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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

**MOTION FOR SUMMARY JUDGMENT  
OR, IN THE ALTERNATIVE, PARTIAL  
SUMMARY JUDGMENT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

DATE: November 10, 2016

TIME: 9:00 a.m.

COURTROOM: 4

JUDGE: Hon. Edward J. Davila

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This case involves twelve firearms that Defendant San Jose Police Officer Steven  
4 Valentine confiscated from Plaintiff Lori Rodriguez's husband, Edward Rodriguez, the  
5 night he was detained for a mental health examination under California Welfare and  
6 Institutions Code<sup>1</sup> section 5150—also known as a “5150” hold—which authorizes police  
7 officers to detain someone who is a danger to themselves or others because of a mental  
8 disorder. When Officer Valentine confiscated the firearms, he was following section  
9 8102(a), which requires police officers to confiscate any firearms from anyone detained for  
10 a 5150 hold. Cal. Welf & Inst. Code § 8102.

11 This case also involves a State Court proceeding—*City of San Jose v. Edward*  
12 *Rodriguez et al.* (Santa Clara County Case No. 1-13-CV-241669)—where the City  
13 petitioned the Santa Clara County Superior Court under Section 8102(c) for a hearing to  
14 determine whether the return of the firearms would be likely to result in endangering  
15 Edward or others. Cal. Welf & Inst. § 8102(c). Plaintiff Lori Rodriguez intervened and  
16 asked the Honorable Peter Kirwan to order the City them to her. After a full evidentiary  
17 hearing, Judge Kirwan found that returning the firearms to Lori would be likely to result in  
18 endangering Edward or others, and granted the City's petition to forfeit the firearms. Cal.  
19 Welf & Inst. § 8102(h). Lori appealed Judge Kirwan's decision to the California Sixth  
20 District Court of Appeal, which upheld the decision. See *City of San Jose v. Rodriguez*  
21 (California Sixth District Court of Appeal Case No. H040317).

22 Despite these other proceedings, Plaintiff Lori Rodriguez, along with advocacy  
23 groups the Second Amendment Foundation, Inc. (SAF) and Calguns Foundation, Inc.  
24 (Calguns), brought this action “to challenge the customs, policies, practices and  
25 procedures of seizing and retaining firearms in conjunction with a mental health and  
26 welfare check under California's Welfare and Institutions Code; when said firearms are  
27 taken from homes that have California approved gun safes and at least one responsible  
28

<sup>1</sup> Unless otherwise stated, all statutory references are to the California Welfare and Institutions Code.



1 and qualified person to take custody of the firearms.” (See Plaintiffs’ Complaint ¶ 1.) They  
 2 allege violations of the Second Amendment, Fourth Amendment, Fifth Amendment  
 3 (Takings Clause), Fourteenth Amendment (Administrative Return of Property), and Penal  
 4 Code section 33880 *et. seq.* Plaintiffs demand the return of the twelve firearms (which are  
 5 still in the custody of SJPD pursuant to an agreement between the parties), injunctive  
 6 relief to prevent future constitutional violations, and monetary damages.

7 However, Defendants are entitled to summary judgment or partial summary  
 8 judgment, in the alternative, because SAF and Calguns do not have Article III standing;  
 9 Plaintiffs have not stated a claim under the Second Amendment, Fifth Amendment, or  
 10 Penal Code section 33800 *et. seq.*; there is no violation of Plaintiffs’ constitutional rights  
 11 under the Second, Fourth, Fifth, and Fourteenth Amendment; the City does not have a  
 12 policy, practice, or custom that violates Plaintiffs’ constitutional rights; Officer Valentine is  
 13 entitled to qualified immunity on all section 1983 claims; and Plaintiffs’ State claim is  
 14 inappropriate for this Court to decide and has already been adjudicated in State court. For  
 15 these reasons, Defendants request that the Court enter judgment in favor of Defendants.

## 16 II. FACTS

### 17 A. **OFFICER VALENTINE DETAINED PLAINTIFF’S HUSBAND, EDWARD 18 RODRIGUEZ FOR EXAMINATION OF HIS MENTAL CONDITION UNDER 19 WELFARE AND INSTITUTIONS CODE SECTION 5150.**

20 On the night of January 24, 2013, Plaintiff Lori Rodriguez called the San Jose  
 21 Police Department (SJPD) because her husband, Edward Rodriguez, was suffering from a  
 22 mental episode inside their home. (See Complaint ¶18). Lori<sup>2</sup> called the police because  
 23 she wanted Edward taken to the hospital as “[he] was in distress” and “[h]e exhibited signs  
 24 of erratic behavior.” (Undisputed Material Fact (“Fact”) 7.). San Jose Police Officer Steven  
 25 Valentine was dispatched to assist.

26 Before Officer Valentine arrived, Edward was “[m]oving all over the house” and  
 27 opening the windows and yelling outside....” (L. Rodriguez Dep. 31:16-32:18.) Lori

28 <sup>2</sup> For efficiency, Defendants refer to Lori and Edward Rodriguez by their first names throughout the remainder of their motion.

1 described Edward's behavior as "high energy" or "manic." (*Id.*) He was also talking  
2 constantly about things like being in the CIA and being Indian/Native American. (*Id.*)

3       When Officer Valentine arrived, Lori opened the door to let him inside so he could  
4 talk to Edward, who was sitting in the kitchen. (*Id.* 34:5-22.) Edward's mother, Grace  
5 Rodriguez, was also present in the home and remained in the living room with Lori. (*Id.*)  
6 Officer Valentine tried to engage with Edward, but Edward only talked about being  
7 affiliated with the CIA and school shootings. (*Id.* 44:5-9.) Edward also mentioned to  
8 Officer Valentine that he had guns inside a nearby gun safe in the kitchen. (Fact 8.) When  
9 Officer Valentine asked how many, Edward said a lot. (*Id.*)

10       Based on Edward's irrational behavior, bizarre and aggressive mannerisms, and  
11 manic personality, Officer Valentine concluded that Edward was suffering from a mental  
12 condition that made him a danger to himself and to others. As authorized under Section  
13 5150, Officer Valentine detained Edward Rodriguez and ordered paramedics, who had  
14 arrived on scene, to bring him to Santa Clara County Valley Medical Center (VMC) to  
15 evaluate the need for 72-hour psychiatric hold, where he was ultimately admitted because  
16 he could harm himself or others. (Facts 6, 14; See Cal. Welf & Inst. Code § 5151.) Edward  
17 was then transferred to another hospital and discharged a week later. (L. Rodriguez Dep.  
18 70:1-12.)

19       As a result of being admitted for a psychiatric hold, Edward is automatically a  
20 "prohibited person" under Section 8103, meaning he cannot "own, possess, control,  
21 receive, or purchase, or attempt to own, possess, control, receive, or purchase any firearm  
22 for a period of five years" or until lifted by a Court. Cal. Welf. & Inst. Code § 8103. As of  
23 the filing of this motion, Edward is still a prohibited person under Section 8103. (Fact 6,  
24 14).

