Bancroft PLLC

December 5, 2012

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 941103
VIA E-FILING

Re: *Peruta v. County of San Diego*, Case No. 10-56971
Response to Appellees' November 29, 2012 Rule 28(j) Letter

Dear Ms. Dwyer:

Pursuant to FRAP 28(j), Appellants respond to Appellees' supplemental citation of *Kachalsky v. Westchester*, No. 11-3642, 2012 WL 5907502 (2d Cir. Nov. 27, 2012).

Kachalsky correctly acknowledged that "[t]he plain text of the Second Amendment does not limit the right to bear arms to the home," *5 n.10, "the Amendment must have *some* application in the . . . context of public possession," *5, a prohibition on both open and concealed carry substantially burdens Second Amendment rights, *8, and heightened review applies, *8.

Despite those correct observations, which should have spelled the New York law's demise, *Kachalsky* upheld it. Nonetheless, *Kachalsky* does not assist Appellees for multiple reasons. First, New York law differs materially from the County's challenged policy. Most notably, the meaning of New York's "proper cause" standard was fixed, whereas here some Counties interpret "good cause," broadly to avoid Second Amendment difficulties, while others, like Appellees, interpret it narrowly to exacerbate constitutional problems. New York law also allowed carrying in circumstances foreclosed by California law.

Kalchasky also provides a cautionary tale about the need to apply strict scrutiny to laws that substantially burden Second Amendment rights. *Kachalsky* instead applied a watered-down version of intermediate scrutiny that resembled the

"interest-balancing" test favored by Justice Breyer, but emphatically rejected by the Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Kachalsky* mistakenly placed the burden on individuals to prove they have some "proper cause" to exercise their fundamental right, instead of on the government. *See* *8-15. Equally telling, *Kalchasky* invoked the same precedents (*e.g.*, *Turner Broadcasting v. FCC*, 520 U.S. 180 (1997)), as did Justice Breyer in his dissent. *12.

Finally, *Kachalsky*'s finding that "there is no right to engage in self-defense with a firearm until the objective circumstances justify the use of deadly force," *15, fatally conflicts with *Heller*'s recognition of a "right to possess and carry weapons in case of confrontation," 554 U.S. at 592. The Second Amendment enshrines an affirmative, fundamental right, not merely a right that remains inchoate until one is attacked. It is a right to self-defense, not merely retaliation.

Respectfully submitted,

/s Paul D. Clement
Paul D. Clement
Attorney for *Plaintiffs-Appellants*

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2012, an electronic PDF of this Response to Appellees' November 29, 2012 Rule 28(j) letter was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

/s Paul D. Clement
Paul D. Clement
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