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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

ANA PATRICIA FERNANDEZ,

 Plaintiff,

 vs.

 LOS ANGELES COUNTY; et al.,

 Defendants.

CASE NO. 2:20-cv-09876-DMG (PD)

**DEFENDANTS, COUNTY OF
 LOS ANGELES EMPLOYEES AMES,
 O'LEARY BROWN, DINGMAN, JACOB,
 LEON, MORENO IV, ROACH, ROTH,
 SAYLOR AND WALDRON'S REPLY TO
 PLAINTIFF'S OPPOSITION TO THEIR
 MOTION TO DISMISS PLAINTIFF'S
 FIRST AMENDED COMPLAINT**
 [F.R.C.P. 12(b)(6)]

 Date: January 14, 2022
 Time: 9:30 a.m.
 Place: Courtroom 8C
 Judge: Hon. Dolly M. Gee

TO THE COURT, TO ALL PARTIES HEREIN AND TO THEIR COUNSEL OF RECORD:

Defendants, JASON AMES, SUSAN O'LEARY BROWN, KYLE DINGMAN,
 MURRAY JACOB, RICHARD LEON, SALVADOR MORENO IV, DAVID ROACH,
 JOHN ROTH, NICHOLAS SAYLOR and WYATT WALDRON (sued in their individual
 capacities as employees of the COUNTY OF LOS ANGELES), hereby reply to the
 Plaintiff's opposition to their Motion to Dismiss the First Amended Complaint.

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MEMORANDUM OF LAW

I. THE APPLICATION OF QUALIFIED IMMUNITY CAN AND SHOULD BE DECIDED ON MOTION TO DISMISS.

Qualified immunity is “an immunity from suit rather than a mere defense to liability. It is effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v. Forsyth*, 472 U.S. 511, 526, (1985). The Supreme Court has made clear that the “driving force” behind creation of the qualified immunity doctrine was a desire to ensure that “‘insubstantial claims’ against government officials [will] be resolved prior to discovery.” *Anderson v. Creighton*, 483 U.S. 635, 640, (1987). Accordingly, the Supreme Court “repeatedly has stressed the importance of resolving immunity questions at the earliest possible stage in litigation.” *Pearson v. Callahan*, 555 U.S. 223, 231–232 (2009).

The County defendants contend that they are entitled to qualified immunity for the alleged violations of the Fourth Amendment set forth by the Plaintiff. Contrary to other grounds set forth on motion to dismiss, qualified immunity is an immunity from suit, not merely a defense to the action. Where, as here, the application of qualified immunity can be resolved on the facts alleged by the Plaintiff, the case can and should be resolved at the earliest possible stage of litigation, on motion to dismiss.

II. THE MINISTERIAL DUTY EXCEPTION TO QUALIFIED IMMUNITY DOES NOT APPLY IN THIS CASE.

In opposition to the County employees’ Motion to Dismiss, the Plaintiff contends that qualified immunity is inapplicable because the County’s employees were performing ministerial duties as opposed to discretionary functions. The Plaintiff cannot prevail on this theory.