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1 **B. BECAUSE EDWARD RODRIGUEZ WAS DETAINED FOR A 5150 HOLD, ALL**  
2 **FIREARMS THAT HE OWNED, CONTROLLED, OR POSSESSED WERE**  
3 **CONFISCATED.**

4 When this incident occurred, Edward and Lori owned twelve firearms stored inside  
5 a gun safe in their kitchen. (Fact 9.) Lori and Edward have been married for over 20 years  
6 and they own this gun safe together. (*Id.*) She claims that one of the firearms (a .357  
7 Magnum) was registered to her and is her separate property because it was acquired  
8 before their marriage. (Complaint ¶ 15.) As to the eleven other firearms, two were  
9 registered to Edward (the remaining eight were long guns that did not need to be  
10 registered prior to January 2014), and Lori claims a community property interest in all  
11 eleven. (*Id.* ¶ 16, see also L. Rodriguez Dep. 24:4-9.)

12 Before Edward was taken to VMC, Officer Valentine informed Lori of the laws  
13 pursuant to a 5150 hold and that he was required to confiscate any firearms in the home  
14 that Edward Rodriguez owned, could possess, or could control. (Fact 10.) When Lori  
15 asked why, Officer Valentine told her about Section 8102. (*Id.*) Lori then went by herself to  
16 get the key to the gun safe from a file cabinet in their home office and to get an address  
17 book from inside a desk in a bedroom where the combination was written down. (Fact 11.)  
18 When she returned, she tried opening the safe, but had trouble. She gave the key and  
19 combination to an officer (not Officer Valentine) who was able to open the safe. (*Id.*)

20 Once the safe was open, the firearms were confiscated and booked for  
21 safekeeping at the SJPD where they are to this day pursuant to an agreement between  
22 the parties. (*Id.*, See Complaint ¶ 40.)

23 **C. SUPERIOR COURT JUDGE PETER KIRWAN REFUSED TO RETURN THE**  
24 **FIREARMS TO LORI RODRIGUEZ BECAUSE HE FOUND IT WAS UNSAFE.**

25 As permitted under Section 8102(c), the City petitioned the Superior Court for a  
26 hearing to determine whether the return of the twelve firearms would be likely to result in  
27 endangering Edward or others. (Fact 16.) The City notified Edward of his right to request  
28 a hearing on this issue, but because Edward was a prohibited person, the firearms could  
not be returned to him. (*Id.*) Lori, citing her property interest in the firearms, intervened by  
way of stipulation between the parties, and requested a Court hearing. (Fact 17.)

1 The matter went before Judge Kirwan. (Facts 5, 12, 15, 20, 21.) Both parties  
 2 briefed the matter and Judge Kirwan held an evidentiary hearing. (*Id.*) Judge Kirwan  
 3 heard testimony from Lori and Officer Valentine, allowed Lori to cross-examine Officer  
 4 Valentine, and heard oral argument from the City Attorney and Lori's attorney. (*Id.*)

5 Lori asked Judge Kirwan to order the City to return the firearms to her where she  
 6 would store them inside the gun safe she and Edward own, and promised to prevent him  
 7 from obtaining access to them by changing the key and combination. (*Id.*) After  
 8 considering the evidence presented, Judge Kirwan found that returning the twelve firearms  
 9 would likely endanger Edward, or others and granted the City's petition to dispose them.  
 10 (*Id.*) Despite Judge Kirwan's order, Lori can still acquire a firearm as she is not a  
 11 prohibited person under California law. (Fact 3.)

12 After Judge Kirwan made his decision, Lori appealed to the Sixth District Court of  
 13 Appeal, which, in an unpublished decision, upheld Judge Kirwan's order. (Fact 19.) The  
 14 Sixth District also recognized that the Second Amendment did not protect a right to a  
 15 specific firearm, and stated:

16 "Lori has not provided any authority for the proposition that trial court  
 17 proceedings on a section 8102 petition preclude a person who claims title to  
 18 the confiscated firearms from seeking their return under Penal Code section  
 19 33850 et seq. Moreover, we believe that the record on appeal shows that the  
 procedure provided by section 33850 et seq. for return of firearms in the  
 possession of law enforcement remains available to Lori." *City of San Jose v*  
*v. Rodriguez*, 2015 WL 1541988, (Cal. Ct. App. 2015)..

20 Subsequent to the Sixth District decision, Lori Rodriguez transferred the registration  
 21 of the firearms to her and requested their return citing Penal Code section 33800 *et seq.*  
 22 The City declined her request in view of Judge Kirwan's finding that returning the firearms  
 23 to her was not safe. Lori then, along with SAF and Calguns, brought this action against the  
 24 City and Officer Valentine asserting constitutional claims under 42 U.S.C. § 1983, as well  
 25 as a State claim under Penal Code section 33800 *et seq.*

26 **D. THE SJPD DUTY MANUAL MIRRORS SECTION 8102.**

27 The SJPD Duty Manual provides guidance to officers when firearms are present  
 28 during a 5150 hold. When someone is detained for a 5150 hold, officers are to determine

1 if firearms are owned through checking the California Department of Justice (DOJ)  
 2 Automated Firearms System; ask if there are any firearms on the premises; and  
 3 confiscate any firearm owned, in the possession of, or under the control of the detained  
 4 person, which is what Section 8102 requires. (Facts 2, 4, 13.) Where firearms are  
 5 confiscated, officers are to then to complete a property report listing the firearms taken  
 6 from the owner or possessor; give the owner or possessor of the firearms a receipt; advise  
 7 the owner or possessor to obtain a DOJ Firearms Release Form from the DOJ webpage  
 8 or contact the Firearms Division; and then take the firearms into custody and book them in  
 9 the Department's Property Room. (*Id.*)

### 10 III. ARGUMENT

#### 11 A. **THE COURT SHOULD GRANT DEFENDANTS SUMMARY JUDGMENT OR, IN 12 THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT BECAUSE THERE IS NO 13 GENUINE ISSUE OF MATERIAL FACT AND DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.**

14 Summary judgment is proper if “there is no genuine dispute as to any material fact  
 15 and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A material  
 16 fact is one that would affect the outcome of the proceedings, and the moving party bears the  
 17 burden to demonstrate the absence of a triable issue of material fact. *Anderson v. Liberty*  
 18 *Lobby, Inc.*, 447 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

19 After the moving party meets its initial burden, the burden shifts to the responding  
 20 party who must present admissible evidence that a triable issue of material fact exists.  
 21 *Celotex*, 477 U.S. at 324. If supported by affidavits or other evidentiary material, the Court  
 22 must regard as true the non-moving party's evidence. *Id.* at 324. However, it is not enough  
 23 for the responding party to point to the allegations or denials contained in the pleadings. Fed.  
 24 R. Civ. P. 56(c); see also *Liberty Lobby*, 447 U.S. at 249–50 (noting that the nonmoving  
 25 party bears the burden of producing more than “a scintilla of evidence” of a triable issue of  
 26 material fact in its favor). It is also insufficient to suggest that facts are in controversy, or  
 27 highlight conclusory or speculative testimony. See *Thornhill Publ'g Co. v. GTE Corp.*, 594  
 28 F.2d 730, 738 (9th Cir. 1979).

