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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN JOSE DIVISION

14 LORI RODRIGUEZ, THE SECOND  
15 AMENDMENT FOUNDATION, INC., THE  
16 CALGUNS FOUNDATION, INC.,

17 Plaintiffs,

18 v.

19 CITY OF SAN JOSE, CITY OF SAN  
20 JOSE POLICE DEPARTMENT, OFFICER  
21 STEVEN VALENTINE, and DOES 1-20,  
22 inclusive,

23 Defendants.

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

**REPLY AND OPPOSITION TO  
PLAINTIFFS' CROSS MOTION FOR  
SUMMARY JUDGMENT**

DATE: November 10, 2016

TIME: 9:00 a.m.

COURTROOM: 4

JUDGE: Hon. Edward J. Davila

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**I. INTRODUCTION**

1  
2 In opposing the Defendants' motion for summary judgment, and moving themselves  
3 for summary judgment, Plaintiffs have failed to establish that a constitutional violation  
4 occurred or that Defendants are liable. Plaintiffs do not sufficiently dispute Defendants'  
5 evidence, and much of the evidence Plaintiffs' present is legal argument, immaterial, or  
6 inadmissible. Accordingly, Defendants request that the Court enter judgment in their favor  
7 or, in the alternative, partial summary judgment as requested in their moving papers.

**II. RESPONSE TO ADDITIONAL FACTS**

8  
9 Plaintiffs have added a number of additional facts, which Defendants must address.  
10 Plaintiffs state as Additional Fact D, that "at the time Officer Valentine demanded  
11 surrender of the Rodriguez firearms, Edward<sup>1</sup> was already on his way to the hospital and  
12 therefore unable to exercise control over any firearms in the Rodriguez's gun safe."  
13 However, Officer Valentine did not know whether Edward could exercise control over the  
14 firearms when he returned from his mental health hold pursuant to Welfare and  
15 Institutions Code<sup>2</sup> section 5150 hold (a "5150 hold"). (Additional Fact 22.) In addition, it is  
16 Officer Valentine's experience that 5150 holds can last as little as four hours. (Additional  
17 Fact 28.)

18 Plaintiffs also assert as Additional Fact E that the key and combination were in a  
19 secure place. However, Edward had access to both rooms where the key and  
20 combination were located, and Lori did not know if Edward had a key to the file cabinet  
21 where the gun safe key was kept. (Additional Fact 23.)

22 Finally, Plaintiffs assert that Lori did not consent to the seizure. Officer Valentine  
23 advised her of her right to refuse, he did not coerce her into opening the safe, and he  
24 believed that she consented. (Additional Facts 24-26.)

25 As to Plaintiffs' interpretation of the Sixth District's opinion and Judge Kirwan's  
26 order, the dispute among the parties is a legal one. Defendants interpret the Sixth  
27 District's opinion differently than Plaintiffs, and are obeying Judge Kirwan's order in

28  
<sup>1</sup> As in their moving papers, Defendants refer to Edward and Lori Rodriguez by their first names.

<sup>2</sup> Unless otherwise stated, all statutory references are to the Welfare and Institutions Code.

1 refusing to return the firearms. Moreover, Judge Kirwan's order has preclusive effect as  
 2 the record of the proceeding shows that Judge Kirwan considered the safety of Lori's plan  
 3 for storage of the firearms and rejected it. (Additional Fact 29.)

### 4 III. OBJECTIONS TO PLAINTIFF'S EVIDENCE

5 When ruling on a motion for summary judgment, the court may consider "the  
 6 pleadings, the discovery and disclosure materials on file, and any affidavits" but the  
 7 evidence must be admissible. See *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. Cal.  
 8 2002) ("A trial court can only consider admissible evidence in ruling on a motion for  
 9 summary judgment.") See also Fed. R. Civ. P. 56(e); *Beyene v. Coleman Sec. Servs.*,  
 10 *Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). "At the summary judgment stage, the trial court  
 11 does not focus on the admissibility of the form in which the evidence is offered. Instead,  
 12 the court focuses on the admissibility of its contents." *Fraser v. Goodale* (9th Cir. 2003)  
 13 342 F3d 1032, 1036, cert. denied sub nom. *United States Bancorp v. Fraser*, 541 US 937  
 14 (2004) Affidavits and declarations in connection with a motion for summary judgment are  
 15 only admissible if the affiant or declarant would be permitted to testify as to the content of  
 16 the affidavit as trial. See *Hughes v. United States*, 953 F.2d 531, 543 (9th Cir. 1992).