1 **A. The Ministerial/Discretionary Distinction is “Dead Law.”**

2 In Sellers By and Through Sellers v. Baer, 28 F.3d 895, 902 (8th Cir. 1994), the
3 Eighth Circuit analyzed the ministerial-duty exception to qualified immunity and held:
4 “[a]dditionally, we note our belief that the ministerial-duty exception to the qualified
5 immunity defense is dead letter. First, we have been unable to find any post-Davis (Davis
6 v. Scherer, 468 U.S. 183) cases in which a court has denied qualified immunity because
7 the official was performing a ministerial task. Furthermore, in light of the limitations
8 placed on the exception by Davis, we are unable to imagine the case in which the
9 ministerial-duty exception ever could apply. Other circuits also have expressed skeptical
10 views of the distinction between discretionary and ministerial duties. See Horta v.
11 Sullivan, 4 F.3d 2, 12 (1st Cir.1993) (“[I]nsofar as the concept of discretionary function is
12 relevant at all in the immunity sphere, . . . ”); Gagne v. City of Galveston, 805 F.2d 558,
13 560 (5th Cir.1986), (“Thus allegations about the breach of a statute or regulation are
14 simply irrelevant to the question of an official's eligibility for qualified immunity in a suit
15 over the deprivation of a constitutional right.”) *cert. Denied*, 483 U.S. 1021 (1987);
16 Coleman v. Frantz, 754 F.2d 719, 727 (7th Cir.1985) (“[A]s a matter of public policy, it
17 would be unwise to engage in a case by case determination of Section 1983 immunity
18 based upon the ministerial versus discretionary nature of the particular official act
19 challenged”). The court reasoned that nearly all decisions made by government officials
20 involve some exercise of discretion.
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23
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25 While the Ninth Circuit has not specifically abrogated the ministerial duty
26 exception, it has ruled that its application is extremely narrow and if an official were
27 required to exercise his or her judgment even rarely or to a small degree, the ministerial

1 duty exception to qualified immunity would be inapplicable. F.E. Trotter, Inc. v.
2 Watkins 869 F.2d 1312, 1314 (9th Cir. 1989).

3
4 As the Plaintiff has cited to no post-Davis cases denying the application of qualified
5 immunity for so called ministerial duties, the defendants contend that the law is “dead
6 law,” and the exception is inapplicable here.

7 **B. The Ministerial Duty Exception Does Not Apply in this Case.**

8 Even if the “ministerial/discretionary” duty exception is still good law, the
9 exception is inapplicable in this case.

10
11 The exception to qualified immunity for functions that are “ministerial” rather than
12 “discretionary” is quite narrow. For qualified immunity purposes, a duty is “ministerial”
13 only where the statute or regulation leaves no room for discretion—that is, it specif[ies] the
14 precise action that the official must take in each instance. “A law that fails to specify the
15 precise action that the official must take in each instance creates only discretionary
16 authority; and that authority remains discretionary however egregiously it is abused.”
17 Watkins, 869 F.2d at 1315, citing Davis, 468 U.S. at 196 n. 14. In all other circumstances,
18 the official is performing a discretionary function for purposes of the qualified immunity
19 analysis.
20

21
22 A duty is discretionary if “an official is required to exercise his judgment, even if rarely
23 or to a small degree.” Watkins, 869 F.2d at 1314; quoting, Gagne v. City of Galveston, 805
24 F.2d 558, 560. Even if some parts of the defendant’s duties were ministerial, “[p]arsing
25 discretionary acts into their discretionary and ministerial components and protecting only the
26 former would sharply curtail the protection for discretionary duties that qualified immunity
27 is meant to furnish.” Watkins, 869 F.2d at 1315.

1 In addition, the ministerial-duty exception applies only where it is the violation of
2 the ministerial duty than gives rise to the cause of action for damages. *Davis*, 468 U.S. at
3 194 n. 12, 196 n. 14, see also, *Anderson as trustee for next-of-kin of Anderson v. City of*
4 *Minneapolis*, (8th Cir. 2019) 934 F.3d 876, 884. That is not the case here.

6 In this case, the Plaintiff contends that the ministerial duties performed by the
7 County employees emanate from the Los Angeles County Sheriff's Department's Policies
8 and Procedures Manual. It is alleged that the policy commands that "all property/evidence
9 items shall be stored in a secure manner in a secure facility. Further, high value items must
10 be stored in a safe, and large collections that cannot be safely stored at the station must be
11 immediately transferred to Central Property and Evidence." (Opposition, page 9:2-10).

