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8 UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10 SAN JOSE COURTHOUSE | 280 S. 1<sup>ST</sup> STREET, SAN JOSE, CA 95113

11  
12 LORI RODRIGUEZ, THE SECOND  
AMENDMENT FOUNDATION,  
13 INC., and THE CALGUNS  
FOUNDATION, INC.,

14  
15 Plaintiffs,

16 vs.

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

20 Defendants.

Case No.: 5:15-CV-03698

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT OR  
PARTIAL SUMMARY  
ADJUDICATION - and -  
PLAINTIFFS' CROSS-MOTION FOR  
SUMMARY JUDGMENT OR  
PARTIAL SUMMARY  
ADJUDICATION**

[Fed. R. Civ. P. 56]

Date: November 10, 2016

Time: 9:00 a.m.

Courtroom: 4

Judge: Hon. Edward J. Davila

21  
22  
23 Please take notice that at the place and time set forth above, Plaintiffs will  
24 oppose Defendant's Motion for Summary Judgment or Partial Summary  
25 Adjudication and will move the Court for affirmative relief (under Stand Order -  
26 Civil Rule IV) in a Cross-Motion for Summary Judgment or Summary Adjudication.  
27 The opposition and cross motion will be based in the material filed concurrently  
28 with this pleading and the entire court file.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This case inspires fear in government actors, whether they are policemen, city  
4 government risk managers, city attorneys, trial court judges or appellate judges. It  
5 is tough to make decisions that involve issues of mental health, precisely because so  
6 little is known about how the human mind can malfunction, including whether or  
7 not that malfunction can manifest itself in dangerous ways. To complicate matters,  
8 decisions about the “right to keep and bear arms” are no less controversial for a  
9 whole different set of reasons.

10 The intersection of these issues creates perverse incentives for state actors to  
11 “pass the buck.” That is apparently what happened, and is still happening, in this  
12 case. Nobody wants to be held responsible for the decision to trust that Lori  
13 Rodriguez will responsibly exercise her “right to keep and bear arms” while she  
14 continues to live with her husband Edward, whose own Second Amendment rights  
15 have been suspended after a mental health hold.

16 The City of San Jose, the state court trial judge, the Court of Appeals judges, all  
17 acknowledge (the City even relies upon this fact in its motion) that Lori Rodriguez  
18 is eligible to acquire new firearms, store them in her California approved gun safe,  
19 in the exact same home she currently lives in with her husband Edward (who  
20 remains a prohibited person.) But none of them want to be the entity that releases  
21 the firearms already owned by Lori and taken (wrongfully) from the Rodriguez  
22 home that night back in January 2013.

23 They might prefer that Lori not exercise her rights. They might prefer that the  
24 law was different and that law-abiding adults lose their own constitutional “right to  
25 keep and bear arms” if they live with a prohibited person. They might like it better  
26 if Lori just agreed to store the firearms somewhere else, or sell them outright  
27 (maybe even use the money from that sale to buy new guns.) They just don’t want  
28 the guns they have control over (for almost 4 years now) to be returned to Lori.

1 It is the only explanation for the government treating these particular firearms  
 2 (and not any hypothetical replacements) as if they were infected or subject to some  
 3 mysterious curse. But:

4 The very enumeration of the right takes out of the hands  
 5 of government – even the Third Branch of Government – the  
 6 power to decide on a case-by-case basis whether the right is  
 7 really worth insisting upon. A constitutional guarantee  
 8 subject to future judges' assessments of its usefulness is no  
 9 constitutional guarantee at all. Constitutional rights are  
 enshrined with the scope they were understood to have  
 when the people adopted them, whether or not future  
 legislatures or (yes) even future judges think that scope too  
 broad.

10 *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)

11 Nor does the Second Amendment stand alone as a constitutional right fraught  
 12 with public safety implications.

13 The right to keep and bear arms, however, is not the only  
 14 constitutional right that has controversial public safety  
 15 implications. All of the constitutional provisions that impose  
 16 restrictions on law enforcement and on the prosecution of  
 17 crimes fall into the same category. *See, e.g., Hudson v.*  
 18 *Michigan*, 547 U.S. 586, 591, 126 S. Ct. 2159, 165 L. Ed. 2d  
 56 (2006) ("The exclusionary rule generates 'substantial  
 19 social costs,' *United States v. Leon*, 468 U.S. 897, 907, [104  
 20 S. Ct. 3405, 82 L. Ed. 2d 677] (1984), which sometimes  
 21 include setting the guilty free and the dangerous at large");  
 22 *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed.  
 2d 101 (1972) (reflecting on the serious consequences of  
 dismissal for a speedy trial violation, which means "a  
 23 defendant who may be guilty of a serious crime will go  
 free"); *Miranda v. Arizona*, 384 U.S. 436, 517, 86 S. Ct.  
 1602, 16 L. Ed. 2d 694 (1966) (Harlan, J., dissenting); *id.*, at  
 542, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (White, J., dissenting)  
 (objecting that the Court's rule "[i]n some unknown number  
 of cases . . . will return a killer, a rapist or other criminal to  
 the streets . . . to repeat his crime"); *Mapp*, 367 U.S., at 659,  
 81 S. Ct. 1684, 6 L. Ed. 2d 1081. [...]

