No. 17-17144

In the United States Court of Appeals
For the Ninth Circuit

LORI RODRIGUEZ, et al.,
Plaintiffs-Appellants,

v.

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

On Appeal from the United States District Court
For the Northern District of California, No. 5:15-cv-03698-EJD
District Judge Edward J. Davila

BRIEF OF CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

California Rifle & Pistol Association, Incorporated has no parent corporations. Because it has no stock, no publicly held company owns 10% or more of its stock.

Dated: March 6, 2018

Respectfully Submitted,
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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

Pursuant to Rule 29(c)(4) of the Federal Rules of Appellate Procedure, the California Rifle & Pistol Association, Incorporated ("CRPA") respectfully submits this amicus curiae brief, with the consent of all parties, in support of Appellants and reversal.

Founded in 1875, the CRPA is a non-profit organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. CRPA regularly participates as a party or amicus in firearms-related litigation. CRPA works to preserve the constitutional and statutory rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA is also dedicated to promoting the shooting sports, providing education, training, and organized competition for adult and junior shooters. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, the general public, and loving parents.

CRPA offers its unique experience, knowledge, and perspective to aid the Court in the just and proper resolution of this case. As an organization with thousands of firearm-owning members in California, CRPA has a wealth of knowledge and expertise concerning the safe and responsible use of firearms. Accordingly, CRPA respectfully provides its informed perspective concerning the real-world impact the challenged actions have on the lawful ownership of firearms.

All parties have consented to the filing of this brief.

STATEMENT REGARDING PARTICIPATION BY PARTIES, THEIR ATTORNEYS, OR OTHER PERSONS IN FUNDING OR AUTHORING THE BRIEF

Pursuant to Federal Rule 29(c)(5), amicus attests that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to its preparation or submission.

BACKGROUND

This appeal results from a district court finding constitutionally permissible Respondent City of San Jose's (the "City" or "Respondent") refusal to return to Appellant Lori Rodriguez ("Appellant" or "Lori") firearms in which she has an ownership interest, as a result of Lori's husband, Edward Rodriguez ("Edward"), suffering a mental health episode that resulted in his involuntary removal from their home and a temporary loss of Second Amendment rights.

The detailed version of what transpired is stated in Lori's brief. Amicus will not restate them here. Amicus will, however, provide insight in addition to what Lori has provided, as to why the district court was in error in rejecting Loris' Second Amendment, Due Process, and Takings Clause claims. Amicus joins Lori is requesting that this Court reverse the district court's decision on those claims.

I. The City's Refusal To Return Lori's Lawfully Possessed Firearms Violates Her Second Amendment Right To Keep And Bear Arms

The Second Amendment provides that "the right of the people to keep and bear Arms . . . shall not be infringed." After conducting an exhaustive textual and historical analysis, the Supreme Court made clear in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an "individual right to possess and carry weapons" for self-defense. *Id.* at 592. In rejecting Lori's Second Amendment claim against the City for refusing to return to her previously seized firearms, in which she has a property interest, due to the mental condition of her

husband, the district court reasoned that this right does not extend protection to any *particular* firearm and that because Lori could still lawfully acquire firearms, her rights are intact. ER 3:10-11.

This understanding of the Second Amendment is patently incorrect. Because the Second Amendment is certainly concerned by the confiscation of arms, the City's confiscation of Lori's firearms must be subjected to constitutional scrutiny. The Ninth Circuit has adopted a two-step inquiry when analyzing Second Amendment cases. Under the first step, the court determines whether the challenged regulation imposes a burden on conduct within the scope of the Second Amendment's guarantees. Under the second step, the Court must select the proper level of scrutiny. *See Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014); *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). Proper application of this analysis establishes that the district court erred in rejecting Lori's Second Amendment claim. This Court should reverse.

A. The Second Amendment Right to "Keep Arms" Includes Those Arms Already Possessed

The Second Amendment protects the right "to keep" those "arms" that are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624-25; *see also Caetano v. Massachusetts*, 136 S. Ct. at 1027-28 (2016). Neither the City nor the district court has claimed that Lori's confiscated firearms are in any way "dangerous and unusual" and thus outside the scope of the Second

Amendment's protections. *Heller*, 554 U.S. at 627. Rather, the City argues, and the district court concurs, that because Lori can simply go out and acquire another firearm, the Second Amendment is not concerned. But, the City's position is untenable.

