Gary Marbut
P.O. Box 16106
Missoula, Montana 59808
President, Montana Shooting Sports Association
Author, *Gun Laws of Montana*
Plaintiff, *MSSA v. Holder*

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Chief Justice John G. Roberts, Jr.
Associate Justices
Supreme Court of the United States
Washington, D.C.

Dear Chief Justice Roberts and Associate Justices,

Greetings from Montana.

This missive is about *MSSA v. Holder*, a lawsuit coming to you to validate the principles of the Montana Firearms Freedom Act. If I were an attorney, this would be written as a legal brief, and submitted at the proper time with proper process. As I am not an attorney, this is somewhat each a formal letter, a petition, and an essay. Please hear me out.

I. History

As *MSSA v. Holder* is now being appealed to SCOTUS, let me acquaint you with its genesis and offer you a sketch of its history.

I wrote the Montana Firearms Freedom Act (MFFA) in 2004, specifically to use firearms as the vehicle to challenge federal power under the Constitution's Interstate Commerce Clause (ICC). The MFFA was introduced into the Montana Legislature in 2005, again in 2007, and again in 2009, when it was passed by the Legislature and signed into law by the Governor of Montana.

The MFFA declares that any firearms made and retained in Montana are simply not subject to any federal restrictions or regulations under the power given to Congress in the ICC to "regulate commerce … among the several states ..." The MFFA is codified at 30-20-101. et. seq., and may be reviewed in full here.

Following passage of the MFFA, I corresponded with the Bureau of Alcohol, Tobacco, Firearms and Explosives. I informed the BATFE that I wished to manufacture and sell only within Montana a youth-model, single-shot, bolt-action, .22-caliber rifle called the "Montana Buckaroo" and stamped "Made in Montana" on a central metallic part. I asked if that could be done without federal licensure under the terms of the MFFA. The BATFE responded in the negative. Its letter stated I could be prosecuted criminally and become subject to asset forfeiture if I were to do as I had proposed. The response offered no opportunity for review of that position. (Note: There is another standing claim in the record if standing should concern you.)

The MFFA became effective on October 1, 2009. That is also the date upon which plaintiffs Montana Shooting Sports Association (MSSA), the Second Amendment Foundation and I filed *MSSA v. Holder* in the federal District Court in Missoula, Montana. *MSSA v. Holder* seeks judicial restraint of executive branch enforcement

of federal laws in conflict with the MFFA. It also seeks adjudication to roll back federal ICC power generally. I am the sole individual plaintiff in the case.

Upon urging by USDoJ, the District Court dismissed the lawsuit, based both on standing and on merit. We appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the District on standing, but upheld the District on merit. That was expected because we are challenging ICC precedent and we know that only SCOTUS may reverse or revise its own precedent. *MSSA v. Holder* in now in the process of appeal to SCOTUS.

Since the passage of the MFFA in Montana, eight other states have enacted clones of the MFFA, and 23 other states now have or have had introduced MFFA-clone bills. See it here.

MSSA has been accompanied in this endeavor by numerous *amici*, beginning at the District Court. These include the Attorney General of Utah, also representing the AGs of eight other states, an *amicus* group of Montana legislators who supported the MFFA, an *amicus* group of legislators from other states who have sponsored or supported MFFA clones in other states, several public policy entity *amici*, and others. The State of Montana has intervened in support of the MFFA.

II. Why should SCOTUS accept *MSSA v. Holder*?

There are several good reasons why SCOTUS should grant plaintiffs *certiorari* in *MSSA v. Holder*, all revolving around the theme that SCOTUS needs to step to the plate to address pressing national issues presented in the case.

A. *MSSA v. Holder* presents questions of core constitutional issues, especially about the critical relationship between the states and people, and the federal government, questions only SCOTUS may resolve.

MSSA v. Holder challenges ICC precedent going back to *Wickard v. Filburn*. As you Chief Justice Roberts said in your concurrence in *Citizens United*, there comes a time when precedent becomes so cobbled together with baling wire and duct tape that it just no longer makes sense, so *stare decisis* must yield. The Ninth Circuit acknowledged that only SCOTUS may overcome *stare decisis* and revise ICC precedent. It is difficult to imagine a more cobbled together ("jury-rigged" in Roberts' words) precedent than the evolution and current status of ICC law.