1           When the facts are undisputed and the only remaining issue is a question of law for  
 2 the Court, summary judgment is appropriate. *Asuncion v. District Director of U.S.*  
 3 *Immigration and Naturalization Service*, 427 F.2d 523, 524 (9th Cir. 1970). Whether a police  
 4 officer is entitled to qualified immunity is a legal question appropriate for resolution by  
 5 summary judgment. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-72 (9th Cir. 1993); see  
 6 also *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997).

7       **B.     PLAINTIFFS SAF AND CALGUNS FOUNDATION, INC. DO NOT HAVE ARTICLE**  
 8       **III STANDING TO SEEK INJUNCTIVE RELIEF.**

9           Without Article III standing there is no federal court jurisdiction. *DaimlerChrysler Corp.*  
 10 *v. Cuno*, 547 U.S. 332, 342 (2006). To have Article III standing, there must be (1) an actual  
 11 or a threatened injury; (2) that injury is fairly traceable to the defendant's conduct; and (3)  
 12 there is a sufficient likelihood that a favorable decision on the merits will redress the injury.  
 13 See *Id.* at 333. The party invoking federal jurisdiction, “bear[s] the burden of showing  
 14 standing by establishing [ ] that they have suffered an injury in fact, i.e., a concrete and  
 15 particularized, actual or imminent invasion of a legally protected interest. To survive a  
 16 summary judgment motion, they must set forth by affidavit or other evidence specific facts to  
 17 support their claim.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

18           The Supreme Court has established a specific standing doctrine when a plaintiff  
 19 seeks injunctive relief. In *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983), criticized  
 20 on other grounds by *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), the  
 21 plaintiff in a section 1983 case sought damages and a permanent injunction to ban police  
 22 officers from using chokeholds unless the officer is threatened with serious harm. *Id.* at 98.  
 23 The Supreme Court found that Lyons did not have standing for injunctive relief because he  
 24 failed to demonstrate a realistic probability that he will again be subjected to the same  
 25 injurious conduct. *Id.* at 101-02. The fact that the officers had previously used a chokehold  
 26 on him or others was not dispositive, nor was Lyons' subjective fear of future chokeholds  
 27 sufficient because it did not demonstrate a real or immediate threat of actual injury. *Id.* at 98,  
 28 105. To establish standing to seek injunctive relief, the Court stated that “Lyons would have



1 had not only to allege that he would have another encounter with the police but also to make  
 2 the incredible assertion either, (1) that *all* police officers in Los Angeles always choke any  
 3 citizen with whom they happen to have an encounter, whether for the purpose of arrest,  
 4 issuing a citation or for questioning or, (2) that the City ordered or authorized police officers  
 5 to act in such manner.” *Id.* at 107.

6 Plaintiffs SAF and Calguns do not have Article III standing as they have not alleged  
 7 an actual injury stemming from the conduct alleged. In fact, Lori is not even a member of  
 8 either organization. (Fact 1.) Further, they cannot establish an immediate threat of actual  
 9 injury because Defendants do not have a policy, practice, custom, or procedure “to  
 10 confiscate firearms from the home and retain them in conjunction with a 5150 hold where  
 11 there is a California approved gun safe and at least one responsible and qualified person  
 12 to take custody of the firearms.” (See Facts 2, 4, 13.) Under *Lyons*, SAF and Calguns  
 13 must rely on more than one instance of firearms being taken under Section 8102 where a  
 14 gun safe and allegedly responsible and qualified person is present to establish standing  
 15 for injunctive relief. Accordingly, the City requests that the Court dismiss SAF and  
 16 Calguns.

17 **C. PLAINTIFFS DO NOT HAVE A CLAIM UNDER THE SECOND AMENDMENT**  
 18 **(FIRST CLAIM OF RELIEF) BECAUSE DEFENDANTS HAVE NOT INFRINGED**  
 19 **UPON PLAINTIFFS’ RIGHT TO KEEP AND BEAR ARMS.**

20 **1. The Core Right Protected Under the Second Amendment Is an**  
 21 **Individual’s Right To Self-Defense.**

22 Although this case involves firearms, it is not a Second Amendment case. In *District*  
 23 *of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court recognized that, at its  
 24 core, the Second Amendment protects the right of individuals to keep and bear arms for  
 25 self-defense. *Id.* at 636; See U.S. Const. amend. II. The Supreme Court reiterated this  
 26 core right when it incorporated the Second Amendment to the States in *McDonald v. City*  
 27 *of Chicago*, 561 U.S. 742, 767 (2010).

28 In expanding an individual’s right “to keep and bear arms” for self-defense, which  
 had not previously been recognized, the Supreme Court acknowledged that, like most



1 Constitutional rights, the Second Amendment is not unlimited. The Supreme Court stated  
2 that it is “not a right to keep and carry any weapon whatsoever in any manner whatsoever  
3 and for whatever purpose.” *Heller* at 627. The *Heller* Court also provided a non-  
4 exhaustive list of examples of firearm prohibitions that they did not intend to disturb (e.g.  
5 “possession of firearms by felons and the mentally ill, or laws forbidding the carrying of  
6 firearms in sensitive places such as schools and government buildings, or laws imposing  
7 conditions and qualifications on the commercial sale of arms”). *Id.*

8 The Supreme Court repeated these same limitations in *McDonald* at 777. And, the  
9 Ninth Circuit recently emphasized the limited scope of the Second Amendment when it  
10 held, *en banc*, that the Second Amendment did not protect the right of a member of the  
11 general public to a carry concealed firearm in public. *Peruta v. County of San Diego*, 824  
12 F.3d 919, 948 (9th Cir. 2016).