The Second Amendment is clearly implicated when the government forcefully removes protected firearms from someone's home and refuses to return them, as the City has done here. The notion that the Second Amendment is not implicated if the person can get another firearm is not compatible with *Heller*'s admonishment that: "It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." *Heller*, 554 U.S. at 629. It is tantamount to saying the government can confiscate Bibles without offending the First Amendment, if the person from whom it was taken can acquire another one, or already has a Koran.

Implicit in the right to bear arms is the right to have seized arms returned if the seizure is not warranted. Indeed, "the most natural reading of 'keep arms' in the Second Amendment is to 'have weapons'." *Heller*, 554 U.S. at 582. *Heller*'s textual analysis also noted the significance of dictionary definitions from the time of the drafting, which included "[t]o retain; not to lose," "[t]o have in custody," and "[t]o hold; to retain in one's power or possession." *Id*. If the right to bear arms does not extend to the specific arms a person lawfully owns, and does not protect

them from unwarranted seizure, then it is essentially an illusory right. If citizens have no Second Amendment right to keep the arms they already own, then there is no practical difference between state retention of firearms already seized and direct seizure of firearms without justification in the first place.

Moreover, and perhaps more importantly, the district court erred in placing the burden on Lori to establish that the challenged actions are within the scope of the Second Amendment. *See, e.g.*, *Jackson*, 746 F.3d at 968 (explaining that a city failed to show that its restrictions fall outside of the Second Amendment's scope). In sum, the notion that the City's confiscation of Lori's firearms is outside the scope of the Amendment is indefensible. That confiscation must be scrutinized.

B. The City's Refusal to Return the Seized Firearms to Lori Due to Edward's Medical Condition Fails Any Level of Scrutiny, Including Rational Basis Review

Evaluating the second step of the analysis–what level of scrutiny to apply—is a two-part question. First, the court must determine (1) how close the challenged law comes to the core of the Second Amendment right. Then it must consider (2) the severity of the law's burden on that right. *Jackson*, 746 F.3d at 960-61. If a regulation severely treads on a core Second Amendment right, strict scrutiny must be applied. *Chovan*, 735 F.3d at 1138. "If a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the

Second Amendment right, [the Court] may apply intermediate scrutiny." *Jackson*, 746 F.3d at 961.

1. The City's Confiscation Severely Burdens Core Second Amendment Conduct

Heller is clear that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. This litigation arises from the confiscation of firearms from Lori's home and the refusal to return them, despite the basis for the seizure being the involuntary mental health conditions of another person. This inarguably goes to the core of the right to possess a firearm in the home for self-defense. The City has flatly denied her that right through its confiscation of her firearms. To this day, Lori possesses no firearms. As such, the burden on the core right could hardly be more severe. There is thus little doubt that strict scrutiny is the correct standard to apply here. Nevertheless, the level of scrutiny applied here is of no consequence because the City's refusal to return Lori's firearms does not satisfy even rational basis review.

2. The City's Confiscation Is Neither Sufficiently Rational or Tailored to Pass Constitutional Muster

According to the district court, "Lori could sell the firearms at issue to a licensed dealer under Cal. Penal Code § 33850(b)" and "apparently" she "could then purchase those guns from the dealer." ER 3:10, n.1. And, the City has

conceded that there is nothing legally preventing Lori from acquiring a new firearm and bringing it to her home. ER 6:70-71.[1] The City concedes that there is nothing stopping Lori from acquiring new firearms. ER 6:70-71. This concession reveals the utter irrationality of the City's refusal to return her firearms. It is an admission that its confiscation is pointless. For, if Lori can go out and buy a firearm, what then is achieved by withholding from her the return of her firearms? The answer is simple: nothing.

As such, denying Lori her firearms on the basis that safety demands it while acknowledging that she can still obtain other firearms is plainly irrational and, thus, fails even rational basis review. Even if the City could contrive some rational basis, the interest in denying Lori her firearms, i.e., keeping weapons away from Edward, certainly cannot be said to be furthered in any meaningful way as required by both levels of heightened scrutiny. To justify a burden on a constitutionally protected right, the government must prove that it is sufficiently tailored to advance a sufficiently important end. Under intermediate scrutiny, the government must prove, first, that the law is "substantially related" to an important government interest. *See Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *see United States v. Chovan*, 735 F.3d 1127, 1139-40 (9th Cir. 2013).