17 Defendants' objections to Plaintiffs' evidence is set forth in the table below.  
 18 Testimony that constitutes a legal conclusion, or the legal implications of evidence is  
 19 inadmissible under Federal Rules of Evidence (FRE) section 704. See *United States v.*  
 20 *Boulware*, 558 F.3d 971, 975 (9th Cir. 2009). In addition, compromise offers and  
 21 statements made during negotiations are inadmissible under FRE 408 on behalf of any  
 22 party.

	Evidence	Objection
1. 26 27 28	Lori Rodriguez Declaration ¶ 4	Improper Compromise Offer and Negotiation (FRE 408)  Improper Legal Opinion/Argument (FRE 704)

1	2.	Lori Rodriguez Declaration, Exhibit A	Improper Compromise Offer and Negotiation (FRE 408)
2			
3			Improper Legal Opinion/Argument (FRE 704)
4			
5	3.	Lori Rodriguez Declaration ¶ 5, lines 26-28: "That is why I offered to complete that process only after the City either dismissed the petition, or after the Judge ordered the firearms released. Neither of those events happened."	Improper Compromise Offer and Negotiation (FRE 408)
6			
7			Improper Legal Opinion/Argument (FRE 704)
8			
9	4.	Lori Rodriguez Declaration ¶ 6: "The gun safe in my home complies with the secure storage requirements of California's regulations for gun safes."	No Foundation
10			Improper Legal Opinion (FRE 704)
11			
12	5.	Lori Rodriguez Declaration ¶ 10: "Every single firearm was authorized, under California law, to be released to me."	Improper Legal Opinion (FRE 704)
13			
14	6.	Lori Rodriguez Declaration ¶ 16: "Later my attorney confirmed to me that obstructing a peace officer in the performance of his legal duties is a crime under Penal Code § 148."	Improper Legal Opinion (FRE 704)
15			Hearsay (FRE 803)
16			
17	7.	Lori Rodriguez Declaration ¶ 18	No Foundation
18			Improper Opinion (FRE 704)
19			
20	8.	Lori Rodriguez Declaration ¶ 19	Relevance (FRE 403)
21			Improper Compromise Offer and Negotiation (FRE 408)
22			

**IV. ARGUMENT**

**A. ARTICLE III STANDING**

The declarations from the institutional Plaintiffs, the Second Amendment Foundation, Inc. (SAF) and Calguns Foundation, Inc. (Calguns), do not establish Article III standing for injunctive relief. As the City argued in its moving papers, SAF and Calguns have not alleged an immediate threat of actual injury because Defendants do not have a



1 policy, practice, custom, or procedure “to confiscate firearms from the home and retain  
2 them in conjunction with a 5150 hold where there is a California approved gun safe and at  
3 least one responsible and qualified person to take custody of the firearms.” SAF and  
4 Calguns must allege more than one instance of firearms being taken under Section 8102  
5 where a gun safe and allegedly responsible and qualified person is present to establish  
6 standing for injunctive relief. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02  
7 (1983), criticized on other grounds by *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S.  
8 561 (1984).

9 **B. PLAINTIFFS HAVE NOT ESTABLISHED A CONSTITUTIONAL**  
10 **VIOLATION.**

11 **1. Defendants Have Not Infringed Plaintiffs’ Second Amendment Rights.**

12 Despite Plaintiffs’ best efforts, this is not a Second Amendment case. Plaintiffs  
13 concede that Lori’s core right under the Second Amendment to keep and bear arms for  
14 self-defense is intact since they do not dispute that she can own, possess, or acquire  
15 firearms. (see Defendants Undisputed Fact 1). Furthermore, Plaintiffs have not  
16 established the need for injunctive or declaratory relief. The City’s policy mirrors section  
17 8102 (See Defendants Fact 2). Section 8102 is constitutional under the Second  
18 Amendment because the confiscation and hearing process only implicates the specific  
19 firearms confiscated by law enforcement and not the right to keep and bear arms  
20 generally. *City of San Diego v. Boggess*, 216 Cal.App.4th 1494, 1503, fn. 5 (Cal. Ct. App.  
21 2013).

