No. 10-36094

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA SHOOTING SPORTS ASSOCIATION, et al.,
Plaintiffs-Appellants,

and

STEVE BULLOCK, the Attorney General of Montana,
Intervenor,

v.

ERIC H. HOLDER, JR., the Attorney General of the United States,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Montana, Missoula
Honorable Donald W. Molloy, District Judge

BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND FIFTEEN STATE LEGISLATORS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae Center for Constitutional Jurisprudence and fifteen state legislators, hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici, Center for Constitutional Jurisprudence and fifteen state legislators join together on this brief to uphold the principles of the American Founding, including the proposition that all powers not expressly conferred upon the United States were reserved to the states or the people. Counsel for all parties have consented to the filing of this brief.

In addition to providing counsel for parties at all levels of state and federal courts, the Center for Constitutional Jurisprudence has participated as amicus curiae or on behalf of parties before the United States Supreme Court in several cases of constitutional significance, including *Rapanos v. United States*, 547 U.S. 715 (2006); *Rancho Viejo, LLC v. Norton*, 541 U.S. 1006 (2004); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center believes the issue before this Court is one of special importance to the principle of dual sovereignty and both the powers of the states and the rights of the people protected by the Constitution. Congress exceeds the limits of its power under Article I when it displaces state regulation in areas that are not within the "few and defined" constitutional powers of the federal government. To permit the federal government to displace state regulation of an activity that takes place entirely

within the state would be to ignore the purpose of enumerated powers and the reserved state sovereignty.

Fifteen state legislators join with the Center as amici: Senators Mike Delph, Brent Steele, Jim Tomes, Greg Walker, John Waterman, and Carlin Yoder of Indiana; Senator Ted Harvey of Colorado; Senator Margaret Dayton of Utah; Senator Dave Sypolt of West Virginia; Representative Carol Vita of New Hampshire; Representative R.J. "Dick" Harwood of Idaho; Representatives Sally Kern and Mike Ritze of Oklahoma; and Representatives Richard LeBlank and Steve Drazkowski of Minnesota. State legislator amici have a duty under their respective oaths of office to uphold not only the Constitution of the United States, but also their state Constitutions. Additionally, amici legislators have a duty to promote the general welfare of their respective states, including protecting the rights of their constituents from the overreaching power of the federal government. Amici legislators are all from states that have either enacted or introduced the Firearms Freedom Act, and have a valid interest in asking the Court to uphold the Montana law as a valid exercise of retained sovereign police power.

INTRODUCTION

Pursuant to its Police Power, Montana has the authority to regulate intrastate commercial activity free from federal interference. This includes the regulation of firearms manufactured and available for sale only within its borders. Montana

exercised its sovereign authority when it adopted the Montana Firearms Freedom Act. Under the Montana Firearms Freedom Act,

> [a] personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce.

Mont. Code Ann. § 30-20-104.

The United States Bureau of Alcohol, Tobacco, Firearms and Explosives, however, sent an open letter to all Firearms Licensees in Montana warning that the federal tax, registration, and disclosure requirements would continue to apply to the firearms regulated under the act—firearms that remained purely within Montana's borders. *Montana Shooting Sporting Ass'n v. Holder*, No. CV-09-147-DWM-JCL, 2010 U.S. Dist. LEXIS 104301, at *4-*5 (D. Mont. Aug. 31 2010). The letter also threatened that failure to comply with the federal tax, registration, and disclosure requirements "'could lead to . . . potential criminal prosecution." *Id.* at 5. Gary Marbut, the President of the Montana Shooting Sports Association, then sought declaratory judgment so that individuals manufacturing and selling firearms under the Montana Firearms Freedom Act would be exempt from these two federal laws. The United States District Court for the District of Montana determined that Congress has authority, under the Commerce Clause, to regulate the purely intrastate manufacture and sale of firearms. *Id.* at 69-70. Therefore,

according to the District Court, the federal laws superseded the state law. *Id.* Amici support the Appellants' argument that the Montana Firearms Freedom Act is within the sovereign authority of the state of Montana and that Congress has no authority under the Commerce Clause to preempt the Montana law.

ARGUMENT

Under the Constitution, each state retains its general sovereign power to regulate for the public health and welfare within its respective boundaries. While states have a broad police power that is inherent, the federal government has limited powers restricted to what is enumerated in the Constitution. *United States v. Morrison*, 529 U.S. 598, 607 (2000).

