UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

UNITED STATES OF AMERICA	)	DOCKET NO. 5:09CR27-V
	)	
v.	)	UNITED STATES' RESPONSE IN
	)	OPPOSITION TO BRIEF OF *AMICUS*
	)	*CURIAE*
(1) BERNARD VON NOTHAUS	)	
	)	
	)	
_____	)	

NOW COMES the United States of America, by and through Anne M. Tompkins, United States Attorney for the Western District of North Carolina, and submits this Response in Opposition to *Amicus Curiae Brief of Gold Anti-Trust Action Committee Inc.* For the reasons set forth below, the arguments advanced by the *amicus* should be disregarded by this court.

PROCEDURAL BACKGROUND

On May 19, 2009, a federal grand jury sitting in the Western District of North Carolina returned a Bill of Indictment against Defendant and three co-defendants. (Doc. 3). Defendant von Nothaus (hereinafter "Defendant") was charged with violating Title 18, United States Code, Section 371 (conspiracy to violate 18 U.S.C. §§ 485, and 486), and substantive violations of Title 18, United States Code, Sections 1341, 485, 486, and 2. On November 17, 2010, the grand jury returned a Superseding Bill of Indictment against the same group of defendants. (Doc. 103). The Superseding Bill of Indictment charged Defendant along with co-defendants Innes, Bledsoe, and Moseley with violating Title 18, United States Code, Section 371 (conspiracy to violate 18, U.S.C. §§ 485 and 486). Defendant and co-defendant Innes were also charged with substantive violations of Title 18,

United States Code, Sections 485, 486, and 2.

On March 8, 2011, Defendant von Nothaus' jury trial on these charges began in Statesville, North Carolina (Defendant's case was severed from those of his co-defendants). During trial, the government presented approximately two days of evidence and rested its case on March 10, 2011. At that time, the Court denied Defendant's motion to dismiss the charges pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Defendant subsequently presented evidence to the jury for approximately four days. On March 17, 2011, the defense rested its case; after a single rebuttal witness testified for the government, the case was sent to the jury for deliberations which began on the morning of March 18, 2011. That same day, after less than two hours of deliberations, the jury returned a verdict finding Defendant guilty on all three counts against him in the Superceding Bill of Indictment. The Court denied Defendant's renewed Rule 29 Motion at that time.

On March 31, 2011, Defendant filed *Post-Conviction Motions Under Rules 29, 33, and 34 of the Fed.R.Crim.Proc*. (Doc. 197). The government filed a Response to these motions on April 7, 2011 (Doc. 201), in which it set forth a significant discussion of the testimony and evidence presented at trial. On May 18, 2011, the Gold Anti-Trust Action Committee (herinafter "GATA") filed a *Motion for Leave to File Brief Amicus Curiae* (Doc. 208), which was granted by the court on May 19, 2011. The immediate *amicus curiae* brief was filed by GATA on May 31, 2011.

DISCUSSION

In its *amicus curiae* brief, GATA urges this court to dismiss the jury's verdict against the defendant, including all three counts of conviction, due to a constitutional argument advanced for the first time in these proceedings. Specifically, GATA directly challenges the constitutionality of

18 U.S.C. § 486 and asserts that, due to the alleged unconstitutionality of the statute, the court erred in instructing the jury at trial. Neither issue was raised by the defendant during the course of this prosecution and, therefore, neither issue is currently before this court. As a result, it is unclear which, if any, specific post-trial defense argument GATA seeks to support, or whether they merely seek to advance their own unique motion at this time. In their brief, GATA discusses at great length the government's post-trial press release and post-trial press coverage of this case, neither of which is relevant to any issue before the court at this time. Significantly, GATA avoids any discussion of the testimony or evidence presented at trial against the defendant.

