

NO. 17-17144

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
Northern District of California,
San Jose

**ANSWERING BRIEF OF CITY OF SAN JOSE,
SAN JOSE POLICE DEPARTMENT & OFFICER STEVE VALENTINE**

Appeal from the United States District
for the Northern District of California (San Jose)
D.C. No. 5:15-cv-03698-EJD

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I. INTRODUCTION

San Jose Police Department Duty Manual section governing confiscation of firearms from persons detained for psychiatric evaluation, challenged here under the Second, Fourth, Fifth, and Fourteenth Amendment as City of San Jose's policy, is constitutional. The City's removal of guns from the house where Plaintiff Lori Rodriguez's mentally disturbed husband had access to them did not violate Rodriguez's constitutional rights. Nor did refusing to return them to her, where the City followed a final court order issued after a full evidentiary hearing.

After Lori Rodriguez called 911, her husband Edward was detained for a psychiatric evaluation under California Welfare and Institutions Code section 5150. In connection with that detention San Jose Police Officer Steve Valentine confiscated twelve firearms, to which the husband had access. Rodriguez allowed the police to take them. The City filed a petition under California Welfare and Institutions Code section 8102 with the California superior court to have these guns forfeited if the court found that their return would likely endanger Rodriguez's husband or others. Rodriguez intervened in that petition and requested that the guns be returned to her. After a full evidentiary hearing, the superior court granted the City's petition and denied Rodriguez's request for return of the guns. She appealed and the court of appeal affirmed. She again asked

the City to return the guns and the City declined in light of the final state court decision.

Rodriguez then filed the present action. The district court sided with the City Defendants, finding no constitutional violations. The City requests this Court to affirm the lower court's decision because the guns were lawfully removed in light of the serious public safety concern if Rodriguez's husband had possession and control of the guns after his return from psychiatric detention. When they were confiscated, the guns were stored in a gun safe to which Rodriguez's husband had access. Rodriguez was able to present her full case to the superior court, advocating for the return of the guns to her, and promising not to give her husband access to the guns and change the combination lock to the gun safe. The superior court carefully considered her evidence and arguments. When Rodriguez again asked the City for return of the guns, the City followed the state court's final decision.

The district court's judgment in favor of the City Defendants should be affirmed.

II. STATEMENT OF JURISDICTION

Defendants are satisfied with Plaintiffs' statement of jurisdiction.

III. STATEMENT OF ISSUES

Whether the January 2013 confiscation of the twelve guns from the Rodriguez residence was lawful under the Second, Fourth, Fifth, and Fourteenth Amendments, where Rodriguez's husband had all of them in his possession and control, exhibited delusional aggressive behavior, mentioned school shootings and guns in his safe, Rodriguez seemed to be afraid of him, and he was detained for a psychiatric evaluation.

Whether the City's July 2015 refusal to return the twelve guns to Rodriguez was lawful under the Second, Fourth, Fifth, and Fourteenth Amendments, where the City followed the state court's final determination that returning the guns to Rodriguez would likely endanger her husband or others.

IV. STATEMENT OF THE CASE

A. In January 2013, Rodriguez's husband exhibited delusional aggressive behavior, mentioned school shootings and guns in his house, and Rodriguez appeared afraid of him.

At about 3 a.m. on January 24, 2013, San Jose Police Officer Steven Valentine responded to a call for service at the Rodriguez residence to investigate a domestic disturbance. (ER 56 (5:4-4), ER 57-58 (6:27-7:16), ER 64 (13:7-9) & ER 246 (31:2-18).) Rodriguez had called the police for a welfare check because

her husband had been having problems for the previous two weeks. (ER 105 (28:15-23).)

Officer Valentine was in charge of the scene. (ER 245 (28:11-24).) He had been advised that there were guns in the house. (ER 56 (5:12-14) & ER 57-58 (6:27-7:16).) Police had responded to that house at least twice in the previous six months for welfare checks and to look into the mental state of Rodriguez's husband. (ER 57 (6:18-21), ER 57-58 (6:27-7:16) & ER 62 (11:9-21).)

When Officer Valentine entered the house, he observed Rodriguez's husband acting delusional, rambling, speaking about the CIA and the army and people watching him. (ER 56 (5:7-11) & ER 57-58 (6:27-7:16).) He mentioned shooting up schools and talked about guns in his safe, that he had a safe full of guns. (ER 121-122 (44:4-45:3).) He tried to injure himself by pulling his thumb back. (ER 56 (5:20-21) & ER 57-58 (6:27-7:16).) He was a large man, weighing nearly 400 pounds, and had bizarre aggressive mannerisms. (*Id.*) Officer Valentine concluded that Rodriguez's husband suffered from a mental condition that made him a danger to himself and others. (ER 56 (5:15-18) & ER 57-58 (6:27-7:16).) Officer Valentine observed that Rodriguez was afraid of her husband. (ER 86.)

Officer Valentine consulted with the district sergeant who had also responded to the scene, and they concluded that a 5150 hold for Rodriguez's

husband was appropriate and that guns must be removed from the house. (ER 246-248 (31:14-33:24).)

