

September 26, 2016

Via: E-File

Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco, California 94103-1526

Case: *Teixeira v. County of Alameda*, No.: 13-17132
Re: Appellants Response to Fed. R. App. P. 28(j) Letter.
Status: Panel Opinion file May 16, 2016.
Petition for Rehearing En Banc filed July 21, 2016.
Response filed September 20, 2016.
Action: Distribute as appropriate given the status of the case.

Your Honors:

No reply was authorized by the Court's Order (Doc #80) that Appellants file a Response. Appellants already brought these new cases to the attention of the court in their filing (Doc #106). That makes Appellees' letter (Doc # 108) read more like an unauthorized reply than a true notice of supplemental authority under Appellate Rule 28(j).

Never-the-less, Appellees letter actually supports the arguments made in the response opposing the petition.

The order and judgment dismissing this case in the District Court was entered more than three (3) years ago on September 4, 2013 [ER: 10] and September 17, 2013 [ER: 7], respectively. Since then, multiple cases (including the ones cited in Appellees' letter) have been filed in various circuits (including the Ninth) expounding on the *Heller* presumptions, how and when they can be overcome, the quality and

quantity of evidence necessary to uphold or overcome them and whether they even apply in any given circumstance.

The gist of the panel's May 16, 2016 opinion is that dismissal by the District Court was premature given the factual record and the fundamental nature of the right burdened by the County's action. In point of fact, both parties will benefit from the intervening case law in those three years, if/when the case is remanded to the District Court. (It may even be appropriate to amend the complaint one more time.)

Neither *Tyler v. Hillsdale County Sheriff's Department*, 2016 WL 4916936 (6th Cir. Sept. 15, 2016)(en banc) nor *Binderup v. Attorney General*, 2016 WL 4655736 (3d Cir. Sept. 7, 2016)(en banc) change the status of the factual record in this case. Both cases support Appellants' position, namely that the Petition for Panel Rehearing and/or En Banc Rehearing should be denied so that the parties can get on with the business of preparing an adequate factual record based on the current state of the law.

This letter contains 317 words.

Respectfully Submitted,
/s/
Donald Kilmer
Attorney for Appellants

CERTIFICATE OF SERVICE

On this, September 26, 2016, I served the foregoing NOTICE OF SUPPLEMENTAL AUTHORITY by electronically filing it with the Court's ECF/CM 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 on September 26, 2016.

/s/ Donald Kilmer
Attorney of Record for Appellants