

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

LORI RODRIGUEZ; et al.,
Plaintiffs - Appellants,

vs.

CITY OF SAN JOSE; et al.,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EXCERPT OF RECORD - Volume I of II
[SUBMITTED BY THE APPELLANTS]

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CORPORATE DISCLOSURE STATEMENT

SECOND AMENDMENT FOUNDATION, INC., (SAF) is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 650,000 members and supporters nationwide, including California. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately owned and possess firearms, and the consequences of gun control. SAF is not a publicly traded corporation.

THE CALGUNS FOUNDATION, INC., (CGF) is a non-profit organization incorporated under the laws of California with its principal place of business in Roseville, California. CGF supports the California firearms community by promoting education for all stakeholders about California and federal firearms laws, rights and privileges, and by defending and protecting the civil rights of California gun owners. CGF is not a publicly traded corporation.

These institutional plaintiffs have provided funding for this suit.

Dated: February 26, 2018

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

TABLE OF CONTENTS | INDEX

Trial Court Docket No.	Document Description (File Date)	ER Page #	ER Tab #
<u>Volume I</u>			
57	Notice of Appeal (10/20/2017)	ER-002	1
56	Judgment (10/03/2017)	ER-006	2
55	Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Cross-Motion for Summary Judgment (10/02/2017)	ER-008	3
1	Complaint (08/12/2015)	ER-015	4
13	Answer (01/11/2016)	ER-026	5
23	Declaration of MARK VANNI (Deputy City Attorney) in support of MOTION FOR SUMMARY JUDGMENT filed by the Defendants. (09/01/2016)	ER-038	6
24	Request for Judicial Notice in support of MOTION FOR SUMMARY JUDGMENT filed by the Defendants. (09/01/2016)	ER-130	7
25	Moving Separate Statement of Material Facts and Evidence in support of MOTION FOR SUMMARY JUDGMENT filed by the Defendants. (09/01/2016)	ER-134	8

Trial Court Docket No.	Document Description (File Date)	ER Page #	ER Tab #
29	Declaration of Alan Gottlieb in support of Plaintiffs' CROSS-MOTION FOR SUMMARY JUDGMENT and Opposing Defendants' MOTION FOR SUMMARY JUDGMENT. (09/16/2016)	ER-145	9
30	Declaration of Brandon Combs in support of Plaintiffs' CROSS-MOTION FOR SUMMARY JUDGMENT and Opposing Defendants' MOTION FOR SUMMARY JUDGMENT. (09/16/2016)	ER-150	10
31	Declaration of Lori Rodriguez in support of Plaintiffs' CROSS-MOTION FOR SUMMARY JUDGMENT and Opposing Defendants' MOTION FOR SUMMARY JUDGMENT. (09/16/2016)	ER-153	11
<u>Volume II</u>			
32	RESPONSE to Defendants' Statement of Material Fact and Plaintiffs' Separate Statement of Material Facts in support of Plaintiffs' CROSS-MOTION FOR SUMMARY JUDGMENT and Opposing Defendants' MOTION FOR SUMMARY JUDGMENT. (09/16/2016)	ER-219	12

Trial Court Docket No.	Document Description (File Date)	ER Page #	ER Tab #
36	Declaration of DONALD KILMER (Plaintiffs' Counsel) in support of Plaintiffs' CROSS-MOTION FOR SUMMARY JUDGMENT and Opposing Defendants' MOTION FOR SUMMARY JUDGMENT. (09/16/2016)	ER-238	13
39	ERRATA (re: Dkt Entry 36) <u>Corrected copies of Exhibits C and D attached to</u> Declaration of DONALD KILMER (Plaintiffs' Counsel) in support of Plaintiffs' CROSS-MOTION FOR SUMMARY JUDGMENT and Opposing Defendants' MOTION FOR SUMMARY JUDGMENT. (09/21/2016)	ER-349	14
41	Declaration of MARK VANNI (Deputy City Attorney) in opposition to Plaintiffs' CROSS-MOTION FOR SUMMARY JUDGMENT filed by the Defendants. (09/01/2016)	ER-381	15
42	Responsive Separate Statement by Defendants in Opposition to Plaintiffs CROSS-MOTION FOR SUMMARY JUDGMENT. (09/30/2016)	ER-405	16
	Docket Report from District Court	ER-435	17
	Certificate of Service	*****	***

Tab 1

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FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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LORI RODRIGUEZ, THE SECOND
AMENDMENT FOUNDATION,
INC., and THE CALGUNS
FOUNDATION, INC.,

Plaintiffs,

vs.

CITY OF SAN JOSE, CITY OF SAN
JOSE POLICE DEPARTMENT,
OFFICER STEVEN VALENTINE
and DOES 1 TO 20,

Defendants.

Case No.: 5:15-CV-03698

**NOTICE OF APPEAL TO THE
UNITED STATES COURT OF
APPEALS FOR THE NINTH
CIRCUIT**

JUDGMENT ENTERED:

October 3, 2017 (Doc # 56)

Related Case: None

Priority Setting: Upon Motion by
Party

Representation: Attached
Statement

NOTICE OF APPEAL

Plaintiffs: LORI RODRIGUEZ, SECOND AMENDMENT FOUNDATION,
INC., and the CALGUNS FOUNDATION, INC., appeal to the United States Court
of Appeal for the Ninth Circuit from the final JUDGMENT (Doc # 56) of the United
States District Court for the Northern District of California – San Jose Division,
entered in this case on October 3, 2017, and all interlocutory orders that gave rise

1 to the Judgment, including but not limited to the ORDER GRANTING
2 DEFENDANTS' MOTION TO FOR SUMMARY JUDGMENT AND DENYING
3 PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT (Doc #55).

4 **RELATED CASES**

5 Plaintiff/Appellants are not aware of any related cases pending in this Circuit
6 Court of Appeals or in any District Court in California.

7 **PRIORITY SETTING**

8 This case may be entitled to priority setting under 28 U.S.C. § 1657 and/or
9 Circuit Rule 34-3, upon motion by any party.

10 Dated: October 20, 2017

11 /s/ Donald Kilmer

12 Donald Kilmer,
13 Attorney for Plaintiff/Appellants

14
15 **CERTIFICATE OF SERVICE**

16
17 On this, October 20, 2017, I served the foregoing NOTICE OF APPEAL by
18 electronically filing it with the Court's ECF/CM system, which generated a Notice of
19 Filing and effects service upon counsel for all parties in the case.

20 I declare under penalty of perjury that the foregoing is true and correct.
21 Executed on October 20, 2017.

22
23 /s/ Donald Kilmer

24 Attorney of Record for Plaintiff/Appellants
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Dated: October 20, 2017

/s/ Donald Kilmer

Donald Kilmer
Attorney for Plaintiffs

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On this, October 20, 2017, I served the foregoing REPRESENTATION STATEMENT by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2017.

/s/ Donald Kilmer
Attorney of Record for Plaintiff/Appellants

Tab 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LORI RODRIGUEZ, et al.,
Plaintiffs,

v.

CITY OF SAN JOSE, et al.,
Defendants.

Case No. [5:15-cv-03698-EJD](#)

JUDGMENT

Defendants' Motion for Summary Judgment having been granted and Plaintiffs' Motion for Summary Judgment having been denied,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants.

IT IS SO ORDERED.

Dated: October 3, 2017



EDWARD J. DAVILA
United States District Judge

Case No.: [5:15-cv-03698-EJD](#)
JUDGMENT

Tab 3

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LORI RODRIGUEZ, et al.,
Plaintiffs,
v.
CITY OF SAN JOSE, et al.,
Defendants.

Case No. [5:15-cv-03698-EJD](#)

**ORDER GRANTING DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFFS’ CROSS-
MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. Nos. 22, 28

Plaintiffs Lori Rodriguez, the Second Amendment Foundation, Inc. (“SAF”), and the Calguns Foundation, Inc. (“Calguns”) bring claims against Defendants the City of San Jose, the City of San Jose’s Police Department, Officer Steven Valentine, and several Doe defendants arising from Defendants’ confiscation and retention of firearms registered to Lori and her husband. Plaintiffs and Defendants have both moved for summary judgment. Plaintiffs’ motion will be denied and Defendants’ motion will be granted.

Case No.: [5:15-cv-03698-EJD](#)
**ORDER GRANTING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFFS’ CROSS-MOTION FOR SUMMARY JUDGMENT**

I. BACKGROUND

In 2013, Edward Rodriguez suffered a mental episode at his home. Defs.’ Mot. for Summ. J. (“MSJ”) 2, Dkt. No. 22. His wife, Plaintiff Lori Rodriguez, called the police, and the San Jose Police responded. Id. An officer detained Edward under Welfare & Institutions Code § 5150 and ordered paramedics to take him to a hospital. Id. at 3; Pls.’ Mot. for Cross-Summ. J. (“Cross-MSJ”) 3, Dkt. No. 28. An officer told Lori that he was required to confiscate guns in the house. Cross-MSJ 3. He asked Lori to provide the combination to the gun safe in the house, and she complied. Id. at 3–4. The officer confiscated eleven guns registered to Edward and one gun registered to Lori. MSJ 4.

The City petitioned the Superior Court for a hearing under Welfare & Institutions Code § 8102 to determine whether the guns should be returned to Edward. MSJ 4; Cross-MSJ 4. The court decided that the guns could not be returned to Edward because he is a “prohibited person” under Welfare & Institutions Code § 8103. MSJ 4–5; Cross-MSJ 4–5. Lori appealed, and the California Court of Appeals affirmed. MSJ 5; Cross-MSJ 5; City of San Jose v. Rodriguez, H04031, 2015 WL 1541988 (Cal. Ct. App. Apr. 2, 2015).

The City has not returned the guns. Plaintiffs filed this action in 2015, bringing claims for violations of the Second Amendment, the Fourth Amendment, the Fifth Amendment, the Fourteenth Amendment, and Cal. Penal Code §§ 33800 et seq. Compl. ¶¶ 42–56, Dkt. No. 1. Now before the Court are Plaintiffs’ motion for summary judgment and Defendants’ cross-motion for summary judgment.

II. LEGAL STANDARD

“Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.” Samuels v. Holland American Line—USA Inc., 656 F.3d 948, 952 (9th Cir. 2011) (citing Fed. R. Civ. P. 56(a)). The Court “must draw all reasonable inferences in favor of the nonmoving party.” Id. “The central issue is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-
Case No.: [5:15-cv-03698-EJD](#)
ORDER GRANTING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFFS’ CROSS-MOTION FOR SUMMARY JUDGMENT

sided that one party must prevail as a matter of law.” Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986)).

III. DISCUSSION

A. Standing

Defendants argue that Plaintiffs SAF and Calguns (but not Lori Rodriguez) lack Article III standing to pursue their claims. “[A]n organization has ‘direct standing to sue [when] it show[s] a drain on its resources from both a diversion of its resources and frustration of its mission.’ ” Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1219 (9th Cir. 2012) (quoting Fair Hous. of Marin v. Combs, 285 F.3d 899, 905 (9th Cir.2002)). The Court agrees with SAF and Calguns that they have standing because they divert resources to assist gun owners to recover their property after seizure, they engage in related public education activities, they litigate cases like this one, and they have members in California that are affected. Cross-MSJ 7.

B. Second Amendment

Plaintiffs allege that Defendants have violated Plaintiffs’ “constitutional right to keep and bear arms under the Second Amendment.” Compl. ¶¶ 42–44. However, despite the City’s decision (under § 8102) not to return the guns it confiscated, Lori concedes that she is free to own and possess other guns that she lawfully acquires.¹ Cross-MSJ 8. The Second Amendment protects the right to keep and bear arms in general, but it does not protect the right to possess specific firearms. See City of San Diego v. Boggess, 216 Cal. App. 4th 1494, 1503 (2013) (“[S]ection 8102 does not eliminate a detainee’s right to possess any and all firearms. Rather, as City points out, it implicates only the detainee’s property right in the specific firearms confiscated by law enforcement.”)

¹ Lori could sell the firearms at issue to a licensed dealer under Cal. Penal Code § 33850(b) (“A person who owns a firearm that is in the custody of a court or law enforcement agency and who does not wish to obtain possession of the firearm, and the firearm is an otherwise legal firearm, and the person otherwise has right to title of the firearm, shall be entitled to sell or transfer title of the firearm to a licensed dealer.”) (emphasis added). Apparently, Lori could then purchase those guns from the dealer.

(emphasis added); Rodriguez, 2015 WL 1541988, at *7 (“[T]he Supreme Court decisions in Heller and McDonald did not state that the Second Amendment right to keep and bear arms extends to keeping and bearing either any particular firearms or firearms that have been confiscated from a mentally ill person.”) (emphasis added). As such, Defendants’ motion for summary judgment must be granted as to Plaintiffs’ Second Amendment claim.

C. Fourth Amendment

Plaintiffs allege that Defendants’ confiscation of the guns and their decision not to return the guns to Lori constitute an unreasonable seizure under the Fourth Amendment. Compl. ¶¶ 45–47. Plaintiffs do not challenge the reasonableness of the search of Lori and Edward’s home; rather, they challenge the reasonableness of Defendants’ confiscation and retention of the firearms. Cross-MSJ 12–14.

The Court finds that, under the circumstances, the confiscation of the guns was entirely reasonable. Edward was detained for mental health reasons under § 5150, and the officer on the scene confiscated the guns under § 8102. This is precisely the type of scenario that § 8102 is designed to address. See Welfare & Institution Code § 8102 (“Whenever a person, who has been detained or apprehended for examination of his or her mental condition . . . , is found to own, have in his or her possession or under his or her control, any firearm whatsoever, or any other deadly weapon, the firearm or other deadly weapon shall be confiscated by any law enforcement agency or peace officer, who shall retain custody of the firearm or other deadly weapon.”) (emphasis added). It was not unreasonable for the officer to follow the statutory procedure for confiscating deadly weapons from a person “who has been detained . . . for examination of his or her mental condition.” Id.

The City’s continued retention of the guns is likewise reasonable. Plaintiffs challenged the City’s petition before the Superior Court and received a full evidentiary hearing. That court’s decision received a full review and a written opinion from the California Court of Appeals, which affirmed the trial court’s decision to grant the City’s petition. See Rodriguez, 2015 WL 1541988.

Case No.: [5:15-cv-03698-EJD](#)

ORDER GRANTING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFFS’ CROSS-MOTION FOR SUMMARY JUDGMENT

Accordingly, Defendants’ motion for summary judgment will be granted as to Plaintiffs’ Fourth Amendment claim.

D. Fifth Amendment

Plaintiffs allege that the City’s confiscation and retention of the guns is a “taking of property without just compensation” under the Fifth Amendment. Compl. ¶¶ 48–50. Plaintiffs’ claim fails because “[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.” Bennis v. Michigan, 516 U.S. 442, 452 (1996). Here, Defendants lawfully exercised their forfeiture authority under § 8102. That exercise does not constitute a taking of property without just compensation. Defendants’ motion for summary judgment will be granted as to Plaintiffs’ Fifth Amendment claim.

E. Fourteenth Amendment

Lori alleges that Defendants’ confiscation and retention of the guns constituted a “violation her due process rights (administrative return of property) under the Fourteenth Amendment” (and Calguns and SAF allege a similar claim on behalf of their members). Compl. ¶¶ 51–53. In their summary judgment briefing, Plaintiffs clarify that they allege a procedural due process violation based on the City’s refusal to return the firearms following the Court of Appeals’ decision. Dkt. No. 43 at 12. Defendants cite the Court of Appeals’ statement that “the procedure provided by section 33850 et seq. for return of firearms in the possession of law enforcement remains available to Lori.” Rodriguez, 2015 WL 1541988, at *8.

