

No. 17-17144

In the United States Court of Appeals
for the Ninth Circuit

LORI RODRIGUEZ, ET AL.,
Plaintiffs-Appellants,

v.

CITY OF SAN JOSE, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern
District of California, No. 5:15-cv-03698-EJD

**BRIEF OF THE BRADY CENTER TO PREVENT GUN
VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF
DEFENDANTS-APPELLEES AND AFFIRMANCE**

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INTEREST OF AMICUS CURIAE¹

The Brady Center to Prevent Gun Violence (the “Brady Center”) is the nation’s largest nonpartisan, non-profit organization dedicated to reducing gun violence through education, research, and direct legal advocacy on behalf of victims and communities affected by gun violence. In support of that mission, the Brady Center files this brief as *amicus curiae* in support of Defendants-Appellees and affirmance.

The Brady Center has a substantial interest in ensuring that the Second Amendment is not interpreted or applied in a way that would jeopardize the public’s interest in protecting individuals, families, and communities from the effects of gun violence. Through its Legal Action Project, the Brady Center has filed amicus briefs in numerous cases involving firearms regulations, including *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *United States v. Hayes*, 555 U.S. 415 (2009), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹ All parties have consented to the filing of this brief. No party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amici or their counsel contributed money that was intended to fund preparing or submitting the brief. See Fed. R. App. P. 29(a)(4)(E).

SUMMARY OF ARGUMENT

The district court properly upheld Defendants' refusal to return twelve firearms that were confiscated from the Rodriguez home by City of San Jose police officers responding to a 9-1-1 emergency call about Mr. Rodriguez's violent mental health episode.

Mr. Rodriguez is mentally ill, has a history of violence, and has been deemed by medical professionals to be a danger to himself and others. In at least three different instances, police officers have responded to disturbances at the home Mr. Rodriguez shares with his wife Lori because of Mr. Rodriguez's mental state and violent tendencies. In January 2013, Mrs. Rodriguez called 9-1-1 because her husband was in distress and apparently had been for weeks. Upon arrival, police officers observed Mr. Rodriguez acting bizarre and delusional, talking about shooting up schools, and letting the officers know he had a safe full of guns, and causing Mrs. Rodriguez to appear fearful of her husband. After transporting Mr. Rodriguez to a hospital where he was designated a danger to himself and others (but not before he repeatedly broke free of his gurney restraints while being transported), officers located twelve firearms in the Rodriguez home,

eleven of which were registered solely to Mr. Rodriguez. Pursuant to California Welfare and Institutions Code Section 8102, which permits the confiscation and retention of firearms owned or possessed by persons admitted to a health care facility like Mr. Rodriguez, the officers removed the twelve firearms from the Rodriguez home.

After California trial and appellate courts denied Mrs. Rodriguez's application for the return of the firearms to the Rodriguez home because the firearms posed a danger to Mr. Rodriguez and others, Mrs. Rodriguez transferred title of the firearms to herself, and re-petitioned the district court for the firearms' return. The district court correctly found that substantial evidence justified the firearms' confiscation and continued retention due to public safety concerns. Indeed, returning the firearms to Mrs. Rodriguez because they are now in her name would frustrate the purposes of laws like Section 8102, which have proven effective in protecting public safety.

Empirical research supports the decision not to release the confiscated firearms to the Rodriguez home. Specifically, studies show that risk-based gun removal laws like Section 8102 have been effective at protecting public safety by restricting access to firearms by persons

like Mr. Rodriguez, who are at high risk of committing gun-related violence. Studies also indicate that if the twelve firearms are released to the Rodriguez home, they are more likely to be used in a homicide, suicide, or unintentional shooting than in self-defense.

Mrs. Rodriguez nevertheless contends that the City of San Jose has no right to refuse to release the firearms to *her*, and that *she* should be able to keep the twelve firearms in the home where she resides with her husband, because she transferred ownership of the firearms to herself after they were confiscated and because she has no history of mental illness or violence. In making this claim, Mrs. Rodriguez draws an artificial and unsupported line between her conduct and her husband's. Courts have repeatedly held that the exercise of a person's constitutional rights may permissibly be restricted based on one's voluntary associations, including based solely on the actions of those with whom one chooses to live. For example, the government may search a person's home based on the consent of a roommate or based on the wrongdoing of a roommate.

