IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 10-36094

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

and

STEVE BULLOCK, Montana Attorney General,
Intervenor,

vs.

ERIC H. HOLDER, Jr.,
Attorney General of the United States
Defendant/Appellee.

On Appeal from the United States District Court
For the District of Montana, Missoula Division
The Hon. Donald W. Molloy, Presiding District Judge

APPELLANTS' REPLY BRIEF

Quentin M. Rhoades, Esq.
SULLIVAN, TABARACCI & RHOADES, P.C.
1821 South Avenue West
Third Floor
Missoula, MT 59801
Telephone: (406) 721-9700
qmr@montanalawyer.com

For Appellants

Abby Christine Wright
U. S. DEPT. OF JUSTICE
Civil Division - Appellate Staff
950 Pennsylvania Avenue, N.W.
Room 7252
Washington, D.C. 20530
Telephone: (202) 514-0664
Abby.Wright@usdoj.gov
For Appellee

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INTRODUCTION

This is an appeal from a district court order dismissing the complaint of Appellants Montana Shooting Sports Association, Second Amendment Foundation, Inc., and Gary Marbut (collectively referred to herein after as "Marbut") pursuant to FED. R. CIV. P. 12(b)(6). The court below ruled that Marbut lacks standing, and besides, the Government is immune from the judgment sought. It nevertheless also ruled on the merits, holding that the Interstate Commerce Clause of the U.S. Constitution, gives the Congress power to void Montana's recently enacted the Montana Firearms Freedom Act ("MFFA").[1] Montana adopted the MFFA expressly to exempt the manufacturing and sale of firearms in purely intrastate Montana commerce from the federal regulatory regime.

In his principal brief, Marbut argued the Government's interpretation that the MFFA is preempted by federal law was a final agency action, and that he enjoys standing because, without the Government's licensing requirement he and other Montanans could immediately begin serving an anxious local marketplace. Thus, they

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[1] Title 30, Chapter 20, Part 1, MONT. CODE ANN.

alleged economic damage which should always be sufficient to confer standing. In addition, Marbut argues sovereign immunity is waived pursuant to the Administrative Procedures Act, and even if it had not been, Appellants would still be entitled to "non-statutory review."

As to the merits, Marbut contends the Supreme Court's Interstate Commerce Clause decisions have altered the form of American government, stripping away dual sovereignty from the U.S. Constitution, leaving the States with no independent power. Because the jurisprudence effectively amends the Constitution by judicial fiat, giving the Congress plenary power which it was never intended to wield, the expansive case-law should be overruled. Dual sovereignty should be restored to the American form of government. Marbut also urges that under the Tenth Amendment, it is apt to apply a level of scrutiny more restrictive than the rational basis test to the federal regulation of intrastate commerce in guns, because the Tenth Amendment modifies the reach of Congress under the Interstate Commerce Clause.

The Government has responded with a pair of arguments. First, it insists that regardless of any economic harm, Marbut must actually act

unlawfully – and face felony prosecution – to be given standing to seek justice from this Court. Second, on the merits, it argues that the Interstate Commerce Clause of the Constitution, as presently construed, affords Congress plenary power to regulate all intrastate activity. Finally, it dismisses the Tenth Amendment as a mere "truism" which should be utterly discounted in any discussion of the powers granted to Congress by the Interstate Commerce Clause, and contends therefore that the authority of Montana over its domestic commerce exists only by sufferance of the federal government.

None of these arguments should prevail. This case is before the Court on a motion granted per FED. R. CIV. P. 12(b)(6). All of the facts alleged in the Second Amended Complaint are taken as true. Marbut's allegation of economic harm is sufficient to convey standing, regardless of the unfairness of barring the courthouse door to law-abiding citizens who seek to put their grievances to this Court. In addition, the Tenth Amendment is not a mere tautology, void of all independent meaning. Rather, as the most recent enactment of two provisions in a coequal body of law, it controls the Interstate Commerce Clause. Properly construed, the Tenth Amendment bars an expansive reading of

Congressional powers to the extent it leaves the states with insufficient independence to perform their vital role in the federalist structure of American government.

ARGUMENT

1. Marbut alleges specific economic harm, which is always sufficient to confer standing, and he is not required to risk prosecution in order to challenge the criminal statute at issue.

"Generalizations about standing to sue are largely worthless as such." *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 151-52 (1970). But "in terms of Article III limitations on federal court jurisdiction, the question of standing is related ***only*** to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.* (emphasis added). Where plaintiffs allege some future loss of profits, "[t]here can be no doubt but that [they] have satisfied this test." *Id.,* 397 U.S. at 152. "Certainly he who is 'likely to be financially' injured," has standing to sue. *Id.*, 397 U.S. at 153-54.