22 Plaintiffs try to save their Second Amendment claim by disputing this fact with  
23 “respect to [Lori’s] right to ‘keep and bear’ firearms already owned by her.” (See Plaintiffs’  
24 Separate Statement.) The is not material and Plaintiffs disputed facts in support do not  
25 change the fact that Lori still enjoys all rights available to her under the Second  
26 Amendment.

27 ///

28 ///

1 As Defendants expected, Plaintiffs are arguing that the Second Amendment  
2 protects the property interest in a specific firearm, but cite no legal authority for this  
3 proposition. To the contrary, the prevailing authority is that the Second Amendment does  
4 not create a property-like right to keep and bear a specific firearm. In their moving papers,  
5 Defendants cited various Circuit Court decisions that discussed this issue. Each case  
6 acknowledged, in some way, that the Second Amendment is not violated when the  
7 government confiscates a specific firearm, since the general right to keep and bear arms  
8 is not taken away.

9 The California Court of Appeal recognized this limitation in *Bogges*, as did the  
10 Sixth District when this matter was before them. See *City of San Jose v. Rodriguez*, 2015  
11 WL 1541988, 7 (Cal. Ct. App. 2015) ["However, the Supreme Court decisions in *Heller*  
12 and *McDonald* did not state that the Second Amendment right to keep and bear arms  
13 extends to keeping and bearing either any particular firearms or firearms that have been  
14 confiscated from a mentally ill person. Moreover, the *Heller* and *McDonald* decisions may  
15 be read to the contrary."]. Accordingly, the City requests that the Court apply the same  
16 rationale here, and enter judgment in Defendants' favor on Plaintiffs' Second Amendment  
17 challenge.

18 **2. Plaintiffs Have Not Established a Fourth Amendment Violation.**

- 19 a. Under the circumstances, the seizure of the twelve firearms was  
20 reasonable and valid under the Fourth Amendment.

21 Defendants established that Officer Valentine acted reasonably under the Fourth  
22 Amendment when he seized the twelve firearms. Plaintiffs do not dispute the validity of  
23 Edward's detention under Section 5150, and therefore must agree that Officer Valentine  
24 had probable cause to confiscate any firearms that Edward owned, could possess, or  
25 could control. The City also established that Edward owned eleven firearms and stored  
26 them with Lori's firearm in a gun safe they jointly owned, in their home, and located in the  
27 same room where he was detained. Given the limited information available and the

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1 important public safety goals served by section 8102, it was reasonable for Officer  
2 Valentine to confiscate all the firearms and let the judicial process take its course.

3         The only impediment to Officer Valentine obtaining access to the firearms was the  
4 gun safe. He correctly informed Lori of the State law and the procedures required, and she  
5 made the firearms available to him when she freely provided the key and combination to  
6 open it. Just because Lori was aware that it could be a crime to disobey a police officer  
7 does not arise to the level of duress, as there is no objective indication that Officer  
8 Valentine coerced, forced, or intimidated Lori into opening the safe. In fact, he advised her  
9 that she could refuse to open the safe. Under these facts, it was reasonable for Officer  
10 Valentine to conclude that Lori voluntarily consented, and Defendants contend that she  
11 did.

12         That aspect aside, the only issue is whether it was reasonable under the Fourth  
13 Amendment for Officer Valentine to confiscate the firearms. Plaintiffs have limited their  
14 claim to the seizure only, and have neither alleged nor argued that an unlawful search of  
15 the home or gun safe occurred. Whether there was consent or a warrant makes no  
16 difference, as consent or a warrant is not always necessary to lawfully confiscate property  
17 where reasonable. *See United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016).

18         Local police have functions that are separate from the enforcement of criminal laws  
19 that involve community caretaking. *Cady v. Drombrowski*, 413 U.S. 433 (1973). Albeit  
20 limited in its application, the community caretaking doctrine recognizes that it can be  
21 reasonable under the Fourth Amendment to seize property to promote public safety in  
22 furtherance of a community caretaking purpose. *United States v. Torres* at 1118. Dealing  
23 with the mentally ill in a non-criminal context is such a function, and Section 8102  
24 authorizes the temporary removal of firearms from someone detained for a 5150 hold as a  
25 cooling-off period to prevent mentally ill individuals from using firearms to harm  
26 themselves or harm others—a legitimate risk in light of recurring mass shootings involving  
27 mentally ill individuals. There is no requirement that the person detained be held for a full  
28 72 hours. In Officer Valentine’s experience a hold has been as little as four hours.