13 The Plaintiff's position fails for several reasons. First, even the opposing papers
14 concede that pursuant to these duties outlined by the LASD policy manual, "the
15 Defendants had at most 'limited discretion' over how they seized, transported and kept the
16 property on behalf of the court." (Opposition, p. 9:2-3). As set forth clearly in *Watkins*,
17 even if a duty requires, a minimal or rare exercise of the use of discretion, the duty is
18 discretionary. Parsing the defendants' acts into minute components of what is and is not
19 discretionary, sharply curtails the application of qualified immunity. Where any degree of
20 discretion is involved, the "ministerial duty" exception is inapplicable.

23 Second, the LASD policy manual as cited by the Plaintiff does not describe ministerial
24 duties. A law that fails to specify the precise action that the official must take in each instance
25 creates only discretionary authority. The LASD policy manual states only that the property
26 must be stored in a secure manner, in a secure facility. What is determined to be a "secure
27 manner" is not specifically described in the policy and is therefore left to the discretion of the

1 persons seizing and storing the property. This is likely true because one would have to store
2 different items of property (i.e., firearms, and explosives), differently than other items (such
3 as narcotics or stolen personal property). Again, if the storage decision involves any manner
4 of discretion, and the Plaintiff concedes that it does, the duties involved are discretionary and
5 the “ministerial-duty” exception does not apply.
6

7 Third, with regard to assessing the fee for the return of the firearms, the First
8 Amended Complaint itself contends that the defendants’ duties allegedly undertaken to
9 enforce Penal Code § 33880, were discretionary. “Under both the original California
10 Penal Code section 12021.3 and the newer section 33880, enactment and enforcement of
11 the administrative fee is discretionary.” (FAC; p.10: ¶ 40).
12

13 Finally, in the case before us the Plaintiff does not claim that she is entitled to
14 damages simply because the County defendants violated LASD policy. The Plaintiff seeks
15 damages based on a claim that the Fourth Amendment was. Thus, the issue before the
16 court is whether the County employees’ conduct violated any clearly established
17 constitutional rights, not whether they may have violated departmental regulations. Even
18 assuming that the officers violated the departmentally imposed duties and that the duties
19 were purely ministerial, the officers are still entitled to qualified immunity. *Anderson as*
20 *trustee for next-of-kin of Anderson v. City of Minneapolis*, 934 F.3d 876, 884, (8th Cir.
21 2019), *see also Sellers*, 28 F.3d at 902.
22
23

24 **III. THE COUNTY EMPLOYEES COULD REASONABLY BELIEVE**
25 **THEY WERE ENTITLED TO RETAIN LAWFULLY SEIZED WEAPONS UNTIL**
26 **THE FEE UNDER PENAL CODE SECTION 33880 HAD BEEN PAID.**
27

1 The Plaintiff fails to show that the County employees violated any clearly
2 established law by retaining the firearms in question until the Plaintiff paid the
3 administrative fee pursuant to Penal Code §33880.
4

5 In Anderson v. Creighton, 483 U.S. 635, 636–37, (1987), the plaintiffs sued a
6 federal law enforcement officer who participated in a search of the plaintiffs' residence that
7 allegedly violated the Fourth Amendment. Qualified immunity was denied by the lower
8 court which held that in the absence of probable cause and exigent circumstances, an
9 individual has a clearly established right to be free in his or her home from a warrantless
10 search. *Id.* at 640. The Supreme Court reversed, concluding that the lower court had
11 formulated its statement of the constitutional right at too high a level of generality. Instead,
12 the Court explained, the right the official is alleged to have violated must have been
13 “clearly established” in a more particularized, and hence more relevant, sense: The
14 contours of the right must be sufficiently clear that a reasonable official would understand
15 that what he is doing violates that right . . . [I]n the light of pre-existing law the
16 unlawfulness must be apparent. *Id.* Thus, the Court held, the proper inquiry was the
17 objective, fact-specific question “whether a reasonable officer [in the defendant's position]
18 could have believed [the] warrantless search to be lawful, in light of clearly established law
19 and the information the searching officers possessed.” *Id.* at 641. *See, Collins v. City of*
20 *Harker Heights*, 503 U.S. 115 (1992).
21
22
23

