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

PLAINTIFF-APPELLANTS' PETITION FOR REHEARING AND/OR REHEARING EN BANC

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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 CALIFORNIA GUN RIGHTS FOUNDATION, (CGF) is a non-profit organization incorporated under the laws of California. Its principal place of business in Sacramento, California. CGF supports the gun owners in California by promoting education for all stakeholders about California and federal firearms laws, rights and privileges, and by defending and advancing the civil rights of California gun owners. CGF is not a publicly traded corporation.

These institutional plaintiffs have provided funding for this suit.

Dated: August 27, 2019

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

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A Petition for En Banc Rehearing may be ordered when: (1) a panel decision conflicts with a decision of the Supreme Court and consideration of the full court is necessary to maintain uniformity, and/or (2) the case presents one or more questions of exceptional importance. Fed. R. App. P. 35(a).

Preserving the Fourth Amendment is of exceptional importance. The intersection of Second Amendment rights and mental health only requires reference to recent headlines to establish it as a question of exceptional importance.

In *Florida v. J.L.*, 529 U.S. 266 (2000), the Supreme Court declined to create a "gun exception" to the Fourth Amendment. The panel created one out of whole cloth. The panel also erred by shifting the burden to Lori to prove telephonic warrants were unavailable to the Defendants to mitigate the failure to obtain a warrant during an event that lacked all indicia of exigent circumstances. [slip opinion pg. 32]

This erosion of the Fourth Amendment should either be reviewed and ratified by the Ninth Circuit sitting en banc, or repudiated.

The panel (and the district court) also usurped of the role of the California legislature. After losing in the trial court, but while her case

was pending in the Sixth District Court of Appeals, the policy makers of the State of California determined that the remedy for safe-guarding firearms in the home by a law-abiding and qualified citizen living with a prohibited person, was through the expedient of requiring an approved gun safe in lieu of forfeiture. [ER: 351-379] The state trial judge's error might be forgiven. This policy only became state law after he made his ruling.

But this also explains why the Court of Appeal found that Lori's Second Amendment rights were contingent on the procedure in Penal Code § 33850, which remained available to her. "[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.

The error by the panel was to assume the role of policy-maker and sanction forfeiture over the new state law. This was compounded when the panel gave only a hollowed-out faith and mere half credit to the judgment of the Court of Appeal. Giving that judgment *full* faith and credit, meant that Lori need only comply with Penal Code § 33850 to get her firearms back. Lori complied. The Defendants did not.

A Petition for Panel Rehearing is required to state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended. Fed. R. App. P. 40(a)(2).

The Summary is not part of the opinion, but it sets the tone for reading the opinion. It is misleading, and perhaps one of the reasons this case has vexed seven different judicial officers. Lori's husband has never been a party to the federal case. He was a co-respondent (in default) in the state case, having never made an appearance. This is not the first time this Court made that error. Docket Entry 48 was appellant's request for correction of the Oral Argument Notice. It showed Lori's husband as a party. It also published a false statement about his status as a gun owner that implied criminal liability.

If the Defendants and/or the Court believed that Lori was a cat's paw for her husband, they should have produced or insisted on admissible evidence supporting that fact. There is none. This is a misapprehension of a central fact of this case and should be corrected.

A second misapprehension is found at footnote 4. There was no statutory change to Penal Code § 33850 while Lori's case was pending in state court. The supplemental briefing was merely directed to the question of how § 33850 affected Lori's Second Amendment claims.

The change in the law that occurred while her case was pending in the Sixth District was Assembly Bill 500 and Senate Bill 363[1] being signed into law. Those laws dealt specifically with the problem of safe storage of firearms by a law-abiding citizen in her home, when co-habiting with a person or family member who was disqualified. [ER 351-379] California's legislature, made the determination that an approved gun safe was the best remedy for addressing this public safety issue. This misapprehension of fact effects the outcome of this case and should be corrected. The change in law also changed the legal context of the preclusion analysis. *See: Herrera v. Wyoming*, 587 U.S. ___, 139 S. Ct. 1686, 1697, 2019 U.S. Lexis 3538, 3549 (2019).

Statement of Facts

On the night of January 24, 2013, Lori called the San Jose Police Department for help because her husband was exhibiting erratic behavior. He was placed on psychiatric hold under California's Welfare & Institutions Code (WIC) § 5150. [ER: 018, ER:136] This resulted in his disqualification to own/possess firearms. WIC § 8100 *et seq*. After her husband was loaded into an ambulance, Defendant Valentine told

[1] These were codified at California Penal Code § 25135.

Lori that he had a legal duty to confiscate all firearms in the her 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. [ER: 221, ER: 245-248, ER: 255, ER: 261, ER: 268-269, ER: 278-279] Lori's gun safe was (is) compliant with state law for the safe storage of firearms. [ER: 060-061]

Lori objected to the seizure of the firearms from the gun safe in her home, and in particular she objected to the seizure of the firearm registered to her. Defendant Valentine insisted that he had a duty to seize all the firearms. [ER: 154-156, ER: 243, ER: 258-267, 277]

Lori did not want to delay, interfere or obstruct a police officer in the discharge of his duties as he represented them to her. She believed this might be a crime, with that in mind, Lori provided the combination to the gun safe. [ER: 267, ER: 156] Without a warrant or consent, over her continued to objection to the seizure of her personal firearm, the police seized all firearms. [ER: 154-157, ER: 244, ER: 258-260, ER: 268]

The San Jose Police Department still refuses to return the firearms. Prior to litigation, Lori made assurances that she would have the safe combination changed and she acknowledged that she knew and understood her duty to prevent her husband from gaining access to

them. Instead the City filed an action under WIC § 8102, where the City was the petitioner and Lori's husband was the respondent. [ER: 154-161] This required Lori to hire an attorney to intervene in that case to get her property back. Despite uncontradicted evidence that Lori could obtain new firearms because she was: A.) not prohibited herself from acquiring new firearms, and B.) owned an approved gun safe (with combination changed); the trial judge ordered the City to retain the firearms. The matter was appealed. [ER: 154-172]

While the case was docketed with the Court of Appeal, California amended its laws regarding secure storage of firearms when a gun owner lives with a prohibited person. The new Penal Code § 25135 became law when signed by the Governor on October 11, 2013. [ER: 351-379] The relevant change required that firearms be secured in an approved gun safe when the gun owner lives with another person who is prohibited from possessing, receiving or purchasing a firearm.

The Court of Appeal affirmed the trial court on the limited petition that was filed. But its opinion also stated that Lori could recover her property through the Penal Code § 33850 procedure. The appellate court only found no Second Amendment violation as to Lori, because she had not (yet) complied with § 33850. It expressed no

opinion on whether the City's continued conversion and interference with Lori's property would violate her rights after compliance.

The Court of Appeal merely passed the ministerial task of returning Lori's firearms back to the City, provided she could comply with Penal Code § 33850. Lori obtained the necessary releases after background checks from California's Department of Justice. She had already been in compliance with § 25135. [ER: 194-217, ER: 303-347]

That should have ended the matter. It did not. The municipal defendants continue to defy the state Court of Appeals[2] – hence this federal court action. [ER: 098-099, ER: 153-217, ER: 287-288]

Reasons for Granting the Petition[3]

A. The Panel Decision Undermines the Public Policy of California on a Question of Exceptional Importance.

Two paradigms of Second Amendment jurisprudence compete in the market-place of ideas. One version, advanced by gun rights organizations (e.g., SAF, NRA, CGF) postulates that rights derived

[2] Why would Lori file a petition with the California Supreme Court when she could not establish prejudicial error? *See Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 232 Cal.Rptr. 528.

[3] Arguments for granting both the petition for panel rehearing and en banc rehearing of both the published opinion and unpublished memorandum are interspersed due to space limits.

from that amendment should be given pure, uncomplicated, broad, vigorous, and categorical protection by the courts, in the same manner as the First Amendment and other rights deemed fundamental.

The other paradigm postulates – regardless of any scrutiny applied to Second Amendment rights – that there is ample room for further statutory, regulatory, and administrative supervision of these rights. Ironically, it is this second paradigm that is undermined by the panel decision in this case.

California has notoriously strict, comprehensive, and complex gun laws. The California legislature even had to reorganize and renumber them in 2010. The Deadly Weapons Recodification Act of 2010. SB 1080 (Committee on Public Safety), 2010 Cal. Stat. ch. 711.