Defendants appear to argue that this language requires the City to return the firearms to Lori. But Defendants misread the court’s decision: the court did not order the City to return the firearms to Lori; rather, it addressed Lori’s two challenges to the City’s petition—on the grounds (1) insufficiency of evidence and (2) violation of her Second Amendment rights—and noted that Lori had not yet chosen to pursue remedies under Penal Code § 33800. No procedural due process violation arises from the City’s decision not to return the guns to Lori, since the Court of Appeals

Case No.: [5:15-cv-03698-EJD](#)

ORDER GRANTING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFFS’ CROSS-MOTION FOR SUMMARY JUDGMENT

1 did not require it to do so. As such, Defendants' motion for summary judgment will be granted as
2 to Plaintiffs' Fourteenth Amendment claim.

3 **F. Penal Code § 33800 et seq.**

4 Plaintiffs bring a claim for violation of Cal. Penal Code § 33800 et seq. However,
5 summary judgment must be granted in Defendants' favor because that statute does not authorize
6 an independent cause of action. See Calhoun v. City of Hercules Police Dep't, No. 14-CV-01684-
7 VC, 2014 WL 4966030, at *3 (N.D. Cal. Oct. 3, 2014), *aff'd*, 675 F. App'x 656 (9th Cir. 2017)
8 ("California Penal Code § 33855 lays out the procedures that a law enforcement agency must
9 follow before it can return a confiscated firearm, but it does not, in itself, provide a cause of action
10 to a plaintiff who believes he is entitled to his firearm.").

11 **IV. CONCLUSION**

12 Defendants' motion for summary judgment (Dkt. No. 22) is GRANTED. Plaintiffs' motion
13 for summary judgment (Dkt. No. 28) is DENIED. The Clerk shall close this file.

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15 **IT IS SO ORDERED.**

16 Dated: September 29, 2017

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18 EDWARD J. DAVILA
United States District Judge

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27 Case No.: [5:15-cv-03698-EJD](#)
28 ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Tab 4

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
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LORI RODRIGUEZ, THE SECOND
AMENDMENT FOUNDATION,
INC., and THE CALGUNS
FOUNDATION, INC.,

Plaintiffs,

vs.

CITY OF SAN JOSE, CITY OF SAN
JOSE POLICE DEPARTMENT,
OFFICER STEVEN VALENTINE
and DOES 1 TO 20,

Defendants.

Case No.: 5:15-CV-03698

COMPLAINT

42 U.S.C. §§ 1983, 1988,

INTRODUCTION

1. This is an action to challenge the customs, policies, practices and procedures of seizing and retaining firearms in conjunction with a mental health and welfare check under California's Welfare and Institutions Code; when said firearms are taken from homes that have California approved gun safes and at least one responsible and qualified person to take custody of the firearms.

PARTIES

2. Plaintiff LORI RODRIGUEZ is a natural person and citizen of the United States and of the State of California and was at all material times a resident of Santa Clara County. LORI RODRIGUEZ is married to Edward Rodriguez. Edward is not a party to this case, nor did he defend the action in state court.
3. Plaintiff SECOND AMENDMENT FOUNDATION, INC., (SAF) is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 650,000 members and supporters nationwide, including California. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately owned and possess firearms, and the consequences of gun control. SAF brings this action on behalf of itself and its members. SAF brings lawsuits like this because the fees and costs of prosecuting such actions often exceeds the personal resources of individual gun owners and value of the gun collections.
4. Plaintiff CALGUNS FOUNDATION, INC., (CGF) is a non-profit organization incorporated under the laws of California with its principal place of business in Roseville, California. The purposes of CGF include supporting the California firearms community by promoting education for all stakeholders about California and federal firearms laws, rights and privileges, and defending and protecting the civil rights of California gun owners. CGF represents its members and supporters, which include California gun owners. CGF brings this action on behalf of itself and its supporters, who possess all the indicia of membership. CGF brings lawsuits like this because the fees and costs of prosecuting such actions often exceeds the personal resources of individual gun owners and value of the gun collections.
5. Defendant CITY OF SAN JOSE is municipal corporation located in the county of Santa Clara.

1 6. Defendant CITY OF SAN JOSE POLICE DEPARTMENT is a law
2 enforcement agency with the power to implement and enforce the laws
3 relevant to this action.

4 7. Defendant OFFICER STEVEN VALENTINE was a San Jose police officer
5 employed by the City of San Jose on the relevant dates. He either personally
6 seized or directed the seizure of the firearms in question pursuant to policies
7 and procedures promulgated by the Defendants CITY OF SAN JOSE and/or
8 the CITY OF SAN JOSE POLICE DEPARTMENT.

9 8. At this time, Plaintiffs are ignorant of the names of any other individuals or
10 entities responsible for the acts giving rise to the claims set forth herein, and
11 therefore names these individuals DOE Defendants and reserves the right to
12 amend this complaint when their true names are ascertained to add those
13 persons and/or entities as Defendants.

14 15 JURISDICTION AND VENUE

16 9. This Court has subject matter jurisdiction over this action pursuant to 28
17 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. §§ 1983, 1988.

18 10. This Court has supplemental jurisdiction over any state law causes of action
19 arising from the same operative facts under 28 U.S.C. § 1367.

20 11. Venue for this action is proper under 28 U.S.C. §§ 1391 and/or the Civil Local
21 Rules for bringing an action in this district.

22 23 CONDITIONS PRECEDENT

24 12. All conditions precedent have been performed, and/or have occurred, and/or
25 have been excused, and/or would be futile.

26 13. If applicable, the Statute of Limitations for this action was tolled during the
27 state court proceedings which began February 22, 2013 (when the civil action
28 *City of San Jose v. Edward Rodriguez (Intervenor: Lori Rodriguez)*, case

1 number: 1-13-CV241669 was filed in Santa Clara Superior Court) through
2 and including June 2, 2015 (when the remittitur was issued by the Sixth
3 District Court of Appeal in case number: H040317).
4

5 **FACTS**

- 6 14. Edward and LORI RODRIGUEZ have been married for more than 20 years.
7 15. Prior to her marriage LORI acquired at least one firearm that was and is her
8 separate property.
9 16. During the marriage, LORI and Edward acquired several firearms that were
10 and are community property.
11 17. LORI and her husband also acquired a gun safe that meets (or exceeds) the
12 requirements of California law for the safe storage of firearms.
13 18. On January 24, 2013 the San Jose Police Department was dispatched to the
14 Rodriguez home. Edward Rodriguez was in distress. He exhibited signs of
15 erratic behavior. The police officers at the scene made a determination that
16 Edward should be taken to the Santa Clara Valley Medical Center for a
17 72-hour hold for a psychiatric and/or psychological evaluation. An
18 ambulance was called to transport him.
19 19. Over LORI's objection, and without a warrant, the Defendants seized twelve
20 firearms from a gun safe in the Rodriguez family home.
21 20. Defendant OFFICER VALENTINE either wrongfully seized Plaintiff's
22 firearms on his own initiative, or he was acting pursuant to the official
23 policies, practices and procedures of the CITY OF SAN JOSE and/or the
24 CITY OF SAN JOSE POLICE DEPARTMENT.
25 21. No firearms were used, displayed, brandished or otherwise outside of the
26 Rodriguez gun safe during the events that lead up to Edward's contact with
27 the San Jose Police. Furthermore, LORI RODRIGUEZ maintained custody
28 and control of the firearms in her home by controlling access to the gun safe.

- 1 22. On or about February 22, 2013 the CITY OF SAN JOSE filed a Petition Re:
2 Disposition of Weapons in the Santa Clara Superior Court. *City of San Jose v.*
3 *Edward Rodriguez (Lori Rodriguez)*, case number: 1-13-CV241669.
- 4 23. LORI RODRIGUEZ filed a Co-Respondent's Response and Request for
5 Hearing on April 12, 2013.
- 6 24. On June 21, 2013 a Stipulation Re: Joinder was filed with the Superior Court
7 formally joining LORI RODRIGUEZ to the action.
- 8 25. A hearing pursuant to Welfare and Institutions Code § 8102 took place in
9 Santa Clara County Superior Court on August 9, 2013 before the Honorable
10 Peter H. Kirwan.
- 11 26. LORI RODRIGUEZ testified at the hearing by way of offer of proof (which
12 was verified during the hearing) that she and Edward had owned a Liberty
13 Safe – Lincoln Model LX25 since August of 2002. This gun safe has a lock
14 that keeps the combination dial from being turned, in addition to also
15 requiring knowledge of the combination code itself.
- 16 27. Furthermore the CITY OF SAN JOSE stipulated during the hearing that the
17 gun safe in question meets all of the regulatory requirements promulgated by
18 the Office of the Attorney General of the State of California for the safe
19 storage of firearms.
- 20 28. LORI RODRIGUEZ was not (and is not now) prohibited from possessing,
21 owing or acquiring firearms, as established through a Personal Firearms
22 Eligibility Check conducted by the California Department of Justice.
- 23 29. LORI RODRIGUEZ acknowledged in her testimony that her husband is
24 currently prohibited from owning and/or possessing firearms based on his
25 psychiatric hold. She also acknowledged that she had a duty to transfer the
26 community property firearms to her own name and then store said firearms
27 (and ammunition) in a way that will prevent Edward from gaining access to
28 those firearms.

- 1 30. LORI RODRIGUEZ had the combination on the gun safe changed on April
2 26, 2013, to prevent unauthorized access to its contents in anticipation of
3 having her firearms returned. Prior to having the combination changed,
4 LORI maintained sole possession of the key used to unlock the combination
5 dial to the gun safe which also prevented unauthorized access to the gun safe.
- 6 31. The CITY OF SAN JOSE through its Attorney engaged in the following
7 exchange with the trial court at the end of the hearing: "[If] the Court agrees
8 and precludes return of the firearms. What's to prevent Ms. Rodriguez from
9 going out tomorrow and purchasing more firearms and bringing them back to
10 the house?" The City Attorney responded: "That is a correct statement.
11 There is nothing that will prevent her from doing that."
- 12 32. The trial court ordered the forfeiture of the firearms, but cautioned the City
13 against their destruction without attempting to recover their economic value.
- 14 33. An appeal was filed in The Court of Appeal of the State of California Sixth
15 Appellate District, Case No.: H040317.
- 16 34. The judgment of the trial court was affirmed in an unpublished opinion
17 issued on April 2, 2015. That opinion including the following language:
18 "Moreover, we believe that the record on appeal shows that the procedure
19 provided by section 33850 et seq. for return of firearms in the possession of
20 law enforcement **remains available** to Lori." (Emphasis added.)
- 21 35. LORI RODRIGUEZ had, at all relevant time, offered to comply with the
22 administrative procedures set forth at California Penal Code § 33850 to
23 obtain possession of the firearms in question after the Welfare and
24 Institutions Code (WIC) § 8102 action was resolved. She did not incur the
25 cost and expense of that administrative procedure prior to the adjudication of
26 the WIC action, because there is a fee for each firearm processed and the
27 release is only good for 30 days, after which the gun owner must resubmit
28 another fee and application to the California Department of Justice.

- 1 36. Immediately after the Court of Appeal decision, LORI RODRIGUEZ,
2 submitted the fees and applications for return of her firearms pursuant to
3 Penal Code § 33800 et seq.
- 4 37. On June 1, 2015, LORI RODRIGUEZ received confirmation of the transfer of
5 community property firearms to her name alone and release documents for
6 the firearms in question from the California Department of Justice.
- 7 38. The remittitur of Court of Appeal, Sixth Appellate District was issued on
8 June 2, 2015.
- 9 39. Copies of the Penal Code § 33850 releases were tendered to the CITY OF
10 SAN JOSE on or about June 11, 2015 with a request that the Defendants
11 release LORI's property to her pursuant to California law.
- 12 40. On or about July 6, 2015, the CITY OF SAN JOSE notified LORI that it still
13 would not return her firearms. However the parties do have an agreement
14 that the firearms will be held (without cost to plaintiff LORI RODRIGUEZ)
15 until this action is resolved.
- 16 41. By seizing, retaining Plaintiff RODRIGUEZ's firearms and defying state law
17 administrative procedures for return of firearms, which are valuable personal
18 property, and for which the Plaintiff LORI RODRIGUEZ had taken all
19 necessary steps to secure in accordance with state law; the Defendants have
20 violated LORI RODRIGUEZ's Second, Fourth, Fifth and Fourteenth
21 Amendment rights under the United States Constitution.

22
23 **FIRST CLAIM FOR RELIEF:**
24 **SECOND AMENDMENT, UNITED STATES CONSTITUTION**
25 **42 USC § 1983, 1988**

- 24 42. Paragraphs 1 through 41 are incorporated by reference.
- 25 43. Plaintiff LORI RODRIGUEZ claims relief under 42 U.S.C. § 1983 against
26 Defendants for violation of her constitutional right to keep and bear arms, a
27 right protected by the Second Amendment as that right is applied through
28 the 14th Amendment.

1 44. Plaintiffs CALGUNS FOUNDATION, INC., and SECOND AMENDMENT
2 FOUNDATION, INC., request injunctive relief under 42 U.S.C. § 1983
3 against the Defendants to prevent future violations of their members'
4 constitutional right to keep and bear arms under the Second Amendment to
5 the United States Constitution as that right is applied to the States through
6 the Fourteenth Amendment.

7
8 **SECOND CLAIM FOR RELIEF:**
9 **FOURTH AMENDMENT, UNITED STATES CONSTITUTION**
10 **42 USC § 1983, 1988**

11 45. Paragraphs 1 through 41 are incorporated by reference.

12 46. Plaintiff LORI RODRIGUEZ requests relief under 42 U.S.C. § 1983 against
13 the Defendants for violation of her constitutional right to be free from
14 unreasonable seizure under the Fourth Amendment to the United States
15 Constitution, as those rights are applied to the States through the
16 Fourteenth Amendment.

17 47. Plaintiffs CALGUNS FOUNDATION, INC., and SECOND AMENDMENT
18 FOUNDATION, INC., request prospective injunctive relief under 42 U.S.C. §
19 1983 against the Defendants to prevent future violations of their members'
20 constitutional right to be free from unreasonable seizure under the Fourth
21 Amendment, to the United States Constitution as those rights are applied to
22 the States through the Fourteenth Amendment.

23 **THIRD CLAIM FOR RELIEF:**
24 **FIFTH AMENDMENT, UNITED STATES CONSTITUTION**
25 **42 USC § 1983, 1988**

26 48. Paragraphs 1 through 41 are incorporated by reference.

27 49. Plaintiff LORI RODRIGUEZ requests relief under 42 U.S.C. § 1983 against
28 the Defendants for the taking of property without just compensation under
the Fifth Amendment to the United States Constitution, as those rights are
applied to the States through the Fourteenth Amendment.

1 50. Plaintiffs CALGUNS FOUNDATION, INC., and SECOND AMENDMENT
2 FOUNDATION, INC., request injunctive relief under 42 U.S.C. § 1983
3 against the Defendants to prevent the future takings of their members'
4 firearms without just compensation under the Fifth Amendment to the
5 United States Constitution as those rights are applied to the States through
6 the Fourteenth Amendment.

7
8 **FOURTH CLAIM FOR RELIEF:**
9 **FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION**
10 **42 USC § 1983, 1988**

11 51. Paragraphs 1 through 41 are incorporated by reference.

12 52. Plaintiff LORI RODRIGUEZ requests relief under 42 U.S.C. § 1983 against
13 the Defendants for violation of her due process rights (administrative return
14 of property) under the Fourteenth Amendment to the United States
15 Constitution.