Officer Valentine detained Rodriguez's husband under California Welfare and Institutions Code section 5150 and he was taken to Santa Clara Valley Medical Center for psychological evaluation. (ER 56 (5:17-18 & 22-23) & ER 57-58 (6:27-7:16).) Rodriguez's husband continued to break his restraints when he was secured on the gurney, so medical personnel asked for a police officer to ride in the ambulance. (ER 86-87.)

At Valley Medical Center, Rodriguez's husband was evaluated and determined to be a danger to himself; he was admitted under California Welfare and Institutions Code sections 5151 and 5152. (ER 57 (6:5-9) & ER 57-58 (6:27-7:16).) He was then transferred to another hospital and discharged about a week later. (ER 118 (70:1-12).)

B. The police removed all guns from the house as required by California Welfare and Institutions Code section 8102.

Officer Valentine and other officers remained in the house after Rodriguez's husband left. (ER 56 (5:23), ER 57-58 (6:27-7:16) & ER 122 (45:10-11).) Officer Valentine obtained verbal consent from Rodriguez to remove the guns and instructed other officers to stay with the safe while it was opened. (ER 122 (45:15-20) & ER 123 (46:10-11).) He informed Rodriguez of the laws regarding a 5150

hold and asked her consent to remove the guns; she agreed. (ER 123 (46:19-47:25) & ER 264 (60:10-15).) Officer Valentine informed her that she had a right to refuse. (ER 128 (63:20-23) & ER 397-398 (63:20-64:1).) She was cooperative. (ER 400 (68:3-7).)

The guns were in a locked gun safe. (ER 106-107 (40:24-41:4).) The safe was in the kitchen. (ER 111 (49:12-14).) In order to open the safe, a key and a code consisting of a combination of numbers were needed. (ER 385 (46:1-6).) One needed to insert the key and then apply the code. (ER 112 (50:11-15).) There were two keys to the safe; they were kept in a home office to which Rodriguez's husband had access. (ER 385-386 (46:12-47:9).) Both keys were placed in an envelope in a locked file cabinet. (ER 385 (46:16-18).) Rodriguez did not know if her husband had a key to that cabinet. (ER 385 (46:24-25).) The numbers for the combination lock were written down in Rodriguez's address book. (ER 110 (48:13-18).) The address book was kept in an unlocked desk in the bedroom. (ER 110-111 (49:23-49:4).) Rodriguez's husband had access to that address book. (ER 111 (49:9-11).)

Rodriguez told the officers that she had to find the key and the code. (ER 114 (54:2-5).) When she went to look for the key no officer accompanied her. (*Id.* (54:18-22).) Then she went to the bedroom to get the code from the address book; again no officer accompanied her. (ER 115 (55:3-7).) Despite trying two or three

times, she was unable to open the safe. (ER 114 (54:5-7) & ER 115 (55:8-11).) She gave the code to an officer to open the safe. (ER 116-117 (60:19-61:1).) She said, “I just didn’t know what combination of that written number was the combination.” (ER 117 (61:1-3).) The officer who opened the safe was able to figure out the number because she “gave him some kind of parameters—it could be this or this—and then he opened it.” (*Id.* (61:4-7).)

The officers did not engage in any coercive or intimidating behavior, speech or touching:

Q. . . . At any point did—and this is with respect to you, not with anybody else—did you at any point during this interaction with the officers after Edward had left, did anyone threaten you with arrest if you didn’t comply?

A. No.

Q. Did anybody tell you or threaten you that you were committing a crime if you didn’t comply?

A. No.

Q. Did any officer draw their firearm?

A. No.

Q. How about did any officers have their hands on their firearms like on the holster?

A. Not when dealing with me. I don’t know if when dealing with him. I don’t think so because there really wasn’t a need for it, but I wasn’t there so—

Q. We're focusing on you at this point.

A. Okay.

Q. Did any officer swear at you?

A. No.

Q. And I assume since they never told you you were committing a crime or put you under arrest, you were never put in handcuffs; is that correct?

A. Correct.

Q. Did any officer touch you in an aggressive manner?

A. No.

Q. Did any officer actually physically touched you?

A. No.

Q. Did any officer say to you that if you didn't comply, that they would get a search warrant in order to open up the safe?

A. No.

(ER 388-389 (61:14-62:22).)

Rodriguez never asked the officers to leave:

Q. At any point after Edward had left to when the guns were confiscated, did you ask the officers to leave?

A. No.

(ER 390 (64:6-9).)

The officer who helped her open the safe was polite:

Q. Now, this tall young Caucasian officer who opened up the gun safe, did he say anything to you?

A. Prior to opening the safe?

Q. Yes.

A. No.

Q. How about after opening the safe?

A. He made a couple of comments how nice the guns were.

Q. Okay.

A. But other than that, no conversation.

Oh, wait. I said, "I apologize for how bad the house looked." And I remember him saying, "This looks fine. We've seen much worse."

(ER 390 (64:6-22).)

Rodriguez brought cases for the guns while the officers were processing them for removal:

Q. When the gun safe was opened, did the young police officer, was he the officer responsible for actually taking the firearms, or were there other officers involved?

