

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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Case No. 10-36094

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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.

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

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***APPELLANTS EXCERPTS OF RECORD***

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*Pro Querente*

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

**MONTANA SHOOTING SPORTS  
ASSOCIATION, SECOND  
AMENDMENT FOUNDATION,  
Inc., and GARY MARBUT,**

Plaintiffs,

v.

**ERIC H. HOLDER, JR.,  
ATTORNEY GENERAL OF THE  
UNITED STATES OF AMERICA,**

Defendant.

Cause No. **CV-09-147-M-DWM**

***NOTICE OF APPEAL***

NOTICE IS HEREBY GIVEN that Plaintiffs Montana Shooting Sports Association, Second Amendment Foundation, Inc., and Gary Marbut



("Plaintiffs"), in the above named case hereby appeal to the United States Court of Appeals for the Ninth Circuit, the final judgment entered in this action on October 19, 2010. (Dkt. No. 109, Exhibit A attached.)

Dated this 2nd day of December, 2010.

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

By: /s/ Quentin M. Rhoades  
Quentin M. Rhoades  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 2nd day of December, 2010, I served a true and correct copy of the foregoing on the following persons by the following means:

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- 2        Mail
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By: /s/ Quentin M. Rhoades  
Quentin M. Rhoades



UNITED STATES DISTRICT COURT

DISTRICT OF MONTANA

MISSOULA DIVISION

Montana Shooting Sports Association, et al. )

Plaintiffs, )

vs. )

Eric H. Holder, Jr., et al. )

Defendants. )

JUDGMENT

CV 09-147-M-DWM

\_\_\_\_\_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

  **X**   **Decision by Court.**

**IT IS HEREBY ORDERED** that judgment is entered in favor of the United States and against Plaintiffs in accordance with the Opinion entered 10/18/10.

Dated this 19th day of July, 2010.

PATRICK E. DUFFY, CLERK

By:       B. Warren        
Deputy Clerk



ER 9-ER 10

**FILED**

**SEP 29 2010**

PATRICK E. DUFFY, CLERK

By \_\_\_\_\_  
DEPUTY CLERK, MISSOULA

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

MONTANA SHOOTING SPORTS	)	CV 09-147-M-DWM-JCL
ASSOCIATION, SECOND AMENDMENT)	)	
FOUNDATION, INC., and GARY	)	
MARBUT,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	ORDER
	)	
ERIC H. HOLDER, JR., ATTORNEY	)	
GENERAL OF THE UNITED STATES OF	)	
AMERICA,	)	
	)	
Defendants.	)	
_____	)	

The Court having reviewed Magistrate Judge Jeremiah C. Lynch's Findings and Recommendations together with the objections of the Plaintiffs and Intervenor and the response filed by the Defendant, and having conducted a de novo review as required by 28 U.S.C. § 636(b)(1),

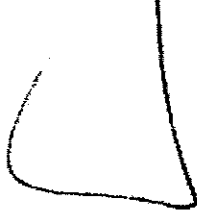
IT IS HEREBY ORDERED that Judge Lynch's Findings and Recommendations (Doc. No. 103) are adopted in full, and the Defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim (Doc. No. 10) is GRANTED. The case will be dismissed and judgment entered upon the filing of a forthcoming explanatory opinion.

DATED this 29<sup>th</sup> day of September, 2010.



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Donald W. Molloy, District Judge  
United States District Court



ER 11-ER 69

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

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MONTANA SHOOTING SPORTS  
ASSOCIATION, SECOND  
AMENDMENT FOUNDATION,  
INC., and GARY MARBUT

CV-09-147-DWM-JCL

Plaintiffs,

vs.

FINDINGS & RECOMMENDATION  
OF UNITED STATES  
MAGISTRATE JUDGE

ERIC H. HOLDER, JR., ATTORNEY  
GENERAL OF THE UNITED STATES  
OF AMERICA,

Defendant.

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Plaintiffs Montana Shooting Sports Association, Second Amendment Foundation, and Gary Marbut bring this declaratory judgment action seeking a determination that they may manufacture and sell firearms under the recently enacted Montana Firearms Freedom Act without complying with Federal firearms laws. They invoke federal question jurisdiction under 28 U.S.C § 1331. Defendant Eric H. Holder, Jr., Attorney General of the United States of America (“United

States”), has moved under Federal Rule of Civil Procedure 12(b) to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

To the extent Plaintiffs seek judicial review under the Administrative Procedures Act, they have not shown final agency action. Furthermore, because Plaintiffs do not have standing to pursue their claims for declaratory and injunctive relief, this case should be dismissed in its entirety for lack of subject matter jurisdiction. Even if presiding United States District Court Judge Donald W. Molloy were to disagree, and conclude on review of the undersigned’s Findings and Recommendation that there is subject matter jurisdiction, Plaintiffs have failed to state a claim upon which relief may be granted and their Second Amended Complaint should be dismissed.

### **I. Background**

The Montana Firearms Freedom Act (“the Act”), Mont Code Ann. § 30-20-101, et seq., is a product of Montana’s 2009 legislative session. The Act, which went into effect on October 1, 2009, declares that “[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

[sic] to regulate interstate commerce.” Mont. Code Ann. § 30-20-104.

In the months preceding the Act’s effective date, the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) received a number of inquiries from firearms industry members as to the potential effects of Montana’s new law on their business activities. Dkt. 33-2. In light of those inquiries, the ATF authored a July 16, 2009, open letter to all Montana Federal Firearms Licensees for the purpose of providing guidance regarding their continuing obligations under federal law. Dkt. 33-2. The ATF explained that “because the Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the Gun Control Act and the National Firearms Act, and their corresponding regulations, continue to apply.” Dkt. 33-2. The ATF indicated that any Federal requirements and prohibitions would “apply whether or not the firearms or ammunition have crossed state lines.” Dkt. 33-2, at 2.

In August 2009, Plaintiff Gary Marbut wrote to the resident agent in charge of the ATF field office in Billings, Montana, seeking similar guidance. Marbut indicated that he wanted to manufacture firearms, firearms accessories, or ammunition consistent with the Act and asked whether it would be permissible under federal law for him to do so. Dkt. 33-1. The ATF responded by letter on September 29, 2009, identifying various requirements under federal firearms laws.

Dkt. 33-1. The ATF cautioned Marbut that a violation of the Gun Control Act or the National Firearms Act “could lead to...potential criminal prosecution.” Dkt. 33-1. In closing, the ATF stated once again that to the extent “the Montana Firearms Freedom Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the [Gun Control Act] and [National Firearms Act], and their corresponding regulations, continue to apply.” Dkt. 33-1.

Unsatisfied with that response, Marbut commenced this declaratory judgment action on October 1, 2009, along with fellow Plaintiffs the Montana Shooting Sports Association<sup>1</sup> and the Second Amendment Foundation.<sup>2</sup> Dkt. 1. Plaintiffs have amended their complaint twice since then, most recently on April 9, 2010.<sup>3</sup> Dkt. 6, 33. Plaintiffs explain that Marbut and other individuals want to be

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<sup>1</sup> Gary Marbut is the president of the Montana Shooting Sports Association, which is a non-profit corporation organized for the purpose of supporting and promoting firearm use and safety, as well as educating its members on their constitutional right to keep and bear arms. Dkt. 33, at 2-3.

<sup>2</sup> The Second Amendment Foundation is a State of Washington non-profit organization with members nationwide, similarly dedicated to promoting the constitutional right to keep and bear firearms.

<sup>3</sup> Plaintiffs amended their Complaint once as a matter of course on December 14, 2009. See Fed. R. Civ. P. 15(a)(1). After the United States moved to dismiss, Plaintiffs filed a Second Amended Complaint primarily to bolster their allegations relating to the questions of standing and final agency action. Dkt. 33. As the United States notes, however, Plaintiffs filed their Second Amended Complaint without first obtaining the opposing party’s written consent or leave of



able to manufacture and sell small arms and small arms ammunition to customers in Montana pursuant to the Act without complying with the National Firearms Act, the Gun Control Act of 1968, or any other applicable federal laws. Dkt. 33, at 7-8. According to Marbut, he “has hundreds of customers who have offered to pay his stated asking price for both firearms and firearms ammunition manufactured under the [Act],” but those sales “are all specifically conditioned on the [firearms] being manufactured pursuant to the [Act], without [National Firearms Act] or [Gun Control Act] licensing, or as the customers see it, [ATF] interference.” Dkt. 33, ¶ 15.

Citing the ATF’s September 29, 2009 letter, however, Plaintiffs maintain the ATF has made clear that “no Montanan who wishes to proceed under the [Act] can do so without becoming licensed by [ATF], and without fear of federal criminal prosecution and/or civil sanctions....” Dkt. 33, ¶ 16. This presents a potential problem for the Plaintiffs, who indicate they do not want to pay the requisite ATF licensing fees and taxes, and do not want to submit to National

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court as required by Fed. R. Civ. P. 15(a). Dkt. 70, at 11 n.2. Nevertheless, the United States has not moved to strike the Second Amended Complaint and has had the opportunity to address Plaintiffs’ newly amended pleading in its reply brief and at oral argument. Accordingly, and bearing in mind that leave to amend shall be freely given under Fed. R. Civ. P. 15(a)(2), the Court will consider Plaintiffs’ Second Amended Complaint as the operative pleading from this point forth. Dkt. 33.

Firearms Act or Gun Control Act licensing and registration procedures, record keeping requirements, and marking mandates. Dkt. 33, ¶ 16. Plaintiffs allege that the threat of federal criminal prosecution and/or civil action is effectively preventing them “and all law abiding citizens from exercising their rights under and otherwise benefitting from the” Act. Dkt. 33, ¶ 22.

Plaintiffs bring this action for declaratory and injunctive relief in an effort to have those rights adjudicated. They ask the Court to declare that: (1) the United States Constitution confers no power on Congress to regulate the special rights and activities contemplated by the Act; (2) under the Ninth and Tenth Amendments of the United States Constitution, all regulatory authority of all such activities within Montana’s political borders is left in the sole discretion of the State of Montana; and (3) federal law does not preempt the Act and cannot be invoked to regulate or prosecute Montana citizens acting in compliance with the Act. Dkt. 33, at 14. Plaintiffs also seek injunctive relief to that effect, asking that the Court permanently enjoin the United States “and any agency of the United States of America from prosecuting any civil action, criminal indictment or information under the [National Firearms Act] or the [Gun Control Act], or any other federal laws and regulations, against Plaintiffs or other Montana citizens acting solely within the political borders of the State of Montana in compliance

with the [Act].” Dkt. 33, at 14.

The United States has moved under Federal Rule of Civil Procedure 12(b) to dismiss this entire action for lack of standing, lack of subject matter jurisdiction, and failure to state a claim upon which relief may be granted. After the United States filed its motion, the State of Montana intervened as of right in this matter and submitted a brief in support of the Act. Dkt. 46, 47. Also contributing to the current discussion are the several amici curiae who have filed briefs in support of either the Plaintiffs or the United States.<sup>4</sup>

Having reviewed the briefs and materials of record, and having heard oral argument on July 15, 2010, the Court turns now to the question of whether Plaintiffs’ Second Amended Complaint is sufficient to withstand the United States’ motion to dismiss.

## **II. Legal Standards - Motion to Dismiss**

### **A. Rule 12(b)(1)**

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<sup>4</sup> The following Amici have appeared in support of the Plaintiffs: Goldwater Institute Scharf-Norton Center for Constitutional Government, *et al.*; Weapons Collectors Society of Montana; the States of Utah and other States; several members of the Montana Legislature; the Paragon Foundation; the Center for Constitutional Jurisprudence and several state lawmakers from seventeen states; and the Gun Owners Foundation *et al.*

The following Amici have appeared in support of the United States: The Brady Center to Prevent Gun Violence *et al.*

A motion to dismiss under Rule 12(b)(1) challenges the court's subject matter jurisdiction over the claims asserted. "Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Rattlesnake Coalition v. United States Environmental Protection Agency*, 509 F.3d 1095, 1102 n. 1 (9<sup>th</sup> Cir. 2007).

A defendant may pursue a Rule 12(b)(1) motion to dismiss for lack of jurisdiction either as a facial challenge to the allegations of a pleading, or as a substantive challenge to the facts underlying the allegations. *Savage v. Glendale Union High School, Dist. No. 205, Maricopa County*, 343 F.3d 1036, 1039 n.2 (9<sup>th</sup> Cir. 2003). A facial challenge to the jurisdictional allegations is one which contends that the allegations "are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9<sup>th</sup> Cir. 2004). The success of a facial challenge to jurisdiction depends on the allegations in the complaint, and does not involve the resolution of a factual dispute. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9<sup>th</sup> Cir. 2004). In a facial challenge the court must assume the allegations in the complaint are true and it must "draw all reasonable inferences in [plaintiff's] favor." *Wolfe*, 392 F.3d at 362.

"By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe*

*Air for Everyone*, 373 F.3d at 1039. In resolving such a factual attack, the court “may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment.” *Safe Air for Everyone*, 373 F.3d at 1039. If the moving party has “converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.” *Safe Air for Everyone*, 373 F.3d at 1039 (quoting *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2 (9<sup>th</sup> Cir. 2003)). In looking to matters outside the pleadings, the Court must “resolve all disputes of fact in favor of the non-movant...similar to the summary judgment standard.” *Dreier v. United States*, 106 F.3d 844, 847 (9<sup>th</sup> Cir. 1996). As with a motion for summary judgment, the party moving to dismiss for lack of subject matter jurisdiction “should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Casumpang v. Int’l Longshoremen’s & Warehousemen’s Union*, 269 F.3d 1042, 1060-61 (9<sup>th</sup> Cir. 2001).

**B. Rule 12(b)(6)**

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Black*, 250 F.3d 729, 732 (9<sup>th</sup> Cir.

2001). “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9<sup>th</sup> Cir. 2008).

To survive a Rule 12(b)(6) motion, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, \_\_ U.S. \_\_, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This means that the plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949.

While the court must accept all factual allegations in the complaint as true and construe them in the light most favorable to the plaintiffs, it is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555. “Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049, 1055 (9<sup>th</sup> Cir. 2008).

Assessing a claim’s plausibility is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 129 S.Ct. at 1950.

### **III. Discussion**

The United States argues that this declaratory judgment action should be dismissed for lack of subject matter jurisdiction because Plaintiffs have not established a waiver of sovereign immunity under the Administrative Procedure Act, 5 U.S.C. § 551 et seq., and have not demonstrated that they are entitled to non-statutory review of a non-final agency action. The United States also maintains that subject matter jurisdiction is lacking because Plaintiffs have not shown an economic injury or credible threat of imminent prosecution sufficient to confer standing for purposes of pursuing their pre-enforcement constitutional challenge. Even if the Court does have subject matter jurisdiction, the United States argues that Plaintiffs have failed to state a claim upon which relief may be granted under binding United States Supreme Court and Ninth Circuit precedent.

#### **A. Sovereign Immunity**

“Federal courts are courts of limited jurisdiction,” having the power to hear cases only as authorized by the Constitution and by Congress. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Pursuant to 28 U.S.C. § 1331, Congress has authorized the federal courts to exercise federal question jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” Plaintiffs have invoked this jurisdictional provision, and ask the Court to

answer such federal questions as whether the United States Constitution gives Congress the power to regulate the intrastate firearms commerce activities contemplated by the Act. Dkt. 33, at 4 & 14. While Plaintiffs' lawsuit can thus be said to arise under federal law for § 1331 purposes, the United States nevertheless argues the Court is without subject matter jurisdiction because the government has not waived its sovereign immunity.

The doctrine of sovereign immunity operates as “an important limitation on the subject matter jurisdiction of federal courts.” *Dunn & Black, P.S. v. U.S.*, 492 F.3d 1084, 1087 (9<sup>th</sup> Cir. 2007) (quoting *Vacek v. U.S. Postal Service*, 447 F.3d 1248, 1250 (9<sup>th</sup> Cir. 2006)). As a sovereign, the United States “is immune from suit unless it has expressly waived such immunity and consented to be sued.” *Dunn & Black*, 492 F.3d at 1087-88 (quoting *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9<sup>th</sup> Cir. 1985)). Absent an unequivocally expressed waiver, there is no federal court jurisdiction. *Dunn & Black*, 492 F.3d at 1088.

Plaintiffs bear the burden of showing that the United States has waived its sovereign immunity. *Cato v. United States*, 70 F.3d 1103, 1107 (9<sup>th</sup> Cir. 1995). Citing the Administrative Procedures Act (“APA”), 5 U.S.C. §§ 701 et seq., Plaintiffs allege the United States has unequivocally waived its immunity with respect to their claims. Dkt. 33, ¶ 7. Section 702 of the APA indeed waives



sovereign immunity for certain nonmonetary claims against the United States, providing as it does that

[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency...acted or failed to act...shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702.

As with any waiver of sovereign immunity, however, the waiver set forth in § 702 is to be strictly construed in favor of the United States. *See e.g. Dunn & Black*, 492 F.3d at 1088; *Vacek*, 477 F.3d at 1250. Consistent with this principle, the United States argues that § 702 does not provide a waiver of sovereign immunity in this case because judicial review under the APA is limited to final agency action, and there has been no such final decision here.<sup>5</sup>

The APA provides the procedural mechanism by which “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,” may obtain “judicial review thereof.” 5 U.S.C. § 702. By its terms, the APA limits this right of judicial review to “final agency action for which there is no other adequate remedy in a

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<sup>5</sup> This amounts to a factual attack on jurisdiction, whereby the United States challenges the Plaintiffs’ allegations regarding final agency action. Because the United States has mounted a factual attack, the Court may look to matters outside the pleadings for purposes of resolving the motion.

court.”<sup>6</sup> 5 U.S.C. § 704. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990). In other words, the APA provides for judicial review of agency action, but only if that action is final. *See Lujan*, 497 U.S. at 882; *Rattlesnake Coalition v. EPA*, 509 F.3d 1095, 1103 (9<sup>th</sup> Cir. 2007).

Plaintiffs allege that the ATF’s September 29, 2009, letter to Marbut constituted “final agency action” within the meaning of the APA. Dkt. 33, ¶¶ 14-16. The ATF wrote the letter in response to an inquiry from Marbut as to whether it would be permissible under federal law for him to engage in the firearms manufacturing activities authorized by the Act. Dkt. 33-1. The ATF’s letter explained that the manufacture of certain firearms, even for personal use, would require ATF approval, and advised Marbut that “[t]he manufacture of firearms or ammunition for sale to others in Montana requires licensure by [the] ATF.” Dkt. 33-1. The ATF cautioned Marbut “that any unlicensed manufacturing of firearms or ammunition for sale or resale, or the manufacture of any [National Firearms Act] weapons, including sound suppressors, without proper registration and payment of tax, is a violation of Federal law and could lead to the forfeiture of such items and potential criminal prosecution under the [Gun Control Act] or the

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<sup>6</sup> The APA also provides for judicial review of an “[a]gency action made reviewable by statute.” 5 U.S.C. § 704. Because neither party points to any agency action made reviewable by statute, this provision is not implicated here.

[National Firearms Act].” Dkt. 33-1. In closing, the ATF stated that to the extent “the Montana Firearms Freedom Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the [Gun Control Act] and [National Firearms Act], and their corresponding regulations, continue to apply.” Dkt. 33-1.

For an agency action like this letter to be considered final for purposes of the APA, it must satisfy the following two criteria: (1) “the action must mark the consummation of the agency’s decisionmaking process – it must not be of a merely tentative or interlocutory nature;” and (2) “the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted). “The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.” *Oregon Natural Desert Association v. United States Forest Service*, 465 F.3d 977, 982 (9<sup>th</sup> Cir. 2006) (citation and quotation omitted).

The ATF’s letter to Marbut does not satisfy either of the *Bennett* criteria. With respect to the first requirement, there is nothing to suggest that the letter marks the consummation of the ATF’s decisionmaking process. In fact, there is

nothing to suggest that the ATF engaged in any decisionmaking process at all. The letter simply restates the requirements of federal firearms laws and reiterates well-established principles of federal supremacy and conflict preemption. *See Golden and Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432 (4<sup>th</sup> Cir. 2010) (concluding “there was simply no decisionmaking process” involved in the publication of an ATF reference guide that did nothing more than restate the requirements of federal firearms laws in response to frequently asked questions) .

Even assuming the letter did somehow mark the consummation of the ATF’s decisionmaking process, it does not satisfy the second prong of the *Bennett* finality test, which requires that the agency’s action “be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett*, 520 U.S. at 178 (internal quotations omitted). In other words, the specific action challenged must have some “legal effect.” *Oregon Natural Desert Association v. United States Forest Service*, 465 F.3d 977, 987 (9<sup>th</sup> Cir. 2006). In determining whether an agency action satisfies this second *Bennett* criteria, the court may properly consider whether the action “has a direct and immediate effect on the day-to-day business of the subject party,” whether it “has the status of law or comparable legal force, and whether immediate compliance with its terms is expected.” *Oregon Natural Desert Association*, 465 F.3d at 987.

The ATF's letter to Marbut did not have any such legal effect. The letter did not impose any new obligations on Marbut, deny him a right, or otherwise fix some legal relationship. The letter simply restated Marbut's obligations under longstanding federal firearms laws. Even if the ATF had not written the letter, Marbut would still have been required to comply with those federal firearms laws. In other words, any legal consequences in this case emanate not from the ATF's letter, but from applicable federal firearms laws and their implementing regulations. *See Golden and Zimmerman*, 599 F.3d at 433.

At oral argument, Plaintiffs maintained that the ATF's letter did more than just restate Marbut's obligations under federal firearms laws. According to Plaintiffs, the letter had the legal effect of clarifying Marbut's obligations under those federal laws in light of Montana's newly passed Firearms Freedom Act. The ATF did advise Marbut that "[t]o the extent that the Montana Firearms Freedom Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the [Gun Control Act] and [National Firearms Act], and their corresponding regulations, continue to apply." Dkt. 33-1. But because that statement did nothing to in any way alter Marbut's pre-existing obligations under those federal firearms laws, it was of no concrete legal effect. Because the ATF's letter did not impose any obligation, deny a right, or have any

legal effect on Marbut, the letter does not satisfy the second *Bennett* criteria for final agency action.

Even assuming they cannot show the requisite final agency action, Plaintiffs argue they are entitled to relief under the narrow doctrine of non-statutory review.

“The basic premise behind non-statutory review is that, even after the passage of the APA, some residuum of power remains with the district court to review agency action that is ultra vires.” *Rhode Island Dept. of Environmental Management v. United States*, 304 F.3d 31, 42 (1<sup>st</sup> Cir. 2002). A plaintiff requesting non-statutory review of a non-final decision must show that the agency acted “in excess of its delegated powers and contrary to a specific prohibition [that] is clear and mandatory.” *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

As they articulated it at oral argument, Plaintiffs’ theory that the ATF was acting in excess of its delegated powers is inextricably intertwined with the merits of their constitutional challenge. On the merits, Plaintiffs argue that Congress exceeded its powers under the Commerce Clause by enacting federal firearms laws regulating the intrastate firearms activities contemplated by the Act. Assuming the federal firearms laws Congress has charged the ATF with enforcing are unconstitutional, Plaintiffs maintain that any actions taken by the ATF to enforce

those unconstitutional laws can only be considered ultra vires.<sup>7</sup> This argument is inescapably circular. Under Plaintiffs' approach, the Court would not be able to determine the threshold jurisdictional question of whether Plaintiffs are entitled to non-statutory review without first conducting that review and addressing the merits of their constitutional claims.

It is this Catch-22 that best illustrates why Plaintiffs' argument regarding non-statutory review of non-final agency action is misplaced. Plaintiffs first developed this argument in response to the United States' motion to dismiss, which understandably characterized Plaintiffs' action as one brought for judicial review of a final agency action under the APA. Plaintiffs' First Amended Complaint, which was the operative pleading when the United States filed its motion to dismiss, alleged jurisdiction "based generally on § 704," which provides for judicial review of final agency action, but said nothing about an alleged waiver of sovereign immunity or anything further about an alleged final agency action. Dkt. 6, ¶ 6. Presumably construing Plaintiffs' jurisdictional allegation as a request for judicial review under the APA, the United States moved to dismiss on the

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<sup>7</sup> Plaintiffs have not cited any authority for the proposition that such conduct is properly described as "ultra vires." Nevertheless, there is authority to support the general notion that sovereign immunity does not bar an action for judicial review of an agency decision where a government officer acts "pursuant to an unconstitutional grant of power from the sovereign." *State of Alaska v. Babbitt*, 38 F.3d 1068, 1076 (9<sup>th</sup> Cir. 1994).

ground that it had not waived its sovereign immunity under § 702, because there was no final agency action. After the United States filed its motion to dismiss, Plaintiffs amended their complaint a second time to specifically allege a waiver of sovereign immunity under § 702, and that the ATF's September 29, 2009, letter to Marbut constituted "final agency action" within the meaning of the APA. Dkt. 33, ¶¶ 7, 14-16.

As discussed above, however, the ATF's September 29, 2009, letter does not constitute final agency action within the meaning of the APA. Consequently, Plaintiffs are not entitled to judicial review under the APA. This does not mean, however, that Plaintiffs' entire lawsuit should be dismissed on that basis alone, as the United States suggests.

Plaintiffs' lawsuit is not simply one for judicial review of agency action under the APA. Rather, the suit seeks declaratory and injunctive relief to prevent the United States from enforcing what Plaintiffs allege are unconstitutional federal firearms laws.<sup>8</sup> For example, Plaintiffs' Second Amended Complaint asks the

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<sup>8</sup> As noted above, while Plaintiffs' first two complaints alleged jurisdiction based on § 704 of the APA, they contained no allegations of final agency action and did not specifically allege a waiver of sovereign immunity. *See* Dkt. 1 & 6. It may well be that Plaintiffs simply intended to rely on the waiver of sovereign immunity set forth in § 702 of the APA for purposes of pursuing their constitutional challenge, over which the Court would have federal question subject matter jurisdiction.



Court to declare that the United States Constitution confers no power on Congress to regulate the special rights and activities contemplated by the Act. Dkt. 33, at 14. The Second Amended Complaint also seeks injunctive relief enjoining the United States “and any agency of the United States of America from prosecuting any civil action, criminal indictment or information under the [National Firearms Act] or the [Gun Control Act], or any other federal laws and regulations, against Plaintiffs or other Montana citizens acting solely with the political borders of the States of Montana in compliance with the [Act].” Dkt. 33, at 14.

These claims fall within a well-established exception to the doctrine of sovereign immunity. Federal courts have long recognized that the doctrine of sovereign immunity is inapplicable “in declaratory and/or injunctive relief suits against federal entities or officials seeking to enjoin the enforcement of an unconstitutional statute.” *Kelley v. United States*, 69 F.3d 1503, 1507 (10<sup>th</sup> Cir. 1995). *See also Entertainment Network, Inc. v. Lappin*, 134 F.Supp.2d 1002, 1009 (S.D. Ind. 2001); *Tenneco Oil Co. v. Sac and Fox Tribe*, 725 F.2d 572, 574 (10<sup>th</sup> Cir. 1984) (claim that law is unconstitutional falls within exception to doctrine of sovereign immunity). As the United States Supreme Court once explained it, the doctrine does not apply in such cases because “the conduct against which specific relief is sought is beyond the officer’s power and is, therefore, not the conduct of

the sovereign.” *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949). Consequently, there is an exception to sovereign immunity in a suit for declaratory and/or injunctive relief against federal officials where the plaintiff “alleges that the statute conferring power upon the officers is unconstitutional.” *Kozero v. Spirito*, 723 F.2d 1003, 1008 (1<sup>st</sup> Cir. 1983). *See also Clinton v. Babbitt*, 180 F.3d 1081, 1087 (9<sup>th</sup> Cir. 1999). “Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it did not possess.” *Kelley*, 69 F.3d at 1507 (quoting *Tenneco Oil Co.*, 725 F.2d at 574).<sup>9</sup>

Because the doctrine of sovereign immunity does not apply to Plaintiffs’ claims for declaratory and injunctive relief to prevent the United States from enforcing allegedly unconstitutional federal firearms laws, it would not be appropriate to dismiss this entire case based on Plaintiffs’ failure to establish a valid waiver. Of course, Plaintiffs must still demonstrate that they have standing under Article III of the United States Constitution to pursue their pre-enforcement challenge. This brings the Court to the United States’ next argument, which is that

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<sup>9</sup> Many courts have essentially read the APA’s waiver of sovereign immunity for nonmonetary actions against the United States as a codification of that common law rule. *See e.g. Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996). This may well be why Plaintiffs cited the APA in the first instance. As noted above, however, they alleged jurisdiction based on § 704 of the APA, and did not allege a waiver of sovereign immunity under § 702 until after their lawsuit had been understandably construed as one seeking judicial review under § 704.

Plaintiffs' pre-enforcement challenge should be dismissed for lack of subject matter jurisdiction based on lack of standing.

**B. Standing**

The United States argues that subject matter jurisdiction is lacking in this case because Plaintiffs have not shown an economic injury or credible threat of imminent prosecution sufficient to confer standing.<sup>10</sup>

Article III of the United States Constitution "limits the jurisdiction of federal courts to 'cases' and 'controversies.'" *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1126 (9<sup>th</sup> Cir. 1996). Standing is an "essential and unchanging part" of this case-or-controversy requirement. *Wolfson v. Brammer*, 2010 WL 3191159 \* 5 (9<sup>th</sup> Cir. 2010). As the party invoking federal jurisdiction, a plaintiff bears the burden of establishing standing to sue. *San Diego County*, 98 F.3d at 1126.

At an "irreducible constitutional minimum," Article III standing requires proof "(1) that the plaintiff suffered an injury in fact that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical;' (2) of a

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<sup>10</sup> The United States' motion to dismiss for lack of standing constitutes a factual challenge to the subject matter jurisdiction of this Court. To determine whether Plaintiffs have established standing based on economic injury or threat of prosecution, the Court properly looks outside the pleadings to the other materials of record.

causal connection between the injury and the complained-of conduct; and (3) that a favorable decision will likely redress the alleged injury.”<sup>11</sup> *Alaska Right to Life Political Action Committee v. Feldman*, 504 F.3d 840, 848 (9<sup>th</sup> Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). And where, as here, “plaintiffs seek declaratory and injunctive relief only, there is a further requirement that they show a very significant possibility of future harm.” *San Diego County*, 98 F.3d at 1126. The United States maintains that Plaintiffs cannot make it over the threshold hurdle of establishing that they have suffered an injury in fact for purposes of satisfying the first element of Article III standing.

Plaintiffs claim to have suffered two types of injury sufficient to confer standing.<sup>12</sup> First, Plaintiffs maintain that as a result of the ATF’s September 29, 2009 letter, they face an imminent and credible threat of prosecution under Federal firearms laws . Second, Plaintiffs allege economic injury because the United

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<sup>11</sup> The doctrine of prudential standing “supplements the requirement of Article 3 constitutional standing” and may require that the Court consider a number of other factors when assessing standing. *Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 891 (9<sup>th</sup> Cir. 2007). Because Plaintiffs lack Article III standing for the reasons set forth below, those prudential concerns are not implicated here.

<sup>12</sup> As briefed, Plaintiffs collectively claim to have standing. As the ensuing discussion reflects, however, their arguments regarding threat of prosecution and economic standing pertain solely to Marbut. Thus, for purposes analyzing these two issues, the Court will refer only to Marbut. The Court will address the standing of the two organizational plaintiffs separately.

States has effectively prevented them from manufacturing firearms under the Act and in turn selling those firearms to prospective customers. The Court will address each of these alleged injuries in turn.

1. Threat of prosecution

Marbut's claims for declaratory and injunctive relief are, in substance, a pre-enforcement challenge to the Federal firearms laws they maintain are unconstitutional. To demonstrate an injury in fact when bringing such a pre-enforcement challenge, a plaintiff must show that "there exists a credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). This does not mean that a plaintiff must go so far as to "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute." *Babbitt*, 442 U.S. at 298. See also *Holder v. Humanitarian Law Project*, \_\_ U.S. \_\_, 2010 WL 2471055 \*11 (2010). By the same token, however, "the mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *San Diego County*, 98 F.3d at 1126 (citation and quotations omitted). A plaintiff is thus tasked with showing that he faces a "genuine threat of imminent prosecution." *San Diego County*, 98 F.3d at 1126.

When evaluating the credibility of a threat of prosecution in any given case,

the court is to consider (1) “whether the plaintiffs have articulated a ‘concrete plan’ to violate the law in question,” (2) “whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings,” and (3) “the history of past prosecution or enforcement under the challenged statute.”<sup>13</sup>

*Thomas v. Anchorage Equal Rights Comm’n.*, 220 F.3d 1134, 1139 (9<sup>th</sup> Cir. 2000).

Assuming Marbut could establish – which he most likely would – a history of Federal government enforcement of the various mandates of the National Firearms Act and Gun Control Act, he has failed to show the remaining two factors.

*a. Concrete plan to violate federal law*

To demonstrate a concrete plan, a plaintiff must point to “something more than a hypothetical intent to violate the law.” *Thomas*, 220 F.3d at 1139. “A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan.” *Thomas*, 220 F.3d at 1139. “Such ‘some day’ intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the ‘actual or imminent’ injury that our cases require.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

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<sup>13</sup> This test “coincides squarely with” the ripeness inquiry. *Thomas*, 220 F.3d at 1138. Regardless of whether the jurisdictional inquiry is framed “as one of standing or of ripeness, the analysis is the same.” *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1093 (9<sup>th</sup> Cir. 2003).

Furthermore, if “[t]he acts necessary to make plaintiffs’ injury – prosecution under the challenged statute – materialize are almost entirely within plaintiffs’ own control,” then the “high degree of immediacy” necessary for purposes of establishing standing is not present. *San Diego County*, 98 F.3d at 1127. Thus, plaintiffs who merely “wish and intend to engage in activities prohibited” by existing law cannot be said to have articulated a concrete plan to violate the law. *San Diego County*, 98 F.3d at 1127.

While Marbut would clearly like to manufacture firearms in accordance with the Act, that is not sufficient for purposes of articulating a concrete plan to violate the law. *San Diego County*, 98 F.3d at 1127. Marbut claims he has the means to manufacture a .22 caliber rifle he proposes to call the Montana Buckaroo, and has presented some evidence in an attempt to establish that this is so, but he has correspondingly indicated that he has no concrete plans to manufacture those firearms if doing so means he will be in violation of federal law. In February 2010, for example, Marbut sent an email to members of the Montana Shooting Sports Association, soliciting customers for his “not-yet-available” Montana Buckaroo. Dkt. 86-18 at 1. Marbut advised the prospective customers that he “may only make these” rifles “IF we win the lawsuit, and IF I can actually produce them.” Dkt. 86-18, at 1. Thus, while Marbut states in his

sworn declaration that he “wishes to pursue this commercial activity,” he has not expressed any intent to actually do so in violation of the federal firearms laws he claims are unconstitutional.

Whether Marbut will ever face prosecution under Federal firearms law is at this point almost entirely within his own control, depending in the first instance on whether he decides to manufacture firearms in accordance with the Act. Because the acts necessary to make Marbut’s injury materialize are almost entirely within his control,” the “high degree of immediacy” necessary for purposes of establishing standing is lacking. *San Diego County*, 98 F.3d at 1127.

Because Marbut has not “articulated a ‘concrete plan’ to violate the law in question,” he cannot show that he faces a credible, genuine threat of imminent prosecution. *Thomas*, 220 F.3d at 1139. Even if the Court were to conclude otherwise and find that Marbut had articulated sufficiently concrete plans to violate the Federal firearms laws in question, he has not shown that he faces a specific threat of prosecution.

*b. Specificity of threat*

To establish standing based on the threat of prosecution, Marbut must show that the federal firearms laws at issue are “actually being enforced” against him. *San Diego County*, 98 F.3d at 1127. Under this standard, “a general threat of



prosecution is not enough to confer standing.” *San Diego County*, 98 F.3d at 1127. Marbut must instead show “[a] specific warning of an intent to prosecute under a criminal statute...” *San Diego County*, 98 F.3d at 1127. This entails showing something more than a general assertion by prosecuting officials that they intend to enforce particular laws. *See e.g. Poe v. Ullman*, 367 U.S. 497, 499 (1961); *Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 5-6 (9<sup>th</sup> Cir. 1974) Such general assertions lack the “immediacy” necessary to give rise to a justiciable controversy. *Poe*, 367 U.S. at 501.

Marbut argues that a specific threat of prosecution can be found in the ATF’s September 29, 2009, letter. As noted above, however, the ATF simply identified various requirements under current federal firearms laws, and cautioned Marbut “that any unlicensed manufacturing of firearms or ammunition for sale or resale, or the manufacture of any [National Firearms Act] weapons, including sound suppressors, without proper registration and payment of tax, is a violation of Federal law and could lead to the forfeiture of such items and potential prosecution under the [Gun Control Act] or the [National Firearms Act].” Dkt. 33-1. This statement amounts to nothing more than a general assertion that anyone who violates the nation’s federal firearms statutes may be subject to criminal prosecution. Such a general statement is not a specific threat of an imminent

intent to prosecute Marbut as required for purposes of establishing standing.<sup>14</sup> See *National Rifle Ass'n. v. Magaw*, 132 F.3d 272, 293-94 (6<sup>th</sup> Cir. 1997) (concluding that “plaintiffs who telephoned BATF agents, submitted a hypothetical question, and received an answer that the questioned activity could subject them to federal prosecution does not confer standing”); *Kegler v. U.S. Dept. Of Justice*, 436 F.Supp.2d 1204, 1212-19 (D. Wyo. 2006); *Crooker v. Magaw*, 41 F.Supp.2d 87, 91- 92 (D. Mass. 1999). Absent a specific threat of prosecution, Marbut cannot establish that he has standing to pursue his pre-enforcement challenge.

When all is said and done, Marbut has not shown that he faces a genuine threat of imminent prosecution, which in turn means he has not satisfied the injury in fact requirement for purposes of Article III standing. While Marbut’s threat of prosecution argument thus fails, he claims in the alternative to have standing based on economic injury. See *National Audubon Society, Inc. V. Davis*, 307 F.3d 835, 855 (9<sup>th</sup> Cir. 2002) (economic injury and threat of prosecution are alternate theories by which a plaintiff may establish standing)

## 2. Economic harm

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<sup>14</sup> To the extent any of the Plaintiffs might argue that the ATF’s July 2009 open letter to all Montana federal firearms licensees constitutes a specific threat of prosecution, that argument would fail for the same reasons. The July 2009 letter was even more general, written as it was for the public at large.

