

SENIOR COUNSEL
C. D. Michel*

SPECIAL COUNSEL
Joshua R. Dale
W. Lee Smith

ASSOCIATES
Anna M. Barvir
Michelle Biglarian
Sean A. Brady
Scott M. Franklin
Ben A. Machida
Thomas E. Maciejewski
Clint B. Monfort
Joseph A. Silvos, III
Los Angeles, CA

* Also admitted in Texas and the
District of Columbia

Writer's Direct Contact:
562-216-4444
CMichel@michel lawyers.com



OF COUNSEL
Don B. Kates
Battleground, WA

Ruth P. Haring
Matthew M. Horeczko
Los Angeles, CA

Glenn S. McRoberts
San Diego, CA

AFFILIATE COUNSEL
John F. Machtinger
Jeffrey M. Cohon
Los Angeles, CA

David T. Hardy
Tucson, AZ

September 29, 2014

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103
VIA E-FILING

Re: Fyock v. City of Sunnyvale, Case No. 14-15408
Response to Appellees' August 19, 2014 Rule 28(j) Letter

Dear Ms. Dwyer:

Kolbe v. O'Malley, No. 13-2841 (D. Md. 2014), is a district court opinion from another circuit that is not binding on this court. And any persuasive value that might be gleaned from this opinion dissipates in light of the stark differences between the cases.

Kolbe upheld a ban on the purchase and sale of legislatively defined "assault weapons" and "large capacity magazines." Op. 2-3. Although the challenged laws in both cases rely on comparable definitions of "large capacity magazine," the similarities end there. Op. 3; E.R. V 673. The ban in *Kolbe* prohibits only the *sale* of magazines over 10 rounds, *not their possession*. Op. 3 n.9. *Kolbe*'s selection of intermediate scrutiny is thus hardly instructive—especially under the two-step analysis it follows, where the extent of the burden helps determine the level of heightened scrutiny that applies.

Further, unlike the district court in *Fyock*, the *Kolbe* court refused to resolve whether magazines over 10 rounds were commonly used for lawful purposes, i.e., protected by the Second Amendment. It merely "assume[d]" that the magazine *sales* ban "places some burden on the Second Amendment right." Op. 24. Such a disinterested approach indicates that the court did

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not fully consider the extent of the law's burden on core conduct, resulting in its selection of intermediate scrutiny and coloring its application of that test. Op. 24-37.

Finally, Appellees mischaracterize Appellants' argument, suggesting they claim that even "minor" burdens on core conduct trigger strict scrutiny.¹ But Appellants' position is that laws restricting the core right to possess protected arms for self-defense *necessarily* impose a severe burden demanding at least strict scrutiny. Reply 3-4. *Kolbe* cites no precedent precluding Appellants' argument. And here, where *Peruta* controls, a law that destroys a right central to the Second Amendment, like the possession of common arms, is *necessarily invalid*. 742 F.3d 1144 (9th Cir. 2014).

Respectfully Submitted,

s/ C.D. Michel

C.D. Michel
Attorney for Plaintiffs-Appellants

¹ Appellees also mischaracterize the *Kolbe* analysis, claiming that it relied on precedent of the Fourth Circuit *and other circuits* to reject a similar argument. It did not. It relied entirely on Fourth Circuit case law. Op. 27-28, 29 n.32.