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February 23, 2015

The Hon. Mark J. Langer, Clerk
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, DC 20001-2866

Re: *Dearth v. Holder*, No. 12-5305
Re-argument set for March 5, 2015

Notice of Supplemental Authority, Fed. R. App. P. 28(j)

Dear Mr. Langer:

The Sixth Circuit has struck down 18 U.S.C. § 922(g)(4) as applied to a particular plaintiff. *Tyler v. Hillsdale Cnty. Sherrif's Dept.*, No. 13-1876, 2014 U.S. App. LEXIS 23929 (6th Cir. Dec. 18, 2014).

Applying strict scrutiny, *Tyler* held Section 922(g)(4) unconstitutional in part because plaintiff's state did not afford access to relief from the provision's disability available to residents of other states. "An individual's ability to exercise a 'fundamental righ[t] necessary to our system of ordered liberty' cannot turn on such a distinction." *Tyler*, 2014 U.S. App. LEXIS 23929, at *59 (quotation omitted). Likewise, *Dearth's* ability to obtain a gun for self-defense cannot turn on the distinction between residents and nonresidents, especially where the Government has not attempted to explain how that distinction relates to its asserted anti-smuggling interests.

Mr. Langer
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Plaintiffs further note that nowhere in the *Tyler* complaint do the words “as applied” or any similar terms appear. Indeed, the *Tyler* complaint describes Section 922(g)(4) as “overbroad” or “unconstitutionally broad” eleven times. See Complaint, *Tyler v. Holder*, W.D. Mich. No. 12-523, at ¶¶ 3, 4, 5, 6, 7, 8, 11, 48, 53, 59, 60; see also *id.* at ¶ 45 (“any individual”). Yet neither the Sixth Circuit, nor the district court below it, paused to consider whether claiming that the law violated the “plaintiff’s right,” *id.* at ¶ 48—the same language used to describe the Section 922(a)(9) challenge here, JA 15 ¶ 26 (laws “violate Plaintiffs’ rights”)—fit into a precise as-applied peg.

Tyler thus supports the District Court’s finding here, with which the Government once agreed, T. 42 l. 13 (“the challenge is as applied to Mr. Dearth”), that Plaintiffs presented an as-applied challenge to Section 922(a)(9). *Cf. Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (“the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge,” and does “not [concern] what must be pleaded in a complaint”) (citation omitted).

Sincerely,

/s/ Alan Gura

The body of this letter contains 343 words.

CERTIFICATE OF SERVICE

On this, the 23rd day of February, 2015, I served the foregoing by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 23rd day of February, 2015.

/s/ Alan Gura
Alan Gura