A. I know—I think it was him. I know it was him. And I think there was at least one other one. I don't know if there was more than that. I was in and out of the room a lot. My mother-in-law was in there. I figured as long as she was there, what's going to happen? It's police.

I was looking for cases. So I wasn't really in the room a lot of the time when they were taking them out and running the serial numbers and whatever else they were doing.

Q. When you say “cases,” what do you mean by that?

A. I was looking for cases for the guns because—

Q. Okay.

A. —I figured they were going to go away for what I thought was a couple of days. . . .

(ER 391 (65:4-22).)

Rodriguez identified one of the guns as hers and objected to its removal. (ER 400 (68:11-13).) Officer Valentine and Rodriguez discussed it but the gun could not stay in the house because Rodriguez’s husband would have access to it when he returned—he still lived there. (ER 400 (68:14-23) & ER 401-402 (69:19-70:2).) The 5150 hold could last only a few hours. (ER 401 (69:4-11).)

The officers removed twelve guns: eleven belonged to Rodriguez’s husband and one to Rodriguez. (ER 243 (16:2-23).) There were three revolvers, three shotguns, a handgun, a rifle, and four semi-automatic rifles. (ER 87.)

C. SJPD Duty Manual requires gun confiscation in 5150 cases.

The San Jose Police Department’s Duty Manual section L5705 provides guidance on booking firearms for safekeeping in mental health incidents. (ER 41-42.) When officers detain a person in a 5150 incident, they must ask if there are any guns on the premises. They are required to confiscate any guns owned by or in the possession or under the control of the detained person. (ER 41.) Officers must

take the guns into custody and book them in the San Jose Police Department's property room. (ER 42.)

D. State court litigation

1. In February 2013, the City petitioned the superior court for weapons disposition.

In February 2013, the City filed a petition in superior court under California Welfare and Institutions Code section 8102(c) for a determination whether returning the seized guns back into the Rodriguez home would likely result in endangering Rodriguez's husband or others. (ER 44-47.) The petition named Rodriguez's husband as the respondent. (*Id.*) The petition requested an order granting the petition and forfeiture of the guns if the court found danger; if the court found no danger, the San Jose Police Department would retain custody of the guns for no more than two years unless Rodriguez's husband obtained a court order allowing their return. (ER 47.)

Rodriguez's husband did not respond to the petition but she did as a "co-respondent," claiming ownership of one gun and community property ownership of the other guns. (ER 49 & 85.) She intervened in the lawsuit as a respondent. (ER 80.)

2. In April 2013, Rodriguez changed the code to the safe.

On April 26, 2013, while the City's petition was pending in superior court, Rodriguez changed the combination code to the gun safe lock. (ER 65-66 (14:26-15:27) & ER 170.)

3. In May 2013, Rodriguez obtained a notice of eligibility to own guns.

On May 8, 2013, the California Department of Justice, Bureau of Firearms, issued an informational notice to Rodriguez that she was eligible to possess and buy guns as of that date. (ER 172 & ER 66-67 (15:1-16:19).) That notice did not authorize the sale or transfer of any guns to her. (ER 172.)

4. In September 2013, after an evidentiary hearing, the superior court granted the City's petition.

The hearing on the City's petition took place in August 2013. (ER 52.) The court heard argument, testimony from Rodriguez, and allowed her to cross-examine Officer Valentine. (ER 55-77.) In her brief opposing the petition, Rodriguez argued that the court had "no power to interfere with [her] Second Amendment 'right to keep and bear arms,'" because she was not prohibited from having guns and because she had promised to take all steps required by California law to secure the guns in a gun safe. (ER 85.) She also raised those arguments at the hearing. (ER 73-75.) The court considered her Second Amendment arguments.

(*Id.*) The court understood that she could purchase another firearm and store it at home. (*Id.*)

The court granted the City's petition, holding that the return of the seized firearms would likely endanger Rodriguez's husband or others. (ER 75 & 80-81.) As part of the order, the City was not to dispose of the firearms until "final disposition or resolution of this matter." (ER 81.)

5. In January 2014, California Penal Code section 25135 became effective.

Effective January 1, 2014, California Legislature enacted Penal Code section 25135 that prohibits anyone 18 years old or older who owns, rents or occupies a dwelling, and who owns a gun, from keeping any such gun at that residence, if he or she knows or has a reason to know that another person living there is prohibited by state or federal law from possessing, owning or buying guns. (Cal. Penal Code §25135(a).) That prohibition does not apply if one of the following occurs: the gun is kept in a locked container, disabled by a gun safety device, kept in a locked gun safe, in a locked trunk, locked with a specified locking device, or "carried on the person or within close enough proximity thereto that the individual can readily retrieve and use the firearm as if carried on the person." (*Id.*) A violation of that section is a misdemeanor. (Cal. Penal Code §25135(c).)

6. In April 2015, the order on the petition was affirmed on appeal.

Rodriguez appealed the superior court's order to California Court of Appeal for the Sixth District, arguing that the order was not supported by substantial evidence of danger and that it violated her Second Amendment right to keep and bear arms. (ER 84.) In April 2015, the court of appeal affirmed the order on the grounds that it was supported by substantial evidence and that Rodriguez did not show that it violated her Second Amendment rights. (ER 84.) The court stated four reasons for its decision on the Second Amendment issue. (ER 94-99.)