Constitutional rights are not unlimited; they are balanced against public safety and other government interests even where an individual

herself has done nothing to trigger the government interest at stake.

The Second Amendment right is no exception, especially when the exercise of that right frustrates the important governmental duty to protect public safety. Because Defendants properly refused to release the confiscated firearms to the Rodriguez home, the judgment of the district court should be affirmed.

ARGUMENT

I. Gun Violence Prevention Laws Like Section 8102 Are Needed to Keep Guns Out of the Hands of People Like Mr. Rodriguez Who Are at High-Risk of Committing Violence.

Section 8102 of the California Welfare and Institutions Code was enacted to protect public safety by restricting access to firearms by persons like Mr. Rodriguez, who are at high-risk of committing violence against themselves and others. Empirical research shows that laws such as Section 8102 are effective.

A. The legislature enacted Section 8102 to protect public safety by preventing persons like Mr. Rodriguez from accessing guns.

Section 8102 authorizes the confiscation of firearms from persons like Mr. Rodriguez who are taken into custody to evaluate their mental condition. *See* Cal. Welf. & Inst. Code § 8102. The California legislature considers Section 8102 “an urgen[t] statute necessary for *the*

immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution.” *Id.* (amended 1989) (emphasis added). Specifically, the legislature considers it “essential” that there is a procedure for law enforcement authorities to confiscate firearms from those taken into custody for evaluation of their mental state. *Id.*

California state courts have accordingly observed that the “legislative history of the statute expressly recognizes the *urgency* and *importance* of such an objective” of public safety. *City of San Diego v. Boggess*, 216 Cal. App. 4th 1494, 1506 (2013) (citations and internal quotation marks omitted) (emphasis added). And when applying Section 8102, courts have considered whether returning the firearms would threaten public safety. *See, e.g., People v. Keil*, 161 Cal. App. 4th 34 (2008) (“Substantial evidence supports the trial court’s findings that appellant would not be likely to use firearms in a safe and lawful manner (§ 8103) and that return of the firearms to appellant would result in danger to appellant and others. (§ 8102).”).

Mr. Rodriguez—a mentally ill individual with a history of violent tendencies—is precisely the type of gun owner that Section 8102 was

intended to address. As of January 2013, City of San Jose police had responded to “disturbance-type calls,” E.R. 62 (Super. Ct. Tr. 11:11), at the Rodriguez home at least three times “to do welfare checks and to look into Mr. Rodriguez’s mental state,” E.R. 57 (*id.* 6:20-21). On the day firearms were seized from the Rodriguez home, Mrs. Rodriguez called the police because her husband had been having problems for “a couple weeks at that point.” E.R. 105 (Rodriguez Dep. 28:23). Upon arriving at the Rodriguez home, City of San Jose police officers observed that Mr. Rodriguez was talking about “[s]hooting up schools,” E.R. 121 (Valentine Dep. 44:9), “rambling,” and “speaking about the CIA and the Army and individuals watching him,” E.R. 56 (Super. Ct. Tr. 5:10-11). Mr. Rodriguez “let [the officers] know that he had a gun safe full of guns.” E.R. 121 (Valentine Dep. 44:17-18). The officers observed that: (i) “Lori appeared to be afraid of Edward”; (ii) “Edward’s behavior was bizarre and delusional”; (iii) “Edward weighed 400 pounds and had broken free of the gurney restraints”; and (iv) “medical personnel had requested that a police officer accompany them in the ambulance transporting Edward to the hospital.” E.R. 93 (*City of San Jose v. Rodriguez*, No. H040317, 2015 WL 1541988, at *6 (Cal. Ct. App. Apr. 2,

2015) (state appeals court reviewing and summarizing record evidence)). Upon detention, Mr. Rodriguez “attempted to break his own thumb,” *id.*, by “pulling his thumb back,” E.R. 56 (Super. Ct. Tr. 5:20-21).

