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January 9, 2019

Via: **E-File**

Molly Dwyer, Clerk  
United States Court of Appeals  
For the Ninth Circuit  
95 Seventh Street  
San Francisco, California 94103-1526

Re: *Rodriguez, et al., v. City of San Jose, et al.* | Case No.: 17-17144

Dear Clerk/Court:

On January 8, 2019, Appellees filed a letter (DktEntry 62<sup>1</sup>) purporting to be supplemental authority under Fed. R. App. P. 28(j). Appellees' Answering Brief (DktEntry 26) was filed on June 26, 2018. Which means relevant cases that can be cited by Rule 28(j), would have to filed after the Answering Brief.

Appellees admit that at least one of the cases they are citing to boot-strap some argument at oral argument was filed in 2016. *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016). The other case – *Pena v. Lindley*, 898 F.3d 969 (9th Cir. 2018) was filed on August 3, 2018, making it chronologically eligible under Rule 28(j). It's just not eligible under the requirement that the citation be "pertinent and significant [...] referring either to the page of the brief or to a point argued orally." *Id.*

On that point, neither case complies. Lori's case can easily be distinguished from both cases. Applying *Wilson* – Lori is not prohibited from acquiring, owning, or possessing firearms, under **any** theory of disability. (e.g., drugs, felon, mental health, etc...) Therefore denying her the right to keep and bear (her own) arms is unconstitutional under **any** theory of tiered scrutiny.

Applying *Pena* – Lori is not seeking to buy any firearms, whether those particular firearms are on a government approved list or not. Quite the contrary, she is trying to keep from having to buy new firearms to exercise her rights, because she wants her own firearms returned to her.

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<sup>1</sup> Appellants received Appellees errata memorandum (DktEntry 64) while preparing this response, which answers points raised in both filings.

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The California Department of Justice has certified that these guns belong to Lori.

The California Department of Justice has certified that these guns can be released to Lori.

The California Department of Justice has approved the gun safe Lori owns to safely store the firearms in accordance with state law.

This Court should acknowledge her compliance with the law (and the Sixth District Court of Appeal's opinion) and order the City of San Jose to comply with the United States Constitution.

Sincerely,

*/s/ Donald Kilmer*

Donald E. J. Kilmer, Jr.  
Attorney for Appellants