1 (Additional Fact 28). There was no way of knowing how long Edward would remain at the  
2 hospital, or whether he would be admitted. Once Lori made the firearms available to  
3 Officer Valentine and the firearms were in plain view (Additional Fact 27),, Section 8102  
4 authorized Officer Valentine to confiscate them to further the important public safety goal  
5 of keeping firearms away from mentally ill individuals.

6 Plaintiffs also cite *People v. Sweig*, 167 Cal.App.4th 1145 (2008), which was  
7 depublished. Defendants do not understand why Plaintiffs cite this case since *Sweig* is  
8 distinguishable on the facts. *Sweig* was a criminal case, where the exclusionary rule  
9 applies, and involved someone detained for a 5150 hold outside of his home. The  
10 responding officers went inside his home, without a warrant, to search for firearms to  
11 confiscate under section 8102. Inside, they found an illegal assault weapon and criminal  
12 charges were brought. Sweig moved to suppress the evidence based on the unlawful  
13 entry of the home, and the Court analyzed the Fourth Amendment in that context. Here,  
14 there is no allegation that Officer Valentine unlawfully entered or searched the home, or  
15 even unlawfully searched the gun safe. Accordingly, it is not persuasive in this case.

16 b. The City's retention of the twelve firearms does not violate the Fourth  
17 Amendment because it is authorized by Court order.

18 Finally, Plaintiffs' Fourth Amendment claim seeks injunctive and declaratory relief  
19 based on the City's retention of the firearms, not the initial confiscation. As analyzed  
20 below, Plaintiffs misinterpret the Sixth District's decision. The City's retention of the  
21 firearms is in accordance with Judge Kirwan's order after a full evidentiary hearing under  
22 section 8102. Until that order is set aside or directly overturned, the City's retention of the  
23 firearms cannot be said to unreasonably violate the Fourth Amendment or be motivated by  
24 a City policy, practice, or custom.

25 **3. Plaintiffs Are Not Entitled To Just Compensation under the Fifth**  
26 **Amendment.**

27 Plaintiffs are correct in asserting that their takings claim is the easiest for the Court  
28 to dispose of, but not for their reasons. Defendants argued that, other than the power of  
eminent domain, there could be no taking where the government lawfully acquired

1 property under the exercise of its authority. See *Bennis v Michigan*, 516 U.S. 442, 452-53  
2 (1996). Otherwise all property subject to government forfeiture and confiscation, such as  
3 property linked to criminal activity, would be a taking requiring just compensation.

4 Moreover, if the firearms were wrongfully confiscated and retained, as Plaintiffs  
5 contend, then their takings claim still fails because property seized unlawfully cannot be  
6 for a “public use.” See *Mateos-Sandoval v. County of Sonoma*, 942 F.Supp.2d 890, 912  
7 (N.D. Cal 2013). Indeed, if the Court were to follow Plaintiffs’ logic and apply a takings  
8 analysis, the Court must conclude, as a matter of law, that the confiscation of the firearms  
9 was lawful and appropriate.

10 Plaintiffs cite *Horne v. Department of Agriculture*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2419  
11 (2015) in opposition. Defendants agree that *Horne* held that that the Fifth Amendment  
12 Takings Clause protects personal property as well as real property, but it remains unclear  
13 how that holding mandates a takings analysis in this case.

14 Plaintiffs also cite *Henderson v. United States*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1780 (2015),  
15 without any indication as to how it applies to their takings claim. *Henderson* involved the  
16 disposition of firearms under a federal statute prohibiting felons from owning, controlling,  
17 or possessing firearms. But, the Supreme Court never considered the issue of a taking  
18 under the Fifth Amendment. Instead, it discussed the Court’s equitable power to authorize  
19 a third party firearm transfer, but only if the disposition prevented the felon from later  
20 exercising control over the firearms. *Id.*

21 If *Henderson* applies at all to this case, it supports the Court’s equitable power to  
22 determine the disposition of firearms under its jurisdiction. If the Court is satisfied that the  
23 prohibited person will not later exercise control over the firearms, then the Court has  
24 equitable power to approve the transfer. *Henderson* at 1784. The corollary is that if not  
25 satisfied, the Court has the equitable power to reject the transfer. Here, Judge Kirwan was  
26 not convinced that Lori would keep the firearms away from Edward, and granted the City’s  
27 petition. In view of the rationale in *Henderson*, the subsequent transfer of the twelve

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1 firearms at issue here will require Court approval before being considered valid under  
2 section 8102.