Equally important, "when contesting the constitutionality of a criminal statute, "it is not necessary that [the plaintiff] first expose

himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)); *see* also *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Evers v. Dwyer*, 358 U.S. 202, 204 (1958). When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

In this case, neither the Government nor the court below has suggested any alternative to this action for Marbut to challenge the federal statutes at issue or to vindicate Montana's Tenth Amendment rights. His only alternative is to face prosecution by committing the acts the Government insists are criminal. There is no "third way" alternative suggested because, plainly, none exists. Marbut therefore enjoys standing to be heard. *See United Farm Workers Nat. Union*, 442 U.S. at 298. Moreover, given the letter penned to him by agents of the

Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE"), Marbut's "fear of criminal prosecution" is "not imaginary or wholly speculative." (*See* Government Appendix, Ex. A.) He therefore need "need not first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute." *United Farm Workers Nat. Union*, 442 U.S. at 302 (quotation omitted). Finally, even though the Tenth Amendment reserves power to the several States, individuals enjoy standing to invoke the Tenth Amendment. *Bond v. United States*, ___ U.S. ___, 131 S. Ct. 2355, 2363-64 (2011) ("The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines.")

Likewise, Marbut's economic harm is not speculative. The Second Amended Complaint alleges:

> PLAINTIFF MARBUT has hundreds of customers who have offered to pay his stated asking price for both firearms and firearms ammunition manufactured under the MFFA. In particular, Marbut has a substantial opportunity to market a "Montana Buckaroo" youth model, single shot, bolt-action .22 caliber rifle to hundreds of customers who have placed orders for many hundreds of firearms. These sales, however, are all specifically conditioned on the "Montana Buckaroo" being manufactured pursuant to the MFFA, without NFA or GCA licensing or, as the customers see it, BATFE interference. They do not want, have not ordered, and will not buy the "Montana Buckaroo" if is manufactured by federal firearms

> licensees. The State of Montana has also expressed keen interest in buying non-lethal ammunition from PLAINTIFF MARBUT for law enforcement and game enforcement purposes. ***But for BATFE's ruling*** that PLAINTIFF MARBUT and anyone else similarly situated to manufacture firearms, firearms or ammunition, they must first file ATF Form 1 (for "a National Firearms Act firearm") and ATF Form 7 (for other "firearms, firearms accessories, and ammunition"), and have such applications approved, and be licensed by BATFE prior to manufacture, ***PLAINTIFF MARBUT would sell his manufactures for significant economic gain.***

(Second Amended Complaint, Dkt. No. 33, ¶ 15 (emphasis added).) He alleges that he intends to set-up an operation if only the BATFE would allow him to. Marbut has designed and is ready to implement a specific plan to take advantage of hundreds of customers who have already submitted orders for the ostensibly prohibited product. (*See* Sworn Dec. of G. Marbut, Dkt. No. 86-2, and Ex. C thereto, Dkt. No. 86-6, copies of which are appended hereto.) The question therefore is not a hypothetical one. With a detailed, written business plan, the skills to implement it, and hundreds customers having already ordered his product, all Marbut has left to accomplish is to prevail against BATFE's prohibition of his manufacturing and sales program. Once the threat of prosecution is gone, Marbut's new business, from which he will enjoy economic benefits, will be up and running.

"In evaluating the genuineness of a claimed threat of prosecution, courts look to whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000). Applying these three factors here, the business plan is detailed, specific and well documented; the customers are real people with real orders; and as a longtime self-employed entrepreneur, who already manufactures unregulated shooting equipment commercially, as well as ammunition for himself, Marbut has the skill to implement it. But the BATFE made it crystal clear that in order to manufacture and sell the Montana Buckaroo youth rifle, Marbut must comply with federal licensing requirements. Furthermore, BATFE has never allowed such activity to anyone else. The statute at issue here, 18 U.S.C. § 922(a)(1)(A)[2], is regularly enforced. E.g., *United States v.*

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[2] 18 U.S.C.A. § 922(a)(1)(A) reads:

It shall be unlawful--
(1) for any person--
(A) except a licensed importer, licensed manufacturer, or

Ogles, 406 F.3d 586, 588 (9th Cir. 2005) on reh'g *en banc*, 440 F.3d 1095 (9th Cir. 2006). And while it is true no one has been prosecuted in the precise circumstances at bar, even before the MFFA became law, BATFE began delivering intimidating "open letters" to the public informing people that they had better not try. It also sent curt letters of denial to folks like Marbut who specifically asked permission to proceed under the new Montana law. Consequently, the posture that Marbut faces no threat of prosecution should he ignore BATFE's licensing strictures is simply fiction. Marbut, and the organizational Appellants, therefore enjoy standing in this case. *See Thomas*, 220 F.3d at 1139.