16 53. Plaintiffs CALGUNS FOUNDATION, INC., and SECOND AMENDMENT
17 FOUNDATION, INC., request prospective injunctive relief under 42 U.S.C. §
18 1983 against the Defendants to prevent future violations of their members'
19 constitutional right of due process (to have firearms returned under
20 California's administrative process) while exercising their Second
21 Amendment rights.

22 **FIFTH CLAIM FOR RELIEF:**
23 **STATE LAW CLAIM**
24 **CALIFORNIA PENAL CODE §§ 33800 et seq.**

25 54. Paragraphs 1 through 41 are incorporated by reference.

26 55. Plaintiff LORI RODRIGUEZ has fully complied with the provisions of
27 California Penal Code § 33800 et seq., and in accordance with the
28 unpublished opinion of the Court of Appeal, tendered a set of approved
releases from the California Department of Justice for return of her firearms.
The Defendants' refusal to comply with the instructions set forth in the

1 appellate court opinion and the provisions of state law entitled her to
2 injunctive relief by this Court under its pendant/ancillary jurisdiction.
3 Furthermore, LORI RODRIGUEZ is entitled to recovery of attorney fees and
4 costs under Penal Code § 33885.

5 56. Plaintiffs CALGUNS FOUNDATION, INC., and SECOND AMENDMENT
6 FOUNDATION, INC., request prospective injunctive relief under 42 U.S.C. §
7 1983 against the Defendants to compel compliance with California Penal
8 Code § 33800 et seq. (to have firearms returned under California's
9 administrative process) while exercising their Second Amendment rights.

10
11 WHEREFORE, the Plaintiffs requests that this Court:

- 12 A. Compel the Defendants to return the firearms released to LORI
13 RODRIGUEZ by the California Department of Justice to her home.
14 B. An award of damages to LORI RODRIGUEZ.
15 C. Injunctive relief against the Defendants to prevent future violations.
16 D. Award costs of this action and all prior actions to all the Plaintiffs;
17 E. Award reasonable attorney fees and costs to the Plaintiffs on all
18 Claims of the complaint, and all prior litigation, including but not
19 limited to fee/cost awards under 42 USC § 1983, 1988; California Code
20 of Civil Procedure § 1021.5 and California Penal Code § 33885.
21 F. Such other and further relief as this Court may deem appropriate.

22 Dated: August 12, 2015.

23 /s/ Donald Kilmer

24 Donald Kilmer, Jr. [SBN: 179986]
25 Law Offices of Donald Kilmer, APC
26 1645 Willow Street, Suite 150
27 San Jose, California 95125
Voice: (408) 264-8489
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28 Attorneys for Plaintiffs

Tab 5

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11 Attorneys for Defendants CITY OF SAN JOSE, CITY
12 OF SAN JOSE POLICE DEPARTMENT and
13 OFFICER STEVEN VALENTINE

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17 LORI RODRIGUEZ, THE SECOND
18 AMENDMENT FOUNDATION, INC., THE
19 CALGUNS FOUNDATION, INC.,

20 Plaintiffs,

21 v.

22 CITY OF SAN JOSE, CITY OF SAN
23 JOSE POLICE DEPARTMENT, OFFICER
24 STEVEN VALENTINE, AND DOES 1 TO
25 20,

26 Defendants.

Case Number: 5:15-CV-03698 EJD

**DEFENDANTS' ANSWER TO
COMPLAINT AND DEMAND FOR
JURY TRIAL**

27 Defendants CITY OF SAN JOSE, CITY OF SAN JOSE POLICE DEPARTMENT,
28 and OFFICER STEVEN VALENTINE (collectively "Defendants") answer the Complaint of
Plaintiffs LORI RODRIGUEZ, THE SECOND AMENDMENT FOUNDATION, INC. and
THE CALGUNS FOUNDATION, INC. (collectively "Plaintiffs") as follows:

///
///
///

1 **INTRODUCTION**

2 1. In response to the allegations contained in Paragraph 1 of said Complaint,
3 Defendants acknowledge the purpose of Plaintiffs' lawsuit, but deny that Plaintiffs' claims
4 have merit.

5 **PARTIES**

6 2. In response to the allegations contained in Paragraph 2 of said Complaint,
7 Defendants admit such allegations.

8 3. In response to the allegations contained in Paragraph 3 of said Complaint,
9 Defendants admit that Plaintiff SECOND AMENDMENT FOUNDATION, INC. (SAF) is an
10 organization with its principal place of business in Bellevue, Washington, but Defendants
11 are without information or belief as to the remaining facts contained therein, and on that
12 basis, deny such facts.

13 4. In response to the allegations contained in Paragraph 4 of said Complaint,
14 Defendants admit that CALGUNS FOUNDATION, INC. (CGF) is an organization
15 incorporated under the laws of California with a principal place of business in Roseville,
16 California, but Defendants are without information or belief as to the remaining facts
17 contained therein, and on that basis, deny such facts.

18 5. In response to the allegations contained in Paragraph 5 of said Complaint,
19 Defendants admit such allegations.

20 6. In response to the allegations contained in Paragraph 6 of said Complaint,
21 Defendants admit such allegations.

22 7. In response to the allegations contained in Paragraph 7 of said Complaint,
23 Defendants admit that Officer Steven Valentine was a San Jose police officer employed
24 by the City of San Jose on the relevant dates and seized the firearms in question pursuant
25 to California Welfare and Institutions Code section 8102, but Defendants deny the
26 remainder of the factual allegations contained therein.

27 8. In response to the allegations contained in Paragraph 8 of said Complaint,
28 ///

1 Defendants acknowledge that Plaintiffs reference the Doe pleading concept of using
2 fictitious names for purposes of future pleading, but deny that said Doe pleading is
3 available in this Court.

4 **JURISDICTION AND VENUE**

5 9. In response to the allegations contained in Paragraph 9 of said Complaint,
6 Defendants admit that the Court has jurisdiction over Plaintiffs' constitutional claims.

7 10. In response to the allegations contained in Paragraph 10 of said Complaint,
8 Defendants admit that the Court has supplemental jurisdiction over Plaintiffs' alleged state
9 claims.

10 11. In response to the allegations contained in Paragraph 11 of said Complaint,
11 Defendants admit that this action is properly venued in the Northern District of California.

12 **CONDITIONS PRECEDENT**

13 12. In response to the allegations contained in Paragraph 12 of said Complaint,
14 Defendants are without information or belief as to the facts contained therein, and on that
15 basis, deny such facts.

16 13. In response to the allegations contained in Paragraph 13 of said Complaint,
17 Defendants deny said allegations.

18 **FACTS**

19 14. In response to the allegations contained in Paragraph 14 of said Complaint,
20 Defendants admit that Edward and LORI RODRIGUEZ are married, but are without
21 information or belief as to the remaining facts contained therein, and on that basis, deny
22 such facts.

23 15. In response to the allegations contained in Paragraph 15 of said Complaint,
24 Defendants are without information or belief as to the facts contained therein, and on that
25 basis, deny such facts.

26 16. In response to the allegations contained in Paragraph 16 of said Complaint,
27 Defendants admit such allegations.

28 17. In response to the allegations contained in Paragraph 17 of said Complaint,

1 Defendants admit such allegations.

2 18. In response to the allegations contained in Paragraph 18 of said Complaint,
3 Defendants admit such allegations.

4 19. In response to the allegations contained in Paragraph 19 of said Complaint,
5 Defendants admit that twelve firearms were seized from a gun safe in the Rodriguez
6 family home, but Defendants deny the remainder of the factual allegations contained
7 therein.

8 20. In response to the allegations contained in Paragraph 20 of said Complaint,
9 Defendants deny said allegations.

10 21. In response to the allegations contained in Paragraph 21 of said Complaint,
11 Defendants admit that no firearms were used, displayed, brandished or otherwise outside
12 the Rodriguez gun safe during the events of Edward's contact with the San Jose Police,
13 but are without information or belief as to the remainder of the facts contained therein, and
14 on that basis, deny such facts.

15 22. In response to the allegations contained in Paragraph 22 of said Complaint,
16 Defendants admit such allegations.

17 23. In response to the allegations contained in Paragraph 23 of said Complaint,
18 Defendants admit such allegations.

19 24. In response to the allegations contained in Paragraph 24 of said Complaint,
20 Defendants admit such allegations.

21 25. In response to the allegations contained in Paragraph 25 of said Complaint,
22 Defendants admit such allegations.

23 26. In response to the allegations contained in Paragraph 26 of said Complaint,
24 Defendants admit such allegations.

25 27. In response to the allegations contained in Paragraph 27 of said Complaint,
26 Defendants admit such allegations.

27 28. In response to the allegations contained in Paragraph 28 of said Complaint,
28 Defendants admit such allegations.

1 29. In response to the allegations contained in Paragraph 29 of said Complaint,
2 Defendants admit such allegations.

3 30. In response to the allegations contained in Paragraph 30 of said Complaint,
4 Defendants are without information or belief as to the facts contained therein, and on that
5 basis, deny such facts.

6 31. In response to the allegations contained in Paragraph 31 of said Complaint,
7 Defendants admit such allegations.

8 32. In response to the allegations contained in Paragraph 32 of said Complaint,
9 Defendants admit that the trial court ordered forfeiture of the firearms, but Defendants
10 deny the remainder of the factual allegations contained therein.

11 33. In response to the allegations contained in Paragraph 33 of said Complaint,
12 Defendants admit such allegations.

13 34. In response to the allegations contained in Paragraph 34 of said Complaint,
14 Defendants admit such allegations.

15 35. In response to the allegations contained in Paragraph 35 of said Complaint,
16 Defendants are without information or belief as to the facts contained therein, and on that
17 basis, deny such facts.

18 36. In response to the allegations contained in Paragraph 36 of said Complaint,
19 Defendants admit such allegations.

20 37. In response to the allegations contained in Paragraph 37 of said Complaint,
21 Defendants admit such allegations.

22 38. In response to the allegations contained in Paragraph 38 of said Complaint,
23 Defendants admit such allegations.

24 39. In response to the allegations contained in Paragraph 39 of said Complaint,
25 Defendants admit such allegations.

26 40. In response to the allegations contained in Paragraph 40 of said Complaint,
27 Defendants admit such allegations.

28 41. In response to the allegations contained in Paragraph 41 of said Complaint,

1 Defendants deny such allegations.

2 **FIRST CLAIM FOR RELIEF:**
3 **SECOND AMENDMENT, UNITED STATES CONSTITUTION**
4 **42 US § 1983, 1988.**

4 42. In response to the allegations contained in Paragraph 42 of said Complaint,
5 Defendants incorporate by reference their responses to Paragraphs 1 thorough 41 herein.

6 43. In response to the allegations contained in Paragraph 43 of said Complaint,
7 Defendants deny said allegations.

8 44. In response to the allegations contained in Paragraph 44 of said Complaint,
9 Defendants deny said allegations.

10 **SECOND CLAIM FOR RELIEF:**
11 **FOURTH AMENDMENT, UNITED STATES CONSTITUTION**
12 **42 US § 1983, 1988.**

12 45. In response to the allegations contained in Paragraph 45 of said Complaint,
13 Defendants incorporate by reference their responses to Paragraphs 1 thorough 41 herein.

14 46. In response to the allegations contained in Paragraph 46 of said Complaint,
15 Defendants deny said allegations.

16 47. In response to the allegations contained in Paragraph 47 of said Complaint,
17 Defendants deny said allegations.

18 **THIRD CLAIM FOR RELIEF:**
19 **FIFTH AMENDMENT, UNITED STATES CONSTITUTION**
20 **42 US § 1983, 1988.**

20 48. In response to the allegations contained in Paragraph 48 of said Complaint,
21 Defendants incorporate by reference their responses to Paragraphs 1 thorough 41 herein.

22 49. In response to the allegations contained in Paragraph 49 of said Complaint,
23 Defendants deny said allegations.

24 50. In response to the allegations contained in Paragraph 50 of said Complaint,
25 Defendants deny said allegations.

26 **FOURTH CLAIM FOR RELIEF:**
27 **FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION**
28 **42 US § 1983, 1988.**

28 51. In response to the allegations contained in Paragraph 51 of said Complaint,

Defendants incorporate by reference their responses to Paragraphs 1 thorough 41 herein.

52. In response to the allegations contained in Paragraph 52 of said Complaint, Defendants deny said allegations.

53. In response to the allegations contained in Paragraph 53 of said Complaint, Defendants deny said allegations.

**FIFTH CLAIM FOR RELIEF:
STATE LAW CLAIM CALIFORNIA
PENAL CODE § 33800 ET SEQ.**

54. In response to the allegations contained in Paragraph 54 of said Complaint, Defendants incorporate by reference their responses to Paragraphs 1 thorough 41 herein.

55. In response to the allegations contained in Paragraph 55 of said Complaint, Defendants deny said allegations.

56. In response to the allegations contained in Paragraph 56 of said Complaint, Defendants deny said allegations.

AFFIRMATIVE DEFENSES

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, these answering Defendants allege that the Complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, these answering Defendants allege that any harm Plaintiffs suffered was the result of negligent or otherwise wrongful conduct of persons other than these Defendants and that the conduct of persons other than these Defendants were the sole and proximate cause of the injuries and damages alleged by Plaintiffs.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE, these answering Defendants allege that all actions taken, including actions of Doe Defendants, were undertaken in good faith and with a reasonable belief that the actions were valid, necessary, constitutionally proper and objectively reasonable for a police officer in the same circumstances, entitling the individual Defendants to qualified immunity.

///

1 AS AND FOR A FOURTH AFFIRMATIVE DEFENSE, these answering Defendants
2 allege that they are immune from the state law causes of action pursuant to Government
3 Code sections 800-1000.

4 AS AND FOR A FIFTH AFFIRMATIVE DEFENSE, these answering Defendants
5 allege they are immune from the state law causes of action pursuant to Government Code
6 sections 815.2(b) and 820.8 granting immunity for an injury caused by the act or omission
7 of another person.

8 AS AND FOR A SIXTH AFFIRMATIVE DEFENSE, these answering Defendants
9 allege that Plaintiffs' Complaint is barred in that Plaintiffs failed to comply with the claims
10 filing provisions of Government Code section 900, et seq.

11 AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE, these answering
12 Defendants allege that Plaintiffs' Complaint is barred by the applicable statutes of
13 limitation.

14 AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE, these answering Defendants
15 allege that their actions towards Plaintiffs were the result of their negligence and/or
16 criminal conduct and that said actions of Plaintiffs were the sole and proximate cause of
17 their actions and any damages alleged by Plaintiffs in this case.

18 AS AND FOR A NINTH AFFIRMATIVE DEFENSE, these answering Defendants
19 allege that those individuals, who are presently designated as Does, are entitled to
20 immunity from Plaintiffs' Complaint by virtue of the provisions of Government Code
21 sections 800 through 1000, including, but not limited to Sections 820.2, 820.4, 820.6,
22 820.8, 821, 821.6 and 822.2.

23 AS AND FOR A TENTH AFFIRMATIVE DEFENSE, these answering Defendants
24 allege that their actions were lawful and justified under the facts of the case.

25 AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE, these answering
26 Defendants allege that they are protected by the affirmative defenses provided by
27 California Penal Code sections 197, 834(a), 835 and 835(a).

28 ///

1 AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE, these answering
2 Defendants allege that any damages or injuries suffered by Plaintiffs were occasioned by
3 their own wrongful actions.