24 *McDonald v. Chicago*, 561 U.S. 742, 783 (2010)

25 Article III Courts, like this District Court, insulated as they are from the  
 26 political process can make the tough decisions in their unique role as guardians of  
 27 unpopular and controversial constitutional rights, even the one that have public  
 28 safety consequences that frighten local government actors and state court judges.



Judges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted. We have held, without much ado, that "speech, or . . . the press" also means the Internet, see *Reno v. ACLU*, 521 U.S. 844, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997), and that "persons, houses, papers, and effects" also means public telephone booths, see *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). When a particular right comports especially well with our notions of good social policy, we build magnificent legal edifices on elliptical constitutional phrases – or even the white spaces between lines of constitutional text. See, e.g., *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), rev'd sub nom. *Washington v. Glucksberg*, 521 U.S. 702, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997).

*Silveira v. Lockyer*, 328 F.3d 567, 568 (9th Cir. 2003)  
Kozinski - Dissenting from petition for en banc review

Plaintiffs seek such a reading of the constitutional rights at stake in this case.

## II. FACTS

The overly complex phrasing of the Defendants' Separate Statement, necessitated the Plaintiffs labeling some of Defendants' facts as disputed because of the conjunctive premises implied by that Statement. (e.g., Despite being married, Lori and Edward Rodriguez are not the same entity.) Separating the wheat from the chaff, the relevant undisputed facts are:

1. Edward Rodriguez needed help that required a psychiatric detention under Welfare & Institutions Code [WIC] § 5150. [Defendants' Fact #6]
2. The San Jose Police Department professionally and compassionately assisted Edward by taking him to the hospital. [Valentine Dep. 70:15-25]
3. After Edward was on his way to the hospital, Officer Valentine told Lori Rodriguez that he had a legal duty to confiscate all firearms in the Rodriguez home; and that Lori was required, to surrender the firearms by providing the combination to the gun safe. None of the firearms were outside of the safe until it was opened by the San Jose Police Department. The gun safe itself is compliant with California law for the safe storage of firearms. [Plaintiffs' Additional Fact D and S.]

1           4. Lori objected to the seizure of the firearms, and in particular objected to  
2 the seizure of the firearm registered to her. [Plaintiffs' Additional Facts G, H and I]

3           5. Officer Valentine insisted that he had a duty to seize the firearms.  
4 [Plaintiffs' Additional Facts AA]

5           6. Not wanting to delay, interfere or obstruct a police officer in the discharge  
6 of his duties, Lori provided the combination to the safe. [Plaintiffs' Additional Facts  
7 T and U]

8           7. The Defendants had not obtained a warrant to seize firearms from the  
9 Rodriguez home, nor had they obtained Lori's consent to seize them, particularly  
10 with regard to firearm registered to Lori. [Plaintiffs' Additional Facts I, P, Q and V]

11           8. The Defendants refused to return the firearms, even after being given  
12 assurances by Lori that she would have the safe combination changed and that she  
13 knew and understood her duty to prevent Edward from gaining access to the  
14 firearms. Instead the City passed the decision on to a Santa Clara Superior Court  
15 judge under the hearing procedures set forth in WIC § 8102, where the City was the  
16 petitioner and Edward was the respondent. [Lori's Declaration ¶¶ 2-8]

17           9. This required Lori to hire an attorney to schedule a hearing and  
18 intervene in that case to get her property back. Despite hearing evidence that Lori  
19 could obtain new firearms because she was: A.) not prohibited herself from  
20 acquiring firearms, and B.) owned a California approved gun safe that she had  
21 already paid to have the combination changed, the Superior Court Judge ordered  
22 the City to keep Lori's firearm, and the remaining firearms that were registered to  
23 Edward or unregistered, thus passing the decision on to the Sixth District Court of  
24 Appeal. [Lori's Declaration ¶¶ 2-8]

25           10. Though the Sixth District did affirm the trial court order on the specific  
26 petition filed by the City (in an unpublished opinion), it also wrote: "[W]e believe  
27 that the record on appeal shows that the procedure provided by section 33850 et  
28 seq. for return of firearms in the possession of law enforcement remains available to

1 Lori.” *City of San Jose v. Rodriguez*, 2015 Cal.App.Unpub. LEXIS 2315, 2326. Thus  
 2 the Sixth District Court of Appeal breathed new life into Lori’s efforts to recover her  
 3 property, but also passed the decision back to the City of San Jose, provided that  
 4 Lori could successfully transfer and register all firearms (excluding the one she  
 5 already owned) from Edward to herself. She did that. [Plaintiffs’ Additional Facts  
 6 L, M, N, O and BB]

7 11. After she completed the transfer and re-registration process through the  
 8 California Department of Justice of her firearms, Lori obtained a release for those  
 9 same firearms that should have ended the matter. But the City of San Jose is still  
 10 refusing to return Lori’s property to her and is now asking this Court to assume this  
 11 burden. [Plaintiffs’ Additional Facts L, M, N, O and BB. Lori’s Declaration ¶¶ 5, 6,  
 12 7, 8, 9, 10, 11, 15, 19]