Here, the United States claims that two federal laws, the National Firearms Act of 1934 and the Gun Control Act of 1968, preempt the Montana Firearms Freedom Act. Both federal laws were ostensibly enacted under Congress' power to regulate commerce between the states. *United States v. Miller*, 307 U.S. 174, 175 (1939); 18 U.S.C. § 922. There is no dispute in this case that Congress' power under the Commerce Clause authorizes the regulation of interstate trade in firearms. Here, however, the United States is arguing that the commerce power also permits Congress to preempt a state's regulation of purely intrastate manufacture and sale of a product that will remain within the state. The Montana Firearms Freedom Act regulates purely intrastate activity.

The purpose of the federal laws at issue here is not to regulate interstate economic activity. Instead, Congress stated that its purpose was to assist state and local authorities with the control of local crime. Public Law 90-618 (1968); H. Rep. No. 1780, 73d Cong., 2d Sess. (1934). Congress is, of course, free to regulate the interstate trade in firearms. However, it has no general power of "crime control" that would permit it to preempt state regulation of purely intrastate activity. This is the teaching of the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995). The *Lopez* Court determined that when the congressional purpose is to fight crime, the Commerce Clause does not permit federal regulation of purely intrastate activity. *Id.* at 561. Furthermore, there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618. Therefore, in the instant case, there is no basis for the preemption of the Montana Firearms Freedom Act.

The decisions upholding the federal regulation of purely intrastate activities on the basis of a substantial effect on interstate commerce are best viewed as "necessary and proper" cases. The Court examined whether the ends meant to be achieved by the federal laws were within Congress' constitutional authority, and whether the means chosen to advance those ends were both necessary and proper. The regulations of the national market in both *Wickard v. Filburn*, 317 U.S. 111

(1942) and *Gonzalez v. Raich*, 545 U.S. 1 (2005) had ends that are not present in the federal laws at issue in this case. Both *Wickard* and *Raich* already press the outer bounds of Congress' Commerce Clause authority. To permit the preemption of the Montana Firearms Freedom Act would stretch the bounds of the Commerce Clause beyond what was originally contemplated by the people.

I. UNDER THE CONSTITUTION'S SYSTEM OF DUAL SOVEREIGNTY, STATES RETAIN THE GENERAL POLICE POWER

The Framers created a system of dual sovereignty. Under this system, the Constitution grants to the federal government limited powers. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Powers that are not enumerated in the Constitution for the federal government are retained by the state as part of its state sovereignty, or reserved to the people. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). This includes the general police power to regulate intrastate commercial activity for the general welfare. *Kidd v. Pearson*, 128 U.S. 1, 24 (1888).

The Framers' intent in creating a system of dual sovereignty is clearly noted in primary sources written during the consideration of the 1787 Constitution. The people adopted a Constitution that created a federal government with limited powers, but left the states free to regulate their own affairs and to promote the general welfare of the people. *The Federalist* No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961). The federal government has the defined power of

regulating *interstate* commerce, while the states retain the exclusive power to regulate *intrastate* activities. States retain power over "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Id.* at 293.

James Madison argued that the division of government power between the defined powers of the federal government and the sovereign powers of state government would protect individual liberty. *The Federalist* No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). It is imperative that the courts maintain a proper balance when evaluating constitutional provisions. Otherwise individual rights will be in jeopardy, since

> [t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments. . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

New York v. United States, 505 U.S. 144, 181 (1992). The *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.* The Court specifically warned about an overly generous interpretation of the Commerce Clause, which would eliminate dual sovereignty "and create a completely centralized government." 301 U.S. 1, 37 (1937).

The Montana Firearms Freedom Act involves the type of intrastate activity that the Framers intended should fall within the states' general police power. It would therefore not be subject to regulation by the federal government. Permitting

the federal government to preempt the Montana Firearms Freedom Act is inconsistent with the principal of dual sovereignty. It would allow the federal government to exceed its authority and diminish state sovereignty. This overreaching interpretation of the Commerce Clause diminishes the powers of the states and would ultimately result in the diminution of individual rights.

II. THE ORIGINAL INTENT OF THE COMMERCE CLAUSE WAS NOT TO REGULATE PURELY INTRASTATE ACTIVITY

The Articles of Confederation did not include any provision for the federal government to regulate trade, and so Congress had no power to end the destructive trade wars that plagued the new nation. *See The Federalist* No. 22, at 144-45 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Thomas D. Dillard, *United States v. Lopez: The Commerce Clause vs. State Sovereignty, Once Again*, 22 J. Contemp. L. 158, 162 n.32 (1996). The Constitutional Convention proposed the Commerce Clause to put an end to trade wars between states. However, neither the text of the Constitution nor the debates over the ratification of the Constitution reveal that the people intended Congress' regulation of commerce to include purely intrastate activity.