First, Rodriguez acknowledged that the order does not bar her from obtaining new guns and that under California Welfare and Institutions Code section 8101, she may not allow her husband access to any new guns she may obtain. (ER 94-95.)

Second, Rodriguez argued that she had a Second Amendment right to the return of the confiscated guns for home protection. (ER 95.) She generally relied on the decisions in *District of Columbia v. Heller* (2008) 554 U.S. 570, and *McDonald v. City of Chicago* (2010) 561 U.S. 742. (ER 95.) The court of appeal pointed out that "Lori has not provided any legal authority for the proposition that the spouse of a person whose firearms were confiscated under section 8102 has a Second Amendment right to the return of those confiscated firearms for home protection." (*Id.*) The Sixth District noted that *Heller* and *McDonald* "did not state

that the Second Amendment right to keep and bear arms extends to keeping and bearing either any particular firearms or firearms that have been confiscated from a mentally ill person. Moreover, the *Heller* and *McDonald* decisions may be read to the contrary.” (*Id.*)

Third, the superior court’s order did not require forfeiture or destruction of the guns. Both the trial court and the City suggested that “there were other viable options for disposition of the firearms, such as sale or storage outside the home.” (ER 96.)

Fourth, the court found that “Lori has not provided any authority for the proposition that trial court proceedings on a section 8102 petition preclude a person who claims title to the confiscated firearms from seeking their return under Penal Code section 33850 et seq.” (ER 98.) “[T]he 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.” (ER 98-99.)¹

¹ Penal Code §§33850 *et seq.* specify the procedure for returning firearms in the custody of a court or law enforcement. For example, they require the claimant to apply to the California Department of Justice (“DOJ”) for a determination whether he or she is eligible to possess a gun (Cal. Penal Code §33850), and require the DOJ to conduct an eligibility check and issue a written determination of eligibility. (Cal. Penal Code §33865.) No law enforcement agency or court may return a gun to anyone unless the person presents a written determination of eligibility by the DOJ, and unless the agency or court verify that the gun is not listed as stolen and is recorded in the Automated Firearms System in the name of the claimant. (Cal. Penal Code §33855(a) & (b).)

- 7. In May 2015, Rodriguez changed the gun ownership record into her name.**

After the appellate decision, Rodriguez changed the ownership record of the guns into her name. (ER 178-188.)

- 8. In June 2015, Rodriguez obtained Law Enforcement Gun Release Clearances from the California Department of Justice.**

On June 1, 2015, the California Department of Justice issued to Rodriguez letters valid for 30 days (ER 194-217) that she was “eligible under state and federal law to possess firearms pursuant to Penal Code section 33850.” (ER 194.)

- 9. In June 2015, Rodriguez requested the City to return the guns.**

On or about June 11, 2015, Rodriguez asked the City to return the guns removed from her house. (ER 21 & ER 30.) The City denied the request in July 2015. (*Id.*)

E. Federal court litigation

- 1. In August 2015, Plaintiffs filed the underlying complaint.**

Rodriguez, Second Amendment Foundation, Inc., and the Calguns Foundation, Inc. (collectively “Rodriguez” or “Plaintiffs”), brought a complaint against the City, San Jose Police Department and Officer Valentine (collectively “City”). (ER 15-24.) The complaint asserted claims for violation of the Second,

Fourth, Fifth, and Fourteenth Amendments of the United States Constitution, and a state claim under California Penal Code section 33800 *et seq.*

The pleading recounted the January 2013 police response to Rodriguez's 911 call, her husband's 5150 hold and confiscation of the guns from the safe at the house. (ER 18.) The complaint claimed the guns were seized wrongfully either on Officer Valentine's own initiative or under the City's policies, practices and procedures. (*Id.*) It detailed the superior court hearing on the City's petition for disposition of weapons, the order granting the petition, Rodriguez's appeal, and the decision on appeal. (ER 19-20.) It stated that after the appellate decision, Rodriguez had the guns transferred into her name and obtained release authorizations from the California Department of Justice. (ER 20.) The complaint alleged that in June 2015, Rodriguez tendered the authorizations to the City and requested release of the guns, and that in July 2015 the City denied the request. (ER 21.) The complaint claimed that seizure, retention and failure to return the guns under "state law administrative procedures for return of firearms" deprived Rodriguez of rights under the Second, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. (*Id.*)

The complaint asserted that Plaintiff Second Amendment Foundation sued on behalf of itself and its members, and that Plaintiff Calguns Foundation sued on behalf of itself and its supporters. (ER 16.) The complaint was silent on whether

any rights of those Plaintiffs had been violated, but it sought injunctive relief on their behalf “to prevent future violations of their members’ constitutional right[s]” under the Second, Fourth, Fifth, and Fourteenth Amendments. (ER 21-24.)