3 **4. Plaintiffs Do Not Have a Claim Under the Fourteenth Amendment or**  
4 **Penal Code section 33800 et seq.**

5 a. Plaintiffs misinterpret the Sixth District's Decision.

6 In support of their Fourteenth Amendment and State law claim, Plaintiffs incorrectly  
7 interpret the Sixth District's statement regarding the availability of Penal Code section  
8 33850 *et seq.* This entire case is premised on a flawed assertion regarding the Sixth  
9 District's statement that "we believe that the record on appeal shows that the procedure  
10 provided by section 33850 *et seq.* for return of firearms in the possession of law  
11 enforcement remains available to Lori." *City of San Jose v. Rodriguez*, 2015 WL 1541988,  
12 (Cal. Ct. App. 2015). Plaintiffs interpret this statement as a conclusive finding ordering the  
13 City to return the firearms to Lori. Plaintiffs reach this conclusion despite the Sixth District  
14 affirming Judge Kirwan's decision refusing to return to the firearms to Lori.

15 Had the Sixth District intended to make a specific finding about the merits of  
16 returning the firearms to Lori, then the Sixth District would have done so. The Sixth  
17 District only analyzed the Penal Code in considering the ripeness of Lori's Second  
18 Amendment challenge. Plaintiffs compound the confusion here by asserting what amounts  
19 to an appeal of the Sixth District's decision in Federal Court. The interpretation of the  
20 State Court decision is better left to those Courts, particularly because the analysis  
21 requires interpreting a State Court decision that itself is interpreting State law. Abstention  
22 may be raised at any time, and it does not matter that this argument was brought in a  
23 motion for summary judgment. See *Munich American Reinsurance Co. v. Crawford*, 141  
24 F.3d 585 (5th Cir. 1998), *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791  
25 (9th Cir. 2001). Accordingly, in the interest of comity, Defendants' request that this Court  
26 let the State court resolve this matter.

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1           b.     Plaintiffs are not entitled to administrative due process nor have a  
2                     separate cause of action under Penal Code Section 33800 et seq.

3           Plaintiffs also appear to argue that they are entitled to additional due process under  
4           Penal Code section 33800 *et seq.* However, Lori has had all of the process due to her  
5           under the Fourteenth Amendment. In cases involving firearms confiscated during a 5150  
6           hold, Section 8102 and its hearing procedures apply. Plaintiffs forget that Penal Code  
7           section 33800 *et seq.* was not “intended to displace any existing law regarding the seizure  
8           or return of firearms.” Cal. Penal Code § 33800(c). Lori had a hearing under Section 8102  
9           and Judge Kirwan decided not to return the firearms to her. Lori then appealed, and the  
10          Court affirmed Judge Kirwan’s order.

11          Plaintiffs also do not have a cause of action under Penal Code section 33800 *et*  
12          *seq.* The *Calhoun* Court was correct when it reached this conclusion. The section Plaintiffs  
13          cite is an attorney fee shifting statute that uses the term “proceeding” generally, but does  
14          not authorize a State law claim or require an administrative process. What legal process is  
15          available could take any form—that is why the Court in *Calhoun* allowed leave to amend,  
16          but Penal Code section 33800 *et seq.* is not an independent State law claim. Accordingly,  
17          Defendants are entitled to judgment on this claim.

18          **C.     OFFICER VALENTINE SHOULD BE DISMISSED FROM THIS ACTION.**

19          Plaintiffs argue that Officer Valentine is not entitled to qualified immunity for  
20          confiscating Lori’s firearms, but fail to provide any legal support for this proposition. In its  
21          moving papers, the City established that it was reasonable for him to confiscate the  
22          firearms as there is no clearly established right under the Second, Fourth, Fifth, or  
23          Fourteenth Amendments prohibiting his actions when a gun safe and allegedly  
24          responsible person are present. Plaintiffs also concede that Officer Valentine is not liable  
25          for the retention of the firearms as that decision lies with the City and Police Department,  
26          yet Plaintiffs still seek to keep Officer Valentine in this case to assert injunctive and  
27          declaratory relief against him.

