No. 17-17144 [Dist Ct. No.: 5:15-cv-03698-EJD]

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

LORI RODRIGUEZ; et al.,
Plaintiffs - Appellants,

vs.

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

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

APPELLANTS' REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

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

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

These institutional plaintiffs have provided funding for this suit.

Dated: July 16, 2018

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

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I. INTRODUCTION

The two core issues for this Court to resolve are: (1) Was at least one firearm, registered and owned by Lori Rodriguez (and/or the entire collection based on her community property interest), **wrongfully seized** in violation of Lori's Constitutional Rights on January 24, 2013? And: (2) After lawfully transferring the community property guns and securing the release of the entire collection in accordance with state law, through the California Department of Justice's administrative procedures (in accordance with the instructions of the Court of Appeal of California – Sixth Appellate District) are Lori Rodriguez's constitutional (and statutory) rights still being violated by the **wrongful retention** of her property by the Defendant-Appellees?

II. STATUS OF THE APPELLATE RECORD

In what reads like a trial brief, opening statement, or an argument that substantial evidence exists somewhere in the record in support of a particular finding or verdict, the Defendant-Appellees' Answering Brief (AB) veers outside of the parties' statements of undisputed facts and even interjects non-material facts from pre-trial discovery in an attempt to obscure the record on appeal. This tactic adds an additional burden to this Court and confuses the state of the record. That record

should be limited to the twenty-one (21) undisputed facts Defendant-Appellees set forth in support of their motion for summary judgment. [ER 8:134-143] Along with the response filed by Plaintiff-Appellants that – either unconditionally, or with some qualifications supported by additional facts – confirmed those twenty-one (21) facts as undisputed. [ER 12:219-236] Plaintiff-Appellants also submitted twenty-nine (29) additional undisputed facts (A through CC) in opposing the City's motion and in support of their own cross-motion for summary judgment. [ER 12:219-236] Defendant-Appellees filed a response to Plaintiffs' statement of undisputed facts making various objections and disputing some of these facts. [ER 16:405-433] In its six-page order[1] that forms the basis of this appeal, the trial court did not resolve the Defendant-Appellees' claims of factual dispute, nor did it address any of the City's evidentiary objections. [ER 3:008-013]

Yet the Defendant-Appellees (and their amici) make unnecessary forays into amateur psychiatric diagnosis, they recount inflammatory statements (some taken out of context), and describe bizarre conduct by

[1] Defendant-Appellees have not cross-appealed or challenged the District Court's finding that the institutional plaintiffs (Second Amendment Foundation and The Calguns Foundation) lack standing.

a person obviously in crisis. (AB at pages: i, 3, 4, and 22.) They sprinkle their briefs with trigger words like "school shooting" and "semi-automatic" to impart a flavor of sensationalism. They even take a flyer at mind-reading by hinting the Lori is afraid of her husband, thus implying that she might be acting under duress in trying to recover the firearms seized and held by the City. (AB at 3, 4, 22, Brady Center Amicus Brief (BCAB)[2] at 7, 14) In point of fact, it is undisputed that no reports of domestic violence were made by Lori and that any inflation of the danger on January 24, 2013 had to be corrected on the record by the Defendants. [ER 12:230, Additional Facts Y and Z][3] And what is the point of referring to Edward Rodriguez's weight? (AB at 4, BCAB at 7, 14) These are hardly material facts even if undisputed. Lori's husband has never appeared as a party in the state or federal case. Nor has he been deposed. Nor has his current mental state been

[2] DktEntry 29 - Brief of the Brady Center to Prevent Gun Violence as *Amicus Curiae* in Support of Defendants-Appellees and Affirmance.

[3] Furthermore, though not part of this record because it was deemed irrelevant by the parties for purposes of summary judgment, Lori specifically testified during her deposition that she was not afraid of her husband. [Lori Dep. 32:19-23] If necessary, the excerpted portions of her transcript [ER 13:271-291] can be augmented with that omitted portion if the Court deems it necessary.

evaluated. The undisputed fact is that his mental-health hold that triggered these events currently disqualifies him from firearm ownership/possession. That is the only necessary facts for adjudication of this case. It has always been undisputed that he became a prohibited person upon his detention under Welfare and Institutions Code (WIC) § 5150 in January 2013. So what is the point of combing the discovery record and inserting these gratuitous, and for purposes of analyzing this case, extraneous remarks that were not subjected to the rules governing a summary judgment's adjudication on undisputed material facts?

