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

<p>MONTANA SPORTS SHOOTING ASSOCIATION, INC., SECOND AMENDMENT FOUNDATION, INC. and GARY MARBUT,</p> <p style="text-align: right;">Plaintiffs,</p> <p>v.</p> <p>ERIC H. HOLDER, JR., Attorney General of the United States,</p> <p style="text-align: right;">Defendant.</p>	<p>No. 09-CV-147-M-DWM-JCL</p> <p>BRIEF OF THE PARAGON FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS AND IN OPPOSITION TO MOTION TO DISMISS</p>
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Amicus Curiae, The Paragon Foundation, Inc. (“*Amicus Curiae*”), through its attorneys Scott & Kienzle, P.A. (Paul M. Kienzle III), hereby submits its Brief Of The Paragon Foundation, Inc. As *Amicus Curiae* In Support Of Plaintiffs:

I. PROPER APPLICATION OF THE SECOND AMENDMENT AND THE HELLER CASE COMPELS DENIAL OF THE MOTION TO DISMISS.

The Supreme Court in District Of Columbia v. Heller, 128 S. Ct. 2783, 2799, 2816 – 17, 2821- 22 (2008) stated that:

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment’s right of free speech was not.

* * *

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.²⁶

[n. ²⁶ We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.]

* * *

In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.

(internal citations omitted).

Heller stands for the rule of law that there is an individual right to keep and bear arms, preserved and guaranteed by the Second Amendment. That rule of law is a limitation upon the federal government. As such, the National Firearms Act (NFA), Gun Control Act of 1968 (GCA), and the "Federal firearms laws" (as that term is used by the federal government in its Motion to Dismiss and Memorandum in Support) are now subject to challenge via the Second Amendment.

While Heller acknowledges that the rights guaranteed and preserved by Second Amendment are not unlimited, it did not foreclose the possibility that "laws imposing conditions and qualifications on the commercial sale of arms" may be invalid. Heller merely states, without deciding, that there is a presumption that such "laws" are lawful. Id. at 2817, n. 26.; cf., U.S. v. Vongxay, 594 F.3d 1111 (9th Cir. 2010).

In Heller, the Court all but declared the right to keep and bear arms a "fundamental right." Cf., Nordyke v. King, 563 F.3d 439 (9th Cir. 2009); rehearing

en banc ordered by 575 F.3d 890 (9th Cir. 2009) (examining the fundamental nature of the Second Amendment and the level of scrutiny, strict or otherwise, to be applied). The Heller Court at 2798 stated that “[b]y the time of the founding, the right to have arms had become fundamental for English subjects . . . Blackstone, whose works, we have said, ‘constituted the preeminent authority on English law for the founding generation,’ . . . cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen.” (internal citations omitted). Heller speaks in the constitutional language of fundamental rights.

Moving from there, the Heller Court at 2799 stated that “[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms,” and formally held at 2821-22 that a “ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”

Heller lifts the Second Amendment to its appropriate place on par with the other Amendments in the Bill of Rights. It would be Orwellian to relegate the Second Amendment to a lower tier of constitutional value that is not worthy of strict scrutiny, i.e. all fundamental constitutional rights are equal but some rights are more equal than others.

As a substantive liberty on par with all other Amendment in the Bill of Rights, the Second Amendment is entitled to all the benefits of “strict scrutiny.” Federal firearms laws must be run through a strict scrutiny analysis to determine if they comport with the individual right to keep and arms guaranteed by the Second Amendment. There is little chance that under a strict scrutiny analysis that the federal government can show that Federal firearms laws are narrowly tailored to further a compelling government interest.

Many constitutional questions left open by Heller will be decided by a case currently pending before the Supreme Court, Otis McDonald, et al., Petitioners v. City of Chicago, Illinois, et al., Docket No. 08-1521, wherein the main parties’ briefs address whether the nature of the right to keep and bear arms is fundamental or otherwise and some amicus briefs address the level of constitutional scrutiny applicable to the Second Amendment.

Curiously, the federal government addressed none of the foregoing issues in its Motion to Dismiss and Memorandum in Support. This case cannot be divorced from recent Second Amendment jurisprudence. There is ample support in the Second Amendment and Heller to uphold the Montana Firearms Freedom Act (“MFFA”). Moreover, the outcome in the McDonald case, now pending, will impact this case as well. When viewed in light of Heller, the Motion to Dismiss must be denied.

II. THE NINTH AMENDMENT AND TENTH AMENDMENT DEMONSTRATE THAT THE CONSTITUTIONAL FRAMERS CREATED A FEDERAL GOVERNMENT OF LIMITED POWERS, NOT GENERAL POWERS.