13 **D. IN FOLLOWING THE PROCEDURES OF SECTION 8102, DEFENDANTS HAVE**  
14 **NOT PREVENTED PLAINTIFFS FROM EXERCISING THEIR CORE RIGHT**  
15 **UNDER THE SECOND AMENDMENT TO KEEP AND BEAR ARMS IN SELF-**  
16 **DEFENSE.**

17 Section 8102 requires police officers to confiscate firearms from anyone detained  
18 or apprehended for a 5150 hold. It also provides a hearing process to determine whether  
19 return of the firearms is likely to be dangerous. In *City of San Diego v. Boggess*, 216  
20 Cal.App.4th 1494 (Cal. Ct. App. 2013), the California Court of Appeal recognized, post-  
21 *Heller* and *McDonald*, that the procedures in Section 8102 did not infringe upon the right to  
22 keep and bear arms because the confiscation and hearing process only implicates the  
23 specific firearms confiscated by law enforcement and not the right to keep and bear arms  
24 generally. *Boggess* at 1503. The *Boggess* Court also found that Section 8102 is a  
25 regulatory measure, within the traditional limitations on the right to bear arms, that the  
26 Supreme Court did not intend to disturb in *Heller* or *McDonald*. *Id.* at 1505.

27 Here, Defendants followed the procedures under Section 8102 and Judge Kirwan  
28 declined to return the firearms to Edward and Lori. Despite Judge Kirwan’s order regarding  
the twelve firearms, Lori is not prohibited from possessing, owning, or acquiring firearms.

1 This is because the confiscation and retention of the twelve firearms under Section 8102  
2 only affects the twelve firearms, not the right to keep and bear arms generally. *Id.* at 1503.  
3 As a result, Plaintiffs do not have a Second Amendment claim because Defendants have  
4 not have prevented them from acquiring firearms.

5 **E. THE SECOND AMENDMENT DOES NOT PROTECT THE RIGHT TO A SPECIFIC**  
6 **FIREARM.**

7 To the extent Plaintiffs seek to create a right to keep and bear a specific firearm,  
8 the prevailing interpretation of the Second Amendment does not protect such a right.  
9 Although this an area of Second Amendment law that “is just beginning to receive judicial  
10 attention,” *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 571 (7th Cir. 2014), the Circuits  
11 that have commented on this issue (the Ninth Circuit has not), have declined to recognize  
12 a property-like right to a specific firearm under the Second Amendment.

13 In *Walters v. Wolf*, 660 F.3d 307 (8th Cir. 2011), the Eighth Circuit found no  
14 violation of the plaintiff’s Second Amendment rights because the government’s retention of  
15 a confiscated firearm did not prohibit Walters from retaining or acquiring another firearm.  
16 The *Walters* Court found no fault with the lower Court’s ruling that “Walters must do more  
17 than show that the City kept him from possessing one particular firearm to establish a  
18 violation of the Second Amendment; Walters must also show that the City kept him from  
19 acquiring any other legal firearm.” *Walters* at 316-18 *discussing Garcha v. City of Beacon*,  
20 351 F.Supp.2d 213 (S.D.N.Y.2005), *Bane v. City of Philadelphia*, Civil Action No. 09–  
21 2798, 2009 WL 6614992 (E.D.Pa. June 18, 2010). Instead, the Court viewed the matter  
22 as involving the government’s retention of property, and reversed the lower court on  
23 procedural due process grounds. *Id.* at 315.

24 Later, in *Rodgers v. Knight*, 781 F.3d 932 (8th Cir. 2015), the Eighth Circuit  
25 affirmed its position in *Walters* stating that even “the *unlawful* retention of specific firearms  
26 does not violate the Second Amendment, because the seizure of one firearm does not  
27 prohibit the owner from retaining or acquiring other firearms.” *Id.* at 941-942 citing *Walters*  
28 at 317-18.

1 Similarly, in *Houston v. City of New Orleans*, 675 F.3d 441 (5th Cir. 2012), opinion  
2 withdrawn and superseded on rehearing by *Houston v. City of New Orleans* 682 F.3d 361  
3 (5th Cir. 2012), rejected the notion that the Second Amendment created a property right to  
4 a specific firearm. Houston's firearm was seized when he was arrested, and the charges  
5 against him were later dropped. When he asked for his firearm back, the City of New  
6 Orleans refused and Houston brought a section 1983 suit alleging, among other things, a  
7 Second Amendment violation.

8 The Fifth Circuit found that Houston had not alleged a viable Second Amendment  
9 claim because the City of New Orleans had done nothing to prevent him from "retaining or  
10 acquiring other firearms." *Houston* at 445. However, the Fifth Circuit, *en banc*, vacated its  
11 decision because the parties had not pursued a Louisiana procedure to recover the  
12 firearm and the Second Amendment issue was not yet ripe. Defendants recognize that the  
13 Fifth's Circuit's constitutional finding in *Houston* was superseded, and do not cite it as  
14 precedent, but cite it because the Fifth Circuit's analysis is persuasive and consistent with  
15 the Supreme Court's limited approach under the Second Amendment.

16 **F. OFFICER VALENTINE IS ENTITLED TO QUALIFIED IMMUNITY ON**  
17 **PLAINTIFFS' SECOND AMENDMENT CLAIM.**

18 Apart from Plaintiffs' failure to allege a Second Amendment violation, Officer  
19 Valentine is entitled to qualified immunity on Plaintiffs' Second Amendment claim.  
20 Qualified immunity turns on the "'objective legal reasonableness' of the action, assessed  
21 in light of the legal rules that were 'clearly established' at the time.... [Citations]" *Anderson*  
22 *v. Creighton*, 483 U.S. 635, 639 (1987). It protects government officials "from liability for  
23 civil damages insofar as their conduct does not violate clearly established statutory or  
24 constitutional rights of which a reasonable person would have known." *Pearson v.*  
25 *Callahan*, 555 U.S. 223, 231 (2009) quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818  
26 (1982). And, "[it] balances two important interests—the need to hold public officials  
27 accountable when they exercise power irresponsibly and the need to shield officials from  
28 harassment, distraction, and liability when they perform their duties reasonably." *Id.*

1 The privilege is “an immunity from suit rather than a mere defense to liability” and is  
 2 lost if the case is erroneously permitted to go to trial.” *Mitchell v. Forsyth*, 472 U.S. 511,  
 3 526 (1985). As a result, the Court has “repeatedly stressed the importance of resolving  
 4 immunity questions at the earliest possible stage in litigation.” *Hunter v. Bryant*, 502 U.S.  
 5 224, 227 (1991).

6 Whether qualified immunity applies is based on: (1) whether the facts alleged show  
 7 that the defendant violated a constitutional right; (2) whether the right was clearly  
 8 established at the time of the alleged violation; and (3) whether it would be clear to a  
 9 reasonable officer that under the circumstances his or her conduct was unconstitutional.  
 10 *Saucier v. Katz*, 533 U.S. 194 (2001). However, because of Supreme Court’s decision in  
 11 *Pearson v. Callahan*, Courts are no longer required to first determine whether the facts  
 12 alleged or shown by plaintiff make out a constitutional violation. *Pearson* at 236.