4 AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE, these answering
5 Defendants allege that Plaintiffs were careless and negligent in and about the matters
6 referred to in said Complaint, and that such carelessness and negligence proximately
7 caused and contributed to the damage, detriment or injuries sustained by them, if any
8 there were, and that Plaintiffs' recovery should therefore either be barred or reduced to the
9 extent of Plaintiffs' negligence.

10 AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE, these answering
11 Defendants allege that Defendants are informed and believe, and thereon allege, that third
12 parties were careless and negligent in and about the matters referred to in said Complaint,
13 and further that these third parties failed to exercise ordinary or any care regarding
14 matters referred to in the Complaint and such carelessness and negligence on the part of
15 these third parties proximately caused and contributed to the damage, detriment or injury
16 sustained by Plaintiffs, if any there was, and that Plaintiffs' recovery from Defendants, if
17 any there is, should therefore either be barred or reduced to the extent of the third party's
18 negligence.

19 AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE, these answering
20 Defendants allege that the acts alleged to have been committed by these answering
21 Defendants were not the cause in fact, proximate or legal cause of Plaintiffs' damages, if
22 any.

23 AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE, these answering
24 Defendants allege that Defendant CITY OF SAN JOSE is immune from a claim of
25 exemplary or punitive damages by virtue of Government Code section 818.

26 AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE, these answering
27 Defendants allege that any act or omission by these Defendants alleged in said Complaint
28 was a result of the exercise of discretion vested in a public employee, and said

1 Defendants are therefore immune and not liable for such acts (Government Code
2 section 820.2).

3 AS AND FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE, these answering
4 Defendants assert the affirmative defenses provided by Penal Code sections 836 and
5 836.5.

6 AS AND FOR A NINETEENTH AFFIRMATIVE DEFENSE, these answering
7 Defendants allege that Plaintiffs have failed to mitigate their damages.

8 AS AND FOR A TWENTIETH AFFIRMATIVE DEFENSE, these answering
9 Defendants allege that Plaintiffs' claims are barred by the doctrine of res judicata.

10 AS AND FOR A TWENTY-FIRST AFFIRMATIVE DEFENSE, these answering
11 Defendants allege that Plaintiffs, and each of them, are collaterally estopped from bringing
12 these claims.

13 AS AND FOR A TWENTY-SECOND AFFIRMATIVE DEFENSE, Plaintiffs, and
14 each of them, do not have standing to bring all or a portion of their claims.

15 AS AND FOR A TWENTY-THIRD AFFIRMATIVE DEFENSE, Defendants complied
16 with procedures set forth in California Welfare and Institutions Code section 8102.

17 AS AND FOR A TWENTY-FOURTH AFFIRMATIVE DEFENSE, Plaintiffs, and each
18 of them, by their words, conduct and actions, made a knowing intentional and voluntary
19 waiver of any and all claims raised in their Complaint.

20 AS AND FOR A TWENTY-FIFTH AFFIRMATIVE DEFENSE,

21 WHEREFORE, these answering Defendants pray:

- 22 1. That Plaintiffs take nothing by their Complaint;
23 2. That Plaintiffs' Complaint be dismissed with prejudice;
24 3. That Defendants be awarded their costs of suit, including attorney's fees
25 incurred herein; and

26 ///

27 ///

28 ///

4. For such other and further relief as the Court deems proper.

DATED: January 11, 2016

RICHARD DOYLE, City Attorney

By: /s/
MARK VANNI
Deputy City Attorney

Attorneys for Defendants
CITY OF SAN JOSE, CITY OF SAN JOSE
POLICE DEPARTMENT AND OFFICER
STEVEN VALENTINE

Tab 6

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Attorneys for CITY OF SAN JOSE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LORI RODRIGUEZ, THE SECOND
AMENDMENT FOUNDATION, INC., THE
CALGUNS FOUNDATION, INC.,

Plaintiffs,

v.

CITY OF SAN JOSE, et al.,

Defendants.

Case Number: 5:15-CV-03698-EJD

**DECLARATION OF MARK VANNI IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, PARTIAL SUMMARY
JUDGMENT**

DATE: November 10, 2016

TIME: 9:00 a.m.

COURTROOM: 4

JUDGE: Hon. Edward J. Davila

I, Mark Vanni, hereby declare:

1. I am a Deputy City Attorney for the City of San Jose, licensed to practice law in the courts of this State and before the United States District Court for the Northern District of California. I was assigned to work on this lawsuit and have personal knowledge of the facts contained herein.

2. Attached hereto as Exhibit A is a true and correct copy of SJPd Duty Manual section L5705 that was in effect at the time the firearms were confiscated.

3. Attached hereto as Exhibit B is a true and correct copy of the City's Petition initiating *City of San Jose v. Edward Rodriguez, et al.* (Santa Clara Superior Court No. 1-13-CV-241669).

4. Attached hereto as Exhibit C is a true and correct copy of Lori Rodriguez's Response and Request for Hearing in *City of San Jose v. Edward Rodriguez, et al.*

5. Attached hereto as Exhibit D is a true and correct copy of the Reporter's Transcript of the hearing before the Honorable Peter Kirwan. Although the transcript is unsigned, the parties have stipulated that the attached is a accurate account of the proceedings.

6. Attached hereto as Exhibit E is a true and correct copy of Judge Kirwan's order, dated September 16, 2013, granting the City's Petition for Disposition of Weapons in the *City of San Jose v. Edward Rodriguez, et al.* (Santa Clara Superior Court No. 1-13-CV-241669).

7. Attached hereto as Exhibit F is a true and correct copy of the decision reached by the California Sixth District Court of Appeal in *City of San Jose v. Edward Rodriguez et al.* (Case No. H040317). This decision may also be located on Westlaw at 2015 WL 1541988.

8. Attached hereto as Exhibit G is a true and correct copy of the deposition testimony of Lori Rodriguez cited by Defendants in their separate statement and points and authorities.

9. Attached hereto as Exhibit H is a true and correct copy of the deposition testimony of Officer Steven Valentine cited by Defendants in their separate statement and points and authorities.

I declare under penalty of perjury, under the laws of the State of California,
that the foregoing is true and correct. Executed on September 1, 2016 at San José,
California.

/s/ Mark J. Vanni
MARK J. VANNI

EXHIBIT A

Firearms booked for safekeeping are held for five (5) business days and then returned to its rightful owner. (12028.5 PC)

L 5703

TAKING OF AMMUNITION FOR SAFEKEEPING:

Officers will not take ammunition for safekeeping when removal of the weapon(s) alone will abate the threatened danger. Officers will exercise reasonable judgment in determining that all weapons have been removed before leaving the ammunition with the owner. When an officer reasonably believes that a person is withholding a weapon, all ammunition located may be taken into custody and booked for safekeeping.

L 5704

BOOKING FIREARMS FOR SAFEKEEPING- DOMESTIC VIOLENCE INCIDENTS

Added 06/06/05

When responding to a domestic violence incident, the officer shall as necessary for the protection of the officer or other persons present:

- Take custody of any firearm in plain sight or discovered pursuant to a consensual search or other lawful search
- Ask if there are any other firearms on the premises
- Contact Communications and request a check be made through the Automated Firearms System to determine if the subject owns a firearm
- Have Communications run a warrant check
 - The warrant check will also verify if a Domestic Violence Restraining Order (DVRO) is in effect and if there is an order prohibiting firearms
 - If the officer determines that a protective order has been issued but not served, the officer shall immediately notify the respondent of the terms of the order
 - Have Communications notify the Sheriff's Office Warrants Unit to have proof of service entered into Domestic Violence Restraining Order System
- Complete the Property Form (Form-13), listing the firearms taken from the owner/possessor
- Give the owner/possessor a copy of the Property Sheet (F-13)
- Give the owner/possessor of the firearm a report receipt (Form 200-45A)
- Advise the owner/possessor to obtain a DOJ Firearms Release Form from the DOJ webpage or contact the Firearms Division for a return application
- Firearms taken into custody must be booked in the Property Room

L 5705

BOOKING FIREARMS FOR SAFEKEEPING - MENTAL HEALTH INCIDENTS

Added 06/06/05

When detaining or apprehending a person at a W&I 5150 incident, the officer shall:

- Have Communications check DOJ Automated Firearms System to determine ownership of firearms
- Ask if there are any firearms on the premises
- Confiscate any firearm owned, in the possession or under the control of the subject

- Check DOJ Supervised Release File and Mental Health Firearms Prohibition system. If weapons are present, subject may be charged
- Complete the Property Sheet (Form-13), listing the firearms taken from the owner/possessor
- Give the owner/possessor a copy of the Property Sheet (Form-13)
- Give the owner/possessor of the firearms a report receipt (Form 200-45A)
- Advise the owner/possessor to obtain a DOJ Firearms Release Form from the DOJ webpage or contact the Firearms Division
- Firearms taken into custody must be booked in the Property Room

L 5706

**BOOKING FIREARMS FOR SAFEKEEPING - ACCEPTANCE OF FIREARMS
SUBJECT TO RELINQUISHMENT UNDER PROTECTIVE ORDERS**

Added 02/10/08

Persons subject to protective orders are required to relinquish any firearms in their possession or control within 24 hours after service of the order, either by surrendering the firearms to a local law enforcement agency or by selling the firearms to a licensed gun dealer. A person who chooses to surrender the firearm to the Department will be directed to respond to the Information Center, and an officer in the Center will take possession of the firearm for safekeeping. The person should be in possession of a DV-800/JV-252, *Proof of Firearms Turned In or Sold*, form. The accepting officer completes sections 4 and 6 of the DV-800/JV-252 form.

The officer who takes possession of the firearms is responsible for completing a Form 2 and booking the surrendered firearms for safekeeping.

EXHIBIT B

1 RICHARD DOYLE, City Attorney (#088625)
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10 CITY OF SAN JOSE

11 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

12 CITY OF SAN JOSE, a municipal
13 corporation,

14 Petitioner,

15 v.

16 EDWARD V. RODRIGUEZ,

17 Respondent.

18 CASE NO.

19 PETITION RE: DISPOSITION OF
20 WEAPONS

21 STATEMENT OF FACTS

22 On Thursday, January 24, 2013, officers from the San Jose Police Department were
23 dispatched to the residence of Respondent Edward V. Rodriguez (hereinafter "Respondent") and his
24 wife in San Jose, California to investigate a domestic disturbance. Respondent's wife had contacted
25 9-1-1 Emergency Response personnel to report that Respondent was seated near a window and
26 yelling in the direction of the exterior of the house. Respondent's wife claimed that Respondent had
27 not been sleeping during the past forty-eight hours and that he may be suffering from a mental illness.
28 She was fearful of Respondent's behavior as well as his access to firearms within the residence.

Upon arrival, an officer made contact with Respondent's wife. He heard odd noises similar to
grunting followed by bizarre speech and cynical laughter. When the officer entered the house and
made contact with Respondent, his laughter turned to an angry facial expression with laughter to
follow again. The officer attempted to converse with Respondent, but he did not engage the officer.

1 Respondent commenced talking about the CIA, the Army and other subjects. He claimed he was
2 affiliated with the CIA.

3 The officer queried Respondent as to whether he had ingested any drugs or prescription
4 medications. He answered that he had only ingested water. Respondent was perspiring heavily and
5 his respiration was rapid and heavy. Family members claimed that his behavior was becoming
6 increasing worse. Respondent's wife stated that after a previous visit by a police officer, he was
7 depressed. During this current police contact, she was fearful of Respondent's behavior.

8 The officer determined that Respondent was delusional and possibly suffering from a mental
9 condition. He was acting irrationally; his mannerisms were bizarre and aggressive. Respondent
10 changed personalities within seconds.

11 Based on the officer's training and experience, coupled with the officer's observations of
12 Respondent and the fact that Respondent attempted to break his own thumb when the officer asked
13 him if he wanted to hurt himself, the officer believed that Respondent was a danger to himself and
14 others. In consideration of the safety of the officer as well as Respondent, the officer awaited the
15 arrival of other officers prior to placing hand-cuffs on Respondent due to his massive girth.

16 Due to Respondent's size and apparent medical condition, San Jose Fire Department
17 personnel and medical personnel responded to the scene. Once Respondent was secured onto the
18 gurney, he continued to break the restraints. Medical personnel requested that an officer accompany
19 them within the ambulance for transport. Respondent was transported to Santa Clara Valley Medical
20 Center for medical treatment and a 72-hour hold and psychological evaluation.

21 During a protective sweep for weapons inside of Respondent's house, the officer located
22 twelve firearms within a gun safe. One firearm belonged to Respondent's wife. However, since
23 Respondent had access to all the firearms, all twelve firearms were confiscated from Respondent's
24 residence by the officers and booked into the San Jose Police Department for safekeeping.

25 The following is a description of the twelve aforementioned firearms:

- 26 1) .44 caliber Dan Wesson Magnum revolver;
- 27 2) .44 caliber Smith & Wesson Magnum revolver;
- 28 3) 12-gauge Browning single-barrel shotgun;

- 4) 12-gauge Browning double-barrel shotgun;
- 5) .22 caliber Ruger semi-automatic rifle;
- 6) .30 caliber Ruger handgun;
- 7) .22 caliber Winchester rifle;
- 8) .22 caliber Marlin Firearms semi-automatic rifle;
- 9) .22 caliber Remington semi-automatic rifle ;
- 10) 7mm caliber Browning semi-automatic rifle;
- 11) 12-gauge Winchester single-barrel shotgun; and
- 12) .357 Smith & Wesson Magnum revolver.

ARGUMENT

Welfare and Institutions Code Section 8102 was amended in response to the action *Bryte v. City of La Mesa* (1989) 207 Cal.App.3d 687, and became effective September 27, 1989 under an urgency measure passed by the California Legislature. Pursuant to this section, the City of San Jose now petitions the Court to retain possession of said weapons and to allow forfeiture of said weapons. According to the responding officer's crime report, a copy of which is attached to the Declaration of Officer Steven Valentine¹, filed herewith, Respondent appears to be a danger to himself and/or others.

Furthermore, during the 1990 legislative session, Welfare and Institutions Code Section 8103 was amended to add subsection (f), which criminalizes, among other things, possession or ownership of firearms by any person who has been admitted to a health care facility pursuant to Sections 5150, 5151 and 5152. This prohibition is effective unless and until the person obtains a Court Order finding the person to be likely to use firearms in a safe and lawful manner.

At the time of filing this Petition, it is not known whether Respondent was officially admitted to the health care facility or whether he was released after an evaluation by hospital personnel. Should Respondent request a hearing on this matter, this Petitioner will obtain such information and submit same to the Court at or before the hearing.

¹At the time that this Petition was filed with the Court on 2/22/13, Petitioner had not yet secured the Declaration of Officer Steven Valentine in support of this Petition. Accordingly, with the Court's indulgence, Petitioner will supplement this Petition with Officer Valentine's Declaration as soon as further contact is made with him.

1 If Respondent was not admitted, Section 8103 does not apply and the Court should simply
2 make the determination under Section 8102. If Respondent was admitted, the Court may not return
3 the weapons because Respondent would not be permitted to possess such weapons, unless and until
4 Respondent petitions the Court and obtains an order pursuant to Section 8103(f)(4).

5 Even in a case implicating Section 8102, the determination should be made as to whether
6 return of the weapons would be likely to endanger Respondent or others. If the Court finds that such
7 danger exists, the Petition should be granted and the weapons forfeited. If the Court is unable to find
8 that such danger exists, the Court should rule that the City of San Jose shall retain custody of the
9 weapons until Respondent obtains a Court Order pursuant to Section 8102. If no order is obtained
10 within two (2) years, the City of San Jose should then be able to dispose of the weapons. It would be
11 unduly burdensome and it would present storage and procedural problems to require the City of San
12 Jose to retain the weapons for a period longer than two (2) years.