The complaint also alleged that even though Rodriguez tendered to the City the release authorizations from the Department of Justice, the City “refus[ed] to comply with the instructions set forth in the appellate court opinion.” (ER 23-24.)

Plaintiffs sought injunctive relief on that claim. (*Id.*)

Plaintiffs prayed for return of the guns, for damages to Rodriguez, and for injunctive relief to prevent future violations. (ER 24.)

The City asserted affirmative defenses of qualified immunity (ER 32) among other defenses.

2. As of May 2016, Rodriguez kept the safe key in the same cabinet as three years earlier but memorized the code.

On May 23, 2016, Rodriguez testified at her deposition that the gun safe still required a key and a combination of numbers for access. (ER 102, ER 116 (60:4-18).) She still kept the key in the same filing cabinet. (ER 116 (60:8-13).) She did not have the combination code written down anywhere. (*Id.* (60:14-18).)

3. Cross-motions for summary judgment

The City sought a motion for summary judgment on the grounds that (1) Plaintiffs Second Amendment Foundation and Calguns Foundation lacked Article

III standing, (2) Plaintiffs failed to state a claim under the Second and Fifth Amendment and under state law, (3) Plaintiffs' constitutional rights were not violated, (4) the City does not have a policy, practice, or custom that would violate Plaintiffs' constitutional rights, (5) Officer Valentine was entitled to qualified immunity, and (6) the state claim should not be decided in federal court and had already been decided in state court. (ER 134.)

Plaintiffs also sought a motion for summary judgment, arguing that the City, the superior court judge, and the state court of appeal were afraid to release the guns to Rodriguez because of her husband's mental issues. (Docket #35.)

4. In September 2017, the district court granted the City's motion.

The district court granted the City Defendants' motion and denied Plaintiffs' motion for summary judgment as follows. (ER 8-13.)

The court found that even though the City decided not to return the confiscated guns, Rodriguez's Second Amendment right was not violated—the Second Amendment does not protect the right to possess specific guns, and Rodriguez concedes she is free to own and possess other guns she lawfully acquires. (*Id.*) The court quoted with approval the opinion of the California Court of Appeal in this case that “the Supreme Court decisions in Heller and McDonald did not state that the Second Amendment right to keep and bear arms extends to

keeping and bearing either any particular firearms or firearms that have been confiscated from a mentally ill person.” (ER 11.) (underlining in the order)

As to the Fourth Amendment claim, the district court found that the confiscation of the guns was “entirely reasonable” because the circumstances—the detention of Rodriguez’s husband for mental health reasons—were exactly what California Welfare and Institutions Code section 8102 was designed to address, and because it is not unreasonable for a police officer to follow the procedure required by that statute. (*Id.*) The court determined that the City’s continued retention of the guns was also reasonable because Rodriguez received a full evidentiary hearing on that issue in superior court and the court’s decision received a full review and opinion on appeal. (ER 11-12.)

The trial court concluded that the City’s confiscation and retention of the guns did not constitute an improper taking under the Fifth Amendment because the City lawfully exercised its forfeiture authority under California Welfare and Institutions Code section 8102. (ER 12.)

The court denied Rodriguez’s claim for violation of the Fourteenth Amendment—an alleged violation of procedural due process based on the City’s refusal to return the guns after the decision of the state court of appeal. (*Id.*) The court found that there was no such violation because, contrary to Rodriguez’s

argument, the court of appeal did not order the City to return the guns to her. (ER 12-13.)

Finally, the court ruled that Rodriguez's claim under California Penal Code sections 33800 *et seq.* failed because the statute does not authorize an independent cause of action. (ER 13.)

V. SUMMARY OF THE ARGUMENT

The City Defendants did not violate Rodriguez's constitutional rights under the Second, Fourth, Fifth or Fourteenth Amendments. The City lawfully removed the guns from the Rodriguez home in January 2013 as required by California Welfare and Institutions Code section 8102. Section 8102 was upheld against a Second Amendment challenge by a California court of appeal after the *Heller* and *McDonald* Supreme Court decisions. The written policy that Rodriguez challenges, San Jose Police Department Duty Manual section L5705, is analogous to section 8102. Rodriguez does not challenge constitutionality of section 8102, and she agrees that section L5705 mirrors section 8102. Like section 8102, the policy is constitutional.

In refusing to return the guns to Rodriguez in July 2015, the City followed the final adjudication of the state court that found that returning the guns to her under the circumstances would likely endanger her husband or others. Rodriguez's

Second Amendment rights were not violated because she is still able to obtain and keep guns at home, just not the confiscated ones.

The confiscation and refusal to return the guns to Rodriguez were reasonable under the Fourth Amendment. There was probable cause to remove the twelve firearms from the control of her mentally disturbed husband, who exhibited delusional aggressive behavior, mentioned school shootings, and referred to guns in his safe. Additionally, Rodriguez appeared afraid of him. The City's refusal to return the guns to Rodriguez was reasonable because the City followed superior court's affirmed determination that returning the guns to Rodriguez would likely endanger her husband or others.