13 Following *Heller* and *McDonald*, no Court has held that the Second Amendment  
 14 protects the right of an individual to keep and bear a specific firearm. In fact, the trend is  
 15 that it does not. See *Sutterfield* at 571. Furthermore, no Court has held that it is a violation  
 16 of the Second Amendment to confiscate firearms during a 5150 hold if a gun safe and  
 17 allegedly responsible person are present to take custody of the firearms. Because there is  
 18 no clearly established Second Amendment right as alleged, Officer Valentine is entitled to  
 19 qualified immunity on Plaintiffs’ Second Amendment claim.

20 **G. THE CITY DOES NOT HAVE A POLICY, PRACTICE, OR CUSTOM THAT**  
 21 **INFRINGES UPON PLAINTIFFS’ SECOND AMENDMENT RIGHTS.**

22 Although not clearly alleged, it appears that, in addition to their prayer for injunction  
 23 relief, Plaintiffs are alleging municipal liability. Under *Monell v. Dep’t of Social Servs.*, 436  
 24 U.S. 658 (1978), a city may not be held vicariously liable for unconstitutional acts of its  
 25 employees. In order to impose constitutional liability against a government entity, a  
 26 plaintiff must establish (1) that he or she possessed a constitutional right of which he or  
 27 she was deprived; (2) that the municipality had a policy; (3) that this policy “amounts to  
 28 deliberate indifference” to plaintiff’s constitutional right; and (4) that the policy is the

1 “moving force behind the constitutional violation.” *City of Canton, Ohio v. Harris*, 489 U.S.  
2 378 (1989).

3 First, since Plaintiffs’ do not have a constitutional claim under the Second  
4 Amendment against Officer Valentine, or any other constitutional claim, they cannot  
5 establish municipal liability. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986);  
6 *Quintanilla v. City of Downey*, 84 F.3d 353, 355 (9th Cir. 1996).

7 Second, Plaintiff can point to no policy within the SJPD that led to any constitutional  
8 violation. The SJPD Duty Manual mirrors the requirements under Section 8102. Plaintiffs  
9 have not alleged that Section 8102 is unconstitutional on its face or as applied here, and  
10 they cannot because Section 8102 survived a Second Amendment challenge post-*Heller*  
11 and *McDonald*. *Bogges* at 1503. Therefore, the City’s policy must likewise be  
12 constitutional where it is identical to a constitutional State law,

13 Although Plaintiffs allege that the City has a policy, practice, or custom of “seizing  
14 and retaining firearms in conjunction with a mental health and welfare check under  
15 California’s Welfare and Institutions Code; when said firearms are taken from homes that  
16 have California approved gun safes and at least one responsible and qualified person to  
17 take custody of the firearms” they cannot establish that such policy exists. This  
18 requirement is not written in the SJPD Duty Manual, and there is no evidence that it is a  
19 practice or custom. (See Facts 2, 4 ; Valentine Dep. 55:6-10.) The fact that one officer,  
20 who is not a policymaker with final authority, confiscated firearms when a gun safe and  
21 allegedly qualified and responsible person were present does not create a policy, practice,  
22 or custom so permanent or widespread to establish the need for injunctive relief or  
23 municipal liability. See *Hunter v. County of Sacramento*, 652 F.3d 1225,1232-34 (9th Cir.  
24 2011).

25 Finally, the City’s continued retention of the firearms is in accordance with a  
26 Superior Court Order finding that it was not safe to return the firearms to Lori because it  
27 would be a danger to Edward and orders. Judge Kirwan’s decision was reached after the  
28 City followed the requirements of Section 8102. Lori intervened and requested that the

1 Court hold a hearing. After this hearing, the Court declined to return the firearms. The  
 2 Court's decision was then appealed, and the Sixth District found Judge Kirwan's decision  
 3 to be based on substantial evidence. Thus, Judge Kirwan's finding is still valid, as his  
 4 order has yet to be set aside or overturned. As a result, there is no municipal liability or  
 5 reason for injunctive relief under Plaintiffs' Second Amendment claim because all the City  
 6 has done is follow State law and allow the judicial process to take its course.

7 **IV. DEFENDANTS ARE ENTITLED TO JUDGMENT ON PLAINTIFFS' FOURTH**  
 8 **AMENDMENT CLAIM (SECOND CLAIM FOR RELIEF) BECAUSE THE**  
 9 **CONFISCATION AND RETENTION OF THE FIREARMS IS REASONABLE.**

10 **A. UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE CONFISCATION OF**  
 11 **THE FIREARMS WAS REASONABLE AND AUTHORIZED UNDER SECTION**  
 12 **8102.**

13 The Fourth Amendment only protects against unreasonable seizures of property.  
 14 *Soldal v. Cook County, Ill.* 502 U.S. 56, 61 (1992). Reasonableness, in turn, is measured  
 15 in objective terms by examining the totality of the circumstances. *Florida v. Jimeno*, 500  
 16 U.S. 248, 250 (1991). Plaintiffs do not allege any fault with Officer Valentine entering the  
 17 home, detaining Edward for mental examination, or with his presence after Edward was  
 18 transported to VMC. Plaintiffs' only allegation is "whether it was reasonable to confiscate  
 19 firearms from the home and retain them in conjunction with a 5150 hold where there is a  
 20 California approved gun safe and at least one responsible and qualified person to take  
 21 custody of the firearms."

22 Under the circumstances, it was reasonable for Officer Valentine to confiscate the  
 23 firearms. California law required Officer Valentine to confiscate any firearms that Edward  
 24 owned, possessed, or controlled when he was detained for mental examination. Edward  
 25 told Officer Valentine about the firearms inside the gun safe, and, following the  
 26 requirements of Section 8102, asked Lori to open it. When she asked why, he informed  
 27 her about Section 8102. She then went by herself to retrieve the key and combination to  
 28 the safe. Once the safe was opened, Officer Valentine confiscated the firearms as  
 California law required.



1           Although Lori maintains that she is responsible and that Edward could not obtain  
2 access to the firearms, that does not affect the reasonableness of the seizure. The  
3 firearms were commingled in a gun safe that they jointly owned, in the home they shared,  
4 and located in the room where Edward was detained.

5           Officer Valentine also had no prior knowledge about Edward and Lori's relationship.  
6 All he knew was that she contacted the police because her husband was mentally  
7 unstable. There was no way for Officer Valentine to be sure that when Edward was  
8 released from VMC he would not later obtain access to the firearms and hurt himself or  
9 others. The only way to be certain that this dangerous scenario did not occur was to  
10 confiscate the firearms.

11           This is an appropriate conclusion given the limited information available. As one  
12 California Court stated "keeping a firearm away from a mentally unstable person is a  
13 reasonable exercise of the police power. It is not unreasonable to conclude there is a  
14 significant risk that a mentally unstable gun owner will harm himself or others with the  
15 weapon." *Rupf v. Yan*, 85 Cal.App.4th 411, 423 (Cal. Ct. App. 2000) The California  
16 Legislature also deems "it [ ] essential that a constitutionally sound mechanism authorizing  
17 a procedure for the confiscation of firearms or other deadly weapons in the hands of  
18 persons taken into custody for evaluation of their mental condition, always be available to  
19 law enforcement agencies." *Id.* at 420, fn. 2.