These "facts" might (or might not) be relevant if the case was to be tried to jury. They have no place at this stage of the proceedings.

A. Appellate Record on the Initial Seizure

Only the first issue (unlawful seizure) presented any possibility of a disputed fact. Officer Valentine claimed the Rodriguez firearms were obtained by implied consent, because Lori provided the key and combination to the gun safe. Lori says she only provided the key and combination because Officer Valentine insisted that he had a legal duty to seize the firearms. What is undisputed is that Lori did not freely and voluntarily consent to the seizure of those firearms. [ER 11:154-156, ER

13:243, ER 13:268, ER 13:277]

It was only Defendant Valentine's insistence that he had a duty to seize all the firearms that overcame Lori's will. [ER 11:156, ER 13:258-263, 267] Not wanting to delay, interfere or obstruct a police officer in the discharge of his (as he stated them to her) duties, Lori provided the combination to the gun safe. [ER 13:267, ER 11:156] That is all.

This is not consent and it is an undisputed fact that the Defendants failed to obtain a warrant to seize firearms. [ER 11:154-157, ER 13:244, ER 13:258-260, ER 13:268] Perhaps there could have been a trial on this issue if the City of San Jose had claimed that a material disputed fact was at issue. (i.e., Valentine said Lori consented, Lori said she didn't.) But the City did not make that argument in the trial court. Why? Because Officer Valentine confirmed that Lori objected to the seizure of her firearms. [ER 13:262-268]

B. Appellate Record on the Wrongful Retention

Nor are the seizure facts the only examples of an inaccurate or confused state of the record proffered by the Defendant-Appellees. The City has unnecessarily obscured the wrongful retention facts as well:

1. There are no facts, disputed or undisputed, that Lori consented to the removal of her guns, as set forth on page 5/6 of the AB. Her

lack of consent is evidenced by her objection. [ER 13:262-268] What was she supposed to do? Offer to fight Officer Valentine if he insisted on removing the guns?

2. Nor does (or did) the gun safe require insertion of the key and application of the code to unlock the Rodriguez gun safe. [AB at 5-9] The key merely unlocks the combination dial and then the combination itself must be applied to the lock. [ER 11:153-157]

3. Moreover, the Defendant-Appellees have admitted that the Rodriguez gun safe complied with California's safe storage law. [ER 6:060-061, ER 10:162] A locking combination dial is not part of that law. See generally California Penal Code § 23620 *et seq.*

4. The City has also admitted [AB at page 12] that Lori had the combination to the gun safe changed after her husband had been disqualified, and that she did so prior to her request that the City return her property. Therefore the location of a key that unlocks a dial (not even part of the gun safe specifications of California's safe storage law) and statements about whether the old combination was written down, where it was written down, or whether it was later memorized by Lori (AB at pages 5-9, 18) are irrelevant and immaterial to adjudication in this case. The City

might want to try and convince a trier of fact that Lori was insincere or unwilling to keep the new combination to herself and away from her husband; but there are no undisputed facts on this record that Lori was lying or lacked the capacity to comply with California law. Any innuendo to the contrary comes close to bad faith pleading of facts outside the record.

5. On page 16 (bullet point #7) of the AB, the City lapses into lazy prose by claiming the Lori "changed the ownership record of the guns to her name." That is a pretty sparse interpretation of the process of firearm transfers in a jurisdiction as notoriously strict as California. In fact, a fee was paid, a background check of both the gun and new owner (Lori) was conducted. And the transferee was (is) also required to possess the necessary safety certificate credentials by passing a written test. See generally California Penal Code §§ 27875, 27920. All of these conditions were met by Lori to effect the transfer of the community property firearms to her name. She obviously did not have to transfer the revolver that had always belonged to her. It was not just a simple matter of changing "the guns to her name" as intimated by the City, as if Lori was merely filling out a luggage tag or change of address.