Unsurprisingly, City of San Jose police officers and medical professionals determined that Mr. Rodriguez was a danger to himself and others. *Id.* (5:15-17) (“Officer Valentine, after observing Mr. Rodriguez and his behavior, determined that he was a danger to himself and to others”); E.R. 57 (*id.* 6:5-7) (“When Mr. Rodriguez was at Valley Medical Center he was evaluated and determined to be a danger to himself and was admitted”); *see also* E.R. 93 (*Rodriguez*, 2015 WL 1541988, at *6) (“VMC personnel . . . determined that Edward was a danger to himself and others and he was admitted to the hospital”). Due to these concerns, the California state trial and appellate courts upheld the Defendants’ decision to remove and retain twelve firearms from the Rodriguez home pursuant to Section 8102 so that Mr. Rodriguez could no longer access them. *See* E.R. 81 (*City of San Jose v. Rodriguez*, No. 1-13-CV-241669 (Cal. Super. Ct., Santa Clara Cty. Sept. 16, 2013)); E.R. 93-94 (*Rodriguez*, 2015 WL 1541988).

B. Common-sense gun laws like Section 8102 have been shown to be effective in preventing gun-related deaths.

Empirical research supports Defendants’ removal and retention of the twelve firearms from the Rodriguez home. Studies have found that laws which “decrease gun access and ownership” among high-risk populations for violence—like Section 8102—may decrease rates of homicides and suicides. For example, in 2016, researchers from Yale and Duke found a positive correlation between Connecticut’s risk-based gun confiscation law and suicide prevention.² Based on an analysis of 762 actual gun-removal cases in Connecticut, the study found that every 10.6 guns collected under Connecticut’s gun violence restraining orders resulted in one averted suicide. *Id* at 204. The researchers concluded that “risk-based gun removal laws . . . can be at least modestly effective in preventing suicide.” *Id.* at 208.

This correlation has been corroborated by other reports and studies, which have found similar decreases in suicide rates following the enactment of risk-based gun removal laws in other states. For

² See Jeffrey W. Swanson et. al., *Implementation and Effectiveness of Connecticut’s Risk-Based Gun Removal Law: Does It Prevent Suicides?*, 80 Law and Contemp. Probs. 179, 206-08 (2017).

example, researchers evaluated the gun seizure law enacted by Connecticut in 1999, *see* Conn. Gen. Stat. § 29-38c (1999), as well as a similar law enacted by Indiana in 2005, *see* Ind. Code § 35-47-14-3 (2006).³ Utilizing sophisticated statistical models to predict trends in suicides had Indiana and Connecticut not passed gun seizure laws, the study found that the seizure laws prevented 383 firearm suicides in Indiana over a 10-year period (a 7.5% decrease in the rate of suicide by firearm) and 128 firearm suicides in Connecticut over an 8-year period (a 13.7% decrease). *Id.* at 2-4. The statistical analysis also indicated that the odds of the study's results occurring by chance—rather than due to the effects of the seizure laws—were less than 1%. *Id.* at 7. As a result, the researchers concluded that “firearm seizure legislation is associated with meaningful reductions in population-level firearm suicide rates.” *Id.*

The relationship between gun confiscations or gun access restrictions and homicides has been most evident in the domestic violence context. For instance, in a 2010 study based on 46 of the

³ *See* Aaron J. Kivisto & Peter Lee Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981–2015*, Psychiatric Services in Advance (June 1, 2018).

largest U.S. cities from 1979 to 2003, researchers found that state laws restricting the access of firearms by domestic abusers are connected to a “19% reduction in [intimate partner homicide] risk” and a “25% reduction in firearm [intimate partner homicide] risk.”⁴

By adopting common-sense gun violence prevention laws, California has saved thousands of lives from gun-related violence each year. In addition to Section 8102, as of 2013, California had enacted more than 30 common-sense gun laws that *inter alia* banned assault weapons,⁵ prohibited the purchase of more than one new handgun within any 30-day period,⁶ and allowed law enforcement authorities to confiscate guns from those who are felons or domestic abusers.⁷ In 2014, California became the first state to enact “red flag laws”⁸ that allowed family members to ask a judge to remove firearms from a relative who appeared to pose a threat to himself and others.⁹

⁴ April M. Zeoli & Daniel W. Webster, *Effects of domestic violence policies, alcohol taxes and police staffing levels on intimate partner homicide in large US cities*, 16 Inj. Prevention 90, 91-92 (2010).

