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August 11, 2023

Christopher G. Conway
Clerk of the Court
United States' Court of Appeals for the Seventh Circuit
219 S. Dearborn Street
Chicago, IL 60604

VIA E-FILING

***Re:*** ***Herrera v. Raoul*, Nos. 23-1793, 23-1825, 23-1826, 23-1827 & 23-1828 (consol.), response to letters submitted pursuant to Fed. R. App. P. 28(j).**

Mr. Conway:

Plaintiffs cite *Teter v. Lopez*, No. 20-15948 (9th Cir. Aug. 7, 2023), as supplemental authority, but it is no help to them because it was wrongly decided, likely because it deliberately abandoned fundamental principles of party presentation.

As this court has recognized, bedrock "principles of party presentation" require a remand to litigate *Bruen*'s effects on pending litigation via the "adversarial process," *Atkinson v. Garland*, 70 F.4th 1018, 1023 (7th Cir. 2023). But *Teter* eschewed that process, on the dubious ground that the panel could "confidently decide the issue" because it involved only "legislative facts." Slip Op. 14 (cleaned up).

Unsurprisingly, then, *Teter*'s analysis is flawed in at least two material respects. First, *Teter*'s relegation of the commonness inquiry to the second, historical prong of the *Bruen* analysis, where the government bears the burden of proof, *see* Slip Op. 22 (faulting Hawaii for "submitt[ing] no evidence"), misreads *Bruen*. While *Heller* derived the commonness "limitation" from historic prohibitions on dangerous or unusual weapons, 554 U.S. at 627, *Bruen* places the analysis of commonness in the textual analysis, *before* the burden of proof shifts, 142 S. Ct. at 2134.

Second, *Teter* erroneously concluded that common possession, rather than common use, controls whether a weapon is protected by the Second Amendment. Slip Op. 21. This conclusion traces to *United States v. Henry*, which noted that the Second Amendment does not protect "'weapons not typically possessed by law-abiding citizens for lawful purposes.'" 688 F.3d 637, 640 (9th Cir. 2012) (quoting *Heller*, 554 U.S. at 625). This statement is consistent with, and does not supersede, the Court's emphasis that "common use" is the analytical touchstone. County Reply 5. That emphasis reflects the ambiguity of the term "arms" – such ambiguity makes appropriate reliance on the prefatory clause's reference to militias, *Heller*, 554 U.S. at 577-78, and militias traditionally employed "arms in common use," *id.* at 624 (cleaned up). Moreover, focus on "use" rather than "possession" saves the commonness test from absurdity, by ensuring that legislatures do not lose the power to regulate merely by failing to predict whether rarely used weapons will result in harm when used.

Sincerely,

KIMBERLY M. FOXX
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By: */s/ Jessica M. Scheller*
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## CERTIFICATE OF COMPLIANCE

I certify that the above letter complies with the word limitation provided in Fed. R. App. P. 28(j). The body of this letter, beginning with "Plaintiffs" and ending with "used," contains 350 words as recorded by the word count of the Microsoft Word word-processing system used to prepare the letter.

*/s/ Jessica M. Scheller*
Jessica M. Scheller

## CERTIFICATE OF SERVICE

The foregoing response to Rule 28(j) letters has been electronically filed on August 11, 2023. I certify that I have caused the foregoing response to be served on all counsel of record via CM/ECF electronic notice on August 11, 2023.

*/s/ Jessica M. Scheller*
Jessica M. Scheller