Nor has California slowed its pace of enacting new gun laws. While this case was pending, in the Court of Appeal, Penal Code § 25135 became law. This new law addressed the problem of safe storage when gun owners live with someone who was disqualified. [ER: 351-379] The panel failed to accord sufficient weight to that change of legal context. The panel opinion also failed to accord the Sixth District Court of Appeals anything close to "full faith and credit" when it interpreted:

> [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

as meaning: Lori still doesn't get her guns back, even after complying with all of California's gun laws.

If Lori Rodriguez cannot recover her property – property essential to exercising a fundamental right – after she has complied with every statutory, regulatory, and administrative rule required by California, then the purists who advocate the first paradigm are correct. Any and all regulation of the rights associated with the Second Amendment are a pretext to tyranny and forfeiture.[4]

1. The Preclusion Defense was Forfeit by the Defendants.

As noted at page 13 of the slip opinion, the Defendants never raised preclusion as an affirmative defense at summary judgment or in their principal brief. The panel forgave this waiver by citing two cases and purporting to engage in a balancing test of Lori's Second

[4] It also invites the question: Why would any gun owner risk seeking mental health treatment for a family member, if their rights and property would be placed in jeopardy?

Amendment rights against the City's omission, while somehow factoring in public safety. How this "balancing" took place without reference to this Circuit's balancing test from *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) is not explained in the panel decision.

First, the case of *AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631 (9th Cir. 2012) does not discuss issue preclusion. It discusses claim preclusion, where this Court (in essence) forgave waiver of an un-argued claim because the district court was wrong, as a matter of law. Therefore, even if the litigant failed to brief only one of two related claims on appeal, that did not work a forfeiture of the un-argued claim even if waived by omission. With the trial court being wrong on the underlying law for other reasons, the waiver was redundant when the case was reversed and remanded anyway.

The second case, *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321 (9th Cir. 1995) can be distinguished, while at the same time lending a hint of support for the proposition that Lori preserved her federal claims by pleading them in the state court. *Id.*, fn. 8, at 329.[5]

[5] *See e.g., Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir. 1990). *See also England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

The facts are different here because the state (appellate) court afforded Lori the remedy she sought. Namely, the return of her firearms after she complied with Penal Code § 33850. In other words, the state (appeals) court reasoned that Lori's Second Amendment claim was not ripe, until or unless she complied with § 33850 for their return; hence they affirmed the trial court's limited order that the City hold the guns until further final disposition. [ER: 080-081]

That final disposition included complying with the Court of Appeal's instructions. Lori perfected her Second Amendment rights in these particular guns through compliance with § 33850. After the City still refused to return the firearms, Lori filed this federal action. Neither the same claim nor the same issues are raised by this federal action. The issue preclusion gambit (raised sua sponte by the panel) is a red herring that avoids the merits of Lori's case.

The panel's decision will also encourage crowding an overloaded federal docket with every firearm forfeiture case filed in any state court case just to preserve federal issues. This would include state cases adjudicating firearm forfeitures in: (1) domestic violence restraining order cases [Fam Code § 6218]; (2) civil harassment restraining order

cases [Code of Civil Procedure § 527.6]; (3) elder abuse restraining order cases [Welfare & Institutions Code § 15657.03]; (4) work place safety restraining order cases [Code of Civil Procedure § 527.7]; (5) gun violence restraining order cases (aka: Red Flag Laws) [Penal Code § 18100 *et seq*.]; along with every petition under WIC §§ 8102 and 8103.

Fatal to the issue preclusion ploy, is the panel's purported balancing test of Lori's rights against some inchoate public interest. (slip opinion pg. 14) This kind of balancing test is forbidden:

> [...] The very enumeration of the right [to keep and bear arms] 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)

2. Issue Preclusion was Wrongly Decided.

Even if waiver is forgiven, the panel still got the issue wrong while creating an intra-circuit split, by boot-strapping a finding that the organizational plaintiffs lacked standing. For several reasons they

don't lack standing, but the most pressing one is:

> "[T]he presence in a suit of even one party with standing suffices to make a claim justiciable," *Brown v. City of L.A.*, 521 F.3d 1238, 1240 n.1 (9th Cir. 2008), we need not address whether the Second Amendment Foundation and the Montana Shooting Sports Association satisfy the requirements for organizational standing. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2, (2006) (declining to address standing of additional plaintiffs "because the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement").
>
> *Montana Shooting Sports Ass'n v. Holder,*
> 727 F.3d 975, 981 (9th Cir. 2013)

The issue preclusion analysis hinges on dismissal of the organizational plaintiffs. One would think that the panel's leniency toward the Defendants' waiver of this issue might inspire a similar generosity toward the proof requirements for the organization standing issues. It didn't. But it turns out that generosity is not needed because it's the law. The standard of review for summary judgment, while *de novo*, still requires "giving the nonmoving party in each instance the benefit of all reasonable inferences." *American Civil Liberties Union of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003).

The declarations of SAF's Executive Vice President and CGF's Executive Director are set forth at ER: 145-148 and ER: 150-151. Both

organizations sought for their members *both* prospective injunctive relief and declaratory relief as to the constitutionality of Defendants' conduct. SAF spends money, and resources educating its members on how to comply with California law, especially when these members have family who might be prohibited persons. [ER:146, ¶ 6] Currently SAF teaches its members that a gun safe is the sensible and legally required safeguard on this point. If this panel decision stands, SAF must rework its educational efforts and teach different methods.

Both SAF and CGF are in the business of leveling the playing field when individual members face the (practically) unlimited resources of government agencies bent on confiscating and forfeiting firearms. [ER: 146, ¶¶ 7, 8, 9 and ER: 151, ¶¶ 5, 6, 7, 8] If it becomes settled law that forfeiture of firearms is unconstitutional when a member employs a gun safe (i.e., the panel is reversed), then SAF and CGF can spend resources elsewhere.

The panel's assertion (slip opinion at 20-21) that this evidence does not support a finding that Defendants actions run counter to the organizational plaintiffs' purposes, or that SAF/CGF do not redirect resources to combat the challenged government conduct is sophistry.

3. The Panel Decision Conflicts with a New Supreme Court Case.

The U.S. Supreme Court updated its issue preclusion doctrine after oral argument, but before the panel opinion was published. Appellants gave notice of this update. (DktEntry 69) Defendants declined to answer. The panel declined to address this development.

Specifically the Supreme Court frowns upon issue preclusion when there is a "change in [the] applicable legal context."

> Under the doctrine of issue preclusion, "a prior judgment . . . foreclos[es] successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *New Hampshire v. Maine*, 532 U. S. 742, 748–749 (2001). Even when the elements of issue preclusion are met, however, an exception may be warranted if there has been an intervening "'change in [the] applicable legal context.'"
>
> [...]
>
> The change-in-law exception recognizes that applying issue preclusion in changed circumstances may not "advance the equitable administration of the law." *Bobby*, 556 U. S., at 836–837.
>
> *Herrera v. Wyoming*, 587 U.S. ___, 139 S. Ct. 1686, 1697, 2019 U.S. Lexis 3538, 3549 (2019)
> (Internal quotes and citations omitted.)

There were three intervening changes in the "applicable legal context" of this case:

1. The superior court hearing was in August 2013. Assembly

Bill 500/Senate Bill 363 became Penal Code § 25135 on October 11, 2013. [ER: 349-379] That change legislated the common-sense solution that Lori had offered all along. But now Lori had a statutory duty, with potential criminal liability, to use a gun safe to deny access to her firearms by any prohibited family member.

2. The California Court of Appeals ratified that approach but insistied on compliance with § 33850 first. *City of San Jose v. Rodriguez*, 2015 Cal. App. Unpub. LEXIS 2315, 2326.

3. The change in ownership (title) of the community property firearms she owned with her husband, and release to her of sole-separate property was recorded by and authorized by the California Department of Justice. [ER:153-217]

B. The Panel Decision Conflicts with the U.S. Supreme Court.

Exceptions are swallowing the Fourth Amendment. This Court, sitting en banc, can stall that attrition by repudiating the Fourth Amendment decision by this panel. As noted above, the U.S. Supreme Court declined to carve out a gun exception to the Fourth Amendment in *Florida v. J.L.*, 529 U.S. 266 (2000). "Time and again, this Court has

observed that searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — **subject only to a few specially established and well delineated exceptions**." *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993). (emphasis added)

Breaching new holes in the Fourth Amendment should therefore be "specially established" and only undertaken by a larger consensus of judicial officers than a mere three judge panel. That the panel created an exception to this amendment out of whole cloth should be reviewed and ratified by the Ninth Circuit sitting en banc, or repudiated.