6. The City makes the same slothful mistake at bullet point #8 on page 16 of their AB. The Law Enforcement Gun Release process mandated by California Penal Code § 33850 *et seq*., is not just a certification that the gun owner is "eligible under state law and federal law to possess firearms." It is a certification, complete with a self-authenticating seal from the Office of the Attorney General, that the firearms are registered in the State's database to the person seeking recovery and that person claiming title has a right to seek their return upon proof of ownership. The releases speak for themselves. [ER 11:194-217] Furthermore, as noted above, Lori did obtain proof of ownership in the form of the Firearm Ownership Record. And she tendered both that proof and the Department of Justice's release to the City of San Jose in an attempt to secure the return of her property. [ER 11:152-217]

The *de novo* standard of review of cross-motions for summary judgment is well settled law. *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). The appellate court's review of facts is even governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003).

Furthermore this Court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Frudden v. Pilling*, 877 F.3d 821, 828 (9th Cir. 2017); *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004).

Why then does the Defendant-Appellees' answering brief (with some corresponding echoes by their amici) attempt to burden this Court with disputed facts, some of which are outside the parties' statements of undisputed facts, at this late stage of the litigation? Perhaps it is because the Defendant-Appellees' legal arguments (and those made by their amici) on the undisputed facts are so poorly conceived that only a change (or obfuscation) of the facts will support their unconstitutional policies, procedures, and practices.

III. **REPLY ARGUMENTS**

A. Answering Brief Fails to Treat the Second Amendment as a Fundamental Right.

The most glaring error in the arguments made by the Defendant-Appellees (and their amici), which also forms the unstated premise of all their arguments, is the breathtaking assumption that the state has

any power to seize/retain firearms, from any law-abiding citizen who is not otherwise disqualified from owning/possessing firearms because the government thinks it's a good idea, or that it's expedient.

It is undisputed that Lori was not being detained for a mental illness hold. [ER 12:226, Additional Fact Q.] It is undisputed that Officer Valentine knew Lori was the sole registered owner of the handgun he seized from her, and that she objected to its seizure. [ER 12:223, Additional Facts G, H, I] Even assuming *arguendo* that Officer Valentine was authorized to seize Edward's firearms (or genuinely mistaken about that authorization), his disarming of Lori was done without lawful authority (i.e., a warrant) and was therefore a violation of her Second Amendment rights. [ER 12:226, Additional fact P.]

Even the statute that the Defendant-Appellees rely upon, Welfare and Institutions Code § 8102(a), only addresses authority over a singular "person" when giving law enforcement officers authority to seize firearms during a mental-health welfare check. (Though in the abstract this is still a dubiously broad legislative general warrant, even if not challenged here in this case.) The statute does not speak in terms of disarming every household member, relative, spouse, or child of the person being given mental-health assistance. The plain language of the

statute limits the confiscation to firearms owned, possessed or under the control of the detainee, not family members.

At most, and this is a stretch, Officer Valentine might believe that he was authorized to seize Edward's guns or guns in which the ownership was indeterminate. As for the theory that Edward might have (or gain) control over Lori's gun? How was that supposed to happen? All of the firearms were in the gun safe when the police arrived and Edward was on his way to the hospital for several weeks when Officer Valentine turned his attention to the Rodriguez firearms. [ER 12:220-231, Additional Facts C, D, E, G, H, I, J, K, P, R, S, T, U, V, W, X, AA]

Seizing Lori's registered firearm from her without lawful authority, or even rational interpretation of the statute was unconstitutional. This isn't a close call.

Even if we assume Officer Valentine formed a "not irrational" opinion that it would be smarter, safer, more prudent, to disarm Lori, while taking Edward's guns for safe-keeping – he is not entitled to act on that opinion. If the U.S. Supreme Court can reject "interest balancing" decisions by judges when it comes to the "right to keep and bear arms" – the same decision process cannot be countenanced by a police officer.

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no 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.
>
> *District of Columbia v. Heller,*
> 554 U.S. 570, 634-35 (2008)

Even the meanest, stingiest, most grudging and contrarian interpretation of the "right to keep and bear arms" includes the right to **keep** arms.