Marbut alleges he has suffered, and will continue to suffer, economic injury because the United States has effectively prevented him from manufacturing firearms under the Act and in turn selling those firearms to prospective customers. Dkt. 33, ¶ 15.

A plaintiff may satisfy the injury-in-fact prong of the constitutional standing analysis by demonstrating economic injury. *Central Arizona Water Conservation Dist. v. United States Environmental Protection Agency*, 990 F.2d 1531, 1537 (9<sup>th</sup> Cir. 1993). As with any injury that is alleged for purposes of establishing standing, such an economic injury must be “concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Central Arizona Water*, 990 F.2d at 1537. *See also, National Audubon Society*, 307 F.3d at 856 (economic harm must be “actual, discrete, and direct”).

Marbut claims to have “suffered past injury in the loss of economic opportunities” since the effective date of the Act because he has not been able to do as he would like, which is to manufacture and sell firearms under the Act without complying with federal firearms laws. Dkt. 51-1, at 8. According to Marbut, the fact that he has “already suffered economic harm” should be “enough [t]o confer standing.” Dkt. 51-1, at 8.

Marbut is mistaken for two reasons. First of all, his allegations of past

economic harm amount to nothing more than a hypothetical injury, consisting only of theoretical lost profits from a non-existent business operation. There is nothing concrete, particularized, or actual about such an alleged economic injury. Even if Marbut did have some plausible basis upon which he might claim past economic injury, that would not be sufficient to confer standing under the circumstances. Because Marbut is seeking “declaratory and injunctive relief only,” he needs to do more than demonstrate past economic injury. *Bras v. California Public Utilities Commission*, 59 F.3d 869, 873 (9<sup>th</sup> Cir. 1995). He must instead “show actual present harm or a significant possibility of future harm in order to demonstrate the need for pre-enforcement review.” *National Rifle Ass’n of America v. Magaw*, 132 F.3d 272, (6<sup>th</sup> Cir. 1997) (citing *Bras*, 59 F.3d at 873).

Marbut does allege that he is suffering ongoing economic harm, and will continue to suffer that economic harm in the future, because the United States is effectively preventing him from manufacturing and selling firearms under the Act “for significant economic gain.” Dkt. 33, ¶ 15. In an effort to demonstrate that this alleged economic injury is more than just hypothetical and speculative, Marbut has presented evidence of his proposed plans for manufacturing the Montana Buckaroo. Dkt. 86-2, ¶ 15; 86-6. For example, Marbut indicates he has identified third-party commercial entities that can assist him with various aspects

of the manufacturing process, and has solicited a number of prospective customers who will buy the Montana Buckaroo if it becomes available. Dkt. 86-2, ¶ 15; 86-6, 86-18. Marbut maintains that the evidence he has presented is sufficient to show that, were it not for the federal firearms laws he claims are unconstitutional, he would be reaping significant financial gain and is therefore suffering an ongoing economic injury.

The Ninth Circuit has long recognized the principle that a plaintiff whose pre-existing business activities are adversely affected by newly enacted legislation or other government action may have standing based on economic injury. In *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 856 (9<sup>th</sup> Cir. 2002), for example, the court held that animal trappers whose commercial trapping activities were prohibited under newly enacted state law had standing based on economic injury to challenge the law. Similarly, in *Central Arizona*, 990 F.2d at 1537-38, the court held that a water district that was contractually obligated to repay a federal agency for a portion of the cost of complying with a final rule imposed by the Environmental Protection Agency had standing based on economic injury to challenge the rule.

Unlike the plaintiffs in *National Audubon* and *Central Arizona*, however, Marbut is not now, and has never been, engaged in a commercial activity that is

suffering, or is likely to suffer, any economic harm as a result of the federal firearms laws he is attempting to challenge. At this point, Marbut is claiming nothing more than hypothetical lost profits from a hypothetical and illegal business enterprise. As such, the ongoing and future economic harm Marbut claims is far too speculative to constitute an injury in fact for purposes of establishing standing. *See e.g. Regents of University of California v. Shalala*, 872 F.Supp. 728, 737 (C.D. Cal. 1994) (concluding that “assertions of possible economic injury are too conjectural and hypothetical” to establish an injury in fact); *Abbott Labs v. Gardner*, 387 U.S. 136, 153 (1967) (explaining that “a possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action”); *Longstreet Delicatessen, fine Wines & Specialty Coffees, L.L.C. v. Jolly*, 2007 WL 2815022 \* 18 (E.D. Cal. 2007) (allegations of economic harm are insufficient where plaintiff “has offered no evidence of actual harm suffered other than by potential lost sales). Regardless of the specificity of Marbut’s proposed manufacturing plan, the fact remains that the business is nothing more than a theoretical one, as are the “significant economic gains” he claims he would be realizing if his proposed illegal business was up and running.

Marbut fails to cite any authority for the proposition that a plaintiff who

wishes he could start an illegal business, and would do so but for the fact that the idea he proposes is illegal, can claim to be suffering actual economic harm in the form of unrealized profits for purposes of establishing standing. While such a plaintiff might be able to establish standing if he proceeded with his plans to the point where he found himself faced with a credible threat of prosecution, that is not the situation here.

Simply put, there is nothing concrete, particularized, actual, or imminent about the economic injury Marbut alleges in this case. Nor has Marbut shown that he faces a credible threat of imminent prosecution. Marbut has thus failed to establish an injury in fact for purposes of satisfying the first element of Article III standing.

### 3. Organizational Plaintiffs

An organization or association like the Montana Shooting Sports Association or Second Amendment Foundation “has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right.” *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000). While Marbut is a member of Montana Shooting Sports Association, he has failed to demonstrate that he has standing to bring this action in his own right. Consequently, the Montana Shooting Sports

Association also lacks standing. *See Cetacean Community v. Bush*, 386 F.3d 1169, 1179 (9<sup>th</sup> Cir. 2004) (concluding that organization lacked standing where it failed to identify a member who had standing in his or her own right). Similarly, the Second Amendment Foundation lacks standing because it has not identified any member of its organization that might have standing in his or her own right.

Because Plaintiffs lack constitutional standing, this case should be dismissed for lack of subject matter jurisdiction. In the event the presiding judge, United States District Court Judge Donald W. Molloy, were to disagree with this recommendation, it would be necessary to turn to the United States' final argument and determine whether Plaintiffs have stated a claim upon which relief may be granted. In the interest of judicial economy, the Court will address that final argument now and consider whether Plaintiffs' Commerce Clause challenge states a claim upon which relief may be granted in light of controlling United States Supreme Court and Ninth Circuit caselaw.

### **C. Commerce Clause**

The operative portion of Montana's Firearms Freedom Act provides, in part, that "[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 [sic] to regulate interstate commerce.” Mont. Code Ann. § 30-20-104. The Act expressly declares “that those items have not traveled in interstate commerce,” and by its terms “applies to a firearm, a firearms accessory, or ammunition that is manufactured in Montana from basic materials and that can be manufactured without the inclusion of any significant parts imported from another state.” Mont. Code Ann. § 30-20-104. The Act excepts certain firearms from its protective scope, such as those “that cannot be carried and used by one person,” and requires that “[a] firearm manufactured or sold in Montana under this part must have the words ‘Made in Montana’ clearly stamped on a central metallic part, such as the receiver or frame.” Mont. Code Ann. §§ 30-20-105, 106.

To that end, the Act includes several “[l]egislative declarations of authority,” which specify that the Montana Legislature’s authority to promulgate such a statutory scheme comes from the Second, Ninth, and Tenth Amendments to the United States Constitution, and from that portion of the Montana Constitution guaranteeing the citizens of this state the right to bear arms. Mont. Code Ann. § 30-20-102. These legislative declarations state, for example, that “[t]he regulation of intrastate commerce is vested in the states under the 9<sup>th</sup> and 10<sup>th</sup> amendments to the United States constitution, particularly if not expressly preempted by federal

law,” and note that “Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearms accessories, and ammunition.” Mont. Code Ann. § 30-20-102(3). Intervenor State of Montana (“State of Montana”) emphasizes that the Montana Legislature, in its normal deliberative manner, enacted the Act as “principally a political statement...setting forth its conception of the interplay between the powers granted to Congress by the Commerce Clause and the powers retained by the states and the people pursuant to the Tenth Amendment.” Dkt. 47, at 5. Consistent with the Montana Legislature’s reading of the United States Constitution, Plaintiffs ask the Court to declare, among other things, that Congress does not have the power “to regulate the special rights and activities contemplated by the [Act].” Dkt. 33, at 14.

As the nature of Plaintiffs’ request for declaratory relief reflects, the central question in this case is whether Congress has the power to regulate those activities the Act purportedly exempts from federal law, namely, the intrastate manufacture and sale of firearms, firearms accessories, and ammunition. Article I, § 8 of the United States Constitution enumerates the powers granted to Congress, including the power “[t]o regulate Commerce...among the several States” and to “[t]o make all Laws which shall be necessary and proper for carrying [that power] into

Execution.” The United States Supreme Court has long held that the Commerce Clause vests Congress with the authority to regulate three types of economic activity: (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce” and (3) “those activities having a substantial relation to interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). *See also Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *United States v. Stewart*, 451 F.3d 1071, 1073 (9<sup>th</sup> Cir. 2006).

Because the Act purports to exempt only the intrastate manufacture and sale of firearms, ammunition, and accessories from federal regulation, the first two categories of economic activity are not implicated here. This means that whether Congress has the power to regulate the intrastate activity contemplated by the Act is properly analyzed under the third and final *Lopez* category. To fall within Congress’ Commerce Clause power on this basis, “the regulated activity must substantially affect interstate commerce.” *Lopez*, 514 U.S. at 558-59.

Applying this standard, the United States Supreme Court has repeatedly held that even purely local activities are subject to the regulatory powers of Congress if those activities “are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.” *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). In *Raich*, the Supreme Court considered whether Congress could, in the

exercise of its powers under the Commerce Clause, apply the Controlled Substances Act to prohibit the purely local production and medical use of marijuana authorized by state law. *Raich*, 545 U.S. at 5-8.

The Court answered this question in the affirmative, holding that the Controlled Substances Act constituted a valid exercise of federal commerce power even as applied to the purely local activity at issue. *Raich*, 545 U.S. at 9.

Harkening back to its decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), the *Raich* majority reiterated that “Congress can regulate purely intrastate activity” even if that activity is not itself commercial, “if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.” *Raich*, 545 U.S. at 18. The Court explained that it was not required to determine whether the local “activities, taken in the aggregate, substantially affect[ed] interstate commerce in fact, but only whether a ‘rational basis’ exist[ed] for so concluding.”<sup>15</sup> *Raich*, 545 U.S. at 22.

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<sup>15</sup> The *Raich* Court thus looked to the rational basis standard for purposes of determining whether Congress had acted within its Commerce Clause powers. At oral argument, Plaintiffs cited the United States Supreme Court’s recent decision in *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020 (U.S. 2010) and argued that federal firearms laws should be subjected to strict scrutiny because they regulate what has now been classified as an individual’s fundamental right to possess a handgun in the home for the purpose of self defense. As discussed below, however, Plaintiffs have not pled a Second Amendment claim in this case. Nor have Plaintiffs established that they have a fundamental Second Amendment right to manufacture and sell firearms. For these reasons *McDonald* is inapposite.

As the *Raich* Court discussed at some length, the Controlled Substances Act provided a “comprehensive framework for regulating the production, distribution, and possession” of the controlled substances, including marijuana. *Raich*, 545 U.S. at 24. Citing “the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere,” along with “concerns about diversion into illicit channels,” the Court had “no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacturing and possession of marijuana would leave a gaping hole in the [Controlled Substances Act].” *Raich*, 545 U.S. at 22. In doing so, the Court emphasized the fact that the regulatory scheme “ensnares some purely intrastate activity is of no moment.” *Raich*, 545 U.S. at 22.

In the end, the Court rejected Raich’s attempt to excise individual applications of [the] concededly valid statutory scheme” established by way of the Controlled Substances Act. *Raich*, 545 U.S. at 23. As the Court explained it, “[t]he notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected.” *Raich*, 545 U.S. at 30. Particularly when “[t]aking into account the fact that California [was] only one of at least nine states to have authorized the medical

use of marijuana,” the *Raich* majority found that “Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision [was] unquestionably substantial.” *Raich*, 545 U.S. at 32.

Under *Raich*, Montana’s attempt to similarly excise a discrete local activity from the comprehensive regulatory framework provided by federal firearms laws cannot stand. As did the federal statute at issue in *Raich*, the federal firearms laws from which Plaintiffs seek to be exempted regulate the production and distribution “of commodities for which there is an established, lucrative interstate market.” *Raich*, 454 U.S. at 26. The Ninth Circuit has specifically recognized the corollary between the regulatory framework of the Controlled Substances Act and that provided by federal firearms laws, noting that “[g]uns, like drugs, are regulated by a detailed and comprehensive statutory regime designed to protect individual firearm ownership while supporting ‘Federal, State and local law enforcement officials in their fight against crime and violence.’” *United States v. Stewart*, 451 F.3d 1071, 1076 (9<sup>th</sup> Cir. 2006) (quoting Gun Control Act of 1968, Pub. L. No. 90-168, § 101, 82 Stat. 1213, 1213). To that end, the National Firearms Act and Gun Control Act set forth various firearms registration, licensing, record keeping, and marking requirements. *See generally*, 26 U.S.C. § 5801 et seq.; 18 U.S.C. § 921 et

seq.

In Congress' view, the Gun Control Act was necessary to keep firearms "out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime in the United States." S. Rep. No. 1097, 90<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1968, 1968 U.S.C.C.A.N. 2112, 2113-2114. Congress found that "[o]nly through adequate Federal control over interstate and foreign commerce in firearms, and over all persons engaging in the business of importing, manufacturing, or dealing in firearms can this problem be dealt with, and effective State and local regulation of the firearms traffic be made possible." *Id.* at 2114.

Here, as in *Raich*, Congress had a rational basis for believing that failure to regulate the intrastate manufacture and sale of firearms, ammunition, and accessories "would leave a gaping hole" in the National Firearms Act and Gun Control Act, thereby undercutting federal regulation of the interstate market in those commodities. *Raich*, 545 U.S. at 18, 22. The size of the "gaping hole" that would be left in the federal regulatory scheme were Montana able to exempt the intrastate activities contemplated by the Act is of particular concern when taking into account the fact that, as of this writing, virtually identical Firearms Freedom

Act legislation has been enacted in six more states and proposed in twenty-two others. *Raich*, 545 U.S. at 32. Taking this into account, “Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.” *Raich*, 545 U.S. at 32.

As *Raich* instructs, the fact that federal firearms laws “ensnare some purely intrastate activity,” such as the manufacturing and sales activity purportedly exempted from regulation by the Act, “is of no moment.” *Raich*, 545 U.S. at 22. Under *Raich*, the National Firearms Act and Gun Control Act constitute a valid exercise of federal commerce power, even as applied to the purely intrastate manufacture and sale of firearms contemplated by the Act.

That this is so is even more clear in light of the fact that the Ninth Circuit has since applied *Raich* to hold that a statute criminalizing machine gun possession constitutes a valid exercise of Congressional power under the Commerce Clause, even as applied to purely intrastate activities. *United States v. Stewart*, 451 F.3d 1071, 1078 (9<sup>th</sup> Cir. 2006). As in *Raich*, the defendant in *Stewart* argued that “his possession [fell] within a subgroup of purely intrastate activities that [could] easily be cordoned off from those Congress may constitutionally control.” *Stewart*, 451 F.3d at 1074.



The Ninth Circuit rejected that argument, noting that “[l]ike the possession regulation in the Controlled Substance Act [at issue in *Raich*], the machine gun possession ban fit[] within a larger scheme for the regulation of interstate commerce in firearms.” *Stewart*, 451 F.3d at 1076. Citing *Raich* and *Wickard*, the Court found the fact that the guns had not traveled in interstate commerce was “entirely irrelevant.” *Stewart*, 451 F.3d at 1077. Observing that “[t]he market for machineguns [was] established and lucrative, like the market for marijuana,” the Court determined there was “a rational basis to conclude that federal regulation of intrastate incidents of transfer and possession [was] essential to effective control of the interstate incident of such traffic.” *Stewart*, 451 F.3d at 1077.

Read together, *Stewart* and *Raich* thus “compel the conclusion that Congress’ power under the Commerce Clause is almost unlimited where the prohibited product has significant economic value such as with drugs or guns.” *United States v. Rothacher*, 442 F.Supp.2d 999, 1007(D. Mont. 2006). Plaintiffs do not disagree, and in an attempt to reverse the course of current Commerce Clause jurisprudence take the novel approach of asking this Court to overrule the United States Supreme Court and Ninth Circuit. Dkt. 51-1, at 18-23.

But this Court is not at liberty to do what Plaintiffs ask. This Court is bound by the decisions of the United States Supreme Court and Ninth Circuit

Court of Appeals. *Hart v. Massanari*, 266 F.3d 1155, 1170 (9<sup>th</sup> Cir. 2001). “[C]aselaw on point is the law,” and “[b]inding authority must be followed unless and until overruled by a body competent to do so.” *Hart*, 266 F.3d at 170. This Court is thus bound by *Raich*, and must leave to the United States Supreme Court “the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). This Court is likewise bound to follow existing Ninth Circuit precedent, and could disregard *Stewart* only if the decision was “clearly irreconcilable” with “intervening higher authority.” *Miller v. Gammie*, 335 F.3d 889, 900 (9<sup>th</sup> Cir. 2003). That is not the case here. *Raich* and *Stewart* remain good law, and control this Court’s analysis.

Plaintiffs argue in the alternative that *Raich* is distinguishable, and maintain that under the circumstances it would be appropriate for this Court to return to the United States Supreme Court’s pre-*Raich* Commerce Clause jurisprudence as set forth in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Jones v. United States*, 529 U.S. 848 (2000). Particularly in light of the Ninth Circuit’s decision in *Stewart*, however, Plaintiffs’ attempts to distinguish *Raich* are unavailing.

Plaintiffs first claim that *Raich* is distinguishable because it involved the market for illegal drugs, and argue its holding should be limited accordingly. But

there is nothing in *Raich* to suggest that the Court meant for its holding to apply only to commerce in illegal drugs. Any argument to the contrary is put to rest by *Stewart*, in which the Ninth Circuit likened the regulatory scheme governing interstate commerce in drugs with that governing interstate commerce in firearms and applied *Raich* accordingly. *Raich*, 451 F.3d at 1076-78.

Plaintiffs also argue that *Raich* should not be viewed as controlling because, unlike the medical marijuana statute at issue there, the Act specifically states that it applies only to intrastate firearms commerce and provides a means for identifying those firearms that come within its protective scope. By its terms, the Act indeed applies only to those firearms, firearms accessories, and ammunition that are manufactured in Montana and that remain within the borders of this state. Mont. Code Ann. § 30-20-104. And as Plaintiffs note, the Act requires that any firearms “manufactured or sold in Montana under this part must have the words ‘Made in Montana’ clearly stamped on a central metallic part, such as the receiver or frame.” Mont. Code Ann. § 30-20-106. Presumably, the statute at issue in *Raich* did not similarly specify that it applied only to marijuana grown and used within the state of California, and did not provide a means for distinguishing locally cultivated marijuana from that cultivated elsewhere. Under the *Raich* Court’s analysis, however, neither of these distinctions is material.

Even assuming, as Plaintiffs allege in their Second Amended Complaint, it is possible to have a purely intrastate firearms market,<sup>16</sup> the fact that the Act purports only to exempt activities within that intrastate market from federal regulation is of no consequence. While California's medical marijuana statute might not have specified that it was to be applied only to intrastate activity, that was the only type of activity at issue in *Raich*. As the *Raich* Court framed it, the question presented was whether Congress had authority under the Commerce Clause to "prohibit the local cultivation and use of marijuana in compliance with California law." *Raich*, 545 U.S. at 5. It was undisputed that the marijuana at issue had been cultivated locally for personal use within California and had never entered the stream of interstate commerce. *Raich*, 454 U.S. at 5-7. Upholding the Controlled Substances Act even as applied to that purely local activity, the Court found the fact that the statute's regulatory framework "ensnare[d] some purely intrastate activity [was] of no moment." *Raich*, 545 U.S. at 22.

That the intrastate firearms commerce contemplated by the Act falls within

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<sup>16</sup> Under *Iqbal*, this Court need not accept as true those allegations that are facially implausible. *Iqbal*, 129 S.Ct. at 1949. This Court is not convinced it is plausible that firearms could be manufactured and sold in Montana without ever thereafter leaving the state. See e.g. *Raich*, 545 U.S. at 30 (finding "[t]he notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition...."). The Court will nevertheless assume for present purposes that Plaintiffs' allegations are plausible and will proceed on that assumption.

the reach of Congress' Commerce Clause power is even more clear in the wake of the Ninth Circuit's decision in *Stewart*. Applying *Raich*, the *Stewart* court concluded that whether or not the machineguns at issue there had traveled in interstate commerce was "entirely irrelevant." *Stewart*, 451 F.3d at 1077. As the Ninth Circuit summed it up, "when Congress makes an interstate omelet, it is entitled to break a few intrastate eggs." *Stewart*, 451 F.3d at 1075.

The fact that the Act provides a means for distinguishing firearms manufactured in Montana from those manufactured elsewhere does not change matters. As Plaintiffs note, the Act requires that any firearms manufactured or sold under its protective umbrella be clearly stamped with the words "Made in Montana." Mont. Code Ann. § 30-20-106. In Plaintiffs' myopic view, this case is thus different from *Raich*, where there was no such mechanism for distinguishing locally cultivated marijuana in the stream of commerce. The *Raich* Court indeed cited the "the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere" as one reason for finding "that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [Controlled Substances Act]." *Raich*, 545 U.S. at 23. But marijuana's fungibility was only a part of the *Raich* Court's explanation.

The *Raich* Court did not intend for its discussion “of the effect of intrastate marijuana use on national drug prices” to limit Congress’ Commerce Clause power “to the sale of fungible goods.” *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1276 (11<sup>th</sup> Cir. 2007). Rather, “the Court’s discussion of commodity pricing in *Raich* was part of its explanation of the rational basis Congress had for thinking that regulating home-consumed marijuana was an essential part of its comprehensive regulatory scheme aimed at controlling access to illegal drugs.” *Alabama-Tombigbee Rivers Coalition*, 477 F.3d at 1276.

The *Raich* Court also cited “concerns about diversion into illicit channels” – concerns that would remain in this case regardless of whether or not firearms manufactured under the Act bear a “Made in Montana” stamp. *Raich*, 545 U.S. at 23. Even more importantly, the *Raich* majority focused on the aggregate effect of medical marijuana use in the nine states with similar statutes and found that “Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.” *Raich*, 545 U.S. at 32.

The same can be said here. Congress could rationally have concluded that allowing local firearms commerce to escape federal regulation would severely undercut the comprehensive regulatory scheme set in place by federal firearms

laws. The rationality of this conclusion is evidenced by the number of states that have already enacted or are contemplating enacting similar Firearms Freedom Act legislation. This is so regardless of whether or not those locally manufactured firearms were to be emblazoned with a marker identifying the state of manufacture, or whether they ever enter the stream of interstate commerce.

Adding its voice to that of Plaintiffs, State of Montana attempts to distinguish *Raich* and *Stewart* on one more basis. The State of Montana begins by pointing to the *Raich* Court's discussion regarding the necessity of congressional findings. The respondents in *Raich* argued that the Controlled Substances Act could not "be constitutionally applied to their activities because Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market." *Raich*, 545 U.S. at 21.

The Court rejected that argument, explaining that "absent a special concern such as the protection of free speech," Congress need not "make particularized findings in order to legislate." *Raich*, 545 U.S. at 21. Elaborating further, the Court stated that "[w]hile congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the

connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate." *Raich*, 545 U.S. at 21.

Based on *Raich*, the Ninth Circuit in *Stewart* placed no significance on the apparent absence of specific congressional findings regarding the effects of homemade weapons on the interstate market. *Stewart*, 451 F.3d at 1075. In doing so, the Court noted there was no special concern that might necessitate particularized findings. The Court reasoned "that since the Second Amendment does not grant individual rights" it could not rely on that constitutional provision "as a basis for requiring Congress to make specific findings in legislation touching on firearms." *Stewart*, 451 F.3d at 1075 n. 6. The State of Montana argues the *Stewart* panel's logic is now flawed in view of the United States Supreme Court's decisions in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

*Heller* made clear that the Second Amendment does in fact confer an individual right to keep and bear arms, subject to certain limitations. *Heller*, 128 S.Ct. at 2799. Characterizing the right to keep and bear arms as one that is related to the inherent right of self-defense, *Heller* described the individual right conferred by the Second Amendment as the right of "law-abiding, responsible



citizens to use arms in defense of hearth and home.” *Heller*, 128 S.Ct. at 2817, 2821.

The fact that *Heller* recognized a Second Amendment right to possess firearms in the home for self-defense does not mean that Congress must have made particularized findings in order to enact a comprehensive regulatory scheme encompassing the intrastate manufacture and sale of firearms. *Heller* specifically contemplated that “the right secured by the Second Amendment is not unlimited,” and is subject to regulation. *Heller*, 128 S.Ct. at 2816. The Court cautioned, for example, that “nothing in [its] 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.” *Heller*, 128 S.Ct. at 2816-17. In fact, the prohibitions are “presumptively lawful regulatory measures.” *Heller*, 128 S.Ct. At 2817, n. 26. The federal firearms laws at issue here do just what *Heller* considered appropriate – they impose conditions and qualifications on the manufacture and sale of arms.

Even more importantly, the specific Second Amendment right recognized by *Heller* is simply not implicated in this case. *Heller* recognized that the Second Amendment guarantees the individual right to keep and bear arms, subject to

certain limitations. But Plaintiffs are not individuals seeking to enforce their constitutionally protected right to keep and bear arms as articulated in *Heller*. Instead, they are individuals who essentially claim they have the right to manufacture and sell firearms within the state of Montana without interference from the federal government. *Heller* said nothing about extending Second Amendment protection to firearm manufacturers or dealers. If anything, *Heller* recognized that firearms manufacturers and dealers are properly subject to regulation by the federal government under existing federal firearms laws.<sup>17</sup> *Heller*, 128 S.Ct. at 2816-17 (emphasizing that its holding should not be seen as casting doubt on laws imposing conditions and qualifications on the commercial sale of arms).

The United States Supreme Court reaffirmed this notion in the even more recent case of *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020 (2010). The Court held in *McDonald* that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right to possess a handgun in

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<sup>17</sup> Consistent with *Heller*, a number of lower courts have previously determined or assumed that there is “no Second Amendment right to be a firearm manufacturer or dealer.” *Olympic Arms v. Magaw*, 91 F.Supp.2d 1061, 1071 (E.D. Mich. 2000), *aff’d Olympic Arms, et al. v. Buckles*, 301 F.3d 384 (6<sup>th</sup> Cir. 2002). *See also United States v. King*, 532 F.2d 505, 510 (5<sup>th</sup> Cir. 1976); *Gilbert Equip. Co. v. Higgins*, 709 F.Supp. 1071, 1080-81 (S.D. Ala. 1989).

the home for the purpose of self-defense. *McDonald*, 130 S.Ct. at 3050. In doing so, the Court repeated the assurances it had made in *Heller*, explaining that its holding “did not cast doubt on such longstanding regulatory measures as...’laws imposing conditions and qualifications on the commercial sale of arms.’” *McDonald*, 130 S.Ct. at 3047 (quoting *Heller*, 128 S.Ct. at 2816-17).

At oral argument, Plaintiffs maintained that in light of the fundamental nature of the Second Amendment right recognized in *McDonald*, this Court should apply strict scrutiny to its review of federal firearms laws rather than the rational basis standard applied by the United States Supreme Court in *Raich*. But Plaintiffs have not pled a Second Amendment claim in this case. Dkt. 33. Plaintiffs do not allege that their Second Amendment rights have been violated, and their prayer for declaratory relief does not even mention the Second Amendment. Dkt. 33. Because Plaintiffs have not pled a Second Amendment claim, *McDonald* does not apply.

Even if Plaintiffs had alleged a Second Amendment violation, *McDonald* says nothing about extending Second Amendment protection to firearm manufacturers or dealers. Because the United States Supreme Court did not intend for its holding in *McDonald* and *Heller* to undermine existing laws regulating the manufacture and sale of firearms, *Raich* and *Stewart* control. Congress was not

required to make particularized findings that the intrastate manufacture and sale of firearms, if performed under the constraints set forth in the Act, would substantially affect the interstate market.

For all of the above reasons, this Court concludes that under *Raich* and *Stewart*, the National Firearms Act and Gun Control Act constitute a valid exercise of Congress' Commerce Clause power, even as applied to the purely intrastate manufacture and sale of firearms contemplated by the Act.

### **C. The Supremacy Clause and the Tenth Amendment**

The Supremacy Clause to the United States Constitution reads, in its entirety, as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

In other words, “[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”

*Raich*, 545 U.S. at 29. “It is beyond peradventure that federal power over commerce is ‘superior to that of the States to provide for the welfare or necessities of their inhabitants,’ however legitimate or dire those necessities may be.” *Raich*,

545 U.S. 29 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968)). It is well-established that State and Federal law conflict “where it is impossible for a private party to comply with both State and Federal requirements or where State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

The Act is in clear conflict with Federal firearms laws, including the Gun Control Act and National Firearms Act. The Act purports to exempt Montana small arms manufacturers and dealers, whose activities are confined within the state of Montana, from requirements imposed by federal law. In fact, it is the conflict between these state and federal statutory schemes that prompted this litigation. Because the Federal firearms laws are a valid exercise of Congressional power under the Commerce Clause, even as applied the Plaintiffs’ intrastate activities, those federal laws prevail to the extent the Act conflicts with them.<sup>18</sup>

To the extent Plaintiffs argue this results in a Tenth Amendment violation, they are mistaken. The Tenth Amendment provides that “[t]he powers not

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<sup>18</sup> Intervenor State of Montana accurately notes that the Supremacy Clause is directed to the judges of every state, and does not operate to circumscribe the state legislatures - or the people - from expressing their views. *Printz v. United States*, 521 U.S. 898, 912 (1997). The United States is not suggesting otherwise, as it is indeed the prerogative of Montana’s Legislature to riddle the statutory code with “political statements” if the Legislature deems it prudent to do so. The issue at hand, however, is whether the Act may be relied upon to prevent enforcement of the Federal firearms laws in relation to a firearm manufactured and sold intrastate.

delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.” U.S. Const. amend X. The Tenth Amendment thus reserves to the states those powers not specifically delegated to the federal government.

Where, as here, a federal statute “is within the powers granted to Congress under the Commerce Clause, it cannot constitute an exercise of power reserved to the states.” *Columbia River Gorge United - Protecting People and Property v. Yeutter*, 960 F.2d 110, 114 (9<sup>th</sup> Cir. 1992). If Congress has acted within its power under the Commerce Clause, “the Tenth Amendment expressly disclaims any reservation of power to the States.” *New York v. United States*, 505 U.S. 144, 156 (1992). In other words, a valid exercise of Congress’ Commerce Clause power is not a violation of the Tenth Amendment.<sup>19</sup> *See e.g. United States v. Collins*, 61 F.3d 1379, 1384 (9<sup>th</sup> Cir. 1995); *Garcia v. San Antonio Metropolitan Trans. Auth.*, 469 U.S. 528 (1985). Because federal firearms laws are a valid exercise of Congress’ power under the Commerce Clause as applied to the intrastate activities

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<sup>19</sup> Plaintiffs also make a cursory reference to the Ninth Amendment, which provides that “[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. Const. amend IX. *See* Dkt. 51-1, at 30-31. The Ninth Amendment does not, as suggested by Plaintiffs, independently secure “any constitutional rights for purposes of making out a constitutional violation.” *Schowengerdt v. United States*, 944 F.2d 483, 490 (9<sup>th</sup> Cir. 1991).

contemplated by the Act, there is no Tenth Amendment violation in this case.

**IV. Conclusion**

For all of the above reasons,

IT IS RECOMMENDED that the United States' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which may be granted be GRANTED and this case be dismissed in its entirety.

DATED this 31st day of August, 2010

/s/ Jeremiah C. Lynch  
Jeremiah C. Lynch  
United States Magistrate Judge

ER 70-ER 150



UNITED STATES DISTRICT COURT  
DISTRICT OF MONTANA  
MISSOULA, NEVADA

MONTANA SHOOTING SPORTS )  
ASSOCIATION, et al., )  
 ) Docket No. 9:09-CV-0147-DWM-JCL  
Plaintiffs, )  
 )  
vs. )  
 )  
ERIC H. HOLDER, JR., et al., )  
 )  
Defendants. ) Missoula, Montana  
 ) July 15, 2010  
 ) 9:03 a.m.  
And related cases and parties)

**HEARING ON MOTIONS**

THE HONORABLE JEREMIAH C. LYNCH PRESIDING  
MAGISTRATE JUDGE OF THE U.S. DISTRICT COURT

COURT RECORDER:

ANNIE PUHRMANN  
U.S. District Court

Proceedings recorded by electronic sound recording, transcript  
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9:09-CV-0147-DWM-JCL Montana Shooting v. Holder 7/15/10 **MOTIONS**

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9:09-CV-0147-DWM-JCL           Montana Shooting v. Holder           7/15/10           MOTIONS

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1 MISSOULA, MONTANA

THURSDAY, JULY 15, 2010

2 PROCEEDINGS BEGAN AT 9:03:58 A.M.

3 THE COURT: This is the time set for hearing in the  
4 Montana Shooting Sports Association, et al., versus Holder.  
5 Civil number 9-147-Missoula.

6 I'm going to begin by asking counsel for the  
7 principal parties, the Intervenor State of Montana and the  
8 Amicus who will be participating today to identify themselves  
9 for the record.

10 We'll begin with plaintiff and we'll go to defense  
11 counsel, to the intervenor, to the amicus.

12 MR. RHOADES: Your Honor, Quentin Rhoades on behalf  
13 of Montana Shooting Sports Association, Second Amendment  
14 Foundation, and Gary Marbut.

15 THE COURT: Okay. Thank you.

16 MS. LEINWAND: Good morning, Your Honor. Jessica  
17 Leinwand on behalf of the United States.

18 THE COURT: Good morning.

19 MR. TWEETEN: Good morning, Your Honor. Chris  
20 Tweeten --

21 THE COURT: Good morning.

22 MR. TWEETEN: -- on behalf of the State of Montana.  
23 Also in the courtroom today with me is Zach Zipfel, who is an  
24 Assistant Attorney General who's on the brief for the State of  
25 Montana.

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1 THE COURT: All right. Thank you.

2 MR. FOX: Your Honor, Tim Fox, local counsel for the  
3 Goldwater Institute. Arguing this morning for the Goldwater  
4 Institute is Nick Dranias.

5 THE COURT: Good morning.

6 MR. DRANIAS: Good morning, Your Honor. Nick  
7 Dranias for the Goldwater Institute. Thank you.

8 THE COURT: And you'll be arguing today?

9 MR. DRANIAS: I will indeed. Thank you.

10 THE COURT: All right.

11 MR. JACKSON: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. JACKSON: Greg Jackson, local counsel for Gun  
14 Owners of America. I'd like to introduce Herb Titus.

15 MR. TITUS: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. TITUS: I'm Herb Titus and I'm of the law firm  
18 of William J. Olson, PC, and we represent Gun Owners of  
19 America and Gun Owners Foundation.

20 THE COURT: All right. Thank you.

21 MR. JACKSON: Thank you, Your Honor.

22 THE COURT: I think we have -- have we covered --  
23 oh, we've got Mr. Renz, I believe.

24 MR. RENZ: Good morning, Your Honor. I'm Jeffrey  
25 Renz and I represent the Amicus Montana Legislatures. And

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1 also in the courtroom is Jennifer Bordy, who is co-author of  
2 the brief.

3 THE COURT: All right. Thank you.

4 That being said, then I will give the floor to Ms.  
5 Leinhart [sic] on behalf of the defendant, Eric Holder. As I  
6 indicated in the order, you will have 50 minutes. You do not  
7 have to use it all if you choose not to, but you can split it  
8 in any manner that you deem appropriate for your opening and  
9 rebuttal.

10 MS. LEINWAND: Thank you, Your Honor.

11 I'd like to reserve 15 minutes at the outset for  
12 rebuttal.

13 THE COURT: 15?

14 MS. LEINWAND: Mm-hmm.

15 THE COURT: All right.

16 MS. LEINWAND: May it please the Court.

17 The Montana Firearms Freedom Act declares that  
18 firearms made and sold within Montana are not subject to  
19 federal regulation. Plaintiffs in this case, Mr. Marbut, the  
20 Montana Shooting Sports Association, and the Second Amendment  
21 Foundation filed suit seeking a declaration that they can  
22 manufacture firearms under the MFFA without complying with  
23 applicable federal firearms laws.

24 This suit raises sensitive issues. There have been  
25 over fifteen briefs submitted, many words have been written.

1 But really, Your Honor, this is an easy case, and it does  
2 center on the issue of federal power. But not only the power  
3 -- excuse me -- not only the power of the federal government  
4 to regulate commercial activity, the buying and selling of  
5 firearms under the Commerce Clause.

6 This suit is about the power of a Federal District  
7 Court to hear a case in which the plaintiffs have no standing  
8 and where applicable Ninth Circuit and Supreme Court precedent  
9 directly controls the challenge on the merits.

10 In fact, plaintiff's claims can only succeed if  
11 binding authority, Gonzales versus Raich and United States  
12 versus Stewart is overturned. And regardless of plaintiff's  
13 frustration or disagreement with those holdings, Stewart and  
14 Raich remain good law. Asking this Court to revisit them  
15 misunderstands the role of a Federal District Court in  
16 interpreting and applying the law as it is.

17 Plaintiffs and Amicus have both referred to the MFFA  
18 as a political statement, and so Montana and other states who  
19 have passed similar legislation can try to amend federal gun  
20 control laws in the political arena through their elected  
21 senators and representatives in Congress, but this Court must  
22 dismiss plaintiff's claims for lack of standing and for  
23 failure to state a claim in light of the settled Commerce  
24 Clause on point -- Commerce Clause laws on point.

25 Turning to those jurisdictional issues now, a

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ER 76

1 federal court can only hear live cases or controversies in  
2 which the plaintiffs allege concrete and actual injury.  
3 Plaintiffs bear the burden of establishing their standing to  
4 challenge the federal firearms laws in light of the MFFA.  
5 And plaintiffs have stated that were it not for the federal  
6 firearms laws currently in place, they could immediately  
7 manufacture and sell firearms under the MFFA. But they claim  
8 they haven't done so out of fear of being prosecuted for  
9 violating federal law.

