Quentin M. Rhoades
State Bar No. 3969
SULLIVAN, TABARACCI & RHOADES, P.C.
1821 South Avenue West
Third Floor
Missoula, Montana 59801
Telephone: (406) 721-9700
Facsimile: (406) 721-5838
qmr@montanalawyer.com

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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' RESPONSE TO BRIEF OF* AMICUS CURIAE *BRADY CENTER TO PREVENT GUN VIOLENCE, et al., IN SUPPORT OF DEFENDANT ERIC H. HOLDER'S MOTION TO DISMISS***

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

counsel of record, states in response to opposition to *Brief of* Amicus Curiae *Brady Center to Prevent Gun Violence, et al., in Support of Defendant Eric H. Holder's Motion* to Dismiss as follows:

The Brady Center to Prevent Gun Violence has filed an amicus brief complaining that the Montana Firearms Freedom Act (MFFA) does not require compliance by Montanans with a variety of U.S. laws, such those for background checks of Montanans (per 18 U.S.C. § 922(g), (t)); barring Montana teens from possessing handguns ((per 18 U.S.C. § 922(x)); sales between Montanans of so called "undetectable firearms" in violation fo 18 U.S.C § 922(p); and the like. The parade of horribles is based on the factual proposition that the MFFA firearms "will be much more likely to be sought after by criminals and used in crimes nationwide." (Brady Center Br., Dkt No. 71, 5:25-26.) They insist: "the MFFA would pose a clear threat to federal or other states' law enforcement's ability to protect the public from gun violence, solve gun crimes, and stop gun trafficking." (*Id.,* 7:10-12.) The Brady Center also argues that MFFA guns would flow in interstate commerce to be used by "criminal gangs" to kill, maim and terrorize victims across the United States with a "cost to American Society approaching $100 billion annually." (*Id.,* 11:9-11.) Finally, the Brady

Center argues without federal regulation of MFFA firearms, public safety will suffer, describing at length its opinion that the federal regulation of MFFA and all other guns is "fundamental to public safety." (*Id.*, 13-23.)

The Brady Center, however, offers no evidence, such an affidavit from law enforcement experts, to support these factual conclusions of its counsel. There is no evidence in the record for the Brady Center's proposition that MFFA guns would have "'a substantial economic effect on interstate commerce.'" (*Id.,* 11:18-19 (quoting *Wickard v. Filburn*, 371 U.S. 111, 125 (1942).) These factual allegations are simply its own wild speculation. Its "facts" – or the arguments of its counsel – are not evidence and are therefore not allowed to be considered for the purposes of the pending motion to dismiss. *Estrella v. Brandt*, 682 F.2d 814, 819-20 (9th Cir.1982). Should the Court deem such factual assertions relevant and material, a trial will be necessary to establish whether they are actually true. See, Pillsbury, *Madison & Sutro v. Lerner*, 31 F.3d 924, 928 (9th Cir.1994). Absent same, such "facts" have no bearing on this case.

Ultimately, no one contends that the Framers of the United States Constitution ***originally*** intended to give Congress the powers extended to it in the *Wickard v. Filburn* decision to regulate all commerce, whether

interstate or intrastate. *Wickard*, 371 U.S. at 123-25. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (Winter, 2001). In other words, the Court adopted this interpretation of the Commerce Clause not because it was legally justified, but because the idea was popular politically. As the Court put it:

> It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.

Id. at 129.

Thus, everyone agrees the Commerce Clause was originally intended, by the Framers, to give an enumerated set of defined and limited powers to Congress. See The Federalist Papers, No. 42, pp. 267-68 (C. Rossiter ed. 1961). Only when the United States Supreme Court's New Deal justices determined – for policy reasons – that Congress ought to have more powers than the Framers intended that such powers came into existence. But whether such a change in the Constitution was a good idea economically, it was not Constitutional. Not only is it unconstitutional for

the Judiciary to change the form of government by reaching beyond the powers enumerated in the Commerce Clause, but by eviscerating federalism, removing real and robust power from the states, the *Wickard* decision and its progeny took it upon the courts to amend the United States of America's form of government. If this had been the original intent, there would have been no need for the Framer's to include means to amend the Constitution.