2. Under the Tenth Amendment, the Interstate Commerce Clause should be construed to preserve state independence, which in this case, shields the MFFA from federal preemption.

A. Federalism should be restored as a bulwark of liberty.

The Government dismisses the Tenth Amendment as Constitutional surplusage. (*See* Appellee's Br., pp. 30-31.) "[B]ecause Congress may regulate the intrastate manufacture and sale of firearms

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> licensed 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; or....

under the [Interstate] Commerce Clause – as we have demonstrated – plaintiffs can state no Tenth Amendment violation." (*Id.*, p. 31.)

The Tenth Amendment, however, is no mere tautology. Any doubt about that was dispelled once-and-for-all just a few weeks ago, when the U.S. Supreme Court decided *Bond v. United States*, ___ U.S. ___, 131 S. Ct. 2355 (2011). Authored by Justice Kennedy for a unanimous court, the decisions's emphatic analysis reads like an amicus brief in support of this very appeal. As the Court detailed:

> The federal system rests on what might at first seem a counterintuitive insight, that "freedom is enhanced by the creation of two governments, not one." *Alden v. Maine*, 527 U.S. 706, 758, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.
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> * * *
>
> Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (Blackmun, J., dissenting)).
>
> Some of these liberties are of a political character. The federal structure allows local policies "more sensitive to the diverse

needs of a heterogeneous society," permits "innovation and experimentation," enables greater citizen "involvement in democratic processes," and makes government "more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States.

Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. *See ibid*. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. *See* New York, supra, at 181, 112 S.Ct. 2408. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

The recognition of an injured person's standing to object to a violation of a constitutional principle that allocates power within government is illustrated, in an analogous context, by cases in which individuals sustain discrete, justiciable injury

> from actions that transgress separation-of-powers limitations. Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well.
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> * * *
>
> If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object.
>
> Just as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism. That claim need not depend on the vicarious assertion of a State's constitutional interests, even if a State's constitutional interests are also implicated.

Bond, 131 S. Ct. at 2364-65.

Thus, as Marbut argued at length in his principal brief, the Framer's concept of federalism is poised for a resurrection. As the *Bond* decision makes clear, it is time for the Tenth Amendment to be recovered from the dust-bin of history, and restored to its rightful place at the forefront of Constitutional jurisprudence. (*See* Appellant's Br., pp. 23-47.) Federalism can – and should again – serve as a key pillar of the American form of government.

B. The Tenth Amendment controls construction of the Congress's

enumerated powers.

One of the most basic canons of interpretation is "that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant....'" *Corley v. United States,* 556 U.S. 303, 129 S. Ct. 1558, 1566, 173 L. Ed. 2d 443 (2009); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). The same goes for Constitutional provisions. "It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 1 Cranch 137, 174, 2 L.Ed. 60 (1803). In other words, "what is not debatable is that it is not the role of this Court to pronounce the [Tenth] Amendment extinct." *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008). Thus, in interpreting the Constitution, "real effect should be given to all the words it uses." *Myers v. United States*, 272 U.S. 52, 151 (1926).

At the same time, it is also unavoidable that if there is a conflict between or among provisions of a coequal body of law, the most recently-enacted controls. "*Leges posteriores, priores contrarias abrogant.*" *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 166, n. 3

(1976).

> When there are two acts on the same subject, the rule is to give effect to both if possible. But, if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.

Dist. of Columbia v. Hutton, 143 U.S. 18, 26-27 (1892). Without adherence to this principle, it would be impossible to amend or repeal any law once codified. Finally, "amendment" means,"specifically, change."[3] Black's Law Dictionary (9th ed. 2009). Thus, whatever the original meaning and intent of Article I of the U.S. Constitution, which enumerates Congressional powers, that meaning is subject to – changed by – later amendments.

In this case, the U.S. Constitution was fully ratified in 1790. *Minor v. Happersett*, 88 U.S. 162, 176 (1874). The Tenth Amendment,

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[3] As Black's Law Dictionary (9th ed. 2009) reads:

> amendment. (17c) 1. A formal revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specif., a change made by addition, deletion, or correction; esp., an alteration in wording. ... 2. The process of making such a revision.

along with the other provisions of the Bill of Rights, was ratified in 1791. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 682 (1970). Enacted most recently, then, the first ten Amendments control application and construction of Article I, including the Interstate Commerce Clause, of the U.S. Constitution. As Justice Goldberg wrote of the Ninth Amendment in his concurring opinion in *Griswold v. Connecticut*:

> The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deeprooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "(t)he enumeration in the Constitution, of certain rights shall ***not*** be construed to deny or disparage others retained by the people." (Emphasis added.)