13 12. The Second Amendment Foundation, Inc., and Calguns Foundation,  
 14 Inc., have assisted Lori (as they do with countless other law-abiding gun owners) in  
 15 trying to recover her firearms. In fact this case is a prime example of how/when  
 16 institutional and representative public policy organizations can level the playing  
 17 field in cases where the constitutional rights cannot be monetized, yet the market  
 18 value of the activity or item seized makes time-consuming litigation prohibitively  
 19 expensive for the average citizen. [Plaintiffs Additional Facts A and B]

### 20 III. ARGUMENT

#### 21 A. **The Court Should Deny Defendants’ Motion for Summary Judgment 22 or in the Alternative, Partial Summary Judgment and Instead Grant 23 Plaintiffs’ Cross-motion for Summary Judgment And/or Summary 24 Adjudication.**

25 Upon a showing that there is no genuine dispute of material fact as to particular  
 26 claim(s) or defense(s), the court may grant summary judgment in the party's favor  
 27 on 'each claim or defense - or the part of each claim or defense - on which summary  
 28 judgment is sought.' FRCP Rule 56(a); *Beal Bank, SSB v. Pittorino* (1st Cir. 1999)  
 177 F.3d 65, 68; *Wang Laboratories, Inc. v. Mitsubishi Electronics America, Inc.* (CD

1 CA 1993) 860 F.Supp. 1448, 1450 (citing text).

2 Cross-motions for summary judgment often may be encountered where the  
3 parties generally agree as to the facts, but disagree as to the conclusions to be  
4 drawn or their legal significance. *Marathon Mfg. Co. v. Enerlite Prod. Corp.* (5th  
5 Cir. 1985) 767 F.2d 214.

6 When cross-motions for summary judgment are filed on the same claim, the court  
7 must consider evidence submitted in support of (and in opposition to) both motions  
8 before ruling on either motion. Thus, a court ruling on one motion must consider  
9 evidence submitted in support of the cross-motion in determining whether there is a  
10 triable issue of fact, even if no formal opposition is filed. *Fair Housing Council of  
11 Riverside County, Inc. v. Riverside Two* (9th Cir. 2001) 249 F.3d 1132, 1136]  
12 However, the court must view each motion independently, viewing evidence and  
13 inferences in the light most favorable to each nonmoving party in turn. *Green  
14 Mountain Realty Corp. v. Leonard* (1st Cir. 2014) 750 F.3d 30, 38; *Cooley v.  
15 Housing Auth. of City of Slidell* (5th Cir. 2014) 747 F.3d 295, 298.

16 **B. Institutional Plaintiffs Second Amendment Foundation, Inc., and  
17 Calguns Foundation, Inc. Have Article III Standing.**

18 The institutional plaintiffs' have standing. This Circuit has held that  
19 organizations have “direct standing to sue [when] it show[s] a drain on its resources  
20 from both a diversion of its resources and frustration of its mission.” *Fair Hous.  
21 Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th  
22 Cir. 2012) (quoting *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir.  
23 2002)). As quoted in: *Valle Del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir.  
24 2013)

25 The Fair Housing opinion did clarify that: “‘standing must be established  
26 independent of the lawsuit filed by the plaintiff.’” *Comite de Jornaleros de Redondo  
27 Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (quoting *Walker v.  
28 City of Lakewood*, 272 F.3d 1114, 1124 n.3 (9th Cir. 2001)). An organization

1 “cannot manufacture [an] injury by incurring litigation costs or simply choosing to  
 2 spend money fixing a problem that otherwise would not affect the organization at  
 3 all.” *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d  
 4 1083, 1088 (9th Cir. 2010); see also *Combs*, 285 F.3d at 903 (“[A]n organization  
 5 cannot, of course, manufacture the injury necessary to maintain a suit from its  
 6 expenditure of resources on that very suit . . . .” (internal quotation marks  
 7 omitted)).” *Id.*, at 1219.

8 Institutional and/or representational standing is established by the facts. Both  
 9 SAF and CGF have submitted declarations [See Declaration of Alan Gottlieb and  
 10 Declaration of Brandon Combs.] by officers of those organizations that show (1) they  
 11 spend time, money and resources assisting law-abiding gun owners to recover their  
 12 property after seizure by the government in other case; (2) they engage in public  
 13 education programs relating to lawful practices of keeping and bearing arms; (3)  
 14 they specifically undertake cases like this (even when the gun owner is not a  
 15 member of the organization) to “level the playing field” because of the disparity in  
 16 economies of scale for this type of litigation; and (4) both organizations stated that  
 17 they have members in California and that the decisional law produced by cases like  
 18 this impact how they advise their members.

19 The only rational inference to be drawn from these facts is that CGF and SAF  
 20 divert resources from other purposes, independent of the costs of this litigation,  
 21 because Defendants wrongful conduct frustrates their organization's central  
 22 mission – that of promoting, defending and educating law-abiding citizens about  
 23 their Second Amendment rights.