> We turn to the phrases "keep arms" and "bear arms." Johnson defined "keep" as, most relevantly, **"[t]o retain; not to lose,"** and "[t]o have in custody." [...] Webster defined it as "[t]o hold; to retain in one's power or possession." No party has apprised us of an idiomatic meaning of "keep Arms." Thus, the most natural reading of "keep Arms" in the Second Amendment is to "have weapons." [emphasis added, internal citations omitted]
>
> *District of Columbia v. Heller*,
> 554 U.S. 570, 582 (2008)

The Defendant-Appellees' citations to various California cases[4]

[4] *City of San Diego v. Boggess*, 216 Cal. App. 4th 1494 (2013), and *Rupf v. Yan*, 85 C.A. 4th 411 (2000).

interpreting Welfare and Institutions Code § 8100 *et seq.* (only one of which is post-*Heller*) are not helpful either.

1.) Those cases dealt with arms owned or possessed by the person disqualified by the mental health hold. Lori was never so classified, and remains outside of that classification.

2.) Nor have the Plaintiff-Appellants challenged the underlying policy of seizing/retaining weapons from any person disqualified for mental health reasons. **But that is not the same fact pattern** as when there is evidence that a responsible qualified adult is living with the prohibited person, who can deny access to the firearms and ammunition through the means adopted by the California Legislature (Penal Code § 25135) and common sense. [ER 11:153-172]

3.) Any residual jurisdiction under WIC § 8100 *et seq.,* arising from the initial seizure, evaporated once Lori became the lawful owner of all the firearm, tendered the Law Enforcement Gun Releases, and demanded the return of her property. The state court adjudication under WIC § 8102 and subsequent appeal, were about Edward's guns, even as those tribunals ignored or downplayed the issues related to Lori's separate property handgun.

Turning to federal cases – Defendant-Appellees' reliance on *Walters*

v. Wolf, 660 F.3d 307 (8th Cir. 2011) is not helpful to their arguments either. First of all, the gun-owner in *Walters* actually prevailed on one of the alternate theories plead in this case. (Unlawful retention and procedural due process violation.)

In the second place, the *Walters* court made a very specific finding that would be precluded by the facts of this case. "The defendants' policy and action affected one of Walters's firearms, which was lawfully seized. The defendants did not prohibit Walters from **retaining** or acquiring other firearms. [...] We do not foreclose the possibility that some plaintiff could show that a state actor violated the Second Amendment by depriving an individual of a specific firearm that he or she otherwise lawfully possessed for self-defense. However, on this record, Walters has failed to make such a showing." *Id*, at 318. (emphasis added and internal citations omitted).

By seizing all of Lori's firearms (not letting her retain one) and by specifically seizing the one registered to her, Officer Valentine deprived Lori of the means of self-defense. The City compounded the error by failing to return any of the firearms, critically the one already owned and registered to Lori.

The cases of *Sutterfield v. City of Milwaukee*, 751 F.3d 542 (7th Cir.

2014) and *Rodgers v. Knight*, 781 F.3d 932 (8th Cir. 2015) fail for the same reasons due to cherry-picked facts. In *Sutterfield* the gun-owner lived alone and was herself the subject of the mental-health detention. As noted above, Lori was not subject to any law or warrant that permitted Officer Valentine to seize her weapon, or any legal disqualification that would allow San Jose to retain it.

The citation to *Rodgers* is even more dodgy than *Sutterfield*. The firearm in question (others had already been returned) was still subject to an evidence hold and then routine bureaucratic delay caused additional deprivation. The point is, the gun-owner in *Rodgers* had access to his own "other guns" that had already been returned. Lori has not been even that fortunate, five years after the initial seizure.

The City's arguments that their actions meet intermediate and/or strict scrutiny assumes that a tiered-scrutiny analysis is appropriate for a policy that amounts to complete forfeiture of the means, already owned, for exercising a fundamental right. Exactly what judicial tests are appropriate when the government seizes and retains (from law-abiding citizens) bibles, crucifixes, printing presses, telephones, houses, children, pets, correspondence? The City's policies aren't even rational when they admit that Lori can (assuming unlimited funding) keep

buying new firearms to store in her California approved gun safe in compliance with California law.[5]

The Defendant-Appellees have come to the conclusion that it is safe to treat the Second Amendment is some kind of second-class right that can be ignored on any pretext. Several times now, Justices of the U.S. Supreme Court have warned in dissents from denial of certiorari that this practice is fraught with peril. *See: Jackson v. City & Cnty. of San Francisco*, ___ U.S. ___, 135 S. Ct. 2799 (2015); *Friedman v. City of Highland Park*, ___ U.S. ___, 136 S. Ct. 447 (2015); *Peruta v. California*, ___ U.S. ___, 137 S. Ct. 1995 (2017), *Silvester v. Becerra*, ___ U.S. ___, 138 S. Ct. 945 (2018).