[1] It is noteworthy that there has been no finding by a court, or even a claim by the City, that the confiscated firearms are particularly dangerous, i.e., more so than firearms Lori could go legally acquire.

What's more, under both heightened scrutiny standards the government must prove that its chosen means are "closely drawn" to achieve that end without "unnecessary abridgment" of constitutionally protected conduct. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). Neither the City nor the district court explain how denying Lori her Second Amendment rights because of the involuntary mental health episode of a third party is sufficiently tailored; particularly, when Lori has indicated that she has a safe that Edward cannot access and that she does not fear him. ER 11:153-157.

For these reasons, this Court should overturn the district court's rejection of Lori's Second Amendment claim.

II. The City's Refusal to Return Appellant's Firearms Is a Violation of Her Fourteenth Amendment Due Process Rights

While there is a clear violation of Lori's Second Amendment rights, this Court need not even reach that question. The City's arbitrary basis for refusing return of her property, particularly without Lori having ever received a sufficient hearing, are grounds enough to compel the City to release Lori's property to her. The Due Process Clause of the Fourteenth Amendment provides that "No state shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The City's violation of Lori's due process rights is twofold.

A. The City's Refusal to Return Lori's Property Is Arbitrary

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *see, e.g.*, *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (collecting cases). A law that deprives an owner of private property without a legitimate justification violates the Due Process Clause, regardless of whether it also violates the Takings Clause. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). The City's purported goal in refusing return of Lori's firearms to her is to keep them away from Edward for the safety of him and the public. ER 6:44-47. Yet, as explained above, Lori still can access firearms. This is the essence of arbitrariness.

The arbitrariness becomes even more stark when considering that Lori is a third party, not the target of the property confiscation, and that she has complied with California's procedural requirements to prove that she is eligible for the firearms to be returned. ER 11:153-157. Lori challenged the disposition hearing under California Welfare & Institutions Code section 8102, to no avail. ER 6:80-81. She followed the Sixth District Court of Appeals' guidance and exhausted the process to retrieve her firearms under California Penal Code section 33800, also to no avail. For these reasons, the City's reliance on *Mora v. Gaithersburg, MD*, 519 F.3d 216 (4th Cir. 2008) is misplaced. Mot. for Summ. J., or, In the Alternative, Partial Summ. J.; Mem. of P. & A. 20:8-9, ECF. No. 22. There, the court found

"no substantive due process claim for firearm seizure where deprivation [was achieved] pursuant to the law and can be rectified by post-deprivation state remedies." Lori has jumped through every "post-deprivation" procedural hoop available and yet the City still denies return of her property.

B. Lori Never Received a Hearing on the Confiscation of Her Property, in Violation of the Due Process Clause

"[The Supreme] Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), citing *Wolff*, 418 U.S. at 557-558. Here, it seems Lori never received a hearing squarely concerning her interest in the confiscated firearms. As the California Sixth District Court of Appeals identified in its decision affirming the state trial court's ruling on the City's disposition hearing:

> We begin by noting that section 8102 expressly provides for the procedure for the return of firearms confiscated by a law enforcement agency *only to the person who was detained under section 5150. Section 8102 is silent as to the return of the confiscated firearms to any other person*. Accordingly, the *only issue* to be decided at a hearing under 8102, subdivision (c) is whether return of the firearms to the previously detained person "would be likely to result in endangering the person or others."

ER 6:92 (emphasis added).

This suggests that the section 8102 hearing, which was affirmed by the state appellate court, only addressed Edward's interest in the firearms because it *could not* address Lori's. That calls the legitimacy of the court's affirmance of the §8102 hearing as to Lori's property interest in the firearms into question on due process

grounds. For the district court's ruling held that the City's failure to return the firearms to Lori was not a due process violation because the Court of Appeals did not order their return and that the procedure available under California Penal Code section 33800 remained available. ER 3:12. That analysis missed the point, however, that Lori did not receive a fair adjudication of *her* interests at all in the state trial court.