There has been much debate over what the term "commerce" actually means. The best way to determine the proper definition is to learn what the Framers meant when they used the term. The Framers advocating the ratification

of the Constitution argued that commerce meant trade or exchange. At the time of the Constitution's drafting, commerce was defined as "[i]ntercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick." 1 Samuel Johnson, *A Dictionary of the English Language* 361 (4th ed. 1773).

Another way to determine the meaning of commerce is to look at the Constitution itself. Steven K. Balman suggests examining the meaning of a word in "the text itself, both the immediate text at issue and any other text in the Constitution that may shed light on the meaning of the relevant portion." Steven K. Balman, *Constitutional Irony: Gonzales v. Raich, Federalism and Congressional Regulation of Intrastate Activities Under the Commerce Clause*, 41 Tulsa L. Rev. 125, 151 (2005) (citation omitted). "Commerce" is used once in the Commerce Clause, which consists of the Indian Commerce Clause, the Foreign Commerce Clause, and the Interstate Commerce Clause. Applying a broad definition of commerce to include intercourse or all gainful activity to both the Indian Commerce Clause and the Foreign Commerce Clause would allow "Congress to interfere with the intercourse or economic activity of other sovereign nations." *Id.* at 152. The Framers did not intend Congress to regulate the economic activity of other nations, and it is therefore unlikely that the Framers would intend a different, more expansive definition for "commerce" when applied to the Interstate Commerce Clause. The definition for commerce in the

Constitution should be synonymous in all instances, because whenever the Framers meant something more than commerce, they specified exactly what they meant.

The writings at the time of the debates over the ratification of the 1787 Constitution are also informative of the Framer's understanding of the definition of "commerce." "Commerce" appears several times in *The Federalist Papers*. For example, Alexander Hamilton equated commerce with the sale of commodities and trade. *The Federalist* No. 11, at 86 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Although Hamilton sometimes switched between "commerce" and "intercourse," he always made it clear that he means trade that crosses state boundaries. *Id.* at 89. Similarly, Madison also discussed trade that crosses state boundaries. *The Federalist* No. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961). When Madison specifically discussed the Commerce Clause in *The Federalist* No. 42, he demonstrated his view that commerce means trade by continually switching between the two terms. *Id.* at 267-70. Thus, the Framers did not intend for the term "commerce" to be construed so broadly as to include simple economic or purely intrastate activity that has nothing to do with "trade" that crosses state boundaries. Instead, the Framers intended for the Commerce Clause to grant Congress the authority to end trade wars between states, while still allowing states the authority to regulate intrastate activities within their boundaries.

III. WHEN THE PURPOSE OF THE FEDERAL LAW IS NEITHER TO PRESERVE NOR DESTROY A NATIONAL MARKET, THE COMMERCE CLAUSE DOES NOT AUTHORIZE THE REGULATION OF PURELY INTRASTATE ACTIVITY

Although the history and text of the Commerce Clause demonstrate the Framers' intent to allow Congress to regulate only trade *between* states, the Supreme Court has ruled that this power can reach a purely intrastate activity in two instances: *Wickard* and *Raich*.[1] In these cases, the Supreme Court upheld the federal regulation of an intrastate activity under the Commerce Clause when Congress sought either to preserve or destroy a national market of a particular commodity. *Wickard*, 317 U.S. at 128; *Raich*, 545 U.S. at 17. However, in both *Wickard* and *Raich*, the ultimate aim of the Congressional enactment was the regulation of commerce crossing state boundaries.

In *Wickard*, Congress enacted a federal law which penalized farmers for producing more than their allotted share of wheat. 317 U.S. at 114. Filburn produced more than his allotted share, and failed to pay the fine to the Secretary of Agriculture. *Id.* at 114-15. Filburn used a portion of his wheat to feed his poultry and livestock, some of which he intended to sell. *Id.* at 114. The Court found that

[1] Regulation of intrastate activity was upheld in other cases where there was a direct link to interstate commercial activity. In both *United States v. Darby* and *Jones & Laughlin Steel*, the Supreme Court determined that because the manufacturers' products were sold in interstate commerce the federal commerce power extended to wage and hour regulations for their employees. *United States v. Darby*, 312 U.S. 100, 113 (1941); *Jones & Laughlin Steel*, 301 U.S. at 31. By contrast, the Montana firearms never cross state boundaries.

the cultivation of wheat for personal consumption impacted the national market and was therefore subject to regulation under the Commerce Clause. *Id.* at 127-28.