I. PROCEDURAL DEFICIENCY

Generally, new issues raised by an *amicus* are not properly before the court. *See United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n. 2 (1981); *Knetsch v. United States*, 364 U.S. 361, 370, (1960). The Fourth Circuit and the majority of other Circuits have consistently been wary, even prohibitive, of addressing an issue raised solely by an *amicus*. *Snyder v. Phelps,* 580 F.3d 206, 216, (4th Cir. 2009); see also, *United States v. Buculei*, 262 F.3d 322, 333 n. 11 (4th Cir.2001)("'An issue waived by appellant cannot be raised by *amicus curiae*.'"); *Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n. 2 (4th Cir.1996)(declining to address issue not raised in opening brief, as it would be "unfair to the appellee and would risk an improvident or ill-advised opinion on the legal issues").

In very "limited and circumscribed circumstances" defined and chosen solely by the Supreme Court, the Supreme Court has addressed issues raised solely by an *amicus*, but this occurrence is very rare. See *Teague v. Lane*, 489 U.S. 288, 300 (1989)(addressing retroactivity issue on appeal because "the question is not foreign to the parties" who addressed retroactivity with respect to another claim). However, the Fourth Circuit, post-*Teague,* has declined to consider issues raised only by *amicus*.

Snyder, 580 F.3d at 217 ("With all respect to the Supreme Court treatment of the waiver issue in *Teague* and *Davis*, this situation does not warrant an exception to our post-*Teague* circuit precedent."). Most importantly, there is no provision within the Federal Rules of Criminal Procedure which provide for the filing of a motion by a non-party intervenor or *amicus* prior to the entry of judgment in the District Court.[1]

While it is unclear from the *amicus* pleading whether GATA seeks to join any specific post-conviction motion filed by Defendant, it is clear that GATA seeks to advance new issues for the court to consider, namely an explicit constitutional challenge to 18 U.S.C. § 486 and a challenge to the jury instructions. Neither argument has been raised by Defendant to date. Therefore, it is procedurally improper for the *amicus* to propose these arguments at this juncture.

To the extent that GATA seeks a reconsideration of the issues raised in Defendant's motion to dismiss pursuant to Rule 12(b) for failure to state an offense (and renewed through Defendant's post trial Rule 34 motion), that issue has been fully litigated at the district court level, and the court has ruled against the defendant. For the foregoing reasons, the issues raised by GATA in its *amicus* brief are inappropriately raised at this juncture and should be disregarded by this court.

II. CONSTITUTIONAL ARGUMENT

In seeking to lobby for a dismissal of the jury verdict in this matter, GATA makes the claim that 18 U.S.C. § 486 in unconstitutional as construed and applied in this case in that it precludes the uttering or passing of coins, intended for use as current money, not only when those coins are "in the resemblance of coins of the United States," but also when those coins are "of original design." It contends that the second avenue of prosecution- the "original design" avenue- is unconstitutional

[1]Fed.R.Civ.P 24 allows for an intervention in a civil matter within the court's discretion.

and, due to the court's failure to instruct the jury that they could not convict under this theory of prosecution, the jury instructions were deficient. Essentially, GATA alleges that the court erred by providing the jury with the plain language of the statute and takes issue with the government's "literal" interpretation of the statute.

As an initial matter, the government's theory of the case- as demonstrated by the indictment, the evidence presented to the jury, and closing arguments- was that the Liberty Dollar coins at issue in this case resembled coins of the United States. It is clear, by virtue of the jury's conviction of the defendant for violating 18 U.S.C. § 485 (counterfeiting), that the jury agreed. A necessary element of 18 U.S.C. § 485 is that the illegal coin be "in resemblance or similitude" to U.S. coins of a denomination higher than 5 cents. The evidence presented by the government at trial overwhelmingly demonstrated that the Liberty Dollar coins resembled U.S. coins. Nevertheless, GATA's constitutional attack focuses on the portion of the statute that supports conviction even in the event that the illegal coins were "of original design." This argument is wholly without merit and should be disregarded by the court in its consideration of the pending motions.

