GURA & POSSESSKY
101 N. COLUMBUS ST., SUITE 405
ALEXANDRIA, VIRGINIA 22314
TEL 703.835.9085
FAX 703.997.7665
WWW.GURAPOSSESSKY.COM

December 2, 2012

The Hon. Molly Dwyer
United States Court of Appeals, Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1518

Re: *Richards* v. *Prieto*
U.S. Court of Appeals, Ninth Cir. No. 11-16255

Response to Appellants' Rule 28(j) Letter re:
*Kachalsky* v. *County of Westchester*, No. 11-3642,
2012 U.S. App. LEXIS 24363 (2d Cir. Nov. 27, 2012)

Dear Ms. Dwyer:

Although opinions of other circuits may be persuasive, Supreme Court opinions are binding. *Kachalsky* notwithstanding, this Court must follow *District of Columbia* v. *Heller*, 554 U.S. 570 (2008) and *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010). Reviewing *Kachalsky*'s numerous flaws, the following points appear most salient:

*Kachalsky* erred in holding that the prior restraint doctrine is limited to the First Amendment and, in any event, is inapplicable to the Second. The Supreme Court has never so limited the prior restraint doctrine, and state high courts have applied it to safeguard the right to arms. *See* Appellants' 28(j) Letter, 11/26/12 (citing cases). "Proper cause" is an illusory restraint on police discretion.

*Kachalsky*'s historical survey is flawed. *Kachalsky* misplaced reliance on Reconstruction Era Southern laws that prohibited carrying *some* handguns. Cottrol & Diamond, *"Never Intended to be Applied to the White Population,"* 70 CHI.-KENT L. REV. 1307, 1333 (1995); *see, e.g. Wilson* v. *State*, 33 Ark. 557, 560 (1878). In any event, the Supreme Court has passed on the meaning of "bear arms." Appellants' Br. at 16.

*Kachalsky*'s notion that because "there is no right to engage in self-defense with a firearm until the objective circumstances justify the use of deadly force," Slip Op. 46 (citation and footnote omitted), the Second Amendment does not protect the availability of arms to that point, is irrelevant. Under that theory, Heller had no right to a handgun until an intruder entered his home. But the Second Amendment secures the right to be "armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (citation omitted).

Finally, *Kachalsky*'s use of rational basis review was not sanctioned simply by being euphemistically styled "intermediate scrutiny." *Kachalsky* eviscerated the right to bear arms merely upon the State having declared it unacceptable as a matter of public policy. The *Kachalsky* Court refused to question a legislative judgment relating to an enumerated, fundamental right. But in so doing, *Kachalsky* second-guessed the People's ratification of the Second Amendment—an act the Supreme Court will soon have an opportunity to review.

Sincerely,

/s/ Alan Gura
Alan Gura

Counsel for Appellants

This body of this letter contains 350 words.

cc: Counsel of Record via ECF