20       **B.       OFFICER VALENTINE IS ENTITLED TO QUALIFIED IMMUNITY ON**  
21       **PLAINTIFF'S FOURTH AMENDMENT CLAIM.**

22           Although no Fourth Amendment violation occurred, Officer Valentine would be  
23 entitled to qualified immunity. The "objective reasonableness" defense applies to Fourth  
24 Amendment challenges even though the Fourth Amendment constitutional standard is  
25 also objective reasonableness. *Anderson v. Creighton*, 483 U.S. 635, 643-45 (1987);  
26 *Malley v. Briggs* 475 U.S. 335, 344-45 (1986). Under this rule, officers can act  
27 unreasonably under the constitutional standard, but still have qualified immunity. *Malley* at  
28 343-46.



1 Any objectively reasonable police officer in this situation would believe that it was  
2 lawful to confiscate the firearms. It was Lori who called the police for assistance, the  
3 firearms were stored in gun safe that Lori and Edward owned together in their home, and  
4 the gun safe was located in the same room where Officer Valentine detained Edward for a  
5 5150 hold. These facts support a reasonable conclusion that Edward could obtain access  
6 to the firearms upon being released from the hospital, and it was then necessary to  
7 confiscate them so that he could not use them to hurt himself or others in the event of a  
8 sudden relapse. So Officer Valentine asked Lori to open the safe so he could take them,  
9 and she complied, such that additional steps were not necessary for Officer Valentine to  
10 carry out his duty under Section 8102.

11 There is also no clearly established right under the Fourth Amendment that  
12 prohibits the confiscation of firearms during a 5150 hold when a responsible party and  
13 California approved gun safe are present. Section 8102 requires police officers to  
14 confiscate firearms during a 5150 hold, but is silent as to its limitations. It does not  
15 mention warrants, guns safes, or responsible parties in its command to police officers.  
16 There is also no case law to support Plaintiffs' claim that it is unreasonable to confiscate  
17 firearms if a California approved gun safe and allegedly responsible person are present to  
18 take custody of them.

19 **C. PLAINTIFFS CANNOT IDENTIFY A POLICY, PRACTICE, OR CUSTOM THAT**  
20 **INFRINGES THEIR FOURTH AMENDMENT RIGHTS.**

21 As previously discussed, the City's policy mirrors the requirements under Section  
22 8102. Plaintiffs have not alleged that Section 8102 is unconstitutional, and there is no  
23 independent policy, practice, or custom that Plaintiffs' can point to that requires officers to  
24 do anything other than what is required under a constitutional State law.

25 Moreover, the City's retention of the firearms is reasonable under the Fourth  
26 Amendment because it is authorized by a Court Order. Section 8102 (h) states that "if,  
27 after a hearing, the court determines that the return of the firearm or other deadly weapon  
28 would likely endanger the person or others, the law enforcement agency may destroy the

1 firearm within 180 days from the date that the court makes that determination....” After an  
 2 evidentiary hearing, where Lori participated, Judge Kirwan found that returning the  
 3 firearms to her would likely endanger Edward or others. The City followed a procedure  
 4 authorized by State law, prevailed against Lori, and now the firearms are forfeited  
 5 (although the City has agreed not to destroy them until this dispute is resolved).

6 If other avenues exists for Lori to seek return of the firearms, those avenues are  
 7 affected by Judge Kirwan’s determination about safety. Until Judge Kirwan’s order is set  
 8 aside, however, the City is justified in keeping the firearms,

9 **V. PLAINTIFFS’ FIFTH AMENDMENT CLAIM (THIRD CLAIM FOR RELIEF) FAILS**  
 10 **BECAUSE THERE IS NO TAKING REQUIRING PLAINTIFFS TO BE JUSTLY**  
 11 **COMPENSATED.**

12 Plaintiffs also allege a violation of the Fifth Amendment in that Defendants have  
 13 taken property without just compensation. The Fifth Amendment states that “no private  
 14 property be taken for public use, without just compensation.” The government, however, is  
 15 not required to compensate an individual for property lawfully acquired under the exercise  
 16 of government authority other than the power of eminent domain. *Bennis v. Michigan*, 516  
 17 U.S. 442, 452 (1996).

18 Therefore, Plaintiffs are not entitled to just compensation because there is no taking  
 19 since Defendants acquired the property lawfully under Section 8102, and not for the  
 20 purpose of eminent domain, when Edward was detained for a 5150 hold. There is also no  
 21 basis for injunctive relief because confiscating firearms after a 5150 hold is authorized  
 22 under Section 8102—a proper exercise of government authority. See *Bogges* at 1506.  
 23 Lastly, even the wrongful confiscation of a firearm under Section 8102 could not be a  
 24 taking because an unlawful seizure of property is not a “public use,” and there are other  
 25 methods to recover the value of a firearm. See *Mateos-Sandoval v. County of Sonoma*,  
 26 942 F.Supp.2d 890, 912 (N.D. Cal 2013).

27 Officer Valentine is also entitled to qualified immunity on Plaintiffs’ Fifth Amendment  
 28 claim. No officer would believe that confiscating firearms under Section 8102 would invoke  
 the Takings Clause because the taking is authorized by law. And, there is no clearly

1 established right that lawfully confiscating firearms under Section 8102 would require just  
 2 compensation. See *Id.* Accordingly, Defendants are entitled to judgment as a matter of law  
 3 on Plaintiffs' Fifth Amendment claim.

4 **VI. DEFENDANTS ARE ENTITLED TO JUDGMENT ON PLAINTIFFS' FOURTEENTH**  
 5 **AMENDMENT DUE PROCESS CLAIM (FOURTH CLAIM OF RELIEF) BECAUSE**  
 6 **LORI HAD A HEARING UNDER SECTION 8102.**

7 **A. PENAL CODE SECTION 33800 *ET SEQ.* IS NOT A SEPARATE PROCEDURE**  
 8 **FOR RECOVERING FIREARMS AFTER A 5150 HOLD BECAUSE SECTION 8102**  
 9 **APPLIES.**

10 In addition to their other constitutional claims, Plaintiffs allege a Fourteenth  
 11 Amendment due process violation related to the administrative return of property.  
 12 Plaintiffs' appear to allege that Defendants are violating their due process rights by not  
 13 returning the firearms to Lori pursuant to Penal Code section 33800 *et seq.*, since Section  
 14 8102 is not an administrative process. It is also not clear whether their due process claim  
 15 is based in procedural due process, substantive due process, or both. Regardless,  
 16 Plaintiffs' due process claim fails because following Section 8102 satisfies constitutional  
 17 due process.