A. Title 18 U.S.C. § 486 is Constitutional

First, GATA's constitutional argument suffers from the same deficiency as do some of the arguments advanced by the defendant in his post-trial motions. Both parties conflate and confuse the distinct activities of (1) engaging in a true and voluntary barter, and (2) uttering coins intended to be used as current money. Indeed, GATA intentionally merges these two very different concepts in an effort to advance a new argument in this case- the remarkable claim that "[b]ecause Article I, Section 8, Clause 5 cannot be reasonably construed to authorize Congress to prohibit the People from exercising their inherent power to use whatever they voluntarily choose to bargain and

exchange, the right of the People to create a medium of exchange in competition with the official U.S. currency is reserved by the Tenth Amendment to the People." (*Amicus* Brief, p. 21). In making this claim, GATA erroneously assumes the existence of some "inherent power and natural right of the People" to attempt to undermine the United States monetary system and declares that the federal government is powerless from enacting laws to protect and preserve the integrity of this system. This argument finds no support in law. Indeed, the Fourth Circuit has held that "every act of Congress is entitled to a 'strong presumption of validity and Constitutionality'" and will be invalidated only for the "most compelling constitutional reasons". *Brzonkala v. Virginia Polytechnic Institute and State University*, 132 F.3d 949, 964 (1997) *citing Barwick v. Celotex Corp*., 736 F.2d 946, 955 (4th Cir.1984) and *Mistretta v. United States*, 488 U.S. 361 (1989). The Supreme Court has directed that "given the deference due the 'duly enacted and carefully considered decision of a coequal and representative branch of our Government', a court is 'not lightly to second-guess such legislative judgments". *Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985). The Supreme Court has categorized review of judgments by the legislature as "the paradigm of judicial restraint". *FCC v. Beach Communications, Inc*. 508 U.S. 307 (1993). It is with this great deference that the court must consider the contentions of the *amicus*.

The powers expressly delegated to the federal government are commonly referred to as the 'enumerated powers' and are contained in Article I, §8 of the U.S. Constitution, wherein Congress is empowered, among other things, "[t]o coin Money, regulate the Value thereof, and of foreign coin, and fix the Standard of Weights and Measures." U.S. Const. art. I, § 8. It is well established that the aggregate powers granted to Congress by the Constitution include broad and comprehensive

authority over revenue, finance, and currency. *Norman v. B. & O. R. Co.*, 294 U.S. 240 (1934).

Chief Justice Hughes discussed this authority at length in *Norman*:

> It is unnecessary to review the historic controversy as to the extent of this power, or again to go over the ground traversed by the Court in reaching the conclusion that the Congress may make treasury notes legal tender in payment of debts previously contracted, as well as of those subsequently contracted, whether that authority be exercised in course of war or in time of peace. *Legal Tender Cases (Knox v. Lee)* 12 Wall. 457, 20 L.Ed. 287; *Legal Tender Case (Juilliard v. Greenman)* 110 U.S. 421, 28 L.Ed. 204, 4 S.Ct. 122. We need only consider certain postulates upon which that conclusion rested.
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> The Constitution grants to the Congress power "To coin money, regulate the value thereof, and of foreign coin." Art. I § 8, ¶ 5. But the Court in the legal tender cases did not derive from that express grant alone the full authority of the Congress in relation to the currency. The Court found the source of that authority in all the related powers conferred upon the Congress and appropriate to achieve "the great objects for which the government was framed,"—"a national government, with sovereign powers." *M'Culloch v. Maryland*, 4 Wheat. 316, 404–407, 4 L.Ed. 579, 601, 602; *Legal Tender Cases* (*Knox v. Lee*) *supra* (12 Wall. 532, 536, 20 L.Ed. 306, 307); *Legal Tender Case (Juilliard v. Greenman) supra* (110 U.S. 438, 28 L.Ed. 211, 4 S.Ct. 132). The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several States, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power "to make all laws which shall be necessary and proper for carrying into execution" the other enumerated powers. *Legal Tender Case (Juilliard v. Greenman) supra* (110 U.S. 439, 440, 28 L.Ed. 211, 212, 4 S.Ct. 122).
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> The Constitution "was designed to provide the same currency, having a uniform legal value in all the States." It was for that reason that the power to regulate the value of money was conferred upon the Federal government, while the same power, as well as the power to emit bills of credit, was withdrawn from the States. The States cannot declare what shall be money, or regulate its value. ***Whatever power there is over the currency is vested in the Congress.*** *Legal Tender Cases (Knox v. Lee) supra* (12 Wall. 545, 20 L.Ed. 310).
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> The authority to impose requirements of uniformity and parity is an essential feature of this control of the currency. The Congress is authorized to provide "a sound and