Additional mischief occurred when the panel imposed on Lori (at oral argument, no less) the burden of proving whether the Defendants had telephone warrants available to them to mitigate their failure to obtain a warrant. The burden for proving exceptions or mitigating factors for Fourth Amendment violations rests with the government not the citizen. "We are not dealing with formalities. The presence of a [..] warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police." *McDonald v. U.S.*, 335 U.S. 451, 455–56 (1948).

Furthermore, the fact that the City of San Jose has telephone warrants available to them was already established in this circuit in *Fisher v. City of San Jose*, 558 F.3d 1069, 1089, fn. 3 (9th Cir. 2009)(en banc). That case still stands for the proposition the government must prove the exigency *and/or* the inability to secure a warrant by telephone. *Id.* None of the exigencies in *Fisher* existed in this case.

Lori's husband was already on his way to the hospital. [ER: 221, ER: 245-248, ER: 255, ER: 261, ER: 268-269, ER: 278-279] Lori had already made her objection to the seizure of her handgun known to Officer Valentine. [ER: 154-156, ER: 243, ER: 268, ER: 277] Without her consent, the police should have sought a telephone warrant. They didn't. That violated the Fourth Amendment. Thus the panel created yet another intra-circuit split on a question of exceptional importance.

C. The Unpublished Memorandum Opinion was Wrongly Decided.

The state court of appeal was clear and specific when it wrote: "[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.

Neither the Defendants nor the panel gave full faith and credit to that judgment by the Sixth District Court of Appeals. That court did not say, as the (unpublished) memorandum at page 4, that: *"We believe the procedure affords Lori the right to sell the firearms."* It did not say: *"We believe the procedure enables Lori to store them outside her home."* It did not say: "*We believe Lori can have the firearms rendered inoperable so she can keep them."* It said Lori could get her firearms back if she complied with Penal Code § 33850.

Conclusion

The irrationality of the panel's decision is set out in stark relief considering that every judicial officer who has weighed in on this case, has acknowledged that Lori can go to the robust gun market in California. She can purchase the exact same firearms. (Whether using her own money or just compensation for the City's taking.) She can keep them in her approved gun safe with the new combination. She can do so while still cohabiting with her husband who remains prohibited. No government actor can stop her.

The only difference between this hypothetical and the remedy under Penal Code § 33850 ordered by the state appellate court, is that

Lori's new guns would have different serial numbers on them. How does that address any claim, by any government actor (municipal entity or judicial officer), that they are acting in the interests of public safety by denying Lori recovery of the firearms she already owns?

The "low-hanging-fruit" argument is a dodge. Lori's right to reproductive health is not guaranteed if she is denied the right to an abortion because she has ready access to contraception. Fundamental rights don't work that way.

The recalcitrance of the circuit courts, and this court in particular, has continued and been continually noted by several justices of the Supreme Court in dissents from certiorari denial. *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).

An en banc panel of the Ninth Circuit should make the necessary course corrections. The three-judge panel in this case ratified the City of San Jose's violation of Lori Rodriguez's rights. That decision should be reviewed by this Court sitting en banc and set aside.

Respectfully Submitted on August 27, 2019,

/s/ Donald Kilmer
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rules 35-1 and 40-1. I contains 4189 words. This brief has been prepared in proportionally spaced typeface using WordPerfect Version X8 in Century Schoolbook 14 point font.

Dated: August 27, 2019,

/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: August 27, 2019,

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

CERTIFICATE OF SERVICE

On August 27, 2019, I served the foregoing

PLAINTIFF-APPELLANTS' PETITION
FOR REHEARING AND/OR
REHEARING EN BANC

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 August 27, 2019,

/s/ Donald Kilmer

Attorney for Appellants

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LORI RODRIGUEZ; SECOND AMENDMENT FOUNDATION, INC.; CALGUNS FOUNDATION, INC., *Plaintiffs-Appellants*, v. CITY OF SAN JOSE; SAN JOSE POLICE DEPARTMENT; STEVEN VALENTINE, *Defendants-Appellees*.	No. 17-17144 D.C. No. 5:15-cv-03698-EJD OPINION

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued and Submitted January 14, 2019
San Francisco, California

Filed July 23, 2019

Before: J. Clifford Wallace, Richard R. Clifton, and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Friedland

SUMMARY*

Civil Rights/Second Amendment

The panel affirmed the district court's summary judgment for defendants City of San Jose, its Police Department and a police officer in an action brought by husband and wife, Edward and Lori Rodriguez, alleging civil rights violations when police seized firearms from their residence after detaining Edward for a mental health evaluation in response to a 911 call, and then declined to return the firearms.

The City petitioned in California Superior Court to retain the firearms on the ground that the firearms would endanger Edward or another member of the public. Lori objected that the confiscation and retention of the firearms, in which she had ownership interests, violated her Second Amendment rights. The Superior Court granted the City's petition over Lori's objection and the California Court of Appeal affirmed. After Lori re-registered the firearms in her name alone and obtained gun release clearances from the California Department of Justice, the City still declined to return the guns, and Lori sued in federal court.

The panel held that Lori's Second Amendment claim was barred by issue preclusion under California law. The panel first held that although defendants failed to raise a preclusion defense in either district court or in their principal brief on appeal, it would forgive defendants' forfeiture given the significant public interests in avoiding a result

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

inconsistent with the California Court of Appeal's decision on an important constitutional question and in not wasting judicial resources on issues that had already been decided by two levels of state courts.

The panel held that the California Court of Appeal had considered and rejected a Second Amendment argument identical to the one before the panel and that the Court's decision was a final decision on the merits. The panel rejected Lori's contention that her subsequent re-registration of the guns as separate property and the Department of Justice's ownership clearance were changes that affected the state court's Second Amendment analysis. The panel noted that the state court had already assumed Lori's ownership interest under California's community property laws and must have considered Lori's exclusive ownership of her personal handgun given it was undisputed that the handgun was her separate property. The panel held that the organizational plaintiffs that had joined Lori in her federal lawsuit did not have Article III standing and therefore Lori was the sole plaintiff against whom preclusion would be applied. Finally, the panel held that redeciding the Second Amendment issue would undermine the issue preclusion doctrine's goals of comity and judicial economy.

The panel rejected Lori's contention that the warrantless confiscation of the firearms on the night of her husband's hospitalization violated her Fourth Amendment rights. The panel analyzed the seizure of the firearms under a community caretaking function framework and held that under the circumstances, the urgency of a significant public safety interest was sufficient to outweigh the significant privacy interest in personal property kept in the home. The panel emphasized that its holding that the warrantless seizure of the guns did not violate the Fourth Amendment was

limited to the particular circumstances before it: the officers had probable cause to detain involuntarily an individual experiencing an acute mental health episode and to send the individual for evaluation, they expected the individual would have access to firearms and present a serious public safety threat if he returned to the home, and they did not know how quickly the individual might return.

The panel affirmed the summary judgment on the remaining claims in a concurrently filed memorandum disposition.

COUNSEL

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OPINION

FRIEDLAND, Circuit Judge:

Immediately after detaining Edward Rodriguez for a mental health evaluation in response to his wife Lori Rodriguez's 911 call, San Jose police officer Steven Valentine seized twelve firearms from the Rodriguez residence without a warrant.[1] The City of San Jose ("the City") later petitioned in California Superior Court to retain the firearms under California Welfare & Institutions Code § 8102 on the ground that the firearms would endanger Edward or another member of the public. Lori objected that the confiscation and retention of the firearms, in which she had ownership interests, violated her Second Amendment right. The court granted the City's petition over Lori's objection. Lori appealed that decision, and the California Court of Appeal affirmed.

After Lori re-registered the firearms in her name alone and obtained clearances to own the guns from the California Department of Justice ("California DOJ"), the City still declined to return the guns. Lori sued the City, the San Jose

[1] Because Lori and Edward have the same last name, we refer to them by their first names.