The *Wickard* Court determined that the Commerce Clause reaches intrastate activities that substantially interfere with a federal regulation meant to preserve a national market in agricultural products. *Id.* at 124. The Court also determined that the Commerce Clause reached Filburn's wheat because he fed his animals the wheat—animals that he intended to sell and thus could be introduced into interstate commerce. *Id.* at 118-19. The underlying purpose behind the wheat regulation was to control the supply of agricultural products, thus preserving the national market by supporting the price of the commodities. Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (1933). The theory underlying the ruling in *Wickard* is that the actions of one farmer, taken in the aggregate with the actions of all other farmers, would affect the national price of wheat, which would undermine the federal government's solution to the endangered wheat market. Since a primary purpose of the Agricultural Adjustment Act "was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market," allowing farmers to grow more than their allotted share of "wheat would have a substantial influence on price and market conditions." *Wickard*, 317 U.S. at 128. There was no local purpose to this regulation. *Id.* However, to preserve the national interstate market in agricultural commodities, the Court agreed with

Congress that the only way to effectively regulate the national market was by reaching the intrastate activity. *Id.* at 129. *Wickard* is considered "the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560. The best argument for the regulation of the intrastate activity of farmer Filburn is that it was "necessary and proper" to the exercise of Congress' commerce power to support the national market in wheat.

By contrast, *Raich* concerned Congress' efforts to destroy a national market in narcotics with the Controlled Substances Act. 545 U.S. at 12. The issue for the Court was whether the Controlled Substances Act preempted California's attempt to decriminalize marijuana for medical purposes. *Id.* at 9. Both Raich and Monson relied on the state law to use medical marijuana to help alleviate their suffering from serious medical conditions. *Id.* at 6-7. Nonetheless, the United States prosecuted them for violation of the federal Controlled Substances Act. *Id.* at 7.

The Court determined that Congress had authority to preempt California's attempt to legalize the medical use of marijuana because it had an impact on the national market for illegal narcotics. *Id.* at 19. The primary purpose of the Controlled Substances Act, 21 U.S.C. § 801, *et seq.*, "is to control the supply and demand of controlled substances in both lawful and unlawful drug markets." *Raich*, 545 U.S. at 19. "Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." *Id.* at 12-13.

Unlike *Wickard*, in the statute at issue in *Raich*, Congress sought to destroy, rather than preserve, a national market. Nonetheless, the market regulated by the Act was national in scope and it was the *market*, the national trade or commerce in goods, which Congress sought to regulate. *Id.* at 17. Further, in both *Wickard* and *Raich*, the federal law dealt with a commodity—a fungible good indistinguishable from other similar products in the stream of interstate commerce. *Id.* at 18-19. Since the product at issue was a commodity, and the purpose was protection or destruction of a national market, the regulation of the intrastate activity was necessary and proper to the regulation of interstate commerce.

The federal laws said to preempt the Montana Firearms Freedom Act, however, seek neither to preserve nor destroy a national market. The purpose is not related to the market at all, but rather "to provide support to . . . officials in their fight against crime and violence." Public Law 90-618 (1968); H. Rep. No. 1780, 73d Cong., 2d Sess. (1934). Additionally, the firearms manufactured pursuant to the Montana law are not fungible goods or commodities like the wheat in *Wickard* or the marijuana in *Raich*. Unlike homegrown agricultural commodities, firearms manufactured under the Montana Firearms Freedom Act and *only* available for sale in Montana are easily distinguishable firearms distributed interstate. The law requires that Montana Firearms be labeled with "Made in Montana," which must be "clearly stamped on a central metallic part" of

the gun. Mont. Code Ann. § 30-20-106. Since the central purpose of the federal laws at issue here, crime control, is different from the federal laws at issue in both *Wickard* and *Raich*, which sought to preserve and destroy national markets, neither *Wickard* nor *Raich* is controlling here.

