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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

MONTANA SHOOTING SPORTS ASSOCIATION, INC., et al.,	)	No. 09-CV-147-M-DWM-JCL
Plaintiffs,	)	BRIEF OF UTAH, ALABAMA, IDAHO, SOUTH CAROLINA, SOUTH DAKOTA, WEST VIRGINIA, AND WYOMING, AS *AMICI CURIAE* IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS
v.	)	
ERIC H. HOLDER, JR., Attorney General of the United States,	)	
Defendant.	)	

Utah Attorney General Mark L. Shurtleff, appearing *pro hac vice*, files this brief *amicus curiae* on behalf of the States of Utah, Alabama, Idaho, South Carolina, South Dakota, West Virginia, and Wyoming to oppose Defendant's

Motion to Dismiss.[1]

The Montana Firearms Freedom Act ("MFFA"), Mont. Rev. Code §§ 30-20-101 to -106, permits the manufacture of firearms, accessories, or ammunition within the State of Montana without being subject to federal laws or federal regulations as long as these activities are carried out solely within the political boundaries of the State of Montana and the product remains there. *Id.* § 30-20-104. In this action Plaintiffs seek a declaration that the MFFA, is a valid exercise of Montana's and Montanans' rights under the Ninth and Tenth Amendments to the United States Constitution. They also seek a permanent injunction barring Defendant or any United States agency from bringing civil or criminal enforcement actions against persons who are in compliance with the MFFA, including actions under the National Firearms Act, 26 U.S.C. §§ 5811-22, 5845, the Gun Control Act of 1968, 18 U.S.C. §§ 921 *et seq.*, or other federal laws or regulations. Plaintiffs' First Amended Complaint at 9-10. These federal statutes and their implementing regulations impose taxation, registration, licensing, marking, and recordkeeping requirements on firearms and ammunition

[1]The States were joined as *Amici* by their respective attorneys general: Troy King, Alabama Attorney General; Lawrence G. Wasden, Idaho Attorney General; Henry D. McMaster, South Carolina Attorney General; Bruce A. Salzburg, South Dakota Attorney General; Darrell V. McGraw, Jr., West Virginia Attorney General; and Marty J. Jackley, Wyoming Attorney General.

manufacturers, dealers, and importers. Def.'s Memorandum in Support of Motion to Dismiss at 2-6. They also provide for civil and criminal enforcement of the federal requirements. *See id.*

Defendant Holder, the Attorney General of the United States, has moved to dismiss the complaint on several grounds: lack of standing; lack of subject matter jurisdiction; unwaived sovereign immunity; and, notwithstanding the Tenth Amendment, preemption of any conflicting provisions of the MFFA by federal laws enacted under the Commerce Clause that regulate the interstate **and** intrastate manufacture and sale of firearms. *Id.* at 21-22. The *Amici* States file this brief in support of Plaintiffs and in opposition to the Motion to Dismiss, only addressing the merits of Defendant's preemption argument. *See id.* at 21-29.

INTEREST OF *AMICI CURIAE* STATES

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

In addition, Utah and other *amici* States have a particular interest in the issues presented in Plaintiffs' Complaint. Six States besides Montana (i.e.,

Arizona, Idaho, South Dakota, Tennessee, Utah, and Wyoming) have recently enacted statutes similar to the Montana Firearms Freedom Act that deem certain firearms manufactured and kept within their own borders as exempt from federal regulation.[2] Many other States have similar bills under consideration by their respective legislatures. *See* www.firearmsfreedomact.com. These laws are intended to allow their respective citizens to engage within their States in constitutionally protected activity without burdensome federal oversight and regulation of their solely intrastate activities. With few viable avenues to assert their political will, States that have enacted laws similar to Montana's Firearms Freedom Act are clamoring to restore the proper balance between State and federal government power.