Police Department, and Officer Valentine (collectively, "Defendants") in federal district court. She argued that the seizure and retention of the firearms violated her rights under the Second, Fourth, Fifth, and Fourteenth Amendments, and that she was also entitled to return of the firearms under California Penal Code § 33800 *et seq.* The district court rejected these arguments and accordingly granted summary judgment for Defendants. Lori appealed. We hold that Lori's Second Amendment claim is barred by issue preclusion and that her Fourth Amendment claim fails on the merits. We therefore affirm.[2]

I.

A.

Late one night in January 2013, Lori called 911 to ask the San Jose Police Department to conduct a welfare check on her husband, Edward. This was not the first time that Lori had made such a call—San Jose police officers had been to the Rodriguez home on prior occasions because of Edward's mental health problems. Before they arrived, Officer Valentine and the other responding officers learned that there were guns in the home.

At the Rodriguez home, Officer Valentine found Edward ranting about the CIA, the army, and people watching him. Edward also mentioned "[s]hooting up schools" and that he had a "gun safe full of guns." When asked if he wanted to hurt himself, Edward attempted to break his own thumb.

[2] We affirm the grant of summary judgment on Lori's Fifth Amendment, Fourteenth Amendment, and state law claims in a concurrently filed memorandum disposition.

Concluding that Edward was in the midst of an acute mental health crisis that made him a danger to himself and others, Officer Valentine and other officers on the scene decided to seize and detain him pursuant to California Welfare & Institutions Code § 5150 for a mental health evaluation. Section 5150 allows an officer, upon probable cause that an individual is a danger to himself or another because of a mental health disorder, to take the person into custody and place him in a medical facility for 72-hour treatment and evaluation. Cal. Welf. & Inst. Code § 5150 (2013); *see also* Cal. Welf. & Inst. Code § 5150(a) (2019) (same). The officers detained Edward and placed him in restraints in an ambulance to travel to a nearby hospital for a psychological evaluation.

After removing Edward from the home, the officers spoke with Lori, who confirmed that there were firearms in the home in a gun safe. Officer Valentine informed her that, pursuant to California Welfare & Institutions Code § 8102, he would have to confiscate the guns. Section 8102(a) requires law enforcement officers to confiscate any firearm or other deadly weapon that is owned, possessed, or otherwise controlled by an individual who has been detained under California Welfare & Institutions Code § 5150.

With Lori providing the keys and the combination code, the officers opened the safe and found twelve firearms, including handguns, shotguns, and semi-automatic rifles. One of the firearms was a personal handgun registered to Lori alone, which she had obtained prior to marrying Edward. The other eleven were either unregistered or registered to Edward. Lori gathered cases for the guns while the officers packed up and documented them. She specifically objected to the removal of her personal handgun,

but the officers confiscated it along with the other eleven firearms.

Meanwhile, in the ambulance, Edward repeatedly broke the restraints holding him to a gurney. Once at the hospital, Edward was evaluated and determined to be a danger to himself, so he was admitted.[3] He was discharged approximately one week later.

B.

One month after the officers confiscated the firearms, the City filed a petition in California Superior Court under California Welfare & Institutions Code § 8102(c), seeking an order of forfeiture based on a determination that the guns' return would likely endanger Edward or others. Edward did not respond to the petition, but Lori intervened, asserting outright ownership of her personal handgun and community property ownership of the other firearms. Lori argued that the court had no power to interfere with her Second Amendment right to keep and bear arms because, even if Edward was prohibited from possessing and owning guns, she was not prohibited. In support, she emphasized that she had obtained a notice of eligibility to own and possess guns from the California DOJ Bureau of Firearms. Lori further represented to the court that, if returned, the guns would be secured in her gun safe and that she had changed the

[3] Under California law, once Edward was taken into custody under § 5150 and then admitted to the hospital under §§ 5151 and 5152 because he was determined to be a danger to himself, he became a "prohibited person." Cal. Welf. & Inst. Code § 8103(f)(1) (2013); *see also* Cal. Penal Code §§ 30000, 30005. As a prohibited person, he could not own, possess, control, receive, or purchase any firearm for a period of five years following his release from the hospital. Cal. Welf. & Inst. Code § 8103(f)(1) (2013).

combination code so that Edward would not have access to them. The return of the guns, she contended, therefore would not present a danger to Edward or others.

The court granted the City's petition. The court acknowledged that Lori could legally "walk . . . into any gun store and qualify to buy a handgun . . . and put [it] in that gun safe." But it held that the City was nevertheless authorized to take the "low hanging fruit" of the guns the Rodriguezes already owned, irrespective of Lori's ability to buy more, because of the danger that Edward presented. Stating that it was not "ignoring [Lori's] Constitutional Rights," the court concluded that it was not appropriate to return the firearms given the public safety concerns at stake.

Lori appealed to the California Court of Appeal, arguing that the superior court order was not supported by substantial evidence of danger and that it violated her Second Amendment right to keep and bear arms. In April 2015, the appellate court affirmed. *City of San Jose v. Rodriguez*, No. H40317, 2015 WL 1541988 (Cal. Ct. App. Apr. 2, 2015) ("*Rodriguez I*"). The court held that there was substantial evidence supporting the superior court's determination that returning the guns to the Rodriguez home would likely result in endangering Edward or others. *Id.* at *5–6, 9. On the constitutional issue, the court held that Lori had not demonstrated a viable Second Amendment claim under the United States Supreme Court's case law. *Id.* at *6–9. The court also explained that Lori had "other viable options," including selling or storing the guns outside the home, and "that the procedure provided by [California Penal Code] section 33850 et seq. for return of firearms in the possession

of law enforcement remains available to Lori."[4] *Id.* at *7–8. Ultimately, the court concluded "that Lori ha[d] failed to show that the trial court's . . . order violate[d] the Second Amendment." *Id.* at *9.

Lori did not seek review in the California Supreme Court or the United States Supreme Court.

Following the California Court of Appeal's decision, Lori took the necessary steps under Penal Code §§ 33850–65 to become eligible for the City to return her the firearms. She changed the registration and ownership so that all twelve guns were in her name only and obtained gun release clearances from the California DOJ. She then asked the City again to return the guns**.** The City denied the request one month later.

Lori subsequently sued Defendants under 42 U.S.C. § 1983 in the United States District Court for the Northern District of California. Lori was joined in the lawsuit by co-plaintiffs the Second Amendment Foundation, Inc. ("SAF") and the Calguns Foundation, Inc. ("CGF") (collectively, "Plaintiffs"). The Complaint alleged violations of Lori's Second, Fourth, Fifth, and Fourteenth Amendment rights, as well as a state law claim under California Penal Code § 33800 *et seq.* Plaintiffs sought return of the guns, damages to compensate Lori, and injunctive and declaratory relief to

[4] The recovery procedures in California Penal Code § 33850 *et seq.* were expressly incorporated into California Welfare & Institutions Code § 8102 while Lori's state court appeal was pending. *Rodriguez I*, 2015 WL 1541988, at *8. The California Court of Appeal ordered supplemental briefing on the implications for Lori's claims of that statutory change and of the availability of procedures under California Penal Code § 33850 *et seq.* for the return of firearms.

prevent future violations of Lori's rights and the rights of the organizations' members.

Defendants moved for summary judgment, raising various defenses including that SAF and CGF lacked Article III standing, but not including estoppel defenses to any of Plaintiffs' federal law claims. The district court granted summary judgment to Defendants. The court rejected Defendants' argument that SAF and CGF lacked Article III standing but ruled that all of Plaintiffs' claims failed on the merits.

II.

We review de novo a district court's summary judgment. *Longoria v. Pinal County*, 873 F.3d 699, 703–04 (9th Cir. 2017). We may affirm on any ground supported by the record, including grounds the district court did not reach. *Or. Short Line R.R. Co. v. Dep't of Revenue Or.*, 139 F.3d 1259, 1265 (9th Cir. 1998).

A.

The California state courts addressed Lori's Second Amendment claim at both the trial and appellate stages, concluding that the seizure and retention of Lori's firearms did not violate her right to keep and bear arms. For reasons of comity, we apply issue preclusion to bar our reconsideration of her Second Amendment claim, even though Defendants did not brief that defense in the district court.[5]

[5] Although the *Rooker-Feldman* doctrine, which limits our authority to review the judgments of state courts, sometimes overlaps with preclusion doctrine, *see Noel v. Hall*, 341 F.3d 1148, 1160–61 (9th Cir.