This Court should not make the same mistake the City (and the courts below) have made. When Officer Valentine seized (at a minimum) that one weapon, over her objection, that belonged to Lori, and that was registered to her – he violated her Second Amendment right to "keep and bear" a handgun in her home for self-defense. The

[5] Both of the amici in support of the Plaintiff-Appellants adequately address tiered-scrutiny analysis. Repetition here would be redundant. See: *Brief of Amicus Curiae Millennial Policy Center* (DktEntry 12) and *Brief of California Rifle and Pistol Association, Incorporated as Amicus Curiae*. (DktEntry 17)

City of San Jose compounded that error by refusing to return it to her after she complied with all applicable California laws. The Defendant-Appellees' argument that she can simply "buy more guns" to cure the City's violation of her Second Amendment rights is an infinite loop plot for a comedy sketch. It is not legal reasoning.

B. The Defendants Violated the Fourth Amendment.

The AB (at 51) argues that because Lori has not challenged the WIC § 5150 hold on her husband, she somehow consented to the seizure and forfeiture of her valuable property. No government policy or judicial action could be more calculated to discourage anyone from seeking help for their relatives who might be suffering from a mental health episode, than to force them to make that call for help on pain of forfeiting their own fundamental rights and valuable property. Rather than encouraging early intervention by family, friends, and mental health professionals – such a policy would frustrate the beneficial policy of removing obstacles and stigmas associated with mental health treatment. It is a good thing that this is not the state of the law.

The City contends that the "only way" public safety could be insured, if/when Edward was released from his medical hold, was to seize guns. But why stop at just the guns in the Rodriguez home? Why not the

neighbors' guns? Why not seize the guns of friends and relatives who Edward is likely to visit for the foreseeable future? Should Edward be restrained from entering sporting goods stores that also sell guns? What should happen if Edward finds himself standing next to an armed police officer? An armed security guard?

In the proposed order submitted with their summary judgment motion, Appellants suggested one (of many) alternative policies:

> That San Jose and the San Jose Police Department implement changes to their Policies and Procedures Manual relating to the seizure of firearms during non-criminal welfare checks, including checks under the Welfare and Institutions Code. Specifically:
>
> 1. The police are only authorized to seize weapons during a Welfare and Institutions Code § 5150 contact if the firearm is in plain site and is registered to the detainee.
>
> 2. The police are only authorized to seize weapons if the detainee lives alone, or there are no law-abiding competent adults present, who are willing and able to take charge of the weapons.
>
> 3. If a responsible, law-abiding adult, can assume control over firearms, and an appropriate firearms safety/storage device is in use (i.e., a gun safe), the police shall seek a warrant, supported by probable cause in accordance with the Fourth Amendment decisional law, before seizing firearms from otherwise law-abiding citizens who have the means to store said firearms in compliance with California law.

Of course this looks remarkably similar to a constitutionally tempered reading of the existing Welfare & Institutions Code § 8102(a), which is why both Officer Valentine and the City of San Jose are liable on the wrongful seizure, but only the City is liable for the wrongful retention.

The City's arguments that Lori was not coerced, and therefore consented to the seizure (AB at 52) were dealt with in the Appellants' Opening Brief (AOB) and above. Defendant-Appellees best argument is that the facts are disputed and therefore required a trial. Lori has maintained, and insists that the matter is undisputed, that she only provided the combination and key to the safe upon Officer Valentine's insistence that he had a legal duty to seize the weapons. [ER 11:156, ER 13:258-263, 267] Not wanting to delay, interfere or obstruct a police officer in the discharge of his (as he stated them to her) duties, Lori provided the combination to the gun safe. [ER 13:267, ER 11:156] This is not consent and it is an undisputed fact that the Defendants failed to obtain a warrant to seize firearms. [ER 11:154-157, ER 13:244, ER 13:258-260, ER 13:268]

Perhaps sensing a loss on this controversy, the AB (at 52) makes the fantastical argument that Lori's consent was irrelevant and that Officer

Valentine was authorized to seize property to promote public safety in furtherance of a community care-taking purpose. But the case cited *United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016) is off point by a mile. In *Torres* the appellate court affirmed the denial of a motion to suppress the warrantless impound search of a vehicle in which evidence of the crime of felon-in-possession was discovered upon an inventory search of that vehicle. This is not an analogous fact pattern. The City (and the district court) failed to accord Lori's Second and Fourth Amendment rights the respect they were due under our Constitutional form of government. No warrant, no lawful seizure. End of discussion. *Payton v. New York*, 445 U.S. 573 (1980).