Griswold v. Connecticut, 381 U.S. 479, 490-92 (1965). The Tenth Amendment, like the Ninth, is therefore something far beyond tautology.

C. Under the Tenth Amendment, enumerated powers should be

construed in favor of preserving independent power in the States.

To give effect to the Tenth Amendment, the Court should require that when an enumerated power of Congress, like the Interstate Commerce Clause, is subject to more than one reasonable construction, the construction should be adopted that reserves the most independent power in the States. Prior to the New Deal, the following analysis applied:

> In determining how far the federal government may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as, *e.g.*, the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. ***But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government.*** Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control. As we said in

> *Simpson v. Shepard (Minnesota Rate Case)*, 230 U.S. 352, 410, 33 S.Ct. 729, 745, 57 L.Ed. 1511, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18: "In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored, and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the state, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the state." *See*, also, *Kidd v. Pearson*, 128 U.S. 1, 21, 9 S.Ct. 6, 32 L.Ed. 346; *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259, 260, 43 S.Ct. 83, 67 L.Ed. 237.

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546-47 (1935) (emphasis added); *see* also *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936); *United States v. Butler*, 297 U.S. 1, 62-63 (1936). Thus, for the first 150 years of American Constitutional history, the States enjoyed a robust and independent power with which they could serve their federalist purpose in the Framers' carefully crafted balance of powers.

Then came the New Deal and cases like *United States v. Darby,* 312 U.S. 100, 114-115 (1941) and *Wickard v. Filburn*, 317 U.S. 111,

128-129 (1942). *See Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). Since the announcement of *Darby* and *Wickard*, a rule giving Congress plenary power has been applied:

> Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. ... As we stated in *Wickard*, ***"even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."*** *Id.*, at 125, 63 S.Ct. 82. We have never required Congress to legislate with scientific exactitude. When Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class. ... In this vein, we have reiterated that when "a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."

Raich, 545 U.S. at 17 (emphasis added). Thus, as this Court recently again held, under the guise of regulating "Interstate Commerce," Congress has full power to legislate against activity that is neither interstate nor commercial. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011). As a result, "the authority of the state over its domestic concerns [now exists] only by sufferance of the federal government." *Schechter Poultry Corp.*, 295 U.S. at 546-47.

But the Tenth Amendment requires, where possible by a

reasonable construction of the enumerating clauses of Article I, the preservation of State independence. It is therefore the arbiter between the two competing visions of Congressional power represented by *Schechter Poultry Corp.* and *Wickard*. Under the Tenth Amendment, if an enumerated power can be fairly construed in two reasonable ways, one that is restrictive of, and which interferes with, state sovereignty; and one that leaves states with effective power over which Congress has no reach, then the latter construction – the construction more likely to leave the States with an independent, robust and meaningful power – should prevail. In other words, as regards the Interstate Commerce Clause, the construction used prior to *Wickard*, should be reinstated, because unlike *Wickard*, it does not strip the States of all independence in the regulation of commercial activity occurring solely within the political bounds of their respective sovereignties. Under the former case law, the MFFA is not preempted by the Gun Control Act ("GCA") or the National Firearms Act ("NFA").

D. Under pre-New Deal case law, the MFFA is not preempted.

The rules that governed for the first 150 years of the Republic do

not allow for the GCA and the NFA to preempt the MFFA. Under that rule, "where the effect of intrastate transactions upon interstate commerce is merely indirect," such transactions"remain within the domain of state power." *Schechter Poultry Corp.*, 295 U.S. at 546-47.

Prior to the *Wickard* case law, the law was that "[t]he federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins." *Carter Coal Co.*, 298 U.S. at 309. Here, interstate commercial intercourse, as conceived properly in view of the Tenth Amendment, never "begins." MFFA firearms are legally manufactured, transferred and possessed only in Montana, and, by law, can never leave Montana. They are sought by – and allowed only to – Montanans who wish to buy "Made in Montana" firearms free from burdensome federal regulation. The intrastate market in MFFA firearms does not reach beyond Montana's borders because the MFFA itself, in remarkable harmony with the purpose and intent of the NFA and the GCA, expressly limits itself only to guns not in interstate commerce. Admittedly, the development of these local resources and markets, and the extension of local manufacturing facilities, may "to an

appreciable degree alter the course of trade" in interstate commerce. *Schechter Poultry Corp.*, 295 U.S. at 546-47. But these effects on interstate commerce, if any, are at best "indirect." *Id.* As such, so long as MFFA guns remain in Montana, they are beyond Congressional regulation. Only if they enter the stream of interstates commerce do they become subject to federal statutes.