> uniform currency for the country," and to "secure the benefit of it to the people by appropriate legislation." *Veazie Bank v. Fenno*, 8 Wall. 533, 549, 19 L.Ed. 482, 488.

Id. at 303-304 (emphasis added).

Additionally, in *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850), the Supreme Court relied upon the Article I, clause 5 powers, coupled with the Necessary and Proper clause, in affirming Congress's constitutional ability to criminalize the passing of counterfeit notes. *Id.* In so doing, it reasoned as follows:

> The power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such a standard of value; and on account of the impossibility which was foreseen of otherwise preventing the inequalities and the confusion necessarily incident to different views of policy, which in different communities would be brought to bear on this subject. The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power. ***It cannot be imputed to wise and practical statesmen, nor is it consistent with common sense, that they should have vested this high and exclusive authority, and with a view to objects partaking of the magnitude of the authority itself, only to be rendered immediately vain and useless, as must have been the case had the government been left disabled and impotent as to the only means of securing the objects in contemplation.***
>
> If the medium which the government was authorized to create and establish could immediately be expelled, and substituted by one it had neither created, estimated, nor authorized,-one possessing no intrinsic value,-then the power conferred by the Constitution would be useless, wholly fruitless of every end it was designed to accomplish. Whatever functions Congress are, by the Constitution, authorized to perform, they are, when the public good requires it, bound to perform; and on this principle, having emitted a circulating medium, a standard value indispensable for the purposes of the community, and for the action of the government itself, ***they are accordingly authorized and bound in duty to prevent its debasement and expulsion, and the destruction of the general confidence and convenience, by the influx and substitution of a spurious coin in lieu of the constitutional currency.***
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> We trace both the offence and the authority to punish it to the power given by the Constitution to coin money, and to the correspondent and necessary power and

> obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation.

Id. at 567-68 (emphasis added); *see also United States v. Gayekpar*, 211 Fed.Appx. 533, 534 (8th Cir. 2007) (unpublished) ("Congress' power to regulate the alteration of genuine U.S. currency is part of its broad power 'to protect and to preserve in its purity this constitutional currency for the benefit of the nation.'" (quoting *Marigold*, 50 U.S. at 568)); *United States v. Howell*, 470 F.2d 1064, 1066 (9th Cir.1972)(relying on *Marigold* and Art. 1, § 8, cl.5 to uphold 18 U.S.C. § 473)); *Barbee v. United States*, 392 F.2d 532, 536 (5th Cir.1968)(upholding a challenge to a conviction for possession of altered currency in violation of 18 U.S.C. § 472, noting that "because attacks upon the physical integrity of currency in particular may endanger society by depleting the public trust in its economic standard, the government must establish sanctions to discourage such attacks"), *cert. denied*, 391 U.S. 935 (1968).

By the Act of June 8, 1864, Congress prohibited private coinage, whether the coins were similar in appearance to coins of the United States or "of original design." 13 Stat. 120 (1864). This prohibition was reaffirmed by Congress in 1873 (Rev. Stat. U.S. § 5461), 1909 (Act of March 4, 1909, Pub. L. No. 350, ch 321, § 167, 35 Stat. 1120), and 1948 (Act of June 25, 1948, Pub. L. No. 772,ch. 645, § 486, 62 Stat. 709) with no substantive changes to the original statute. The current statute reads as follows:

> Whoever, except as authorized by law, makes or utters or passes, or attempts to utter or pass, and coins of gold or silver or other metal, or alloys of metals, intended for use as current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design, shall be fined no more than $3,000 or imprisoned not more than five years or both.