24 As was the case in Anderson, the Plaintiff here has stated the constitutional right
25 allegedly violated at too high a level of generality. As set forth in the moving papers, the
26 defendants agree with the general Fourth Amendment proposition that property seized
27 pursuant to a warrant can lose its protection under the amendment if unreasonably retained

1 thereafter. Here, the opposing papers make no showing that the County's employees could
2 not reasonably rely upon the California Penal Code by retaining possession of the firearms
3 until the administrative fees were paid.
4

5 Plaintiff's citation to Brewster v Beck, 859 F.3d 1194 (9th Cir. 2017), is not
6 instructive. There, the Plaintiff sued the LAPD challenging California Vehicle Code §
7 14602.6(a)(1) which permitted law enforcement agencies to retain an impounded vehicle
8 for a period of 30 days. The plaintiff appeared three days after the vehicle impound with
9 proof of ownership and payment of the towing and storage fees for the three days that the
10 car was held. The LAPD refused to return the vehicle until the 30-day period had lapsed,
11 and the storage fees for that period had been paid. Id. at 1195. The court found the seizure
12 and retention to be unlawful under the circumstances.
13

14 In this case, the County Employees did not retain the firearms for some arbitrary
15 period of time requiring the Plaintiff to pay additional fees for that extended time period.
16 California Penal Code does not require that seized firearms be retained for an arbitrary
17 period of time driving up the fees the owner must pay in order to recover their property.
18 Penal Code § 33875, in fact, requires that the owner seeking to recover seized firearms
19 must recover them within 180 days after notification that they are available for return, or
20 they will be destroyed. So, there are no arbitrary dates that the firearms must be held
21 before their return as in Brewster. Moreover, Penal Code § 33880 does not assess a daily
22 fee for the return of firearms which accumulates on end for the arbitrary number of days
23 the firearms must be held as in Brewster. The fee under Penal Code § 33880 is not
24 assessed daily, and the County's employees were not required to retain, and did not retain,
25 the firearms for an arbitrary number of days under the statute.
26
27

Also, the fee under Penal Code § 33880 is not arbitrary as the fee in Brewster. The Brewster court found no reasonable basis to continue holding Brewster's vehicle and assessing the daily impound fees where the owner has provided proof of ownership of the vehicle. The objective of California's Law Enforcement Gun Release ("LEGR") process "is one of public safety: keeping firearms out of the hands of those who – under California law – are not eligible to possess them." Cupp v Harris, 2021 WL 4443099 *4, slip copy filed September 28, 2021, (E.D. Cal. 2021), citing, Wilson v Lynch, 835 F.3d 1083, 1097 (9th Cir. 2016). In the Plaintiffs' case, the Penal Code permits the law enforcement agency to recover the costs of seizure, impound, storage and release of firearms so that said fees are not borne by the taxpayers.

As such, Brewster does not demonstrate that the County's employees violated clearly established law by retaining possession of the seized firearms until the administrative fee under the Penal Code was paid. There was no clear indication that they were violating the Fourth Amendment by doing so.

"Clearly established" for qualified immunity purposes means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. His very action need not previously have been held unlawful, but in the light of pre-existing law its unlawfulness must be apparent. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

IV. THE COUNTY'S EMPLOYEES ARE ENTITLED TO QUALIFIED IMMUNITY FOR THE PLAINTIFF'S FOURTH AMENDMENT DESTRUCTION OF PROPERTY CLAIM.

