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May 13, 2018

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit

Re: *Duncan et al. v. Becerra*, No. 17-56081

Dear Ms. Dwyer:

Plaintiffs-Appellees respectfully submit this response to Defendant-Appellant's Rule 28(j) letter. *Worman v. Healey* and its adoption of the Fourth Circuit's holding that firearms "most useful in military service" fall outside the scope of the Second Amendment, *Kolbe v. Hogan*, 849 F.3d 114, 136 (4th Cir. 2017) (en banc), cannot be reconciled with binding Ninth Circuit and Supreme Court precedent.

First, that standard squarely conflicts with the law of this Circuit. This Court has correctly held that the standard for whether arms are protected by the Second Amendment is whether they are "commonly possessed by law-abiding citizens for lawful purposes." *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015); *see also United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012). That standard is compelled by the Supreme Court's holding in *District of Columbia v. Heller* that weapons "typically possessed by law-abiding citizens for lawful purposes" fall within the scope of the amendment. 554 U.S. 50, 625 (2008). It also is consistent with the text of the amendment, which was designed, in part, to ensure the existence of "[a] well regulated Militia." U.S. Const. amend. II. The state's contrary argument rests on a flat misreading of language in *Heller* that was simply acknowledging that not *all* weapons "most useful in military service" will *necessarily* satisfy the commonly-possessed-for-lawful-purposes test. *Heller*, 554 U.S. at 627.

Even setting aside that binding precedent forecloses the *Kolbe* standard, the state made no record to support its contention that the banned magazines are "more useful in military service." *See* Opening Br.27 (citing no evidence). In fact, as the district court correctly concluded, magazines capable of holding more than 10 rounds are standard issue for many popular firearms used for self-defense. *See* Answering Br.5-6. That they are "commonly possessed by law-abiding citizens for lawful purposes" brings them squarely within the Second Amendment. *Fyock*, 779 F.3d at 997.

In all events, neither *Worman* nor *Kolbe* said anything about the Takings Clause (presumably because, unlike Penal Code §32310, the laws they confronted had express or de facto grandfathering clauses), which provides an independent ground for affirming here.

Respectfully submitted,

s/ Erin E. Murphy
Erin E. Murphy

Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

1. This letter complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 349 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

May 13, 2018

s/Erin E. Murphy
Erin E. Murphy

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Erin E. Murphy
Erin E. Murphy