The Fifth Amendment does not apply here because the guns were seized lawfully and were not taken for public use. The Fourteenth Amendment was not violated because Rodriguez had a full evidentiary hearing on disposition of the guns in superior court. The Sixth District did not order releasing the guns to Rodriguez because it in fact upheld the superior court's decision to refuse their return to her. California Penal Code sections 33800 *et seq.* do not displace the process for firearm seizure and return under California Welfare and Institutions Code section 8102.

Officer Valentine is entitled to qualified immunity because under the circumstances there was no clearly established violation of the Second, Fourth, or Fifth Amendment.

VI. ARGUMENT

A. Standard of review

A district court's decision to grant summary judgment is reviewed de novo. (*Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017).) Appellate review is governed by the standard used by the trial court under Federal Rule of Civil Procedure, rule 56(c). (*Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003).) Whether a police officer is entitled to qualified immunity is a legal question appropriate for resolution by summary judgment. (*Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-72 (9th Cir. 1993).)

“A trial court can only consider admissible evidence in ruling on a motion for summary judgment.” (*Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002).) Affidavits and declarations in connection with a motion for summary judgment are only admissible if the affiant or declarant would be permitted to testify as to the content of the affidavit as trial. (*See Hughes v. United States*, 953 F.2d 531, 543 (9th Cir. 1992).) Testimony that constitutes a legal conclusion, and legal implications of evidence, are inadmissible under Federal Rules of Evidence section 704. (*See United States v. Boulware*, 558 F.3d 971, 975 (9th Cir. 2009).)

Rodriguez does not argue on appeal that summary judgment should have been denied based on a triable issue of fact.

Summary judgment may be affirmed on any ground supported by the record. (*Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017).)

B. The City did not violate Rodriguez’s Second Amendment rights.

1. Removal of the guns in January 2013 was lawful.

Rodriguez argues that removal of the guns—and particularly the one gun that belonged to her—was unconstitutional because under *District of Columbia v. Heller*, 554 U.S. 570 (2008), she cannot lose her Second Amendment rights based on her husband’s status as a prohibited person. (AOB 14-15.)

Contrary to Rodriguez’s argument, the Second Amendment was not breached by removing the guns from her husband’s control in January 2013. Rodriguez has always acknowledged that seizure of these guns did not preclude her from obtaining new ones. (ER 70-71 & 85.) She effectively conceded in district court that her core right under the Second Amendment was intact because she did not dispute, and indeed acknowledged, that she could own, possess, or acquire firearms. (ER 410.)

In *Heller*, the Supreme Court recognized that, at its core, the Second Amendment protects the right of individuals to keep and bear arms for self-defense. (*Id.* at 636.) The Court reiterated this core right when it incorporated the

Second Amendment to the states in *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

Rodriguez argues that *Heller* “completely and utterly rejected any notion” that the Second Amendment protects a “collective right.” (AOB 14.) *Heller* found that the right to keep and bear arms does not depend on one’s service in a militia. (*Id.* at 592-95 & 622.) But *Heller* also explained that a wide range of gun control laws do not violate the Second Amendment: “Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” (*Heller* at 626.)

Heller declared that “nothing in our opinion should be taken to cast doubt” on a wide range of gun control laws, which the Court said remain “presumptively lawful” under that decision. (*Id.* at 626-27 & 627 n. 26.) *Heller* provided a list of examples of firearm prohibitions that the remain undisturbed, such as “possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” (*Id.*) The Court repeated these same limitations in *McDonald*. (*McDonald* at 777.)

This Court emphasized the limited scope of the Second Amendment when it held that the Second Amendment did not protect the right of a member of the general public to a carry concealed firearm in public. (*Peruta v. County of San Diego*, 824 F.3d 919, 948 (9th Cir. 2016).)

Rodriguez claims that the City is liable for violating Rodriguez's rights because Officer Valentine was enforcing a policy of the City. (AOB 16.) Although she does not spell out the alleged policy, from her citations to the record it appears that she claims the policy is San Jose Police Department Duty Manual section L5705 entitled "Booking firearms for safekeeping – mental health incidents." (See AOB 16 & ER 41-42.) San Jose Police Department's Duty Manual section L5705 mirrors section 8102 (ER 38 & 41-42), which Rodriguez does not dispute.

Section 8102 provides in part as follows:

Whenever a person, who has been detained or apprehended for examination of his or her mental condition or who is a person described in Section 8100 or 8103, is found to own, **have in his or her possession or under his or her control**, any firearm whatsoever, or any other deadly weapon, the firearm or other deadly weapon shall be confiscated by any law enforcement agency or peace officer, who shall retain custody of the firearm or other deadly weapon.

(Cal. Welf. & Inst. Code §8102(a).) (emphasis added) Section 8102, in addition to requiring confiscation of firearms under circumstances such as here, also provides for a court hearing to determine whether return of the firearms is likely to be

dangerous. (Cal. Welf. & Inst. Code §8102(c).) Rodriguez does not question constitutionality of section 8102, nor could she.