The United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. As implemented under 28 U.S.C. § 1738, federal courts must "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). This requirement has equal force in cases brought under 42 U.S.C. § 1983. *See Allen v. McCurry*, 449 U.S. 90, 97–98 (1980).

We therefore look to California law, which defines two main forms of preclusion: claim, also known as res judicata; and issue, also known as collateral estoppel. Claim preclusion "provid[es] that 'a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'"[6] *White v. City of Pasadena*, 671 F.3d 918, 926 (9th

2003), we have assured ourselves that *Rooker-Feldman* does not deprive us of jurisdiction here. Lori did not name the California state courts or any of its judges as defendants in her Complaint. Nor does she seek relief from the state court judgment, which *authorizes* the City to keep the guns but does not *require* the City to do so. Rather, Lori complains "of a legal injury caused by an adverse party." *Id.* at 1163. The *Rooker-Feldman* doctrine accordingly does not apply. *See id.* at 1161–64.

[6] "Claim" in this California state law context refers to a "'cause of action' [that] is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." *Mycogen Corp. v. Monsanto Co.*, 51 P.3d 297, 306 (Cal. 2002). In this opinion, we refer to Lori's federal causes of action as "claims" without intending to suggest that her separate federal causes of action would necessarily count as separate "claims" for purposes of California state law preclusion.

Cir. 2012) (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008)). "Issue preclusion, in contrast, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Id.* (quoting *Taylor*, 553 U.S. at 892).

Defendants failed to raise either form of preclusion in response to Lori's Second Amendment claim in their summary judgment briefing in the district court or in their principal brief to our court. Only after we requested supplemental briefing on preclusion did the parties address it. Defendants' omissions would typically effect a forfeiture. *See AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 638 (9th Cir. 2012); *Clements v. Airport Auth. of Washoe Cty.*, 69 F.3d 321, 328–30 (9th Cir. 1995).[7]

We may, however, overlook forfeiture to consider preclusion sua sponte in some circumstances. *See Clements*, 69 F.3d at 328–31. We determine whether to do so by balancing the public and private interests, and we are more likely to overlook forfeiture where the public interests outweigh the private. *Id.* at 330.

This balancing in large part turns "upon the type of preclusion at stake" and generally favors forgiving forfeiture of issue preclusion more often than claim preclusion. *Id.* Both doctrines vindicate private interests in repose and in avoiding the cost of duplicative litigation. And both serve the public interest in conserving judicial resources by

[7] We recognize that *Hernandez* and *Clements* use the term "waiver," not "forfeiture." But under our recent en banc decision in *United States v. Depue*, 912 F.3d 1227, 1232–33 (9th Cir. 2019) (en banc), we understand those cases to be describing what we now call a forfeiture.

ensuring that courts do not revisit matters that were already litigated—or should have been. But issue preclusion advances an additional public interest: "preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results." *Id.* (quoting 18 Charles Allen Wright et al., Federal Practice and Procedure § 4403). Claim preclusion does not similarly prevent inconsistent results because it "bars the litigation of issues never before tried." *Id.* Given that applying issue preclusion protects more public interests, we have more reason to overlook forfeitures of that defense. *See id.*

Among Lori's federal claims, her argument that the seizure and retention of her firearms violated her Second Amendment right is the only one that she pressed before the state court. Accordingly, it is the only one to which issue preclusion could apply. Given the significant public interests in avoiding a result inconsistent with the California Court of Appeal's decision on an important constitutional question and in not wasting judicial resources on issues that have already been decided by two levels of state courts, to the extent that relitigation of Lori's Second Amendment argument would be precluded in California court, we will forgive Defendants' forfeiture and hold that "relitigation of those issues in federal court is precluded" as well. *Id.*

Under California law, issue preclusion applies when six criteria, named the "*Lucido* factors" after the California Supreme Court's seminal case on the doctrine, *Lucido v. Superior Court*, 795 P.2d 1223 (Cal. 1990), are satisfied:

> (1) "the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding"; (2) the issue to be precluded "must have been actually litigated

> in the former proceeding"; (3) the issue to be precluded "must have been necessarily decided in the former proceeding"; (4) "the decision in the former proceeding must be final and on the merits"; (5) "the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding"; and (6) application of issue preclusion must be consistent with the public policies of "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation."

White, 671 F.3d at 927 (quoting *Lucido*, 795 P.2d at 1225–27). Here, the California Court of Appeal's opinion was a final decision on the merits, so the fourth factor is clearly satisfied. Whether Lori's Second Amendment argument is issue precluded in this case turns on the remaining factors.

The first three factors can be addressed together, as they all involve assessing the California Court of Appeal's Second Amendment analysis and the similarity of the argument it addressed to the argument advanced here. As she does now, Lori contended in the state court proceedings that Defendants were violating her "right to keep and bear arms" by refusing to return the firearms because of her husband's prohibited status, even though "she was not prohibited from acquiring or possessing firearms and had promised to take all steps required under California law to secure the firearms in a gun safe." *Rodriguez I*, 2015 WL 1541988, at *2, 6–7. The California Court of Appeal expressly rejected this argument and the notion that the Second Amendment required returning her the guns. Highlighting that Lori had not pointed to any authority to the

contrary, the court stated that the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), suggested that the Second Amendment did not "extend[] to keeping and bearing either any particular firearms or firearms that have been confiscated from a mentally ill person." *Rodriguez I*, 2015 WL 1541988, at *7 (emphasizing that "the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose'" (quoting *McDonald*, 561 U.S. at 786)). Ultimately, the court concluded "that Lori ha[d] failed to show that the trial court's . . . order violate[d] the Second Amendment." *Id.* at *9.

Lori seeks to escape the preclusive effect of the California Court of Appeal's Second Amendment determination by arguing that two developments since the court's decision differentiate the issue in her federal lawsuit from the issue litigated in state court: (1) Lori transmuted the eleven guns from community property to her separate personal property; and (2) Lori obtained gun clearance releases for the firearms from the California DOJ, which made her eligible for the return of the firearms under California Penal Code §§ 33850–65. But neither purported "change" affects the premises underlying the state court's Second Amendment analysis.[8]

[8] Lori also points to the California Legislature's passage of California Penal Code § 25135 in October 2013, at the same time that California Penal Code § 33850 *et seq.* was expressly incorporated into California Welfare & Institutions Code § 8102, as support for her contention that issue preclusion does not bar her Second Amendment claim. *See supra* n.4. According to Lori, because California Penal Code § 25135 criminalizes keeping firearms in a home with a prohibited

First, the fact that Lori obtained exclusive ownership is irrelevant for preclusion purposes because the state appellate court already assumed that Lori had an ownership interest in the guns under California's community property laws. *See Rodriguez I*, 2015 WL 1541988, at *6 (stating that the parties stipulated that Lori had standing to assert a Second Amendment right to the firearms based on her community property interest in them). Moreover, it is undisputed that at least one of the twelve guns, Lori's personal handgun, was always her separate property—accordingly, the court must have considered her exclusive ownership of that gun as part of its analysis and determined that ownership did not affect the outcome under the Second Amendment.

Second, the fact that Lori has now completed the procedural requirements of California Penal Code § 33850 *et seq.* to be eligible for the return of her firearms does not make her current situation materially different from that considered by the California Court of Appeal. The court requested and received supplemental briefing from both parties on the effect of § 33850 *et seq.* on Lori's Second Amendment right. After considering the parties' arguments, and after observing that "[a]ccording to Lori, the evidence

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person unless they are kept in the statutorily prescribed manner, and because she would keep the firearms in a gun safe that she contends would comply with that statute, California law expressly authorizes her to possess the firearms. Lori is wrong on two levels. First, even if Lori would not be violating a criminal statute if the guns were returned to her, nothing in California Penal Code § 25135 suggests that complying with that statute vitiates a California court order forfeiting firearms under California Welfare & Institutions Code § 8102. Second, California Penal Code § 25135 had been in effect for more than a year when the California Court of Appeal published its decision, so there is nothing new about its passage that causes the issue here to be different from the issue decided by the state appellate court.

showed that she is not prohibited from owning or possessing firearms" and that "she could secure [the guns, if returned] in a gun safe to prevent Edward from having unauthorized access," *Rodriguez I*, 2015 WL 1541988, at *5, the state appellate court held that the seizure and retention did not violate Lori's right to keep and bear arms.