III. The Confiscation of Appellant's Firearms Is a Taking That Requires Compensation Under the Fifth Amendment

Even if there is no due process violation, the refusal to return the firearms which Appellant had either a community property or a separate and personal interest in is plainly an unlawful taking of property by the City. The Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend V. A physical taking occurs whenever the state "dispossess[es] the owner" of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 435 n.12 (1982). Whenever a taking occurs, the government must pay compensation. *Id*. at 421. And, the Supreme Court has made clear that a physical taking occurs when the government dispossess an owner of personal, not just real, property—as the "categorial duty" imposed by the Takings Clause applies "when [the government] takes your car, just as when it takes your home." *Horne v. Dep't of Agric.*, S. Ct. 2419, 2426 (2015).

Because the City has physically dispossessed Lori of her property, and refuses to return it to her, with the justification that public safety is furthered by its doing so, she has a straightforward right to compensation under the Takings Clause.[2] The district court relied exclusively on *Bennis v. Michigan,* 516 U.S. 442, 452 (1996), in rejecting Lori's Takings claim, concluding that the exemption to the just compensation requirement whenever the taking of property results from the misuse of property, even from an innocent third-party owner, applies here. But *Bennis* is wholly inapposite to Lori's case.

Central to the holding in *Bennis*, and its progeny, is that there is a *misuse* of the seized property. *See Bennis*, 516 U.S. at 453. (Rehnquist, J. maj.) ("The State sought to deter illegal activity . . . The Bennis [property], it is conceded, facilitated and was used in criminal activity.") Here, there was not even any use, let alone misuse of Lori's firearms. Nor have Lori or Edward committed any crime.

Here, the City's basis for the confiscation of the firearms was and has always been public safety. The rationale behind the sort of uncompensated seizure

[2] The notion that Lori's property has not been taken because she can sell the firearms to a dealer is erroneous. Whether government's action results in a transfer of the property to the government or to a third party, a dispossession of property has occurred. This is why in the landmark case *Kelo v. City of New London*, 545 U.S. 469 (2005), the Court reasoned that it made no difference for the purposes of takings analysis that the law in question allowed the plaintiff, Ms. Kelo, to sell her property to a "private nonprofit entity." *Id*. at 473-475.

of property criminally misused addressed in *Bennis*—deterrence and retribution—is, therefore, not present. *Id*. Edward experienced a mental breakdown, and the firearms were accordingly seized by the authorities to keep him, Lori, and the public safe. Threat of seizure of her firearms could not have deterred Lori from Edward's having an *involuntary* mental health crisis. Nor should she be punished for his condition or trying to help him.

As such, the *Bennis* doctrine is not readily transferable to the instant circumstance. Anticipatory confiscation of firearms due to public safety assumptions is fundamentally distinguishable from criminal prosecution related forfeiture. It would simply be unfair to permit the same outcome for Lori, whose property has been implicated in no crime, as it would for someone whose property was used in the commission of a crime. Thus, the City's reading of *Bennis* is extremely broad and should not be allowed to contaminate the otherwise clear, fair, and long-standing Takings jurisprudence that supports her right to just compensation from the City.

And, any suggestion that the just compensation requirement can be bypassed so long as the government effectuates the taking pursuant to its police power is spurious. In *Loretto*, the Supreme Court held that a law requiring physical occupation of private property was both "within the State's police power" as well as a physical taking that required compensation. *Loretto*, 458 U.S. at 425. The

Court was emphatic that the question of whether a law effects a physical taking is a "separate question" from whether the state has the police power to enact the law in the first place, and that an uncompensated taking is unconstitutional "without regard to the public interest that it might serve." *Id.* at 426. In short, whether the law was a function of the state's police power or not is a legal non-sequitur. *See Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003, 1020-1027 (1992); *Chicago B&Q Ry. Co. V. Illinois*, 200 U.S. 561, 593 (1906) (the Court stated that "if, in the execution of any power, no matter what it is, the government … finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner").

Accordingly, the City has effectuated an uncompensated taking on Lori in violation of her Fifth Amendment right.

IV. Conclusion

As such, amicus CRPA respectfully requests that the judgment of the district court as to Lori's Second Amendment, Due Process, and Takings Clause claims, be reversed.

Dated: March 6, 2018

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE WITH FRAP 29(a)(5)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure, rules 29(a)(5) and 32(a)(7)(B), because this brief contains 3,201 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: March 6, 2018

Michel & Associates, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2018, I electronically filed the foregoing using the courts' CM/ECF system which will automatically generate and send notification of such filing to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Dated: March 6, 2018

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