28          ///

///

1 As to the original confiscation of the firearms, there is no basis for injunctive or  
 2 declaratory relief against Officer Valentine. Plaintiffs' lawsuit is about compelling the City  
 3 to return the twelve firearms and making constitutional law in the process. That does not  
 4 require keeping Officer Valentine in this lawsuit since Plaintiffs take issue with the alleged  
 5 policy that Officer Valentine was following.

6 As to the retention of the firearms, Plaintiffs concede that Officer Valentine is not  
 7 the cause of their alleged injury. The parties may disagree as to the merits of the City's  
 8 retention of the firearms, but Plaintiffs agree that Officer Valentine played no part in that  
 9 decision. He is not an officer with any policy-making authority in the City of San Jose, and  
 10 Plaintiffs' claim for injunctive and declaratory relief is properly directed to the City of San  
 11 Jose. Therefore, Defendants requests that the Court enter judgment in favor of Officer  
 12 Valentine or, in the alternative, dismiss him as Plaintiffs have failed to state a claim against  
 13 him.

14 **D. THE CITY IS NOT LIABLE FOR FOLLOWING SECTION 8102 AND JUDGE**  
 15 **KIRWAN'S ORDER.**

16 **1. The City Does Not Have A Policy, Practice or Custom of Confiscating**  
 17 **Firearms Under Section 8102 That Violates the Second, Fourth,**  
 18 **Fifth, or Fourteenth Amendments.**

19 In support of its motion, the City submitted the section of the San Jose Duty  
 20 Manual related to the confiscation of firearms after a 5150 hold, which mirrors Section  
 21 8102. As previously argued, Section 8102 does not violate the Second Amendment right  
 22 to keep and bear arms, violate the Fourth Amendment when a gun safe and allegedly  
 23 responsible person is present, or constitute a taking requiring just compensation. Plaintiffs  
 24 have not introduced any evidence or legal authority that the City in fact has a policy,  
 25 procedure, practice, or custom that is unconstitutional as alleged.

26 **2. Judge Kirwan Authorized the Retention of the Firearms After a Hearing**  
 27 **On The Merits.**

28 Plaintiffs also argue that the City's decision to follow Judge Kirwan's order is a basis  
 for municipal liability. To impose liability on a local government under § 1983, Plaintiffs  
 must prove that an "action pursuant to official municipal policy caused their injury."



1 *Connick v. Thompson*, 563 U.S. 51 (2011) *citing Monell v. Dep't of Soc. Servs.*, 436 U.S.  
2 658, 691 (1978). As the City has already argued, the City is following Judge Kirwan's  
3 order, which has yet to be set aside or overturned.

4 Contrary to Plaintiffs' argument, his decision remains valid as to Lori and has  
5 preclusive effect on the issue of safety. Based on the record of the proceeding, Judge  
6 Kirwan considered substantially the same evidence Lori is introducing here. He considered  
7 her claim that she would have the firearms transferred to her, that she would then store  
8 them inside the home she shares with Edward, and her pledge to keep the firearms away  
9 from him. However, he granted the City's petition in the face of this evidence because he  
10 concluded, as the law required him to do, that Lori's plan would likely endanger Edward or  
11 others. Lori's transfer of ownership and registration of the guns to her own name does not  
12 change this holding. But, if Lori believes that it does, then this case should return to Judge  
13 Kirwan or, if unavailable, another Santa Clara County Superior Court Judge to determine  
14 the merits.

15 It is also unclear what additional administrative process Plaintiffs contend they are  
16 entitled to under Penal Code section 33800 *et seq.* As previously discussed, Plaintiffs  
17 incorrectly believe that Penal Code section 33800 *et seq.* mandates the return of firearms.  
18 This statutory scheme forbids law enforcement from returning firearms to people unless  
19 certain requirements are met, but nowhere does it compel law enforcement to return a  
20 firearm if these requirements are met, especially where other laws—like section 8102—  
21 apply. Accordingly, the City is entitled to judgment as the City does not have a policy,  
22 practice, or custom of refusing to return firearms under Penal Code section 33800 *et. seq.*  
23 that violates the law.

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**V. CONCLUSION**

For the foregoing reasons, Defendants request that the Court grant the Defendants' motion for summary judgment or, in the alternative, partial summary judgment, and deny Plaintiffs' cross-motion.

Respectfully submitted,

Dated: September 30, 2016

RICHARD DOYLE, City Attorney

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