B. The natives are beyond restless. They are at the stage of collecting torches and pitchforks and preparing to head for the castle gates en masse. There is plenty of evidence for this assertion. Nine states have enacted Firearms Freedom Acts, and 23 others have introduced FFA clones and may yet enact them. Other states have enacted or introduced other "Freedom Acts," such as the Whiskey Freedom Act, the Light Bulb Freedom Act, and the Healthcare Freedom Act. But those only tell part of the story. States are passing laws prohibiting enforcement of indefinite detention under the NDAA, there are police agencies that have publicly declared refusal to enforce provisions of the Patriot Act(s), there are the states that have enacted various marijuana tolerance laws in defiance of federal law, and much more. These rejections of overweening federal power are happening not only at the state level, but at the county, city level, and with individual citizens.

Frankly, the working people of America are fed up with an overbearing federal government bent on regulating everyone and everything.

President John F. Kennedy informed us, "Those who make peaceful revolution impossible make violent revolution inevitable." *MSSA v. Holder* is our best, and could be the last or near last, attempt at the peaceful revolution we'd all emphatically prefer to the alternative Kennedy asserted. It could well be that *MSSA v.*

Holder marks an historical cusp similar to that served up to SCOTUS in *Scott v. Sandford*. (For any non-attorneys reading this, *Scott v. Sandford* is often known as the "Dred Scott decision," a Supreme Court decision thought by many historians to have been the spark that set off the Civil War, a decision that effectively upheld the institution of slavery.)

C. In its line of ICC cases, from *Wickard* to present, SCOTUS has lost institutional credibility by abdicating its crucial role as a check on the executive and legislative branches. *MSSA v. Holder* will provide the Court opportunity to regain some of that lost credibility (as it may have begun to do in its recent and surprisingly unanimous *Bond v. US* decision.

III. Merits of *MSSA v. Holder*

If SCOTUS should accept *MSSA v. Holder*, there are very good reasons why SCOTUS can and should provide some level of remedy to plaintiffs. We will not trouble the Court with ICC arguments that have already failed in other ICC cases. We offer the Court broad new, and we believe persuasive, reasons why the Court should take a fresh look at ICC precedent.

A. In 1942, the *Wickard* Court impermissibly and improperly, yet effectively amended the Constitution by assigning new definitions to three critical words: Regulate, commerce, and among. The Constitution gives the Court no role in amending the Constitution, which power is reserved primarily to the states, the creators and enablers of the federal government (see Abel Upshur's *A Brief Enquiry*.)

One of the greatest advances in federal power happened with the *Wickard* decision. President Franklin D. Roosevelt was frustrated that SCOTUS had invalidated many of the New Deal programs FDR had pushed through a friendly Congress. FDR threatened to "pack" SCOTUS – to appoint six more and friendly-to-FDR justices to swing the SCOTUS balance to approve all of the New Deal programs. He could have accomplished that with his captive Congress.

In the face of that court-packing threat from FDR, SCOTUS caved in the *Wickard* decision, a decision about the scope of federal power given under the ICC. In order to make the *Wickard* decision outcome satisfy FDR, it became necessary for SCOTUS to effectively amend the Constitution. To accomplish that, SCOTUS had to revise the definitions of three critical words used in the Constitution's ICC, "regulate," "commerce," and "among." SCOTUS had to make up entirely new definitions for these critical three words to give them meaning these words had never before been known to have in the English language.

In order to revise the meaning of the Constitution sufficiently to give FDR what he wanted, SCOTUS redefined "regulate." Regulate had always before meant "to make regular." SCOTUS redefined "regulate" to include "prohibit."

SCOTUS had to redefine "commerce." Commerce had always meant "gross trade," such as shiploads of goods moving from port to port. To sufficiently revise the meaning of the Constitution to satisfy FDR, SCOTUS redefined "commerce" to mean essentially "any economic activity, no matter how minor."

Finally, SCOTUS had to change the definition of "among" (as in "... among the several states ..."). The word "among" is a bit slippery to define, although we all grasp what it means. However, we can easily define what it does NOT mean with a simple thought experiment: You say, "Among the three children they had enough money for two ice cream cones." I ask, "Is an X-ray machine required to find the money." You answer, "No, because the money is not within them, it is among them." Thus, we see clearly that the meaning of "among" does NOT include "within." Yet to make the *Wickard* decision do what FDR wanted, SCOTUS had to redefine "among" to mean "within."

By redefining "regulate" to mean "prohibit," by redefining "commerce" to mean "any economic activity, no matter how minor," and by redefining "among" to mean "within," the *Wickard* Court dramatically and improperly changed the meaning and effect of the Constitution. The Court effectively amended the Constitution, despite that it had no authority to do so.