18 U.S.C. § 486. Significantly, this statute requires that the illegal coins be "intended for use as

current money." In *United States v. Gellman*, 44 F.Supp. 360 (D. Minn. 1942), the court considered an application of the predecessor statute to § 486 (§ 281) and reasoned as follows.

> A reading of these sections [sections 281 and 282] induces the view that they were primarily adopted to prevent the coining of money in competition with the United States; resemblance or similitude is not necessarily an element. The United States has the sole power to coin money under the Constitution, and if anyone, individual or State, assumes to supplant the medium of exchange adopted by our Government, or assumes to compete with the United States Government in this regard, a violation of these statutes would follow. Undoubtedly, no one can interfere with the monopoly which this Government has obtained by reason of the Constitutional provisions without running afoul of these statutes.

Id. at 364. The *Gellman* court held that tokens with inscriptions: "No Cash Value" and "For Amusement Purposes Only" were not used as money because there "was no promise to pay money or anything of value, either impliedly or by reason of any express inscription on the coin." *Id.* The *Gellman* court relied on the following language from *United States v. Rossopulous*:

> *** It does not purport to be a piece of money, or an obligation to pay money, and the obligation expressed is in terms solvable in merchandise. It cannot, therefore, have been intended to circulate as money, or to be received and used in lieu of lawful money..."

95 F. 977, 978 (D.C. Minn. 1899).

In *United States v. Falvey*, 676 F.2d 871, 876 (1st Cir.1982), the First Circuit Court of Appeals agreed with the *Gellman* court regarding the import of § 486, stating that "the primary concern of Congress [in enacting the 1864 act] seems to have been with the prohibition of private systems of coinage created for use in competition with the official United States coinage." *Id.* In considering this statute, the *Falvey* court recognized the authority of Congress to protect the integrity of U.S. currency from "unofficial coinage," stating "[w]e think it unlikely, for example, that Congress intended to proscribe the making of coins "of original design" that were not intended for

use as money in the United States. Otherwise, we would be placed in the position of protecting the integrity of foreign currency from unofficial coinage that did not even resemble it, and without any direct relationship to our own monetary system." *Id.* at 877.

In presenting its constitutional argument in this matter, GATA seeks to advance its private interests by arguing contrary to considerable legal precedent. It is significant that, in making its "natural rights" argument, GATA makes the bizarre and fallacious inference that if citizens have a right "to use whatever they voluntarily choose to bargain and exchange," then they therefore necessarily have an inherent right "to create a medium of exchange in competition with the official U.S. currency." (*Amicus Brief p. 21*). This logic does not follow. There is a drastic difference between the scenario where citizens enter into a voluntary and mutual barter exchange, and the scenario where an individual creates his own alternate coinage and injects that coinage into commerce for the purpose of competing with, and indeed undermining, the U.S. monetary system. Title 18 U.S.C. § 486 punishes the latter, not the former; Mr. von Nothaus was convicted of the engaging in the latter, not the former.[2]

In a true barter exchange, the parties engaged in the exchange have first-hand knowledge of the merchandise that they are exchanging with one another. The defendant in this case was not prosecuted for engaging in a barter system, because that is not what he was doing. Rather, the defendant minted his own coins- coins intentionally designed to resemble U.S. coins; he falsely stamped those coins with false dollar denominations; and he operated a business for the purpose of entering those coins into commerce using deceptive means. When an individual takes such action,

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[2] For purposes of this discussion, we will not discuss in great detail the deceptive and fraudulent means that Defendant employed in issuing his competing currency, as those means were fully discussed in the government's response to Defendant's post-trial motions.

opposed to a voluntary barter situation, there is no assurance that recipients of those coins will understand (1) it is a privately-minted coin, and not a U.S. coin; (2) it is not legal tender, and, (3) it is not of the value it purports to be. The issue then is not whether there exists a right of individuals to engage in voluntary barter, as the *amicus* may have this court believe, but rather whether there is an *absolute* right of individuals to attempt to undermine the U.S. monetary system by injecting private coinage into that system to be used as current money. In light of the case law previously discussed, it is apparent that no such right exists.