⁵ Cal. Penal Code §§ 30500-30530.

⁶ Cal. Penal Code § 27535.

⁷ Cal. Penal Code §§ 12028.5 (domestic abusers) and 29800 (felons).

⁸ Cal. Penal Code §§ 18125, 18150, 18175.

⁹ The California legislature enacted these “red flag laws” as a response to a shooting spree that occurred at the University of California, Santa

These laws have contributed to a significant decrease in the rate of death caused by guns in California. Between 1993 and 2010, the rate of gun-related deaths dropped by 56%;¹⁰ between 1993 and 2013, the rate dropped by 56.6%.¹¹ This 56.6% decline in California's gun-related death rate from 1993 to 2013 was approximately 29% greater than the decline in the rest of the country. *See id.* As such, California's common-sense gun laws like Section 8102 appear highly effective in reducing gun-related violence.

II. The Mere Presence of Firearms in the Rodriguez Home—Whether Held in Mr. or Mrs. Rodriguez's Name—Will Likely Increase the Risk of Gun-Related Violence.

Barbara, where a mentally ill man killed six students and wounded 13 before ultimately killing himself. *See* Michael Livingston, *More states approving 'red flag' laws to keep guns away from people perceived as threats*, Los Angeles Times (May 14, 2018, 3:00 AM), *available at* <http://www.latimes.com/nation/la-na-red-flag-laws-20180514-story.html>. With these laws, the legislature sought to provide a means for intervention before it is too late, to prevent similar shooting sprees from occurring again. *See id.*

¹⁰ *See* Law Center to Prevent Gun Violence, *The California Model: Twenty Years of Putting Safety First*, Law Center to Prevent Gun Violence (June 18, 2013), *available at* https://www.chapman.edu/law/_files/events/mli-symposium/mclively-the-california-model.pdf.

¹¹ *See* The Brady Campaign to Prevent Gun Violence, *California's Gun Laws are Saving Lives*, The Brady Campaign to Prevent Gun Violence, *available at* <http://www.bradycampaign.org/california%E2%80%99s-gun-laws-are-saving-lives> (last visited July 2, 2018).

In this appeal, Mrs. Rodriguez challenges Defendants’ refusal to return to her—not her husband—twelve firearms confiscated pursuant to Section 8102, all of which have now been registered in her name instead of her husband’s. Statistical and survey evidence supports the Defendants’ continued refusal to return the weapons.

Numerous studies have shown a positive correlation between access to firearms—regardless of ownership—and the likelihood of homicides, suicides, and unintentional shootings. Concerns about such gun-related violence and Mr. Rodriguez’s history of mental illness with violent tendencies have justifiably propelled the City of San Jose and two state courts to prohibit the release of the confiscated firearms back to the Rodriguez household. *See, e.g.*, E.R. 70 (Super. Ct. Tr. 19:21-24) (“[T]he City believes that returning these weapons to the Rodriguez family home will be a likely danger to both Mr. Rodriguez, as well as to Ms. Rodriguez and the community at large.”); E.R. 72 (*id.* 21:9-20) (trial court noting concern about Mr. Rodriguez’s “history of instability,” and concern that he might “overpower[]” or “coerce” Mrs. Rodriguez to gain access to the firearms); E.R. 93 (*Rodriguez*, 2015 WL 1541988, at *6) (holding that substantial evidence supported the trial court’s order

because *inter alia* “there had been two prior calls of a domestic disturbance at the Rodriguez home; . . . 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”).

A. There is a positive correlation between the number of households with firearms and the number of homicides, suicides, and unintentional deaths.

Numerous studies suggest that releasing the confiscated firearms in this case may put members of the Rodriguez household and others at increased risk of gun-related violence. First, “[t]he available evidence is quite consistent” that “households with firearms are at higher risk for homicide, particularly firearm homicide.”¹² According to Dr. Matthew Miller, an adjunct professor at the Harvard School of Public Health, and his colleagues, this “association between higher household gun ownership rates and higher overall homicide rates is robust.”¹³ For

¹² Lisa M. Hepburn & David Hemenway, *Firearm availability and homicide: A review of the literature*, 9 *Aggression and Violent Behavior* 417, 437 (2004); *see also id.* at 417 (“The research suggests that households with firearms are at higher risk for homicide, and there is no net beneficial effect of firearm ownership.”).