Although the court noted 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," *id.* at *8, it did not hold that completing the section's procedural requirements would alter the Second Amendment analysis. Instead, the appellate court concluded that "Lori ha[d] failed to show that the trial court's . . . order violate[d] the Second Amendment by precluding her from keeping firearms for home protection." *Id.* at *9. In other words, as we understand the appellate court's decision, whether Lori might alternatively be able to regain the guns through a state administrative procedure was not necessary to the court's conclusion that her Second Amendment right had not been violated. *See id.* at *8–9. We therefore conclude that the state court considered and rejected a Second Amendment argument identical to the one before us now.

We next turn to the fifth *Lucido* factor and ask whether the parties against whom preclusion is being sought are the same as, or in privity with, the parties in the former proceeding. *See Lucido*, 795 P.2d at 1225. The two organizational plaintiffs, SAF and CGF, have joined Lori in her federal suit but were not present in the state court proceedings. We hold that because the organizational plaintiffs do not have Article III standing, Lori is the sole

plaintiff against whom preclusion would be applied, so the fifth *Lucido* factor is satisfied.[9]

Plaintiffs admit that Lori is not a member of either SAF or CGF, and the organizations do not appear to assert that they have standing on behalf of any other member. They accordingly do not have standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977) (holding that an organization may establish standing if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit").

Even absent a member with standing, however, an organizational plaintiff "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Am. Fed'n of Gov't Emps. Local 1 v. Stone*, 502 F.3d 1027, 1032 (9th Cir. 2007) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Of course, to do so, organizations must satisfy the traditional standing requirements of (1) injury in fact, (2) causation, and (3) redressability. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir.

[9] The fifth *Lucido* factor would also be satisfied if SAF and CGF were in privity with Lori. Because Lori is not one of their members, and because the nature of the relationship between Lori and the organizations—including whether SAF or CGF had any involvement in the state court proceedings—is unclear from the record, we have addressed this *Lucido* factor by analyzing the organizational plaintiffs' standing instead of attempting to apply the state law criteria for privity. *See Lynch v. Glass*, 119 Cal. Rptr. 139, 141–43 (Ct. App. 1975).

2010) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Our "in its own right" line of organizational standing case law stems from the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). There, a fair housing organization alleged in its complaint that it "ha[d] been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing" and that the organization had needed "to devote significant resources to identify and counteract" those practices. *Id.* at 379. The Supreme Court held that those allegations were sufficient to establish standing at the motion to dismiss stage, explaining that "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitute[d] far more than simply a setback to the organization's abstract social interests." *Id.*

We have subsequently interpreted *Havens* to mean that an organization may establish "injury in fact if it can demonstrate: (1) frustration of its organizational mission; and (2) diversion of its resources to combat the particular [injurious behavior] in question." *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (citation omitted). The organization cannot, however, "manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *La Asociacion de Trabajadores*, 624 F.3d at 1088. In other words, an organizational plaintiff must show that the defendant's actions run counter to the organization's purpose, that the organization seeks broad relief against the defendant's actions, and that granting relief would allow the organization to redirect resources currently spent combating the specific

challenged conduct to other activities that would advance its mission.

For example, in *El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, 959 F.2d 742 (9th Cir. 1991), organizations assisting Central American refugee clients in their efforts to obtain immigration relief brought suit challenging the government's policy and practice of using incompetent translators and of not interpreting portions of immigration court hearings. *Id.* at 745, 748. We held that the organizations had standing because the policy "frustrate[d] [the organizations'] goals and require[d] the organizations to expend resources in representing clients they otherwise would spend in other ways." *Id.* at 748 (citing *Havens*, 455 U.S. at 379).

Similarly, in *People for the Ethical Treatment of Animals v. United States Department of Agriculture*, 797 F.3d 1087 (D.C. Cir. 2015), the plaintiff organization alleged that it had needed to expend additional resources to ensure the humane treatment of birds because the USDA had failed to apply the protections of the Animal Welfare Act to birds even after promising for ten years to do so. *Id.* at 1089, 1094–95. The D.C. Circuit held that because the plaintiff had specifically alleged how it diverted resources to address the USDA's failure to apply the Act to birds, there was enough evidence of injury to satisfy Article III's standing requirements. *Id.* at 1096–97.[10]

[10] Writing separately in *People for the Ethical Treatment of Animals*, Judge Millett contended that there is "grave tension" between the expansion of *Havens*-based organizational standing and broader Article III standing principles. *Id.* at 1099–1106 (Millett, J., dubitante). Although Judge Millett recognized that, under current precedent, an organizational plaintiff's expenditure of resources can be sufficient to

By contrast to the organizational plaintiffs in *El Rescate* and *People for the Ethical Treatment of Animals*, Plaintiffs here challenge only the City's seizure of one person's, Lori's, guns and the refusal to give them back. Although the organizational plaintiffs state in the Complaint that they are seeking prospective injunctive relief "to prevent future violations of their members' constitutional right[s]," the *Havens* theory of standing they relied on exclusively at summary judgment is not based on injury to their members. And the only specific remedy ever requested was return of the guns to Lori (who, again, is not a member of either SAF or CGF). The organizational plaintiffs have not explained how the City's retention of Lori's guns either impedes their

establish standing, she expressed concern that the doctrine allows an organization to bring suit "every time [it] believes that the government is not enforcing the law as much, as often, or as vigorously as it would like." *Id.* at 1103. She found this "hard to reconcile with the general rule that a plaintiff's voluntary expenditure of resources to counteract governmental action that only indirectly affects the plaintiff does not support standing." *Id.* at 1099 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410–16 (2013)); *see also Fair Hous. Council v. Roommate.com, LLC*, 666 F.3d 1216, 1224–27 (9th Cir. 2012) (Ikuta, J., concurring and dissenting) (criticizing our case law holding "that an organization with a social interest in advancing enforcement of a law was injured when the organization spent money enforcing that law," because "[t]his looks suspiciously like a harm that is simply 'a setback to the organization's abstract social interests,' [which] *Havens* indicated was not a 'concrete and demonstrable injury,'" and urging en banc reconsideration of our organizational standing doctrine). We share many of these concerns but are bound to apply current precedent regardless. *See E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1242–43 (9th Cir. 2018) (recognizing these criticisms of *Havens*-based organizational standing but also recognizing that three-judge panels of our court may not depart from prior precedent). In any event, these concerns are not directly implicated here because, as we explain below, SAF and CGF lack standing even under the line of standing case law that Judge Millett and Judge Ikuta believe has gone astray.

ability to carry out their mission or requires them to divert substantial resources away from the organizations' preferred uses—let alone both. Relatedly, the organizations have not shown how the requested relief would redress any broader harm that the organizations work to combat.

Each organization has produced a single affidavit from a high-ranking official to attempt to establish Article III standing. In his affidavit, SAF's executive vice president asserted only that the organization's purpose "include[s] education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms [as well as] the consequences of gun control and legislation that impacts the 'right to keep and bear arms.'" CGF's executive director similarly framed CGF's mission as "promoting education for all stakeholders about California and federal firearms laws . . . and defending and protecting the civil rights of California gun owners." Both organizations also allege that they expend resources advising and assisting members and non-members in navigating California's gun laws and attempting to recover confiscated firearms. But neither organization presents any evidence of expending resources to assist Lori apart from incurring litigation costs as co-plaintiffs in her federal litigation.

The mere fact that these organizations represent California gun owners and provide legal advice in navigating California's gun laws does not automatically lead to the conclusion that the confiscation and retention of Lori's guns frustrates their missions or requires them to divert resources. Because SAF and CGF have offered no theory explaining their organizational harm—let alone evidence supporting such a theory, as is required at the summary judgment

stage—they have not demonstrated Article III standing.[11] And without the presence of the organizational plaintiffs, we are left considering issue preclusion against only Lori, the same party who litigated the state court proceedings. The fifth *Lucido* factor is thus satisfied.

Finally, under the sixth *Lucido* factor, we ask whether applying issue preclusion here would promote the public policies of "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation." *Lucido*, 795 P.2d at 1227. Throughout the state court proceedings, the question whether the seizure and retention of the firearms violated Lori's Second Amendment right was at center stage. The California Superior Court and the California Court of Appeal both expressly considered and ruled on that issue. Redeciding it now, when the facts and Lori's arguments have not materially changed from what was presented in the state proceedings, would undermine the issue preclusion doctrine's goals of comity and judicial economy, so the requirements of the sixth *Lucido* factor are also met.