10 Plaintiffs then are challenging laws before those  
11 laws have been enforced against them. And to have standing in  
12 the context of a pre-enforcement challenge, a plaintiff must  
13 allege two things, an intention to engage in conduct  
14 prohibited by a federal statute, and a creditable threat of  
15 prosecution that is more than speculative.

16 And plaintiffs are unable to establish standing  
17 under the Ninth Circuit's three part test announced in San  
18 Diego County versus Reno. They can't allege a concrete  
19 intention to violate federal firearms laws at a specific time  
20 or place. They can point to no creditable threat of  
21 prosecution on the part of the federal government. And they  
22 haven't alleged a history or a pattern of prosecution by  
23 federal authorities.

24 If we look at the first prong, intent, Plaintiff  
25 Marbut has submitted evidence on his development of 12 gauge

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1 round beanbag ammunition and the Montana Buckaroo Rifle. Mr.  
2 Marbut clearly has a desire to manufacture and sell small  
3 arms and ammunition under the MFFA. And he has the means to  
4 complete a pilot project if the law is upheld. But he hasn't  
5 alleged a plan to violate federal law at a particular time or  
6 on a date certain. In fact he'll manufacture these firearms  
7 only once this Court declares that the MFFA is valid.

8 So Mr. Marbut has no intention of violating federal  
9 law. He's expressly refusing to violate the Gun Control Act,  
10 and will produce and sell MFFA firearms someday when a  
11 judicial decision says that he can.

12 And the Court in San Diego County found similar  
13 facts to be troubling, stating that plaintiffs had to specify  
14 a particular time or date on which they intend to violate a  
15 statute because the acts necessary to trigger prosecution are  
16 entirely within the plaintiff's control.

17 THE COURT: How do you respond to the plaintiff's  
18 argument that the Court should not, in this instance, look to  
19 the three part test of Thomas and San Diego because he's  
20 alleged sufficient tangible economic entry? He contends he  
21 has.

22 MS. LEINWAND: Well, Your Honor, if we look at  
23 binding authority Ninth Circuit precedent on economic harm, we  
24 see that the Ninth Circuit really requires the plaintiff to  
25 allege tangible financial loss. So in National Audubon

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1 Society versus Davis, for example, the Court found that  
2 animal trappers who were utilizing certain traps had  
3 standing to challenge a California law that banned those  
4 trap's usage.

5 The plaintiffs were using these traps to hunt  
6 animals and then they would sell their furs. So outlawing  
7 the traps had a direct and substantial effect on their  
8 livelihood.

9 Here plaintiffs can't allege that type of direct  
10 financial injury because Mr. Marbut has future plans to  
11 manufacture a quantity of firearms. And he claims that he's  
12 lost money on these firearms that he's been unable to sell  
13 since October 1<sup>st</sup>, 2009, or the date that the MFFA was  
14 enacted. But he hasn't described production costs, pricing,  
15 or demand for the firearms that he plans to sell. And so  
16 without these facts it's impossible to determine his loss of  
17 potential profit or whether he would have lost a profit at  
18 all.

19 To assume that the plaintiff has incurred some kind  
20 of economic injury, we'd have to pile inference on top of  
21 inference on top of inference. We'd have to assume he was  
22 able to produce these firearms, that he could produce them in  
23 a manner that was efficient enough that he could actually  
24 make a profit, that they were priced in a way that actually  
25 satisfied demand, and then that these customers who -- and

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1 I've seen Plaintiff Marbut's email submissions, but these  
2 customers were responding to a help needed email solicitation  
3 to establish standing for this lawsuit. And those emails  
4 provided no enforceable assurances that they would actually  
5 complete those sales. There was no down payment, there was  
6 no credit card number, there -- you know, so really these  
7 emails were no more than tentative expressions of interest.

8 THE COURT: Should he be given an opportunity to  
9 present evidence since we're here on a motion to dismiss?

10 MS. LEINWAND: Well, Your Honor, I think even if he  
11 did present evidence that there was some type of demand for  
12 these firearms, if we look again at the case law, it really  
13 requires that plaintiffs are engaging in a business that is  
14 under -- that is experiencing some kind of harm as a result  
15 of the application of federal law.

16 So in Navegar, which was the challenge in the DC  
17 Circuit to the 1994 Assault Weapon Statute, that court found  
18 that manufactures and dealers whose products were specifically  
19 banned by a statute by name, and only those manufactures had  
20 standing to challenge the law.

21 Similarly in the Six Circuit, National Rifle  
22 Association versus McGraw, it was the same type of thing.  
23 These plaintiffs were engaged in a particular type of  
24 business, and the federal statute targeted and eliminated a  
25 portion of the plaintiff's business.

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1           We don't have that here. If Mr. -- Mr. Marbut seeks  
2 to create a business, and an unlawful business at that. But  
3 he's really not suffering any type of concrete economic harm  
4 at the operation of federal law, which was the standard  
5 originally announced by the Supreme Court in Abbott Labs.

6           THE COURT: So it's your position that the  
7 individual would have to actually be engaged in the prohibited  
8 enterprise?

9           MS. LEINWAND: For economic injury, I think he --

10          THE COURT: For economic injury.

11          MS. LEINWAND: Mm-hmm. I think that the case law  
12 clearly establishes that he would be -- he would need to be,  
13 again, suffering some kind of concrete injury as a result of  
14 federal law, which would indicate that he was suffering a  
15 tangible financial loss at this moment, and loss of profit  
16 doesn't suffice.

17          THE COURT: All right.

18          MS. LEINWAND: To go back to the preenforcement  
19 challenge, I had been discussing plaintiff's -- plaintiff's  
20 plans to violate the law and how they really weren't  
21 concrete. And again I think, and I won't go into the facts  
22 of those cases again, but I think Navegar and National Rifle  
23 Association are instructive because the plaintiffs were  
24 engaging in conduct prohibited by law at the time the statute  
25 was passed.

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1 Same is true in Gonzales versus Raich, which the  
2 plaintiffs referenced in their brief. Plaintiff in that case  
3 had been cultivating and using marijuana to treat symptoms  
4 associated with brain cancer. So federal law has -- was  
5 directly threatening conduct that she was currently engaging.

6 And those cases are very different than the facts  
7 that are alleged in this case. They won't -- the plaintiffs  
8 here again, won't violate the law unless and until the MFFA  
9 is declared valid.

10 And so like the plaintiffs in San Diego County, or  
11 if plaintiffs denied standing in Navegar and National Rifle  
12 Association, because there were -- there were lines drawn in  
13 those cases, and the individual plaintiffs who were denied  
14 standing similarly expressed a desire to engage in certain  
15 type of non-specific activity.

16 THE COURT: Well, let me ask you, if we assume for  
17 purposes of a motion to dismiss that Mr. Marbut has the  
18 wherewithal to start up this enterprise and actually the  
19 enterprise would in fact be profitable or lucrative, but he  
20 does not engage in the enterprise because of fear of  
21 prosecution, is that -- does that satisfy the economic injury  
22 question?

23 MS. LEINWAND: The economic injury question or the  
24 first prong of the pre-enforcement challenge?

25 THE COURT: I'm asking about economic injury. He

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ER 82

1 doesn't engage in -- he doesn't engage in the process because  
2 -- or in the enterprise because of a fear of prosecution.

3 MS. LEINWAND: I think --

4 THE COURT: He doesn't invest his monies.

5 MS. LEINWAND: -- I think again, I think Abbott  
6 Labs is instructive here as well because in that case  
7 plaintiffs were challenging a law that had a direct effect  
8 again on their business. So the operation of federal law  
9 would cause them to invest money and, you know, change a whole  
10 portion of their business so that they complied. And in that  
11 case the Supreme Court said well, you can challenge federal  
12 law because if you don't you have to invest all of this money  
13 and go through -- jump through all of these hoops and  
14 foreseeably lose a lot of money in doing so, without a  
15 declaration that the law is even valid. So in that case we  
16 see how there was direct injury.

17 But again in this case we have the reverse.  
18 Plaintiff wants to engage in a business, and maybe he'll  
19 invest money to engage in that business, but in a sense we'd  
20 be allowing him to create his own economic harm and then come  
21 into court and sue. So no, I don't think that that would --

22 THE COURT: Well, he's prohibited -- arguably  
23 prohibited from engaging in the enterprise because of the  
24 fear of prosecution, or the existing federal regulations.

25 MS. LEINWAND: He's prohibited from engaging in the

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ER 83

1 actual manufacture and sale, but the -- you know, the prep  
2 work that goes into that, if he did, you know, set up --  
3 invest these -- this money in preparing these guns to be  
4 manufactured, I still think he would need a preexisting  
5 business under Navegar and National Rifle Association.

6 THE COURT: That's what I was getting to. It's your  
7 position it has to be a preexisting business?

8 MS. LEINWAND: Under those cases.

9 THE COURT: He has to be actively engaged in the  
10 business?

11 MS. LEINWAND: Yes, for economic injury.

12 THE COURT: All right.

13 MS. LEINWAND: I don't think that that's entirely  
14 true in the pre-enforcement prong -- pre-enforcement context  
15 because there are these other two prongs of that test. So  
16 there's the concrete intention to violate federal law at a  
17 specific time or date, but then you also need a credible  
18 threat of prosecution on the part of the federal government  
19 and a history and pattern of enforcement. And all of those  
20 three -- the confluence of those three factors is what gives  
21 rise to standing in that context.

22 And so there I think if plaintiff could allege a  
23 concrete intention, which I don't think he has here, and he  
24 demonstrate a creditable threat of prosecution, which he  
25 clearly can't do in this case because all ATF did with their

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1 September 29<sup>th</sup>, 2009 letter, was remind plaintiff of his  
2 preexisting obligations under federal law. And as with any  
3 federal law, should someone choose to violate that law, they  
4 are subject to criminal and civil penalties. So there's no  
5 creditable threat or concrete threat of prosecution in this  
6 case, and plaintiff hasn't pointed to any history of  
7 enforcement of the federal laws at issue, in light of the  
8 MFFA. So I think under the three part test in San Diego  
9 County, he fails all three prongs in fact.

10 And so when we consider the fact that he does not  
11 have standing in the pre-enforcement context, and has no  
12 preexisting business suffering any kind of concrete financial  
13 injury and can't satisfy the economic basis for standing,  
14 Plaintiff Marbut just doesn't have standing to bring this  
15 lawsuit.

16 And in that case, the organizational plaintiffs in  
17 this case, the Montana Shooting Sports Association and the  
18 Second Amendment Foundation, these organizations would only  
19 have standing to sue if their members have standing to sue in  
20 their own right. And for the reasons I've discussed, the  
21 individual plaintiffs don't have standing to sue in this case,  
22 and thus the organizations don't either.

23 If this Court does find that Mr. Marbut has  
24 standing to sue, none of the -- the Second Amendment  
25 Foundation has offered no individual plaintiff expressing

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1 any of the type of injuries that Mr. Marbut has alleged. So  
2 they -- that organization clearly has no standing under this  
3 test.

4 Plaintiff suffers from an additional jurisdictional  
5 problem, and it's a technical one, but they haven't shown  
6 that this Court has subject matter jurisdiction over their  
7 claims. So plaintiffs are bringing suit under the  
8 Administrative Procedure Act, which permits judicial review  
9 and a waiver of sovereign immunity, only a final agency  
10 action. And there's simply no final agency action for the  
11 Court to review in this case.

12 Plaintiffs maintain that the government's decision  
13 to require licenses of those who wish to proceed under the  
14 MFFA was final agency action under Section 704. But for  
15 action to be final it has to, first, mark the consummation of  
16 the agency's decision making process. So it can't be just a  
17 tentative step along the way.

18 And second, it has to have legal consequences. And  
19 here those legal consequences are simply lacking because  
20 again, the two letters from ATF that form the basis of this  
21 lawsuit sought only to preserve the status quo. They offered  
22 guidance to assist plaintiffs and the Montana Federal Firearm  
23 licensees in meeting their obligations under federal law.

24 So federal law was the same the day before this  
25 letter was sent out, and it was the same after this letter is

1 sent out -- was sent out. The letter did nothing and  
2 constituted no new interpretation of federal firearms laws,  
3 and it didn't change plaintiffs's ongoing obligations for  
4 activities.

5 And so again, if we look at Ninth Circuit precedent,  
6 there's a case called Air California versus United States  
7 Department of Transportation, which similarly held that a  
8 letter from the FFA -- FAA to a constituent merely interpreted  
9 the federal law at issue and reminded the constituent what his  
10 preexisting obligations were. And when plaintiff sued on the  
11 basis of this letter, the Court said that that's just -- that  
12 it didn't change anything. It didn't change the playing  
13 field, it shouldn't have altered your behavior.

14 And in fact the Ninth Circuit said expressly that  
15 they were loathed to find a test for final agency action that  
16 centered on a regulated party's will to resist. So there  
17 really is no final agency action for the Court to review in  
18 this case.

19 And to the extent that plaintiffs argue that they're  
20 entitled to non-statutory review, they really ignore the very  
21 limited nature of the doctrine, even in the case that they  
22 cite. The non-statutory review pertains only to cases where  
23 agency officials are acting beyond the scope of their  
24 statutory authority, or ultra vires.

25 And here's there no allegation that ATF officials

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1 were acting beyond the scope of their delegated authority.  
2 ATF is the agency that's responsible for enforcing the federal  
3 firearms laws. And so in September of 2009 they took no  
4 action beyond sending a letter, remind -- reminding the  
5 firearm dealers that they remain subject to federal law.

6 But even if this Court finds that it has  
7 jurisdiction to consider the merits of this suit, plaintiffs  
8 admit that under binding Supreme Court and Ninth Circuit  
9 precedent interpreting the commerce clause, quote:

10 "The MFFA is a dead letter."

11 And indeed, the Supreme Court's decision in  
12 Gonzales versus Raich is both applicable and decisive in this  
13 case. That decision affirmed Congress' power to regulate  
14 purely local economic activity that has a substantial effect  
15 on interstate commerce. And as such, Congress' Commerce  
16 Clause authority included the power to prohibit the  
17 cultivation and use of marijuana under California law.

18 The Court found that the federal statute at issue,  
19 the Controlled Substances Act, regulated the production,  
20 distribution, and consumption of a commodity for which there  
21 was an established and lucrative market.

22 Congress had the power to regulate the possession  
23 and consumption of home grown marijuana, which was purely  
24 intrastate activity that was not in itself commercial because  
25 they concluded that failure to regulate would undercut the

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1 regulation of the interstate market in marijuana more  
2 generally.

3           And according to the Raich decision, a court needs  
4 to confirm only that Congress had a rational basis to conclude  
5 that the intrastate activity would have a substantial effect  
6 on interstate commerce. So Congress doesn't have to prove an  
7 actual effect. They're entitled to make a rational basis  
8 assumption.

9           And the Raich holding clearly applies to the  
10 intrastate manufacture and sale of firearms, which is the  
11 activity at issue here. Plaintiffs seek to manufacture and  
12 sell firearms to others without any federal controls. No  
13 record keeping requirements, no marking requirements,  
14 including serial numbers, and no background checks.

15           And just looking at the activity at issue in this  
16 case, the production and sale of guns, the point at which a  
17 firearm enters the marketplace, it is more clearly commercial  
18 than the possession of medical marijuana.

19           And just like the statute in Raich, the Gun Control  
20 Act is concerned with regulating the interstate market in a  
21 commodity that presents real law enforcement concerns.

22           And Congress enacted the Gun Control Act because  
23 they wanted to keep firearms out of the hands of those not  
24 legally entitled to possess them, dangerous and violent  
25 persons, and to assist state and local law enforcement

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1 authorities in combating crime.

2 And some of the Amicus' briefs tried to focus the  
3 Court's attention on the law enforcement purposes of the Gun  
4 Control Act, suggesting that this somehow detracted from the  
5 government's Commerce Clause argument.

6 But these arguments miss the connection between the  
7 regulation of traffic and firearms on one hand, who has the  
8 ability to purchase and possess a dangerous weapon, and the  
9 prevention of violent crime on the other. So as Congress  
10 noted explicitly, these goals aren't mutually exclusive, but  
11 interconnected.

12 And Congress found that only through adequate  
13 control of interstate and foreign commerce and firearms, and  
14 over all persons engaging in the business of dealing in  
15 firearms, could the federal government effectively regulate.

16 THE COURT: Let me ask you, because the plaintiff,  
17 as well as some of the Amicus seek to distinguish Raich on the  
18 ground that the Raich, as well as Wickard on which it relied  
19 dealt with fungible commodities.

20 MS. LEINWAND: Yes.

21 THE COURT: How do you respond to that?

22 MS. LEINWAND: Well, Your Honor, I think the  
23 fungibility issue is an interesting one. And granted these  
24 guns are distinguishable in the sense that they bear a stamp  
25 made in Montana.

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1           But they don't have serial numbers. And there --  
2 the federal government is unable to track them at all once  
3 they leave the State of Montana and enter the stream of  
4 interstate commerce.

5           And so from the federal government's perspective,  
6 these guns are completely fungible and indistinguishable. And  
7 I think given the illicit market for firearms that exists  
8 nationwide, the fungibility issue -- the fungibility argument  
9 kind of falls flat.

10           In fact, Judge Kozinski in the Stewart opinion  
11 addressed fungibility head on when he was talking about the  
12 ban on machine gun possession. And he said fungibility is a  
13 matter of degree. And at some point everything is fungible.  
14 And so when we think of someone who clearly wants to avoid a  
15 background check and wants an untraceable weapon to use in a  
16 crime, that person cares only that that gun fires bullets and  
17 will work properly.

18           And so when we -- when you consider all of those  
19 factors, I really don't think that the fungibility argument  
20 holds any water. And --

21           THE COURT: Do you think Raich hinges on the  
22 fungible nature of medical marijuana, or of marijuana?

23           MS. LEINWAND: I don't, because I think that Raich  
24 discussed expressly the diversion of marijuana into illicit  
25 channels. And I think that that concern is no less prevalent

1 here, because given the illicit market for firearms that  
2 exists nationwide, again, it's unrealistic to think that these  
3 guns won't leave the State of Montana, especially given the  
4 nature that they're completely unregulated. There's no  
5 licensing number, there's no record of that initial sale. So  
6 often ATF agents will use that first record of when a dealer  
7 sells to another person and then use the licensing number to  
8 trace that gun. But here we're completely eliminating the  
9 chain of custody. And so I think that these firearms are  
10 again ideal for anyone who wishes to purchase a firearm but is  
11 prohibited from doing so under federal law.

12           And to illustrate by a specific example, because I  
13 think when I was thinking about this case it really helped me  
14 to put it in more concrete terms. If we think of a convicted  
15 felon out of state, in California for example, he can easily  
16 make his way to Montana, buy a quantity of firearms to take  
17 back to California with him, and once he does there's no way  
18 for those firearms to be traced. There's no serial number,  
19 there's no record of that initial sale.

20           And so I think given -- given these kinds of  
21 hypotheticals and the fact that really Congress again only  
22 needed a rational basis to conclude that there would be this  
23 type of effect on interstate commerce, and they certainly have  
24 evidence. There's been evidence submitted by state senators  
25 and congressmen on the trafficking of firearms across state

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1 lines, on gun runners, on the fact that four out of five  
2 firearms used in a state like New York are from out of state.  
3 I mean we clearly have tangible findings on this issue. And  
4 so, again, I don't think that the fungibility issue has any  
5 merit.

6 And again, these concerns are compounded when we  
7 consider that six states have followed Montana's lead in  
8 enacting virtually identical Firearms Freedom Acts. An  
9 additional 22 have proposed similar legislation.

10 So the fact that up to 29 states might nullify  
11 certain federal firearms laws would leave a gaping hole in  
12 federal firearms regulation. And that hole would encompass  
13 over half of the United States. So this would certainly  
14 encourage the trading of unregulated firearms nationwide.

15 THE COURT: Now because you -- you still have some  
16 time left but I want to get to a couple questions I have.

17 MS. LEINWAND: Of course.

18 THE COURT: How do you respond to the State of  
19 Montana's contention that the absence of particularized  
20 findings regarding the effect of firearms manufactured  
21 intrastate is problematic?

22 MS. LEINWAND: Well, again, I think that Congress  
23 only needs a rational basis under Raich. So findings --  
24 specific findings of that nature are not required by the  
25 Supreme Court. And to the extent that they are, the

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1 congressional record is littered with references to -- to  
2 the effect of -- to the transportation of guns across state  
3 lines, and how that presents real law enforcement concerns.

4           So again, you know, Congress enacted the GCA  
5 because it was concerned with keeping firearms out of the  
6 hands of those not legally entitled to possess them, and that  
7 was expressly in the preamble of the act.

8           In the house report it says that the principle  
9 purpose of the GCA wedded two mutually supporting goals to  
10 strengthen federal controls over interstate commerce in  
11 firearms, and to assist states to effectively regulate  
12 firearms traffic within their borders.

13           So there are all of these references to the  
14 interstate market. And so while maybe they didn't expressly  
15 deal with this very issue, there's also references to things  
16 like Congress determined that the ease with which firearms  
17 could be obtained contributed significantly to the prevalence  
18 of lawlessness and violent crime in the United States.

19           THE COURT: Here where I was going with that, as  
20 Montana points out in its brief, or I should say they seize  
21 upon Justice Stevens statement that the courts never require  
22 particularized findings unless there's a special concern,  
23 such as free speech --

24           MS. LEINWAND: Right.

25           THE COURT: -- which brings us to -- even though

1 McDonald was decided after the briefing in this case, but  
2 given the holding in McDonald, which I know you're familiar  
3 with --

4 MS. LEINWAND: Right.

5 THE COURT: -- how does that -- how am I to  
6 interpret Justice Stevens' statement there?

7 MS. LEINWAND: Well, I think that, you know,  
8 McDonald may impact that footnoted language and Justice  
9 Stevens' discussion of the need for congressional findings.  
10 But I think that we have congressional findings here. I  
11 think we have clear evidence on the effect of the interstate  
12 -- of the transportation of firearms across state lines.

13 And so it's very easy to extrapolate that if you  
14 produce weapons in state, they are transported, and there's  
15 no real way to get around that.

16 And again, we do have reports -- I was looking at a  
17 report by Senator Schumer which it was entitled "War Between  
18 the States," and it discusses this very phenomenon how guns  
19 from states with weaker gun control laws travel through  
20 interstate commerce to states with stronger gun control  
21 laws.

22 And so perhaps, you know, there isn't a finding  
23 that says if a gun is manufactured in state it will -- but I  
24 don't -- I think that that's, you know, really splitting  
25 hairs when there's clear evidence on the congressional record

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1 itself that indicates that there -- that this is a real  
2 concern for Congress and certainly an interstate issue.

3 THE COURT: All right.

4 MS. LEINWAND: Well, Your Honor, I can -- I can  
5 discuss why Lopez and Morrison are inapplicable in this case  
6 if you have any questions about that?

7 THE COURT: I don't think it's necessary for you to  
8 discuss that. You do have 15 minutes remaining for your  
9 rebuttal if that's what you wish to do.

10 MS. LEINWAND: Wonderful. Thank you so much, Your  
11 Honor.

12 THE COURT: All right. Thank you.

13 Mr. Rhoades.

14 MR. RHOADES: Thank you, Your Honor. May it please  
15 the Court.

16 I'm going to be arguing standing, the consent of  
17 the sovereign to be sued, and some of the issues that have  
18 been raised with respect to the case law under the Commerce  
19 Clause.

20 Mr. Dranias will be arguing Tenth Amendment issues  
21 and the role of state sovereignty and protecting individual  
22 liberties.

23 And Mr. Titus will argue whether the Congress indeed  
24 intended to preempt under the federal statutes at issue, and  
25 if they did some argument about whether the Second Amendment

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1 prohibits that preemption.

2 THE COURT: All right.

3 MR. RHOADES: But to begin with, standing -- there  
4 are two basis for standing here. One is the pre-enforcement  
5 challenge of a criminal law based on constitutional grounds,  
6 and the second is the economic impact of the interplay between  
7 the new state law and federal law.

8 Addressing the first, Justice White said in Babbitt  
9 against United Farm Workers National Union, which is 442 U.S.  
10 289 point cite 298, quote:

11 "When the plaintiff has alleged an intention to  
12 engage in a course of conduct arguably effected with a  
13 constitutional interest, but proscribed by a statute  
14 and there exists a credible threat of prosecution  
15 thereunder, he should not be required to await and  
16 undergo a criminal prosecution as the sole means of  
17 seeking relief."

18 In this case the facts fit this rule of law on all  
19 fours. We don't have, for example, an alternative means to  
20 challenge the interpretation by the ATF of the new law.

21 Now the argument has been that they've just  
22 interpreted existing law and there's nothing new about the  
23 interpretation that says that you folks in Montana can't  
24 manufacture firearms without a federal license. Well,  
25 that's true up to October 31, 2009. On that date the state

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1 of the law changed. On that date Montana's Firearms Freedom  
2 Act went into effect, and consequently the agency has to come  
3 up with an interpretation of how that new law interplays  
4 with the existing law. And that's a new set of  
5 circumstances, new law that has to be interpreted, and that's  
6 what they did.

7           And they reached what we think is not an  
8 interlocutory decision. And the reason we don't think it's  
9 interlocutory is because in June of 2009, anticipating the  
10 new law, they sent a letter that's attached to the second  
11 amended complaint as Exhibit B, informing federal firearms  
12 licensees of their interpretation of how federal law and the  
13 new state law interplay.

14           And then in September, in response to a specific  
15 question by citizens, they said again, in response to your  
16 question about how the new law effects federal law, you folks  
17 need a license.

18           And so at least two occasions the ATF is telling the  
19 world what its interpretation is. It doesn't change. It  
20 doesn't seem to be interlocutory in nature. It's not  
21 preliminary, because the new law is not federal and the new  
22 law doesn't ask the ATF to promulgate new regulations that  
23 someday will become final and then we can challenge them  
24 somehow.

25           The new law is a Montana state law, and the ATF

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1 uses the only mechanism that I know of available to it to  
2 interpret that law, and that is internally to review it and  
3 issue its opinions to the public. So it is a new  
4 interpretation. It's not interlocutory. And we think,  
5 because of that, it's final.

6 Furthermore, the threat is credible. I mean if we  
7 look at --

8 THE COURT: Let me interrupt you for a moment and  
9 ask you --

10 MR. RHOADES: Yes, sir.

11 THE COURT: -- what is the individual constitutional  
12 right that you're focusing upon with regard to the manufacture  
13 of firearms?

14 MR. RHOADES: Your Honor, that arises under the  
15 Second Amendment, in our view.

16 THE COURT: Manufacture does?

17 MR. RHOADES: Yes, sir. And the reason why we say  
18 that is because we can't possess firearms unless someone can  
19 manufacture them.

20 And I think that the Gun Owners Association points  
21 out very well in its Amicus brief, the effect of federal  
22 regulation on the availability of firearms to law abiding  
23 citizens. There's hundreds of pages of interpretation and  
24 regulation that a firearms licensee has to comply with in  
25 order to manufacture and sell firearms to the people who are

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1 ultimately going to exercise their second amendment rights  
2 with those firearms, and it's an incredible burden on that  
3 right.

4           And so consequently the availability of these MFA --  
5 MFFA firearms for Montanans to exercise their Second Amendment  
6 rights creates the nexus between the activity and the  
7 constitutional right involved.

8           THE COURT: All right.

9           MR. RHOADES: Secondly, there's the economic  
10 question. I mean this is a new law. We can't have had,  
11 prior to October 31, 2009, businesses manufacturing MFFA  
12 firearms. So we have -- we can't meet the standard under any  
13 circumstances urged by the government that it has to be an  
14 existing ongoing business.

15           But there is a marketplace. It's been developed.  
16 It's been identified. There are actual orders pending. There  
17 are actual contracts with customers pending, of course  
18 conditioned on the outcome of this litigation, but  
19 nevertheless, there's an actual marketplace that but for the  
20 September letter of the ATF to Mr. Marbut and its creditable  
21 threat that if you take advantage of the MFFA you will be  
22 prosecuted, that Mr. Marbut and others like him could take  
23 advantage of.

24           We have to assume for the sake of the argument that  
25 all of the factors alluded to by the government in its

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1 argument are true. There's a marketplace, there's lost  
2 profits. Mr. Marbut has, besides the evidence that's in the  
3 record and the allegations in the complaint, he actually has  
4 the ability to meet this marketplace. All of those facts  
5 that can be imagined and have been alluded to have to be  
6 assumed to be true for the purposes of the motion to dismiss,  
7 otherwise if they're material, and if they're being argued,  
8 they must be material. And we should have at least a chance  
9 to put on evidence to prove those facts. So we either assume  
10 those facts to be true or we think we're entitled to an  
11 opportunity to prove those facts to be true.

12 THE COURT: How do you respond to the government's  
13 argument that the business has to be preexisting?

14 MR. RHOADES: Well, once again, in this context it  
15 cannot be preexisting. In other words, the MFFA was passed --  
16 or came into law on October 31<sup>st</sup>, 2009. The ATF issued  
17 letters in June and September of 2009, before it even came  
18 into existence, telling folks that you can't have a  
19 preexisting business after October 31, 2009, when it becomes  
20 the law in Montana because we're telling you now that if you  
21 take advantage of this law you're going to be prosecuted.

22 And once again, the Supreme Court has said as  
23 recently as June 20<sup>th</sup> that that threat of prosecution gives  
24 standing. And the government has not said, and this is  
25 significant for both the Babbitt case to Justice White, and

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1 more recently June 20<sup>th</sup> to the Supreme Court in Holder against  
2 Humanitarian Law Project, which is 2010 Westlaw 2471055. The  
3 government hasn't said we're not going to prosecute. In the  
4 Humanitarian Law Project the quote is:

5 "The government has not argued to this Court that  
6 plaintiffs will not be prosecuted if they do not -- if  
7 they do what they say they wish to do." Unquote.

8 In other words, if the government doesn't come to  
9 you and say we're not going to prosecute under any  
10 circumstances, Your Honor, then they have standing to make  
11 the challenge. And that goes back to 1979 with the Babbitt  
12 against United Farm Workers.

13 We think under either the economic harm or the pre-  
14 enforcement challenge rules Mr. Marbut has standing. And  
15 furthermore, under the Ninth Circuit's rule in National  
16 Association of Optometrists and Opticians LensCrafters against  
17 Brown, 567 F.3d 521. If we can show any of our plaintiffs to  
18 have standing then we don't have to show the organizational  
19 plaintiffs to have standing, the Court can proceed. So we  
20 think we've met that burden.

21 The second burden, of course, that we have to show  
22 is your jurisdiction. There are two ways to jurisdiction on  
23 this. The first is non-statutory review. And the government  
24 points out, I think very correctly, that unless we can show  
25 that the agency exceeded its authority, we are not entitled

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1 to non-statutory review. But our argument on the merit is  
2 precisely that. We argue on the merits that under the  
3 Commerce Clause the Congress doesn't have the power to  
4 regulate in this fashion, and so it cannot delegate to the  
5 ATF the power to exercise the role that it has in this case.

6 In other words, you have to -- for non-statutory  
7 review you have to address the merits. And only if you  
8 disagree with us on the merits can you determine whether  
9 we're entitled to non-statutory review. We're alleging that  
10 the government agency has exceeded its authority, and  
11 consequently we're entitled to that review.

12 Now the second --

13 THE COURT: But it's authority you can see that  
14 under prevailing Commerce Clause jurisdiction that the MFFA is  
15 dead letter.

16 MR. RHOADES: Well, June 28<sup>th</sup> --

17 THE COURT: So under current -- under prevailing  
18 Commerce Cause jurisprudence, the ATF is not exceeding its  
19 authority, is it?

20 MR. RHOADES: On June 28, 2010, the law changed  
21 substantially. And in -- in the case of McDonald, which the  
22 case has alluded to, the Court held, quote:

23 "In sum it is clear that the framers and ratifiers  
24 of the Fourteenth Amendment counted the right to keep and  
25 bear arms among those fundamental rights necessary to our

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1 system of ordered liberty."

2 And I pull that quote from -- excuse me, Judge --  
3 page 11, I believe, of the Westlaw -- excuse me -- page 18 of  
4 the Westlaw publication of that case.

5 And that is Justice -- excuse me -- that is Justice  
6 Alito's statement of the conclusion of the question of whether  
7 the second amendment right is a fundamental right.

8 THE COURT: Well, there's no doubt McDonald holds  
9 that. But of concern here, isn't it, is caution that he again  
10 emphasized, as the court did in Heller, that -- I'll quote  
11 from him:

12 "We made it clear in Heller that our holding did not  
13 cast out in such longstanding regulatory measures as  
14 prohibitions on the possession of firearms by felons and  
15 mentally ill, laws forbidding the carrying of firearms in  
16 sensitive places, such as schools and government  
17 buildings, most importantly for our purposes or laws  
18 imposing conditions and qualifications on the commercial  
19 sale of arms."

20 MR. RHOADES: And I don't think that this case that  
21 the holding in McDonald gives you a standard of review for  
22 that particular question.

23 THE COURT: Well, I'm just trying to focus. I want  
24 to -- and I'm sorry to interrupt you, but --

25 MR. RHOADES: Yes, sir.

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1 THE COURT: -- I want to focus on -- I see this as  
2 a Commerce Clause case. I asked the government's attorney  
3 whether she believed McDonald had any effect upon the decision  
4 to be made here. In other words, upon the application of  
5 Raich and I'm asking you the same question.

6 MR. RHOADES: Well, in Stewart II, Your Honor, Judge  
7 Kozinski, in footnote 6 and 7 said that:

8 "First of all, second amendment right under current  
9 jurisprudence in this Circuit is not an individual  
10 right." That's footnote 6.

11 And then he said in footnote 7 under his reading of  
12 Raich:

13 "That if there was such a review there would be a  
14 rational basis test employed."

15 That was the assumption that he made. And so  
16 because of those two factors, and they're both set forth in  
17 footnote 6 and 7, they didn't conduct this bare review we're  
18 asking the Court now to conduct.

19 This is a case of first impression under current  
20 law. In Stewart II we didn't have MFFA. We had an individual  
21 proceeding on his own. And in Stewart II we didn't have  
22 McDonald and we didn't have Heller. And we don't have today,  
23 from the Supreme Court, a clear direction on the standard of  
24 review for the question of what is the appropriate level of  
25 regulation for a manufacturer of arms. But if it's a

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1 fundamental right, then the inference to draw and the  
2 guidance that we have from the courts in the Ninth Circuit and  
3 the U.S. Supreme Court is that you should employ strict  
4 scrutiny. And then if you do, the government bears the burden  
5 of showing that these regulations are the least restrictive  
6 means to serve a compelling government interest. They have to  
7 show that the regulations are narrowly tailored to serve that  
8 government interest by at least restrictive means, and they  
9 haven't -- and in fairness, they didn't know before June 28<sup>th</sup>  
10 that they might need to do this, but they haven't made any  
11 effort to prove that to the Court.

12 THE COURT: So I take it you're withdrawing your  
13 concession?

14 MR. RHOADES: Yes, sir, we're withdrawing our  
15 concession.

16 Judge Kozinski said in that Stewart II case that  
17 Congress is entitled to break a few intrastate eggs in order  
18 to make an interstate omelet. And in our view of the  
19 Commerce Clause, there's a distinction that is talked about in  
20 Raich in recognizing Stewart along those lines, that in order  
21 for the government to regulate under the Commerce Clause it  
22 has to have an interstate object. And if it does then the  
23 Necessary and Proper Clause allows it to pretty much do what  
24 it wants to do with respect to intrastate activity.

25 But here we have the opposite. There's an

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1 intrastate object in the firearms -- the Federal Firearms Act  
2 and the Gun Control Act there's an intrastate object. That  
3 exceeds the Commerce Clause power of Congress. And the  
4 intrastate object is assisting local law enforcement in its  
5 fight against violent crime.

6 Now if --

7 THE COURT: Well, also to ensure the states can  
8 adequately control the flow of firearms within their own  
9 borders. Correct?

10 MR. RHOADES: In order to fight crime locally. Yes,  
11 sir.

12 THE COURT: But the first -- that's in the  
13 congressional record too, isn't it, that it's designed to  
14 assist the states in enforcing their gun regulation laws by  
15 controlling the -- assisting in controlling the flow of  
16 firearms.

17 MR. RHOADES: That's right. And we think that  
18 exceeds the jurisdiction because unlike the Raich case where  
19 the Controlled Substances Act was designed to regulate a  
20 marketplace in a -- that was the object, to regulate the  
21 industry, encourage the production of beneficial drugs,  
22 discourage the production of harmful drugs. These commercial  
23 type activities to protect consumers and protect patients. I  
24 mean this is a bonafide interstate commerce object to protect  
25 the manufacturers from having disparate rules from state to

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1 state.

2 What Congress did with the Controlled Substances  
3 Act was repeal all of its drug control laws and replace them  
4 with this comprehensive scheme.

5 Now Congress did the same thing with the Gun Control  
6 Act and the Federal Firearms Act, but the object was not the  
7 regulation of an industry or regulation of commerce. The  
8 object was to help local police with what they perceive to be  
9 the violent crime problems. So it wasn't the industry, it  
10 wasn't the commerce that was at issue, it was local crime  
11 fighting.

12 And the courts have said the federal government  
13 doesn't have a general police power, but they passed this law  
14 in order to help the states exercise their general police  
15 powers. And --

16 THE COURT: Well, did you agree with me, I think  
17 you've conceded it in your brief, that we're dealing here  
18 with an economic activity, that being the manufacturer of  
19 firearms --

20 MR. RHOADES: Yes.

21 THE COURT: -- and sale of firearms?

22 MR. RHOADES: It's a commercial activity. But the  
23 object of the exercise is general police powers. And there --

24 THE COURT: But you do agree that the Gun Control  
25 Act and the National Firearms Act are comprehensive regulatory

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1 schemes?

2 MR. RHOADES: Yes, with the purpose of controlling  
3 crime locally. And what the -- what the statute does is take  
4 the -- I mean if the means are justified under the Commerce  
5 Clause, the Necessary and Proper Clause allows almost any --  
6 and even if it interferes with intrastate commerce.

7 THE COURT: Particularly when you're dealing with  
8 economic activity. Correct?

9 MR. RHOADES: In particular. But --

10 THE COURT: And the -- the Lopez Morrison line of  
11 cases, along with Jones, they dealt with non-economic  
12 activity. Correct?

13 MR. RHOADES: They dealt with criminal activity.

14 THE COURT: And non-economic.

15 MR. RHOADES: And non-economic activity.

16 THE COURT: They drew a distinction -- the Court  
17 drew a distinction between economic and non-economic.  
18 Correct?