¹³ Matthew Miller et al., *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988-1997*, 92 *Am. J. of Pub. Health* 1988 (2002); *see also id.* (“The association between household

example, Dr. Miller and his colleagues found that states with the highest rates of firearm prevalence have 114% higher rates of firearm homicide than states with the lowest rates of firearm prevalence.¹⁴

Second, higher rates of household firearm possession are similarly correlated with higher rates of suicide. A Boston University study of suicide rates from 1981 to 2013 found “a strong relationship between state-level firearm ownership and firearm suicide rates among both genders.”¹⁵ This study “add[ed] to the consistent finding that, among both genders, increased prevalence of firearms is associated with an increase in the firearm-specific suicide rate.” *Id.* at 1320. The researchers explained that “[t]he magnitude of this relationship is substantial”—“if the firearm ownership in Wyoming were 41.0% (the average for all states) instead of 72.8%, its male firearm suicide rate would be lower by 9.9 per 100 000 (a 38% decline), and its female

firearm ownership rates and homicide rates held for virtually all age groups and was particularly strong for adults aged 25 years and older.”).

¹⁴ Matthew Miller et al., *State-Level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 *Social Sci. & Med.* 656, 659-60 (2007) (emphasis added).

¹⁵ Michael Siegel & Emily F. Rothman, *Firearm Ownership and Suicide Rates Among US Men and Women, 1981-2013*, 106 *Am. J. of Pub. Health Res.* 1316, 1316 (2016), available at <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2016.303182>.

firearm suicide rate would be lower by 2.2 per 100 000 (a 56% decline).”

Id.

Likewise, another study by Harvard adjunct professor Dr. Miller and his colleagues found that “[i]n both regional and state-level analyses, for the U.S. population as a whole, for both males and females, and for virtually every age group, a robust association exists between levels of household firearm ownership and suicide rates.”¹⁶ Specifically, Dr. Miller’s study found that “[f]or the U.S. population as a whole, a one standard deviation increase in household handgun ownership rates . . . was associated with suicide rates that were, on average, *14% higher* in the regions with higher handgun ownership” *Id.* at 521 (emphasis added). It also found that “[p]eople living in high-gun states were 1.6 times more likely to take their own lives (3.8 times more likely to kill themselves with a gun but only 0.6 times as likely to kill themselves with other means).” *Id.* at 522.

Third, higher rates of household firearm possession are correlated with higher rates of unintentional deaths. A study by Dr. Miller and

¹⁶ Matthew Miller et al., *Household Firearm Ownership and Suicide Rates in the United States*, 13 *Epidemiology* 517, 517 (2002); see also *id.* at 523 (“[O]ur study provides robust, nationally representative evidence that household firearm prevalence is related to the rate of suicide.”).

his colleagues found that “[a] statistically significant and robust association exists between gun availability and unintentional firearm deaths for the US as a whole and within each age group.”¹⁷ This study found that “compared to states with the lowest gun levels, states with the highest gun levels had, on average, *9 times* the rate of unintentional firearm deaths.” *Id.* (emphasis added). Another study—conducted by the UCLA School of Public Health—found that “[t]he relative risk of death by an unintentional gunshot injury, comparing subjects living in homes with and without guns, was 3.7”¹⁸ The risk was even higher—3.9 “among subjects with *multiple* guns in the home”—compared to 3.4 “among subjects with one gun” in the home. *Id.* (emphasis added).

In sum, studies show that returning the firearms to the Rodriguez home will appreciably increase the risk that they will be used to harm the Rodriguezes or others.

¹⁷ Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths*, 33 Accident Analysis & Prevention 477, 477 (2000).

¹⁸ Douglas J. Wiebe, *Firearms in U.S. Homes as a Risk Factor for Unintentional Gunshot Fatality*, 35 Accident Analysis & Prevention 711, 711 (2003).

B. A gun at the Rodriguez home is more likely to be used in homicide, suicide, or unintentional shooting than in self-defense.