Finally, this analysis is the exact same result which would obtain under *United States v. Stewart (Stewart I)*, 348 F.3d 1132, 1136-37 (9th Cir. 2003), which this Court overruled in *United States v. Stewart (Stewart II)*, 451 F.3d 1071, 1076 (9th Cir. 2006). As set forth in Marbut's princpal brief, and again, in view of the Tenth Amendment, *Stewart II* should be overruled, as should be the *Wickard* progeny. This is ultimately one of those "unusual circumstances when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it." *See Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S.Ct. 876, 920-21 (2010) (Roberts, C.J., concurring.) The Court should therefore be "willing to depart from that precedent." *Id.*

CONCLUSION

Accordingly, the Court is respectfully requested to:

1. Overrule the district court's decision to affirm the Attorney General's ruling that the Montana Firearms Freedom Act is preempted by the Gun Control Act and the National Firearms Act;

2. Remand the case, with directions to enter a declaratory judgement in favor of Appellants, and enjoin the Attorney General from prosecuting anyone who acts in compliance with the MFFA; and

3. Grant Appellants such other relief as may be apt in the circumstances.

DATED this 4th day of August, 2011.

Respectfully Submitted,
SULLIVAN, TABARACCI & RHOADES, P.C.

By: *<u>/s/ Quentin M. Rhoades</u>*
Quentin M. Rhoades
For Appellants

CERTIFICATION OF COMPLIANCE REQUIRED BY CIRCUIT RULE 32(e)(4)

Pursuant to FED. R. APP. P. 28.1(e)(2) and 32(a)(7)(C) and Ninth Circuit Rule 32-1, the undersigned certifies that the attached Principal

Brief is proportionately spaced, has a typeface of Century 14 points or more and contains 4,789 words and no more than 165 words per page.

DATED this 4th day of August, 2011.

Respectfully Submitted,
SULLIVAN, TABARACCI & RHOADES, P.C.

By: *<u>/s/ Quentin M. Rhoades</u>*
Quentin M. Rhoades
For Appellants

CERTIFICATE OF SERVICE

This is to verify that on this 4th day of August, 2011, a copy of the foregoing was duly served on the following persons by the following means:

1	CM/ECF
	Hand Delivery
2	Mail
	Overnight Delivery Service
	Certified Return Receipt Requested Mail
	Registered Mail
	Fax
	E-Mail

1. Abby Christine Wright
   UNITED STATES DEPARTMENT OF JUSTICE
   Civil Division - Appellate Staff
   7252
   950 Pennsylvania Avenue, N.W.
   Washington, D.C. 20530
   Representing Defendant Eric H. Holder, Jr.

2. Jessica B. Leinwand, Esq.
   UNITED STATES DEPARTMENT OF JUSTICE
   Federal Programs Branch
   Post Office Box 883
   Ben Franklin Station
   Washington, D.C. 20044
   Representing Defendant Eric H. Holder, Jr.

1. Adam Pomeroy
   PACIFIC LEGAL FOUNDATION
   Suite 200
   3900 Lennane Drive
   Sacramento, CA 95834

1. Anthony T. Caso
LAW OFFICE OF ANTHONY T. CASO
c/o Chapman Univ School of Law
One University Drive
Orange, CA 92866

1. Gil Peles
Proskauer Rose LLP
Suite 3200
2049 Century Park East
Los Angeles, CA 90067-3206

1. Herbert W. Titus
William J. Olson, P.C.
370 Maple Ave. W
Suite 4
Vienna, VA 22180-5615

1. John E. Bloomquist
Doney Crowley Bloomquist Payne Uda P.C.
Suite 200
44 West 6th Avenue
P.O. Box 1185
Helena, MT 59624-1185

1. Mark L. Shurtleff
Utah Attorney General's Office
Suite 230
350 North State Street Street
Salt Lake City, UT 84114

1. Nicholas Constantine Dranias
Scharf-Norton Center for Constitutional Litigation
Goldwater Institute
500 E. Coronado Rd.
Phoenix, AZ 85004