For these reasons, we hold that Lori's Second Amendment challenge is precluded under California law.

[11] Unlike in *Havens*, which the Supreme Court considered at the motion to dismiss stage, we are reviewing the organizations' Article III standing here on appeal from summary judgment. Accordingly, SAF and CGF were required to support their standing claims with "specific facts" showing the frustration of their purpose and diversion of their resources through affidavits or other evidence. *See Lujan*, 504 U.S. at 561 ("[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," but at the summary judgment stage "the plaintiff can no longer rest on such mere allegations and instead must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true" (citations and quotation marks omitted)).

We therefore affirm judgment for Defendants on Lori's Second Amendment claim without further analysis.

B.

Lori also argues that the officers' warrantless confiscation of her firearms on the night of her husband's hospitalization violated her Fourth Amendment rights. "A seizure conducted without a warrant is '*per se* unreasonable under the Fourth Amendment,'" with some limited exceptions. *United States v. Hawkins*, 249 F.3d 867, 872 (9th Cir. 2001) (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993)).[12] We hold that an exception to the warrant requirement applies here, so we reject Lori's Fourth Amendment claim.[13]

The Supreme Court has recognized a category of police activity relating to the protection of public health and safety—a category commonly referred to as the "community caretaking function"—that is "totally divorced from the detection, investigation, or acquisition of evidence relating

[12] The Fourth Amendment also protects against warrantless searches, absent an exception. *United States v. Martinez*, 406 F.3d 1160, 1163 (9th Cir. 2005) (explaining that searches, as well as seizures, inside a home are presumptively unreasonable). Lori has not challenged any search. Indeed, in her opening brief to our court, she emphasized that "there was no search." We therefore limit our Fourth Amendment inquiry to the reasonableness of the seizure.

[13] Unlike the Second Amendment challenge, Lori's Fourth Amendment arguments were neither raised nor decided in state court, so issue preclusion could not apply. And, as explained above, there is less reason to forgive waiver of claim preclusion than there is to forgive waiver of issue preclusion, so even if the Fourth Amendment argument could be viewed as part of the same claim that Lori pursued in state court, we would decline to consider claim preclusion sua sponte.

to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). Searches and seizures performed under the community caretaking function, like those performed pursuant to the criminal investigatory function, are subject to the Fourth Amendment's warrant requirement. *See United States v. Erickson*, 991 F.2d 529, 531–32 (9th Cir. 1993) (holding that the "community caretaking function . . . cannot itself justify a warrantless search"). Thus, the government must demonstrate that a search or seizure conducted to protect public health or safety but without a warrant falls within an exception to the warrant requirement.

We have previously recognized two types of police action in which an officer may conduct a warrantless search or seizure when acting within the community caretaking function: (1) home entries to investigate safety or medical emergencies, and (2) impoundments of hazardous vehicles.

The first category, termed the "emergency exception," authorizes a warrantless home entry where officers "ha[ve] an objectively reasonable basis for concluding that there [i]s an immediate need to protect others or themselves from serious harm; and [that] the search's scope and manner [a]re reasonable to meet the need." *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008). As with many exceptions to the warrant requirement, we "judge whether or not the emergency exception applies in any given situation based on the totality of the circumstances," with the government bearing the burden of showing "that the search at issue meets these parameters." *Hopkins v. Bonvicino*, 573 F.3d 752, 764 (9th Cir. 2009) (quoting *United States v. Stafford*, 416 F.3d 1068, 1074 (9th Cir. 2005)). That burden includes "show[ing] that a warrant could not have been obtained in time." *United States v. Struckman*, 603 F.3d 731, 738 (9th

Cir. 2010) (quoting *United States v. Good*, 780 F.2d 773, 775 (9th Cir. 1986)).[14]

Until now, our case law on seizures under the community caretaking function has related solely to the second category: impounding vehicles that "jeopardize public safety and the efficient movement of vehicular traffic," oftentimes after the driver has been detained or has otherwise become incapacitated. *Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005) (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368–69 (1976)); *see also United States v. Jensen*, 425 F.3d 698, 706 (9th Cir. 2005) ("Once the arrest [of the driver] was made, the doctrine allowed law enforcement officers to seize and remove any vehicle which may impede traffic, threaten public safety, or be subject to vandalism."). In those cases, to determine whether the seizure was reasonable, we balanced the urgency of the public interest in safe, clear roads against the private interest in preventing the police from interfering with a person's property. *Compare United States v. Torres*, 828 F.3d 1113, 1120 (9th Cir. 2016) (holding that it did not violate the Fourth Amendment to impound a vehicle that, among other concerns, was "positioned in a manner that could impede

[14] By contrast, the exigent circumstances exception arises within the police's investigative function. *Hopkins*, 573 F.3d at 763. Under that exception to the warrant requirement, police may "enter a home without a warrant if they have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is 'necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.'" *Id.* (quoting *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc)). Defendants do not attempt to rely on the exigent circumstances exception here, so we need not decide whether it could have applied.

emergency services") *with United States v. Caseres*, 533 F.3d 1064, 1075 (9th Cir. 2008) (concluding that it was constitutionally unreasonable for police to impound a car when the car was lawfully parked near the arrested driver's residence and when there was no showing that the car was likely to be stolen or vandalized, or to impede traffic).[15] These vehicle seizure cases are similar to the emergency exception home entry cases because they allow the police to respond to an immediate threat to community safety.

A seizure of a firearm in the possession or control of a person who has been detained because of an acute mental health episode likewise responds to an immediate threat to community safety. We believe the same factors at issue in the context of emergency exception home entries and vehicle impoundments—(1) the public safety interest; (2) the urgency of that public interest; and (3) the individual property, liberty, and privacy interests—must be balanced, based on all of the facts available to an objectively reasonable officer, when asking whether such a seizure of a firearm falls within an exception to the warrant requirement.

Other circuits have looked at precisely such factors in analyzing whether guns could be seized without a warrant to protect the gun owner or those nearby. For example, in *Mora v. City of Gaithersburg*, 519 F.3d 216 (4th Cir. 2008), a firefighter (Mora) called 911 and told the operator that "he was suicidal, had weapons in his apartment, could understand shooting people at work, and said, 'I might as well die at work.'" *Id.* at 220. After confirming with one of Mora's coworkers that his threats should be taken seriously,

[15] To properly impound a motor vehicle without a warrant, law enforcement must also act "in conformance with the standardized procedures of the local police department." *Torres*, 828 F.3d at 1118.

but without first obtaining a warrant, police drove to Mora's apartment and found him loading his vehicle with suitcases and gym bags. *Id.* The police confiscated the bags and found a gun inside. *Id.* Police then took Mora's keys, entered his apartment, and discovered a large gun safe containing twenty-one guns and keys to a second safe. *Id.* They ultimately located forty-one firearms, ammunition, and survivalist literature throughout the apartment. *Id.* The police detained Mora for a mental health evaluation and then seized the firearms without a warrant. *Id.*

The Fourth Circuit held that the officers had not violated Mora's Fourth Amendment rights. The Fourth Circuit "identif[ied] the individual and governmental interests at stake and balanc[ed] them for reasonableness in light of the circumstances." *Id.* at 223. Weighing the government's interest in "[p]rotecting the physical security of its people" from "an individual who intends slaughter" against the private interests in liberty, privacy, and property, the court observed that "[r]especting the rights of individuals has never required running a risk of mass death." *Id.* at 223–24. Rather, the court explained that "[a]s the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action." *Id.* at 224. Applying these principles, the Fourth Circuit held that the officers had "a sound basis for seizing Mora's weapons, whether or not they were contraband or evidence." *Id.* at 227. The court also rejected the argument that Mora's previous removal from the scene diminished the public safety justification for seizing the guns because the officers had no idea whether Mora's "confederates might possess access to Mora's considerable store of firearms, or whether Mora himself might return to the apartment more quickly than expected." *Id.* at 228.