The constitutionality of section 8102 under the Second Amendment was upheld in *City of San Diego v. Boggess*, 216 Cal. App. 4th 1494 (2013). The *Boggess* court decided a facial constitutional challenge to section 8102 in light of *Heller* and *McDonald*. (*Id.* at 1497-98.) *Boggess* held that “the state may ensure that firearms are not in the hands of someone who may use them dangerously. Section 8102 has procedural devices and burdens set in place to remedy constitutional deficiencies and *Heller* and *McDonald* do not alter its validity.” (*Id.* at 1506.) (citations omitted)

The *Boggess* court recognized that section 8102 does not infringe on the right to keep and bear arms because the confiscation and hearing process only implicate the specific guns confiscated by law enforcement and not the right to have guns generally. (*Id.* at 1503.) *Boggess* also found that section 8102 is a regulatory measure within the traditional limitations on guns that *Heller* and *McDonald* did not intend to disturb. (*Id.* at 1505.)

The constitutionality of section 8102 was also upheld against a substantive due process challenge under the state and federal constitutions in *Rupf v. Yan*, 85 C.A.4th 411 (2000). (*Id.* at 420-23.) The *Rupf* court stated: “Keeping a firearm away from a mentally unstable person is a reasonable exercise of the police power.

It is not unreasonable to conclude there is a significant risk that a mentally unstable gun owner will harm himself or others with the weapon.” (*Id.* at 423.)

“Decisions by state intermediate appellate courts are data which are ‘not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.’” (*Damidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986).) There is no indication that the California Supreme Court would hold differently on constitutional firmness of section 8102.

In accordance with section 8102, Officer Valentine determined that Rodriguez’s husband lived at the house, that the guns in the safe (including the gun registered to Rodriguez) were in the husband’s possession and control, and that they would potentially be again when he returned home after the 5150 hold. (*See* Part IV.A., *supra.*) Rodriguez acknowledged that her husband had access to the guns at the time the police seized them. (*See* Part IV.B, *supra.*)

The City petitioned superior court under section 8102 for a decision whether the seized guns should be returned or forfeited. (ER 84-85.) Because Rodriguez intervened, she was able to fully participate in the case. (ER 85-88.) She offered legal arguments and evidence. (*Id.*) The court declined to return the guns to her; the court of appeal affirmed. (ER 88-89 & 84.) Only the seized guns were affected,

however, not her right to have guns generally—she is not prohibited from possessing, owning, or acquiring guns. (*See Boggess*, 216 Cal. App. 4th at 1503.)

In sum, Rodriguez challenges the City’s policy stated in SJPD’s Duty Manual section L5705. That policy mirrors California Welfare and Institutions Code section 8102, upheld as constitutional under the Second Amendment, post-*Heller* and *McDonald*. Therefore, the policy also comports with the Second Amendment. Rodriguez appears to agree that section 8102 does not violate the Second Amendment. She does not have a Second Amendment claim.

2. The City’s 2015 refusal to return the confiscated guns to Rodriguez was lawful.

Rodriguez contends that the City should have returned the guns to her after the appellate court’s decision because (1) it is uncontroverted that she can obtain new guns and keep them at home where she lives with her husband, (2) she promised not to make them available to him, and (3) the state court of appeal allegedly instructed the City to return the guns to her. (AOB 17-19.)

The fact that she has a right to obtain other guns and keep them where she lives with her husband does not mean that her Second Amendment right was violated when the City did not return the guns the police officer had confiscated. As a result of the psychiatric hold, Rodriguez’s husband automatically became a “prohibited person” under Section 8103, meaning that he could not “own, possess,

control, receive, or purchase, or attempt to own, possess, control, receive, or purchase any firearm for a period of five years” or until lifted by a court. (Cal. Welf. & Inst. Code §8103(f)(1).) When Rodriguez requested the City to return the guns to that household in June 2015, her husband was still a “prohibited person.” (*Id.* & ER 64 & 415).

Moreover, the City’s refusal to return the guns to Rodriguez in July 2015 was in accordance with the superior court’s finding that it was not safe to return the guns to her because that could endanger her husband or others. (*See* ER 84.) The state courts’ decision became final in May 2015. (*See* ER 83 & Cal. Rules of Court, rule 8.264(b)(1) (appellate decision in civil case is final 30 days after filing).) The City’s refusal to return the guns to Rodriguez complied with that decision.

Rodriguez seems to argue that the guns should have been returned because it was her husband, and not she, who had a mental illness, and because no one argues that she is incapable of safely handling weapons. (*See* AOB 21-23.) The superior court proceeding was specifically contoured to the precise circumstances where Rodriguez was not the person taken into section 5150 custody but where she is married to and lives with such a person. (ER 85-89.) Rodriguez made those arguments to the superior court. (ER 85-88.) The superior court was tasked with deciding whether the return of the guns under those circumstances was

appropriate. (Cal. Welf. & Inst. Code §8102(c).) It considered all these facts. (ER 85-89.) Her promise not to give the guns to her husband did not persuade the superior court. (ER 88-89.) After careful consideration, the court determined that it would be dangerous to return the confiscated guns to her. (*Id.*) The court of appeal found substantial evidence to support that determination. (ER 84.)