Mr. Rodriguez has a history of mental episodes that manifest violent tendencies and could result in his obtaining possession of firearms kept in the Rodriguez home. When determining that the confiscated firearms should not be released to the Rodriguez home, the state trial court voiced special concern about the “history of instability” at the Rodriguez home, the history of police responding to the Rodriguez home, and Mr. Rodriguez’s ability to “overpower[] [Mrs. Rodriguez] or pressure[] her or something to open the safe” where the firearms allegedly would be stored. E.R. 72 (Super. Ct. Tr. 21:9-20). The court determined that having the firearms “right there” in the marital home would be “low hanging fruit” and “a public safety issue.” *Id.* (21:12-13); *see also* E.R. 73 (*id.* 22:6-7) (“I mean these are—this is his home. This is his home. And there’s a history of the police being out there.”); E.R. 73-74 (*id.* 22:27-23:6) (“[T]he underlying public policy behind all of these is public safety, correct? I mean that’s, at the end of the day, is what my responsibility is, is public safety. And that’s what guides me. . . . I have to determine whether it’s appropriate to release those guns given the

facts in this particular case and the situation.”).¹⁹ The state appellate court subsequently affirmed the trial court’s order, finding substantial evidence that “return of the confiscated firearms to the Rodriguez home would be likely to result in endangering Edward or others.” E.R. 94 (*Rodriguez*, 2015 WL 1541988, at *6).

Mrs. Rodriguez nonetheless claims that Defendants’ refusal to release the confiscated firearms “cannot withstand even rational basis review” because they “are a de facto forfeiture” of arms “useful for self-defense.” Appellants’ Opening Br. 17. This claim ignores substantial evidence that returning the confiscated firearms to the Rodriguez home is substantially more likely to lead to their use in a criminal assault, suicide attempt, or unintentional shooting than in self-defense.²⁰

¹⁹ The City of San Jose’s lawyer noted at the hearing that there was “just no way once the weapons are back in Ms. Rodriguez’s possession to determine or to confirm that she’s indeed holding them the way that she pledges,” E.R. 57 (*id.* 6:24-26), and that there was no “medical testimony or any offer of proof as to what Mr. Rodriguez has been doing to kind of change his mental behavior or remediate his mental illness,” E.R. 70 (*id.* 19:9-11).

²⁰ See, e.g., Arthur L. Kellermann et al., *Injuries and Deaths Due to Firearms in the Home*, 45 J. of Trauma, Inj., Infection, and Critical Care 263 (1993) (“Although guns in the home are occasionally used to injure or [sic] kill in self-defense, the odds that a gun will be used in this manner are substantially outweighed by the odds that it will be involved in an unintentional shooting, a criminal assault, or a suicide attempt.”).

For instance, one study found that “[t]he number of unintentional shootings, criminal assaults, and suicide attempts involving a gun kept in the home exceed[s] the number of self-defense and legally justifiable shootings by a ratio of *22 to 1*.” *Id.* (emphasis added). It also found that:

[g]uns kept in homes were *four times more likely* to be involved in an unintentional shooting, *seven times more likely* to be used in a criminal assault or homicide, and *11 times more likely* to be used in an attempted or completed suicide than to be used to injure or kill in self-defense

Id. (emphases added). In addition, a study by the Harvard Injury Research Center found that the criminal use of guns exceeds the self-defense use of guns by a ratio of at least 4:1 or 6:1.²¹ In other words, far from providing protection, releasing the confiscated firearms to the Rodriguez home may significantly increase the risk of homicide, suicide, or unintentional shooting occurring there.

III. Mrs. Rodriguez’s Second Amendment Rights Have Not Been Violated.

A. Mrs. Rodriguez’s claim that Section 8102 is unconstitutional as applied to her because *she* is not mentally ill is unavailing.

²¹ See David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 *Violence & Victims* 257, 269 (2000).

Rather than apply an intermediate scrutiny analysis to their Second Amendment claim under this Court's decisions, *see, e.g., Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2016), Plaintiffs assert that Section 8102 is unconstitutional as applied to the Rodriguezes because Mrs. Rodriguez "can only be disqualified [from exercising her Second Amendment rights] by her own conduct or status," not by her husband's. Appellants' Opening Br. 14. This position has no basis in Second Amendment jurisprudence or in other constitutional precedents, and Plaintiffs cite no cases in support of it. A significant government interest can limit an individual's constitutional rights—even where the individual's own conduct is not the trigger for the government interest at stake.