1. Sharon Louise Browne
PACIFIC LEGAL FOUNDATION
Suite 200
3900 Lennane Drive
Sacramento, CA 95834

1. Steve Bullock
MONTANA ATTORNEY GENERAL
215 N. Sanders
Helena, MT 59620-1401

1. Timothy Neal Baldwin
Baldwin Law Offices, PA
1001 S. Main Street
PO Box 1520
Kalispell, MT 59901

By: *<u>/s/ Quentin M. Rhoades</u>*
Quentin M. Rhoades

ADDENDUM

Table of Contents

Sworn Dec. of G. Marbut - Dkt. No. 86-2. . . . . ADD 1-ADD 8

Ex. C of Dec. of G. Marbut - Dkt. No. 86-6. . . . . ADD 9-ADD13

EXHIBIT B

SWORN DECLARATION OF
GARY MARBUT DATED MAY 25, 2010

I, Gary Marbut, declare as follows:

1. I am of adult age. I am mentally sound and competent to testify in the courts of the State of Montana. The matters set forth in this Affidavit are based upon my own personal knowledge unless otherwise stated.

2. I will testify in open court, if called upon to do so, as to the facts set forth herein.

3. I am 63 years old and am a longtime resident of Missoula County, Montana, having first moved to Missoula County in about 1954. I have never been arrested for or convicted of any crime. I have never been a defendant in a criminal matter (other than a rare parking ticket or more rare moving vehicle violation).

4. I am intimately involved with and am familiar with firearms, having used them since childhood. I have handloaded my own ammunition since high school (graduated 1964).

5. I currently serve as President and Chairman of the Board of Directors of the Montana Shooting Sports Association and as Secretary and a member of the Board of Directors of the Western

Montana Fish and Game Association. I am a member of the United States Practical Shooting Association, the Big Sky Practical Shooting Club, the National Rifle Association, Gun Owners of America, Citizens Committee for the Right to Keep and Bear Arms, the Wilderness Sportsmans Association, and the International Association of Law Enforcement Firearms Instructors (IALEFI). See Bio attached hereto as Exhibit A.

6. I shoot competitively in two different shooting disciplines, "practical pistol" an international sport involving speed and accuracy with handguns, and "precision rifle" which involves hitting game-sized targets out to 1,000 yards and beyond under field conditions.

7. I am the author of *Gun Laws of Montana*, a trade paperback book now the standard reference on this subject in Montana, and currently in its third printing.

8. I am self employed and doing business as Target Operator Systems. I manufacture shooting range equipment for law enforcement agencies nationwide, federal, state and local. I also do business as Montana Publishing, in which I market my book, *Gun Laws of Montana*. Personally and doing business as Montana

Firearms Academy, I am a firearms instructor and train people in the safe, effective and lawful use of firearms, having graduated approximately 2,500 students in the past 20 years. Personally, I work as a legal consultant and expert witness in state and federal courts on firearm-related issues: Self defense, use of force, shooting ranges, firearm safety and related topics.

9. For the two shooting disciplines in which I shoot competitively, I handload ALL of the ammunition I shoot - between 5,000 and 15,000 rounds of ammunition per year, depending on the year and my level of activity.

10. I am a lifetime hunter, having hunted varmints, upland game birds, waterfowl, coyotes, antelope, deer, moose, caribou and elk. Having grown up on a working cattle ranch, I've also had a lifetime exposure to and interest in wildlife. One of the applications for firearms in which I have long been interested is self-defense from large predators, especially bears.

11. In about 2003, I became interested in less-than-lethal ammunition that could be used for wildlife adversity training and behavior modification. I was first exposed to shotgun "beanbag"

ammunition at an IALEFI Annual Training Conference. I found the beanbag rounds then available in the marketplace to be inordinately expensive, to be quite inaccurate, and because of the ballistic coefficient of the projectile to be useful only within a narrow range of distance from target. I set about to develop a better beanbag round. The results of my experimentation and development was a very functional 12-gauge round with a drag-stabilized projectile, one ounce of lead shot encased in a triple-layer of parachute nylon fabric. I documented and published the results of my experimentation in December of 2005. Please see Beanbag report attached hereto as Exhibit B.

12. This ammunition tested to be much more reliable for accuracy and velocity than the ammunition then available in the marketplace, which used square pillow-shaped beanbag projectiles. I projected that my drag-stabilized beanbag rounds would thump a garbage-marauding bear about as if the bear had been hit with a good fastball pitch, which should be excellent for both non-lethality and for behavior modification.

13. During development of this ammunition I had been in dialog with Region 2 of the Montana Department of Fish, Wildlife and Parks (FWP), especially with Region 2 Director Mac Long, and Region 2 bear biologist Jamie Jonkle. I provided Region 2 with a dozen or so of my beanbag rounds for testing. The response from Region 2 was a request that I make and sell these rounds to FWP. FWP needs this ammunition to help fulfill its wildlife management mission.