This Court is the first to be faced with the question of whether such new state laws are valid exercises of rights retained by the States under the Tenth Amendment or are preempted under the Supremacy Clause by federal statutes and

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[2]2010 Utah Senate Bill 11(codified at Utah Code Ann. §§ 53-5b-101 to -202, effective February 26, 2010); 2009 Tennessee House Bill 1796, 2009 Public Acts Ch. 435; 2010 Wyoming House Bill 0095 (codified at Wyoming Stat. §§ 6-8-402 to -406); 2010 South Dakota Senate Bill 89 (signed March 12, 2010). The Arizona Legislature enacted the Arizona Firearms Freedom Act, House Bill 2307, on March 29, 2010; it was signed into law on April 5, 2010. And the Idaho Legislature enacted the Idaho Firearms Freedom Act, House Bill 859, on March 29, 2010; it was signed by the governor on April 8, 2010.

implementing regulations that impose taxation, registration, licensing, marking, and recordkeeping requirements on all firearms and ammunition manufacturers, dealers, and importers. It is important that the States' voices be heard as the Court considers this important constitutional question. This brief by the *Amici* States is meant to provide the Court with their unique perspective on the interplay between the power granted to the federal government under the Commerce Clause and the rights reserved to the States or to their people under the Tenth Amendments to the United States Constitution.

ARGUMENT

I. THE TENTH AMENDMENT LIMITS THE POWER OF THE FEDERAL GOVERNMENT TO REGULATE PURELY INTRASTATE ACTIVITIES

Issues of federalism and the Tenth Amendment have reached the United States Supreme Court framed in two different ways. A determination of "whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment" requires the Court to examine the scope of the particular incident of state sovereignty at issue. *New York v. United States*, 505 U.S. 144, 155-56 (1992). On the other hand, a question of "whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I" necessitates an inquiry into the scope of Congress's enumerated powers. *Id.*

Plaintiffs' First Amended Complaint frames the first type of federalism question. The *Amici* States agree with Plaintiffs that Montana, like all States, retains under the Tenth Amendment the right to control purely intrastate activities, including the local manufacture of firearms, accessories, and ammunition that remain out of interstate commerce.

The proper division of authority between the Federal Government and the States is said to be one of the oldest questions of constitutional law. *Id.* at 149. James Madison famously wrote: "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (*quoting* The Federalist No. 45). Prior to the ratification of the Bill of Rights, there was disagreement between the Federalists and Anti-Federalists as to the need for such amendments in order to protect the division between State and Federal power. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 568-70 (1985) (Powell, J., dissenting). Widespread concern about the necessity of a bill of rights protecting the States' reserved powers led "the Federalists [to] eventually concede[] that such provisions were necessary." *Id.* at 569. Thus, adoption of the amendments now known as the Bill of Rights, which included the Tenth Amendment, became one of the first

matters of business for the First Congress. *Id.* "Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized." *Id.* at 568.

The Tenth Amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. The Supreme Court has consistently recognized that States retain significant sovereign authority to the extent that the Constitution has not transferred such authority to the Federal Government. *New York*, 505 U.S. at 156. In one sense, "[t]he [Tenth] amendment states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 123-124 (1941). But that is not to say that States merely retain authority over that which Congress has chosen, as "a matter of legislative grace," not to regulate. *United States v. Morrison*, 529 U.S. 598, 616 (2000). Rather, the Court's decisions in *Lopez*, *Morrison*, and *New York* represent a narrowed construction of federal power textually grounded in the federalism embodied by the Tenth Amendment. *See Lopez*, 514 U.S. 566-68; *New York*, 505 U.S. at 174-77; *Morrison*, 529 U.S. at 615-19. In other words, while providing no substantive limits of its own, the Tenth Amendment can be a tool of judicial construction that serves to ensure that

constitutional limits on the powers of the federal government are respected. While some have argued that the political position of the States within the federal system is sufficient to guard against expansive federal power, *Garcia*, 469 U.S. at 551-54, the more realistic view recognizes that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

The *Amici* States ask this Court to honor that essential part of our constitutional structure and recognize that the Tenth Amendment is not an empty promise to the States, but a vital guarantor of rights retained by the States, including the right to regulate purely intrastate activities.