13 CONCLUSION

14 Based upon the above argument, the City of San Jose respectfully requests this Court to order
15 the San Jose Police Department to retain Respondent's weapons and that the weapons be forfeited.

16 DATED: February 22, 2013

RICHARD DOYLE, City Attorney

17
18 By:



MARK J. VANNI

Associate Deputy City Attorney

Attorneys for Petitioner,
CITY OF SAN JOSE

EXHIBIT C

1 Donald E. J. Kilmer, Jr. [SBN: 179986]
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4 San Jose, California 95125
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8 Attorney for Respondent:
9 LORI RODRIGUEZ

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SUPERIOR COURT OF CALIFORNIA
SANTA CLARA COUNTY
CIVIL LAW DIVISION

CITY OF SAN JOSE,
Petitioner,

vs.

EDWARD RODRIGUEZ,
Respondent.

LORI RODRIGUEZ,
Co-Respondent.

Case No.: 1-13-CV-241669

RESPONDENT'S and/or
CO-RESPONDENT'S RESPONSE
AND REQUEST FOR HEARING

Welfare and Institutions Code §§ 8100 et
seq

By and through undersigned counsel, LORI RODRIGUEZ, Co-Respondent,
hereby requests a hearing in the above-entitled matter.

1. LORI RODRIGUEZ is the Wife of Respondent EDWARD RODRIGUEZ.

2. The firearms that are subject to disposition by this Court in this action
either: (a) belong to LORI RODRIGUEZ , or (b) she has a community
property interest in said firearms.

3. LORI RODRIGUEZ is eligible to own, possess and acquire firearms.

4. LORI RODRIGUEZ has the means to safely store firearms and ammunition
in the family home and deny access to said firearms and ammunition to her
husband EDWARD RODRIGUEZ, who currently remains a prohibited
person.

1 5. LORI RODRIGUEZ reserves all of her substantive and procedural rights,
2 including the right to file supplemental pleadings, file pre-trial motions and
3 conduct discovery.
4

5 Respectfully Submitted,

6 Date: April 12, 2013
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10 Donald Kilmer
Attorney for LORI RODRIGUEZ
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EXHIBIT D

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SANTA CLARA

3 BEFORE THE HONORABLE PETER H. KIRWAN, JUDGE

4 DEPARTMENT 8

5 ---oOo---

6 CITY OF SAN JOSE,

7 PETITIONER,

8 -VS-

9 E. RODRIGUEZ,

10 RESPONDENT.

11)
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14) NO. 1-13-CV-241669
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13 REPORTER'S TRANSCRIPT OF PROCEEDINGS

14 AUGUST 9, 2013

15 ---oOo---

16 A P P E A R A N C E S:

17 FOR THE PLAINTIFF:

18 MARK VANNI
19 Attorney at Law

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21
22
23 FOR THE DEFENDANT:

24 DONALD KILMER
25 Attorney at Law

26
27 OFFICIAL COURT REPORTER:

28 MELISSA CRAWFORD, CSR, RPR
CSR NO. 12288

INDEX OF EXAMINATIONSWITNESSES FOR THE PETITIONERPAGE**OFFICER STEVEN VALENTINE**

Offer of proof by Mr. Valentine

5

Cross-Examination by Mr. Kilmer

7

WITNESSES FOR THE RESPONDENT**OFFICER STEVEN VALENTINE**

Examination by Mr. Kilmer

13

LORI RODRIGUEZ

Direct Examination by Mr. Kilmer

14

Cross-Examination by Mr. Vanni

17

INDEX OF EXHIBITSPETITIONER'S
EXHIBITSDESCRIPTIONMARKEDENTERED

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Document

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RESPONDENT'S
EXHIBITSDESCRIPTIONMARKEDENTERED

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1 San Jose, California

August 9, 2013

2 P R O C E E D I N G S

3 THE COURT: All right, we're going to go on the record
4 this morning. This is the matter of City of San Jose versus
5 Rodriguez. Can I please get appearances?

6 MR. VANNI: Yes, Your Honor. Good morning. Mark
7 Vanni on behalf of the City of San Jose.

8 MR. KILMER: Good morning, Your Honor. Donald Kilmer
9 on behalf of Lori Rodriguez. Ms. Rodriguez is seated next to me
10 at counsel table.

11 THE COURT: All right. Good morning to each of you.
12 We've got an officer here; is that correct?

13 MR. VANNI: We do, Your Honor.

14 THE COURT: Okay. Do you want state your appearance,
15 sir?

16 OFFICER VALENTINE: Officer Steven Valentine, San Jose
17 PD. Badge 3985.

18 THE COURT: All right, this matter is on calendar this
19 morning. It's a continued hearing from our law and motion
20 calendar. Relates to a disposition of firearms. Mr. Kilmer
21 requested a hearing. I want to reiterate the fact that we're
22 going to do this efficiently and we're going to streamline it.
23 To the extent that you want to provide some testimony, I'm going
24 to require that you do it by offer of proof. If the other side
25 has any questions, or whatnot, they can ask. All right? So
26 we'll start with the City of San Jose. Mr. Vanni?

27 MR. VANNI: Yes, Your Honor. We have our officer
28 present today. Do you want me to give an offer of proof as to

1 his statement?

2 THE COURT: Yes.

3 MR. VANNI: Well, as stated in the City's declaration
4 that was attached to its petition, Officer Steve Valentine
5 received a call for service at the Rodriguez family home because
6 of a -- to investigate a domestic disturbance. Officer
7 Valentine arrived on scene. Made contact with Ms. Rodriguez.
8 Then made contact with Mr. Rodriguez where he noticed, or
9 observed, that Mr. Rodriguez was acting delusional. He was
10 rambling and speaking about the CIA and the Army and individuals
11 watching him.

12 Officer Valentine was also informed, prior to
13 arriving, that there were guns in the home. So that added a
14 level of sensitivity to the matter. Although the guns were not
15 out. Officer Valentine, after observing Mr. Rodriguez and his
16 behavior, determined that he was a danger to himself and to
17 others and determined to place him on a 5150 hold and transport
18 him to Valley Medical Center. When officer Valentine, with the
19 assistance of other officers who arrived, detained
20 Mr. Rodriguez, he attempted to injure himself by pulling his
21 thumb back.

22 When Mr. Rodriguez was then transported to Valley
23 Medical Center Officer Valentine remained behind. He informed
24 Ms. Rodriguez that pursuant to the Welfare and Institutions Code
25 Section 8102 he would need to confiscate the weapons.
26 Ms. Rodriguez then went and opened the safe. It was a dual
27 combination key safe. And then Ms. Rodriguez then had to obtain
28 the key. She opened the safe and Officer Valentine saw 12

1 weapons inside. Various handguns and rifles. Those weapons
2 were confiscated and they're documented in the police report.
3 And they remain currently in the possession of the City of San
4 Jose.

5 When Mr. Rodriguez was at Valley Medical Center he was
6 evaluated and determined to be a danger to himself and was
7 admitted pursuant to 5151 and 5152, which means that he,
8 himself, was a prohibited party under Welfare and Institutions
9 Code 8103. That issue is not in dispute with the opposing party
10 and the City.

11 So the issue now before the Court is whether or not
12 weapons can be returned to the home where somebody who is a
13 prohibited party resides. And the City believes that to do so
14 would result in a likely danger to others and to Mr. Rodriguez.
15 While Lori Rodriguez has promised and pledged to maintain the
16 weapons in a safe without providing access to Mr. Rodriguez,
17 given the observations that Officer Valentine observed on that
18 evening, as well as past instances, the City of San Jose has
19 responded to that house on a number of occasions because of --
20 to do welfare checks and to look into Mr. Rodriguez's mental
21 state, the City believes that there is just too much of a risk
22 that Mr. Rodriguez would be able to access those weapons and --
23 either through coercing Ms. Rodriguez or overpowering her. And
24 unfortunately there is just no way once the weapons are back in
25 Ms. Rodriguez's possession to determine or to confirm that she's
26 indeed holding them the way that she pledges.

27 THE COURT: All right. Officer Valentine, we're going
28 to swear you in. I'm going to ask if you affirm the statements

1 that have been made for an offer of proof. Could I ask you to
2 please stand and raise your right hand.

3 MR. KILMER: You want to swear both witnesses at the
4 same time, Your Honor?

5 THE COURT: We can do that. Ms. Rodriguez, would you
6 stand up, please.

7 (Whereupon, the witnesses were duly sworn in this
8 matter.)

9 OFFICER VALENTINE: Yes, I do.

10 RESPONDENT LORI RODRIGUEZ: Yes, I do.

11 THE COURT: And, Officer Valentine, I want to ask you
12 on the record, you heard the statements that were made by
13 counsel for the City as an offer of proof to what you would
14 testify if you were here testifying under oath. Do you confirm
15 those statements and the accuracy of those statements?

16 OFFICER VALENTINE: Yes, Your Honor.

17 THE COURT: Okay. All right. Mr. Kilmer, do you have
18 any questions for Officer Valentine?

19 MR. KILMER: Just briefly, Your Honor.

20 THE COURT: Okay.

21 **CROSS-EXAMINATION**

22 BY MR. KILMER:

23 Q. Officer Valentine, you testified, by way of offer of proof,
24 that the guns were in a gun safe. Were there any guns that were
25 not in the gun safe at the house?

26 A. No, there was not.

27 Q. Did you -- in addition to removing the firearms, did you
28 remove any ammunition?

1 A. No, I did not.

2 Q. Did you see any ammunition?

3 A. I believe there was ammunition, yes.

4 Q. And you left the ammunition at the house?

5 A. Yes.

6 Q. Where was the ammunition that you left at the house stored?

7 A. In the safe.

8 Q. When -- did Ms. Rodriguez open the safe or did you open the
9 safe after she gave you the combination?

10 A. Ms. Rodriguez opened it.

11 Q. Okay. And what did she do? What was the procedure she
12 went through to open the safe?

13 A. I believe it was a two combination. She had -- couldn't
14 recall exactly what the combination was. It took her a couple
15 minutes.

16 Q. Okay.

17 A. And then she had to use a key also and she opened up the
18 safe.

19 Q. Okay. Was the key used to unlock the combination dial or
20 was it actually used to unlock the safe?

21 A. I did not observe her open the safe. I believe I was still
22 doing paperwork for the transport of Mr. Rodriguez.

23 MR. KILMER: Your Honor, may I have this brochure
24 marked for identification as Exhibit A? I have previously
25 provided a copy to opposing counsel. I have a courtesy copy for
26 the Court as well.

27 THE COURT: All right. You can hand that to my clerk.

28 THE CLERK: Marked for identification only as

1 Respondent's Exhibit Number 1.

2 (Whereupon, Respondent's Exhibit 1 was marked for
3 identification.)

4 MR. KILMER: Do I want to have the witness look at the
5 exhibit or the -- I think you have the exhibit.

6 THE COURT: Yeah.

7 Q. (By Mr. Kilmer) Officer, I'm handing you a document that
8 has been marked for identification as Exhibit 1. And I'm going
9 to turn to a page in here. It's towards the middle of the
10 brochure. It says -- unfortunately there are no page numbers.
11 It says Lincoln Series. And I'm going to ask you to take a look
12 at a safe in the lower right-hand corner that says LX 25. Does
13 that appear to be the kind of safe that you were retrieving the
14 firearms from?

15 A. To be honest with you, I couldn't even tell you what the
16 safe looked like. I just remember the door being opened when I
17 started retrieving the firearms from inside the safe. The
18 appearance, I don't -- I never saw the outside of that door.

19 Q. Okay.

20 A. I just -- like I said, I was outside doing paperwork. I
21 came in and I started inventorying the firearms.

22 Q. Okay. Does that look to you --

23 A. I wish I could tell you more.

24 Q. That's okay. I'm not asking you to testify to anything you
25 don't know.

26 MR. KILMER: Your Honor, I believe that we can enter
27 into a stipulation at this point that I previously arranged with
28 the City Attorney's office. That is that the gun safe at the

1 Rodriguez home meets all of the requirements of the regulations
2 promulgated by the Office of the Attorney General of the State
3 of California.

4 MR. VANNI: And, Your Honor, that's certainly a
5 stipulation I'd be willing to enter to. It appears if you are
6 going to purchase a gun safe this would be the safe to purchase.

7 MR. KILMER: Your Honor, I ask that this exhibit be
8 admitted.

9 THE COURT: Any objection?

10 MR. VANNI: No, Your Honor.

11 THE COURT: All right. This will be admitted as
12 Respondent's 1.

13 (Whereupon, Respondent's Exhibit 1 was admitted into
14 evidence.)

15 MR. KILMER: I will be handing it back to your clerk.
16 I have no further questions of this witness, Your Honor.

17 THE COURT: Okay. Anything further, Mr. Vanni?

18 MR. VANNI: No, Your Honor. But I would request that
19 the City's petition as well be marked as Exhibit 1 I guess.

20 THE COURT: Let's make sure that -- because -- I
21 believe I got a couple things from the City. The actual
22 petition itself you're asking that that be admitted into
23 evidence?

24 MR. VANNI: Excuse me, the declaration of Officer
25 Valentine.

26 THE COURT: Any objection?

27 MR. KILMER: No objection, Your Honor.

28 THE COURT: All right. That'll be admitted. Let's

1 just do them consecutive. That'll be next in order.

2 THE CLERK: All right.

3 (Whereupon, Petitioner's Exhibit 2 was admitted into
4 evidence.)

5 THE COURT: Anything further with respect to Officer
6 Valentine?

7 MR. VANNI: No, Your Honor.

8 THE COURT: Okay. The Court has a couple quick
9 questions. Officer Valentine, how many times, to your
10 knowledge, had the San Jose Police been out there for
11 disturbance-type calls.

12 OFFICER VALENTINE: To my knowledge, I believe it was
13 at least two times before I arrived that I knew -- that we had
14 already been there before.

15 THE COURT: All right. And these involved
16 specifically Mr. Rodriguez?

17 OFFICER VALENTINE: Yes, Your Honor.

18 THE COURT: Okay. All right. And what's the
19 timeframe, in terms of the span, between those calls?

20 OFFICER VALENTINE: Usually, if I would know, it would
21 be no more than six months. We're going through a new system.
22 So we don't have all the information available to us right away.
23 It's a lengthy process.

24 THE COURT: All right. Okay. All right, anything
25 further from the City at this point?

26 MR. VANNI: If we could maybe just get some foundation
27 from Officer Valentine about his background and dealing with
28 people with mental illness. If the Court would like me to do

1 that I can do that.

2 THE COURT: I don't know that that's necessary.

3 MR. KILMER: I don't think it is, Your Honor. I think
4 the officer is eminently qualified to determine if somebody is
5 to be taken in for a 5150 hold.

6 MR. VANNI: That's fine.

7 THE COURT: Right. Okay.

8 MR. VANNI: Nothing further.

9 THE COURT: Nothing further. All right, Mr. Kilmer?

10 MR. KILMER: If the City is closing it's evidence I'd
11 ask the Court to just go ahead and deny the petition at this
12 point because there's been no evidence presented that Ms. Lori
13 Rodriguez is either a prohibited person or that she's a danger
14 to herself or others or that she wouldn't store the firearms in
15 a safe manner.

16 THE COURT: So, in essence, you're asking for the
17 equivalent of a nonsuit at this point.

18 MR. KILMER: At this point in time, Your Honor, if the
19 Court does deny it then I'm prepared to put on a case.

20 THE COURT: Yeah, and I am going to deny it. I think
21 there is evidence. She clearly lives there. The guns were
22 there. There is an issue that's been raised, and I think it's
23 been confirmed through some of the testimony, about concern that
24 the guns being there would present a problem. So I'm going to
25 deny your motion. So if you want to present your evidence at
26 this point.