#### 24 **IV. DEFENDANTS’ ACTIONS AND POLICIES VIOLATE** **THE SECOND AMENDMENT.**

25 **A. The Second Amendment Rights of Lori Rodriguez Were Violated**  
 26 **When the Defendants Seized and Retained Her Firearms Without**  
 27 **Justification.** (Also responding to Sections D and E of Def’s Memorandum.)

28 Defendant sets up a strawman by citing the “assurance” passages from *District*

1 of *Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742  
2 (2010). It is true that Justice Scalia wrote in *Heller* at 626-27, that:

3 [W]e do not undertake an exhaustive historical analysis  
4 today of the full scope of the Second Amendment, nothing in  
5 our opinion should be taken to cast doubt on longstanding  
6 prohibitions on the possession of firearms by felons and the  
mentally ill, or laws forbidding the carrying of firearms in  
sensitive places such as schools and government buildings,  
[...]

7 And that Justice Alito repeated those assurances in *McDonald* at 786:

8 We made it clear in *Heller* that our holding did not cast  
9 doubt on such longstanding regulatory measures as  
10 "prohibitions on the possession of firearms by felons and the  
11 mentally ill," "laws forbidding the carrying of firearms in  
sensitive places such as schools and government buildings,  
or laws imposing conditions and qualifications on the  
commercial sale of arms." *Id.*, at 626-627, 128 S. Ct. 2783,  
171 L. Ed. 2d at 678. We repeat those assurances here.

12 There is just one problem. Lori Rodriguez is not a felon. Lori Rodriguez is not  
13 mentally ill, she is not seeking to carry firearms in sensitive places or government  
14 buildings. She is seeking to recover firearms that already belong to her, so she is  
15 not even seeking to engage in commercial sales or purchases of firearms.

16 In *District of Columbia v. Heller*, 554 U.S. 570 (2008) the United States Supreme  
17 Court completely and utterly rejected any notion that the rights protected by the  
18 Second Amendment are a collective right. The analysis here is the same. A wife  
19 can not lose or gain fundamental rights based on her associations. She can only be  
20 disqualified by her own conduct or status as a prohibited person. *McDonald v. City*  
21 *of Chicago*, 561 U.S. 742 (2010), merely applied the same holdings and rationale of  
22 *Heller* to the states through the 14th Amendment.

23 Perhaps the most dissonant aspect of this case is the uncontradicted proposition  
24 that Lori cannot be prohibited from acquiring new firearms and keeping them in  
25 her California approved gun safe in the home she still shares with Edward, her only  
26 duty being to transfer registration to herself and deny Edward access to the  
27 firearms. She has done all that. [See Declaration of Lori Rodriguez and  
28



1 attachments thereto.]

2 Yet the City of San Jose manifestly refuses to permit Lori to recover her firearms  
3 under the procedures set forth in Penal Code § 33800 *et seq.*, as they were directed  
4 to do by the Sixth District Court of Appeal. [See generally: Plaintiffs Additional  
5 Fact BB and Lori Rodriguez's Declaration and Exhibits attached thereto.]

6 Defendants' policies and decision-making in this matter cannot withstand even  
7 rational basis review, which would be the wrong standard anyway, because San  
8 Jose's actions are a *de facto* forfeiture of all of Lori's arms. See: *U.S. v. Chovan*, 735  
9 F.3d 1127 (9th Cir. 2013), for this Circuit's standard of review in Second  
10 Amendment cases.

11 The State of California already imposes criminal liability on anyone who,  
12 knowing that a person is prohibited from owning/possessing firearms based on  
13 mental health issues, gives that person a gun. WIC § 8101. The Penal Code (PC)  
14 similarly imposes criminal liability on anyone failing to properly store firearms  
15 such that a minor gains access to them. PC § 25100 *et seq.* Aiding and abetting a  
16 known prohibited person to obtain a firearm is a separate and distinct crime. PC §§  
17 30, 31.

18 California has a "safe-storage" policy of requiring gun owners to keep their  
19 firearms locked with specified devices or stored in a locked gun safe that will deny  
20 access to unauthorized persons. PC §§ 23620, 23635, 23645, 23650.

21 While this case was pending in the State Courts, the California Legislature  
22 passed and the Governor signed into law Senate Bill 363 and Assembly Bill 500.  
23 Both laws address the safe storage of firearms by persons who live with another  
24 person who is disqualified from owning and/or possessing firearms. Even though  
25 both bills were signed into law in October 11, 2013 (after Judge Kirwan's decision),  
26 the bills merely gathered existing law into a more coherent organization to address  
27 the issue of safe gun storage regarding minors and those with mental health  
28 disqualifications. [The text of those bills are attached to Declaration of Attorney

1 Kilmer.]<sup>1</sup>

2 Lori had already complied with, and is still willing to comply with, California's  
3 safe storage laws to insure that her husband would be denied access to her  
4 firearms. She has transferred title of the firearms to her name. She swore under  
5 oath to do everything in her power to prevent unauthorized access to her firearms.  
6 [See Lori Rodriguez Declaration.]

