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COUNSEL FOR INTERVENOR  
STATE OF MONTANA

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

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MONTANA SHOOTING SPORTS	)	CV-09-147-DWM-JCL
ASSOCIATION, SECOND	)	
AMENDMENT FOUNDATION,	)	
Inc., and GARY MARBUT	)	<b>INTERVENOR STATE OF</b>
	)	<b>MONTANA’S OBJECTIONS</b>
Plaintiffs,	)	<b>TO MAGISTRATE JUDGE’S</b>
	)	<b>FINDINGS AND</b>
STATE OF MONTANA,	)	<b>RECOMMENDATIONS</b>
	)	
Rule 5.1(c) Intervenor,	)	
v.	)	
	)	
ERIC H. HOLDER, JR.,	)	
ATTORNEY	)	
GENERAL OF THE UNITED	)	
STATES OF AMERICA,	)	
	)	
Defendant.	)	

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Pursuant to 28 U.S.C. § 636(b)(1) and L.R. 73.1(b), the State of Montana, Intervenor in this action, respectfully submits its Objections to the Findings and Recommendations of the Magistrate Judge filed August 31, 2010.

In its Brief in Intervention, the State of Montana argued that this case should be distinguished from the U.S. Supreme Court's holding in Gonzales v. Raich, 545 U.S. 1 (2005) and the Ninth Circuit case that applied it, United States v. Stewart, 451 F.3d 1071 (9th Cir. 2006), because of the specific language of the statute at issue, the Montana Firearms Freedom Act ("MFFA"). Because the MFFA requires all firearms manufactured pursuant to its terms to be stamped "Made in Montana," such firearms are readily distinguishable from a fungible commodity such as the medical marijuana at issue in Raich or an unstamped firearm such as in Stewart. Additionally, the MFFA limits its application to only those firearms "manufactured in Montana from basic materials" and specifically does not apply to those firearms once they leave the state. Mont. Code Ann. § 30-20-104. Finally, the State of Montana argued that the Stewart court erred by ignoring the absence of explicit Congressional findings regarding the effects of homemade weapons on the interstate market because the Second Amendment did not create the kind of "special concern" that would necessitate Congress identifying grounds for regulation. In light of the Supreme Court's holding that the Second Amendment confers an individual right to bear arms, Stewart is now

distinguishable from the present case. Cf. District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008).

In his Findings and Recommendations, however, the Magistrate disagreed with the State's reasoning. The Magistrate followed the reasoning set forth in Raich and Stewart wholesale, concluding that the two cases, when read together, "compel the conclusion that Congress's power under the Commerce Clause is almost unlimited where the prohibited product has significant economic value such as with drugs or guns." Findings and Recommendations, p. 45, quoting United States v. Rothacher, 442 F.Supp.2d 999, 1007 (D. Mont. 2006). According to the Magistrate, the fact that such regulation "ensnares some purely intrastate activity" is of no consequence. Findings and Recommendations at 44, quoting Raich, 545 U.S. at 22.

The State of Montana reiterates its argument that Raich and Stewart should be distinguished. Raich and the case upon which it is based, Wickard v. Filburn, 317 U.S. 111 (1942), are based largely on the fact that the products at issue--marijuana and wheat--are fungible commodities which cannot be distinguished once they enter the stream of commerce. Thus, they affect the interstate market while simultaneously undermining the ability of Congress to regulate that market. Similarly, the Court in Stewart noted that even "unique"

home-made machine guns can enter the stream of commerce and be indistinguishable from others. 451 F.3d at 1077-78.

The reach of the MFFA, however, is different. For instance, the MFFA requires that all guns manufactured in Montana be stamped as such. Thus, unlike the firearm at issue in Stewart or fungible commodities such as in Raich in Wickard, they are readily distinguishable from other firearms in commerce. Additionally, the MFFA, by its terms, seeks to limit the market for Montana-made firearms. First, it only applies to Montana-made firearms so long as they are within the state of Montana. Mont. Code Ann. § 30-20-104. Furthermore, it only applies to firearms “manufactured in Montana from basic materials.” Id. Each of these factors is crucial to distinguishing the present case from Raich and Stewart.

The State argued that the Plaintiffs should be allowed to put on their proof as to the nature of the market. This case differs from Raich and Wickard in that those cases involved an existing commodity whose market characteristics could easily be assumed based on common knowledge about the commodities. Nevertheless, the courts in both cases received evidence, testimony in Wickard and affidavits in Raich as to the nature and behavior of the markets for wheat and marijuana, respectively. This case, in contrast, involves a new kind of commodity. No example of the “Montana-Made” firearm contemplated by the statutes exists. In this case, before assuming that a rational member of Congress could conclude that

the sale of “Montana-Made” firearms affected the national firearms market, cf. Findings and Recommendations at \_\_\_\_ (holding that the test for affecting commerce is whether a member of Congress rationally could have concluded that the product affected interstate markets), the Court should allow the plaintiffs to put on evidence as to the existence, nature, and behavior of the “Montana-Made” firearms intrastate markets, and on the tendency of the intrastate market to affect interstate commerce.

For the foregoing reasons, the State of Montana respectfully requests the Court reject the Magistrate Judge’s Findings and Recommendations and deny the motion to dismiss submitted by the United States.

Respectfully submitted this 13th day of September, 2010.

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**CERTIFICATE OF MAILING**

*Fed. R. App. P. 25*

I hereby certify that on September 13, 2010, I electronically filed the foregoing Intervenor State of Montana's Objections to Magistrate Judge's Findings and Recommendations with the Clerk of the Court for the United States District Court for the District of Montana, Missoula Division, by using the appellate CM/ECF system.

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

DATED: September 13, 2010 /s/ Chris D. Tweeten