1 In opposition to the Motion to Dismiss, the Plaintiff takes issue with the fact that the
2 County defendants did not argue the Constitutional violation in the alleged destruction of
3 property under the Fourth Amendment. They are not required to do so.
4

5 In Pearson v. Callahan, 555 U.S. 223, 241, (2009), the Supreme Court held that in
6 resolving government officials' qualified immunity claims, courts need not first determine
7 whether facts alleged or shown by plaintiff make out violation of constitutional right,
8 receding from Saucier v. Katz, 533 U.S. 194, (2001). This court may undertake the
9 analysis of either prong of the qualified immunity analysis. If there is no violation of the
10 clearly established law, despite a Constitutional violation, the defendants are entitled to
11 qualified immunity.
12

13 Again, “clearly established” for qualified immunity purposes means that the
14 contours of the right must be sufficiently clear that a reasonable official would understand
15 that what he is doing violates that right. The right alleged to have been violated cannot be
16 stated at a high level of generality. Anderson, 483 U.S. at 640. An official must be clear
17 that his or her acts violate the constitution.
18

19 The opposing papers still provide no support for the Plaintiff’s contention that the
20 alleged “grossly negligent” damage to personal property following a lawful seizure,
21 violates clearly established law under the Fourth Amendment.
22

23 The defendants do not dispute the general holdings in Bonds v. Cox, 20 F.3d 697,
24 702 (6th Cir 1994) and United States v. Jacobsen, 466 U.S. 109, 124–25 (9184), that
25 destruction of personal property during a search constitutes a seizure under the Fourth
26 Amendment. In Bonds, the question of whether the damage to Bonds' house, which
27 included broken doors, mutilated vinyl siding, a cracked commode, holes in walls, broken

1 dishes, and trampled personal belongings, did not establish clearly established law on
2 which the County defendants could rely. In Jacobsen, the destruction of a quantity of
3 cocaine during testing, an act for which the officer was entitled to qualified immunity, also
4 failed to set forth clearly established law for the County employees in this case.
5

6 Plaintiff's opposition cites to Lavan v. City of Los Angeles, 693 F.3d 1022, 1024
7 (9th Cir. 2012). In that case, a class of homeless persons sued the LAPD for enforcing
8 regulations requiring them to seize and immediately destroy unabandoned personal
9 property on the public street. Id. at 1024-25. The court concluded that the Fourth and
10 Fourteenth Amendments protect homeless persons from government seizure and summary
11 destruction of their unabandoned, but momentarily unattended, personal property. Id. at
12 1030. The facts set forth in Lavan do not assist in the determination of the clearly
13 established law to be applied in this case. The Lavan case did not involve a seizure of
14 property pursuant to a warrant. The Lavan case did not involve the seizure or storage of
15 firearms and ammunition, but instead involved the personal effects that the plaintiffs
16 required for daily living. Finally, the Lavan case involved a municipal order to destroy,
17 not damage, the plaintiff's personal property. In this case, there was no order requiring the
18 summary destruction of the Plaintiff's property.
19
20

21 The matter of Liston v County of Riverside, 120 F.3d 965 (9th Cir 1997) is also not
22 instructive here. In Liston, officers damaged property including use of a battering ram,
23 when executing a search warrant on the wrong house. There, the Ninth Circuit expressly
24 held that "officers executing a search warrant must damage some property in order to
25 perform their duty." Id. at 979. Thus, the court remanded for a determination of when the
26 property damage occurred because, until the officers learned they were in the wrong house,
27

1 they could have reasonably believed “that the way they conducted the search was lawful.”
2 *Id.* *Liston* recognizes that property damage can occur during a lawful search.

3
4 In *West v City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), Plaintiffs sued the police
5 department alleging, among other things, violation of the Fourth Amendment for causing
6 extensive damage to property during the search. *Id.* at 982. The court held that no
7 Supreme Court or circuit court case clearly established that the procedure SWAT used to
8 gain entry into the home was unreasonable, thus, the officers were entitled to qualified
9 immunity. *Id.* at 987-988. In that case, the court held that it need not decide whether the
10 destruction of the Plaintiffs’ home was excessive under the Fourth Amendment, and
11 proceeded directly to the issue of whether the officers’ actions violated clearly established
12 law. *Id.* at 986.