C. The Defendants Violated the Fifth Amendment.

The AB's arguments against the "takings" claim under the Fifth Amendment (starting at pg. 54) have the patina of merely disagreeing with the points of law raised in the AOB (staring at pg. 28). And the City makes only a half-hearted attempt to address the modification of *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) by this Circuit. *See United States v. Ferro*, 681 F.3d 1105, 1112 (9th Cir. 2012).

Furthermore, the idea that "title" to the guns irrevocably passed to the City is contradicted by the findings and instructions issued by the

Sixth District Court of Appeal: "**[W]e 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. Rodriguez*, 2015 Cal.App.Unpub. LEXIS 2315, 2326. (Emphasis added.)

Finally, while Defendant-Appellees clearly disagree with the legal reasoning of the cases cited for Lori's Fifth Amendment claims: *Horne v. Dep't of Agriculture*, 569 U.S. 513 (2013); *Henderson v. United States*, 575 U.S. ___, 135 S. Ct. 1780 (2015); *Nelson v. Colorado*, 581 U.S. ___, 137 S. Ct. 1249 (2017); and *Panzella v. Sposato*, 863 F.3d 210 (2nd Cir. 2017), they have offered no arguments against the holdings of these cases that clearly and unequivocally support Plaintiff-Appellants' claims, along with her arguments that support the return of, or payment of just compensation for, Lori's valuable property.

D. Defendants Violated the 14th Amendment & Penal Code 33850.

The Defendant-Appellees seem to run out of steam and logic when they get to the end of their Answering Brief. Their own (earlier) citation to *Walters v. Wolf*, 660 F.3d 307 (8th Cir. 2011) undermines their argument that no "Procedural Due Process" claim arises on these facts. As noted in the AOB, those guarantees are fully applicable when

property interests are at stake. *Wolff v. McDonnell,* 418 U.S. 539, (1974), and *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Furthermore, the Sixth District Court of Appeal, interpreting state law, found that Lori could comply with Penal Code § 33850 *et seq.,* for the return of the firearms held by The City of San Jose. *See City of San Jose v. Rodriguez*, 2015 Cal. App. Unpub. LEXIS 2315, 2326. In other words, the Superior Court hearing under Welfare & Institutions Code § 8102 did not deprive her of her property interest in her firearms, in part (probably) because that Superior Court hearing was about Edward's firearms. Regardless, the Court of Appeal was insistent that the administrative processes of Penal Code § 33850 would sufficiently change the character of the case, such that Lori's compliance would ensure the recovery of her property. And they baked that solution into their opinion. The City doesn't like the taste, but that doesn't sanction their continued defiance.

It is undisputed that Lori complied with the procedures set forth at Penal Code § 33850 *et seq*. [ER 11:194-217] Furthermore, it defies logic and language to conclude that 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, where the defendant or cross-defendant is a law enforcement agency, the court shall award reasonable attorney fees and costs to the prevailing party." [emphasis added]

The process due to Lori after she tendered the Law Enforcement Gun Release Letters [ER 11:194-217] was release of her firearms. Denial of administrative and ministerial duties by government actors is actionable under the Fourteenth Amendment's Due Process Clause. *See: Memphis Light, Gas & Water v. Craft*, 436 U.S. 1 (1978).

E. Qualified Immunity and Municipal Liability.

Throughout this litigation, and as set forth in the AOB, Plaintiff-Appellants have conceded that Officer Valentine is liable only on the unlawful seizure of Lori's firearms under the Second and Fourth Amendments, and that Plaintiff-Appellants were only seeking nominal and/or declaratory/injunctive relief (rather than money damages) against Officer Valentine on these claims. However on that single issue of wrongful seizure (under either theory), qualified immunity is not available to Officer Valentine for the simple reasons that the plain language of Welfare & Institutions Code § 8102(a) only permits the seizure of weapons owned/possessed by the mental health detainee, and

not the arms of their family members and/or house-mates.