27 MR. KILMER: Thank you, Your Honor. Well, then I
28 guess I'm going to recall the officer at this point.

1 DIRECT EXAMINATION

2 BY MR. KILMER:

3 Q. Officer Valentine?

4 A. Yes.

5 Q. Or is it Balentine?

6 A. Valentine.

7 Q. Officer Valentine, on the day in question -- I believe it
8 was January 24th of this year?

9 A. Yes.

10 Q. Were there any firearms out of the safe or present during
11 that event?

12 A. Not to my knowledge, no.

13 Q. Okay. You testified earlier that on at least one prior
14 occasion, perhaps two, that the San Jose Police had been called
15 out to the Rodriguez home; is that correct?

16 A. Yes.

17 Q. On any one of those prior two occasions were firearms
18 present or out during the situation?

19 A. I did not respond to those prior occasions.

20 Q. Do you have any testimony that you can offer to this Court
21 that firearms were out or present during any of those prior
22 occasions?

23 A. No, I do not.

24 MR. KILMER: Nothing further of this witness, Your
25 Honor.26 THE COURT: All right. Any further testimony you want
27 provide at this point?

28 MR. KILMER: I'd like to put my client on now, Your

1 Honor.

2 THE COURT: You can make an offer of proof.

3 MR. KILMER: Thank you, Your Honor.

4 THE COURT: Let me just say, Ms. Rodriguez, we've
5 sworn you in under penalty of perjury. I've asked your lawyer
6 to make an offer of proof. It's a way of really streamlining
7 the evidence. I want you to listen very carefully to it. At
8 the conclusion I'm going to ask if you agree and confirm to the
9 statements that are made. And you're going to be under oath,
10 okay? All right.

11 **DIRECT EXAMINATION**

12 BY MR. KILMER:

13 Q. Ms. Rodriguez, on June 14th we filed a declaration that you
14 filed on May 29th, 2013. And I'm going to hand you a copy of
15 what is a declaration and offer of proof and ask that you review
16 that document.

17 THE COURT: I'm sorry, counsel, what's the date?

18 MR. KILMER: It was a declaration offer of proof filed
19 on June 14th, Your Honor.

20 THE COURT: Okay.

21 Q. (By Mr. Kilmer) Ms. Rodriguez, I'd ask you to turn to what
22 is attached to your declaration as Exhibit A. I'll ask if you
23 can identify that exhibit.

24 A. This is a provisional receipt from the purchase of the
25 safe.

26 Q. All right. And could you please turn to Exhibit B. Please
27 identify that exhibit?

28 A. This is the receipt from the locksmith that I changed the

1 lock on the safe.

2 Q. And when did you have the lock changed?

3 A. April 26th of this year.

4 Q. All right. How is it that your gun safe works? You heard
5 the officer testify there is a key and a dial. Can you explain
6 to the Court how your gun safe works?

7 A. You need the key to unlock the dial to be able to enter the
8 combination. And then it's a combination lock to open the safe.

9 Q. All right. And how many numbers are required to -- first
10 of all, how many numbers are on the dial of the gun safe?

11 A. 0 to 99.

12 Q. All right. So it's a hundred possible combinations?

13 A. Probably more than that.

14 Q. And it requires three numbers?

15 A. Yes.

16 Q. You have to go left, right, left?

17 A. Yes. And several times past the number and stop, and then
18 several times the other way and stop.

19 Q. Okay. And for clarification for the Court, the key, that
20 was talked about earlier, does not open the gun safe?

21 A. No.

22 Q. All right. The key just unlocks the dial?

23 A. Correct.

24 Q. And how many keys are there for unlocking the dial?

25 A. Two.

26 Q. And where are those keys kept?

27 A. I have them.

28 Q. Okay. I'd ask you to turn to Exhibit C of your offer of

1 proof. And identify that document, please.

2 A. This is when I did the fingerprint check and sent it off so
3 that I could be approved to own firearms.

4 Q. Okay. And the date on that note? At the top of the
5 document is the State of California Department of Justice Bureau
6 of Firearms, personal firearms eligibility check notification;
7 is that correct?

8 A. Yes.

9 Q. The date on that is May 8th, 2013?

10 A. Yes.

11 Q. So on that date you were cleared to own and possess
12 firearms?

13 A. Correct.

14 Q. Since May 8th of 2013, have you committed any felonies?

15 A. No.

16 Q. Have you been taken in for a 5150 hold yourself?

17 A. No.

18 Q. Have you had any restraining orders filed against you?

19 A. No.

20 Q. As far as you know, as you sit here today, you're still
21 authorized to own, possess, acquire and own firearms and
22 ammunition?

23 A. Yes.

24 Q. Thank you. The declaration that you submitted says that
25 you're aware of the potential criminal liability if you allow
26 your husband access to the safe. You understand that's a pretty
27 serious consequence, correct?

28 A. Yes.

1 Q. And you know you can go to prison if you quite possibly
2 even negligently or intentionally allow your husband to have
3 access to firearms and ammunition?

4 A. Yes.

5 Q. And you're willing to assume that risk?

6 A. Yes.

7 Q. All right.

8 MR. KILMER: Nothing further, Your Honor.

9 THE COURT: Okay. Mr. Vanni?

10 MR. VANNI: Just one question.

11 **CROSS-EXAMINATION**

12 BY MR. VANNI:

13 Q. Ms. Rodriguez, on the date of the incident there's a
14 reference in Officer Valentine's report that you stated that you
15 were fearful of your husband's behavior. Is that an accurate
16 statement?

17 A. Fearful for myself or fearful for --

18 Q. Yes or no? The fearful -- the statement is that you were
19 fearful of your husband's behavior.

20 A. I don't know that fearful is the right word. So I can't
21 really say yes or no to that.

22 Q. Okay. Well, were you afraid for your husband's safety or
23 for your safety?

24 A. Um --

25 Q. Or for the safety --

26 A. Not afraid for safety. Just he needed help.

27 MR. VANNI: Okay. Nothing further, Your Honor.

28 THE COURT: I have a couple quick questions. Who

1 purchased the guns?

2 RESPONDENT LORI RODRIGUEZ: A combination. Some were
3 my family's guns that have been there for years. One is I
4 actually purchased. A couple he did. And some were given to
5 us. Array of different ways.

6 THE COURT: All right. And prior to the incident that
7 is at issue here involving Officer Valentine's investigation,
8 did he have access to the guns?

9 RESPONDENT LORI RODRIGUEZ: No.

10 THE COURT: All right. Has he ever had access to
11 those guns?

12 RESPONDENT LORI RODRIGUEZ: Years ago. But I had had
13 both keys for years at that point.

14 THE COURT: All right. Anything further?

15 MR. VANNI: No, Your Honor.

16 THE COURT: No. All right. What I want to do is I'm
17 going to submit it on the evidence. I want to hear from both
18 counsel. Here is obviously the issue, the issue is we've got
19 somebody living with Ms. Rodriguez, her husband, who can't -- is
20 not allowed to use the firearms. The defense is predicated upon
21 the fact that these firearms are going to be kept in a safe.
22 Kept from him. He won't have access to them. I think what I
23 want to hear from both sides is what the Court should do in this
24 situation, and any authority you have that you want the Court to
25 review, all right? So we'll start with the City.

26 MR. VANNI: Well, Your Honor, Mr. Kilmer is correct
27 that the City has no evidence that Lori, herself, is a
28 prohibited party. The issue though is with her husband. And

1 the standard under 8102 is whether or not return of the weapons
2 would be a likely danger to others, as well to Mr. Rodriguez.
3 And the unfortunate set of circumstances in these types of cases
4 is if that -- if that burden is shown, which the City believes
5 it has because the mental health professionals at Valley Medical
6 Center have determined that Mr. Rodriguez is a prohibited party.
7 That at the time that Officer Valentine took him in he was a
8 danger to himself and to others. And we haven't heard any
9 medical testimony or any offer of proof as to what Mr. Rodriguez
10 has been doing to kind of change his mental behavior or
11 remediate his mental illness. So there is just no way if these
12 weapons are returned that anybody can monitor and ensure that
13 Mr. Rodriguez will not have access to them.

14 The City has proposed a few options. Either the guns
15 be held at another location away from the home. They could also
16 be sold. The City is certainly interested or willing to enter
17 into that type of stipulation to sell them through a third party
18 gun dealer. Or they could be held in the house if they're
19 rendered inoperable. I'm not a gun expert myself, but I imagine
20 the weapons can be taken apart and the firing mechanisms can be
21 kept outside of the home. So unfortunately, however, the City
22 believes that returning these weapons to the Rodriguez family
23 home will be a likely danger to both Mr. Rodriguez, as well as
24 to Ms. Rodriguez and the community at large.

25 THE COURT: Let me ask you a question. Mr. Kilmer, I
26 believe in his brief, raised the issue of, assuming a
27 hypothetical, that the Court agrees and precludes return of the
28 firearms. What's to prevent Ms. Rodriguez from going out

1 tomorrow and purchasing more firearms and bringing them back to
2 the house?

3 MR. VANNI: That is a correct statement. There is
4 nothing that will prevent her from doing that.

5 THE COURT: Okay. Anything further?

6 MR. VANNI: No, Your Honor.

7 THE COURT: All right. Mr. Kilmer?

8 MR. KILMER: Thank you, Your Honor. That's really the
9 nub of the case, Your Honor. We really can't be sitting here
10 seriously considering that maybe the serial number on the side
11 of the weapon somehow makes it more lethal. Because if this
12 Court orders a Smith and Wesson revolver sold, that's a current
13 collection of the Rodriguez guns, and she goes out tomorrow and
14 buys a different Smith and Wesson revolver with a different
15 serial number that somehow everybody is safe.

16 The Second Amendment is fraught with peril. We're not
17 here arguing against the public policy. But this is a classic
18 case where public policy can run headlong into Constitutional
19 Rights. And the Supreme Court has instructed us on the two
20 cases cited in my brief that the decision about the individual
21 right to keep and bear arms has already been made. And it's
22 made in the Second Amendment. We're not here arguing that there
23 can't be reasonable instructions imposed. We're not here
24 arguing that we can't impose higher restrictions on
25 Ms. Rodriguez than would apply to any other gun owner. And that
26 is that she has a duty to transfer the firearms in addition to
27 keeping them in a gun safe and keeping them away from another
28 adult in the house.

1 There is no question that Mr. Rodriguez is
2 disqualified from owning firearms at this point. And I'd be a
3 stone-cold fool to come into here and argue that he should have
4 his gun rights restored so close to his recent episode.

5 THE COURT: Let me call you on that a little bit. In
6 fairness I'm doing this with everybody because I want to get to
7 the bottom here.

8 MR. KILMER: Sure.

9 THE COURT: I mean the elephant in the room is he goes
10 back and somehow he overpowers her or pressures her or something
11 to open the safe. I mean that's a real concern I have. At the
12 end of the day this is a public safety issue. The guns are
13 right there. They're low hanging fruit. Yeah, they're behind
14 the safe. But, you know, I don't know the dynamics of the
15 relationship. I know the police have been out there. I know
16 there is a history of instability. I'm real concerned about
17 releasing these weapons back to home, even behind the safe, when
18 he's got the authority -- or not the authority, I'm sorry. He's
19 got the ability to, you know, coerce her somehow into opening
20 that safe. That concerns me.

21 MR. KILMER: Your Honor, you raise a good point. But
22 here's the counter factual; Mr. Rodriguez does not have a red
23 letter painted on his forehead. Nobody knows when he's walking
24 the street that he's a prohibited person. He can walk into any
25 gun store in the city and shop for a gun. The sale will be
26 halted once he tries to fill out the paperwork and produces his
27 driver's license because that's what the system is designed to
28 do. But he can walk into any gun store and pick up a shotgun

1 and see if, you know, is this the right gun? Does this hand gun
2 fit my hand? Quite frankly, if he is mentally unstable he can
3 walk into any neighbor's house and try to overpower them and
4 have them open their gun safe.

5 THE COURT: Yeah, but there this is a distinction
6 here. I mean these are -- this is his home. This is his home.
7 And there's a history of the police being out there.

8 MR. KILMER: But it's also her home, Your Honor. And
9 she doesn't lose her rights because she is married to somebody
10 who is currently prohibited. And that's -- it's a tough
11 decision to make. No question. But this is a classic case of a
12 clash of values here. The public policy is very clear.
13 Mr. Rodriguez is prohibited and shouldn't have guns. We're not
14 here arguing that he shouldn't have them.

15 But also the public policy in the State of California,
16 guns have to be kept in gun safes. Guns have to be registered
17 to their proper owner. People have to understand that there are
18 consequences. California's gun laws are a legend in the
19 country. They're complicated. There is a lot of them. The
20 Department of Justice publishes a shorthand definition for
21 everybody about handguns and rifles and the safe storage of
22 firearms. We're sitting here saying that the public policy of
23 imposing criminal sanctions on people for misuse of firearms,
24 requiring them to have gun safes, requiring the guns to be
25 registered. And if none of that can work to prevent
26 Mr. Rodriguez from having a gun, then no gun control works.

27 THE COURT: But the underlying public policy behind
28 all of these is public safety, correct? I mean that's, at the

1 end of the day, is what my responsibility is, is public safety.
2 And that's what guides me. And I'm not saying I'm ignoring her
3 Constitutional Rights or anybody else's rights. But at the end
4 of the day it's my call. I have to determine whether it's
5 appropriate to release those guns given the facts in this
6 particular case and the situation.

7 MR. KILMER: But, again, you're going to have to
8 resolve the issue of what difference does it make which guns she
9 has in her safe. You can't order the confiscation of the gun
10 safe. Quite frankly, I'm surprised that the police didn't
11 confiscate the ammunition as well because Mr. Rodriguez is also
12 prohibited from having ammunition. They didn't think it was
13 important enough to take the ammunition.

14 Now if you rule against her today she can walk out of
15 here and into any gun store and qualify to buy a handgun or
16 shotgun and ten days later go pick it up and put in that gun
17 safe. And then the community is no safer than if you release
18 these particular guns.

19 It's her decision, Your Honor. If she makes a
20 decision at some point in the future that these guns need to be
21 sold and "I'm going to get rid of the gun safe," that's her
22 decision. If she decides she wants to keep one gun in her home
23 for her safety, that's her decision as well. That's what the
24 Constitution says. And that's why --

25 THE COURT: And I don't deny that. But that's really
26 not the issue before me. The issue before me is whether -- I
27 can't order her not to do something she's got a right to do down
28 the road. What I can do is I can prevent those guns from being

1 returned to the home.

2 MR. KILMER: Okay. So what's to prevent -- I mean,
3 Your Honor, how much sense does it make for you to order the
4 guns sold and they go on consignment sale in the gun store and
5 then she turns around and goes back and buys them?

6 THE COURT: Yeah. And I don't know the answer to that
7 question.

8 MR. KILMER: The answer is that you can't prevent
9 that.

10 THE COURT: Yeah. All right. Anything further?

11 MR. VANNI: No, Your Honor.

12 MR. KILMER: Submitted, Your Honor.

13 THE COURT: All right. So, I'm prepared to issue my
14 decision. I'm not going to order the release of the guns to the
15 respondent. I don't think it's appropriate under the
16 circumstances. I appreciate all the comments that have been
17 made. It's an interesting issue. I spent some time with this
18 ahead of time. At the end of the day there's enough concern on
19 my part about the public safety that I'm not going to do that.