Constitutional rights may be restricted based on the actions of people with whom one chooses to live. For example, this Court has held that when a probationer's residence is lawfully searched without a warrant pursuant to probation terms, evidence discovered can be used against the probationer's nonconsenting co-inhabitant without violating the co-inhabitant's Fourth Amendment rights. In *United States v. Davis*, 932 F.2d 752 (9th Cir. 1991), narcotics officers had conducted a

search of an apartment belonging to a probationer and a co-inhabitant, through which they found a safe containing heroin. *Id.* at 755. The co-inhabitant argued that the search of the safe fell outside the bounds of the probation terms, since circumstances suggested that the safe belonged to him and not the probationer. *Id.* at 758-59. This Court rejected the co-inhabitant's argument and found the officers' search of the safe constitutionally proper. *Id.* at 759. This Court concluded that the officers had a reasonable suspicion that "the safe was jointly owned, possessed, or controlled by [cohabitant] and probationer, and thus subject to search under the rubric of [probationer's] probation search condition." *Id.* This Court has consistently affirmed this holding in subsequent cases. *See, e.g., United States v. Bolivar*, 670 F.3d 1091, 1093 (9th Cir. 2012) (finding that the search of co-inhabitant's backpack was justified by probationer's consent, through the terms of her probation, to a search of her property).

The behavior of a defendant's co-inhabitant may also occasion a search which subsequently implicates a defendant in criminal behavior. For example, where an arresting officer accompanies a defendant's co-inhabitant into a shared residence and observes evidence of illegal

activity in plain view, the subsequent search and use of that evidence against the defendant does not violate his Fourth Amendment rights. *See Washington v. Chrisman*, 455 U.S. 1, 9-10 (1982) (holding that where defendant's roommate was under lawful arrest and arresting officer accompanied arrestee into shared residence so that arrestee could retrieve identification, use of evidence observed in plain view by officer and subsequently seized pursuant to defendant's consent did not violate defendant's Fourth Amendment rights).

Similarly, if a criminal defendant chooses to live with someone who consents to a search of their shared residence, the ensuing search does not violate the defendant's Fourth Amendment rights, and evidence discovered during the search may be offered against the defendant even though she never consented to the search. *See, e.g., Fernandez v. California*, 571 U.S. 292, 301-07 (2014) (holding that where defendant objected to search and was subsequently arrested and removed from the premise, defendant's wife could consent to a search and the evidence recovered could be introduced against defendant); *United States v. Matlock*, 415 U.S. 164, 171 (1974) (holding that proof of voluntary consent to a search "is not limited to proof that consent was

given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.”). The rationale underlying this restriction of a defendant’s constitutional rights is that “any of the co-inhabitants has the right to permit the inspection in his own right and . . . *the others have assumed the risk that one of their number might permit the common area to be searched.*” *Id.* at 171 n.7 (emphasis added).

In the Fifth Amendment context, the Supreme Court has established a similar principle, holding that a sale of property can be forced—even where a co-owner of the property does not want to sell—in order to satisfy a judgment against another co-owner. *See, e.g., United States v. Rodgers*, 461 U.S. 677, 694 (1983) (holding that the government may foreclose on a family house attached by a federal tax lien, even though a non-delinquent spouse also has a homestead interest in the house); *see also United States v. Craft*, 535 U.S. 274, 284 (2002) (same).

The common thread in all of these cases is that the government interest in searching the premises (or in selling property) was

sustained—and an individual’s Fourth (or Fifth) Amendment rights were compromised—even though the individual himself did nothing to justify the search (or sale).

The same principle has, if anything, greater resonance in the Second Amendment context, where firearms can create a risk of death or injury to others. *See* Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 Geo. J. L. and Pub. Pol’y 187 (2016). The Supreme Court has made clear that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *See Heller*, 554 U.S. at 626. According to the Supreme Court, “[f]rom Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.*

Thus, the City of San Jose can protect public safety even though it might impose modest limits on Mrs. Rodriguez’s Second Amendment rights. Assuming *arguendo* that the Defendants’ refusal to return the twelve firearms to Mrs. Rodriguez impinges on her Second Amendment rights, those limitations are modest and arise from her choice to reside

with Mr. Rodriguez, and from her choice to keep the firearms in an operational state in the house she shares with him—just as the Fourth Amendment rights of the individuals involved in the cases cited above were circumscribed by the conduct of their co-inhabitants.