B. It is an ancient principle of law that if a conflict exists between or among provisions within a co-equal body of law, the most recently enacted must be given preference as the most recent expression of the enacting authority. (*Leges posteriores priores contrarias abrogant*. Subsequent laws repeal those before enacted to the contrary.)

The Second Amendment (to whatever extent it may apply), the Ninth Amendment and the Tenth Amendment were all enacted subsequent to the Supremacy Clause, the Necessary and Proper Clause, and the ICC. Thus, the Second, Ninth, and Tenth actually amended and affected the underlying Constitution. It is a sound principle of American jurisprudence that there are no meaningless words in the Constitution.

Given conflict between the Second/Ninth/Tenth and the Supremacy/N&P/Commerce, the Second/Ninth/Tenth must prevail as the most recent expressions of the enacting authority. The Second, Ninth and Tenth must be afforded an equal seat at the constitutional banquet table with the First, Fourth, Fifth, and others. They may not be driven off to and sequestered in the servants' quarters as undesirable and unrecognized stepchildren while the constitutional banquet is held. Or, as Justice Scalia said in *D.C. v. Heller*, "... what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct." Ditto the Ninth and Tenth Amendments. They must be afforded real vitality for any honest reading of the Constitution.

It is the Tenth Amendment that reserves the right of Montana to enact and preemptively implement the MFFA. It is the Ninth Amendment which reserves to me the individual right to manufacture and sell a firearm, without federal licensure or regulation, as long as that firearm does not leave Montana (and perhaps even if it does leave Montana, although that permutation is not at issue in *MSSA v. Holder*).

C. Because of the effect of the Second, Ninth and Tenth Amendments on ICC assertion by Congress, a rational basis will no longer suffice as justification for governmental intrusion into spheres of operation protected by the Second, Ninth and Tenth Amendments.

A perfectly lucid argument can be made, and is made here, that before the federal government may interfere with Montana's implementation of the MFFA, or interfere with my intent to make and sell the Montana Buckaroo to Montana customers, the federal government must show clearly that it both has a compelling government interest, and that it is using the least restrictive means to accomplish its purpose.

The history of enactments of the federal laws at issue here that are claimed to prevent Montana from implementing the MFFA, and to prevent me from making and selling the Montana Buckaroo, demonstrates that these laws were enacted ostensibly to help Montana fight local crime. That Montana enacted the MFFA shows that Montana does not want or need any such mother-knows-best assistance from the federal government.

Further, Congress did not attempt any less restrictive or more focused measures before enacting those laws that the U.S. now asserts prohibit Montana's implementation of the MFFA, and also prohibit my unregulated production and sale of the Montana Buckaroo.

D. The laws that the U.S. asserts prohibit Montana from implementing the MFFA, and that prohibit me from making and selling the Montana Buckaroo sans federal regulation, are clearly a form of prior restraint. SCOTUS has been clear that prior restraint upon the exercise of constitutionally-protected rights is not to be

lightly tolerated. Because federal laws being applied inhibit exercise of Second, Ninth and Tenth Amendment reserved rights in advance, those laws neatly fit the prior restraint definition. Generically, prior restraint of a reserved constitutional right may not be done when supported only by a rational basis. It will be difficult or impossible for the U.S. to muster persuasive arguments to satisfy a level of review more strict than a simple rational basis concerning an asserted federal trump of the MFFA.

E. When Montana entered into statehood in 1889, that event was memorialized via a contract, called the *Compact with the United States* (Compact), now found at Article I of the Montana Constitution. Note that the terms "contract" and "compact" are effectively synonymous, except that such instruments are more likely called compacts when entered into between states or nations. Compacts and contracts submit to the same historic legal principles, such as competent parties, subject matter, legal considerations, mutuality of agreement, and mutuality of obligation.

Montana's Compact incorporated two other significant documents: Ordinance 1 of the Montana Legislature, and the Enabling Act of Congress. Montana's Compact declares on its face that it may not be amended unilaterally, as in principle with all contracts. In Ordinance 1, Montana agreed to accept the United States Constitution as it was understood in 1889. The interpretation of the present terms and conditions of that contract must be viewed in light of how those terms and conditions were accepted and understood in 1889.

If the people of Montana had understood in 1889 that this proposed Compact would preclude them from being able to make firearms, or even repair firearms, without a federal license, I seriously doubt that the Montana Legislature would have approved the Compact and Ordinance 1.