Furthermore, if Officer Valentine is to be believed (and he should be) that he was merely enforcing a policy of the City of San Jose [ER 6:041-042, ER 6:125-126], then the City's liability for the initial seizures overlaps with Officer Valentines and extends to their own wrongful conduct. "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 563 U.S. 51, 60-61 (2011). A policy "promulgated, adopted, or ratified by a local governmental entity's legislative body unquestionably satisfies *Monell's* policy requirement." *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *overruled on other grounds by Bull v. City & County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc).

The simple expedient of proper training and promulgation of constitutionally aligned policies that respect the Fourth and Second Amendment rights of family members of mental health detainees (as set forth above) is all that is necessary to cure San Jose's future liability on this issue. This Court should decline to let them off the hook in this case.

IV. AMICUS BRIEFING IN SUPPORT OF THE CITY.

Amici in support of Defendant-Appellees[6]make substantially identical arguments, even if the Brady Brief uses more of a public policy statistical approach, while the League of California Cities Brief at least attempts to couch their arguments in existing law. However, both briefs make fatally flawed pleas to vest power in judges and police officers that would override the decisions of law-abiding gun owners about the wisdom of keeping and bearing arms.

That kind of interesting balance, when conducted by judges in the static environment of a courtroom is equally unconstitutional when made by a police officer in the field. *District of Columbia v. Heller,* 554 U.S. 570, 634-35 (2008).

Petitioner-Appellants' earlier reference to the constitutional prohibition on "corruption of blood" [AOB pg. 1] was partly made in jest. But leave it to gun-control advocates to try and turn hyperbole into policy, because loss of rights based on "corruption of blood" is precisely the policy that amici are proposing. How else can their briefs be

[6] Brief of the Brady Center to Prevent Gun Violence. DktEntry 29 Brief of Amici Curiae League of California Cities & International Municipal Lawyers Association. DktEntry 30.

interpreted except that judges (and police) should be able to confiscate firearms, for public safety reasons, from law-abiding gun owners based on familial relations? Do third cousins count?

For the notoriously anti-gun California Legislature, even this is a bridge too far. California Penal Code § 25135 (AOB at 39) addresses the issue of a law-abiding gun owner living with a prohibited person. Nowhere do the amici (or the City for that matter) advance constitutionally cogent arguments for second guessing the California legislature.

Although codified by California after the case was heard in the superior court, but before Lori completed the Law Enforcement Gun Release process under Penal Code § 33850, Penal Code § 25135 was precisely the remedy Lori had suggested in her pre-litigation correspondence with the City of San Jose in April of 2013. [ER 11:158-161]

The crux of the Second Amendment violation is that the Defendant-Appellees deprived (and continues to deprive) Lori of the quintessential firearm, upheld in *Heller*, as necessary for self-defense in the home – her previously own, registered and lawfully possessed handgun.

IV. **CONCLUSION**

It is undisputed that Lori Rodriguez has the right to acquire new firearms and then safely and legally store them in her state-approved gun safe in her home; even if her husband, who is currently prohibited, still lives with her.

So why deprive her of the firearms she already owns?

Lori obtained the necessary releases, through the California Department of Justice's administrative procedures to recover her guns. The decision to have firearms in her home is Lori's to make. It is her right under the Constitution. The government's only interest can be to require compliance with state law on transfer, ownership and storage.

The decision below was in error under any number of possible theories and must be reversed. Lori's property must be returned to her. She must be made whole and this Court should issue an opinion that will prevent future unconstitutional conduct by officers in the field and municipal policy makers.

Respectfully Submitted on July 16, 2018,

/s/ Donald Kilmer

Attorney for Plaintiff/Appellants

Addendum

Second Amendment – A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Fourth Amendment – The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment § 1 – All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code § 25135

Part 6: Control Of Deadly Weapons; Title 4; Firearms; Division 4; Storage Of Firearms; Chapter 2 – Criminal Storage Of Firearm

§ 25135 - (a) A person who is 18 years of age or older, and who is the owner, lessee, renter, or other legal occupant of a residence, who owns a firearm and who knows or has reason to know that another person also residing therein is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm shall not keep in that residence any firearm that he or she owns unless one of the following applies:

(1) The firearm is maintained within a locked container.