Had the framers anticipated current Commerce Clause jurisprudence, the Constitution would never have made it out of the Convention, let alone through Ratification -- because they were serious about the "vertical separation of powers" between the states and what they called the National Government. If the Federalist Papers and Madison's account of the Constitutional Convention are any accurate guide, this federalism was fundamental, and intended to serve as a functional bulwark in the service of individual liberty. No one disputes this. Right now, however, all power is concentrated in the National Government. No one disputes this either.

As a result, the form of government the Framers adopted no longer exists. Federalism has been repealed by judicial interpretation. All admit that the interstitial and sometimes large space left by the express language

of the Constitution can and should be filled in by judges, guided by the principals the Constitutional language espouses. But no one seriously argues that it is in any way acceptable for one entire pillar of the form of government the Framers crafted to be eviscerated, as it is in current Commerce Clause jurisprudence, absent an express Constitutional amendment. Indeed, this is reason why the Framers included an express amendment process -- should the people someday wish to change the form of government, the Constitution delineates a specific and orderly process for doing so.

But current Commerce Clause jurisprudence strips the states of all power, changing the form of government by means of mere judicial decision making, without the adoption of any express amendment. The judiciary should recognize that its willingness to remove federalism from the Constitution violates the Framers' form of government in two fundamental ways -- which unintended consequences put the entire structure in jeopardy -- and therefore even its own power.

The first violation of the Framer's form of government is direct. The current case law deprives the states of the robust (not complete, but substantial) independence that was viewed by the Framers as a

fundamental element of the form of government they adopted. Federalism has been removed from the American of government.

The second violation is less direct, but is even more important and dangerous. The willingness of the judiciary to assume the power to amend the form of government with very little input and no express consent by the governed is in itself a fundamental change in the form of government the Constitution implemented. It violates the sovereignty of the people. The judiciary's annexation of the power of amendment bestows on the judiciary -- who is appointed for life -- the most fundamental of all powers under any form of government: the ability to change it. But the Framers expressly intended this ultimate power to be placed elsewhere, in structures that require the participation and consent of multiple branches of government -- all of which branches are controlled much more directly by the sovereign people than is the judiciary. In the Framer's form of government, only by a truly national consensus of the people could the form of government be changed. Under the current Commerce Clause jurisprudence, however, not only are the states stripped of all independence, but, the federal judiciary arrogates to itself the power to change the very structure of the government, without any participation

(much less consent) by the other branches, or the states, or ultimately the people (who control those institutions much more actively and directly than they do the judiciary). Thus, the very form of government the Framers implemented has been fundamentally amended -- and this foundational change has never been consented to directly by the sovereign people.

The result of the current Commerce Clause jurisprudence, both directly and indirectly, is a new form of government, one which concentrates power in the hand of an unelected few, and upsets the balance and separation of powers so carefully crafted by the Framers to ensure not only liberty, but the very survival of the National Government. The federal judiciary's willingness to simply assume ultimate power alienates the people -- because they, who are supposed to be sovereign, see so much power concentrated in the hands of so few, none of whom are directly answerable to them. Alienation of the governed, and the judiciary's violation of the form of government under which the judiciary itself was created, undermines the authority and legitimacy of the both the judiciary and the rest of the national government. The more the judiciary is willing to gather ultimate power to itself, without the express

institutional consent of the governed through the process of express amendment, the less legitimate the entire national government is seen in the eyes of the governed. Intending to create order, the judiciary's concentration of such power in its own hand breeds disrespect for the rule of law. And the rule of law, at least under the American theory of government, is the foundation upon which all other liberty rests.