The cases set forth above- *Norman*, *Marigold*, the *Legal Tender Cases*, and others- establish the clear constitutional basis for Congress' broad and comprehensive authority over matters of revenue, finance, and currency. These cases demonstrate that the federal government has the explicit constitutional authority to create and maintain a stable currency and a stable domestic monetary system; and consequently, it possesses the authority to pass laws to preserve and maintain the integrity of that system, including 18 U.S.C. § 486. Defendant von Nothaus sought to undermine that system by minting his own coinage (coinage replete with characteristics of U.S. coins for the purpose of deceiving others), falsely stamping dollar-value denominations on that coinage, and injecting that coinage into commerce through distributors and merchants. He was prosecuted and convicted of these activities pursuant to a constitutionally valid criminal statute.

Additionally, GATA's argument that individuals have an inherent right to create a medium of exchange in competition with the official U.S. currency ignores the proscriptions of 18 U.S.C. § 485 which prohibits coinage in resemblance to or similitude of any U.S. coin of a denomination of greater than 5 cents. GATA does not attack the Constitutionality of 18 U.S.C. 485, rather they defer to a "confusion of the jury" argument as a basis to ignore the verdict on that violation. While the

amicus selects portions of the jury instruction to illustrate the contention that the "jury may have been confused" (*Amicus Brief, p.32*) in rendering their guilty verdicts, the law is clear that jury instructions are to be construed as a whole and in light of the entire record, not in a piecemeal fashion. *Chaudhry v. Gallerizo,* 174 F.3d 394, 408 (4th Cir.1999), *cert denied*, 528 U.S. 891 (1999); *United States v. Cobb*, 905 F.2d 784, 789 (4th Cir.1990)("We review a jury instruction to determine 'whether taken as a whole, the instruction fairly states the law'"). Further, "public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation". *Tanner v. U.S.*, 483 U.S. 107, 128 (1987), citing S.Rep. 93-1277, p. 13-14.

The *amicus* suggests that we are to speculate on the jury's understanding of the instructions and draw the conclusion that their verdict was rendered improperly. They also rely upon this speculation to suggest that the guilty verdict on Count One (Conspiracy Against the United States; 18 U.S.C. § 371) should be set aside because the jury "could have" found the defendant guilty by relying on 18 U.S.C. § 486. However, the law is well-settled that "a guilty verdict must be sustained if the evidence shows the conspiracy furthered any one of the objects alleged." *United States v. Bolden*, 325 F.3d 471, 492 (4th Cir. 2003). To ignore the overwhelming evidence regarding the common and similar features of the Liberty Dollar coins when compared to U.S. coinage, the defendant's words and deeds in relation to the distribution of the Liberty Dollar coins, the literature and marketing materials related to the creation, use and distribution of the Liberty Dollar coins, and the clear ability of the jury to visually compare the Liberty Dollar coins to U.S. coinage and make a determination of the resemblance and similarities between the two, would be contrary to well-

settled law.

B. Harmless Error

Should the court determine that the contested portion of 486 is in fact unconstitutional, the resulting error in instructing the jury would still remain subject to harmless error analysis and would not ultimately warrant dismissal of the convictions against the defendant. As a general matter, preserved errors, even those of constitutional moment, are reviewed at the appellate level for harmlessness under Federal Rule of Criminal Procedure 52(a). *Neder v. United States*, 527 U.S. 1, 7-8 (1999); *see also United States v. Davis*, 270 Fed.Appx. 236 (4th Cir. 2008). Indeed, "most constitutional errors can be harmless." *Neder*, 527 U.S. at 8 (internal quotations omitted) . In *Nader*, the Supreme Court considered the complete omission of an element of the offense from jury instructions to be analogous "to improperly instructing the jury on an element of the offense, an error which is subject to harmless-error analysis." *Id.* at 10. Indeed, the Supreme Court has often applied harmless-error analysis to cases involving improper instructions on a single element of the offense. *See, e.g., Yates v. Evatt*, 500 U.S. 391(1991)(mandatory rebuttable presumption); *Carella v. California*, 491 U.S. 263 (1989) (per curiam)(mandatory conclusive presumption); *Pope v. Illinois*, 481 U.S. 497 (misstatement of element); *Rose v. Clark*, 478 U.S. 570 (1986)(mandatory rebuttable presumption); see also *California v. Roy*, 519 U.S. 2, 5 (1996) (per curiam)("The specific error at issue here-an error in the instruction that defined the crime-is ... as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission' ").