14. I responded to FWP that federal law prohibited me from engaging in the commercial activity of loading and selling ammunition, especially to a state agency, without the appropriate federal manufacturing license, which I did not possess. Therefore, I was unable to supply FWP with the additional (beyond samples) ammunition they requested.

15. I am also interested in manufacturing a Montana-made youth model, single shot, bolt-action .22 caliber rifle, designated as the Montana Buckaroo. My report on the planned manufacturing process for the Montana Buckaroo is attached hereto as Exhibit C.

16. Since the passage of HB 246 (the "Montana Firearms Freedom Act") by the 2009 Montana Legislature, I believe it would

now be legal for me to make these beanbag rounds and sell them under contract to FWP, without any federal license, as long as the ammunition is used within Montana and does not leave the state. I now wish to pursue this commercial activity.

17. Under the Montana Firearms Freedom Act, I believe the same to be true, that it would be permissible for me to make and sell the Montana Buckaroo, without any federal license, as long as the rifle is used within Montana and does not leave the state. I wish to pursue this commercial activity.

18. I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED in Missoula, Montana on 25th day of May, 2010.

Gary Marbut

STATE OF MONTANA)
:ss
County of Missoula)

Subscribed and sworn to before me, a notary public, on the 25th day of May, 2010.

MICHELLE M. FONTAINE
NOTARY PUBLIC-MONTANA
Residing at Bonner, Montana
My Comm. Expires Oct. 3, 2010

Notary Public for the State of Montana
Printed Name: Michelle M. Fontaine
Residing at: Bonner Montana
My commission expires: 10/3/2010

B.I.T. Enterprises

Montana Buckaroo

A youth model, single shot, bolt-action .22 Caliber rifle

To be manufactured pursuant to the
Montana Firearms Freedom Act
by
B.I.T. Enterprises
P.O. Box 16106
Missoula, Montana 59808

Design characteristics

Action type. Several different action types were considered, included break-open, falling-block, and bolt-action. A bolt-action design with a manually-operated cocking device was selected both because if its suitability for young shooters and because of simplicity of production.

Models. Many different models were reviewed for design suitability. The brands/models under final consideration for design influence for the Buckaroo included:

1. Chipmunk (now produced as the Crickett);
2. Remington Model 514;
3. Winchester Model 67A; and
4. Remington Model 33. (in order in the photo below, top to bottom)

Since the Crickett is currently in production and current patents may apply, it is used only for general evaluation of size, shape and weight. The Remington 514, an adult-sized rifle, was manufactured from 1948 until 1971, so no patents should apply to that

mechanism. The Winchester 67A, an adult-sized rifle, was originally patented by John M. Browning in 1899 and manufactured from 1934 to 1963, so no patents should apply to that mechanism. The Remington Model 33, an adult-sized rifle, was produced from 1933 to 1935, so no patents should apply to the mechanism.

The Winchester 67A was selected as the model mechanism for the Buckaroo because of the simplicity of the mechanism for manufacture. The 67 must be manually cocked, but the bolt does not contain either extractor or ejector. Those functions are performed by a U-shaped, attached piece that also works in conjunction with the trigger as a sear. The trigger is actually pinned into the stock, and is mounted independently of the action. Further, the action (the cylinder in which the bolt travels) on the 67 is not separate, but is merely a drilled-out and cut-away section of the barrel, which would make production that much more simple.

Concerning the Winchester Model 67A, see:
http://www.remington.com/products/archived/rimfire/bolt-action/model-33.aspx

The 1889 John Browning patent is attached as **Exhibit A**

Model Designation - "Montana Buckaroo"

This Made-in-Montana, .22 rimfire, single shot, bolt action, youth model rifle is designated as the "Montana Buckaroo."