18 California Penal Code section 33800 *et seq.*, titled *Firearm in Custody of Court or*  
 19 *Law Enforcement Agency or Similarly Situation*, outlines the procedures a law  
 20 enforcement agency must follow before it can release a firearm in its custody. Under these  
 21 sections, a person seeking the return of a firearm must submit an application to the  
 22 California Department of Justice (CA DOJ) that includes their identifying information and a  
 23 description of the firearm (e.g., make, model, serial number, etc.). Cal. Penal Code §  
 24 33850. CA DOJ then performs a background check to see if the person is eligible to  
 25 receive the firearm. *Id.* § 33865(a). If eligible, the person is given written notification to  
 26 present to law enforcement. *Id.* § 33865(c)(3). Law enforcement may then return the  
 27 firearm only when the individual presents the written notification. *Id.* § 33855.

28 However, this procedure does not consider how law enforcement acquired the  
 firearm and was not "intended to displace any existing law regarding the seizure or return

1 of firearms.” Cal. Penal Code § 33800(c). In view of these limitations, this procedure is not  
 2 dispositive where Section 8102 applies. This is further evident in that, after Judge  
 3 Kirwan’s order was entered, the California State Legislature amended Section 8102 to  
 4 incorporate the provisions of Penal Code section 33800 *et seq.*, but left intact the Court’s  
 5 role under Section 8102 to determine whether the return of a firearm would likely  
 6 endanger the person or others. Stats.2013, c. 747 (A.B.1131), § 2. This demonstrates the  
 7 Legislature’s intent that Penal Code section 33800 *et seq.* is not superior to or separate  
 8 from Section 8102 when it applies. Therefore, Plaintiffs’ have no independent claim under  
 9 this section to recover the firearms, since Section 8102 controls.

10 **B. LORI HAS ALREADY HAD A HEARING ON THE DISPOSITION OF THE**  
 11 **FIREARMS.**

12 Procedural due process requires notice and an “opportunity to be heard at a  
 13 meaningful time and in a meaningful manner.” *Schneider v. County of San Diego*, 28 F.3d  
 14 89, 92 (9th Cir. 1994) quoting *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 261 (1987).  
 15 California Courts have held that Section 8102 satisfies the requirements of procedural due  
 16 process. *Rupf* at 420.

17 Lori had a full evidentiary hearing under Section 8102 when she intervened to seek  
 18 return of her firearms. Lori then had an additional hearing when she appealed the matter  
 19 to the Sixth District, which found that Judge Kirwan’s order was supported by substantial  
 20 evidence.

21 Despite these proceedings, Plaintiffs contend that the City must still return the  
 22 firearms, but that is contrary to the judicial record. The Sixth District’s statement about  
 23 Penal Code section 33800 *et. seq.* remaining available to Lori was not a directive to return  
 24 the firearms or conduct further proceedings, but rather part of the Court’s analysis about  
 25 the ripeness of Lori’s Second Amendment claim. In any event, to allege that Defendants  
 26 have deprived Lori of property without due process lacks merit given the lengthy  
 27 proceedings held in State court regarding the twelve firearms.

28 ///

1 **C. THE CITY HAS NOT ACTED ARBITRARILY WHEN REFUSING TO RETURN THE**  
 2 **FIREARMS.**

3 Substantive due process protects individuals from the arbitrary deprivation of liberty  
 4 by the government. *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006) *citing County of*  
 5 *Sacramento v. Lewis*, 523 U.S.845, 49 (1998). Courts will often find a substantive due  
 6 process violation only when the government action “shocks the conscience.” *Id* at 847. If  
 7 Plaintiffs’ Fourteenth claim is based on a violation of substantive due process, it fails. The  
 8 City’s reluctance to return the firearms is not arbitrary, neither does it shock the  
 9 conscience. Rather, it is based on Judge Kirwan’s order regarding safety. See *Mora v. The*  
 10 *City of Gaithersburg, MD*, 519 F.3d 216 (4th Cir. 2008) (finding no substantive due  
 11 process claim for firearm seizure where deprivation pursuant to the law and can be  
 12 rectified by post-deprivation state remedies.)

12 **D. OFFICER VALENTINE IS ENTITLED TO QUALIFIED IMMUNITY ON**  
 13 **PLAINTIFFS’ DUE PROCESS CLAIM.**

14 Even though his involvement in the judicial proceedings was limited to testifying on  
 15 behalf of the City, Plaintiffs include Officer Valentine in their due process claim. However,  
 16 no officer would conclude that it was a violation of an individual’s due process rights to  
 17 refuse to return firearms under Penal Code section 33800 *et seq.* where a Court found,  
 18 after a Section 8102 hearing, that it was unsafe. Furthermore, the law is not well-settled  
 19 on how Penal Code section 33800 *et seq.* relates to Section 8102, such that the right to  
 20 due process under Penal Code section 33800 *et seq.* is not clearly established under  
 21 State or federal law.

22 **E. THERE IS NO BASIS FOR MONETARY OR INJUNCTIVE RELIEF ON**  
 23 **PLAINTIFF’S DUE PROCESS CLAIM.**

24 Plaintiffs allege injunctive relief to prevent future violations of their members’ due  
 25 process rights, but cannot identify any City policy, practice, or custom that takes property  
 26 without due process. As discussed, the City’s retention of the firearms is based on a Court  
 27 order and not a general directive to withhold firearms from individuals who comply with  
 28 requirements under Penal Code section 33800 *et seq.* Thus, Defendants cannot establish

1 a basis for monetary or injunctive relief on their due process claim, and Defendants  
 2 request that the Court enter judgment in its favor.

3 **VII. THE COURT SHOULD DISMISS PLAINTIFF’S CLAIM UNDER PENAL CODE**  
 4 **SECTION 33800 ET. SEQ (FIFTH CLAIM OF RELIEF).**

5 **A. PLAINTIFFS DO NOT HAVE AN INDEPENDENT CAUSE OF ACTION UNDER**  
 6 **PENAL CODE SECTION 33800 ET SEQ.**

7 Penal Code section 33800 *et. seq.* does not provide an independent cause of  
 8 action. In *Calhoun v. City of Hercules*, 2014 WL 4966030 (N.D. Cal Oct. 03, 2014),  
 9 presently on appeal in the Ninth Circuit (see *Romon Calhoun v. City of Hercules Police*  
 10 *Depart, Et. al.*, 9th Cir., Sep. 04, 2015, Case No. 15-16774), Calhoun alleged that the  
 11 Hercules Police Department refused to return confiscated firearms, despite Calhoun  
 12 following all the requirements under the Penal Code.<sup>3</sup> And, unlike this case, Calhoun had  
 13 a court order directing the police to return the firearm.