19 MR. RHOADES: Absolutely. But what Congress can't  
20 do is use the economic activity as a pretext to exceed the  
21 Commerce laws -- Clause. I mean it's using the regulation of  
22 economic activity discern -- to serve a non-economic end.  
23 And that --

24 THE COURT: Well, isn't it -- isn't the manufacture  
25 and sale of firearms quite a lucrative economic activity?



1 MR. RHOADES: Yes, it is. But once again, the  
2 object of Congress in doing this is to exercise a general  
3 police power it doesn't have.

4 THE COURT: That's your conclusion?

5 MR. RHOADES: Yes, sir. And furthermore, with --

6 THE COURT: But I look at it as a rational basis.  
7 Did Congress have a rational basis to enact this law for the  
8 purpose of controlling the interstate economic activity of  
9 manufacture and sale of arms?

10 MR. RHOADES: Well, they're using that pretext that  
11 this is commercial in order to assist with --

12 THE COURT: How do I draw -- how do I, sitting here,  
13 -- and I understand your argument, but how do I, sitting here,  
14 what -- how am I at liberty to draw that conclusion?

15 MR. RHOADES: Well, that's one of the problems with  
16 the rational basis test. But in this case we're not dealing  
17 with that anymore. What we're dealing with is a strict  
18 scrutiny test at least. If Heller tells us anything about  
19 the test that's being employed, we know it's not rational  
20 basis. And it may be intermediate scrutiny. We didn't know  
21 whether it was strict scrutiny until June 28<sup>th</sup> when we found  
22 out we're dealing with fundamental rights and then strict --  
23 strict scrutiny is employed, and that gives the federal courts  
24 the ability to look at what Congress did and see what the  
25 object is.

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1 THE COURT: Why do you think Justice Alito  
2 cautioned, by reference to Heller again, that laws imposing  
3 conditions and qualifications on the commercial sale of arms  
4 are not in peril? What am I to read into that?

5 MR. RHOADES: Well, they're subject to review. I  
6 mean I don't think that McDonald says -- and that illusion  
7 says there's no review -- there's still no review or there's  
8 still a rational basis review. What it says is that, you  
9 know, all of these laws are subject to review. We're not  
10 just repealing them all today by the passage of McDonald.  
11 There's got to be some kind of a test for each kind -- each  
12 set of facts. But there is a test, and it --

13 THE COURT: And you -- certainly if it were  
14 possession of a firearm it would be a strict scrutiny test  
15 because it recognized as a fundamental right. Right?

16 MR. RHOADES: Yes, sir. And --

17 THE COURT: But here you're extending that to the  
18 manufacture and sale of firearms. Correct?

19 MR. RHOADES: Yes, sir. And only because without  
20 manufacture and sale of firearms we can't have possession.  
21 Unless everybody who wants to exercise a Second Amendment or  
22 her Second Amendment right has the ability to manufacture his  
23 or her own firearm. If that's what the Second Amendment  
24 means, then perhaps that would be the case. But we don't  
25 think that's what it means.

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1           We -- not -- in order to exercise a Second Amendment  
2 right there has to be available to the right holder the means  
3 to exercise that right. And the only way to get the means is  
4 to have it manufactured by someone with the skill and  
5 expertise.

6           THE COURT: That's not being done?

7           MR. RHOADES: Well, it's being done --

8           THE COURT: The last time I checked there were  
9 plenty of firearms.

10           MR. RHOADES: Well, that's a very good point,  
11 Judge, but there are less federal firearms licensees all the  
12 time because the onerous regulation that's put upon them by  
13 the ATF. I mean that's -- that may very well be the exercise  
14 that the Court has to undertake is to look at the ATF  
15 regulations that has effectively cut in half the number of  
16 licensees holders in this century and see if that satisfies  
17 the strict scrutiny test.

18           I mean when I --

19           THE COURT: So you agree that, at least under  
20 current case law, that the Congress may consider the aggregate  
21 effects of purely intrastate economic activity?

22           MR. RHOADES: If the object of their regulation is  
23 commercial activity. If it's -- if it's an end run around  
24 the fact that they don't have a general police power --

25           THE COURT: But this is -- they are dealing only

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1 with commercial activity, are they not, these regulations that  
2 were -- that are at issue here?

3 MR. RHOADES: They're dealing only with commercial  
4 activity so that the Congress can use that as a pretext to  
5 exercise a general police power it doesn't have.

6 THE COURT: How is that different from the  
7 Controlled Substances Act?

8 MR. RHOADES: Because the bonafide -- the  
9 regulation of intrastate activity under Raich is incidental  
10 and ancillary from the object of the Congress to regulate the  
11 national -- the national marketplace. It's a means and end.

12 The Necessary and Proper Clause says that if you  
13 have a legitimate end then you can exercise means that  
14 interfere with intrastate commerce. But if --

15 THE COURT: How about if we -- if there's a  
16 manufacturer of a pacemaker and it's stamped "Made in Ohio,"  
17 does that mean the federal government cannot reach those  
18 devices through the Medical Device Act?

19 MR. RHOADES: It can, and that's what Raich stands  
20 for because it's a commercial activity. They're not trying  
21 to regulate -- they would not be, under that scenario, trying  
22 to regulate pacemakers to serve a police power to help --

23 THE COURT: Well, a power historically with the  
24 state, the welfare of the state's inhabitants. It's just  
25 you're focusing -- if I -- I just want to understand your

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1 argument very precisely, that it's because of the fundamental  
2 nature of the right to possess a firearm, which is recognized  
3 in McDonald, that that can be -- has to be extended to the  
4 right to manufacture and sell firearms?

5 MR. RHOADES: Well, the scrutiny that's given rise  
6 to by the ruling in McDonald --

7 THE COURT: Well, all right the --

8 MR. RHOADES: -- has to be applied to the  
9 manufacture of firearms. Yes.

10 And in view of the Tenth Amendment, our argument is  
11 the Tenth Amendment is an interpretive tool for the courts to  
12 understand the meaning of the enumerated power set forth in  
13 the constitution. And in view of the Tenth Amendment, when  
14 you look at the Commerce Clause, do I -- do I interpret the  
15 Commerce Clause broadly to give Congress powers that are  
16 arguably within it, but aren't expressly and directly, or do  
17 I interpret the Commerce Clause narrowly and only -- and look  
18 with some skepticism of Congress' decision to act in a  
19 particular field. And the Tenth Amendment says you should be  
20 skeptical.

21 THE COURT: Well, of course I'm not here construing  
22 the Tenth Amendment. I'm here to interpret existing case law.  
23 Correct?

24 MR. RHOADES: Yes, sir.

25 THE COURT: And I've got -- obviously Raich is the

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1 case we all have to be concerned with and how -- and by your  
2 concession that under that law, I have no choice here but to  
3 follow that law, unless your argument that McDonald somehow  
4 changed the equation holds water. Right?

5 MR. RHOADES: Yes, sir. And that -- and that level  
6 of scrutiny that you apply to the federal regulations, and in  
7 particular -- I mean beyond the federal regulations, the  
8 level of scrutiny that you apply to Congress' statement that  
9 it has. I mean in the statutes themselves it says we're  
10 exercising our prerogatives under the Commerce -- Commerce  
11 Clause. And you're to review that now with McDonald under a  
12 strict scrutiny analysis.

13 If you look at the legislative history of the Gun  
14 Control Act in 1968, the Congress asked the justice  
15 department, well, there's a Second Amendment involved here.  
16 And the justice department's response was, well, the Second  
17 Amendment doesn't apply to an individual right, so do what  
18 you want. And that's different.

19 I mean that interpretation of the law was wrong,  
20 and we think that the Court needs to look at what the law  
21 actually is and look at what Congress is trying to do and see  
22 if it had the power to actually do that, given what the state  
23 of the law actually is.

24 THE COURT: Understood. You're making -- I just --  
25 again, I want to understand your argument. I know we're

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1 dealing with McDonald now and nobody had the opportunity to  
2 fully brief that and so forth, but you're also arguing that  
3 the state through the Tenth -- it's Ninth and Tenth  
4 Amendment, reserve powers if you will, has the right to allow  
5 to order -- not order, but allow this manufacture intrastate  
6 in order to facilitate its inhabitants right to possess a  
7 firearm.

8 MR. RHOADES: Yes, sir. And Mr. Dranias will -- can  
9 address that in more detail, but in -- the theory behind  
10 federalism, in our view, is that both the federal government  
11 and the state governments were designed to protect the  
12 individual. And in the Twentieth Century, for example, the  
13 federal government was interceding on behalf of the individual  
14 by -- against depredation by the states, I guess, their  
15 rights. And now in the Twentieth Century the states are doing  
16 the same thing, interceding on behalf of the individual and  
17 the Second Amendment right against depredation as they see it  
18 by the U.S. Government.

19 Ultimately that's the point of federalism. The end  
20 of federalism is not to have this disorganized and difficult  
21 to manage dual set of governments. The point of federalism  
22 is to protect these individual rights. And in this case, a  
23 right that we now see as a fundamental one.

24 THE COURT: All right.

25 MR. RHOADES: I have a little bit more on the APA if

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1 you care to hear it, otherwise I'd urge the Court to deny the  
2 motion to dismiss.

3 THE COURT: All right. Your time is up so I'll  
4 listen from your Amicus.

5 MR. RHOADES: Thank you, Your Honor.

6 THE COURT: Thank you.

7 MR. DRANIAS: May it please the Court. Nicholas  
8 Dranias on behalf of the Amici Goldwater Institute and  
9 numerous Arizona representatives and political organizations.

10 Your Honor, if I may, I was about to begin this  
11 argument by saying this is a case of first impression. Indeed  
12 it used to be. There is now persuasive authority, in a  
13 different outcome context, but persuasive authority on the  
14 federalism issues that recently was decided on Thursday by the  
15 United States District Court for the State of -- for the  
16 District of Massachusetts. And of course I'm referring to the  
17 now famous decision on the gay marriage rights of  
18 Massachusetts citizens.

19 I believe, Your Honor, that this case lays out the  
20 framework for thinking about the federalism issues in this  
21 case. In fact, Your Honor, if you were to simply swap out the  
22 statute that allowed and permitted gay marriage in  
23 Massachusetts with the Montana Firearms Freedom Act, you would  
24 see the parallelism between the two cases in terms of our  
25 argument from federalism.

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1           And in that respect, Your Honor, I would like to  
2 highlight the three analytical elements that derive from the  
3 U.S. Supreme Court case of Hodel that really control the  
4 outcome from a federalism perspective.

5           In other words, to show that it would violate the  
6 Tenth Amendment for the federal government to preempt the  
7 Montana Firearms Freedom Act, we must show the following.  
8 One, the statute must regulate the states as states. Two,  
9 it must concern attributes of state sovereignty. And three,  
10 it must be of such a nature that compliance with it would  
11 impair a state's ability to structure integral operations in  
12 areas of traditional governmental functions.

13           Without a doubt all of these elements are present  
14 here. And following Hodel and also the recitation of the  
15 principles of protecting traditional attributes of state  
16 sovereignty, which we see in New York, in Lopez, in Prince,  
17 and in Morrison, we are compelled to reach the same outcome  
18 with respect to the Montana Firearms Freedom Act, vis a vis  
19 the Commerce Clause as Massachusetts' Gay Marriage Act  
20 received vis a vis the Spending Clause.

21           First, Your Honor, this federal regulation clearly  
22 regulates the states as states. It is seeking to override a  
23 state statute, which was promulgated pursuant to the inherent  
24 police power of the state to regulate the activities in  
25 question.

1           Second, the federal regulation certainly concern  
2 attributes of state sovereignty. If only and simply based on  
3 the fact that the Montana constitution guarantees the  
4 liberties protected by the Montana Firearms Freedom Act.

5           And third, there is no question that the state has  
6 the primary responsibility, exclusive authority over police  
7 powers. And therefore, the states should be the primary  
8 determinant of how those police powers should be exercised to  
9 regulate liberties.

10           And therefore, when a federal law overrides the  
11 state's exercise of its police powers in that respect, it  
12 necessarily impairs a state's ability to structure integral  
13 operations in areas of traditional governmental functions.

14           So, Your Honor, in a sense, and I really don't mean  
15 to be flippant because there are very complex issues in this  
16 case, but when the other side, with the government side says  
17 that this is an easy case for them, increasingly the  
18 development of Tenth Amendment jurisprudence indicates this is  
19 an easy case for state sovereignty and for protecting  
20 individual liberty.

21           Now before I conclude, because I only reserved seven  
22 and a half minutes, I wanted to emphasize one last point,  
23 which is this. Raich does not control this case. I  
24 respectfully disagree with my esteem colleague, Quentin  
25 Rhoades. Raich does not control this case for a number of

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1 reasons. Not just including the fact that we are now dealing  
2 with a fundamental enumerator right. The real reason why  
3 Raich does not apply to this case can be drawn from the  
4 concurrence of Justice Scalia. The concurrence of Justice  
5 Scalia, which was obviously unusual and unexpected -- the  
6 concurrence of Justice Scalia emphasized that the plaintiffs  
7 in Raich made no case that these federal regulations at issue  
8 in any way violated principles of state sovereignty. And  
9 therefore, he felt compelled to reach the same conclusion as  
10 a majority.

11 That is obviously not the case here. From the  
12 abundance of Amici briefs who can see the numerous ways in  
13 which state sovereignty is being violated, if the federal  
14 government were able to preempt the Montana Firearms Freedom  
15 Act.

16 The other way in which Raich is distinguishable  
17 here, is -- and I -- respectfully, again, this may be a point  
18 of disagreement, but really on Raich and Wickard, these are  
19 cases not so much about the Commerce Clause per se, but about  
20 the Necessary and Proper Clause.

21 Again, if we look to the concurrence of Justice  
22 Scalia, he focuses on the fact that we are not dealing with  
23 something that is actually interstate commerce, that is an  
24 instrumentality of interstate commerce. What was at issue in  
25 Raich was the implied power to regulate things that were

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1 necessary and proper to regulating interstate commerce.

2 And, Your Honor, if you go back to Wickard, Wickard  
3 itself was a decision both on the Commerce Clause and the  
4 Necessary and Proper Clause. And in the seminal part of the  
5 holding it referred to an earlier case that talked about how  
6 it would be appropriate to reach things that had a substantial  
7 effect on interstate commerce when exercising the Commerce  
8 Clause power.

9 All of these cases, the history that counsel for  
10 government relies upon, are actually founded more on the  
11 Necessary and Proper Clause than the Commerce Clause. And the  
12 reason why this is critical is --

13 THE COURT: I was hoping you'd get to that.

14 MR. DRANIAS: The reason why that is critical is  
15 there are two components in the Necessary and Proper Clause,  
16 which we have not discussed. The Proper Clause, the proper  
17 portion of the Necessary and Proper Clause guarantees our  
18 system of dual sovereignty. It ensures that whatever powers  
19 the federal government claims, cannot violate principles of  
20 state sovereignty because that would be improper.

21 And this interpretation was embraced in Prince.  
22 Little known is the fact that Prince cited to a Duke Law  
23 Journal study of the meaning of a Necessary and Proper Clause,  
24 and we cite it in our brief. And I've recently read it and  
25 reread it, and this law journal points out that the proper

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1 element of the Necessary and Proper Clause is the thing that  
2 guarantees our system of dual sovereignty. It is the point  
3 of reference for jurists, such as yourself, to review any  
4 purported exercise of federal power to see that it stays  
5 within the boundaries of a division of power between the  
6 state and federal government.

7           And lastly, Your Honor, if I may, it is simply not  
8 true that the new federalism cases are all focused on non-  
9 economic activity. New York versus United States dealt with  
10 questions of property title. It clearly involved economic  
11 activities in terms of where the hazardous waste would go and  
12 how it would be taken.

13           So there's a bigger principle at issue with New  
14 York, with Morrison, with Lopez, with Prince, and it goes to  
15 courts recognizing that they have a role in policing the  
16 structural differences between the powers of the federal  
17 government and the states, that no deference is accorded to  
18 Congress when they are patrolling those structural differences  
19 because the states don't have a voice in Congress any longer,  
20 only the people do.

21           And therefore, the courts appropriately seek to  
22 ensure that our dual system of sovereignty is maintained.  
23 And especially in a case like this where individual liberty  
24 is at issue. A fundamental right. The idea that federal  
25 supremacy in a system that created dual sovereignty for the

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1 purpose of protecting individual liberty, the idea that  
2 federal supremacy could squash that individual liberty in the  
3 name of federalism is simply an outrage respectfully, Your  
4 Honor.

5 Thank you very much.

6 THE COURT: Well, hold on.

7 MR. DRANIAS: Okay.

8 THE COURT: Now you don't dispute that Congress has  
9 the authority under the Commerce Clause and Necessary and  
10 Proper Clause to regulate the flow of interstate -- or  
11 interstate flow of firearms, do you?

12 MR. DRANIAS: If it's in the actual flow then you  
13 wouldn't even have to go to the Necessary and Proper Clause.  
14 It would be within the Interstate Commerce Clause.

15 THE COURT: And so when we're talking about  
16 intrastate -- controlling intrastate manufacture and sale of  
17 firearms, that's where you draw the line?

18 MR. DRANIAS: That's correct. And I think  
19 interestingly for --

20 THE COURT: Notwithstanding if all 50 states  
21 enacted, or a great majority of those states enacted laws  
22 similar to the Montana Freedom Firearm Act, but some states  
23 didn't and some states had strict gun regulation that  
24 Congress cannot act to control the interstate -- interstate  
25 flow of firearms of regulating the intrastate flow --

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1 MR. DRANIAS: Not under the --

2 THE COURT: -- in order to --

3 MR. DRANIAS: Yeah.

4 THE COURT: -- in order to preserve in this federal  
5 system the interaction between the states, and to assist those  
6 states which wish to have gun control or regulations  
7 controlling the manufacture and sale, that their efforts in  
8 that regard are not inhibited.

9 MR. DRANIAS: Well, Your Honor, I would say under  
10 the Commerce Clause if it's not in instrumental -- in  
11 instrumentality of commerce -- of interstate commerce, if it's  
12 not in the actual flow of interstate commerce then the only  
13 source of power for Congress is the Necessary and Proper  
14 Clause.

15 And it may be needful. In other words, I'm not  
16 disputing that it would be convenient to reach out and  
17 regulate intrastate activities to ensure a uniform interstate  
18 rule, but we cannot forget the proper clause -- the proper  
19 element of the Necessary and Proper Clause, which in Prince,  
20 by virtue of the Supreme Court's embrace of the Duke Law  
21 Journal study, means that courts have to examine the  
22 proprietariness or the appropriateness from the perspective  
23 of the structure of our kind of government, whether that  
24 particular --

25 THE COURT: True. I agree wholeheartedly. So if

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1 State A has absolutely no regulation of gun manufacturing  
2 sales or anything else, but State B truly wants to have that  
3 and does have that, that Congress and controlling -- in order  
4 to control the interstate flow to serve obviously the  
5 interest of B, it can control intrastate manufacture and  
6 sales, can it not?

7 MR. DRANIAS: Not when it goes into the core area  
8 of state sovereignty, which involves, as I've gone through the  
9 Hodel elements, if you would disrupt states as states, the  
10 exercise of their police powers, and if you were to disrupt  
11 the purpose of federalism, which is to protect the individual  
12 liberty, and particularly enumerated rights, then I would have  
13 to say that that could not happen.

14 Now the devil is in the details. If we're dealing  
15 with things that are not related to fundamental enumerated  
16 rights, if we're dealing with regulations by states that  
17 don't go to the core of their traditional functions, then a  
18 different analysis would apply under the Necessary and Proper  
19 Clause on the proper side of it. But in this case, when  
20 we're dealing with a fundamental right --

21 THE COURT: So McDonald -- as I asked Mr. Rhoades,  
22 McDonald effects your position in the case?

23 MR. DRANIAS: Absolutely. And so does the findings  
24 relative to Massachusetts' gay marriage statute because in  
25 both cases we have an exercise of traditional state powers,

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1 the power to regulate marriage on one side, the power to  
2 engage in police powers on the other, which displaces  
3 contrary federal law because it would be improper,  
4 considering the scheme of our system, for the federal  
5 government to disrupt states when they're exercising their  
6 core attributes of state sovereignty to protect the  
7 individual liberty.

8 THE COURT: All right.

9 MR. DRANIAS: So Your Honor, if you have more  
10 questions I'm free to -- I'm happy to take them, but I think I  
11 may get into somebody's time.

12 THE COURT: I'll consider -- I'll consider the  
13 Massachusetts District Court decision, but certainly I'm no  
14 way bound by that. You agree to that?

15 MR. DRANIAS: I would agree it's that binding, but  
16 it certainly makes this case now not one of first impression  
17 but one of closely related impression.

18 THE COURT: I see. Thank you.

19 MR. DRANIAS: Thank you.

20 THE COURT: Good morning.

21 MR. TITUS: Good morning again, Your Honor. Again,  
22 my name is Herb Titus and I'm here on behalf of the Gun Owners  
23 of America, Gun Owners Foundation, and the Virginia Citizens  
24 Defense League.

25 It's a well established rule of judicial restraint

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1 that this Court should not reach the interesting and complex  
2 and controversial questions of constitutionality when there  
3 is an alternative way to resolve this case and to deny the  
4 United States Government's motion, based upon a careful  
5 reading of the relevant statutes.

6 The problem with the government's argument is that  
7 they take the Raich case, and like a magic wand paint the  
8 Gun Owners Control Act to prohibit the same kinds of economic  
9 activities that the controlled substances statute  
10 prohibited.

11 But as clearly recognized in the controlled  
12 substance statute, it is both plenary and comprehensive,  
13 whereas with regard to the Gun Control Act it is not plenary  
14 but rather limited, and indeed differently focused.

15 THE COURT: So you two disagree with --

16 MR. TITUS: Now the government would have you  
17 believe --

18 THE COURT: -- you two disagree with Mr. Rhoades?

19 MR. TITUS: Well, I'm suggesting here that if you  
20 look at the statutory provisions that are at issue here that  
21 you wouldn't have to reach the Raich question, you wouldn't  
22 have to reach the Commerce Clause question or the Necessary  
23 and Proper Clause question.

24 And, Your Honor, as a friend of the Court in  
25 support of Mr. Rhoades' position, we believe that it's

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1 important for us to submit to the Court an alternative way  
2 by which you could resolve this case in Gary Marbut's favor  
3 without having to reach the constitutional questions under  
4 the Commerce Clause or any of the other clauses.

5           And let me point out two very important distinctions  
6 between the Gun Control Act and the controlled substances law.  
7 The first one is, as the government points out, it says it's  
8 a dual purpose to govern the interstate commerce of foreign  
9 -- and foreign commerce and firearms, and to assist the states  
10 in their enforcement of the criminal law.

11           Now it has to serve a dual purpose. If you take  
12 the government's position you will no longer have a law that  
13 assists the states in enforcing the criminal law, but you will  
14 have a law that displaces the states. And therefore, would  
15 not serve the purpose of the Gun Control Act as it is  
16 articulated because after all, the Montana Firearms Freedom  
17 Act has to do with the State of Montana determining what its  
18 policy should be with regard to firearms in relationship to  
19 defending one's home and defending one's property and so  
20 forth.

21           More significantly, Your Honor, is that the  
22 government completely omits from consideration the FOPA, the  
23 Firearm Owners Protection Act, that was passed in 1986. And  
24 in that act they actually narrowed, they cut back the  
25 authority that was being assumed by federal authorities under

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1 the prior statute to deal with economic activities with  
2 respect to the manufacturer and dealing of firearms.

3 Added to the Gun Control Act was Section 921(a)21  
4 and 22, which required, before you could impose the federal  
5 licensing requirement on a personal buying or selling or  
6 manufacturing a firearm, it required two things. They had to  
7 be engaged in the business of, and that this was their  
8 livelihood.

9 In other words, there's a lot of economic activity  
10 that is not governed by the federal firearms licensing  
11 statute. You can engage in buying and selling and  
12 manufacturing a firearm, so long as it's not your business by  
13 which you're making your livelihood. And so this is very  
14 different from the Controlled Substances Act where even non-  
15 economic activity was covered by that particular statute.  
16 That's not true here.

17 Now why is this important? It's important because  
18 Section 927 of Title 18 has a specific rule with regard to  
19 preemption. And this rule, Congress has indicated to the  
20 courts, this is our intention with regard to occupying the  
21 field. And the first thing they say is that nothing in this  
22 act should be construed to occupy the field. Yet that's the  
23 very thing the United States Government is arguing is that the  
24 Gun Control Act occupies the field. That's directly contrary  
25 to the statute as it's stated in Section 927.

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1 Not only that, but 927 indicates that unless there  
2 is a direct --

3 THE COURT: Well, I'm not sure -- I'm not sure  
4 they're making that argument. There's nothing that prohibits  
5 the state from enacting regulations regarding gun control,  
6 registration, et cetera, that are stricter than the federal  
7 government, is there?

8 MR. TITUS: Yes. But at the same time there's  
9 nothing in the Gun Control Act which indicates that states  
10 couldn't enact laws that are less restrictive than the federal  
11 statute.

12 It's important to understand that the rule of  
13 Section 927 says that the government -- it should not be  
14 construed to occupy the field. And indeed goes on to say  
15 that there should be only a -- where there's a direct and  
16 positive conflict, and where it cannot be reconciled. Now  
17 notice in Section 922(a)(1), which is a specific regulation  
18 having to do with licensed firearm dealers and manufacturers,  
19 that that particular prohibition applies only to interstate  
20 and foreign commerce.

21 Now if you look at Section 922(1)(2), you will see  
22 that interstate commerce is defined in such a way as to  
23 specifically and exclude intrastate commerce. Because that  
24 is such an important statute, let me -- let me just read to  
25 you the exact language, which says -- and this is 921(a)(2).

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1 It says:

2 "The term interstate or foreign commerce includes  
3 commerce between anyplace in a state, and anyplace  
4 outside of that state, or with any possession of the  
5 United States, or the District of Columbia, but such  
6 term does not include commerce between places within the  
7 same state."

8 So Congress had in mind that the intrastate  
9 commerce still remained in the hands of the state, and it was  
10 not to be construed as occupying the field. So it's  
11 extremely important to see that in 922(a)(1) the only thing  
12 that's prohibited of a licensed dealer is an interstate  
13 activity, not an intrastate activity.

14 Now the Stewart case and the -- I hope I pronounce  
15 this correct --

16 THE COURT: You've got about -- you've got -- I'm  
17 going to have you have about two more minutes. I've given  
18 this --

19 MR. TITUS: Okay. The Stewart case and the Rahaker  
20 [phonetic] case are not in any way opposed to this because  
21 they didn't deal with licensing, they dealt with a  
22 prohibition in 922(g). And notice if you look at 922(g) you  
23 will see they used the word "affecting commerce." That's the  
24 only place that's used is "affecting commerce," which is a  
25 different jurisdictional claim for the federal government

1 than is the one with regard to licensing generally.

2 Now let me just make a couple of remarks with  
3 regard to the Second Amendment. If you believe that you  
4 can't resolve this case without addressing the constitutional  
5 question, I would pose this point to you with regard to the  
6 application of the Second Amendment to manufacturers and  
7 sellers of firearms. Does not the First Amendment, freedom  
8 of speech and freedom of the press, apply to publishers of  
9 magazines and sellers of magazines? Of course, because they  
10 recognize that the freedom of speech of the people depends  
11 upon the availability of books and magazines and newspapers.  
12 It's the same thing with regard to the Second Amendment right  
13 to keep and bear arms. And so it applies to dealers and  
14 manufacturers of firearms just the same as the First Amendment  
15 does to the publishers and sellers of books.

16 THE COURT: All right. Thank you.

17 MR. TITUS: Thank you.

18 THE COURT: And Mr. Tweeten on behalf of the State  
19 of Montana.

20 MR. TWEETEN: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. TWEETEN: The State of Montana is in this case  
23 in order to defend the constitutionality of the statutes that  
24 -- statute that has been enacted by our legislature. And in  
25 my -- in my brief I've argued two different points, and one

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1 of them has to do directly with the question of the  
2 constitutionality of the statute. The second has to do with  
3 the status of the lawsuit that's before the Court today and  
4 whether it ought to be dismissed on motion as opposed to  
5 following further proceedings to develop a factual record.

6 With respect to the first point, this is an -- this  
7 is an odd statute in -- and I mean that in the sense that it  
8 constitutes a political statement on the part of the  
9 legislature with respect to the relationship between certain  
10 activities that are contemplated to be carried on in the  
11 State of Montana and the federal constitution.

12 Those activities could be undertaken without the  
13 enactment of the statute. In other words, the statute doesn't  
14 -- isn't the mode by which it's permitted that guns are  
15 manufactured in the State of Montana. That activity exists  
16 as a matter of commercial law, free and clear of the  
17 activities of the State of Montana to authorize it.

18 So the statute isn't operative in the sense that it  
19 permits the manufacturing of firearms. What it says is that  
20 if firearm --

21 THE COURT: I agree with you on that point.

22 MR. TWEETEN: -- if firearms are manufactured under  
23 certain conditions, it's the view of the Montana legislature  
24 that those activities can be undertaken without regulation by  
25 the federal government because of, first of all, the limited

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1 reading of the Commerce Clause, and second, the effect of the  
2 Ninth and Tenth Amendments.

3           It's the position of the State of Montana that our  
4 legislature, under the Tenth Amendment, has retained the  
5 authority to make those kinds of political statements, even  
6 if the Congress of the United States, or even if the federal  
7 courts disagree with the philosophical positions that are  
8 taken in those statutes.

9           The -- I guess maybe the clearest way to look at  
10 this would be that the -- this lawsuit could exist and the  
11 very same claims could be brought, and the very same legal  
12 issues would be presented whether this statute existed or  
13 not. The rights that the plaintiffs claim are rights that  
14 exist under the provisions of the constitution protecting the  
15 right to bear arms under the Second Amendment under the  
16 Doctrine of Retained Sovereignty for the State of Montana,  
17 under the Tenth Amendment, and the reserved powers of the  
18 people in the Ninth Amendment.

19           And the plaintiffs contend that those -- that a  
20 coalescence of those constitutional rights create their  
21 opportunity to manufacture these firearms without federal  
22 regulation. It's not something that exists solely as a result  
23 of this statute. So --

24           THE COURT: So you don't view it the same as Mr.  
25 Rhoades that the state is undertaking to ensure that its

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1 citizens have sufficient access to firearms, or do you?

2 MR. TWEETEN: That's one of the -- one of the  
3 objectives that's stated in the findings, but that's not how  
4 the operative provisions of the statute work. So in that  
5 sense, it's our position that as a philosophical statement  
6 it's entirely within the powers of the State of Montana under  
7 the Tenth Amendment to make such a statement. And the fact  
8 that such a statement argues for an extension or change in  
9 the existing prevailing decisions of the United States  
10 Supreme Court, does not render the statute itself  
11 unconstitutional, i.e., it doesn't say that the state did not  
12 have the authority to make that statement in the first  
13 instance.

14 THE COURT: I agree with you on that point.

15 MR. TWEETEN: So what this case is really about is  
16 not the Montana Firearms Freedom Act. What this case is about  
17 is the question of whether, under the Commerce Clause, the  
18 United States has the authority to regulate the conduct that  
19 the plaintiff, Mr. Marbut, wishes to engage in. And it's  
20 controlled by constitutional principles that deal with the  
21 individual right of Mr. Marbut to engage in those -- in those  
22 behaviors and not anything that has to do specifically with  
23 the statute.

24 THE COURT: Right.

25 MR. TWEETEN: Now with respect to the second point,

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1 this case is very different from any of the other cases that  
2 have been discussed today that have been decided by the  
3 United States Supreme Court. Wickard and Raich were decided  
4 on the basis of a more or less well developed factual record  
5 with respect to the actual behavior that was subject of  
6 regulation.

7 And also in the case of Wickard, with respect to a  
8 fairly lengthy and detailed stipulation with respect to the  
9 nature of the federal market in wheat, which Justice Jackson  
10 referred to in extensive detail in reaching his conclusion  
11 that the individual that's growing and harvesting wheat for  
12 individual use could effect the national market.

13 We don't have any such factual development on the  
14 record before the Court this morning. And so we don't know  
15 the extent to which the manufacturer of a few hundred firearms  
16 in the State of Montana, under the conditions that are  
17 described by the Montana Firearms Act, may have any effect on  
18 the interstate marketing of guns at all.

19 THE COURT: But the --

20 MR. TWEETEN: Even if you were assume that all of  
21 them went into interstate commerce.

22 THE COURT: -- but the Congress -- the Congress is  
23 fairly -- or is -- can consider the aggregate effect of not  
24 just -- I don't know, maybe it's a minimal amount to Montana  
25 theoretically that would be produced, but it can, on a

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1 rational basis at least, conclude that the aggregate effect  
2 of a large -- a number of states engaged in the similar type  
3 of manufacturing provides a sufficient basis to regulate that  
4 intrastate activity. Correct?

5 MR. TWEETEN: Yeah, I think that Congress could  
6 take that into consideration if it had before it facts that  
7 describe the particular kind of manufacturing activities  
8 being undertaken under the Montana Firearms Freedom Act where  
9 you're dealing with firearms that are built entirely from  
10 intrastate materials and that are marked as being specifically  
11 manufactured and intended for use within the State of Montana  
12 or the State of Tennessee or whatever other state might have  
13 it. The question of what effect those kinds of manufacturing  
14 activities might have on interstate commerce is something that  
15 Congress didn't opine on at all.

16 And I guess in light of Mr. Rhoades' concession,  
17 I'm not sure how important this argument is anymore because  
18 our position is that the case law -- that it's not clear that  
19 the federal case law governs this activity, and it won't be  
20 clear until there's more factual development. But in Mr.  
21 Rhoades' concession it -- the only thing that stands between  
22 this case and Raich is the -- is the decision of McDonald.  
23 I'm not -- in McDonald I'm not sure that this argument really  
24 has a lot of -- has a lot of traction anymore.

25 But, Your Honor, it is the State's position that

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1 should the case turn on the operation of Raich that at least  
2 the plaintiffs ought to be given the opportunity to make  
3 their proof before the Court were to take the fairly drastic  
4 step of dismissing on the pleadings.

5 THE COURT: Understood. All right. Thank you.

6 Mr. Renz.

7 MR. RENZ: Good morning, Your Honor. And thank you.

8 And I would also like to thank Attorney General Steve Bullock  
9 for conceding some of their time to me.

10 I think I want to go directly to some of the  
11 questions that you posed both to the United States and to the  
12 Amici and to the defendant. And the first one I want to think  
13 about is this question of fungibility.

14 The United States agreed that yes, Mr. Marbut's  
15 firearms would be distinguishable, and in that sense they're  
16 somewhat unique relative to other firearms. But they say --  
17 but they say because they don't have necessarily serial  
18 numbers attached to them, that has an impact upon our ability  
19 to trace them should they go into the stream of interstate  
20 commerce.

21 Now that's an interesting point. I mean if we look  
22 at this carpet we can't tell one fiber from another. And so  
23 the United States would be correct to say, yes, we've got to  
24 put a serial number on each fiber so that we can tell them  
25 apart.

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1           But Marbut's firearms aren't different only  
2 because they have a stand. They're different because he  
3 manufactures them in a certain way. So his firearms are  
4 distinguishable from other MFFA firearms because of the way  
5 he makes them.

6           So what does that mean for us? Well, what it means  
7 is that if that man from California comes up to Montana and  
8 says to Gary Marbut I'd like about a hundred of those fine  
9 looking weapons that you've got, and Gary says sure, and Gary  
10 says give me your check, and it's from California, looks at  
11 the plates and he's from California, says it's great seeing  
12 you, have a good trip back to Sacramento. At this point the  
13 United States has a case. Gary Marbut has violated federal  
14 law by sending those arms into interstate commerce.

15           THE COURT: Well, he would tell the person you can't  
16 take these across the border, I'm sure.

17           MR. RENZ: That's the point, isn't it. But that is  
18 the point, you see, because -- because if he did violate the  
19 law the United States can backtrack. The impact to which  
20 scheme is not significant, and that's the question that we  
21 have to ask.

22           Remember in Wickard the question was if everyone  
23 consumes their own wheat we won't be able to raise the price  
24 of wheat, and our objective is to raise the price of wheat.  
25 Here the objection is altogether different. The objective is

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1 to ensure that firearms that are used in unlawful ways can be  
2 traced in some way.

3 And so if the seller of an MFFA firearm is going to  
4 violate federal law by sending -- and violate the MFFA for  
5 that matter by sending those firearms into interstate  
6 commerce, the government still has the control. It still has  
7 means to enforce its scheme.

8 THE COURT: How about on the front end? Aren't some  
9 of these regulations designed to act on the front end of the  
10 sale?

11 MR. RENZ: In what way do you mean?

12 THE COURT: Well, to ensure that a felon isn't  
13 getting a -- a convicted felon isn't getting a firearm?

14 MR. RENZ: Sure. Sure. And that's unlawful, isn't  
15 it?

16 THE COURT: Last time I checked it was.

17 MR. RENZ: Yeah. And so, you know, Mr. Marbut,  
18 should he know that the man is a convicted felon, and it's  
19 easy to find out because everyone now except in one state is  
20 on a state database, for example the Montana Con Web.

21 So, again, the seller has no excuse. And the  
22 government is in a position to enforce its scheme in that way,  
23 even with respect to an MFFA firearm.

24 THE COURT: So the federal government is required  
25 to rely upon the resources of Mr. Marbut and his good

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1 intentions when he makes the sale?

2 MR. RENZ: The firearm is -- the United States is  
3 going to rely upon not the good intentions of Mr. Marbut but  
4 Mr. Marbut's fear of being prosecuted for violating federal  
5 law by sending those arms in interstate commerce. And Mr.  
6 Marbut's fear of losing his opportunity to engage in MFFA  
7 manufacturing by violating the MFFA itself.

8 And then you did speak about the footnote, and how  
9 I would submit that what the Court was saying there is we  
10 don't -- we don't reach the Natural Firearms Act because it's  
11 not before us. That's a question for the future, and this  
12 case happens to be the future.

13 So the court in McDonald said the Second Amendment  
14 is a fundamental right, and because it is a fundamental right  
15 any attempt to regulate that fundamental right is subject to  
16 strict scrutiny.

17 Now we talked about economic activity, but when we  
18 say that what we're talking about is an economic transaction.  
19 The transaction between Mr. Marbut who makes the firearms and  
20 the transaction between the customer who's got the Second  
21 Amendment right to bear those firearms.