7 Lori's fundamental rights and the policy of the legislature for safe storage of  
8 firearms cannot be second guessed by the City of San Jose. The Defendants'  
9 reliance on the case of *City of San Diego v. Boggess*, 216 Cal.App.4th 1494 (2013) is  
10 misplaced. Lori was never in a prohibited category. Furthermore, even if the initial  
11 confiscation of the firearms is justified, their retention after the Sixth District Court  
12 of Appeals authorized their release is not.

13 Likewise the City's reliance on the cases of *Sutterfield v. City of Milwaukee*, 751  
14 F.3d 542, 571 (7<sup>th</sup> Cir. 2014) is misplaced as there are no facts that even hint that  
15 Lori Rodriguez was unlawfully in possession of a firearm. The court in *Walters v.*  
16 *Wolf*, 660 F .3d 307 (8th Cir. 2011), specifically confined itself to the facts of that  
17 case, which are also unlike any of the facts in this matter. The same infirmities  
18 exist for *Rodgers v. Knight*, 781 F.3d 932 (8th Cir. 2015). There are just no facts  
19 that Lori Rodriguez was ever under criminal investigation, detained for mental  
20 health reasons or otherwise unlawfully made use or negligently stored her firearms.  
21 Furthermore, she was not deprived of just one among the dozen firearms in the  
22 safe. The defendants took all the firearms, leaving her none.

23 The case of *Houston v. City of New Orleans*, 675 F.3d 441 (5th Cir. 2012), opinion  
24 withdrawn and superseded on rehearing by *Houston v. City of New Orleans* 682  
25 F.3d 361 (5th Cir. 2012), actually supports Lori's position because she has complied

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26  
27 <sup>1</sup> As this pleading is being filed, additional legislation relating to safe storage of firearms  
28 is sitting on the Governor's desk awaiting signature or veto. SB 1332 (Mendoza) Plaintiffs will  
file a supplemental notice and short brief when the status of the bill is resolved.



1 with California' Law Enforcement Gun Release Procedure. [See Declaration of Lori  
2 Rodriguez and attached Exhibits.]

3 **B. Officer Valentine Is Not Entitled to Qualified Immunity on the**  
4 **Original Taking of Lori's Firearm(s). Plaintiffs Concede That He Not**  
5 **Liable for the Wrongful Retention.** (Addressing Def. Memo Section F.)

6 Plaintiffs concede that Officer Valentine is not liable for the wrongful retention  
7 of Lori's firearms, especially after she completed the administrative process under  
8 Penal Code § 33800 and demanded their return in June of 2015. That decision  
9 making process lies wholly with the City and Police Department.

10 However, Qualified immunity is only an immunity from suit for damages, it is  
11 not an immunity from suit for declaratory or injunctive relief. See *L.A. Police*  
12 *Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993); *Am. Fire, Theft &*  
13 *Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991).

14 The remedies sought in this case are injunctive and declaratory. Return of the  
15 firearms and injunctive relief to prevent future wrongs to other law-abiding gun  
16 owners is all that is requested. [See Proposed Order] Any monetary awards, if made  
17 by the court, will be limited to costs of this suit and attorney fees according to proof  
18 if Plaintiffs are the prevailing party. 42 U.S.C. §§ 1983, 1988. This has been a  
19 standing offer to the Defendants in informal discussions about the case from day  
20 one. [See Attorney Kilmer Declaration.]

21 **C. The City's Policies of Retaining Firearms That Have Been**  
22 **Authorized for Release by Statute and by Appellate Court**  
23 **Instruction Violates the Second (and Fourth) Amendment.**  
24 (Responding to Section G of Def Memo)

25 The City and/or the Police Department are the only policy makers and/or  
26 decision makers with the power to release Lori's firearms. Since her first encounter  
27 with the Defendants, Lori has offered, or actually complied, with every federal and  
28 state law required of her to secure the return of her firearms and insure that  
Edward is denied access. [See Lori Rodriguez Declaration and Exhibits attached  
thereto and Plaintiffs Additional Fact BB (citing the 6<sup>th</sup> DCA instructions)]

1 A choice among alternatives by a municipal official with final decision-making  
 2 authority may also serve as the basis of municipal liability. See *Pembaur v. City of*  
 3 *Cincinnati*, 475 U.S. 469, 482-83 (1986); *Waggy v. Spokane Cty. Wash*, 594 F.3d 707  
 4 at 713 (explaining that a policy has been defined as a deliberate choice, made from  
 5 among various alternatives, to follow a course of action); *Long v. Cty. of Los Angeles*,  
 6 442 F.3d 1178, 1185 (9th Cir. 2006); *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir.  
 7 2002) (per curiam); *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992); see also  
 8 *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (emphasizing that critical  
 9 inquiry is whether official has final decision-making authority).