Sources/Plans

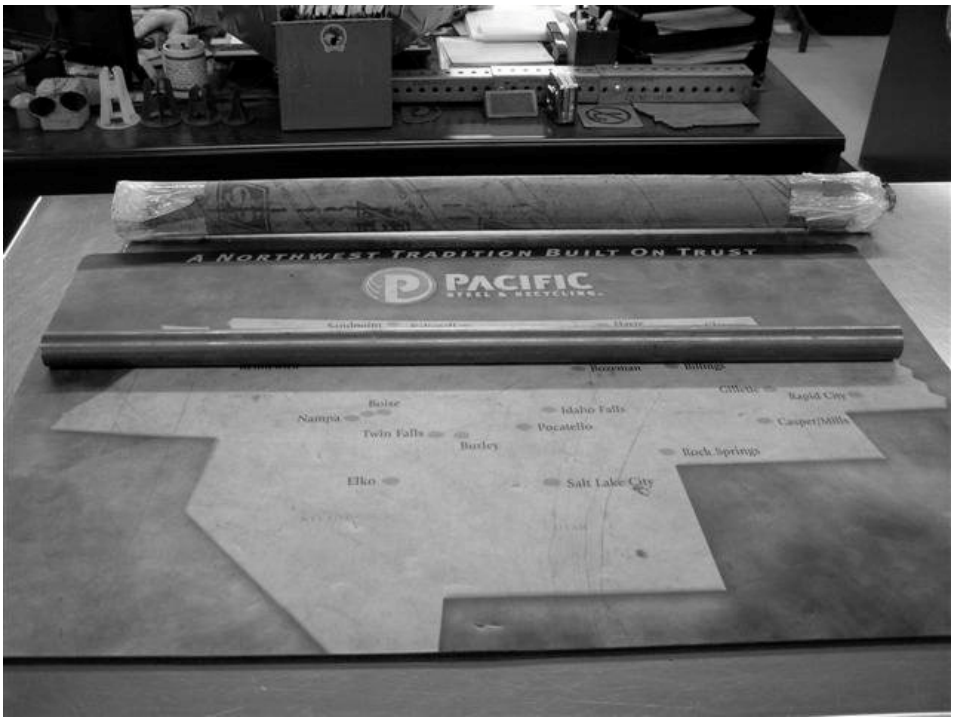
Richard Celata of KT Ordnance in Dillon will provide detailed plans and computer readable shop drawings for the Buckaroo based on the size and weight of the Chipmunk and the mechanics of the Winchester Model 67A. A Winchester Model 67A sample is on hand for reverse engineering of the parts used by Winchester until 1963 in this 1899 patent by John Browning.

See the attached **Exhibits B-1 through B-6** for the mechanical, MasterCad renderings of the Montana Buckaroo. These specifications are on hand as machine-readable computer code, ready to load into computer-controlled machining equipment for production.

Dan Lilja of Lilja Rifle Barrels in Plains, Montana will bore and rifle standard 1" round steel stock off the shelf at Pacific Steel, 2828 Palmer Street, Missoula, for barrels for the Buckaroo. For the pilot project, a 24" piece of 1" cold-rolled steel was obtained from Pacific Steel in Missoula.

The receipt is attached as **Exhibit C**.

Here is what the raw, 1" cold-rolled steel looked like on the sales counter at Pacific:



This steel was then shipped to Lilja Rifle Barrels to be bored and rifled for .22 Rimfire. See the attached **Exhibit D**, a letter from Gary Marbut to Lilja Rifle Barrels ordering the work on this stock steel.

Also see the attached **Exhibit E**, an invoice from Lilja Rifle Barrels for this work.

Here is what this steel (now barrel) looks like on its return from Lilja:

This photo is looking on-end at this to-be Buckaroo rifle barrel:

Pyramid Lumber company of Seeley Lake will provide high-density Pine wood with a guaranteed Montana pedigree for Buckaroo stocks.

Randy Stemple, co-owner of Hellgate Tool Repair, 2006 North Avenue West, Missoula, will provide a "stock duplicator," a mechanized pantographic machine for making gunstocks from raw wood and an example model.

Monte Koppes, owner of Double R Machine, 1326 Skalkaho Hwy, Hamilton, will apply his high-pressure water jet steel cutting equipment and process to cut out and manufacture the trigger and the extractor/ejector/sear element essential to the Buckaroo action.

Randy Jones, owner of Bitterroot Tool & Machine LLC, Stevensville, will bore/ream the barrels for the bolt inclusion and ejection port cutouts, and manufacture four necessary parts for the bolt. Randy will also fabricate the leaf spring that tensions the extractor/ejector/sear element, and front and rear sights.

Other springs, screws and pins, and the barrel mounting stud will be obtained as common hardware on the open market, consistent with the MFFA.

Custom Packaging, 1200 Shakespear St., Missoula, will provide the boxes and other packaging material for packaging the finished products.

Stocks are to be made and finished and Buckaroos assembled, stamped "Made in Montana" and sold by Gary Marbut, dba B.I.T. Enterprises, P.O. Box 16106, Missoula, Montana.

Market for the Montana Buckaroo. One contract for production and delivery of a single Montana Buckaroo has been entered into, conditioned upon validation of the MFFA. See attached **Exhibit F**. Waiting customers for about 500 Buckaroos are already identified. See attached emails as **Exhibit G.**

Dated this 31st day of March, 2010

Gary Marbut, Owner
B.I.T. Enterprises