22 And just as -- as we speak about the interaction  
23 between a woman and her doctor, we're talking about the same  
24 sort of transaction, although we're not talking about  
25 necessarily the privacy right that attaches to that

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1 transaction. But if doctors can't perform abortions because  
2 it's outlawed, it's not the doctor's right that's impacted  
3 it's the woman's right, and it's the same thing.

4 THE COURT: So you agree that the -- that the right  
5 to manufacture and sell firearms is subject to strict  
6 scrutiny, the purported right to manufacture and sell?

7 MR. RENZ: Yes, in the same -- in the same way that  
8 the transaction between a woman and her doctor, subject to  
9 strict scrutiny, and the effort to regulate that transaction  
10 is subject to strict scrutiny.

11 Now what does that mean? Well, that means I think  
12 that we're probably going to engage down the line in a  
13 question of significant burden. Does the regulation in some  
14 way significantly burden the exercise of the right. That's  
15 my guess as to how these things are going to play out, and  
16 then this is the case where they may begin to play out.

17 But what that means, of course, is that at this  
18 stage it's going to require evidence. I mean we're not in a  
19 position to say if there's a significant burden or not  
20 without evidence. And this is the preliminary stage, the  
21 motion to dismiss. And that's why the legislatures agree  
22 with the state that the case ought to pass through the motion  
23 to dismiss stage, and the Court ought to hear evidence with  
24 respect to what Mr. Marbut intends to do, with respect to  
25 what the United States would do with respect to what he does,

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1 and then make the determination as to whether or not there's  
2 a significant burden on the Second Amendment right, and make  
3 the determination as to whether or not the United States'  
4 scheme to regulate interstate transactions and firearms is  
5 significantly frustrated.

6 THE COURT: All right. Thank you.

7 Ms. Leinhart [sic], you get to mop up.

8 MS. LEINWAND: Okay. Thank you, Your Honor.

9 Your Honor, I'd like to discuss the arguments that  
10 were raised with respect to the Tenth Amendment and the Second  
11 Amendment.

12 As an initial matter I just wanted to clarify that  
13 the government recognizes 18, U.S.C., 927 and is not arguing  
14 that there's field preemption in this case. We are saying  
15 that there's a clear conflict here between the federal  
16 firearms laws, which impose various licensing, record  
17 keeping, and marking requirements, and the MFFA, which  
18 simultaneously exempts Montana Firearms dealers from those  
19 same requirements.

20 And according to well settled preemption law,  
21 interpreting the supremacy clause, if there is any conflict  
22 between federal law and state law, federal law shall  
23 prevail.

24 THE COURT: Well, just so we're all -- or at least  
25 I'm clear, you don't disagree with the State's argument that

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1 its Ninth and Tenth Amendment powers allows it to pass this  
2 political statement, and certainly they have that right -- the  
3 State has that right. And what we're talking about is the  
4 federal government's position that it has a right to enforce  
5 the gun regulations in federal statute and regulations  
6 promulgated thereunder?

7 MS. LEINWAND: Exactly.

8 THE COURT: Okay.

9 MS. LEINWAND: And to the extent that there is a  
10 conflict, federal law preempts state law in this issue.

11 In terms of the Tenth --

12 THE COURT: Supercede probably is better. Under the  
13 Supremacy Clause is what your arguing, is that correct?

14 MS. LEINWAND: Right. Supercedes.

15 THE COURT: All right.

16 MS. LEINWAND: The plaintiffs and the amici also  
17 maintain that federal law superceding state law in this case  
18 also violates the Tenth Amendment. And I think the Tenth  
19 Amendment argument and the reference to the Defensive Marriage  
20 Act decision ignores the relationship between a state's  
21 authority under the Tenth Amendment and congressional power  
22 under the Commerce Clause.

23 And there's a principle of dual sovereignty at play,  
24 which the Supreme Court has discussed in Garcia versus  
25 Metropolitan Transit Authority and New York versus the United

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1 States, and that the Ninth Circuit recognized in Stewart and  
2 that this Court recognized in Rahaker [phonetic], which is  
3 that where Congress has the power to legislate, pursuant to  
4 an enumerated power, the states don't have control. So to  
5 the extent that this Court decides that Congress has the  
6 power to regulate the manufacture and sale of firearms under  
7 the commerce clause, which Raich and Stewart has clearly said  
8 it does, there is no Tenth Amendment violation.

9           And the Defensive Marriage Act that the Goldwater  
10 Institute referenced actually is not intention with this  
11 principle because in that case the first question that the  
12 Court had to answer was whether Congress has the authority to  
13 pass the Defensive Marriage Act under the spending clause.  
14 And so it ran through its whole spending clause analysis and  
15 concluded that it didn't have that power. And once it did not  
16 have that power it then continued on and considered the Tenth  
17 Amendment issues in that case.

18           And there's confusing language in that decision  
19 that sort of reverts back to the traditional state function  
20 language that was overruled by Garcia, and so I'm not going  
21 to get into kind of the intricacies of their Tenth Amendment  
22 analysis because for our purposes the first prong of the test  
23 is what's important. And here because it's a very clear  
24 question that Congress does have this power under the Commerce  
25 Clause, the Tenth Amendment argument falls flat.

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1           Moving on to the Second Amendment, I just want to  
2 point out that plaintiffs haven't raised a Second Amendment --  
3 a Second Amendment claim in their complaint. They have  
4 referenced it in terms of the authority and context for the  
5 MFFA, but they didn't bring a claim expressly under the  
6 Second Amendment itself. And in the prayer for relief they  
7 asked the Court to declare the MFFA constitutional under the  
8 Ninth and Tenth Amendments, but they don't ask for this  
9 relief under the Second Amendment. So while the Second  
10 Amendment was a central point in many of the amicus briefs as  
11 we've seen, the amici really can't raise claims on behalf of  
12 the plaintiffs.

13           But in any event, it's the federal government's  
14 position that a Second Amendment challenge wouldn't survive  
15 scrutiny, even under the recent Supreme Court decisions of  
16 Heller versus the District of Columbia, and McDonald versus  
17 Chicago. And as this Court recognized in Vanderhule, Heller  
18 was a very limited and fact specific decision.

19           And in both Heller and McDonald we were dealing  
20 with absolute bans on the possession of handguns. So that's  
21 just an initial distinction. But the Supreme Court did  
22 consider whether a person who was lawfully entitled to  
23 possess firearms generally could possess a handgun for self-  
24 defense. In Heller it was in his home. And in holding that  
25 he could, obviously the court invalidated a D.C. gun control

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1 law that prohibited the possession of handguns generally,  
2 and a requirement that said all firearms have to be kept  
3 unloaded and inoperable in the home. And the Court expressly  
4 tied these absolute bans to the right of a person to self-  
5 defense.

6 And I think Your Honor recognized this in your line  
7 of questioning that what's important about Heller and  
8 McDonald, for our purposes, is how the Court defined the  
9 individual right itself. And the restrictions on that right  
10 that the Supreme Court expressly said remain lawful. Because  
11 the Court set out in dicta to guide lower courts in  
12 interpreting the Second Amendment after Heller, and they  
13 noted that the right is not unlimited. And in their non-  
14 exhaustive list of permissible limitations, they mentioned  
15 gun ownership on the part of felons or the mentally ill, but  
16 most importantly laws imposing conditions on the commercial  
17 sale of firearms.

18 So again, this is the Supreme Court expressly  
19 saying that the activity at issue in this case should not be  
20 called into question after Heller.

21 And again, it's probably most important to remember  
22 that the Second Amendment's right to bear arms has never been  
23 interpreted to include the right to manufacture and sell  
24 firearms.

25 THE COURT: So you disagree with the argument that

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1 the Court should employ some sort of strict scrutiny to the  
2 manufacturer?

3 MS. LEINWAND: Well, first of all, Heller and  
4 McDonald didn't discuss scrutiny at all, so there's no  
5 relevant precedent to interpret from the Supreme Court in  
6 that area.

7 But that aside, I do because I think that the right  
8 at issue here is very different from the right to bear arms,  
9 subject to some absolute ban, which was at issue in Heller  
10 and McDonald. And I think looking at the right to  
11 manufacture and sell firearms, and many of the amici who  
12 argued tied the right to manufacture and sell to the right to  
13 possess and bear arms, saying that you can't have one without  
14 the other.

15 But federal firearm licensees are producing  
16 firearms right now, and these firearms are available for  
17 purchase. And all the federal government is doing is  
18 regulating them to an extent. And so I think when we look at  
19 all of that we see that the -- while McDonald and Heller are  
20 certainly -- they color the arguments, but they're -- they're  
21 really in no way decisive.

22 And finally, just as a brief aside because I know  
23 some of amicus briefs also referenced the Ninth Amendment,  
24 sort of this idea that the Ninth Amendment takes the  
25 individual right to bear arms and then provides a sort of

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1 independent right to manufacture and sell arms, and the  
2 Ninth Amendment has never been interpreted to confer  
3 individual rights, a rule of reading the constitution. So I  
4 think any reference to the Ninth Amendment as a source of  
5 rights is just -- it's not a -- that argument has no merit.

6 And that's all I have today, so thank you very much  
7 for your time.

8 THE COURT: All right. Thank you.

9 I thank all of the individuals who argued today. I  
10 will issue a decision as soon as practicable.

11 The Court stands in recess.

12 THE CLERK: All rise.

13 COUNSEL: Thank you for hearing us, Your Honor.

14 THE COURT: You're welcome.

15 PROCEEDINGS CONCLUDED AT 10:46:39 A.M.

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CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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# **EXHIBIT A**

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*Pro Querente*

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

**MONTANA SHOOTING SPORTS  
ASSOCIATION, SECOND  
AMENDMENT FOUNDATION,  
Inc., and GARY MARBUT,**

Plaintiffs,

v.

**ERIC H. HOLDER, JR.,  
ATTORNEY GENERAL OF THE  
UNITED STATES OF AMERICA,**

Defendant.

Cause No. **CV-09-147-M-DWM**

***PLAINTIFFS' SURREPLY IN  
OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS  
[PROPOSED]***

Plaintiffs Montana Shooting Sports Association, Second Amendment  
Foundation, Inc., and Gary Marbut ("Plaintiffs"), by and through their

counsel of record, and submits in opposition to Defendant's motion to dismiss the following:

***SURREPLY BRIEF***

In this case, Defendant Eric H. Holder, Jr., Attorney General of the United States of America ("Defendant") filed a Motion to Dismiss the first amended complaint. (Dkt. No. 10.) Subsequently, Plaintiffs filed a second amended complaint (Dkt. No. 33.) and a brief in opposition to the motion to dismiss (Dkt. No. 48). Defendant then filed a reply that raised two new issues:

1. Whether Plaintiffs' second amended complaint was filed in violation FED. R. CIV. P. 15(a). (Dkt. No. 70, fn. 2.)
2. Whether Plaintiffs intend in fact to manufacture the Montana Buckaroo youth rifle and certain "less than legal" ammunition, including whether:
  - A. Plaintiffs have "material plans" to take part "in any activity threatened by Federal law enforcement." (Dkt. No. 70, p. 6.)
  - B. Plaintiff Marbut has not claimed he has the means to manufacture MFFA-firearms, nor has he taken any steps toward realizing this commercial venture. (*Id.*)
  - C. Purchases by the hundreds of customers who have placed orders with Marbut for the Montana Buckaroo rifle is speculative. (*Id.*)

- D. Plaintiffs have not decided to manufacture and sell MSSA firearms. (*Id.*, p. 8.)
- E. Marbut has provided no details to describe production costs and pricing for the firearms he plans to sell; customers have provided no compensation or any assurances that they will complete their alleged orders. (*Id.*, p. 10.)
- F. ATF's letter prohibiting Marbut from taking advantage of the MFFA has no effect on his day-to-day business. (*Id.*, p. 16.)
- G. ATF's letter prohibiting Marbut from taking advantage of the MFFA has no effect on his day-to-day business. (*Id.*, p. 16.)

Plaintiffs therefore have not had an opportunity to address these issues.

Turning to them now, first, the Second Amended Complaint was filed in compliance with the Court's Case Scheduling Order (Dkt. No. 17), entered pursuant to FED. R. CIV. P. 16. Once the Scheduling Order was entered in this case, Plaintiffs' ability to amend their pleadings "was governed by Rule 16(b), not Rule 15(a)." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). The deadline for filing amended pleadings was April 12, 2010. Plaintiffs' Second Amended Complaint complied with that deadline. Given that Rule 16(b) governs, the filing of the amended complaint was appropriate.

Second, the factual allegations regarding standing and the consent of the United States to be sued are set forth in the Second Amended Complaint. For the purposes of the Government's motion to dismiss under FED. R. CIV. P. 12(b)(6), the Court should assume all facts plead in the Second Amended Complaint to be true, should resolve all doubts and inference in the pleader's favor, and should view the pleading in the light most favorable to the non-moving party. *Tellabs, Inc. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The pleading of tediously detailed factual allegations is not required. *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1949 (2009). Moreover, the pleader's memorandum or brief can be used to clarify allegations of the pleading to flesh out inferences that can be reasonably drawn from the pleadings.

*Pegram v. Herdich*, 530 U.S. 211, 229 (2000).

Defendant argues that the factual allegations of the Second Amended Complaint are insufficient to confer standing. In *Friends of the Earth v. Laidlaw Environmental Services*, 405 U.S. 727, 734 (1972), the U.S. Supreme Court upheld a standing based on claims that plaintiffs had chosen to forego recreational opportunities on the river in question, out of mere fear of exposure to pollution, even though the Court accepted the

finding that there was, in fact, no basis for that fear. Thus, fear of prosecution, like a fear of pollution, results in standing. *See, United States v. SCRAP*, 412 U.S. 669, 689 & n.14 (1973) and *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 231 n.4 (1986).

In this case, the fear of prosecution arises from the factual circumstances which Plaintiffs have pled, and which underlay those facts. (*See, Sworn Declaration of Gary Marbut dated May 25, 2010, Exhibit B, attached to Plaintiff's Motion to Strike Portions of Defendant's Reply Memorandum and To Allow for Leave to File Surreply.*) Review of the declaration, and attached Exhibits, makes clear that Plaintiff Marbut has the means and opportunity to manufacture firearms and ammunition under the MFFA. The correspondence he has received from the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives make clear that his fear has an objective basis. (*See, Second Amended Complaint, Dkt. No. 33, Exhibits A and B.*) It arises not only from his subjective reading of U.S. statutes, but from the reading of the executive agency charged with enforcement of the statutes, which has taken the time to communicate its views on prosecution of the actions he proposes to undertake.

These factual issues including the fear of prosecution, confer



standing. *Friends of the Earth*, 405 U.S. at 727. For example, *In Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (rev'd on other grounds *sub nom. Washington v. Gluckburg*, 521 U.S. 702 (1997)), it was held that physicians had standing to contest an anti-euthanasia statute – even though there had been no threats to prosecute whatsoever. The physician cited *Doe v. Bolton*, 410 U.S. 179, 188 (1973) and *Babbitt v. United Farm Workers*, 442 U.S. 289 198-99 & 302 (1979), correctly, for the proposition that no such threat was necessary. Finally, in this case, as the Declaration of Marbut establishes, there is indisputable economic injury. This is also always enough to confer standing: “When such tangible economic injury is alleged, we need not rely on the three factor test applied in *Thomas* and *San Diego Guns*.”<sup>1</sup> *National Audubon Society v. Davis*, 307 F.3d 835, 855 (9th Cir. 2002). Given both the fear of prosecution and the economic harm, facts the Court must assume to be true, Plaintiffs have standing to sue.

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<sup>1</sup> Note that *San Diego Guns* is the principal authority upon which the Government relies to support its standing arguments.

**CONCLUSION**

For the reasons stated herein, Defendant's motion to dismiss should be denied.

Dated this 2<sup>nd</sup> day of June, 2010.

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

By: /s/ Quentin M. Rhoades  
Quentin M. Rhoades  
*Pro Querente*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of June, 2010, I served a true and correct copy of the foregoing on the following persons by the following means:

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By: /s/ Quentin M. Rhoades  
Quentin M. Rhoades

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# **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.

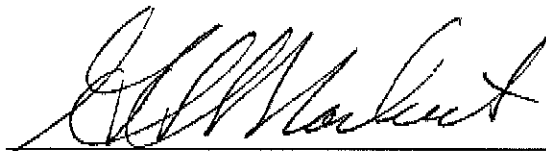
16. Since the passage of HB 246 (the "Montana Firearms Freedom Act") by the 2009 Montana Legislature, I believe it would

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 25<sup>th</sup> day of May, 2010.

  
\_\_\_\_\_  
Gary Marbut

STATE OF MONTANA)

:SS

County of Missoula )

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



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

*Michelle M. Fontaine*

Notary Public for the State of Montana

Printed Name: Michelle M. Fontaine

Residing at: Bonner Montana

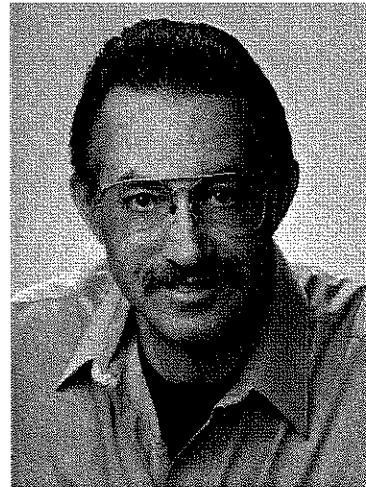
My commission expires: 10/3/2010

**Expert witness**  
**Legal consultant and trial consultant, civil and criminal**

Gary Marbut  
Missoula, Montana

P.O. Box 16106  
Missoula, Montana 59808

406-549-1252 - Office  
800-549-1252 - Office  
406-544-1252 - Cellular  
Email - gary AT marbut DOT com



Topics

Firearm safety  
Use of lethal force  
Self defense  
Kids and guns  
Montana gun laws  
Concealed weapons and permits  
Shooting ranges

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Resume'  
Gary S. Marbut  
Missoula, Montana

**History/Employment**

Born: 1946

To 1966: Raised on a 5,000-acre cattle ranch in western Montana, using firearms from age eight. Attended schools in western Montana, including the University of Montana, and during a portion of high school, attended Shattuck Military Academy, Fairbault, Minnesota.

August 1966: Enlisted for three years in the U.S. Army, and was honorably discharged in August, 1969. While in the Army, qualified expert with every small arm fired, including M-14, M-14A2, 1911 - .45 auto, M-60 machine gun, and M-2 - .50 caliber machine gun. No rating but qualification and lots of experience and practice with LAW (Light Antitank Weapon - a shoulder-fired rocket), M-69 grenade launcher, and "Quad 50" a synchronous cluster of four, .50 caliber machine guns.

January, 1970: Assistant Sergeant-at-Arms, Montana House of Representatives

January, 1972: Employed as a firefighter and subsequently as an Advanced Life Support Paramedic by the Fairbanks, Alaska, Fire Department. While serving in that capacity, responded to and treated many gunshot victims. Obtained first-hand experience of the trauma and suffering caused by misuse or improper use of firearms.

1975, Tanana Valley chapter, American Red Cross, Vice Chairman for Safety Programs

1978: Certified by the American Heart Association as an Advanced Cardiac Life Support Instructor.

1974 to 1979: Instructor of Fire Science and Emergency Medicine part time, Tanana Valley Community College and University of Alaska.

1988 to present: Sole proprietor of Target Operator Systems, a business that manufactures and markets shooting range equipment for law enforcement agencies nationwide, federal, state and local.

2003 to present: Sole proprietor, Montana Firearms Academy

### **Memberships, Activities and Awards**

Member, International Association of Law Enforcement Firearms Instructors - involved in training law enforcement, security and private investigators personnel in the safe use of firearms.

Honorary Life Member, president and Chairman of the Board of Directors of the Montana Shooting Sports Association, the principle organization asserting the rights and prerogatives of gun owners and hunters in Montana. MSSA is a statewide organization, is nearly two decades old, and is affiliated with the National Rifle Association and the Citizens Committee for the Right to Keep and Bear Arms and allied with Gun Owners of America. MSSA is a nonprofit Montana corporation. MSSA actively presses pro-gun legislation before the Montana Legislature. MSSA also delivers firearm safety programs to the public.

Certified by the Second Amendment Foundation to teach and to train and certify instructors to teach any gun safety curricula designed, adopted and fielded by MSSA.

Director and Secretary of the Western Montana Fish and Game Association, Montana's oldest and largest regional organization of sportsmen, founded in 1911, with over 1,000 local members. WMFGA is a nonprofit Montana corporation. WMFGA owns and operates one of the most extensive shooting ranges in the Pacific/Rocky Mountain northwest, the Deer Creek Shooting Center. Former Chairman of the Range Committee (past Range manager, including enforcement the safety rules for the Range), and Chairman of the Public Policy Committee of WMFGA.

Appointed by two governors to the Governor's Concealed Weapon Permit Advisory Council, pursuant to 45-8-329, M.C.A. The Council is made up of law enforcement personnel, legislators, representatives of pro-gun groups and MTDOJ, prosecutors, and others.

Past president of the Montana Rifle and Pistol Association, the organization administering the traditional NRA-sponsored shooting disciplines in Montana.

Past member of the Board of Directors of Gun Owners of America, a national pro-gun advocacy group.

Life Member of the National Rifle Association.

Member, United States Practical Shooting Association

Honorary Life Member of the Big Sky Practical Shooting Club.

Recipient of the nationally-awarded Saint Gabriel Possenti Medal for "Defenders of the Faith", awarded to one to three persons each year for exceptional contributions to gun

owners - selected and awarded by the Second Amendment Foundation at the national Gun Rights Policy Conference.

Active competitor in the sport of "practical pistol", a sport requiring speed and accuracy with handguns. The international governing body for this sport is the International Practical Shooting Confederation (the sport is often known by this acronym, IPSC [ip' sic]), and the national governing body is the United States Practical Shooting Association. Competitors in this sport shoot under the most strict set of safety rules of any shooting sport. Fire up to 10,000 rounds annually in practice and competition.

Devotee of the sport of "precision rifle", shooting small targets at long distances under practical, field conditions.

Handgun hunter of big game; elk with a .44 magnum revolver, and deer with a .45 autopistol.

### **Firearm Safety**

Certified by the Second Amendment foundation to teach all gun safety programs, and to train and certify instructors to teach all gun safety programs.

Author of Gun Laws of Montana (Montana Publishing, 2003), a trade publication now the standard reference for this issue across Montana. GLM is used as a reference by gun owners, law enforcement personnel and agencies, attorneys, courts and the University of Montana Law School Library.

Author and curricula developer, Be Safe, a gun safety program for children, designed for children in first through third grades. The primary message of the Be Safe program is: "Don't touch! Do not handle firearms without adult supervision." The secondary message is: "If you ever see another kid playing with a real gun, leave the building and tell an adult." The Be Safe program has been distributed to every elementary school in Montana, and literally thousands of Montana schoolchildren have received the training. The Be Safe program is supported by a state law (20-7-132, M.C.A.) calling on schools to provide gun safety training as a part of their school curricula.

Author and curricula developer and primary instructor and instructor trainer, Introduction to Handguns for Women (IHW), designed to train women who have no experience with handguns. IHW teaches the three primary rules of gun safety, which are: 1) All guns are loaded. All guns must always be assumed to be loaded. It is the guns people think are unloaded which cause accidents; 2) Muzzle direction. Never point a firearm at anything you are not willing to destroy; 3) Finger out of the trigger guard. The gun handler must keep their finger out of the trigger guard (and along the frame) until they are ready to shoot. 768 western Montana women have graduated from IHW in the past eight years.

Author and curricula developer and primary instructor and instructor trainer, Gun Safety for Concealed Weapon Permits (GS-CWP). GS-CWP is a curriculum similar to IHW, but is an either-gender class. 341 persons from western Montana have graduated from GS-CWP in the past few years.

Certified by the State of Montana as a Firearms Instructor for initial training and requalification of state-licensed private security guards and private investigators.

### **Montana Public Policy and Firearms**

Since 1985, heavily involved in the formulation of public policy concerning civilian ownership and use of firearms in Montana. Has testified before scores of legislative committees about firearms issues. Has drafted many successful pieces of legislation concerning use and ownership of firearms, shooting and hunting.

### **Writings**

- < Gun Laws of Montana, a trade paperback book, 2003; revised/reprinted 2007, 2009
- < Be Safe, Gun Safety for Boys and Girls in Montana, 1996, 15th printing
- < Allowable Uses of Lethal Force, A Review of Montana Law for Gun Owners, 1994, 4th printing
- < Montana Concealed Weapon Permits, History, Law and the Application Process, 1994, 3rd printing
- < Introduction to Handguns for Women, Instructor's Guide, 1997
- < Gun Safety for Concealed Weapon Permits, Instructor's Guide, 1999
- < Standard Firearm Safety Check (for CWP applicants), Purpose, Methodology and Practice, 1995
- < MSSA, Successful Work for Gun Owners and Hunters of Montana, 1993 to 2009 updated
- < Hunting Elk By Handgun, a Primer for the Beginner, a Refresher for Others, unpublished book
- < Emergency Patient Care System for Interior Alaska, 1976 DHEW 1203 application, co-author
- < 87-1-304(1)(b), M.C.A. Special weapons hunting districts. 1987
- < 50-61-120, M.C.A. Sporting goods stores storage of smokeless powder and primers. 1989
- < 1-1-224, M.C.A. Observance of right to keep and bear arms, 1991.
- < 1-1-226, M.C.A.. Official observance of Montana's hunting heritage, 1991.
- < 45-8-315, et. seq., M.C.A. Mandatory Issue Concealed Weapon Permits. 1991
- < 27-1-721, M.C.A. Immunity of certain firearms safety instructors, 1995.
- < 70-17-101, M.C.A. Easements to use land adjacent to a shooting range as a safety zone, 1993.
- < 87-2-509, M.C.A. Game Lawfully Taken Becomes the Personal Property of the Hunter. 1993

< 87-3-143, M.C.A. Second Conviction of Hunter Harassment increased penalty. 1993  
< 45-8-360, M.C.A. Montana exempted from the federal "gun-free school zones". 1995  
< 45-8-329, M.C.A. CWP reciprocity. 1995  
< 45-8-324, M.C.A. Appeal of CWP denial. 1995  
< 45-8-330, M.C.A. Gun buys for CWP-holders under the Brady Law. 1995  
< 76-9-101, M.C.A., et. seq., Montana Shooting Range Protection Act, 1991  
< 27-1-709, M.C.A. Gun owner not liable for criminal acts committed with a stolen  
firearm. 1997  
< SB427. Machine guns and silencers repeal. 1999  
< 45-8-328, M.C.A. CWP prohibited places revision 1999  
< 45-8-329, M.C.A. CWP reciprocity revision, 1999  
< 87-1-276, M.C.A., et. seq. Montana Shooting Range Development Act, 1999  
< 27-1-722, M.C.A. Defenders not civilly liable. 2001  
< C-41/HB306. Montana Constitution, Right to Hunt and Fish. 2003  
< 87-1-217, M.C.A. FWP large predator management. 2003  
< 40-4-121(7)(a), M.C.A. Lautenberg warning. 2003  
< 87-1-201, M.C.A. FWP game counts to be published. 2003  
< 10-3-114. Confiscation of firearm by government prohibited, 2005  
< SJ 15. Firearms safety training for school-age children in Montana, 1991  
< SJ 16. Rimfire competition in secondary schools of Montana. 1991  
< HJ5. Repeal the Brady Law. 1999  
< HJ32. Wolf delisting. 2003  
< HJ12. Terrorist Free America resolution. 2003  
< HB 246. Montana Firearms Freedom Act, 2009  
< HB 228. Montana Self Defense Act, 2009  
< SB 185. College students hunting, 2009  
< HJ 14. Self defense in National Parks, 2009  
< Montana Statehood Contract in re Heller, 2008  
<http://www.progunleaders.org/Heller/argument.html>  
<Jury-rigging Federal Commerce Power  
<http://www.marbut.com/commerce/>  
<Making Sense of the Ninth Amendment and the Montana Firearms Freedom Act  
Interplay  
<http://www.marbut.com/NinthAmendment/>  
<"Dangerous and unusual" weapons  
<http://www.progunleaders.org/Dangerous%20and%20Unusual/>  
<The Montana University System and Firearms Authority, Policy, Discussion and  
Conclusions  
<http://www.progunleaders.org/university/>  
<Concepts within the Montana Constitution relating to the right to bear arms  
<http://www.progunleaders.org/MT%20RKBA/>  
<A Modest Proposal  
<http://www.marbut.com/ModestProposal/>

Development of 12-gauge "beanbag" ammunition in 2005

I have hand-loaded my own ammunition for handguns and rifles since about 1970, including casting bullets for many of the calibers I shoot. Since I usually shoot over 10,000 rounds of ammunition annually in practice and shooting competition, I'd guess that I've hand-loaded over 1/4 million rounds of ammunition in my lifetime.

During the Autumn of 2005, I worked on development of "beanbag" ammunition to be used in a 12-gauge shotgun for bear adversity training. I wanted a relatively accurate round that would thump an invading bear as hard as a fastball pitcher thrown by a major-league pitcher. I wanted ammunition that would definitely get a bear's attention, but which would not break a bear's skin or cause any permanent injury - a firearm owner's equivalent of throwing a rock at a bear. This, I surmised, would allow me to train intruding bears to stay out of the apple tree at my rural residence and leave my dog alone.

I documented development of this beanbag round of ammunition in 2005 at:  
<http://marbut.com/beanbag>

The presentation at this URL has been unchanged since.

See attached **Exhibit A** as a reproduction of the Website page where I documented my developmental work on the beanbag ammunition in 2005.

Since development, I have had opportunity to test this ammunition on intruding bears. Before doing so, I discussed the proposed testing with Jamie Jonkle, the bear biologist for Region 2 of the Montana Department of Fish, Wildlife and Parks (FWP). Jamie was very encouraging, and expressed a wish that all rural homeowners would also engage in similar, non-lethal bear adversity training.

My tests of the beanbag ammunition showed dramatic and positive results. I have hit three bears in my yard with beanbags. All three left the yard at the highest speed they could achieve. None of the three have ever returned (they were identifiable by unique coloration and markings). In all three cases I recovered used beanbags from my lawn that had bounced off of the target bears, one with some black bear hairs still attached.

In 2005, I delivered a manila envelope with ten rounds of my handloaded beanbag 12-gauge ammunition to FWP Region 2 Director Mack Long for Jamie Jonkle to test in his work with bears. I discussed this with Jamie on the phone in 2006.

Jamie found the ammunition very effective. He asked if I could load several boxes of this specialty ammunition to sell to FWP for bear biologists to use in their work. I declined, telling Jamie that I lacked the requisite federal license to load and sell ammunition to FWP.

Dated this 31<sup>st</sup> day of March, 2010

Gary Marbut, Owner  
B.I.T. Enterprises

Reproduction of: <http://www.marbut.com/beanbag>

## **Bean Bag 12-guage Ammunition Roll your own**

(Note: Accesses to this Webpage is intended to be by invitation only. If you have not been invited, go away - you don't belong here.)

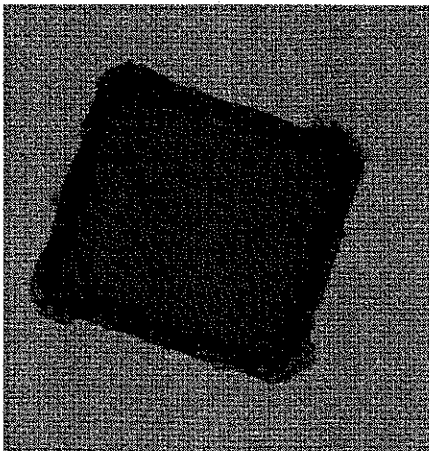
(Note well: All the information here is simply a report of my own tinkering. No warranty, result or benefit is guaranteed, implied, or intended from this or the processes, techniques or materials discussed here. If you follow my footsteps, you are on your own. All usual safety procedures and practices must be applied, and all laws followed. This is your responsibility.)

### **History**

Beanbag 12-guage ammo has been available for several years, developed as a "less than lethal" round for law enforcement uses. Most commonly, bean bags have been used by law enforcement as a stand-off contact weapon, for example to disarm a knife-wielding subject.

My interest in beanbags is for wildlife "adversity training", specifically to keep marauding bears out of my apple tree. I have tried paintballs on bears, and they work okay, but they don't thump a bear with quite the authority necessary to render a good lesson. Twelve-gauge beanbags might work well also for other wildlife tasks, such as hazing wild bison.

The first development of commercial bean bag rounds of which I am aware was done with square bean bags. Two squares of heavy-duty fabric, about 1 1/4" per side, were sewn together, including a measure of lead shot between them, to make a small pillow of encased lead shot.



These have generally been produced in two loadings: 1) A "close range" loading with a muzzle velocity of about 200 feet per second (FPS), and 2) a "long range" loading of about 300 FPS. The close range ammo has been intended for law enforcement personnel to use on subjects who are at close range to the officer. Instructions with the long range ammo declare that use on subjects within a certain range may cause serious injury or loss of life.

There is one serious problem with these early, square beanbags. They are highly inaccurate. Because they are flat and square, when they exit the muzzle of a shotgun they tend to "sail" - sail off in some random direction other than straight towards the target. This is generally not a big problem inside about 20 yards, but don't bother trying to hit anything with a square beanbag at 50 yards.

More recently, manufacturers have been producing what they call a "drag-stabalized" beanbag round. In this configuration, fabric is gathered around the measure of shot and banded behind the shot, leaving a tail of fabric. This configuration presents a round front to the projectile, and the tail of fabric drags in the air to keep the projectile pointed down range during flight.

The drag-stabilized rounds struck me as a much more accurate way to configure the beanbag.

There is still a problem. These rounds are VERY expensive, even assuming a consumer can persuade a manufacturer to sell them to a person not using the ammo for law enforcement purposes. The going rate is about \$6 per round, too much for my lean budget.

It seemed to me that making these rounds would not be rocket science or brain surgery, so I set out to make my own. It turns out that it's not all that hard to do.

## **Development**

My goal was a one-ounce bag with a muzzle velocity of about 400 to 450 FPS. Although I've loaded a LOT of ammo, I've never loaded shotgun ammunition. But it was pretty simple, at least for what I needed to do, thanks to friend Scott for his coaching and use of his press.

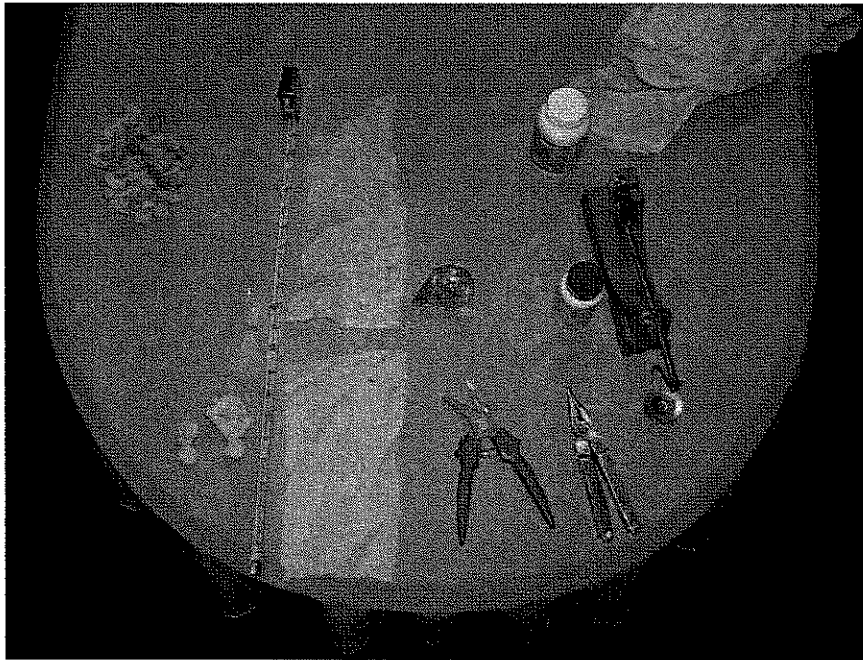
I happened to have quite a bit of BB-sized lead shot on hand, so that's what I used. Probably any weight of shot would work just fine. Some manufacturers of drag-stabilized bean bag rounds use mil-spec, rip-stop nylon to encapsulate the shot. I had an old parachute I'd formerly used for a dropcloth, so I used fabric from that chute (which explains why some photos show paint spots on the fabric).

A shotshell loader is essential for loading beanbag rounds, as well as a brief introduction to shotshell loading.



The loading manual shows quite a few powders that can be used with one-ounce 12-gauge loads, but many of them are powders specific for shotguns. The manual did, however, show loads for Bullseye, Unique and Blue Dot. Being a handgun and rifle loader, I had those powders in stock. I elected to work up my loads with Bullseye.

#### Materials and equipment



Here are the materials and equipment I found necessary to create the loads.

