Law Office of Orin S. Kerr, Esq.
2000 H Street, NW
Washington DC 20052
(202) 994-4775

April 2, 2014

Marcia M. Waldron, Esq.
Clerk, United States Court Of Appeals For The Third Circuit
601 Market Street
Philadelphia, PA 19106-1790

Re: United States v. Auernheimer, No. 13-1816
(Oral argument held March 19, 2014)
Response to Government's Second Rule 28(j) Letter

Dear Ms. Waldron:

Once again, Auernheimer responds to the government's Rule 28(j) letter:

The government claims that the remedy for venue error is a new trial. But as explained in *United States v. Strain*, 407 F.3d 379, 380 (5th Cir. 2005) (per curiam), the authorities the government cites show only that a new trial is *one* remedy for venue error, not that it is the *only* remedy. Under 28 U.S.C. § 2106, this Court is required to apply whatever remedy is "just under the circumstances," which can include either a new trial or acquittal. *Strain*, 407 F.3d at 380. This mandate exists regardless of what remedy the defendant requested. *See Burks v. United States*, 437 U.S. 1, 17-18 (1978) (ordering acquittal although defendant sought new trial).

The government asserts that a post-conviction acquittal would grant Auernheimer a windfall, as the pre-conviction remedy presumably would be a new trial. As a result of the conviction, however, Auernheimer has spent the last year in federal prison. That is no windfall. Having lost over a year of his life to an unlawful conviction, Auernheimer should not be subject to prosecution *again* in another district based on the same bogus theories of liability. Auernheimer deserves acquittal – on the merits, venue, or both.

Finally, failure to prove venue is a structural error that triggers automatic reversal. As with violations of the right to a public trial, a prejudice requirement for venue error is unworkable: "To require proof of this by the defendant would be ironically to enforce against him the necessity to prove what the disregard of his constitutional right has made it impossible for him to learn." *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3d Cir. 1969) (en banc). *See also Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984).

Even if a harmless error test applied, it would not be found here. Auernheimer was forced to defend himself 1,300 miles away from home, impacting not only his

financial situation but also his choice of counsel and the witnesses he could call on his behalf.

Respectfully submitted,

/s/ Orin S. Kerr
Orin S. Kerr
2000 H Street, N.W.
Washington, DC 20052

Hanni M. Fakhoury
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109

Marcia C. Hofmann
LAW OFFICE OF MARCIA C. HOFMANN
25 Taylor Street
San Francisco, CA 94102

Tor B. Ekeland
Mark H. Jaffe
TOR EKELAND, P.C.
155 Water Street
Brooklyn, NY 11201

Attorneys for Appellant Andrew Auernheimer