Mrs. Rodriguez could choose to store her firearms outside of the house she shares with Mr. Rodriguez, or keep her firearms there in an inoperable state. *See* E.R. 70 (Super. Ct. Tr. 19:14-19) (statement by counsel for the City that “the guns [could] be held at another location away from the home . . . [o]r they could be held in the house if they’re rendered inoperable”). Alternatively, Mrs. Rodriguez could choose to reside separately from Mr. Rodriguez. But since she chooses to keep the firearms operational and to store them in the house she shares with Mr. Rodriguez, the City of San Jose has made a reasonable and constitutionally valid decision to protect public safety, where Mr. Rodriguez has a history of mental illness with violent tendencies. The Second Amendment does not prohibit this government conduct.

B. The fact that Mrs. Rodriguez can keep *different* guns in her house does not render Section 8102 ineffective because the legislature is not obligated to completely eradicate a problem in order to address it.

Mrs. Rodriguez’s ability to buy new guns and keep them in the home does not render Section 8102 unconstitutional. Legislatures may regulate in piecemeal fashion. *See Rupf v. Yan*, 85 Cal. App. 4th 411, 425 (2000) (“[A]ppellant points out the statute does not prohibit him from acquiring new guns at will, but only speaks to confiscation of those he currently owns, controls, or has in his possession. . . . It is well established that a statute need not eliminate all evils at once to survive a challenge on this ground. . . . ‘[G]overnments are entitled to attack problems piecemeal’” (citation omitted)); *see also, e.g., United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993) (“Nor do we require that the Government make progress on every front before it can make progress on any front.”); *Dex Media West, Inc. v. City of Seattle*, 790 F. Supp. 2d 1276, 1287 (W.D. Wash. 2011) (“The government is not required to legislate in a way that wholly eliminates a particular problem; rather, it may advance its goals in piecemeal fashion with a graduated response.”); *Spafford v. Echostar Commc’ns Corp.*, 448 F. Supp. 2d 1220, 1225-26 (W.D. Wash. 2006) (same).²²

²² *Cf., e.g., Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 911 (9th Cir. 2009) (“Although the SFA permits some advertising, a regime that combines the Sign Ordinance and the SFA still arrests the

Thus, as the state trial court explained, the issue facing the Court is narrow: “I can’t order [Mrs. Rodriguez] not to do something she’s got a right to do down the road. What I can do is I can prevent those guns from being returned to the home.” E.R. 74-75 (Super Ct. Tr. 23:26-24:1).

Deference to legislative decision-making, moreover, is particularly appropriate in the realm of combating gun violence to ensure the protection of public safety. *Cf. Heller*, 554 U.S. at 636 (“We are aware of the problem of handgun violence in this country The Constitution leaves the District of Columbia a variety of tools for combating that problem”). Given the difficulty and urgency of addressing America’s gun violence epidemic, states should not be hampered in their efforts to find solutions, as long as they leave intact the core right of self-defense. *Cf. Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198,

uncontrolled proliferation of signage and thereby goes a long way toward cleaning up the clutter, which the City believed to be a worthy legislative goal.”); *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995) (“The First Amendment does not require Congress to forgo addressing the problem at all unless it completely eliminates cost shifting.”); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1109 (5th Cir. 1987) (“The case law makes clear that a city is not precluded from curing only some of its visual blight, or from pursuing the elimination of visual blight in a piecemeal fashion.” (citation omitted)).

2214 (2016) (stating that states may serve as “laboratories for experimentation” (citation omitted)).

CONCLUSION

For these reasons, the Brady Center respectfully requests that this Court affirm the District Court’s grant of summary judgment for the Defendants-Appellees.

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Signature of Attorney or
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s/ Sharon Kim

Date

07/02/2018

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2018, I electronically filed the foregoing using the courts' CM/ECF system which will automatically generate and send notification of such filing to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

s/ Sharon Kim
SHARON KIM

July 2, 2018