitution's political structure of federalism and sovereignty is designed to protect, not defeat, the legal substance of individual rights." Akhil Reed Amar, *Of Sovereignty & Federalism*, 96 Yale L.J. 1425, 1426 (1987). To avoid the threat to liberty posed by concentrated power, the Founders deliberately designed a system "of complete decentralization." Joseph Story, *Commentaries on the Constitution of the United States*, Vol. 1, 189, 195-97 (Little, Brown & Co. 1878). Such "complete decentralization" was not meant to be passive. The Founders intended for the

people to use the levers of power provided by both state and federal governments to protect their constitutional rights against usurpations by either government.

Alexander Hamilton—hardly the Founder best known for championing state sovereignty—said it best in *Federalist* No. 28:

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

Id. (Gideon ed., 1818) (emphasis added).

In other words, the Founders fully anticipated that the people would resist federal usurpation through exerting state sovereignty to protect their constitutional liberty. This point is not the same as the long-rejected contention that the state has *parens patriae* standing to enforce the rights of its citizenry—i.e., that the state has the right to stand in the shoes of its citizens and enforce *their* rights. Instead, the point is that our system of dual sovereignty simply cannot function as designed if the federal government has total power to bypass state sovereignty, occupy the state's entire jurisdiction within the scope of its reserved powers, and then regulate the people directly without any check or balance from the states. Principles of state sovereignty thus bestow upon the state *as a state* the power to exercise its reserved powers to secure constitutional liberty against federal overreach.

Correspondingly, Plaintiffs' Second Amended Complaint plausibly challenges the constitutionality of federal firearms regulations that would displace the MFFA as unconstitutionally attempting to regulate "states as states."

II. Heightened judicial scrutiny applies when implied federal power is invoked to override state sovereignty.

A logical extension of modern Supreme Court precedent also supports the Plaintiffs' request for heightened judicial scrutiny. For well over a century, the scope of the implied federal power conferred by the Enforcement Clause under the Fourteenth Amendment has been equated to that of the implied power confirmed by the Necessary and Proper Clause. *Katzenbach v. Morgan*, 383 U.S. 301, 324, 326 (1966) (citing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880); *Virginia v. Rives*, 100 U.S. 313, 318 (1880); *Strauder v. West Virginia*, 100 U.S. 303, 311 (1880)). In light of this longstanding analogy, it would be arbitrary to apply a lower level of judicial scrutiny to federal regulations that invoke implied power to preempt state law under the Necessary and Proper Clause than to federal actions that invoke such implied power under the Enforcement Clause. Consequently, just as the Supreme Court has applied heightened scrutiny to federal actions that invoke the Enforcement Clause to override state sovereignty (*see, e.g.*, *Horne v. Flores*, 129 S.Ct. 2579, 2595-96 (2009); *City of Boerne*, 521 U.S at 527-36), the district court should have applied heightened scrutiny to Defendant's claim under the

Necessary and Proper Clause that the activities regulated by the MFFA would have substantial effects on interstate commerce.

CONCLUSION

Above and beyond the "great latitude" the states enjoy in the exercise of their police powers over public health and safety, *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006), our federalist system guarantees the states (and the people) decentralized autonomy to experiment with heightened protections of individual liberty. *Gregory*, 501 U.S. at 458; *see generally* William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). From this perspective, it is inconsistent with the letter and spirit of the Constitution for the federal government to claim the implied power to preempt the Montana Firearms Freedom Act. The district court thus committed reversible error in dismissing Plaintiffs' Second Amended Complaint. Plaintiffs should be permitted to prosecute their very plausible cause of action beyond the pleadings stage.

RESPECTFULLY SUBMITTED on this13th day of June, 2011, by:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 5,124 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman Font size 14.

s/Nicholas C. Dranias
June 13, 2011

CERTIFICATE OF SERVICE

The above document was filed with the Clerk of the U.S. Court of Appeals for the Ninth Circuit via Electronic Case Filing (CM/ECF) on June 13, 2011. Unless otherwise stated, filing and service was initiated from Phoenix, Arizona.

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I, Nicholas C. Dranias, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 13th day of June, 2011.

s/Nicholas C. Dranias