Nylon parachute fabric

Lead shot

4" plastic cable ties

A stout and sharp pair of shears (good dikes might work as well)

Winchester AA trap shotgun hulls

Bullseye smokeless powder

CCI 209 shotshell primers

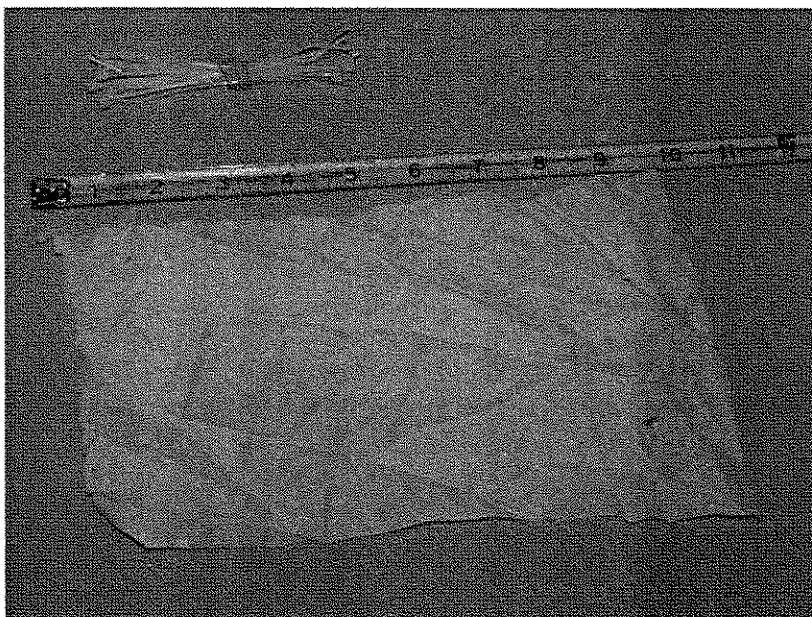
Claybuster WAA-12 wads

A basic shotshell reloading press

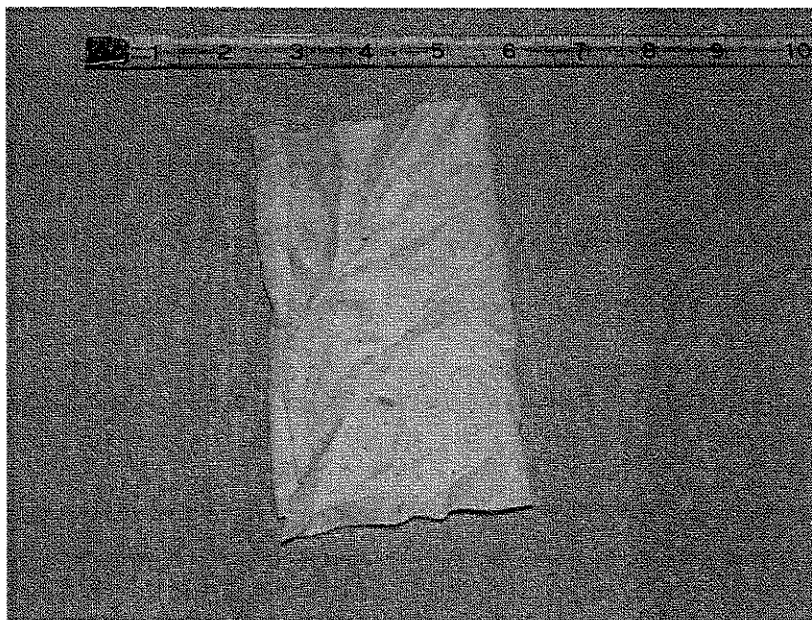
A scale for powder and shot.

#### **The Process**

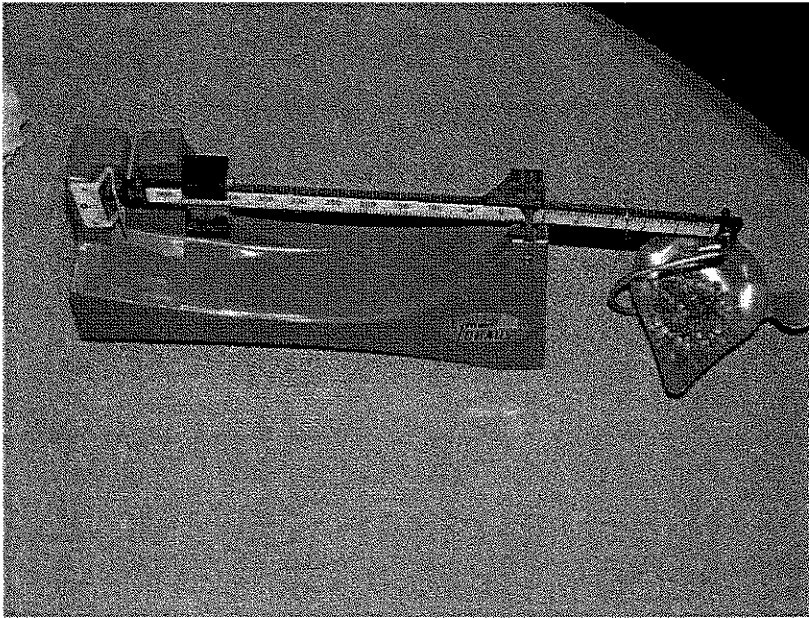
After trial and error, I found that a piece of fabric about 3" by 9" inches worked best for my purpose. I tested two layers of fabric, but found that the shot would sometimes break through two layers (my parachute is old and the fabric is weak). I found that three layers seems to reliably contain the shot upon impact with a soft target (it is unknown how this would perform with a hard target).



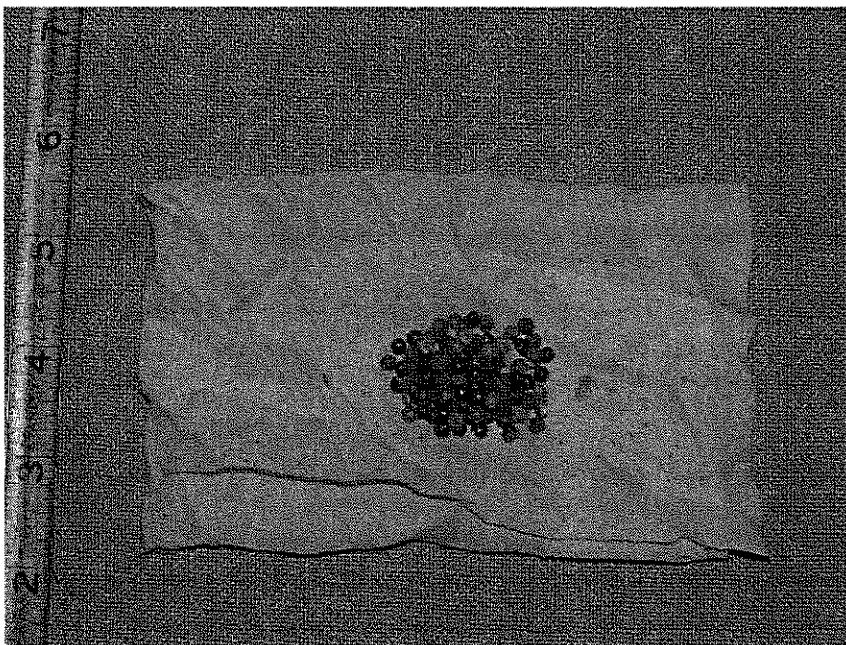
So, my 3 X 9 piece of fabric was intended to be folded into three layers, giving a three-layer piece of about 3" by 3".



I weighed every load of shot on a powder scale to make sure my projectiles were as uniform as I could make them.

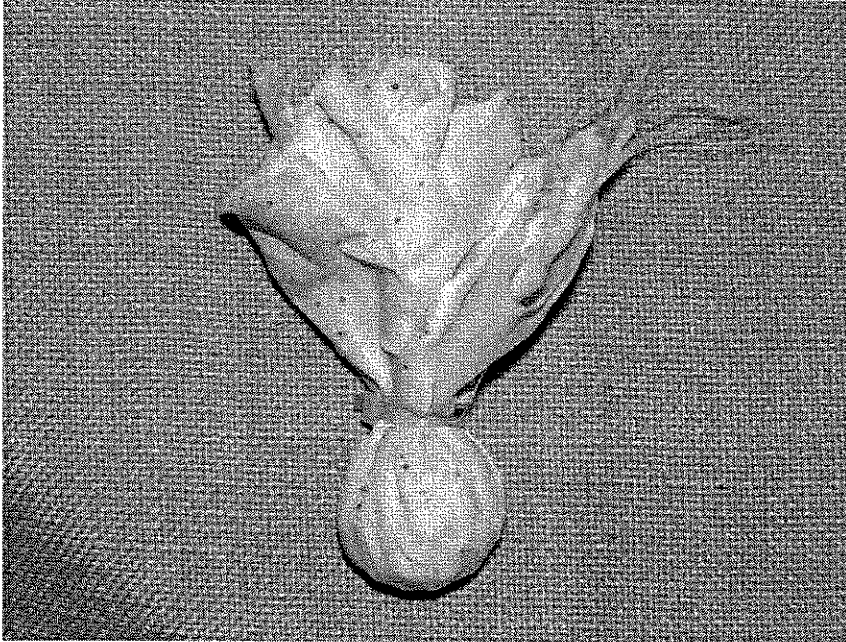


It works fine to just dump the pan of weighed shot into the center of the fabric square.

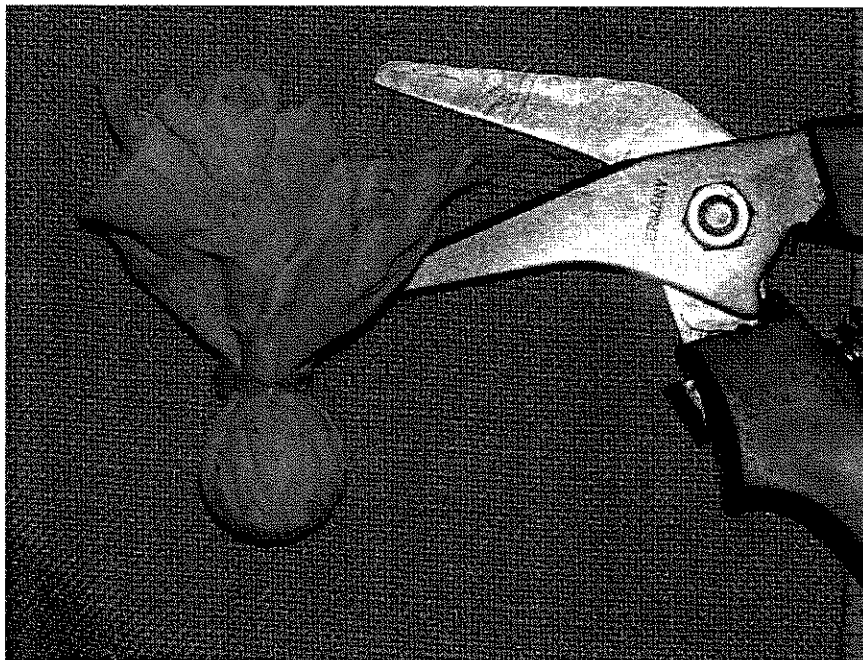


Then, it is simple to just pick the fabric up by the corners, allowing the shot to pool in the center of the square. I learned to shake the fabric and shot just a bit to get the shot settled in the pocket of the fabric. Then, I gathered the fabric at the top, and gave it a quarter twist above the shot to further gather the fabric. Then, I would wrap and lightly secure the cable tie at the location of the twist. At first I used two cable ties, but later determined that two ties were not needed for my application.

I also learned to not crowd the cable tie too close to the shot. If I left just a bit of looseness in the fabric between the shot bunch and the cable tie it was a LOT easier to get the projectile into the shotgun hull. After getting the cable tie properly positioned, I would pull it tight with a pair of pliers and clip off the excess length of the cable tie.



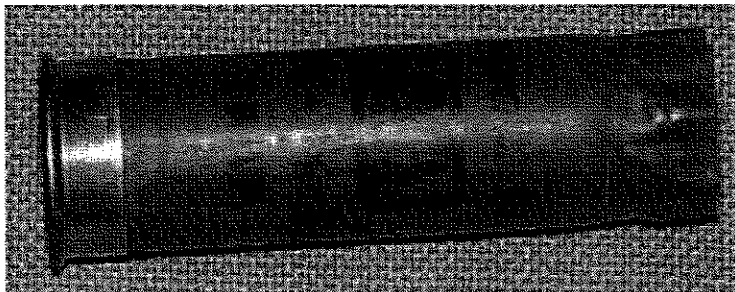
One further step was necessary. Because of the limited capacity of the shotgun hull, it was necessary to clip excess fabric off the projectile. A sharp and strong pair of shears was useful for this purpose, but a pair of dikes might also work fine.







For loading, I used Winchester, 2 3/4 AA trap hulls because they are a known standard. Other hulls might work just as well.



After some experimentation, I found that 6 grains of Bullseye would launch the bean bag over my chronograph at an average of 430 FPS, just where I wanted to be.

Of course, it was necessary to de-prime and re-prime the hulls, add the load of Bullseye, and insert the wad before seating the bean bag. I found the Claybuster WAA-12 wad to be about the right length to accommodate the bean bag in the 2 3/4" hull.

It took a while to figure out how to insert the bean bag into the hull. What worked best for me was to twist the tail a bit to get the tail started into the hull. Then, it was necessary to roll the shot capsule/fabric between my fingers to reduce the diameter of the capsule enough so it would fit into the hull. I would roll, push, roll more, push more, roll more and push more. I would also rotate the projectile in the hull a bit during the first part of the insertion. For the final seating of the projectile, I would use the ram of the press, that seats the wad, to press the bean bag further into the hull. Sometimes I would have to

push with the press, release, roll the hull in my fingers to squeeze the shot, and press some more with the press. Once the bean bag was firmly seated and crimped, the combo makes a tidy package. I considered using an overwad, but space was short, and an overwad didn't seem necessary with three layers of fabric.

### **Accuracy**

I was pleasantly surprised at how accurately the bean bags shoot - much more accurately at distance than the square bean bags. I didn't actually group them, but I'd guess they'd group in about six inches at 50 yards, which is a lot better than the two or three feet I have gotten from the square bags. These drag-stabilized bags seem to drop about four to six inches from line of sight at 50 yards.

### **Conclusion**

This is a pretty stout load for a less-than-lethal round. Running out at 430 FPS, I will be careful to not use it at close range (who wants to get close to a bear anyway). But, it does meet my goals for what I wanted to produce. And, it was not all that hard to do.

## **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**

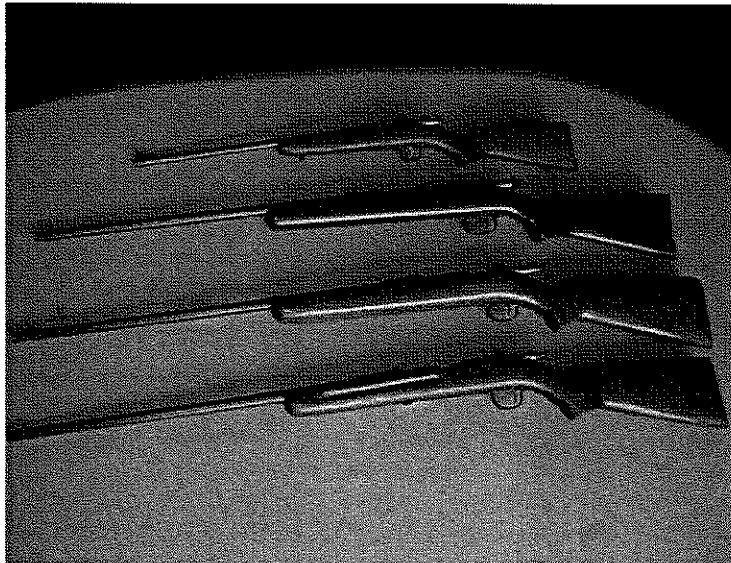
**Missoula, Montana 59808**

#### **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 of 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**.



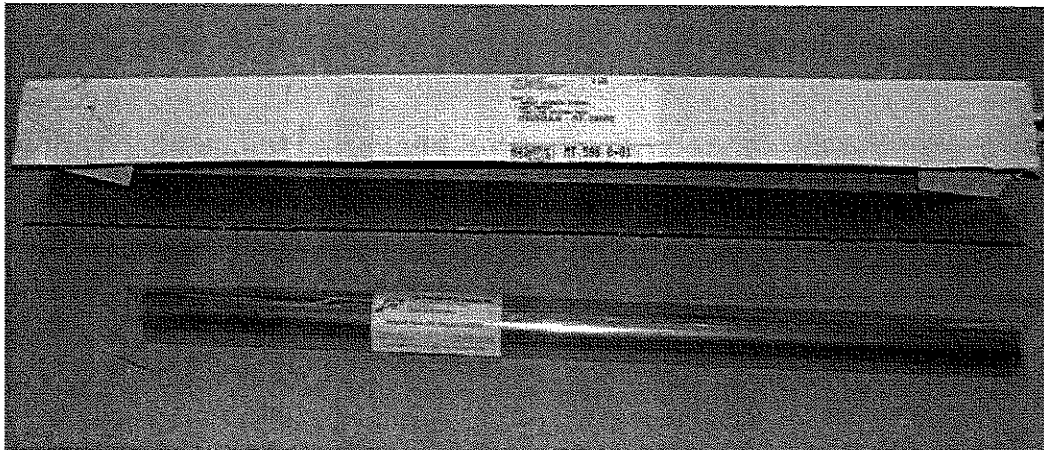
Here is what the raw, 1" cold-rolled steel looked like on the sales counter at Pacific:



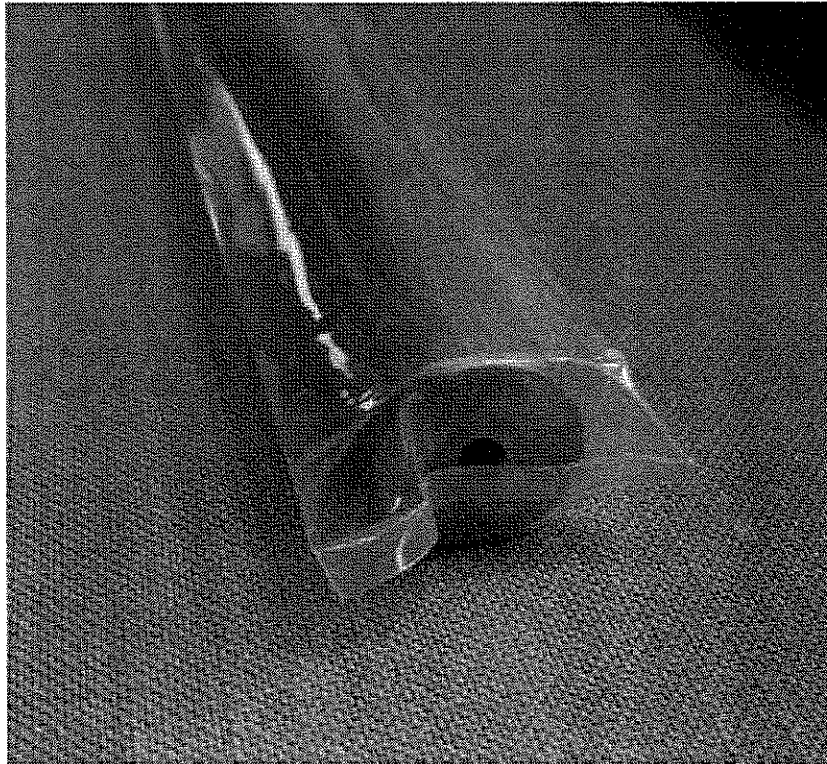
This steel was then shipped to Lilja Rifle Barrels to be bored and rifled for .22 Rimfire. See the attached **Exhibit D**, a letter from Gary Marbut to Lilja Rifle Barrels ordering the work on this stock steel.

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



No. 632,094.

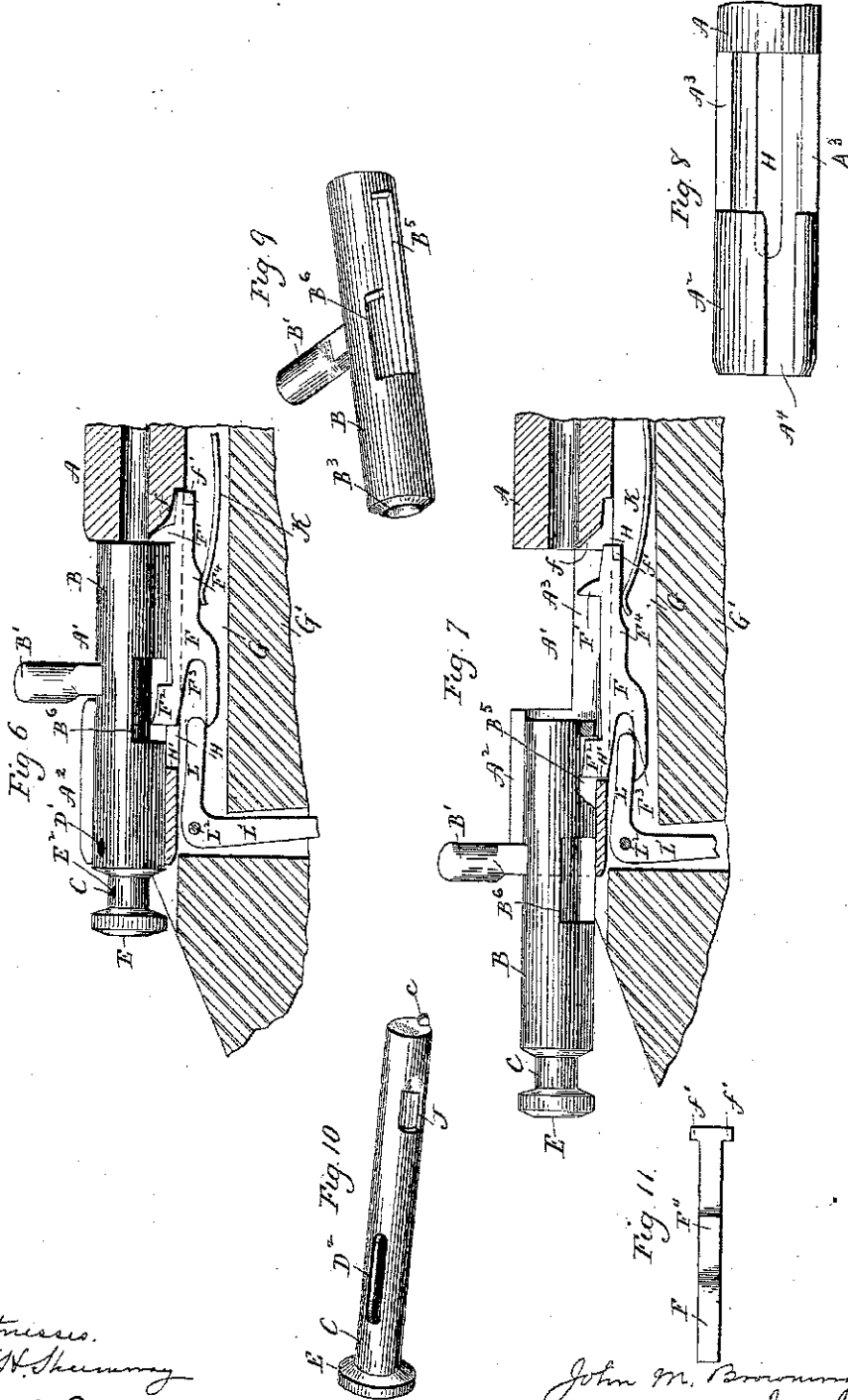
Patented Aug. 29, 1899.

J. M. BROWNING.  
BOLT GUN.

(Application filed Feb. 17, 1899.)

(No Model.)

2 Sheets—Sheet 2.



Witnesses.  
J. H. Sheeney  
C. R. Paige

John M. Browning,  
Inventor.  
By Atty. Carl Seymour

# UNITED STATES PATENT OFFICE.

JOHN M. BROWNING, OF OGDEN, UTAH, ASSIGNOR TO THE WINCHESTER REPEATING ARMS COMPANY, OF NEW HAVEN, CONNECTICUT.

## BOLT-GUN.

SPECIFICATION forming part of Letters Patent No. 632,094, dated August 29, 1899.

Application filed February 17, 1899. Serial No. 705,793. (No model.)

*To all whom it may concern:*

Be it known that I, JOHN M. BROWNING, of Ogden, in the county of Weber and State of Utah, have invented a new Improvement in Bolt-Guns; and I do hereby declare the following, when taken in connection with the accompanying drawings and the letters of reference marked thereon, to be a full, clear, and exact description of the same, and which said drawings constitute part of this specification, and represent, in—

Figure 1, a view in side elevation of a gun constructed in accordance with my invention; Fig. 2, a broken plan view thereof on an enlarged scale, showing the integral receiver extension of the gun-barrel and the bolt; Fig. 3, a broken view of the gun in vertical longitudinal section; Fig. 4, a view of the gun in vertical transverse section on the line *a b* of Fig. 2, looking rearward in the direction of the arrow *c*; Fig. 5, a less comprehensive view of the gun in vertical transverse section on the line *c d* of Fig. 3; Fig. 6, a broken view of the gun, partly in elevation and partly in vertical section, showing the bolt in its closed but unlocked position; Fig. 7, a similar view showing the bolt in its open position; Fig. 8, a broken plan view of the gun-barrel, showing its receiver extension stripped of all the parts mounted therein; Fig. 9, a perspective view of the bolt; Fig. 10, a perspective view of the hammer; Fig. 11, a detached plan view of the combined extractor and sear.

My invention relates to an improvement in that class of bolt-guns in which the bolt is located in a bolt-housing formed in a rearward extension of the gun-barrel itself, the object being to produce at a low cost for manufacture a simple, safe, and effective gun composed of few parts and not liable to derangement.

A further object of my invention is to produce a gun in which the barrel may be readily removed from the stock without the use of tools to permit the gun to be more compactly packed for transportation.

With these ends in view my invention consists in a gun having certain details of construction and combinations of parts, as will be hereinafter described, and pointed out in the claims.

In carrying out my invention I provide the barrel A at its butt-end with an integral receiver extension, which is "separated," so to speak, from the barrel proper by means of a transversely-arranged loading-opening A', which extends downward below the axial center of the barrel. The said receiver extension may be said to consist of a tubular bolt-housing A<sup>2</sup> and a grooved reach or tie A<sup>3</sup>, which connects the same with the barrel. The bolt B, which is cylindrical in cross-section, is located within the said bolt-housing A<sup>2</sup> and at its forward end has bearing in the said reach or tie, which is concaved to conform to it in curvature. The said bolt is furnished with a radially-arranged handle B', movable back and forth in a longitudinal clearance passage or slot A<sup>4</sup>, extending throughout the length of the housing and constituting the means for locking the bolt in its closed position, for when the handle emerges from the forward end of the slot A<sup>4</sup> into the transverse opening A' it is free to be swung to the right in position to be engaged with the right-hand portion of the forward end of the housing at the point B<sup>2</sup>, (seen in Fig. 2,) whereby the bolt is not only turned on its longitudinal axis, but also locked in its closed position. The bolt is itself formed with a longitudinal hammer-chamber B<sup>3</sup>, open at its rear end and extending nearly to its forward end, where it terminates in a wall B<sup>4</sup>. This hammer-chamber receives the reciprocating hammer C, which is entered into it from its rear end and which is provided at its forward end with a firing pin or nose *c*, which passes through a small opening *b*, formed in the wall B<sup>4</sup> just mentioned. When the said firing-pin is projected through the said opening, it engages with the head of the cartridge in the cartridge-chamber of the gun-barrel, into which the cartridges are entered through the transverse loading-opening A' aforesaid. The said hammer is also formed with a longitudinal spring-chamber C', entering it at its rear end and extending forward nearly to its forward end, where it terminates in a solid wall C<sup>2</sup>. A spiral hammer-spring D is inserted into this spring-chamber C' through the rear end thereof and is impinged at its forward end against the wall C<sup>2</sup>,

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its rear end being engaged with a transversely-arranged pin D', mounted in the rear end of the bolt B and passing through an elongated slot D<sup>2</sup>, formed in the hammer. The said pin D' not only constitutes an abutment for the rear end of the spring D, but prevents the hammer from rotation within the bolt and limits its reciprocation therein. The rear end of the spring-chamber C', formed in the hammer, is closed by an operating-button or finger-piece E, having a stem E', which is secured within the hammer by means of a pin E<sup>2</sup>. It will be understood, of course, that the operating-button E, with its stem E', is removed for the introduction and removal of the hammer-spring. A very simple and economical construction and one easily accessible for attention and repair is thus provided. Moreover, the hammer-spring is located entirely within the hammer and the firing-pin made integral with the forward end thereof. These are obvious advantages. With this bolt and hammer I employ a longitudinally and vertically movable combined extractor and sear F, which is made in one piece and which is mainly located in a narrow recess G, formed in the gun-stock G'. The upper edge of this combined part extends upward through a long slot H, formed in the reach or tie A<sup>3</sup> of the receiver extension, the said recess G and slot H being long enough to permit the said part to be moved back and forth, as will be hereinafter explained, the rear wall H' of the slot H limiting the rearward movement of the said part, while the forward movement thereof is limited by the engagement of the extractor-hook F' with the forward wall of the notch f, formed in the rear end of the gun-barrel for the reception of the said hook. I may here remark that the said notch f and the forward end of the slot H are adapted in form and size to provide enough clearance for the forward end of the said combined part to permit the play required for the rocking movement thereof upon its lugs f' f', as will be more fully described later on. The recess G is also made deep enough to permit the required vertical movement of the rear end of the said combined part. The sear-lug F<sup>2</sup>, which is located upon the upper edge of the rear end of the said combined part, extends upward into a clearance-opening B<sup>5</sup>, formed in the lower face of the bolt, the rear end of the said opening being laterally enlarged, as at B<sup>6</sup>, Fig. 9. The said sear-lug also enters a cocking-notch J, formed in the lower face of the reciprocating hammer C, which the sear-lug enters under the influence of a spring K, located within the recess G. The rear end of the combined part is formed with a deep horizontally-arranged notch F<sup>3</sup>, which receives a finger L, extending forward from the upper end of the trigger L', which is hung on a pin L<sup>2</sup> and the lower end of which extends downward into a trigger-guard M, secured by screws M' M' to the lower face of the stock G'. For the purpose of giving a slight impulse to the rearward or extracting movement of the said combined part and also for preventing the extractor from moving forward until after a cartridge has been entered into the cartridge-chamber of the gun-barrel the lower edge of the said combined extractor and sear is formed with a doubly-beveled operating-nose F<sup>4</sup>, over which the rear end of the spring K snaps, as will be described later on. The extreme forward end of the said combined part is formed with two laterally-arranged lugs f<sup>2</sup> f<sup>2</sup>, which engage with the lower face of the barrel and reach A<sup>3</sup> on opposite sides of the slot H, the main portion of which is located in the reach, but which extends forward into the gun-barrel and rearward into the bolt-housing, these lugs preventing the forward end of the combined part from undue upward movement and acting as pivot-pins, upon which the part virtually swings, while its rear end moves upward and downward for cocking the hammer and releasing the same.

The gun-barrel and its connected parts are secured in place by means of a removable or take-down screw N, which passes upward through the gun-stock into a heavy lug O, which may be dovetailed into the gun-barrel, as shown, or made integral therewith. By removing the said take-down screw N the barrel and all of its connected parts may be readily removed from the gun-stock and readily replaced therein, at which time care should be taken to cause the finger L of the trigger to enter the notch F<sup>3</sup> in the said combined extractor and sear.

In order to load the gun, the handle is lifted from its locked position of engagement with that portion of the forward edge of the tubular bolt-housing lying just below the lower or right-hand wall of the longitudinal clearance-slot formed therein. When the handle has been brought into registration with the said slot, during which time the bolt has been rotated, the bolt may be retracted into its open position, when its forward end is withdrawn into the forward end of the tubular bolt-housing, so as to leave the transverse loading-opening entirely unobstructed to permit a cartridge to be readily entered into the cartridge-chamber of the gun-barrel. Shortly before the bolt reaches its open position the forward edge of the sear-lug F<sup>2</sup> is brought into engagement with the extreme forward end of the clearance-slot B<sup>3</sup>, formed in the lower face of the bolt. After this engagement takes place the combined extractor and sear is drawn back until the extreme rear end of the said combined part is brought into engagement with the extreme rear end of the slot H, formed in the reach or tie of the receiver extension, whereby the rearward movement of the bolt is arrested and the bolt prevented from disengagement from the gun. A cartridge is now entered into the cartridge-chamber of the gun-barrel, after which the bolt is

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moved forward, but without disturbing the  
 combined extractor and sear, which is held at  
 the limit of its rearward excursion by means  
 of the engagement of the spring K with the  
 forward bevel of the nose F<sup>4</sup>, formed upon the  
 lower face of the said part. When, however,  
 the forward end of the bolt engages with the  
 rear edge of the extractor-hook, the bolt  
 "picks up" the combined part, so to speak, and  
 pushes it forward into its home position, dur-  
 ing which time the combined extractor-and-  
 sear spring K rides over the nose F<sup>4</sup> and then  
 engages with the beveled rear face thereof.  
 The bolt is now locked in its closed position by  
 turning its handle down into engagement with  
 the forward edge of the bolt-housing, as al-  
 ready described, at which time the bolt is ro-  
 tated on its longitudinal axis. The operating-  
 button is now seized and the hammer drawn  
 back against the tension of its spring to bring  
 the cocking-opening formed in its lower face  
 into engagement with the sear-lug, which is  
 then immediately lifted into the said notch for  
 cocking the hammer by the lifting action of  
 the combined extractor-and-sear spring K.  
 It may be here mentioned that the said cock-  
 ing-notch is only brought into registration  
 with the sear-lug when the bolt and hence  
 the hammer are in their locked or closed po-  
 sitions, for at other times the sear-lug simply  
 rides upon the exterior surface of the lower  
 portion of the hammer. The hammer having  
 been cocked the gun is fired by pulling the  
 trigger, which pulls the sear-lug down out of  
 the cocking-notch and permits the hammer-  
 spring to project the hammer forward with  
 sufficient force to cause the firing-pin to ex-  
 plose the cartridge. I should here explain  
 that the cocking of the hammer by the en-  
 trance of the sear-lug into the cocking-notch  
 thereof locks the bolt in its closed position,  
 for the bolt cannot be rotated unless the ham-  
 mer rotates and the hammer cannot be ro-  
 tated as long as the sear-lug is entered into  
 its cocking-notch. The pulling of the trig-  
 ger, however, unlocks the bolt and permits  
 it to be turned back to bring the handle into  
 line with the clearance-passage of the bolt-  
 housing, after which the bolt is retracted, with-  
 out, however, disturbing the combined ex-  
 tractor and sear, until in the rearward move-  
 ment of the bolt the forward end wall of the  
 clearance-opening formed therein engages  
 with the forward edge of the sear-lug, at which  
 time the combined extractor and sear is  
 "picked up," so to speak, by the bolt and  
 drawn rearward against the tension of the  
 combined extractor and sear-spring, which,  
 when it snaps over the nose of the said com-  
 bined part, pushes the same rearward with  
 a sudden movement, assisting more or less in  
 the extraction and ejection of the spent shell.

It is obvious that in carrying out my inven-  
 tion I may make some changes in the con-  
 struction herein shown and described, and I  
 therefore wish it to be understood that I do not

limit myself thereto, but hold myself at liberty  
 to make such changes and alterations as fairly  
 fall within the spirit and scope of my inven-  
 tion.

Having fully described my invention, what  
 I claim as new, and desire to secure by Letters  
 Patent, is—

1. In a bolt-gun, the combination with a  
 gun-barrel formed at its butt-end with an in-  
 tegral receiver extension comprising a tabu-  
 lar bolt-housing formed with a longitudinal  
 slot, and a reach formed with a downwardly-  
 opening longitudinal slot; of a longitudinally-  
 movable and rotatable bolt mounted in the  
 said receiver extension and provided with a  
 radially-arranged operating-handle which is  
 movable back and forth in the longitudinal  
 slot of the bolt-housing, a reciprocating ham-  
 mer located within the bolt, and a combined  
 extractor and sear located below the said  
 reach, but extending upward into the longi-  
 tudinal slot therein, and adapted at its for-  
 ward end to be directly engaged by the bolt  
 for being pushed forward thereby and at its  
 rear end to be directly engaged by the bolt  
 for being drawn rearward thereby, the for-  
 ward end of the said part acting as an ex-  
 tractor, and the rear end of the said part act-  
 ing as a sear by engaging with the hammer.

2. In a bolt-gun, the combination with a  
 bolt having a hammer-chamber open at its  
 rear end, of a reciprocating hammer located  
 within the said hammer-chamber, projecting  
 rearward beyond the rear end of the said bolt,  
 and formed with a hammer-spring chamber  
 open at its rear end, a hammer-spring which  
 is introduced into and removed from the said  
 hammer-spring chamber through the open  
 rear end thereof, an operating-button or fin-  
 ger-piece formed independently of the ham-  
 mer and adapted to be secured thereto so as to  
 close the rear end of the said hammer-spring  
 chamber and a combined part located below  
 the said bolt, adapted at its forward end to  
 act as an extractor and at its rear end as a  
 sear, and to be engaged by the bolt which  
 slides it forward and back.

3. In a bolt-gun, the combination with a  
 bolt formed with a hammer-chamber open at  
 its rear end, and closed at its forward end by  
 a wall provided with a firing-pin opening, of  
 a reciprocating hammer located within the  
 said chamber, provided at its forward end  
 with a firing-pin arranged to pass through the  
 said firing-pin opening, and the said hammer  
 being formed with a hammer-spring chamber  
 open at its rear end which projects beyond  
 the rear end of the bolt, a hammer-spring  
 which is introduced into and removed from  
 the said hammer-spring chamber through the  
 open rear end thereof, a removable operat-  
 ing-button or finger-piece adapted to be at-  
 tached to the projecting rear end of the ham-  
 mer, and to close the rear end of the ham-  
 mer-spring chamber and a combined part lo-  
 cated below the said bolt which coacts with



it to move it forward and back, and adapted at its forward end to act as an extractor and at its rear end to act as a sear.

4. In a bolt-gun, the combination with a gun-barrel formed at its butt-end with an integral receiver extension comprising a tubular bolt-housing and a reach having a longitudinal slot, the said reach being located entirely below a transversely-arranged loading-opening separating the cartridge-chamber of the gun-barrel from the said housing; of a longitudinally-movable and rotatable bolt mounted in the said receiver extension, provided with an operating-handle, and formed with a hammer-chamber, a hammer located in the said hammer-chamber from the rear end of which it projects, and provided with a hammer-spring chamber, a pin passing through the said bolt and extending through a slot formed in the rear end of the hammer for securing the same to the bolt, a hammer-spring introduced into and removed from the said hammer-spring chamber through the open rear end thereof, and abutting at its rear end against the said pin, an operating-button or finger-piece secured to the projecting rear end of the hammer, and removed for the insertion and introduction of the hammer-spring, and a combined extractor and sear extending into the longitudinal slot of the reach in which it is moved back and forth by the bolt, and adapted at its forward end to act as an extractor, and at its rear end to act as a sear.

5. In a bolt-gun, the combination with a longitudinally-chambered bolt provided in its lower face with a clearance-opening, of a reciprocating hammer located within the said bolt and formed with a cocking-notch registering with the said clearance-opening, and a sear passing upward through the said clearance-opening in the bolt and entering the said cocking-notch in the hammer, the said sear being formed at its forward end so as to constitute an extractor and adapted to be engaged by the bolt which slides it rearward for the performance of its extracting function and which slides it forward into its home position.

6. In a bolt-gun, the combination with a gun-barrel formed at its butt-end with an integral receiver extension comprising a tubular bolt-housing and a reach, which latter lies below a transversely-arranged loading-opening located between the cartridge-chamber of the barrel and the said housing, of a longitudinally-movable and rotatable bolt mounted in the said housing, and a longitudinally-movable combined extractor and sear provided at its forward end with an extractor-hook and at its rear end with a sear-lug which enters a cocking-notch formed in the hammer through a clearance-opening formed in the bolt.