Said differently, there is nothing in the Compact, Ordinance 1, or the Enabling Act of Congress mentioning manufacture of firearms whatsoever. Nothing. In 1889, the ICC was not understood to give Congress the power to prohibit any economic activity within states. That was the view of the accepted terms and conditions surrounding the contract in 1889. Today, that contract must be held to the accepted usages and understandings in effect at the time the contract was entered into. That is standard contract law. For the U.S. to attempt to prevent implementation of the MFFA, and to prevent me from making and selling the Montana Buckaroo, amounts to breach of contract by attempted but prohibited unilateral amendment of Montana's Compact.

Of course, the first remedy for breach of contract is a demand for performance. *MSSA v. Holder* is that demand for performance under Montana's Compact. If contract enforcement cannot be obtained, the ultimate remedy is rescission of contract. We prefer not to rattle that particular saber, but that ultimate remedy remains an inescapable final option that cannot be blinked away.

IV. Possible SCOTUS options

SCOTUS could decline to accept *MSSA v. Holder*, or there is a range of remedies that SCOTUS could apply after considering merit arguments.

A. SCOTUS could certainly decline to accept *MSSA v. Holder*. I submit that this would be a serious strategic error. Truly, America is at an historic crossroads. For an excellent recitation of many of the unacceptable and improper usurpations of power by the federal government, see Mark Levin's new book, *The Liberty Amendments*. Suffice it to say that where the primary role of government is supposed to be to protect the liberties of the people, our federal government is charging madly down the road to transform the U.S. into some form of police state where everything that is not permitted by government is forbidden. That is simply unacceptable.

The time will come very soon when the Kennedy equation is likely to tip decisively in one direction or the

other. I dearly hope that SCOTUS will avail itself of *MSSA v. Holder* to shepherd in the much preferred peaceful revolution in President Kennedy's equation. The alternative is too dire to contemplate, but remains clearly potential.

B. SCOTUS could reverse *Wickard* and all of its progeny, based on demonstration that the *Wickard* Court improperly amended the Constitution. That would certainly take courage. But, such a decision would repair a lot of wrong that has happened in our Nation, and would reaffirm the proper principles by which our federal government is supposed to be governed.

The aftershocks of such a decision might even undo some federal policies that many or most people think are good things, even if they are deemed as properly beyond the purview of Congress. From the perspective of principle, such a decision would still be the right thing to do. Of those federal policies that are popular and that might be undone by this solution, probably all could and many would be implemented separately and properly by affected states. They would not be lost.

C. SCOTUS could admit that the Ninth and Tenth Amendments are equal in vitality to the other amendments, that they effect and modify the underlying Constitution, and that they prevail when in conflict with the Supremacy Clause, the Necessary and Proper Clause, and the ICC as the most recent expression of the enacting authority, especially as applied to the MFFA.

D. Because of the effect of the Second, Ninth and Tenth Amendments, SCOTUS could invoke prior restraint doctrine and require that invasions of those protected spheres may only be justified by strict scrutiny, or some clearly-articulated form of intermediate scrutiny (if that can be done).

E. SCOTUS could decide that *Wickard* must be narrowed to its fact set, that it is limited to a scheme to support wheat prices during time of national economic emergency only, and that the subsequent *Wickard* doctrine simply doesn't apply to the MFFA because the MFFA is outside of the *Wickard* fact set and rationale.

F. SCOTUS could hold that the asserted federal trump of the MFFA violates Montana's contract for statehood, and SCOTUS could grant Montana's demand for contract performance.

G. Of course, SCOTUS could accept *MSSA v. Holder*, circle the wagons, reaffirm all ICC precedent from *Wickard* through *Raich*, and uphold the Ninth Circuit's *MSSA v. Holder* decision. However, I submit that such a solution would play as badly against the current background of national distress and potential turmoil as option A. above.

V. Conclusion

SCOTUS will soon receive detailed legal briefing from MSSA and *amici* about all of the issues raised here. Just as the colonies pleaded with King George in various petitions to grant relief from intolerably burdensome governance, I plead with you to both accept *MSSA v. Holder* and to use it as a vehicle to grant principled and effective and desperately needed relief to plaintiffs, and to a very troubled Nation.

Thank you for your consideration, and for your concern for the people of these United States.

Very sincerely yours,

Gary Marbut
Missoula, Montana
gary@marbut.com