10  
 11 **V. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR**  
 12 **SUMMARY ADJUDICATION ON THE FOURTH**  
 13 **AMENDMENT CLAIMS SHOULD BE DENIED and**  
 14 **PLAINTIFFS' CROSS-MOTION**  
 15 **ON THAT CLAIM SHOULD BE GRANTED.**

16 **A. Warrantless Seizures in the Home Are Presumptively Unreasonable.**

17 “Time and again, this Court has observed that searches and seizures conducted  
 18 outside the judicial process, without prior approval by judge or magistrate, are per  
 19 se unreasonable under the Fourth Amendment—subject only to a few specically  
 20 established and well delineated exceptions.” *Minnesota v. Dickerson*, 508 U.S. 366,  
 21 372, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).

22 This issue with respect to the warrantless seizure of firearms in the context of a  
 23 WIC § 5150 hold was litigated in the matter of *People v. Sweig*, 167 Cal.App.4th  
 24 1145 (2008). The case has since been de-published in lieu of a “legislative” fix of  
 25 WIC § 8100 *et seq.* There’s just one problem. The legislative branch is on no better  
 26 constitutional footing to authorize blanket exceptions to the Fourth Amendment’s  
 27 warrant requirements than the executive branch is. The power to seize property  
 28 from the home of a presumptively law-abiding citizen is a power reserved to judges.

Indeed, general warrants issued by the Crown for the seizure of firearms from  
 the colonists is one, among many, of the transgressions that sparked the

1 Revolutionary War. The California legislature's re-enactment of English  
 2 Parliamentary and/or Crown prerogatives from the late 18<sup>th</sup> Century have no place  
 3 in a 21<sup>st</sup> Century America.

4 It is undisputed that no warrant was obtained and consent was not given for the  
 5 seizure of the Rodriguez firearms, nor were there any exigent circumstances. [See  
 6 Declaration of Lori Rodriguez. ¶ 17. Plaintiffs Additional Facts: S, T, U, V, W, X, Y,  
 7 Z, AA]

8 The City now bears the burden to justify the warrantless seizure of property  
 9 from a law-abiding citizen. "[T]he burden is on those seeking the exemption to show  
 10 the need for it." *U.S. v. Jeffers*, 342 U.S. 48 (1951). And also:

11 "We are not dealing with formalities. The presence of a  
 12 search warrant serves a high function. Absent some grave  
 13 emergency, the Fourth Amendment has interposed a  
 14 magistrate between the citizen and the police. This was  
 15 done not to shield criminals nor to make the home a safe  
 16 haven for illegal activities. It was done so that an  
 17 objective mind might weigh the need to invade that  
 18 privacy in order to enforce the law. The right of privacy  
 19 was deemed too precious to entrust to the discretion of  
 20 those whose job is the detection of crime and the arrest of  
 21 criminals. Power is a heady thing; and history shows that  
 22 the police acting on their own cannot be trusted. And so  
 23 the Constitution requires a magistrate to pass on the  
 24 desires of the police before they violate the privacy of the  
 25 home. We cannot be true to that constitutional  
 26 requirement and excuse the absence of a search warrant  
 27 without a showing by those who seek exemption from the  
 28 constitutional mandate that the exigencies of the  
 situation made that course imperative."

*McDonald v. U.S.*, 335 U.S. 451, 455–56 (1948)

23 **B. Officer Valentine Is Not Entitled to Qualified Immunity on the**  
 24 **Original Seizure of Lori's Firearm(s). Plaintiffs Concede That He**  
 25 **Not Liable for the Wrongful Retention.**

26 Because the remedies sought are injunctive and declaratory, Officer Valentine is  
 27 not entitled to qualified immunity for the same reasons set forth above. Plaintiffs  
 28 concede that Valentine is not liable for the wrongful retention of the Rodriguez  
 firearms; which, however does constitute an continuing violation by the City.

1 **C. The City’s Policies of Retaining Firearms That Have Been**  
 2 **Authorized for Release by Statute and by Appellate Court**  
 3 **Instruction Violates the Fourth Amendment.**

4 The City and/or the Police Department are the only policy makers and/or  
 5 decision makers with the power to release Lori’s firearms. Since her first encounter  
 6 with the Defendants, Lori has offered, or actually complied, with every federal and  
 7 state law required of her to secure the return of her firearms and insure that  
 8 Edward is denied access. [See Lori Rodriguez Declaration and Exhibits attached  
 9 thereto and Plaintiffs Additional Fact BB (citing the 6<sup>th</sup> DCA instructions)]

10 A choice among alternatives by a municipal official with final decision-making  
 11 authority may also serve as the basis of municipal liability. See *Pembaur v. City of*  
 12 *Cincinnati*, 475 U.S. 469, 482-83 (1986); *Waggy v. Spokane Cty. Wash.*, 594 F.3d 707  
 13 at 713 (explaining that a policy has been defined as a deliberate choice, made from  
 14 among various alternatives, to follow a course of action); *Long v. Cty. of Los Angeles*,  
 15 442 F.3d 1178, 1185 (9th Cir. 2006); *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir.  
 16 2002) (per curiam); *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992); see also  
 17 *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (emphasizing that critical  
 18 inquiry is whether official has final decision-making authority).