7. In a bolt-gun, the combination with the barrel thereof, of a longitudinally-movable

and rotatable bolt, a longitudinally-movable hammer located within the said bolt, and formed with a cocking-notch, and a combined extractor and sear located below the pathway of the bolt, and provided at its forward end with an extractor-hook, and at its rear end with a sear-lug which enters the cocking-notch of the hammer through a clearance-opening formed in the bolt and locks the bolt against rotation as well as reciprocation, when the hammer is cocked.

8. In a bolt-gun, the combination with the barrel thereof, of a longitudinally-movable and rotatable bolt, a longitudinally-movable hammer located within the bolt and formed with a cocking-notch, a combined extractor and sear located below the path of the bolt, and formed at its forward end with an extractor-hook and at its rear end with a sear-lug which enters the cocking-notch of the hammer through a clearance-opening formed in the bolt, a nose located upon the lower face of the combined extractor and sear, and a spring engaging with the lower edge of the said combined part, and coacting with the nose to give the part a rearward impulse in the ejection of spent cartridges, and coacting with the said nose to retard the forward movement of the part in the closing of the gun.

9. In a bolt-gun, the combination with the bolt thereof, of a reciprocating hammer mounted therein, a trigger, and a longitudinally-movable combined extractor and sear located below the bolt which moves back and forth over it, and which as well as the hammer has reciprocating movement independent of it and by which it is directly engaged at its forward end for being pushed forward, and by which it is directly engaged at its rear end for being drawn rearward, its forward end acting as an extractor and its rear end coacting with the hammer as a sear and adapted to be engaged by the trigger.

10. In a bolt-gun, the combination with the bolt thereof, of a longitudinally and vertically movable combined extractor and sear located below the bolt which moves back and forth over it, and adapted at its forward end to act as an extractor and at its rear end to act as a sear, and also adapted to be engaged by a trigger, and provided at its forward end with lateral extensions upon which it swings as upon a pivot, but which do not prevent its sliding movement back and forth under the action of the bolt, which also has reciprocating movement independent of it.

11. In a bolt-gun, the combination with a gun-barrel formed at its butt-end with an integral receiver extension comprising a tubular bolt-housing and a reach which latter is formed in its bottom portion with a long slot, of a longitudinally-movable and rotatable bolt, mounted in the said housing, a longitudinally-movable hammer located within the said bolt and formed with a cocking-notch, a combined extractor and sear, having longitudinal and

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vertical movement in the slot formed in the reach, adapted at its forward end to act as an extractor, and at its rear end to act as a sear by entering a cocking-notch formed in the hammer through a clearance-opening  
5 formed in the bolt, a spring engaging with the lower edge of the said combined part for operating and controlling it, and a trigger engaging with the said combined part for draw-

ing its rear end downward out of the cocking-notch of the hammer in firing the gun.

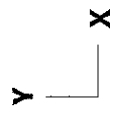
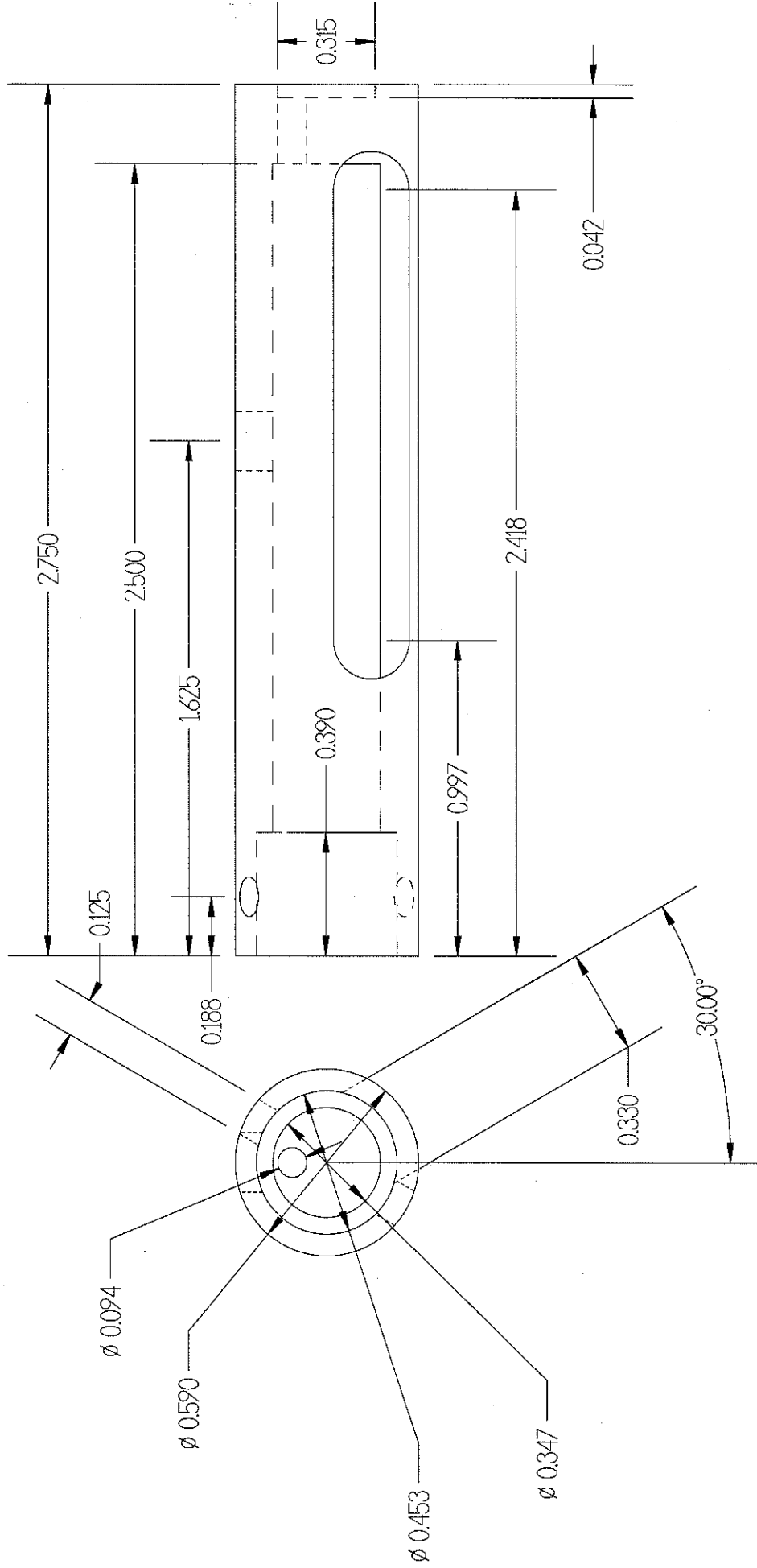
In testimony whereof I have signed this specification in the presence of two subscribing witnesses.

JOHN M. BROWNING.

Witnesses:

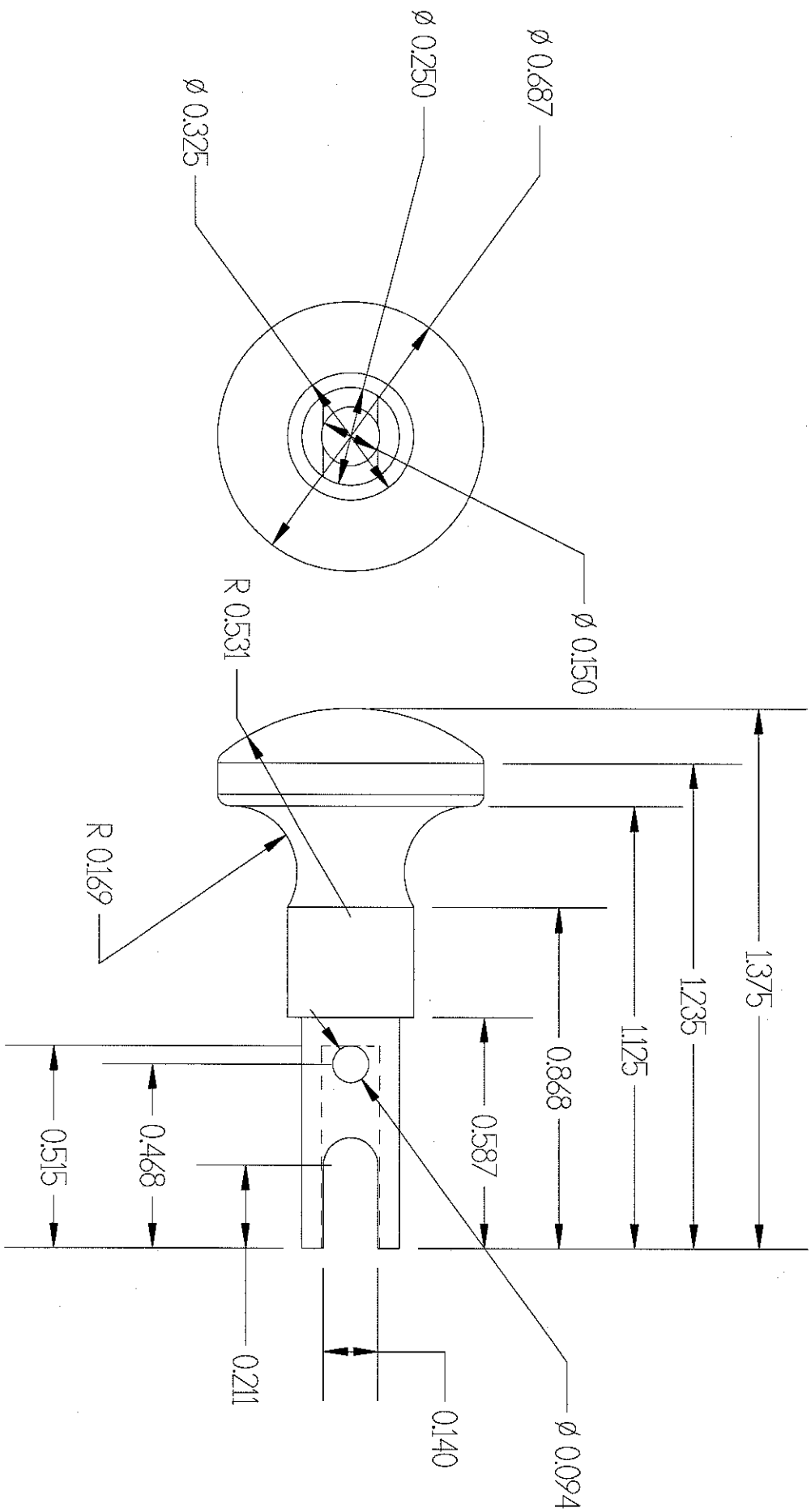
WM. F. CRITCHLOW,

M. J. HALL.



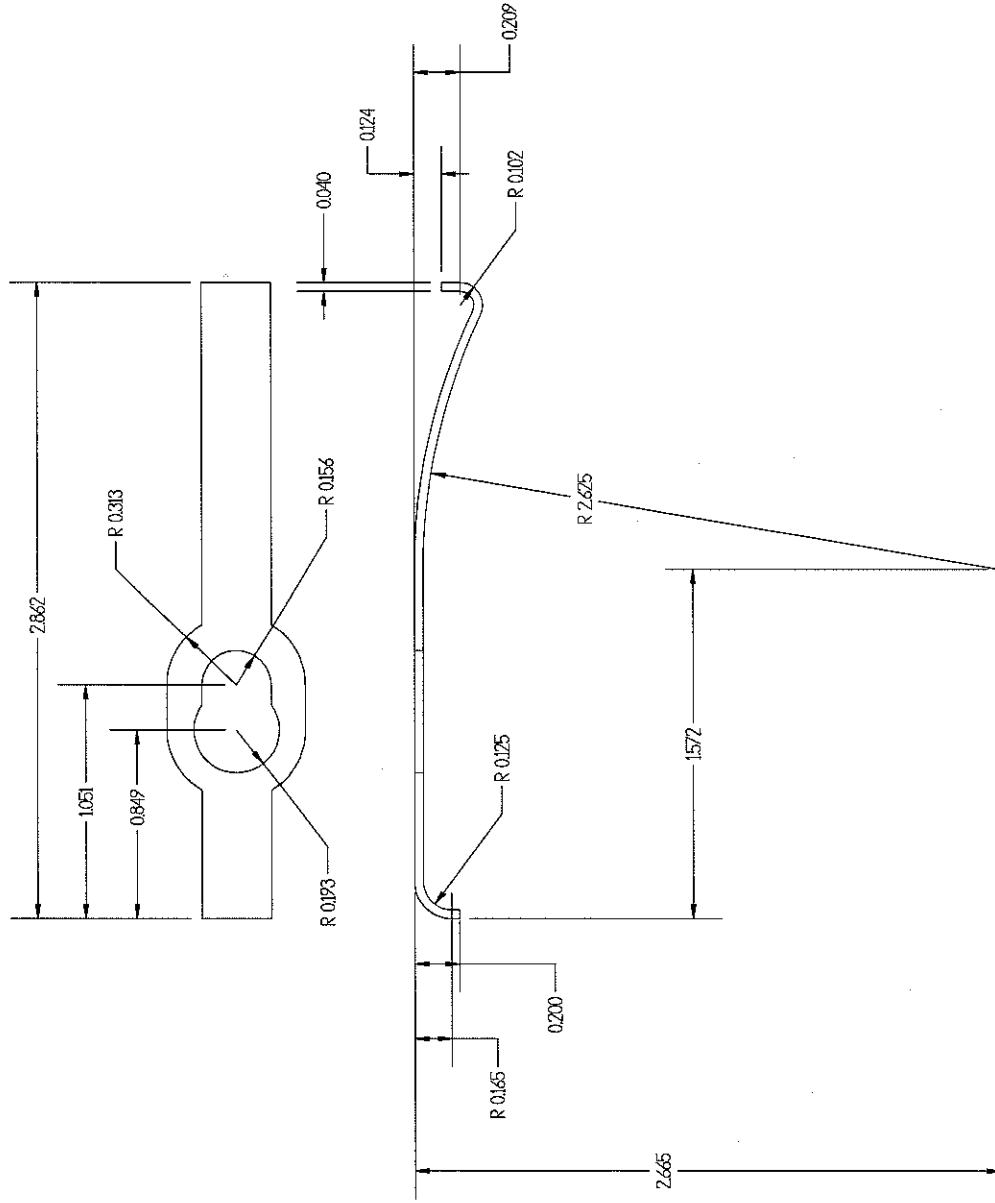
Gview:TOP WCS:TOP T/Cplane:TOP

ER 198 0.4692 Inch



Gview:TOP WCS:TOP T/Cplane:TOP

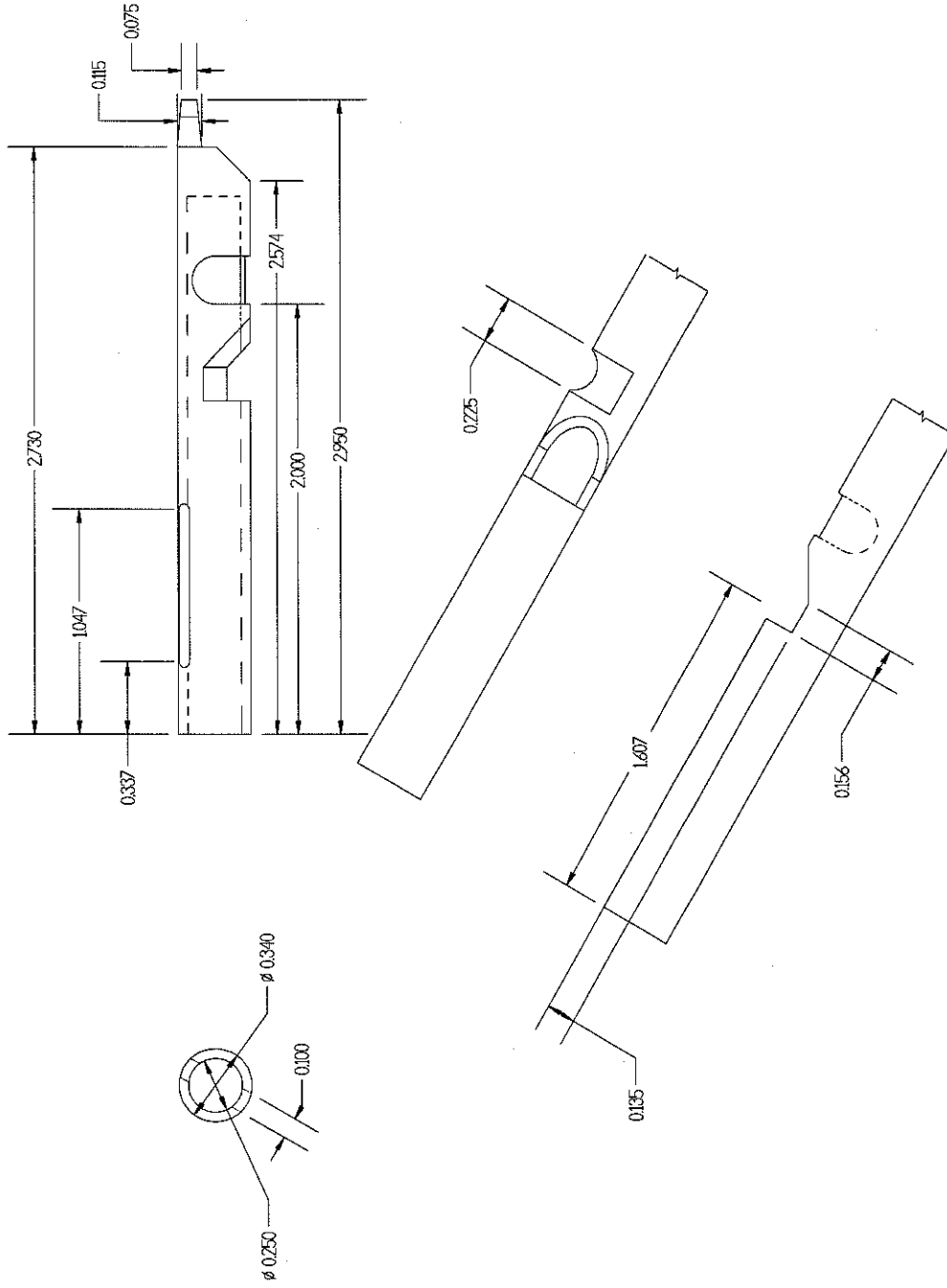
FR 199  
0.3814  
Inch



Y  
X

Gview:TOP WCS:TOP T/Cplane:TOP

ER 200 0.8315 Inch



Gview:TOP WCS:TOP T/Cplane:TOP









# PACIFIC

STEEL & RECYCLING™

2228 Palmer PO Box 8477 Missoula, MT 59807 (406) 542-0581

QUOTE		438264
CUSTOMER #	76666	
ORDER DATE	03/02/10 2:18 PM	
SHIP DATE	03/02/10	
CUSTOMER PO #		
METHOD	*** CASH ***	ORDERED
SIEVE D		7

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QUOTE TO	76666
CASH CONTRACTOR Missoula, MT	
<i>Gary Marbut</i>	

QUOTE TO	76666
CASH CONTRACTOR Missoula, MT	

Quantity	Description	Weight	Pricing		Unit Price	Amount
			Quantity	UOM		
1"	C1018 C F ROUND 20'	5	0.053	CW	166.6667	8.90
1 Piece @	24"					

*COPIES RECEIVED 3/2/10*

*[Signature]*

TOTAL WEIGHT	5	SUB TOTAL	\$9.90
		SALES TAX	\$0.00
		TOTAL DUE	\$9.90

THIS IS A QUOTE - GOOD THRU - 03/12/2010

Page 1 Thank you for choosing Pacific Steel - Missoula 03/02/10 2:18 PM

TERMS: 100% due 30 days from invoice date; and an additional .0484% per day late charge. (16% ANNUAL RATE) due for each day late after 30 days. Pacific retains a Purchase Money Security Interest in the merchandise on this invoice, and expressly disclaims any warranties AS NOTED ON REVERSE SIDE.



## *Target Operator Systems*

an activity of

**B.I.T. Enterprises**

*Gary S. Marbut, Owner*

P.O. Box 16106

Missoula, Montana 59808 USA

406-549-1252

406-549-1212 Fax

800-549-1252

March 2, 2010

Dan Lilja  
Lilja Rifle Barrels  
P.O. Box 372  
Plains, Montana 59859

Dan,

In this package is a 24" piece of 1" round stock I have purchased from Pacific Steel in Missoula as the sample barrel for the "Montana Buckaroo" .22 rimfire, youth-model, bolt-action rifle.

Please bore this round stock and rifle it for .22 rimfire and return to me at your early convenience.

You may return to me at either:

Gary Marbut  
Target Operator Systems  
USPS - P.O. Box 16106  
Missoula, Montana 59808

or

Gary Marbut  
Target Operator Systems  
UPS/FedEx - 7700 Lime Springs Trail  
Missoula, Montana 59808

Thank you for your assistance.

Best wishes,

  
Gary Marbut



**Lilja Precision Rifle Barrels, Inc.**

P. O. Box 372  
 Plains, MT 59859  
 Voice: (406) 826-3084  
 Fax: (406) 826-3083

**Invoice**

Invoice Number:  
 031483

Invoice Date:  
 Mar 5, 2010

Page:  
 1

Please remit to: P.O.Box 372, Plains, MT 59859

**Sold To:**

Gary Marbut  
 P.O. Box 16106  
 Missoula, MT 59808

**Ship to:**

Gary Marbut  
 7700 Lime Springs Trail  
 Missoula, MT 59808

	<b>Customer ID</b>	<b>Payment Terms</b>	
	401605	Prepaid	
<b>PO Date &amp; Number</b>	<b>Shipping Method</b>	<b>Ship Date</b>	<b>Due Date</b>
3/5/10	UPS Ground	3/5/10	3/5/10

Quantity	Description	Unit Price	Extension
1	22-16RF 1" o.d. x 24" long, drill, ream & rifled blank		

web page: [www.riflebarrels.com](http://www.riflebarrels.com)

email: [lilja@riflebarrels.com](mailto:lilja@riflebarrels.com)

Subtotal	0.00
Freight	
<b>Total Invoice Amount</b>	<b>0.00</b>
Payment Received	
<b>TOTAL</b>	<b>0.00</b>

**THANK YOU; PLEASE PAY BY INVOICE.  
 NO STATEMENT WILL BE SENT**

## AGREEMENT

This Agreement is entered into by and between Gary Marbut of Missoula County, Montana, dba B.I.T. Enterprises, P.O. Box 16106, Missoula, Montana 59808, manufacturer and seller (hereinafter Seller) and Eric Smart, 15999 East Mullan Road, Clinton, Montana 59825, of Missoula County, Montana (hereinafter Purchaser) concerning the manufacture, sale and purchase of a youth model, bolt-action, single shot .22 caliber rifle.

### Product

The product subject to this Agreement is one youth model, bolt-action, single shot .22 caliber rifle, chambered in .22 long rifle rimfire, similar in mechanics, operation and size to a Chipmunk or Crickett, and with a wooden stock made of native Montana wood. This product is designated as a B.I.T. Montana Buckaroo (hereinafter Buckaroo).

### Seller

Seller agrees to manufacture one Buckaroo for delivery to Purchaser as specified below. Seller agrees that the Buckaroo delivered will be fully functional, serviceable, and as safe to operate as firearms usually are. Seller does not promise that the Buckaroo will meet any perceived or actual standards of aesthetic or cosmetic appearance. Seller agrees to use ordinary care in the manufacture of a safe and serviceable firearm, and that the Buckaroo will be manufactured in accordance with the Montana Firearms Freedom Act (MFFA).

### Purchaser

Purchaser agrees in advance to accept the Buckaroo upon delivery if the Buckaroo meets reasonable standards of workmanship and serviceability. Purchaser agrees and understands that the Buckaroo will be stamped "Made in Montana" in a central metallic part, will be made in conformance to the MFFA, and that the Buckaroo may not leave the State of Montana, for any reason, at any time in the future. Purchaser agrees to bind any subsequent owner or possessor of the Buckaroo to these terms of agreement. Purchaser agrees to hold Seller harmless for any injuries resulting from proper or improper uses of the Buckaroo that are not the result of gross negligence of care or manufacture by Seller. Purchaser has read and understands the Montana Firearms Freedom Act and understands and agrees that once Purchaser takes possession of the Buckaroo the Purchaser may be subject to enforcement of federal laws beyond the control of Seller.

Manufacture and delivery conditional

Both Seller and Purchaser agree that production, sale and purchase of the Buckaroo are entirely conditioned upon Seller's success in validating the principles of the MFFA in the lawsuit titled *MSSA v. Holder*. If the conclusion of *MSSA v. Holder* is such that it is permissible for Seller to manufacture the proposed MFFA item, the Buckaroo, Seller will deliver the Buckaroo to Purchaser within six months of final and favorable resolution of *MSSA v. Holder*.

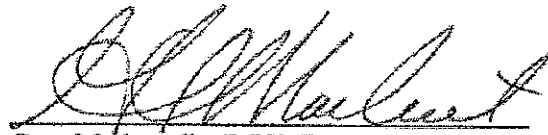
Disagreement; Resolution

If, after entering into this Agreement, Seller and Purchaser should fail to agree about any of the terms or conditions of the Agreement, any such disagreement shall be decided by any third party residing in Missoula County, Montana, acceptable to both Seller and Purchaser. Any decision of such third party shall be final and binding upon Seller and Purchaser.

Full Agreement

This Agreement is the full and complete agreement and may not be changed or modified without the written consent of both Seller and Purchaser.

Signed this 27th Day of February, 2010.



Gary Marbut, dba B.I.T. Enterprises, Seller



Eric Smart Purchaser

I have approximately 201 incoming emails filed away from Montana citizens who wish to purchase Montana Buckaroo, youth-model, bolt-action, .22 caliber rifles if they can be made available. The total number of rifles these customers are willing to purchase is about 500. Below is a sampling of these emails (Note: Headers and original text redacted after the first sample for brevity).

----- Original Message -----

Subject: Re: Help needed - Youth .22 rifle buyers?  
Date: Tue, 09 Feb 2010 15:43:00 -0700  
From: cary smith <cary@bresnan.net>  
To: Gary Marbut-MSSA <mssa@mtssa.org>  
CC: Quentin Rhoades <qmr@montanalawyer.com>  
References: <6.2.3.4.2.20100209153039.071a34c0@mail.modwest.com>

Gary,

I would buy 5 rifles.

Representative Cary Smith  
House District 55  
Montana State House of Representatives

On Tue, 09 Feb 2010 15:30:51 -0700

Gary Marbut-MSSA <mssa@mtssa.org> wrote:

> Dear MSSA Friends,

>

> In our lawsuit to validate the Montana Firearms Freedom Act, MSSA v. Holder,

> I am the only individual plaintiff.

>

> The U.S. has filed a Motion to Dismiss, in part claiming I lack standing

> because I don't have any firm plans to make and sell an MFFA item.

>

> But I do.

>

> I've researched the possibility of manufacturing, under the terms of the

> MFFA, a youth model, single shot, bolt action .22 rifle. This rifle will be

> the size of a Chipmunk youth rifle (with a couple of improvements), and will

> be mechanically similar to a Winchester Model 67A (with a couple of

> improvements), which has not been manufactured for almost 50 years (original

> John Browning patent in 1899). I'm calling this not-yet-available model the

> "Montana Buckaroo."

>

> I may only make these IF MSSA is successful in its MFFA lawsuit, but it

> would be VERY helpful in addressing the "standing" question if I have

> evidence that there are a lot of folks in Montana who would buy these rifles,

> IF we win the lawsuit and IF I can actually produce them.

>

> So, how many of you are willing to declare that you would purchase one (or

> more) of these (historical) Made-in-Montana rifles at a price of \$100 each,

> IF we win the lawsuit, and IF I can actually get them into production.

>

> If you are willing to declare that you would buy such a rifle(s), remember  
>that they may never leave Montana and that your expressed desire to purchase  
>will be entered into the court records in MSSA v. Holder.

>

> So, if you are willing, please reply to this email and tell me that you  
>would like to buy one or more Montana Buckaroos, how many you'd like to buy,  
>and please also copy our lead attorney ("Quentin Rhoades"  
><qmr@montanalawyer.com>) on your email for his records.

>

> Thanks,

>

> Gary Marbut, president  
> Montana Shooting Sports Association  
> <http://www.mtssa.org>  
> author, Gun Laws of Montana  
> <http://www.mtpublish.com>

---

Dear Mr. Marbut and Mr. Rhoades,  
I would like to purchase three (3) Montana Buckaroos youth .22 rifles.  
Richard Celata  
382 Adams Lane  
Dillon, Montana 59725

---

Gary,

When you get the "Montana Buckaroo" .22 youth rifle in production I would like to purchase 10 of them.

I plan on using these rifles to teach firearms safety and marksmanship principles to junior shooters. I can't think of a better way to teach Montana's shooting heritage than with a historic MFFA rifle.

Rick LePage  
East Helena, MT  
406-459-9851

---

I would like to purchase two of these rifles. I am anxious to see these made for my two daughters. If possible, I would like some input into the serial numbers.

Thanks for your consideration

Randy Stemple  
4307 Capy Ct  
Missoula, MT 59801  
406-549-7871

---

I would be willing to buy a made in Montana .22. In fact I got lots of grand kids, if it happened I may consider buying more.

Charlie Young  
Froid, Mt.

---

I'm interested in purchasing a Montana Buckaroo .22 rifle... preferably, the first one you finish.

Senator Joe Balyeat

---

---

Gary: I will take 5.

Jim Stiffler

Country Gun Room

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---

Yes, Gary, i would love to buy one for my grand daughter, which would really make her whole birthday wish come true! She loves to shoot with "papa" and to have her own would be the supreme gift for her!!

Court

montram@hughes.net

---

---

Gary, I will go on record as intending to purchase one .22 rifle for the express purpose of donating it to my local hunter's safety education program for which I am a registered instructor.

Gary Ritter

---

---

I am willing to buy two 'Montana Buckaroo' single shot, bolt action .22 rifles.

Bill Kopetski

email: kopetski@yahoo.com

phone: (406) 251-0301

---

---

Dear Gary

Yes I would love to buy three ( 3 ) of these 22 rifles, let me know when and where..

Thank you for the opportunity to but a small but gigantic bit of Montana / American History and thank you for your many efforts in the of gun owners in not just Montana but the entire US of A !

TJ ( Joe ) Reeder

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---

Dear Gary: I'll Buy at least one of these " Montana Buckaroo " Rifles, possibly two. I DO understand that this particular Montana- Manufactured rifle may NEVER leave the State of Montana, and I will not allow it to be transferred out of Montana.

Frank J. Austin

Butte, Montana

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---

Gary,

I would be interested in purchasing 4 of the Montana Buckaroo rifles

Kirk Bushman

532 Wyoming ave

Billings, MT 59101

(406) 256-8496

---

---



I'd like to buy five Montana Buckaroos.

Scott Berish  
900 Riverside Road  
Kalispell MT 59901

---

---

Please put me down for 5

James Knox

---

---

Gary,  
Sign me up for one!  
Senator Greg Hinkle

---

---

Dear Gary,

Okay here is my problem: I have four grandkids on the ground, two more on the way, and my youngest gets married on June 12th, so I expect results from him by mid winter. Put me down for seven with the option to purchase more pending the results of the "ept".

Representative Krayton Kerns

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Gary - I would absolutely commit to buying TWO of the Montana Buckaroo rifles for \$100 each, as soon as they become available. I believe they would be collector's items one day!

Sincerely,  
Representative Wendy Warburton  
709 9th St., Havre, MT  
(406) 262-3185

---

---

Hi Gary -

When available, I would like to purchase two Montana Buckaroo youth model 22 rifles, and possibly two more later on.

Thanks,

Mark Colton  
Helena, Montana

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Gary,

Please do let me know when the Montana Buckaroo will be available for purchase. I would like to purchase 2 of them.

Thank you.

Greg Bervy  
Red Lodge, MT

I would buy three or four Montana Buckaroos for children I know, as a present. I am definitely a customer. I hope you have these excellent first rifles in manufacture soon.

Iloilo M. Jones  
Helena

I would be more than happy to buy at least one if not two of the Montana Buckaroo .22lr Rifle

Mike Gibney  
Hamilton MT

I would be thrilled to purchase one of these rifles for my 12 year old daughter.

James Pennington  
5859 Ironwood Dr  
Billings, Mt 59106  
406 690 9456

Gary,

Put me down for at least one of those rifles for one or more of my grandsons.

Thanks,  
Ron Hines

Dear Mr Gary Marbut,  
I would like a Montana Buckaroo. Please put me at the head of the line for purchase of one youth model, single shot, bolt action .22 rifle; which you are in the planning stages of manufacture. I would be happy to pay up front.  
Jed White

Gary-

You may add my name to the list, I would definitely purchase 4 rifles.

Thanks,  
Matthew Fochs  
Billings, MT  
406-855-2229

Hi, Gary, please put my wife and me down for two made in Montana 22lr rifles.  
Michael Michlig  
Bridget Michlig  
459 Electric Ave  
Suite E  
Bigfork, MT 59911  
406-250-3168

Please put me down as willing to buy five Montana Buckaroo .22 rifles at a price of around \$100 each.

Regards,  
John Mangus  
jmangus@casnow.com  
406-698-3770 (mobile)

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Dear Mr. Marbut,  
Should you be successful in your quest to manufacture youth .22 rifles, I would like to purchase two; one for my grandson and one for my granddaughter.

Scott J. Orr  
34 River Woods Rd  
Belgrade MT 59714

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Gary,  
Sign me up for 5 buckeroos. If they do get into production I'll probably want more of the low serial numbered. They ought to make great investments for collectors. "The Little Rifle That Saved The Second Amendment".

Les Tanberg  
3989 Spring Hill Rd  
Helena, MT 59601

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Hi Gary,  
I would like to purchase 5 of them. One for each grandchild. Please acknowledge. And, keep up the good work, Gary.  
Bless you. Gloria

---

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Hi Gary, I would like to put on order, if ever manufactured three of these Montana Buckaroos. Golden Spur Sport Shop, P.O. Box 10, Miles City, Mt., 59301.  
Thanks again. If you need anything else just let us know.  
Miles Milligan, Owner

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Gary,  
As a long term Montana resident, I have a very strong interest in the .22 rifle you intend to manufacture. From the description, it sounds like the ideal starter weapon for young people. It will be perfect for training them in gun safety and marksmanship while at the same time instilling in them an appreciation for the Second Amendment to our Federal Constitution. My very first rifle was a similar model, and I wish I still had it.

Please let me know if you have established a price for this rifle. In order to support Montana industry and job growth, and on the understanding that this rifle would be manufactured entirely within Montana under the terms of the MFFA, I would be willing to purchase an early edition of the weapon in advance of production. Thank you!

Jim Wagner  
406-862-7657  
jim@wirelessalliance.net

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Dated this 5th day of April, 2010

Gary Marbut, Owner  
B.I.T. Enterprises

ER 215-ER 233

APPEAL, CLOSED, DISPF&amp;R

**U.S. District Court  
District Of Montana (Missoula)  
CIVIL DOCKET FOR CASE #: 9:09-cv-00147-DWM**

Montana Shooting Sports Association et al v. Holder,  
Jr.

Assigned to: Judge Donald W. Molloy  
Case in other court: USCA, 10-36094  
Cause: 28:2201 Declaratory Judgement

Date Filed: 10/01/2009  
Date Terminated: 10/18/2010  
Jury Demand: None  
Nature of Suit: 440 Civil Rights:  
Other  
Jurisdiction: U.S. Government  
Defendant

**Plaintiff**

**Montana Shooting Sports  
Association**

represented by **Quentin M. Rhoades**  
SULLIVAN TABARACCI & RHOADES  
1821 South Ave West  
Third Floor  
Missoula, MT 59801  
406-721-9700  
Fax: 406-721-5838  
Email: qmr@montanalawyer.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**Second Amendment  
Foundation, Inc.**

represented by **Quentin M. Rhoades**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**Gary Marbut**

represented by **Quentin M. Rhoades**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

**Eric H. Holder, Jr.**  
*Attorney General of the United  
States of America*

represented by **Jessica B. Leinwand**  
U.S. DEPARTMENT OF JUSTICE -  
CIVIL DIVISION

ER 215

PO Box 883  
Ben Franklin Station  
Washington, DC 20044  
202-305-8628  
Fax: 202-616-8470  
Email:  
Jessica.B.Leinwand@usdoj.gov  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Alexander Kenneth Haas**  
U. S. Department of Justice  
P. O. Box 883  
Washington, DC 20530  
202-307-3937  
Fax: 202-353-3880  
Email: alexander.haas@usdoj.gov  
*TERMINATED: 04/30/2010*

**Amicus**

**Goldwater Institute Scharf-  
Norton Center for  
Constitutional Government; 1  
U.S. Congressman, 8 Arizona  
Senators, 26 Arizona  
Representatives, 2 Arizona  
Political Organizations and 1  
Arizona Book Publish**

represented by **Nicholas C. Dranias**  
GOLDWATER INSTITUTE  
500 East Coronado Road  
Phoenix, AZ 85004  
602-462-5000 ext. 221  
Fax: 602-256-7045  
Email:  
ndranias@goldwaterinstitute.org  
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**Timothy C. Fox**  
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WATERMAN  
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Fax: 442-8783  
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**Amicus**

**Weapons Collectors Society of  
Montana; Western Tradition  
Partnership**  
*also known as*

represented by **James Edward Brown**  
DONEY CROWLEY BLOOMQUIST  
PAYNE UDA  
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Weapons Collectors Society of  
Montana

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**Amicus**

**State of Utah and other States**

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**Amicus**

**Montana Legislators**

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32 Campus Drive  
University of Montana

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Fax: 406-587-6253  
Email: jennifer@jbordylaw.com  
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**Amicus**

**Paragon Foundation, Inc.**

represented by **Duncan Scott**  
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Fax: 505-246-8682  
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**Amicus**

**Center for Constitutional  
Jurisprudence and Lawmakers  
from 17 States**

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**Arthur V. Wittich**  
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Email: artw@law-advisor.com  
*ATTORNEY TO BE NOTICED*

**Amicus**

**The Gun Owners Foundation,  
Gun Owners of America, Inc.,  
and Virginia Citizens Defense  
League**

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Vienna, VA 22180-5615  
703-356-5070  
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**Amicus**

**Brady Center to Prevent Gun  
Violence, The International  
Brotherhood of Police Officers,  
Hispanic American Police  
Command Officers Association,  
National Black Police  
Association, National Network  
to En  
*Other***

represented by **Cynthia L. Wolken**  
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*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

V.