20 With that said, I think there are viable alternatives
21 that need to be explored. This is the community possession of
22 the respondent and whether it's by sale or release to a separate
23 place. I'm going to let you folks work that out. So with
24 respect to the request to release the guns back to
25 Ms. Rodriguez, I'm going to deny that request, all right? I'm
26 going to ask that the City prepare the order.

27 MR. KILMER: And may we have a stay on that decision
28 for 60 days, Your Honor?

1 THE COURT: And tell me why.

2 MR. KILMER: I respectfully disagree with the Court's
3 conclusion. I'd like to take it up with the Court of Appeal and
4 the Federal Court.

5 THE COURT: I think you have to ask for the stay
6 through the Court of Appeal though. I mean the City is going to
7 hold the guns anyway. I'm not sure what affect the stay would
8 have here.

9 MR. KILMER: The problem is, Your Honor, at this point
10 in time the government can't be charging my client storage fees
11 or anything like that. Once you order disposition of the guns
12 and they have to keep them in their evidence room they can start
13 charging her fees for storage. I just don't want that to happen
14 while we resolve this.

15 THE COURT: Do you want to comment on that?

16 MR. VANNI: I believe the City can charge and
17 sometimes does charge for the storage of weapons in that
18 circumstance. I can't promise that the police department won't
19 do that, especially after a court order from this Court. So in
20 that mind -- in that vein it's a substantial likelihood that
21 Ms. Rodriguez might be charged for storage of those weapons.

22 THE COURT: So are you opposing the request for stay?

23 MR. VANNI: On the record I'll oppose it, yes, Your
24 Honor. I do think the Court's decision is a valid decision and
25 that returning the weapons will be a likely danger to the
26 community at large.

27 THE COURT: I think -- I'm going to deny the stay
28 without prejudice. I think probably the way to do this is if,

1 in fact, you appeal this, Mr. Kilmer, you can request that the
2 Court of Appeal issue a stay of the order, okay?

3 MR. KILMER: Thank you, Your Honor.

4 THE COURT: All right. Thank you.

5 (Whereupon, this matter adjourned.)

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5 That I was the duly appointed, qualified shorthand
6 reporter of said court in the above-entitled action taken on the
7 above-entitled date; that I reported the same in machine
8 shorthand and thereafter had the same transcribed through
9 computer-aided transcription as herein appears; and that the
10 foregoing typewritten pages contain a true and correct
11 transcript of the proceedings had in said matter at said time
12 and place to the best of my ability.

13 I further certify that I have complied with CCP
14 237(a)(2) in that all personal juror identifying information has
15 been redacted, if applicable.

18

21

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EXHIBIT E

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10 Attorneys for CITY OF SAN JOSE

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED JURISDICTION

CITY OF SAN JOSE,

Petitioner,

v.

EDWARD RODRIGUEZ,

Respondent,

LORI RODRIGUEZ,

Intervenor.

Case Number: 1-13-CV-241669

ORDER RE: DISPOSITION OF
WEAPONS

(WELFARE & INSTITUTIONS CODE
§8102)

20 This matter having come on for hearing in the above-captioned Court on August 9,
21 2013, the Honorable Peter Kirwan, presiding; Mark J. Vanni having appeared for Petitioner
22 CITY OF SAN JOSE; and Donald Kilmer appearing on behalf of Intervenor. Having
23 considered testimony and arguments of counsel, and for good cause shown;

24 ///

THE FOREGOING INSTRUMENT IS
A CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE
ATTEST DAVID H. YAMASAKI

25 ///

AUG 30 2016

26 ///

CHIEF EXECUTIVE OFFICER/CLERK
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
IN AND FOR THE COUNTY OF SANTA CLARA

27 ///

BY  DEPUTY

ORDER RE: DISPOSITION OF WEAPONS

1-13-CV-241669

1005667

K. Kubo

Legal Process Clerk

ER - 080

FILED

2013 SEP 30 A 10:56

David H. Yamasaki, Clerk of the Superior Court
County of Santa Clara, California

T. Mai

1 IT IS HEREBY ORDERED that City's Petition for Disposition of Weapons is
2 GRANTED.

3 The City agrees to hold the weapons pending final disposition or resolution of this
4 matter in accordance with its general practices.

5
6
7 Dated: 9/10/13

P. H. Kirwan

8 THE HONORABLE PETER KIRWAN
9 SUPERIOR COURT JUDGE

10 APPROVED AS TO FORM:

11 Donald Kilmer

12 DONALD KILMER
13 Counsel for Intervenor

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19
20 THE FOREGOING INSTRUMENT IS
21 A CORRECT COPY OF THE ORIGINAL
22 ON FILE IN THIS OFFICE
23 ATTEST: DAVID H. YAMASAKI

24 AUG 30 2016

25 CHIEF EXECUTIVE OFFICER/CLERK
26 SUPERIOR COURT OF SANTA CLARA
27 IN AND FOR THE COUNTY OF SANTA CLARA

28 BY K. Kubo DEPUTY

K. Kubo

Legal Process Clerk



ORDER RE: DISPOSITION OF WEAPONS

1-13-CV-241669

1005667

EXHIBIT F

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CITY OF SAN JOSE,

Plaintiff and Respondent,

v.

EDWARD V. RODRIGUEZ,

Defendant;

LORI RODRIGUEZ,

Intervener and Appellant.

H040317

(Santa Clara County

Super. Ct. No. 1-13-CV241669)

I. INTRODUCTION

The City of San Jose police officers who responded to a domestic disturbance call at the home of Edward V. Rodriguez determined that he was a danger to himself and others and had him transported to Santa Clara Valley Medical Center for 72-hour treatment and evaluation under Welfare and Institutions Code section 5150.¹ The police officers also seized 12 firearms from the home pursuant to section 8102, subdivision (a), which requires confiscation of any firearms owned by or found in the possession or control of a person detained for an examination of his or her mental condition.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

The City of San Jose (City) subsequently filed a petition for disposition of the firearms in which the City requested a court order allowing forfeiture of the confiscated firearms pursuant to section 8102, subdivision (c). Edward V. Rodriguez's wife, appellant Lori Rodriguez, opposed the petition and sought return of the firearms to her.² After an evidentiary hearing, the trial court determined that return of the confiscated firearms to the Rodriguez home would be likely to result in the endangerment of Edward or others, and granted City's petition.

On appeal, Lori contends that the trial court erred because the order granting City's petition is not supported by substantial evidence of danger and also violates her right to keep and bear arms under the Second Amendment to the United States Constitution. For the reasons stated below, we determine that the trial court's order under section 8102, subdivision (a) is supported by substantial evidence. We also determine that Lori has not shown that her Second Amendment rights were violated by the trial court's order.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. City's Petition for Disposition of the Firearms

On February 22, 2013, City filed a petition for disposition of the firearms pursuant to section 8102, subdivision (c) that named Edward as the respondent. City stated that the firearms that were the subject of the petition came into police custody on January 24, 2013, when police officers responding to a domestic disturbance call at the Rodriguez home determined that Edward was a danger to himself or others. Edward was then transported to a medical center on a 72-hour hold for medical treatment and a

² Since Edward V. Rodriguez and appellant Lori Rodriguez have the same surname, we will refer to them by their first names for purposes of clarity and meaning no disrespect.

psychological evaluation pursuant to section 5150. After Edward was transported, police officers conducted a protective sweep and confiscated 12 firearms from the home.

In its petition, City requested that the trial court make a finding under section 8102 as to whether return of the weapons would be likely to endanger Edward or others and, if the finding of danger was made, order that the petition be granted and the weapons forfeited. Alternatively, if no finding of danger was made, City requested that the San Jose Police Department retain custody of the weapons for no more than two years unless Edward obtained a court order allowing their return.

B. Lori's Response to City's Petition

Edward did not file a response to City's petition for disposition of firearms. Lori filed a response in opposition to the petition in which she designated herself as Edward's "co-respondent." In her supporting declaration, Lori stated that she had been married to Edward for nearly 20 years; Edward was placed on a psychiatric hold pursuant to section 5150 on January 24, 2013; Edward was currently prohibited from owning, acquiring, or possessing firearms or ammunition; and the confiscated firearms had been kept in a safe in their home and were community property.

Lori further declared that no firearms were involved in the event that triggered Edward's January 24, 2013 episode; she had opened the gun safe for the police officers who took all of their firearms; and she acknowledged that she had a legal duty to prevent Edward from obtaining access to any firearms or ammunition under her control while he remained a prohibited person. Additionally, Lori attached documents to her declaration that showed her ownership of a firearm safe and her April 2013 change to the safe's combination.

In her hearing brief, Lori argued that the trial court had "no power to interfere with [her] Second Amendment 'right to keep and bear arms,' " since she was not prohibited from acquiring or possessing firearms and had promised to take all steps required under California law to secure the firearms in a gun safe.

On June 21, 2013, the parties filed a stipulation and order stating that the parties agreed that "Lori Rodriguez has standing in this action in that she has at least a community property interest in the firearms at issue in these proceedings."

C. Evidentiary Hearing

The following is a summary of the evidence presented at the August 9, 2013 evidentiary hearing on City's petition.

On January 24, 2013, Police Officer Steven Valentine and other City of San Jose police officers arrived at the Rodriguez home to investigate a domestic disturbance. They were responding to Lori's 911 call regarding Edward's behavior and her concern that he might be suffering from a mental illness. Police officers had previously responded to at least two calls of a domestic disturbance at the Rodriguez home and were aware that there were firearms in the home.

Upon his arrival at the Rodriguez home on January 24, 2013, Officer Valentine observed that Edward was perspiring heavily and had rapid respiration. Officer Valentine also observed that Lori was afraid of Edward. Edward claimed that he was affiliated with the CIA, was acting irrationally, and had bizarre and aggressive mannerisms. Officer Valentine believed that Edward was delusional.

When Officer Valentine asked Edward if he wanted to hurt himself, Edward responded by attempting to break his own thumb. Based on his observations and Edward's attempt to hurt himself, Officer Valentine determined that Edward, who weighed nearly 400 pounds, was a danger to himself and others.

San Jose Fire Department personnel and medical personnel arrived to transport Edward to Santa Clara Valley Medical Center (VMC) for a 72-hour hold and psychological evaluation pursuant to former section 5150.³ After Edward was secured on

³ At the time of Edwards's detention, former section 5150 provided in part: "When any person, as a result of mental disorder, is a danger to others, or to himself or (continued)"

the gurney, he continued to break the restraints. Medical personnel requested that a police officer accompany them in the ambulance. Edward was then transported to VMC, where he was determined to be a danger to himself and others and admitted to the hospital pursuant to former section 5151⁴ and section 5152.⁵

Officer Valentine remained at the Rodriguez home after Edward was transported. He advised Lori that that he would need to confiscate the weapons in the home pursuant to section 8102. Lori unlocked a gun safe by using the key she kept in her possession and a combination lock. Police officers then removed 12 firearms, including three revolvers, three shotguns, a handgun, a rifle, and four semi-automatic rifles. Police officers did not find any firearms outside the gun safe. The firearms had been purchased by Lori or Edward or acquired from her family. Although one firearm belonged to Lori, all 12 firearms were confiscated because Edward had access to them.

In February 2013, City filed a petition for disposition of the firearms to which Lori filed a response in April 2013. In May 2013, Lori received notification from the

herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team provided by Section 5651.7, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Social Services as a facility for 72-hour treatment and evaluation.”

⁴ At the time of Edward’s detention, former section 5151 provided in part: “If the facility for 72-hour treatment and evaluation admits the person, it may detain him or her for evaluation and treatment for a period not to exceed 72 hours. . . . Prior to admitting a person to the facility for 72-hour treatment and evaluation pursuant to Section 5150, the professional person in charge of the facility or his or her designee shall assess the individual in person to determine the appropriateness of the involuntary detention.”

⁵ Section 5152, subdivision (a) provides in part: “Each person admitted to a facility for 72-hour treatment and evaluation under the provisions of this article shall receive an evaluation as soon as possible after he or she is admitted and shall receive whatever treatment and care his or her condition requires for the full period that he or she is held.”

California Department of Justice Bureau of Firearms that she is eligible to both possess and purchase firearms. At the hearing, Lori testified that she has not committed a felony and has not been detained under section 5150.

D. Trial Court Order

In its order of September 30, 2013, the trial court granted City's petition for disposition of weapons. The order also states: "The City agrees to hold the weapons pending final disposition or resolution of this matter in accordance with its general practices."

During the hearing on the petition, the trial court provided the court's reasoning for granting the petition. The court stated: "I mean the elephant in the room is [Edward] goes back and somehow he overpowers [Lori] or pressures her or something to open the safe. I mean that's a real concern I have. At the end of the day this is a public safety issue. The guns are right there. They're low hanging fruit. Yeah, they're behind the safe. But, you know, I don't know the dynamics of the relationship. I know the police have been out there. I know there is a history of instability. I'm real concerned about releasing these weapons back to home, even behind the safe, when he's got . . . the ability to, you know, coerce [Lori] somehow into opening that safe. That concerns me."

The trial court also stated: "[A]t the end of the day, is what my responsibility is, is public safety. And that's what guides me. And I'm not saying I'm ignoring her Constitutional Rights or anybody else's rights. . . . I have to determine whether it's appropriate to release those guns given the facts in this particular case and the situation." The court then ruled, "I'm not going to order the release of the guns to the respondent. I don't think it's appropriate under the circumstances."

The trial court's order did not require forfeiture or destruction of the confiscated firearms. During the hearing, City's attorney noted that other options were available for disposition of the firearms: "The City has proposed a few options. Either the guns be held at another location away from the home. They could also be sold. The City is

certainly interested or willing to enter into that type of stipulation to sell them through a third party gun dealer. Or they could be held in the house if they're rendered inoperable."

As to Lori's claim of a community property interest in the confiscated firearms, the trial court stated: "I think there are viable alternatives that need to be explored. This is the community possession of the respondent and whether it's by sale or release to a separate place. I'm going to let you folks work that out. So with respect to the request to release the guns back to [Lori], I'm going to deny that request."

Thereafter, Lori filed a notice of appeal from the September 30, 2013 order.

III. DISCUSSION

On appeal, we understand Lori to challenge the trial court's order granting City's petition for disposition of firearms on two grounds, insufficiency of the evidence and violation of her Second Amendment right to keep and bear arms. We will begin our evaluation of her claims with an overview of the statutory framework for the confiscation of firearms from a person who has been detained for examination of his or her mental condition and the disposition of confiscated firearms.

A. The Statutory Framework

"Two firearm statutes come into play when a person is detained under section 5150 as a danger to himself [or herself] or others. Section 8103 will prohibit his [or her] possession of firearms for a five-year period.^[6] Section 8102^[7] authorizes

⁶ Section 8103, subdivision (f)(1) provides in part: "No person who has been (A) taken into custody as provided in Section 5150 because that person is a danger to himself, herself, or to others, (B) assessed within the meaning of Section 5151, and (C) admitted to a designated facility within the meaning of Sections 5151 and 5152 because that person is a danger to himself, herself, or others, shall own, possess, control, receive, or purchase, or attempt to own, possess, control, receive, or purchase any firearm for a period of five years after the person is released from the facility." The person may request a hearing to lift the restriction. (§ 8103, subd. (f)(3).)

⁷ Section 8102, subdivision (a) provides in part: "Whenever a person, who has been detained or apprehended for examination of his or her mental condition . . . is found (continued)

confiscation of any weapons he [or she] already possesses.” (*People v. Keil* (2008) 161 Cal.App.4th 34, 37 (*Keil*)).) Section 8102 also authorizes “possible forfeiture of weapons belonging to persons detained for examination under section 5150 because of their mental condition. [Citations.]” (*City of San Diego v. Boggess* (2013) 216 Cal.App.4th 1494, 1500 (*City of San Diego*)).