The Constitutional Framers widely believed that the federal government was a government of limited powers, rather than general powers. Indeed, James Madison, a primary drafter of the Constitution, noted in Federalist No. 45 that “[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which remain in the State Governments are numerous and indefinite.” With regard to the Commerce Clause, Federalist Nos. 11 and 42 show that the Constitutional Framers’ intent was to prohibit state restrictions on interstate commerce, not grant an unlimited, police power to the federal government.

The federal government's powers are limited and enumerated rather than general. The Ninth Amendment and Tenth Amendment guarantee the same.

The Tenth Amendment states that “[t]he 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,” making clear that the federal government is a government of enumerated powers and that all other powers are reserved to the States, or to the people.

The Ninth Amendment nails down further that the federal government is a limited one, stating that “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

Putting together the Ninth Amendment and Tenth Amendment demonstrates that the federal government is a limited one with narrowly defined enumerated powers while the rights retained by States and the people are broad and expansive.

However, the Commerce Clause and Supremacy Clause of the Constitution have been used throughout the 20th and 21st centuries to turn that constitutional scheme on its head. Now, the federal government grows without bounds, expanding beyond its limited, enumerated powers.

Although the Supremacy Clause of the Constitution mandates that federal law (enacted pursuant to the Commerce Clause for purposes of this case) supersedes state law when they are in conflict, the Supremacy Clause only applies to those powers specifically enumerated under the Constitution. In those instances when a State specifically nullifies a federal law (here Federal firearms laws enacted pursuant to the Commerce Clause), when the federal law usurps State power despite a lack of specific enumeration in the Constitution, the federal courts would be remiss to not take notice and act in accord with the Ninth Amendment and Tenth Amendment.

James Madison noted in Federalist No. 46 that, "...But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse

the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke...”

Indeed, the apprehension of the States from federal intrusion is apparent as seen by similar, recent nullification laws in other States in the firearms area. The States are, in fact, rising up in alarm at the intrusion of the federal government into areas that go beyond its limited, enumerated powers.

Accordingly, the power of the federal government to act and regulate under the Commerce Clause and Supremacy Clause should be revisited and curtailed in order to achieve a fairer balance between the rights of the States and the people under the Ninth Amendment and Tenth Amendment, on the one hand, and the will of the federal government to move beyond the bounds of its limited, enumerated powers, on the other.

Re-balancing these interests in favor of the scheme embodied in the Ninth Amendment and Tenth Amendment is commensurate with the Constitutional Framers' original intent of a limited federal government. Re-balancing these interests ensures that the rights of the State of Montana and its citizens are not trampled underfoot by a federal leviathan that intrudes ever deeper into people's lives.

The federal government will no doubt argue that the Ninth Amendment and Tenth Amendment are dead letters, truisms, and the like. However, the Supreme Court in the very recent case of Citizens United v. Federal Election Commission, 130 S.Ct. 876 (2010) showed that the principles of *stare decisis* are not inviolate. This is precisely the type of case where the principles of *stare decisis* should not be followed. The law, such as it is regarding the Ninth Amendment and Tenth Amendment, should be changed or more fully expounded upon to give effect to the constitutional scheme set up by the Ninth Amendment and Tenth Amendment. The concept of federalism and the rights of States and the people under the Ninth Amendment and Tenth Amendment trump the Commerce Clause and Supremacy Clause.

The “federal yoke,” envisioned by Madison, weighs upon the States and the people, who are forced against their will to pull the ever-expanding federal plow. *Amicus Curiae* urges this Court to uphold the MFFA and lift the “federal yoke” off the State and the people. The Motion to Dismiss should be denied.

III. INTEREST OF *AMICUS CURIAE*

The Paragon Foundation, Inc. is a New Mexico 501(c)(3) non-profit organization created to support and advance the fundamental principles set forth in the Declaration of Independence and Constitution of the United States of America.

Amicus Curiae advocates for individual freedom, private property rights, and limited government controlled by the consent of people. *Amicus Curiae* provides for education, research and the exchange of ideas in an effort to promote and support constitutional principles, individual freedoms, private property rights and the continuation of rural customs and culture, all with the intent of celebrating and continuing the Founding Fathers' vision for America. *Amicus Curiae* has several thousand current or former members nationwide; its constituents include ranchers and rural landowners. Consistent with its mission, *Amicus Curiae* is well positioned to bring to the Court's attention relevant material that will assist in the disposition of this case.

This brief is submitted and filed with the consent of the parties. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

WHEREFORE, *Amicus Curiae*, The Paragon Foundation, Inc. requests that the Motion to Dismiss be denied and for other relief as the Court deems just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 13, 2010, a copy of the foregoing document was served on counsel of record by filing it through the Court's CM/ECF system and e-mailed to:

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