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VIA ECF

Ms. Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
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Re: *John Teixeira, et al. v. County of Alameda, et al.*, No. 13-17132
Panel Opinion filed May 16, 2016
Petition for Rehearing En Banc filed July 21, 2016
Order Directing Response to Petition filed July 27, 2016
Response to Petition filed September 20, 2016

Dear Ms. Dwyer:

Alameda County submits this letter under Federal Rule of Appellate Procedure 28(j) to address two decisions Plaintiffs cited in their Response (at 6, 7, 10 & 11) that were issued after the County filed its Petition.

In *Tyler v. Hillsdale County Sheriff's Department*, 2016 WL 4916936 (6th Cir. Sept. 15, 2016) (en banc), the Sixth Circuit examined whether a federal statute fits within *Heller*'s "presumptively lawful" category of regulations on possession by the mentally ill. The Sixth Circuit addressed this question at the motion-to-dismiss stage. *Id.* at *4. The procedural posture in this case is identical, and en banc consideration is equally appropriate here. Indeed, *Heller*'s carve-outs are important because they prevent protracted litigation, absent allegations sufficient to rebut the enumerated regulations' presumptive validity. See Pet. 21-22; *contra* Response 2, 9-12.

Moreover, concurring in the judgment for four judges, Judge Sutton explained that to demonstrate that a "*Heller* exception" does not apply, a plaintiff must "show" that his "constitutional right to possess a gun" was compromised.

Tyler, 2016 WL 4916936, at *25. This threshold step to rebut a regulation’s presumptive validity precedes any application of heightened scrutiny. *Id.*; accord Pet. 9-10.

Similarly, in *Binderup v. Attorney General*, 2016 WL 4655736 (3d Cir. Sept. 7, 2016) (en banc), the Third Circuit concluded that a challenge to a “presumptively lawful” regulation is properly brought as an as-applied challenge. And “the burden [is] on the challenger to rebut the presumptive lawfulness of the exclusion” with a “strong” showing—“no small task”—before any “burden shifts to the Government.” *Id.* at *7.

Here, Plaintiffs did not meet their initial burden because they could not allege that “individuals cannot lawfully buy guns in Alameda County,” for example at one of the “ten gun stores already operating.” Dissent 35. Their assertion that the Ordinance “regulate[s] [gun stores] out of existence” is baseless. Response 3.

Additionally, that the Third and Sixth Circuits recently sat en banc to review the standards governing *Heller*’s “presumptively lawful regulatory measures” only underscores the exceptional importance of questions like the one presented in this case. Rehearing en banc is similarly warranted here.

Respectfully submitted,

/s/ Robert M. Loeb
Robert M. Loeb

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County of Alameda, et al.*

cc: Counsel of Record (via CM/ECF)