14 However, in granting the City’s motion to dismiss, the District Court stated “[ ]  
 15 Calhoun has not alleged any corresponding violation of state or federal law; California  
 16 Penal Code § 33855 lays out the procedures that a law enforcement agency must follow  
 17 before it can return a confiscated firearm, but it does not, in itself, provide a cause of  
 18 action to a plaintiff who believes he is entitled to his firearm.” *Id.*

19 Indeed, Penal Code section 33800 *et seq.* is geared towards law enforcement and  
 20 what things must occur before an agency can return a firearm, but it is not an independent  
 21 right to obtain them. Other remedies might be available under California law, but Penal  
 22 Code section 33800 *et seq.* is not one of them. Defendants request that the Court follow  
 23 its fellow district court and dismiss Plaintiffs’ under Penal Code section 33800 *et. seq.* for  
 24 failure to state a claim.

25 ///

26 ///

27 ///

28 <sup>3</sup> Some courts have referred to provision under Penal Code section 33800 *et seq.* as Penal Code section 33850 *et seq.*



1 **B. COMITY BETWEEN FEDERAL AND STATE COURT REQUIRES DISMISSAL OF**  
 2 **PLAINTIFFS' ALLEGED STATE LAW CLAIM.**

3 Supplemental jurisdiction is a matter of Court power and discretion, but it is not a  
 4 plaintiff's right. *United Mine Works of America v. Gibbs*, 383 U.S. 715, 726 (1966). "The  
 5 comity doctrine counsels lower federal courts to resist engagement in certain cases falling  
 6 within their jurisdiction," and reflects a proper respect for the States and their institutions.  
 7 *Levin v. Commerce Energy, Inc.* 560 U.S. 413, 421 (2010). Therefore, a district court may  
 8 decline to exercise supplemental jurisdiction when the supplemental claim "raises a novel  
 9 or complex issue of state law," when the state law claim "substantially predominates over"  
 10 the jurisdiction conferring claim," when the district court has dismissed the jurisdiction  
 11 conferring claim, or in other "exceptional circumstances." 28 U.S.C. § 1367(c); See  
 12 *Burford v. Sun Oil Co.*, 319 U.S. 315. (1943).

13 In the interest of comity, the Court should abstain from deciding this matter because  
 14 Plaintiffs' have inappropriately sought to challenge a State court proceeding in federal  
 15 Court. This case involves the interpretation of two California laws, and a lengthy California  
 16 Court proceeding where dispositive factual and legal issues were decided. The Sixth  
 17 District's statement about Penal Code section 33800 *et. seq.* remaining available to Lori  
 18 has, at least for Plaintiffs, created some confusion. If these issues are to be revisited or  
 19 are in need of further explanation, it should be done by a California Court in the interest of  
 20 comity. See also *Railroad Commission of Tex. V. Pullman. Co.*, 312 U.S. 496; *Younger v.*  
 21 *Harris*, 401 U.S. 37 (1971).

22 This would not be the first time that a Court in the Northern District declined to  
 23 address issues related Penal Code section 33800 *et seq.* on comity grounds. In *Reynaga*  
 24 *v. Monterey County District Attorney's Office*, 2014 WL 984389, (N.D. Cal. March 7, 2014),  
 25 Reynaga had a Court order authorizing the return of his firearm, but the Monterey County  
 26 District Attorney refused to return it until he complied with Penal Code section 33800 *et.*  
 27 *seq.* Reynaga filed a section 1983 claim and the District Attorney moved to dismiss. In  
 28 granting the motion to dismiss, the Court stated :



1 “Reynaga has a state remedy for the return of the gun. He can simply ask  
2 the court which entered the order to return the Glock to clarify whether it  
3 intended for him to fill out an application pursuant to California Penal Code  
4 §§ 33850 et seq. as a requisite to the return. The question of whether an  
5 application for return is required arises out of a state court proceeding and  
6 comity requires that the federal court not interfere.”

7 The same result should apply here. Whether Defendants are required to return the  
8 firearms to Lori under Penal Code section 33800 *et seq.*, arises out of a State court  
9 proceeding and may require interpreting the interplay, if any, between Section 8102 and  
10 Penal Code section 33800 *et seq.* Because this is matter of State concern, Defendants  
11 request that the District Court dismiss this claim in the interest of comity.

12 **C. JUDGE KIRWAN’S ORDER HAS PRECLUSIVE EFFECT ON ANY STATE CLAIM  
13 TO RETURN THE FIREARMS.**

14 Federal courts should also give Full Faith and Credit to State court orders, and give  
15 them the same preclusive effect they would have under state law. 28 U.S.C. § 1738. Issue  
16 preclusion, or collateral estoppel as referred to in California, precludes relitigation of  
17 issues argued and decided in prior proceedings. *Lucido v. Superior Court*, 51 Cal.3d 335,  
18 340 (Cal. 1990); See also *White v. City of Pasadena*, 671 F.3d 918, 926 (9th Cir. 2012.)

19 For issue preclusion to apply:

20 (1) the issue sought to be precluded from relitigation must be identical to  
21 that decided in a former proceeding”; (2) the issue to be precluded “must  
22 have been actually litigated in the former proceeding”; (3) the issue to be  
23 precluded “must have been necessarily decided in the former proceeding”;  
24 (4) “the decision in the former proceeding must be final and on the merits”;  
25 (5) “the party against whom preclusion is sought must be the same as, or in  
26 privity with, the party to the former proceeding”; and (6) application of issue  
27 preclusion must be consistent with the public policies of “preservation of the  
28 integrity of the judicial system, promotion of judicial economy, and protection  
of litigants from harassment by vexatious litigation.” *White* at 927 quoting  
*Lucido* at 1225-27.

In this case, whether it was safe to return the firearms to Lori was decided in a  
hearing under Section 8102. The decision was final and on the merits, appealed to the  
Sixth District, and affirmed. Although Penal Code section 33800 *et seq.* does not speak to  
safety or the likelihood of danger, a Court considering safety when returning firearms is  
appropriate in light of the violence that can be caused by unsafe firearm use. See *Heller* at  
636 (stating “[w]e are aware of the problem of handgun violence in this country....”). Since

1 the issue of safety has been already been decided against Lori, Judge Kirwan's decision  
2 should have a preclusive effect on any claim Lori may have to the twelve firearms.

3  
4 **VIII. CONCLUSION**

5 For the reasons stated, Defendants motion should be granted and summary  
6 judgment entered. Should the Court determine that only certain causes of action or claims  
7 should be dismissed, Defendant requests partial summary judgment on such claims.

8 Respectfully submitted,

9 Dated: September 1, 2016

RICHARD DOYLE, City Attorney

10  
11 By: /s/ Mark J. Vanni  
12 MARK J. VANNI  
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14 OFFICER STEVEN VALENTINE