"[T]he test for determining whether a constitutional error is harmless .... is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Nader*, 527 U.S. at 15-16, ((quoting *Chapman v. California*, 386 U.S. 18, 24 (1967); citing *Delaware*

v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt"). Further, the *Nader* Court stated,

> Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error-for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding-it should not find the error harmless.

Id. at 19.

Were the court to concur with GATA's constitutional attack in the immediate case, the resulting error in instructing the jury as to the elements of 18 U.S.C. § 486 would be analogous to other cases in which courts provided improper instructions on a single element of the offense. Under such circumstances, the harmless error standard is to be applied. In this case, the answer to a harmless analysis inquiry of this type would reside in the verdict itself.

At trial, the government pursued the primary theory that the Liberty Dollar coins resembled coins of the United States. Indeed, the government charged the defendant with violating 18 U.S.C. § 485 (counterfeit statute) which includes, as a necessary element, that the illegal coin be "in resemblance or similitude" to U.S. coins of a denomination higher than 5 cents. The evidence presented by the government at trial overwhelmingly established that the Liberty Dollar coins resembled U.S. coins.[3] And, it is clear, by virtue of the jury's conviction of the defendant for violating 18 U.S.C. § 485, that the jury ultimately found, beyond a reasonable doubt, that the "resemblance or similitude"requirement of the counterfeiting statute was met. By its verdict,

[3]In fact, it was established that Liberty Dollars were marked with three of the four same, or very similar, words or symbols which are statutorily required elements for U.S. coinage.

therefore, the jury explicitly and necessarily found that the Liberty Dollars were in fact "in resemblance or similitude" to U.S. coins, thereby supporting the government's first avenue of prosecution under 18 U.S.C. § 486 and the conspiracy count (18 U.S.C. § 371) on both objects. Consequently, even if it were determined that the second avenue of prosecution available under § 486 were deemed unconstitutional, there is a sufficient record to sustain the jury's verdict on the first avenue of prosecution and, therefore, on all three counts in this case. Any error in the jury instructions would be harmless.

III. CONCLUSION

For the foregoing reasons, the arguments advanced by the *amicus curiae* in this case should be disregarded by this court. In addition to the procedural impropriety of the pleading, the *amicus* substantively presents a legally unsupportable position in an effort to urge this court to declare a portion of a federal statute unconstitutional and to dismiss the jury's verdict against Defendant von Nothaus. It is wholly inconsistent with historic constitutional principles, and with pure common sense, to suggest that, were one, hundreds, or even thousands of U.S. citizens to start their own personal monetary systems to compete with, and seek to undermine, the U.S. monetary system, Congress would be required to sit idly by, impotent, regardless of what adverse impact such a scenario might have on that system or the U.S. economy in general. GATA may wish for this scenario, and it may even believe that this scenario would be preferable to our current system; however, the federal courts are not a political forum for GATA to pursue its lobbying interests. If GATA wishes to seek the repeal of 18 U.S.C. § 486, it can lobby Congress to do so. But there can be no question, in light of the constitutional precedent discussed, that the United States Congress

possesses the legal authority to regulate such behavior by statute, which it has done through the passage of 18 U.S.C. § 486. Further, the federal government has the authority to enforce that law, and it has done so through the prosecution of Defendant von Nothaus for his illegal activities.

For the foregoing reasons, the government contends that GATA's *amicus curiae* brief should be disregarded by this court.

RESPECTFULLY SUBMITTED, this, the 10th day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this10th day of June, 2011, the foregoing document was electronically served upon Defendants at the following addresses:

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