19 **VI. PLAINTIFFS’ CLAIM FOR A “TAKING” WITHOUT JUST**  
 20 **COMPENSATION IS VALID.**

21 This is perhaps the easiest of claims for the Court to dispose of. The confluence  
 22 of two recent Supreme Court decisions compels a finding that personal property  
 23 taken for the benefit of the public is subject to a “takings” analysis. *Horne v. Dep’t*  
 24 *of Agriculture*, \_\_\_U.S.\_\_\_\_, 133 S.Ct. 2053 (2015). And that firearms in particular  
 25 are subject to a strict observance of the indicia of property rights, even when the  
 26 owner is convicted felon. *Henderson v. United States*, \_\_\_U.S.\_\_\_\_, 135 S.Ct. 1780  
 27 (2015) stands for the proposition that even felons can dispose of their property,  
 28 providing that steps are taken to prevent unauthorized access to the firearm by the  
 prohibited person.

1 In this case there are multiple examples of undisputed facts that the Rodriguez  
 2 guns were lawfully transferred to Lori, that she has the will, the means and the  
 3 motivation to make the firearms in-accessible to Edward, and that the firearms  
 4 themselves are valuable personal property. [See generally: Declaration of Lori  
 5 Rodriguez and attachments thereto.]

6 Again, there is no qualified immunity in cases where the remedies sought are  
 7 injunctive and declaratory relief. *Supra*.

8  
 9 **VII. PLAINTIFFS FOURTEENTH AMENDMENT DUE PROCESS**  
 10 **CLAIM and STATE LAW CLAIMS UNDER**  
 11 **PENAL CODE § 33800 ARE VALID.**

12 **A. The State Appellate Court Made a Specific Finding That  
 13 Lori Could Seek Return of the Firearms After Complying  
 14 with Penal Code § 33850.**

15 The Defendants misconstrue the final two causes of action. They arise  
 16 specifically in response to the Sixth District Court of Appeals finding that is directly  
 17 on point for these two claims: “[W]e believe that the record on appeal shows that the  
 18 procedure provided by section 33850 et seq. for return of firearms in the possession  
 19 of law enforcement remains available to Lori.” *City of San Jose v. Rodriguez*, 2015  
 20 Cal.App.Unpub. LEXIS 2315, 2326.

21 Thus the Sixth District Court of Appeal breathed new life into Lori’s prospects  
 22 fore getting her property back, but passed the decision back to the City of San Jose;  
 23 provided that Lori could successfully transfer and register all firearms (excluding  
 24 the one she already owned) from Edward to herself. She did that and the City still  
 25 refuses to return the firearms. [Plaintiffs’ Additional Facts L, M, N, O and BB]

26 Lori complied with the procedures set forth at Penal Code § 33800 *et seq.*, for  
 27 return of her firearms. Furthermore, it defies logic and language to conclude that  
 28 no cause of action exists for the failure of a law enforcement agency to return  
 firearms to the complying gun owner when Penal Code § 33885 states plainly: “*In a  
 proceeding for return of the firearm seized and not returned pursuant to this chapter,*

1 *where the defendant or cross-defendant is a law enforcement agency, the court shall*  
 2 *award reasonable attorney fees and costs to the prevailing party.* [underline added]

3 The process due to Lori by the City of San Jose after she tendered the Law  
 4 Enforcement Gun Release Letters [See Exhibit E attached to Declaration of Lori  
 5 Rodriguez] was release of her firearms. Denial of administrative and ministerial  
 6 duties by government actors is actionable under the 14<sup>th</sup> Amendment Due Process  
 7 Clause. *Memphis Light, Gas & Water v. Craft*, 436 U.S. 1 (1978).

8 What the Defendants keep missing, is that Judge Kirwan's order was necessarily  
 9 modified by the finding in the Court of Appeals, that the procedures under Penal  
 10 Code § 33800 remain open to Lori for return of the firearms. Furthermore,  
 11 Defendants only argument trying to diminish that finding by the Court of Appeals  
 12 concedes that, at a minimum, Lori's compliance with that process makes her Second  
 13 Amendment Claims ripe for review, for example in this case. [See pg.19, lines 21-25  
 14 of Defendants' Motion for Summary Judgment.]

15 For the reasons state above, Plaintiffs concede that Officer Valentine is not liable  
 16 on the Due Process Claim or the pendant State Law claim under Penal Code §  
 17 33800 *et seq.*

18 However, as the City and/or the Police Department are the only policy makers  
 19 and/or decision makers with the power to release Lori's firearms, they are liable for  
 20 the failure to comply with the administrative processes as alleged in the final two  
 21 claims. Since her first encounter with the Defendants, Lori has offered, and  
 22 actually complied, with every federal and state law required of her to secure the  
 23 return of her firearms and insure that Edward is denied access. [See Lori Rodriguez  
 24 Declaration and Exhibits attached thereto and Plaintiffs Additional Fact BB (citing  
 25 the 6th DCA instructions)]

26 A choice among alternatives by a municipal official with final decision-making  
 27 authority may also serve as the basis of municipal liability. See *Pembaur v. City of*  
 28 *Cincinnati*, 475 U.S. 469, 482-83 (1986); *Waggy v. Spokane Cty. Wash.*, 594 F.3d 707



1 at 713 (explaining that a policy has been defined as a deliberate choice, made from  
 2 among various alternatives, to follow a course of action); *Long v. Cty. of Los Angeles*,  
 3 442 F.3d 1178, 1185 (9th Cir. 2006); *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir.  
 4 2002) (per curiam); *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992); see also  
 5 *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (emphasizing that critical  
 6 inquiry is whether official has final decision-making authority).