II. CONGRESS'S ENUMERATED POWER UNDER THE COMMERCE CLAUSE SHOULD NOT EXTEND TO PURELY INTRASTATE ACTIVITIES

The argument on the merits presented by Defendant Holder in support of his Motion to Dismiss frames a question of the second type identified in *New York*, 505 U.S. at 155-56: whether Congress has exceeded its Article I authority in regulating purely intrastate manufacture of firearms. Def.'s Memorandum at 21-29. The *Amici* States, though mindful of adverse precedent that is discussed below, believe that the federal firearms statutes at issue here exceed Congress's

enumerated power under the Commerce Clause, as properly construed, insofar as they reach purely intrastate activities.

The Constitution provides that Congress "shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. Art. I, § 8, cl. 3. According to Justice Frankfurter the Commerce Clause "has throughout the Court's history been the chief source of its adjudications regarding federalism." *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring).

States cannot successfully reassert the powers they retain under the Tenth Amendment until the courts revisit and alter their expansive reading of the "commerce" that Congress may properly regulate exercising its Article I, section 8 power. Supreme Court precedent has construed Congress's authority to regulate interstate commerce as allowing regulation of purely intrastate, private, non-commercial activity, as long as the regulated activity substantially affects interstate commerce. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *Lopez*, 514 U.S. at 555-57; *Wickard v. Filburn*, 317 U.S. 111 (1942).

The "substantial effects" test is a 20th century innovation with no textual basis in the Constitution. It has enabled a sweeping expansion of Congress's Commerce Clause powers since the time of the New Deal. *See Lopez*, 514 U.S. at

596 (Thomas, J., concurring); *Morrison*, 529 U.S. at 607-08; U.S. Const. Art. I, § 8, cl. 3. The test, derived from the Necessary and Proper Clause, allows Congress to regulate **intrastate** activities in order to make effective a regulation of **interstate** commerce. *Raich*, 545 U.S. at 34-35 (Scalia, J., concurring); *see also Garcia*, 469 U.S. at 585-86 (O'Connor, J., dissenting). But in doing so, the Court has effectively eliminated any requirement that acts of Congress be a regulation of interstate commercial activity. "Commerce" is expansively defined in a way that "threatens to sweep all of productive human activity into federal regulatory reach." *Raich*, 545 U.S. at 49 (O'Connor, J., dissenting). Similarly, the Court has abandoned any meaningful standard for the substantiality of an intrastate activity's effects on interstate commerce, requiring only that Congress "draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce" in order to regulate it under its Article I, section 8 authority. *Lopez*, 514 U.S. at 600-01 (Thomas, J., concurring). By applying this "rootless and malleable" substantial effects standard for over half a century "the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits." *Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *see also Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring).

The Supreme Court's construction of congressional authority to regulate interstate commerce "[comes] close to turning the Tenth Amendment on its head" and the "case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution." *Lopez*, 514 U.S. at 589 (Thomas, J., concurring). The substantial effects test has expanded congressional Commerce Clause authority far beyond the incidental powers contemplated by the Necessary and Proper Clause. *See Raich*, 545 U.S. at 58-66 (Thomas, J., dissenting). Interpreting the Commerce Clause to permit the regulation of any activity that substantially affects interstate commerce has transformed the purpose of the clause –regulation of commerce "among the several States" as an end in and of itself–into a means for Congress to appropriate States' police powers. *See Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring). The "substantial effects" test is, therefore, repugnant to the federalism embodied by the Constitution. *See Lopez*, 514 U.S. at 584-85, 600-01 (Thomas, J., concurring); *Raich*, 545 U.S. at 67-74 (Thomas, J., dissenting). Accordingly, the Tenth Amendment mandates a judicial standard that yields a construction of congressional authority consistent with the text and the original meaning of the Commerce Clause. *See Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring).

CONCLUSION

For the foregoing reasons, the *Amici* States urge this Court to deny the Motion to Dismiss.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(d)(2(E), I certify that this brief is 2460 words long and thus complies with the word limit listed in Rule 7.1(d)(2)(A).

/s/ Mark L. Shurtleff
MARK L. SHURTLEFF

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served on counsel of record by filing it through the Court's CM/ECF system this 12th day of April, 2010.

/s/ Mark L. Shurtleff
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