As stated in *City of San Diego*, “ ‘[s]ection 8102 directly safeguards public health and safety by allowing law enforcement officers to confiscate any firearm in the possession or control of a person who is appropriately detained or apprehended for a mental examination. Keeping a firearm away from a mentally unstable person is a reasonable exercise of the police power. It is not unreasonable to conclude there is a significant risk that a mentally unstable gun owner will harm himself [or herself] or others with the weapon.’ [Citation.]” (*City of San Diego, supra*, 216 Cal.App.4th at p. 1500.)

The statutory scheme also provides the procedure for the return of the confiscated firearms to the person who was detained under section 5150. At the time of the August 2013 hearing on City’s petition for disposition of firearms, former section 8102, subdivision (b) (now § 8102, subd. (b)(2)) provided in part: “Where the person is released, the professional person in charge of the facility, or his or her designee, shall notify the person of the procedure for the return of any firearm or other deadly weapon which may have been confiscated.”

If the law enforcement agency that confiscated the firearms does not make the firearms available for return upon release of the detained person, the person may request

to own, have in his or her possession or under his or her control, any firearm whatsoever, or any other deadly weapon, the firearm or other deadly weapon shall be confiscated by any law enforcement agency or peace officer, who shall retain custody of the firearm or other deadly weapon.”

a hearing on return of the firearms. (§ 8102, subds. (e), (f).) The law enforcement agency may also request a hearing: “Upon the release of a person as described in subdivision (b), the confiscating law enforcement agency shall have 30 days to initiate a petition in the superior court for a hearing to determine whether the return of a firearm or other deadly weapon would be likely to result in endangering the person or others, and to send a notice advising the person of his or her right to a hearing on this issue.” (§ 8102, subd. (c).) “Section 8102 thus ‘places the onus upon law enforcement to initiate the forfeiture proceeding, and to bear the burden of proof on the issue of the danger presented by return of the weapons.’ [Citations.]” (*City of San Diego, supra*, 216 Cal.App.4th at p. 1500.)

“If, after a hearing, the court determines that the return of the firearm or other deadly weapon would likely endanger the person or others, the law enforcement agency may destroy the firearm within 180 days from the date that the court makes that determination, unless the person contacts the law enforcement agency to facilitate the sale or transfer of the firearm to a licensed dealer pursuant to Section 33870 of the Penal Code.” (§ 8102, subd. (h).)

The standard of review for the trial court’s order granting a petition for disposition of firearms under section 8102 is substantial evidence. (*City of San Diego, supra*, 216 Cal.App.4th at p. 1501.) “In determining whether a trial court’s ruling is supported by substantial evidence, the appellate court should view the whole record in the light most favorable to the ruling, resolving all evidentiary conflicts and drawing all reasonable inferences supporting the court’s decision. [Citation.]” (*Ibid.*) “We affirm if ‘substantial evidence supports the court’s determination that return of the firearms to appellant would be likely to result in endangering appellant or other persons.’ [Citation.]” (*Keil, supra*, 161 Cal.App.4th at p. 38.)

B. Analysis

1. Substantial Evidence

We understand Lori to argue on appeal that the trial court's order granting City's petition for disposition of firearms and declining to return the firearms to her is not supported by substantial evidence. According to Lori, the evidence showed that she is not prohibited from owning or possessing firearms and if the confiscated firearms were returned to her, she could secure them in a gun safe to prevent Edward from having unauthorized access. Lori also offers to have the title to the firearms transferred to her. In addition, Lori points out that City's counsel conceded during the hearing that there is nothing to prevent her from buying more firearms and bringing them to the Rodriguez home.

In response, City relies on the statement in *City of San Diego* that "[t]he court may properly consider whether the circumstances leading to the section 5150 detention might occur again and whether possession or control of those confiscated weapons in such circumstance would pose a risk of danger to appellant or to others." [Citation.] (*City of San Diego, supra*, 216 Cal.App.4th at p. 1502.) City asserts that the undisputed evidence shows that the circumstances here included Edward's behavior when Officer Valentine detained him, as well as Edward's size and the prior police responses to the Rodriguez home. City also asserts that return of the confiscated firearms to Lori would have "the practical effect of returning them to Edward," who is prohibited from accessing firearms.

We begin by noting that section 8102 expressly provides the procedure for the return of firearms confiscated by a law enforcement agency only to the person who was detained under section 5150. Section 8102 is silent as to the return of the confiscated firearms to any other person. Accordingly, the only issue to be decided at a hearing under section 8102, subdivision (c) is whether return of the firearms to the previously detained person "would be likely to result in endangering the person or others." (§ 8102,

subd. (c); see also *id.*, subd. (h).) On appeal from a trial court order denying return of confiscated firearms under section 8102, the reviewing court decides the narrow issue of whether substantial evidence supports the trial court's determination that return of the firearms to the person who was detained under section 5150 would be likely to result in endangering that person or other persons. (*Keil, supra*, 161 Cal.App.4th at p. 38.)

In this case, Edward did not oppose the City's petition for disposition of the firearms. The parties filed a stipulation and order stating that the parties agreed that "Lori Rodriguez has standing in this action in that she has at least a community property interest in the firearms at issue in these proceedings." Since the parties stipulated that Lori has standing in this matter, we will consider whether the trial court's order granting City's petition is supported by substantial evidence that return of the firearms to the Rodriguez home would be likely to result in endangering Edward or others. (§ 8102, subds. (c), (h).)

Having reviewed the record in the light most favorable to the trial court's order (*City of San Diego, supra*, 216 Cal.App.4th at p. 1501), we agree with City that the trial court's order is supported by substantial evidence. The evidence showed that there had been two prior calls of a domestic disturbance at the Rodriguez home; Lori made the 911 call regarding Edward's condition on the day of his detention; Lori appeared to be afraid of Edward; Edward's behavior was bizarre and delusional; Edward had attempted to break his own thumb; Edward weighed 400 pounds and had broken free of the gurney restraints; and medical personnel had requested that a police officer accompany them in the ambulance transporting Edward to the hospital. VMC personnel then determined that Edward was a danger to himself and others and he was admitted to the hospital pursuant to sections 5151 and 5152. Moreover, the trial court was not convinced by Lori's testimony that she could safely store the firearms and prevent Edward from having access to them. " 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

We therefore conclude that substantial evidence supports the trial court's order granting City's petition for disposition of firearms under section 8102 on the ground that return of the confiscated firearms to the Rodriguez home would be likely to result in endangering Edward or others.

2. Constitutional Claim

Lori's chief contention on appeal is that the trial court's order granting City's petition for disposition of firearms violates her Second Amendment right to keep and bear arms for home protection. She explains that "[d]epriving an owner of her own guns deprives her of the value of the property and means of exercising the core right of self-defense. [Citation.]" City urges that Lori's constitutional and community property rights may be lawfully impacted by a lawful restriction on her husband Edward's property interest in the confiscated firearms.

At the outset, we note that Lori does not challenge the trial court's order as violating Edward's Second Amendment rights. Constitutional challenges to the trial court's refusal under section 8102 to return confiscated firearms to a person who was detained due to his or her mental condition have been rejected. (See *Rupf v. Yan* (2000) 85 Cal.App.4th 411, 427-428; *People v. One Ruger .22-Caliber Pistol* (2000) 84 Cal.App.4th 310, 312.)

Lori's constitutional claim involves only her own Second Amendment right to keep and bear arms. For several reasons, we determine that Lori has not shown that her Second Amendment rights were violated by the trial court's September 30, 2013 order granting City's petition for disposition of firearms.

First, Lori acknowledges in her opening brief that the trial court's order does not bar her from acquiring new firearms, noting the trial court's "uncontradicted finding . . . that Lori cannot be prohibited from acquiring new firearms." Lori further acknowledges that under section 8101, she may not allow Edward access to any new firearms that she may acquire. Section 8101 provides: "(a) Any person who shall knowingly supply, sell,

give, or allow possession or control of a deadly weapon to any person described in Section 8100 or 8103 shall be punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code, or in a county jail for a period of not exceeding one year, by a fine of not exceeding one thousand dollars (\$1,000), or by both the fine and imprisonment. [¶] (b) Any person who shall knowingly supply, sell, give, or allow possession or control of a firearm to any person described in Section 8100 or 8103 shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years.”

Second, we understand Lori to argue that she has a Second Amendment right to return of the particular firearms that were confiscated under section 8102 for home protection. However, Lori has not provided any legal authority for the proposition that the spouse of a person whose firearms were confiscated under section 8102 has a Second Amendment right to the return of those confiscated firearms for home protection. In her briefing, she generally argues that the United States Supreme Court expanded Second Amendment rights in *District of Columbia v. Heller* (2008) 554 U.S. 570 (*Heller*) and *McDonald v. City of Chicago* (2010) 561 U.S. 742 (*McDonald*).

However, the Supreme Court decisions in *Heller* and *McDonald* did not state that the Second Amendment right to keep and bear arms extends to keeping and bearing either any particular firearms or firearms that have been confiscated from a mentally ill person. Moreover, the *Heller* and *McDonald* decisions may be read to the contrary.

The *McDonald* court reiterated that “[i]n *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.” (*McDonald, supra*, 561 U.S. 742, 791.) However, the court also stated: “It is important to keep in mind that *Heller* while striking down a law that prohibited the possession of handguns in the home, recognized *that the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’* [Citation.] We made it clear in *Heller* that our holding did not cast

doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill,’ [Citation.]” (*McDonald, supra*, 561 U.S. at p. 786, italics added.)

Third, we note that the trial court’s order does not actually require forfeiture or destruction of the confiscated firearms. Both the trial court and City’s attorney suggested there were other viable options for disposition of the firearms, such as sale or storage outside the home.

Finally, we consider whether the provisions of Penal Code section 33850 et seq. impact Lori’s Second Amendment claim. Lori has acknowledged that Penal Code section 33850 provides a procedure for the return of firearms in police custody to persons who claim ownership of the firearms.

Under Penal Code section 33850, a “person who claims title to any firearm” in law enforcement custody may seek the return of that firearm. (Pen. Code, § 33850, subd. (a).)⁸ The person seeking return of any firearms must file an application for a Penal Code section 33865 notification that specifies the make and model of the firearms that are being sought and provides detailed information about any handguns. (Pen. Code, §§ 33850, 33865, subd. (c)(3).) The firearms cannot be returned by a court or law enforcement agency unless the person seeking them obtains a Penal Code section 33865 notification that the person is eligible to possess a firearm and “the firearm has been recorded in the Automated Firearms System in the name of the individual who seeks its return.” (Pen. Code, § 33855, subd. (b).)

⁸ Penal Code section 33850, subdivision (a) provides in part: “Any person who claims title to any firearm that is in the custody or control of a court or law enforcement agency and who wishes to have the firearm returned shall make application for a determination by the Department of Justice as to whether the applicant is eligible to possess a firearm.”

After oral argument, we asked the parties to provide supplemental briefing with respect to the impact of Penal Code section 33850 et seq. on Lori's Second Amendment claim, by responding to the following questions: (1) "The record on appeal includes a copy of a May 8, 2013 Department of Justice Bureau of Firearms notice stating that Lori Rodriguez is 'eligible to both possess and purchase firearms as of the date the [personal firearms eligibility] check was completed.' What evidence in the record, if any, shows that Rodriguez either has or has not sought return of the confiscated firearms under the procedure provided by Penal Code section 33850 et seq?"; (2) "Assuming that Rodriguez has not sought return of the confiscated firearms under Penal Code section 33850 et seq., what is the impact on her claim that the trial court's order of September 30, 2013, violates her rights under the Second Amendment?"; and (3) "Assuming that Rodriguez has sought return of the confiscated firearms under Penal Code section 33850 et seq., what is the impact on her claim that the trial court's order of September 30, 2013, violates her rights under the Second Amendment?"

In their supplemental briefing, the parties agree that the record does not indicate that Lori has sought return of the confiscated firearms under the procedure provided by Penal Code section 33850 et seq. We understand Lori to contend that her failure to utilize the firearms return procedure provided by Penal Code section 33850 et seq. has no impact on her Second Amendment claim, for three reasons. First, Lori asserts that she properly sought return of the confiscated firearms by intervening in City's petition for disposition of firearms under section 8102. Second, Lori maintains that she may raise a constitutional claim without exhausting the administrative remedy provided by Penal Code section 33850 et seq. Finally, Lori appears to argue that the trial court proceedings on City's section 8102 petition precluded her from seeking return of the confiscated firearms under Penal Code section 33850.

City responds that whether or not Lori has sought return of the confiscated firearms under Penal Code section 33850 et seq. has no impact on her claim that the

trial court's September 30, 2013 order violates her Second Amendment rights. City notes that prior to amendment in 2013, section 8102 was silent as to Penal Code section 33850 et seq.,⁹ and emphasizes its position that the trial court's order is constitutional because substantial evidence supports the trial court's finding that return of the confiscated firearms would likely endanger Edward and others.

The parties' supplemental briefing confirms that Lori has not sought return of the confiscated firearms under the procedure provided by Penal Code section 33850 et seq., although the firearms remain in the custody of law enforcement and Lori has obtained notification from the California Department of Justice Bureau of Firearms that she is eligible to both possess and purchase firearms. Lori has not provided any authority for the proposition that trial court proceedings on a section 8102 petition preclude a person who claims title to the confiscated firearms from seeking their return under Penal Code section 33850 et seq. Moreover, we believe that the record on appeal shows that the

⁹ As amended in 2013, section 8102, subdivision (b) provides: "(1) Upon confiscation of any firearm or other deadly weapon from a person who has been detained or apprehended for examination of his or her mental condition, the peace officer or law enforcement agency shall issue a receipt describing the deadly weapon or any firearm and listing any serial number or other identification on the firearm and shall notify the person of the procedure for the return, sale, transfer, or destruction of any firearm or other deadly weapon which has been confiscated. A peace officer or law enforcement agency that provides the receipt and notification described in Section 33800 of the Penal Code satisfies the receipt and notice requirements. [¶] (2) If the person is released, the professional person in charge of the facility, or his or her designee, shall notify the person of the procedure for the return of any firearm or other deadly weapon which may have been confiscated. [¶] (3) Health facility personnel shall notify the confiscating law enforcement agency upon release of the detained person, and shall make a notation to the effect that the facility provided the required notice to the person regarding the procedure to obtain return of any confiscated firearm. [¶] (4) For purposes of this subdivision, the procedure for the return, sale, or transfer of confiscated firearms includes the procedures described in this section and the procedures described in Chapter 2 (commencing with Section 33850) of Division 11 of Title 4 of Part 6 of the Penal Code." (Stats. 2013, ch. 747, § 2.)

procedure provided by section 33850 et seq. for return of firearms in the possession of law enforcement remains available to Lori.

We therefore determine that Lori has failed to show that the trial court's September 30, 2013 order violates the Second Amendment by precluding her from keeping firearms for home protection. In the absence of any evidence that Lori's Second Amendment right to keep and bear arms was actually violated by the trial court's September 30, 2013 order granting City's petition for disposition of firearms under section 8102, we conclude that her Second Amendment claim lacks merit.

Having also determined that the order may be affirmed under section 8102 because the order is supported by substantial evidence that return of the confiscated firearms to the Rodriguez home would be likely to result in endangering Edward or others, we will affirm the order.

IV. DISPOSITION

The September 30, 2013 order is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

GROVER, J.