IV. THE FEDERAL LAWS' PURPOSE IS CRIME CONTROL, WHICH IS OUTSIDE THE SCOPE OF THE COMMERCE CLAUSE WHEN ATTEMPTING TO REGULATE INTRASTATE ACTIVITY

The Supreme Court in *Lopez* held that when the purpose of the federal law is crime control as applied to intrastate activities, the federal law is outside the scope of the Commerce Clause. 514 U.S. at 552. In *Lopez*, the Court determined the limitations of the Commerce Clause by evaluating the purpose of the federal law. *Id.* at 551. The federal Gun-Free School Zones Act made it an offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone," and the state law made it an offense to possess a firearm on school premises. *Id.* Congress enacted the Gun-Free School Zone Act of 1990 specifically to help combat crime. 18 U.S.C § 922(q)(1). Since the purpose of the Gun-Free School Zone Act of 1990 was crime control, the federal law applying to purely intrastate activities was outside the scope of Congress' power under the Commerce Clause. *Lopez*, 514 U.S. at 552.

> Nor could the law be justified under the Necessary and Proper Clause.
>
> When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a "La[w] . . . *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."

Printz v. United States, 521 U.S. 898, 923-24 (1997) (citations omitted).

The issue in *Lopez* regarding the applicability of a federal law under the Commerce Clause to preempt a state law is similar to the issue in the instant case. Just as in *Lopez*, the purpose of the federal laws in the case at hand is crime control. There are two federal laws at issue in this case, the National Firearms Act of 1934 and the Gun Control Act of 1968. The National Firearms Act of 1934 was created to impose a tax on firearms manufacturers and dealers. 26 U.S.C. § 5801. The law was specifically enacted to create a system of federal gun control:

> [i]t has been frequently pointed out that there are limitations on the States, that the Federal Government has powers in the field, and that the evil needs a remedy. The growing frequency of crimes of violence in which people are killed or injured by the use of dangerous weapons needs no comment.

H. Rep. No. 1780, 73d Cong., 2d Sess. (1934). Thus, the main purpose of the National Firearms Act was to assist state and local governments with crime control. As in *Lopez*, the crime control emphasis is "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity w[as] regulated." 514 U.S. at 561. Since the

National Firearms Act focuses on crime control, the larger regulatory scheme is not related to the Commerce Clause.

The Gun Control Act of 1968 regulates the interstate commerce of firearms by prohibiting interstate transfers, except among licensed manufacturers, dealers, and importers. 18 U.S.C. § 922. Like the National Firearms Act, the purpose of the Gun Control Act is also crime control: "Congress hereby declares that the purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence." Public Law 90-618 (1968). Furthermore, the law's primary purpose is "to assist the States effectively to regulate firearms traffic within their borders." *Id.* Since crime control, rather than national regulation of a commodity market, is the primary focus, the Commerce Clause does not give Congress the power to preempt Montana's exercise of its police power. As in *Lopez*, the Montana Firearms Freedom Act has no effect on interstate commerce. The Gun Control Act was created in response to several high-profile deaths by firearms: "President Kennedy, Martin Luther King, Jr., Medgar Evers . . . were all shot by rifles or shotguns." H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7-8 (1968), reprinted in 1968 U.S.C.C.A.N. 4410, 4413. There is no discussion of economic activity in the legislative findings. As in *Lopez*, the Commerce Clause does not allow regulation of a purely intrastate activity when local crime control is the purpose behind the

federal law attempting to preempt the state law. Congress' power is to regulate commerce among the states; Congress does not have the power to displace local regulation of intrastate markets for the purpose of controlling local criminal activity. There is nothing in the Montana Firearms Freedom Act that frustrates a Congressional purpose to regulate interstate trade.

CONCLUSION

Montana is acting within its police powers under its state sovereignty by regulating intrastate activity. The original intent of the Framers was not to give the federal government a broad police power; indeed the Framers warned of the danger of a nationalized police power. The government claims in this case a power to displace the authority of states to regulate *any* intrastate commercial transaction. Plainly, such a result was not contemplated by the people when they adopted the Constitution and is not consistent with the language of the Constitution they adopted. *Kidd*, 128 U.S. at 1. To rule that the Commerce Clause empowers

Congress to displace a state's police power to regulate intrastate activity for the general welfare destroys the constitutional structure envisioned by the Framers.

DATED: June 8, 2011.

Respectfully submitted,

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STATEMENT OF AMICI

Pursuant to Federal Rule of Civil Procedure 29(c)(5), Amici Curiae Center for Constitutional Jurisprudence and fifteen state legislators, hereby state:

(A) a party's counsel DID NOT author the brief in whole or in part;

(B) a party or a party's counsel DID NOT contribute money that was intended to fund preparing or submitting the brief; and

(C) a person—other than the amicus curiae, its members, or its counsel—DID NOT contribute money that was intended to fund preparing or submitting the brief.

DATED: June 8, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 8, 2011.

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

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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