The D.C. Circuit considered similar factors in *Corrigan v. District of Columbia*, 841 F.3d 1022 (D.C. Cir. 2016), and ultimately held that there was not a sufficiently imminent threat to justify the warrantless search of a home and seizure of guns found inside. *Id.* at 1035. In that case, the police were dispatched in the middle of the night to a military veteran's (Corrigan's) home for what they believed to be an "attempted suicide." *Id.* at 1026. They learned from his ex-girlfriend and landlord that Corrigan had weapons, had recently ended a romantic relationship, and was under psychiatric care for PTSD and depression. *Id.* at 1026. After the police attempted to contact him numerous times over the course of several hours, Corrigan woke up and voluntarily came outside. *Id.* at 1026–27. He surrendered himself into the officers' custody, though he refused to consent to a search of his home. *Id.* at 1027.

Despite having Corrigan in custody, the police broke into his home, first conducting a "sweep" for injured persons or threats and then performing a "top-to-bottom warrantless search" to look for "any hazardous materials that could remain on the scene and be dangerous to the public." *Id.* During the search, the officers broke into several locked boxes and discovered multiple firearms, a military smoke grenade, fireworks, and ammunition. *Id.* at 1028.

The D.C. Circuit held that the search was unreasonable under the Fourth Amendment. *Id.* at 1035. Emphasizing that the police "had been on the scene for five hours and fully secured the area prior to the [] entry and search," as well as the fact that Corrigan had surrendered peacefully, *id.* at 1034, the court concluded that "there was no objectively reasonable factual basis for the [police] to believe an *imminently dangerous hazard* could be present in Corrigan's

home, particularly after completing the 'sweep,'" *id.* at 1031 (emphasis added).

Applying the same analytical framework, we hold that the warrantless seizure of the Rodriguezes' guns was appropriate. The seizure of the firearms did affect a serious private interest in personal property kept in the home. On the other hand, the public interest at stake here was also very significant. San Jose police officers had previously been to the home on prior occasions because Edward was acting erratically, and on the day in question, Edward was ranting about the CIA, the army, and other people watching him. He also mentioned "[s]hooting up schools," specifically referencing the guns in the safe. Edward's threats may not have been as explicit as the threats made in *Mora*, but a reasonable officer would have been deeply concerned by the prospect that Edward might have had access to a firearm in the near future. Consequently, there was a substantial public safety interest in ensuring that the guns would not be available to Edward should he return from the hospital.

With significant private and public interests present on both sides, the urgency of the public safety interest is the key consideration in deciding whether the seizure here was reasonable. We believe that, on this record, the urgency of the situation justified the seizure of the firearms.

Importantly, the officers had no idea when Edward might return from the hospital. Even though California Welfare & Institutions Code § 5150 authorized the detention of Edward for a period of up to 72 hours for treatment and evaluation, he could only be held for that period if the hospital staff actually admitted him. *See id.* §§ 5150 (2013), 5151 (2013). As Lori conceded at oral argument, as far as the officers knew, Edward could have returned to the home at any time—making it uncertain that a warrant could have been

obtained quickly enough to prevent the firearms from presenting a serious threat to public safety.

Lori asserts two primary counterarguments to the conclusion that there was sufficient urgency to justify the warrantless seizure of the firearms. First, she argues that any urgency was diminished because she could change the combination to the gun safe, preventing Edward from accessing the guns. But even assuming Lori could have changed the combination before Edward could have returned, it was reasonable to believe that Edward, who weighed 400 pounds, could have overpowered her to gain access to the guns. Second, Lori contended at oral argument that telephonic warrants are available in San Jose and that the officers could have obtained such a warrant more quickly than Edward could have returned if the hospital had not admitted him. But she has offered no support for either assertion. And without evidence or other support for her conclusory statements, Lori has not carried her burden in opposing summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).[16]

Our holding that the warrantless seizure of the guns did not violate the Fourth Amendment is limited to the particular circumstances here: the officers had probable cause to detain involuntarily an individual experiencing an acute mental health episode and to send the individual for evaluation, they expected the individual would have access to firearms and present a serious public safety threat if he returned to the

[16] As noted above, *see supra* n.15, police must act "in conformance" with department procedures when impounding a vehicle without a warrant. *See Torres*, 828 F.3d at 1118. We need not decide whether there is an equivalent requirement for the seizure of firearms because Lori has not disputed the officers' compliance with San Jose Police Department procedures here.

home, and they did not know how quickly the individual might return. Under these circumstances, the urgency of a significant public safety interest was sufficient to outweigh the significant privacy interest in personal property kept in the home, and a warrant was not required.

III.

For the foregoing reasons, we **AFFIRM**.

NOT FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LORI RODRIGUEZ; et al., Plaintiffs-Appellants, v. CITY OF SAN JOSE; et al., Defendants-Appellees.	No. 17-17144 D.C. No. 5:15-cv-03698-EJD MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued and Submitted January 14, 2019
San Francisco, California

Before: WALLACE, CLIFTON, and FRIEDLAND, Circuit Judges.

Plaintiff-Appellant Lori Rodriguez ("Lori") and two organizational co-plaintiffs appeal from the district court's summary judgment for the City of San Jose ("the City"), the San Jose Police Department, and Officer Valentine (collectively, "Defendants"). Lori argues that the district court erred in concluding there was no genuine dispute of material fact on her claims that the seizure and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

retention of her firearms violated her rights under the Second, Fourth, Fifth, and Fourteenth Amendments, and under California Penal Code § 33800 *et seq.* We affirm the summary judgment in favor of Defendants on the Second and Fourth Amendment claims in a concurrently filed opinion, and we address the remaining claims herein. We affirm judgment for Defendants on those claims as well.

First, Lori argues that the City's refusal to return the firearms after Lori had complied with the procedures set forth in Penal Code § 33800 *et seq.* violates her right to procedural due process. We disagree.

Generally, procedural due process claims have "two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *Brewster v. Bd. of Educ.*, 149 F.3d 971, 982 (9th Cir. 1998). As a preliminary matter, Lori does not argue, nor could she, that the City initially retained the firearms without adequate process. She was allowed to intervene in proceedings before the state trial court concerning the City's petition to retain the weapons, including in a hearing in which she offered evidence and contested the City's evidence before a neutral decisionmaker and in which the City had the burden of showing the firearms should not be returned. Instead, she challenges the process she received when the City refused to return her guns for a second time. In our view, however, Lori misunderstands California Penal Code § 33800 *et seq.* in arguing that she obtained a new property interest,

and therefore was entitled to additional process, after she fulfilled the statute's two requirements.

Obtaining gun clearance releases from the California Department of Justice and re-registering the guns in her name may have made Lori eligible for the return of her firearms, but that eligibility did not supersede any existing prohibitions on returning the firearms—including, in this case, the trial court's order that Defendants could retain the guns under California Welfare & Institutions Code § 8102. *See* Cal. Penal Code § 33800(c) ("Nothing in this section is intended to displace any existing law regarding the seizure or return of firearms."). In other words, completing the procedures outlined in § 33800 *et seq.* did not give Lori an additional property interest in her guns, so she was not due any additional process. *See Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 931 (9th Cir. 2017) (explaining that property interests "arise[] only where there is a legitimate claim of entitlement, not merely an abstract need or desire for [a] particular benefit").[1]

Second, Lori contends that because the Takings Clause applies to personal property, Defendants' seizure and retention of her firearms means her private

[1] Lori's state law claim mirrors her procedural due process claim, as she asserts that Penal Code § 33800 *et seq.* creates an independent cause of action entitling her to the return of her firearms. Because we conclude that the procedures under § 33800 *et seq.* do not supersede a determination that it would be unsafe to return the firearms under Welfare & Institutions Code § 8102, Lori's state claim falls with her procedural due process claim.

property was taken for public use without just compensation, violating the Fifth Amendment. Again, her arguments are unavailing.

The Takings Clause, as relevant here, protects "against a direct appropriation of property—personal or real," *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015), and such an appropriation "triggers a 'categorical duty to compensate the former owner' under the Takings Clause." *Fowler v. Guerin*, 899 F.3d 1112, 1117 (9th Cir. 2018) (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003)). As she conceded at oral argument, Lori still has title to her property and can sell it to a third-party licensed firearms dealer, *see* Cal. Penal Code § 33870(a), and Defendants have agreed that Lori can still store her firearms at a location other than her home or even keep them in her home if they are rendered inoperable. Lori's Takings Clause claim therefore fails. *Cf. Horne*, 135 S. Ct. at 2428 (explaining that raisin growers had an actionable Takings Clause claim because they lost "the entire 'bundle' of property rights in the . . . raisins [the government appropriated]—'the rights to possess, use and dispose of' them" (citation omitted)).

AFFIRMED.