7  
 8 **B. The Plaintiffs Have Concurrently Alleged Violations of State and  
 9 Federal Law and the Plain Language of Penal Code § 33885 Permits  
 “A Proceeding” for Recovery of Firearms.**

10 The Defendants’ citation to *Calhoun v. City of Hercules*, 2014 U.S. Dist. LEXIS  
 11 141224, seems incongruous given that in that decision the district court permitted  
 12 leave to amend “*if Calhoun does not receive his firearm, and continues to believe that*  
 13 *he has followed all procedures and is entitled to this firearm, then he can file an*  
 14 *amended claim identifying the law that the Hercules Police Department has violated*  
 15 *by refusing to return his firearm.*” Mr. Calhoun was (is) a pro se plaintiff. In this  
 16 action the Plaintiffs have alleged several and various theories (including denial of  
 17 administrative due process) that make the Defendants’ refusal to release Lori’s  
 18 firearms unlawful. So even if this Court were to accept *Calhoun* as persuasive  
 19 authority, and the Court was further prepared to ignore the plain language of Penal  
 20 Code § 33885 that authorizes “proceedings for the return of firearm(s)” - *Calhoun*  
 21 does not stand for the proposition advanced by the Defendants.

22 **C. If Plaintiffs Had Brought Only an Single Cause of Action under  
 23 Penal Code § 33800 et Seq., Then Their Comity Argument Might Have  
 24 Merit. This Court Cannot Abdicate its Article III Duty to Adjudicate  
 this Case.**

25 Defendants’ keep bending logic and language to arrive at obtuse interpretations  
 26 of the law. How could the Sixth District Court of Appeal been any clearer than:  
 27 “[W]e believe that the record on appeal shows that the procedure provided by  
 28 section 33850 et seq. for return of firearms in the possession of law enforcement

1 remains available to Lori.” *City of San Jose v. Rodriguez*, 2015 Cal.App.Unpub.  
 2 LEXIS 2315, 2326. There is no confusion here. While the idea of comity, that  
 3 federal courts should not assume jurisdiction over cases that are predominantly  
 4 state law claims, that does not accurately describe this case.

5 Furthermore, it would unfair at this time for Defendants to seek – what is  
 6 essentially – a remand of this action to state court on some theory of abstention  
 7 after filing a Motion for Summary Judgment. These kinds of procedural motions are  
 8 usually brought at the beginning of the case.

9 The Plaintiffs have fairly alleged Article III standing on constitutional grounds  
 10 and plead pendant state claims under California’s Penal Code. The case should be  
 11 decided on its merits where it was filed.

12  
 13 **D. Judge Kirwan’s Order Has No Preclusive Effect Because the Court of**  
 14 **Appeals Imposed New Conditions for Lori to Renew Her Claims, She**  
**Fulfilled Those Conditions.**

15 The Sixth District Court of Appeal could not have been any clearer than: “[W]e  
 16 believe that the record on appeal shows that the procedure provided by section  
 17 33850 et seq. for return of firearms in the possession of law enforcement remains  
 18 available to Lori.” *City of San Jose v. Rodriguez*, 2015 Cal.App.Unpub. LEXIS 2315,  
 19 2326. At the time of Judge Kirwin’s order, 11 of the 12 firearms were either  
 20 unregistered or registered to Edward. If there is even a plausible reason to assume  
 21 that Judge Kirwan was basing his decision on that fact, that rationale disappeared  
 22 when Lori took the Court of Appeals findings at face value. She transferred and  
 23 registered all of the firearms to her name with the California Department of  
 24 Justice, obtained the necessary releases and tendered those releases to the City of  
 25 San Jose. [See Declaration of Lori Rodriguez and attachments thereto.]

26 Judge Kirwin’s order was simply that the petition filed by the City was granted.  
 27 That petition was for the forfeiture of firearms in Edward’s possession and control,  
 28 which plausibly made up 11 of the 12 guns. By complying with the instructions



1 from the Court of Appeal, Lori Rodriguez has shifted the case to one about her guns,  
2 a gun safe under her control and her rights.

3 It is black letter law that findings by a Court of Appeal override conflicting  
4 orders by a trial court.

5  
6 **VIII. CONCLUSION**

7 Under any of the theories plead, and according to the undisputed facts and  
8 clearly established law, the City of San Jose is wrongfully retaining Lori’s property.

9 This Court should order the return of that property, order the Defendants to  
10 modify their policies in circumstance where a responsible adult can assume control  
11 over and safely store firearms.

12 This declaratory and injunctive relief is necessary to right a past wrong, prevent  
13 future wrongful seizure and promote the efficient and timely return of firearms that  
14 are seized.

15 Respectfully Submitted on September 15, 2016.

16  /s/ Donald Kilmer

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