CONCLUSION

The amicus arguments of the Brady Center fail for two reasons. First, it has presented no evidence for its facts. Second, it's view of the Commerce Clause is unconstitutional in view of the Framer's original intent, both as regards federalism, and as regards the judiciary's power to ignore the original intent of the Framers for pragmatic reasons.

Dated this 1st 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 1st day of June, I served a true and correct copy of the foregoing on the following persons by the following means:

__1__ CM/ECF
_____ Hand Delivery
_____ Mail
_____ Overnight Delivery Service
_____ Fax
_____ E-Mail

1. Jessica B. Leinwand
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs
P.O. Box 883
Washington, D.C. 20044
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Representing Defendant Eric H. Holder, Jr.

1. James Edward Brown
John E. Bloomquist
DONEY CROWLEY BLOOMQUIST & PAYNE UDA, P.C.
Diamond Block ,Suite 200
44 West Sixth Avenue
P.O. Box 1185
Helena, MT 59624
Representing Weapons Collectors Society of MT (Amicus)
Representing Western Tradition Partnership (Amicus)

1. Mark L. Shurtleff
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 142320
Salt Lake City, UT 84114-2320
Representing State of Utah & Other States (Amicus)

CERTIFICATE OF SERVICE
(continued)

1. Patrick T. Fox
DOUBEK & PYFER
P.O. Box 236
Helena, MT 59624
Representing State of Utah & Other States (Amicus)

1. Jeffrey T. Renz
CRIMINAL DEFENSE CLINIC
School of Law
32 Campus Drive
University of Montana
Missoula, MT 59812
Representing Montana Legislators (Amicus)

1. Jennifer W. Bordy
ATTORNEY AT LAW
7720 A Shedhorn Drive
PMB 132
Bozeman, MT 59718
Representing Montana Legislators (Amicus)

1. Duncan Scott
SCOTT & KIENZEL
1001 South Main Street
Kalispell, MT 59901
Representing Paragon Foundation, Inc. (Amicus)

1. Arthur V. Wittich
WITTICH LAW OFFICE
602 Ferguson Avenue
Suite 5
Bozeman, MT 59718
Representing Center for Constitutional Jurisprudence & Lawmakers from 17 States (Amicus)

CERTIFICATE OF SERVICE
(continued)

1. Anthony T. Caso
LAW OFFICE OF ANTHONY T. CASO
8001 Folsom Blvd
Suite 100
Sacramento, CA 95826
Representing Center for Constitutional Jurisprudence & Lawmakers from 17 States (Amicus)

1. Nicholas C. Dranias
GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
Representing Goldwater Institute Scharf-Norton Center for Constitutional Gov't., et al. (Amicus)

1. Timothy C. Fox
GOUGH SHANAHAN JOHNSON & WATERMAN
P.O. Box 1715
Helena, MT 59624-1715
Representing Goldwater Institute Scharf-Norton Center for Constitutional Gov't., et al. (Amicus)

1. Chris D. Tweeten
OFFICE OF THE MONTANA ATTORNEY GENERAL
P.O. Box 201401
Helena, MT 59620-1401
Representing Montana Attorney Gen Steve Bullock (Intervenor)

///

///

CERTIFICATE OF SERVICE
(continued)

1. Gregory A. Jackson
JACKSON LAW FIRM, P.C.
320 - 11th Avenue
Helena, MT 59601
Representing Gun Owners Foundation, Gun Owners of America, Inc. & Virginia Citizens Defense League

1. Herbert W. Titus
William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
Representing Gun Owners Foundation, Gun Owners of America, Inc. & Virginia Citizens Defense League

1. Cynthia L. Wolken
P.O. Box 1222
Helena, MT 59624
Representing Brady Center to Prevent Gun Violence; & Int'l Brotherhood of Police Officers, et al.

1. Gil N. Peles
PROSKAUER ROSE, LLP
2049 Century Park East
32nd Floor
Los Angeles, CA 90067-3206
Representing Brady Center to Prevent Gun Violence

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