(2) The firearm is disabled by a firearm safety device.

(3) The firearm is maintained within a locked gun safe.

(4) The firearm is maintained within a locked trunk.

(5) The firearm is locked with a locking device as described in Section 16860, which has rendered the firearm inoperable.

(6) The firearm is carried on the person or within close enough proximity thereto that the individual can readily retrieve and use the firearm as if carried on the person.

(b) A violation of this section is a misdemeanor.

(c) The provisions of this section are cumulative, and do not restrict the application of any other law. However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.

Califonria Penal Code § 33850

Part 6: Control Of Deadly Weapons; Title 4: Firearms; Division 11: Firearm In Custody Of Court Or Law Enforcement Agency Or Similar Situation; Chapter 2: Return Or Transfer Of Firearm In Custody Or Control Of Court Or Law Enforcement Agency

§ 33850 - (a) Any person who claims title to any firearm that is in the

custody or control of a court or law enforcement agency and who wishes to have the firearm returned shall make application for a determination by the Department of Justice as to whether the applicant is eligible to possess a firearm. The application shall include the following:

(1) The applicant's name, date and place of birth, gender, telephone number, and complete address.

(2) Whether the applicant is a United States citizen. If the applicant is not a United States citizen, the application shall also include the applicant's country of citizenship and the applicant's alien registration or I-94 number.

(3) If the firearm is a handgun, and commencing January 1, 2014, any firearm, the firearm's make, model, caliber, barrel length, handgun type, country of origin, and serial number, provided, however, that if the firearm is not a handgun and does not have a serial number, identification number, or identification mark assigned to it, there shall be a place on the application to note that fact.

(4) For residents of California, the applicant's valid California driver's license number or valid California identification card

number issued by the Department of Motor Vehicles. For nonresidents of California, a copy of the applicant's military identification with orders indicating that the individual is stationed in California, or a copy of the applicant's valid driver's license from the applicant's state of residence, or a copy of the applicant's state identification card from the applicant's state of residence. Copies of the documents provided by non-California residents shall be notarized.

(5) The name of the court or law enforcement agency holding the firearm.

(6) The signature of the applicant and the date of signature.

(7) Any person furnishing a fictitious name or address or knowingly furnishing any incorrect information or knowingly omitting any information required to be provided for the application, including any notarized information pursuant to paragraph (4), shall be guilty of a misdemeanor.

(b) A person who owns a firearm that is in the custody of a court or law enforcement agency and who does not wish to obtain possession of the firearm, and the firearm is an otherwise legal firearm, and the person otherwise has right to title of the firearm, shall be entitled to sell or

transfer title of the firearm to a licensed dealer.

(c) Any person furnishing a fictitious name or address, or knowingly furnishing any incorrect information or knowingly omitting any information required to be provided for the application, including any notarized information pursuant to paragraph (4) of subdivision (a), is punishable as a misdemeanor.

California Penal Code § 33885

Part 6: Control Of Deadly Weapons; Title 4: Firearms; Division 11: Firearm In Custody Of Court Or Law Enforcement Agency Or Similar Situation; Chapter 2: Return Or Transfer Of Firearm In Custody Or Control Of Court Or Law Enforcement Agency

§ 33885 - In a proceeding for the return of a firearm seized and not returned pursuant to this chapter, where the defendant or cross-defendant is a law enforcement agency, the court shall award reasonable attorney's fees to the prevailing party.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of this Circuit because it consists of 5669 words and because this brief has been prepared in proportionally spaced typeface using WordPerfect Version X8 in Century Schoolbook 14 point font.

Dated: July 16, 2018

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

NOTICE OF RELATED CASES

Plaintiff/Appellants are not aware of any pending cases in Northern District of California or the Ninth Circuit that could be related to this action.

Dated: July 16, 2018

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

CERTIFICATE OF SERVICE

On July 16, 2018, I served the foregoing APPELLANTS' OPENING BRIEF by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. I declare under penalty of perjury that the foregoing is true and correct.

Executed July 16, 2018,

/s/ Donald Kilmer

Attorney for Appellants