**Intervenor**

**Montana Attorney Gen Steve  
Bullock**

represented by **Chris D. Tweeten**  
OFFICE OF THE MONTANA

State of Montana

ATTORNEY GENERAL  
 PO Box 201401  
 Helena, MT 59620-1401  
 406-444-2026  
 Fax: 444-3549  
 Email: ctweeten@mt.gov  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

Date Filed	#	Docket Text
12/03/2010	<u>111</u>	USCA Time Scheduling Order as to <u>110</u> Notice of Appeal, filed by Second Amendment Foundation, Inc., Gary Marbut, Montana Shooting Sports Association. (BAW, ) (Entered: 12/03/2010)
12/03/2010		USCA Case Number 10-36094 for <u>110</u> Notice of Appeal, filed by Second Amendment Foundation, Inc., Gary Marbut, Montana Shooting Sports Association. (BAW, ) (Entered: 12/03/2010)
12/02/2010	<u>110</u>	NOTICE OF APPEAL as to <u>109</u> Judgment by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc.. Filing fee \$ 455, receipt number 0977-812411. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> CIVIL APPEALS DOCKETING STATEMENT FOR THE NINTH CIRCUIT, # <u>3</u> APPELLANT'S REPRESENTATION STATEMENT FOR THE NINTH CIRCUIT) (Rhoades, Quentin) (Entered: 12/02/2010)
10/19/2010	<u>109</u>	JUDGMENT entered in favor of the United States and against Plaintiffs in accordance with the Opinion entered 10/18/2010. (BAW, ) (Entered: 10/19/2010)
10/18/2010	<u>108</u>	MEMORANDUM AND OPINION: The Clerk of Court is directed to enter judgment in favor of the United States and against Plaintiffs in accordance with this Opinion. Signed by Judge Donald W. Molloy on 10/18/2010. (dle) (Entered: 10/18/2010)
09/29/2010	<u>107</u>	ORDER ADOPTING FINDINGS AND RECOMMENDATIONS for <u>10</u> Motion to Dismiss/Lack of Jurisdiction filed by Eric H. Holder, Jr., is GRANTED <u>103</u> Findings and Recommendations. Judgment shall be entered upon the filing of a forthcoming explanatory opinion. Signed by Judge Donald W. Molloy on 9/29/2010. (CDH, ) (Entered: 09/29/2010)
09/27/2010	<u>106</u>	Reply to Objection to Findings and Recommendations re <u>103</u> FINDINGS AND RECOMMENDATIONS re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction filed by Eric H. Holder, Jr.. FINDINGS AND RECOMMENDATIONS re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction filed by Eric H. Holder, Jr.. filed by Eric H. Holder, Jr.. (Leinwand, Jessica) (Entered: 09/27/2010)

ER 220

09/14/2010	<u>105</u>	OBJECTION to <u>103</u> Findings and Recommendations <i>PLAINTIFF'S OBJECTIONS TO FINDINGS AND RECOMMENDATIONS OF MAGISTRATE JUDGE</i> filed by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc.. (Attachments: # <u>1</u> Exhibit A) (Rhoades, Quentin) (Entered: 09/14/2010)
09/13/2010	<u>104</u>	Objection re: <u>103</u> FINDINGS AND RECOMMENDATIONS re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction filed by Eric H. Holder, Jr..FINDINGS AND RECOMMENDATIONS re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction filed by Eric H. Holder, Jr... (Tweeten, Chris) (Entered: 09/13/2010)
08/31/2010	<u>103</u>	FINDINGS AND RECOMMENDATIONS re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction filed by Eric H. Holder, Jr.. Objections to F&R due by 9/17/2010. Signed by Jeremiah C. Lynch on 8/31/2010. (TXB, ) Modified on 9/1/2010 to reflect copy of order mailed to Titus and Kienzle this date (APP, ). (Entered: 08/31/2010)
08/30/2010	<u>102</u>	TRANSCRIPT of Motion Hearing held on 7/15/10 before Judge Lynch. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the Clerks Office or the court reporter NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 14 DAYS OF THIS FILING. Contact Court Reporter NW Transcripts, 208-908-7998. <u>Transcript Redaction Procedures</u> . Redaction Request due 9/20/2010. Redacted Transcript Deadline set for 9/30/2010. Release of Transcript Restriction set for 11/29/2010. (APP, ) (Entered: 08/30/2010)
08/11/2010	<u>101</u>	TRANSCRIPT DESIGNATION ORDER FORM by Eric H. Holder, Jr. for proceedings held on July 15, 2010 before Judge Lynch.. (Leinwand, Jessica) (Entered: 08/11/2010)
08/04/2010	<u>100</u>	NOTICE by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc. <i>PLAINTIFFS' LR 7.4 NOTICE OF SUPPLEMENTAL AUTHORITY (VIRGINIA VS. SEBELIUS)</i> (Attachments: # <u>1</u> CASE OF COMMONWEALTH VIRGINIA VS. SEBELIUS & DEPT. HEALTH & HUMAN SERVICES) (Rhoades, Quentin) (Entered: 08/04/2010)
07/22/2010	<u>99</u>	TRANSCRIPT DESIGNATION ORDER FORM by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc. for proceedings held on 07/15/2010 before Judge Jeremiah C. Lynch.. (Rhoades, Quentin) (Entered: 07/22/2010)
07/15/2010	<u>98</u>	Minute Entry for proceedings held before Jeremiah C. Lynch: Oral Argument Hearing held on 7/15/2010 re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction filed by Eric H. Holder; Quentin Rhoades appeared

		on behalf of plaintiffs, Jessica Leinwand appeared on behalf defendant, Timothy Fox and Nicholas Dranias appeared on behalf of Goldwater et al, Chris Tweeten appeared on behalf of State of Montana, Jeffrey Renz and Jennifer Bordy appeared on behalf of Montana Legislators, Greg Jackson and Herb Titus appeared on behalf of The Gun Owners Foundation et al; Arguments made; Written decision to follow. (Court Reporter FTR Gold.) (APP, ) (Entered: 07/15/2010)
07/13/2010	<u>97</u>	NOTICE by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc. <i>PLAINTIFF'S LR 7.4 NOTICE OF SUPPLEMENTAL AUTHORITY (MCDONALD VS. CITY OF CHICAGO)</i> (Rhoades, Quentin) (Entered: 07/13/2010)
07/13/2010	<u>96</u>	NOTICE by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc. <i>PLAINTIFF'S LR 7.4 NOTICE OF SUPPLEMENTAL AUTHORITY (HOLDER VS. HUMANITARIAN LAW PROJECT)</i> (Rhoades, Quentin) (Entered: 07/13/2010)
07/13/2010	<u>95</u>	NOTICE by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc. <i>PLAINTIFF'S LR 7.4 NOTICE OF SUPPLEMENTAL AUTHORITY (MASSACHUSETTS VS. UNITED STATES DHHS)</i> (Attachments: # <u>1</u> Case of Commonwealth of Massachusetts vs. USDHHS, et al.) (Rhoades, Quentin) (Entered: 07/13/2010)
07/06/2010	<u>94</u>	RESPONSE to Motion re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction <i>Defendant's Response to Plaintiffs' Surreply</i> filed by Eric H. Holder, Jr.. (Leinwand, Jessica) (Entered: 07/06/2010)
07/06/2010	<u>93</u>	REPLY to Response to Motion re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction <i>PLAINTIFFS' SURREPLY IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS</i> filed by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc.. (Rhoades, Quentin) (Entered: 07/06/2010)
07/01/2010	<u>92</u>	ORDER granting in part and denying in part <u>86</u> Motion to Strike. Signed by Jeremiah C. Lynch on 7/1/2010. (TXB, ) Modified on 7/2/2010 to reflect copy of order mailed to Wittich, Titus and Kienzle this date (APP, ). (Entered: 07/01/2010)
06/30/2010	<u>91</u>	REPLY to Response to Motion re <u>86</u> MOTION to Strike <u>70</u> Reply to Response to Motion <i>PLAINTIFFS' MOTION TO STRIKE PORTIONS OF DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO ALLOW FOR LEAVE TO FILE SURREPLY</i> filed by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc.. (Rhoades, Quentin) Modified on 6/30/2010 to clean up entry (APP, ). (Entered: 06/30/2010)

06/16/2010	<u>90</u>	RESPONSE to Motion re <u>86</u> MOTION to Strike <u>70</u> Reply to Response to Motion <i>PLAINTIFFS' MOTION TO STRIKE PORTIONS OF DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO ALLOW FOR LEAVE TO FILE SURREPLY</i> filed by Eric H. Holder, Jr.. (Attachments: # <u>1</u> Exhibit) (Leinwand, Jessica) Modified on 6/22/2010 to clean up entry (APP, ). (Entered: 06/16/2010)
06/07/2010	<u>89</u>	NOTICE by Steve Bullock <i>State's Notice of Allocation of Argument Time</i> (Tweeten, Chris) (Entered: 06/07/2010)
06/07/2010	<u>88</u>	NOTICE by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc. re <u>78</u> Order on Motion for Hearing (Rhoades, Quentin) (Entered: 06/07/2010)
06/02/2010	<u>87</u>	Brief/Memorandum in Support re <u>86</u> MOTION to Strike <u>70</u> Reply to Response to Motion <i>PLAINTIFFS' MOTION TO STRIKE PORTIONS OF DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO ALLOW FOR LEAVE TO FILE SURREPLY</i> filed by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc.. (Rhoades, Quentin) (Entered: 06/02/2010)
06/02/2010	<u>86</u>	MOTION to Strike <u>70</u> Reply to Response to Motion <i>PLAINTIFFS' MOTION TO STRIKE PORTIONS OF DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO ALLOW FOR LEAVE TO FILE SURREPLY</i> Quentin M. Rhoades appearing for Plaintiffs Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc. Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Bio - Exhibit A To Sworn Declaration of Marbut, # <u>4</u> Beanbag Statement - Exhibit B to Sworn Declaration of Marbut, # <u>5</u> Beanbag Webpage - Exhibit A to Exhibit B of Sworn Declaration of Marbut, # <u>6</u> Buckaroo Report - Exhibit C to Sworn Declaration of Marbut, # <u>7</u> Browning Patent - Exhibit A to Exhibit C of Sworn Declaration of Marbut, # <u>8</u> Bolt - Exhibit B-1 to Exhibit C of Sworn Declaration of Marbut, # <u>9</u> Cocking Handle - Exhibit B-2 to Exhibit C of Sworn Declaration of Marbut, # <u>10</u> Finger Spring - Exhibit B-3 to Exhibit C of Sworn Declaration of Marbut, # <u>11</u> Firing Pin - Exhibit B-4 to Exhibit C of Sworn Declaration of Marbut, # <u>12</u> Sear - Exhibit B-5 to Exhibit C of Sworn Declaration of Marbut, # <u>13</u> Trigger - Exhibit B-6 to Exhibit C of Sworn Declaration of Marbut, # <u>14</u> Pacific Steel Receipt - Exhibit C to Exhibit C of Sworn Declaration of Marbut, # <u>15</u> Lilja Letter - Exhibit D to Exhibit C of Sworn Declaration of Marbut, # <u>16</u> Lilja Invoice - Exhibit E to Exhibit C of Sworn Declaration of Marbut, # <u>17</u> Buckaroo Agreement - Exhibit F to Exhibit C of Sworn Declaration of Marbut, # <u>18</u> Buckaroo Buyers - Exhibit G to Exhibit C of Sworn Declaration of Marbut) (Rhoades, Quentin) (Entered: 06/02/2010)

06/01/2010	<u>85</u>	RESPONSE to Motion re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction <i>PLAINTIFFS' RESPONSE TO BRIEF OF MAICUS CURIAE BRADY CENTER TO PREVENT GUN VIOLENCE, ET AL. IN SUPPORT OF DEFEDANT ERIC H. HOLDER'S MOTION TO DISMISS</i> filed by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc.. (Rhoades, Quentin) (Entered: 06/01/2010)
05/28/2010		Set/Reset Hearings: Oral Argument reset for 7/15/2010 at 09:00 AM in Missoula, MT before Magistrate Judge Jeremiah C. Lynch. (BAW, ) (Entered: 05/28/2010)
05/28/2010	<u>84</u>	NOTICE of Acknowledgment of Pro Hac Vice Order by Brady Center to Prevent Gun Violence, The International Brotherhood of Police Officers, Hispanic American Police Command Officers Association, National Black Police Association, National Network to En (Wolken, Cynthia) (Entered: 05/28/2010)
05/28/2010	<u>83</u>	ORDER granting <u>81</u> Motion to Continue. Signed by Jeremiah C. Lynch on 5/28/2010. (TXB, ) Modified on 5/28/2010 -order mailed to counsel Wittich, Peles, Titus, and Kienzle (BAW, ). (Entered: 05/28/2010)
05/28/2010	<u>82</u>	NOTICE of Acknowledgment of Pro Hac Vice Order by The Gun Owners Foundation, Gun Owners of America, Inc., and Virginia Citizens Defense League (Jackson, Gregory) (Entered: 05/28/2010)
05/28/2010	<u>81</u>	Unopposed MOTION to continue Hearing by Jessica B. Leinwand appearing for Defendant Eric H. Holder, Jr. Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Text of Proposed Order) (Leinwand, Jessica) Modified on 5/28/2010 (BAW, ). (Entered: 05/28/2010)
05/25/2010	<u>80</u>	ORDER granting <u>79</u> Motion to Appear Pro Hac Vice regarding Gil N. Peles. Signed by Jeremiah C. Lynch on 5/25/2010. (APP, ) Copy mailed to Peles this date along w/ ECF Registration Form. Modified on 5/25/2010 to reflect copy of order mailed to Wittich, Titus and Kienzle this date (APP, ). (Entered: 05/25/2010)
05/25/2010	<u>79</u>	MOTION Gil Peles to Appear Pro Hac Vice ( Filing fee \$ 250 receipt number MTX900003326.) Cynthia L. Wolken appearing for Amicus Brady Center to Prevent Gun Violence, The International Brotherhood of Police Officers, Hispanic American Police Command Officers Association, National Black Police Association, National Network to En Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Text of Proposed Order) (Wolken, Cynthia) (Entered: 05/25/2010)
05/25/2010		Set/Reset Hearings: Oral Argument set for 6/16/2010 09:00 AM in Missoula, MT before Jeremiah C. Lynch. (TXB, ) (Entered: 05/25/2010)



		05/25/2010)
05/25/2010	<u>78</u>	ORDER granting <u>77</u> Motion for Hearing. Signed by Jeremiah C. Lynch on 5/25/2010. (TXB, ) Modified on 5/25/2010 to reflect copy of order mailed to Wittich, Titus and Kienzle this date (APP, ). (Entered: 05/25/2010)
05/24/2010	<u>77</u>	Unopposed MOTION for Hearing re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction, <u>11</u> Brief/Memorandum in Support <i>PLAINTIFFS UNOPPOSED MOTION FOR ORAL ARGUMENT</i> Quentin M. Rhoades appearing for Plaintiffs Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc. Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Text of Proposed Order) (Rhoades, Quentin) (Entered: 05/24/2010)
05/20/2010	<u>76</u>	ORDER granting <u>74</u> Motion to Amend/Correct. IT IS ORDERED that the motion for leave to participate as amicus curiae is GRANTED and the Proposed Amicus Curiae are granted leave to appear as amicus curiae and to join in the brief of amicus curiae the Brady Center. Signed by Jeremiah C. Lynch on 5/20/2010. (APP, ) (Entered: 05/20/2010)
05/20/2010	<u>75</u>	ORDER granting <u>73</u> Motion to File Amicus Brief. Signed by Jeremiah C. Lynch on 5/20/2010. (TXB, ) (Entered: 05/20/2010)
05/20/2010	<u>74</u>	MOTION to Amend/Correct Cynthia L. Wolken appearing for Amicus Brady Center to Prevent Gun Violence Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Text of Proposed Order) (Wolken, Cynthia) (Entered: 05/20/2010)
05/20/2010	<u>73</u>	Unopposed MOTION to File Amicus Brief Cynthia L. Wolken appearing for Amicus Brady Center to Prevent Gun Violence Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Text of Proposed Order Proposed Order) (Wolken, Cynthia) (Entered: 05/20/2010)
05/19/2010	<u>72</u>	ORDER. Signed by Jeremiah C. Lynch on 5/19/2010. (TXB, ) (Entered: 05/19/2010)
05/18/2010	<u>71</u>	RESPONSE to Motion re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction filed by Brady Center to Prevent Gun Violence. (APP, ) (Entered: 05/19/2010)
05/18/2010	<u>70</u>	REPLY to Response to Motion re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction filed by Eric H. Holder, Jr.. (Leinwand, Jessica) (Entered: 05/18/2010)
05/05/2010	<u>69</u>	ORDER granting <u>68</u> Motion for Leave to File Excess Words. Signed by Jeremiah C. Lynch on 5/5/2010. (TCL, ) (Entered: 05/05/2010)
05/05/2010	<u>68</u>	Unopposed MOTION for Leave to File Excess Pages Jessica B.

		Leinwand appearing for Defendant Eric H. Holder, Jr. Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Text of Proposed Order) (Leinwand, Jessica) (Entered: 05/05/2010)
04/30/2010	<u>67</u>	NOTICE of Substitution of Counsel by Eric H. Holder, Jr. (Leinwand, Jessica) (Entered: 04/30/2010)
04/27/2010	<u>66</u>	ORDER granting <u>65</u> Motion for Leave to File. Signed by Jeremiah C. Lynch on 4/27/2010. (TXB, ) (Entered: 04/27/2010)
04/27/2010	<u>65</u>	Unopposed MOTION for Leave to File <i>BRIEF IN RESPOSNE TO BRADY CENTER'S BRIEF AMICUS CURIAE</i> Quentin M. Rhoades appearing for Plaintiffs Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc. Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Text of Proposed Order) (Rhoades, Quentin) (Entered: 04/27/2010)
04/24/2010	<u>64</u>	Response to Motion by Montana Legislators <i>Reformatted Brief Amici Curiae of Montana Legislators</i> (Renz, Jeffrey) Modified on 4/26/2010 to reflect that the event type used was not correct and should have been filed using the "Response to Motion" event (APP, ). Modified on 4/26/2010 to change wording in this entry to reflect "Response" and create relationship to <u>10</u> Motion (APP, ). (Entered: 04/24/2010)
04/23/2010		Corrective Entry for Response to Motion: re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction, <u>64</u> Notice (Other). Incorrect event used: Notice (Other). Correct event to use: Response to Motion. This notice is for your information for future filings. THIS IS A TEXT ONLY ENTRY. A PDF DOCUMENT IS NOT ATTACHED TO THIS ENTRY. Please call w/ any questions. (APP, ) (Entered: 04/26/2010)
04/23/2010	<u>62</u>	ORDER granting <u>61</u> Motion for Leave to File. Signed by Jeremiah C. Lynch on 4/23/2010. (APP, ) (Entered: 04/23/2010)
04/23/2010	<u>61</u>	MOTION for Leave to File Amicus and Join in Amicus Brief, James Edward Brown appearing for Western Tradition Partnership. Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Text of Proposed Order) (APP, ) (Entered: 04/23/2010)
04/19/2010	<u>60</u>	ORDER granting <u>59</u> Motion for Leave to File. IT IS FURTHER ORDERED that the Brady Center shall have until May 18, 2010, within which to file its amicus brief. Signed by Jeremiah C. Lynch on 4/19/2010. (APP, ) (Entered: 04/19/2010)
04/19/2010	<u>59</u>	MOTION for Leave to File Amicus Curiae, Cynthia L. Wolken appearing for Amicus Brady Center to Prevent Gun Violence. Motions referred to Jeremiah C. Lynch. (APP, ) (Entered: 04/19/2010)
04/19/2010	<u>58</u>	RESPONSE to Motion re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction <i>CORRECTED AMICUS BRIEF</i> filed by Center for Constitutional



		Jurisprudence and Lawmakers from 17 States. (Caso, Anthony) (Entered: 04/19/2010)
04/19/2010	<u>57</u>	ORDER granting <u>55</u> Motion to Appear Pro Hac Vice. Signed by Jeremiah C. Lynch on 4/19/2010. (APP, ) Copy of order mailed to Titus this date. (Entered: 04/19/2010)
04/19/2010	<u>56</u>	INCORRECT (see dkt 58) - RESPONSE to Motion re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction <i>by Amici CCJ and State Lawmakers</i> filed by Center for Constitutional Jurisprudence and Lawmakers from 17 States. (Caso, Anthony) Modified on 4/19/2010 to reflect calling and having counsel refile (APP, ). (Entered: 04/19/2010)
04/16/2010	<u>55</u>	MOTION Herbert W. Titus to Appear Pro Hac Vice <i>as Counsel for Amici Curiae Gun Owners Foundation, et al</i> ( Filing fee \$ 250 receipt number 34467.) Gregory A. Jackson appearing for Amicus The Gun Owners Foundation, Gun Owners of America, Inc., and Virginia Citizens Defense League Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Affidavit, # <u>2</u> Text of Proposed Order) (Jackson, Gregory) (Entered: 04/16/2010)
04/14/2010	<u>54</u>	RESPONSE to Motion Amicus Brief re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction filed by The Gun Owners Foundation, Gun Owners of America, Inc., and Virginia Citizens Defense League. (APP, ) (Entered: 04/14/2010)
04/14/2010	<u>53</u>	ORDER granting <u>52</u> Motion for Leave to File. Signed by Jeremiah C. Lynch on 4/14/2010. (APP, ) (Entered: 04/14/2010)
04/13/2010	<u>52</u>	MOTION for Leave to File Amici Curiae, Gregory A. Jackson appearing for Amicus The Gun Owners Foundation, Gun Owners of America, Inc., and Virginia Citizens Defense League. Motions referred to Jeremiah C. Lynch. (APP, ) (Entered: 04/14/2010)
04/13/2010	<u>51</u>	ERRATA <i>PLAINTIFFS NOTICE OF ERRATA</i> . (Attachments: # <u>1</u> PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO MOTION TO DISMISS (WITH EMPHASIS)) (Rhoades, Quentin) Modified on 4/14/2010 to create relationship w/ <u>48</u> Response and <u>10</u> Motion (APP, ). (Entered: 04/13/2010)
04/13/2010	<u>50</u>	RESPONSE to Motion re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction <i>and Brief Of The Paragon Foundation, Inc. As Amicus Curiae In Support Of Plaintiffs And In Opposition To Motion To Dismiss</i> filed by Paragon Foundation, Inc.. (Scott, Duncan) (Entered: 04/13/2010)
04/13/2010	<u>49</u>	NOTICE by Paragon Foundation, Inc. re <u>39</u> Order on Motion for Leave to File, Order on Motion to Appear Pro Hac Vice,, <i>Of Acknowledgment Of Paul M. Kienzle III Of Terms Of Pro Hac Vice Admission</i> (Scott, Duncan) (Entered: 04/13/2010)

04/12/2010	<u>48</u>	RESPONSE to Motion re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction <i>PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO MOTION TO DISMISS</i> filed by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc.. (Rhoades, Quentin) (Entered: 04/12/2010)
04/12/2010	<u>47</u>	Brief/Memorandum in Support re <u>46</u> Notice of Appearance <i>State of Montana's Brief in Intervention</i> filed by Steve Bullock. (Tweeten, Chris) (Entered: 04/12/2010)
04/12/2010	<u>46</u>	Notice to Intervene and NOTICE of Appearance by Chris D. Tweeten on behalf of Steve Bullock (Tweeten, Chris) Modified on 4/13/2010 to reflect changing this entry to a Motion to Intervene (APP, ). Modified on 4/13/2010 to change entry to Notice of Intervention per JCL (APP, ). (Entered: 04/12/2010)
04/12/2010	<u>45</u>	RESPONSE to Motion re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction <i>Amicus Brief</i> filed by Weapons Collectors Society of Montana. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2) (Bloomquist, John) (Entered: 04/12/2010)
04/12/2010	<u>44</u>	Order Extending Scheduling Order Deadlines. IT IS ORDERED that the scheduling order is amended as follows:Any individual or entity granted leave to appear as an amicus curie shall file a brief in response to the Defendants' pending motion to dismiss on or before April 23, 2010. The Defendant shall have until May 18,2010 within which to file its reply brief. Signed by Jeremiah C. Lynch on 4/12/2010. (APP, ) Copy mailed to Kienzle, Wittich, Caso this date. Modified on 4/12/2010 to create relationship w/ <u>10</u> Motion (APP, ). (Entered: 04/12/2010)
04/12/2010	<u>43</u>	ORDER granting <u>40</u> Motion for Leave to File; granting <u>41</u> Motion to Appear Pro Hac Vice. IT IS FURTHER ORDERED that the Center for Constitutional Jurisprudence and several state lawmakers shall have until April 23, 2010, within which to file their response to Defendant's motion to dismiss. Signed by Jeremiah C. Lynch on 4/12/2010. (APP, ) Copy mailed to Wittich and Caso this date. (Entered: 04/12/2010)
04/12/2010	<u>39</u>	ORDER granting <u>37</u> Motion for Leave to File; granting <u>38</u> Motion to Appear Pro Hac Vice. IT IS FURTHER ORDERED that the Paragon Foundation shall have until April 23, 2010, within which to file its response to Defendant's motion to dismiss. Signed by Jeremiah C. Lynch on 4/12/2010. (APP, ) Copy mailed to Kienzle this date. (Entered: 04/12/2010)
04/12/2010	<u>36</u>	ORDER granting <u>35</u> Motion for Leave to File. IT IS FURTHER ORDERED that the Montana Legislators shall have until April 23, 2010, within which to file their response to Defendant's motion to dismiss.

		Signed by Jeremiah C. Lynch on 4/12/2010. (APP, ) (Entered: 04/12/2010)
04/12/2010	<u>34</u>	RESPONSE to Motion re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction <i>Opposition to Defendant's Motion to Dismiss</i> filed by State of Utah and other States. (Shurtleff, Mark) (Entered: 04/12/2010)
04/09/2010	<u>42</u>	CERTIFICATE OF SERVICE by Center for Constitutional Jurisprudence and Lawmakers from 17 States re <u>41</u> MOTION Anthony T. Caso to Appear Pro Hac Vice, <u>40</u> MOTION for Leave to File (APP, ) (Entered: 04/12/2010)
04/09/2010	<u>41</u>	MOTION Anthony T. Caso to Appear Pro Hac Vice ( Filing fee \$ 250.00 receipt number MTX9-3216.) Arthur V. Wittich appearing for Amicus Center for Constitutional Jurisprudence and Lawmakers from 17 States. Motions referred to Jeremiah C. Lynch. (APP, ) (Entered: 04/12/2010)
04/09/2010	<u>40</u>	MOTION for Leave to File Amicus Curiae, Arthur V. Wittich appearing for Amicus Center for Constitutional Jurisprudence and Lawmakers from 17 States. Motions referred to Jeremiah C. Lynch. (APP, ) (Entered: 04/12/2010)
04/09/2010	<u>33</u>	AMENDED COMPLAINT <i>SECOND AMENDED COMPLAINT</i> against Eric H. Holder, Jr., filed by Second Amendment Foundation, Inc., Montana Shooting Sports Association, Gary Marbut. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B) (Rhoades, Quentin) (Entered: 04/09/2010)
04/09/2010	<u>32</u>	RESPONSE to Motion re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction <i>Amicus Brief</i> filed by Goldwater Institute Scharf-Norton Center for Constitutional Government; 1 U.S. Congressman, 8 Arizona Senators, 26 Arizona Representatives, 2 Arizona Political Organizations and 1 Arizona Book Publish. (Draniias, Nicholas) (Entered: 04/09/2010)
04/08/2010	<u>38</u>	MOTION Paul M. Kienzle to Appear Pro Hac Vice ( Filing fee \$ 250.00 receipt number MTX9-3211.) Duncan Scott appearing for Amicus Paragon Foundation, Inc. Motions referred to Jeremiah C. Lynch. (APP, ) (Entered: 04/12/2010)
04/08/2010	<u>37</u>	MOTION for Leave to File Amicus Curiae Briefs, Duncan Scott appearing for Amicus Paragon Foundation, Inc. Motions referred to Jeremiah C. Lynch. (APP, ) (Entered: 04/12/2010)
04/08/2010	<u>35</u>	MOTION for Leave to File Amici Curiae, Jennifer W. Bordy, Jeffrey T. Renz appearing for Amicus Montana Legislators. Motions referred to Jeremiah C. Lynch. (APP, ) (Entered: 04/12/2010)
04/01/2010	<u>31</u>	AFFIDAVIT/DECLARATION <i>Acknowledgment of Terms of Pro Hac Vice Admission</i> by State of Utah and other States. (Fox, Patrick) (Entered: 04/01/2010)

03/25/2010	<u>30</u>	ORDER granting <u>28</u> Motion for Leave to File; granting <u>29</u> Motion to Appear Pro Hac Vice. Signed by Jeremiah C. Lynch on 3/25/2010. (APP, ) Copy of order mailed to Mark Shurtleff this date. (Entered: 03/26/2010)
03/24/2010	<u>29</u>	MOTION Mark L. Shurtleff to Appear Pro Hac Vice ( Filing fee \$ 250.00 receipt number MTX6-1162.) Patrick T. Fox appearing for Amicus State of Utah and other States. Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Application for PHV, # <u>2</u> Text of Proposed Order) (APP, ) (Entered: 03/26/2010)
03/24/2010	<u>28</u>	MOTION for Leave to File Brief Amici Curiae. Motions referred to Jeremiah C. Lynch. (APP, ) (Entered: 03/26/2010)
03/24/2010	<u>27</u>	ORDER granting <u>26</u> Motion for Extension of Time to File intervention. Signed by Jeremiah C. Lynch on 3/24/2010. (TCL, ) (Entered: 03/24/2010)
03/24/2010	<u>26</u>	MOTION for Extension of Time to File <i>Intervene</i> Chris D. Tweeten appearing for Intervenor Steve Bullock Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Text of Proposed Order) (Tweeten, Chris) (Entered: 03/24/2010)
03/19/2010	<u>25</u>	ORDER granting <u>24</u> Motion to File Amicus Brief. Signed by Jeremiah C. Lynch on 3/19/2010. (APP, ) (Entered: 03/19/2010)
03/19/2010	<u>24</u>	MOTION to File Amicus Brief. Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Text of Proposed Order) (APP, ) (Entered: 03/19/2010)
03/12/2010	<u>23</u>	ORDER granting <u>22</u> Motion to Amend/Correct. Signed by Jeremiah C. Lynch on 3/12/2010. (APP, ) (Entered: 03/12/2010)
03/12/2010	<u>22</u>	First MOTION to Amend/Correct <u>19</u> Order, Add and Terminate Parties, Terminate Motions,,, <u>21</u> Notice (Other) Nicholas C. Dranias appearing for Amicus Goldwater Institute Scharf-Norton Center for Constitutional Government Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Text of Proposed Order) (Dranias, Nicholas) (Entered: 03/12/2010)
02/25/2010	<u>21</u>	NOTICE by Goldwater Institute Scharf-Norton Center for Constitutional Government <i>of Acknowledgment of Terms of Pro Hac Vice Admission to Counsel Nick Dranias</i> (Fox, Timothy) (Entered: 02/25/2010)
02/12/2010	<u>19</u>	IT IS ORDERED that the Goldwater Institute is granted leave to appear as amicus curiae in this case for the limited purpose of submitting amicus briefs on pending motions. IT IS FURTHER ORDERED that <u>18</u> MOTION Nicholas C. Dranias to Appear Pro Hac Vice is GRANTED. Signed by Jeremiah C. Lynch on 2/12/2010. (APP, ) Copy sent to atty Nicholas C. Dranias. (Entered: 02/12/2010)

02/11/2010	<u>20</u>	ORDER REASSIGNING the case to Judge Molloy, REFERRING the case to Judge Lynch. Signed by Judge Donald W. Molloy on 2/11/2010. (APP, ) (Entered: 02/12/2010)
02/10/2010	<u>18</u>	MOTION for Nicholas C. Dranias to Appear Pro Hac Vice ( Filing fee \$ 250.00 receipt number MTX6-1107.) Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Application for PHV) (APP, ) (Entered: 02/11/2010)
02/02/2010	<u>17</u>	SCHEDULING ORDER: Bench Trial set for 12/6/2010 08:30 AM in Missoula, MT before Judge Donald W. Molloy. Final Pretrial Conference set for 12/6/2010 08:30 AM in Missoula, MT before Judge Donald W. Molloy. Amended Pleadings due by 4/12/2010. Discovery due by 8/11/2010. Motions due by 9/13/2010. Proposed Pretrial Order due by 11/1/2010. Signed by Jeremiah C. Lynch on 2/2/2010. (TCL, ) (Entered: 02/02/2010)
01/27/2010	<u>16</u>	CERTIFICATION to the Honorable Stephen C. Bullock, Attorney General for the State of Montana. Signed by Jeremiah C. Lynch on 1/27/2010. (APP, ) Copy of this certification sent to Department of Justice, P.O. Box 201401, Helena, MT 59620-1401 this date. (Entered: 01/27/2010)
01/27/2010	<u>15</u>	Order Setting: Telephonic Conference set for 2/2/2010 10:00 AM in Missoula, MT before Jeremiah C. Lynch.. Signed by Jeremiah C. Lynch on 1/27/2010. (TXB, ) (Entered: 01/27/2010)
01/27/2010	<u>14</u>	STIPULATION re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction, <u>11</u> Brief/Memorandum in Support, <u>3</u> Preliminary Pretrial Conference Order, <i>STIPULATION FOR EXTENSION OF TIME TO FILE RESPONSE AND TO SUSPEND SCHEDULING ORDER</i> by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc.. (Attachments: # <u>1</u> Text of Proposed Order) (Rhoades, Quentin) (Entered: 01/27/2010)
01/19/2010	<u>13</u>	Electronic Mailing of Consent: Judge Lynch as Presiding Judge. Mailed to counsel Alexander Kenneth Haas. Consent/Objection to USMJ Form due by 2/22/2010. (APP, ) (Entered: 01/19/2010)
01/19/2010	<u>12</u>	NOTICE by Eric H. Holder, Jr. re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction, <u>11</u> Brief/Memorandum in Support of <i>Potential Constitutional Challenge (Fed. R. Civ. P. 5.1)</i> (Haas, Alexander) (Entered: 01/19/2010)
01/19/2010	<u>11</u>	Brief/Memorandum in Support re <u>10</u> MOTION to Dismiss for Lack of Jurisdiction filed by Eric H. Holder, Jr.. (Attachments: # <u>1</u> Exhibit MFFA -- Westlaw Version) (Haas, Alexander) (Entered: 01/19/2010)
01/19/2010	<u>10</u>	MOTION to Dismiss for Lack of Jurisdiction Alexander Kenneth Haas

		appearing for Defendant Eric H. Holder, Jr. Motions referred to Jeremiah C. Lynch. (Haas, Alexander) (Entered: 01/19/2010)
01/05/2010	<u>9</u>	Proof of Service filed by Gary Marbut, Montana Shooting Sports Association, Second Amendment Foundation, Inc.. Service by REGISTERED MAIL, CERTIFIED RETURN-RECEIPT REQUESTED on 11/17/2009 and 11/25/2009. (Rhoades, Quentin) (Entered: 01/05/2010)
12/30/2009		Remark-per CH and order denying motion [doc.8] amicus party GoldWater Institute has been deleted from this case. (BAW, ) (Entered: 12/30/2009)
12/30/2009		Remark: per Court's denial of PHV admission of N. Dranias, Gough Shanahan Johnson and Waterman check number 81464 in the amount of \$250 was returned to Tim Fox via regular mail from the Helena Clerk's office. (ded, ) (Entered: 12/30/2009)
12/30/2009	<u>8</u>	ORDER denying <u>7</u> Motion to Appear Pro Hac Vice. Signed by Jeremiah C. Lynch on 12/30/2009. (TXB, ) (Entered: 12/30/2009)
12/29/2009	<u>7</u>	MOTION Nicholas C. Dranias to Appear Pro Hac Vice ( Filing fee \$ 250 receipt number MTX600001057.) Timothy C. Fox appearing for Amicus GoldWater Institute Motions referred to Jeremiah C. Lynch. (Attachments: # <u>1</u> Application in Support of Motion for Pro Hac Vice, # <u>2</u> Text of Proposed Order) (Fox, Timothy) (Entered: 12/29/2009)
12/14/2009	<u>6</u>	AMENDED COMPLAINT <i>FIRST AMENDED COMPLAINT</i> against Eric H. Holder, Jr., filed by Montana Shooting Sports Association, Second Amendment Foundation, Inc., Gary Marbut. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B) (Rhoades, Quentin) (Entered: 12/14/2009)
10/16/2009	<u>5</u>	NOTICE by Montana Shooting Sports Association, Second Amendment Foundation, Inc., Gary Marbut re <u>2</u> Summons Issued as to USA, <u>1</u> Complaint, <i>NOTICE OF LAWSUIT &amp; REQUEST FOR WAIVER OF SERVICE OF SUMMONS</i> (Attachments: # <u>1</u> Copy of Complaint & Civil Cover Sheet, # <u>2</u> Waiver of the Service of Summons) (Rhoades, Quentin) (Entered: 10/16/2009)
10/05/2009	<u>4</u>	Electronic Mailing of Consent: Judge Lynch as Presiding Judge. Mailed to counsel Quentin M. Rhoades. Consent/Objection to USMJ Form due by 11/9/2009. (APP, ) (Entered: 10/05/2009)
10/05/2009	<u>3</u>	PRELIMINARY PRETRIAL CONFERENCE ORDER Preliminary Pretrial Statement due by 1/26/2010. Joint Discovery Plan due by 1/26/2010. Pretrial Conference set for 2/2/2010 10:00 AM in Missoula, MT before Jeremiah C. Lynch.. Signed by Jeremiah C. Lynch on 10/5/2009. (TXB, ) (Entered: 10/05/2009)
10/01/2009	<u>2</u>	Summons Issued as to Eric H. Holder, Jr., U.S. Attorney General.

		Original mailed to counsel Rhoades this date. (NOS, ) (Entered: 10/01/2009)
10/01/2009	<u>1</u>	COMPLAINT against Eric H. Holder, Jr. ( Filing fee \$ 350 receipt number 09770000000000623751.), filed by Montana Shooting Sports Association, Second Amendment Foundation, Inc., Gary Marbut. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Exhibit A, # <u>3</u> Exhibit B) (NOS, ) (Entered: 10/01/2009)

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