13
14 The court held: “[g]iven the unusual circumstances of the case, the need for
15 specificity of precedent in the Fourth Amendment context and controlling cases
16 establishing that officers sometimes can damage a home during a search without violating
17 the occupant’s Fourth Amendment rights, this is not an obvious case in which to deny
18 qualified immunity.” *Id.* at 987.

19
20 Based on the analysis in the *West* case, the defendants are entitled to qualified
21 immunity. As set forth in the moving papers there is no precedent for the factual
22 circumstances set forth in the Plaintiffs’ FAC. In fact, the FAC adeptly describes the
23 unusual circumstances of the property seizure in this case.

24
25 Law enforcement personnel arrived at the scene on June 11, 2018, with a warrant
26 expecting to confiscate 41 firearms from a felon prohibited from possessing firearms and
27 other associated items. (FAC, ¶ 45). Instead, they arrived and discovered a large cache of

1 weapons prompting three additional searches on June 15, 21, and 29, 2018. (FAC, ¶ 51).
2 The searches yielded more than 400 firearms, ten times the number anticipated, including
3 pistols, long guns, ammunition magazines and speed loaders. (FAC, ¶¶ 49, 51).
4

5 The weapons had to be transported from their original locations to the Palmdale
6 Sheriff's Station for cataloging. (FAC, ¶ 53). From there, and pursuant to LASD policy
7 the "large collection" of firearms then had to be transferred from the Palmdale station to
8 Central Property in Whittier, CA for storage. (FAC, ¶¶ 56, 68). From there, the weapons
9 were transferred back to the Palmdale Station from Central Property in Whittier to
10 effectuate the transfer to the Plaintiff. (FAC., ¶ 61). The weapons were then transferred to
11 "Carol Watson's Orange Coast Auctions" at plaintiff's request for sale. (FAC, ¶¶ 61, 62).
12

13 The Plaintiff contends that "Orange Coast Auctions" estimated the damage to the
14 firearms they received to be \$96,000. The FAC does not allege how "Orange Coast
15 Auctions" could possibly value damage to property having first seen it *after* the alleged
16 damage occurred.
17

18 The FAC also contends that the LASD, in determining the fee to assess under Penal
19 Code § 33880, then Sheriff Leroy Baca revealed that potentially 500 per year would be
20 eligible for the fee. (FAC, ¶ 38). Here, the County's employees seized from Miguel
21 Fernandez, alone, the number of weapons estimated to be seized in a year, and that seizure
22 occurred in a period of four days.
23

24 Given the law recognized that some degree of damage to property will occur when
25 executing a warrant; given the unprecedented number of pistols, long guns, ammunition,
26 and speed loaders seized from Miguel Fernandez; given the dangerous nature of the seized
27 property itself; given the number of transfers of the large cache of weapons from areas all

1 over Los Angeles County; and given no precedent establishing that the damage to property
2 under the same or similar circumstances violates the Fourth Amendment, the County
3 employees are entitled to qualified immunity on this claim as well.
4

5 **CONCLUSION**

6 For the foregoing reasons, the Defendants County of Los Angeles employees
7 JASON AMES, SUSAN O'LEARY BROWN, KYLE DINGMAN, MURRAY JACOB,
8 RICHARD LEON, SALVADOR MORENO IV, DAVID ROACH, JOHN ROTH,
9 NICHOLAS SAYLOR and WYATT WALDRON hereby respectfully request that this
10 Court dismiss Plaintiff's entire FAC, and all claims alleged against them.
11

12 DATED: December 20, 2021

Respectfully submitted,

14 **NELSON & FULTON**

15
16 By: s / Amber A. Logan
17 AMBER A. LOGAN

18 Attorneys for Defendants,
County Employees Jason Ames, et al.
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