Rodriguez misinterprets the appellate opinion. Contrary to her argument, that decision did not direct the City to release the guns to her. (ER 96-99.) It states that “we 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.” (ER 98-99.) It is not an order to the City to return the guns to her. Had the court of appeal intended to order the return of the guns to Rodriguez, it would have done so. Instead, it affirmed the superior court’s refusal to return the guns to her. (ER 84 & 99.)

Rodriguez mentions various state gun laws without explaining how they support her position: California Welfare and Institutions Code section 8101 that prohibits giving a gun to someone with mental health problems; California Penal Code sections 30 and 31 that defines parties to crime generally; and California Penal Code section 25135, effective since 2014, that requires a gun owner to properly store guns when he or she lives with someone with mental health problems. (AOB 17-18.) Section 8101 existed when the superior court hearing

occurred. (Cal. Welf. & Inst. Code §8101 (current ver. operative Oct. 1, 2011).) Rodriguez testified that she intended to prevent her husband's access to those guns. (ER 65-68.) The superior court was unpersuaded. (ER 75.)

In California Penal Code section 25135 the Legislature presumably concluded that it is not unsafe for guns to be present in a household where a prohibited person resides. (Cal. Penal Code §25135(a)(3).) But section 25135 did not exist in January 2013 when the guns were removed, or in September 2013 when the superior court issued its order. (Cal. Penal Code §25135 (effective Jan. 1, 2014).) And Rodriguez did not bring up that statute in her federal case. Additionally, that statute does not affect this case also because the superior court found that returning the weapons to Rodriguez would likely endanger her husband or others despite Rodriguez's stated intent to keep the weapons locked and away from her husband. The superior court concluded that under the circumstances of this case it would not be safe for guns to be present in that household, and the court of appeal affirmed.

Rodriguez also cites *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), and *Panzella v. Sposato*, 863 F.3d 210 (2nd Cir. 2017), to argue that the failure to return the guns amounts to an improper forfeiture. (AOB 19-22.) Neither case applies here.

In *Nelson* two people received criminal convictions and were ordered to pay court costs, fees and restitution. (*Nelson*, 137 S. Ct. at 1253.) When their convictions were reversed, they sought a refund. (*Id.*) Colorado’s procedure for obtaining such refunds required the parties to establish by clear and convincing evidence actual innocence of the crimes. (*Id.* at 1254.) The *Nelson* Court determined that such procedure did not comport with due process because the statutory process improperly saddled petitioners with the burden of establishing actual innocence. (*Id.* at 1256-58.) Because the two were convicted invalidly, they were presumed innocent. (*Id.* at 1256.) The *Nelson* Court stated that “to comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated.” (*Id.* at 1258.)

Rodriguez incorrectly argues that *Nelson* “directed all courts” to use the *Mathews v. Eldridge* test. (AOB 19.) *Nelson* noted that the competing test, advocated by Colorado, under *Medina v. California*, is appropriate when “assessing the validity of state procedural rules that are part of the criminal process.” (*Nelson*, 137 S. Ct. at 1255.) (internal quotation marks omitted) *Nelson* decided that the *Mathews* due process analysis was appropriate in the case before it “[b]ecause no further criminal process is implicated.” (*Nelson*, 137 S. Ct. at

1255.) Unlike *Nelson*, the present case does not involve a refund of money in an invalidated conviction, nor does it involve any criminal process.

Nelson relied on the well-known rule that government may not take property without due process and the process due depends on the specific circumstances relating to the deprivation of that property. (*See id.* at 1255-56.) Here, California Welfare and Institutions Code section 8102 provides for a court process to determine whether guns should be returned to someone taken into custody under section 5150. (Cal. Welf. & Inst. Code §8102(c); *see also* Cal. Welf. & Inst. Code §8103(f)(1).)

The City petitioned superior court under section 8102 for a decision whether the guns could be returned to Rodriguez's husband. (ER 44-47.) Rodriguez intervened and took full advantage of the court process. (ER 49-77.) She received a prompt post-deprivation hearing before a neutral decision-maker. (*See id.*) It is well-established that section 8102 comports with due process because it requires the government to initiate court proceedings and bear the burden of establishing that it would be dangerous to return the confiscated gun. (*Rupf*, 85 Cal. App. 4th at 419-20.) Rodriguez as the person seeking return of the guns thus received sufficient due process in the proceedings, including an option to obtain money for the guns. (ER 70.) *Nelson* does not support her claims.

And *Panzella* does not support Rodriguez's Second Amendment claim because it is not a Second Amendment case. The district court's order was not final so the court of appeal found that it lacked jurisdiction to review claims other than a due process claim on which the district court granted an injunction. (*Panzella*, 863 F.3d at 216-17.) The *Panzella* court declined to review the Second Amendment claim. (*Id.*) Rodriguez misconstrues the import of the safety factor analysis in *Panzella*. (AOB 21-22.) It was relevant to the determination whether the claimant received due process rather than to any Second Amendment analysis. (*Panzella*, 863 F.3d at 219.)

Panzella and the present case are different. In *Panzella*, the county confiscated guns without any authority and refused to return them even though the court order did not require the claimant to surrender guns. (*Id.* at 212 & 214.) There was no adequate mechanism for seeking their return. (*Id.* at 217-19.) Here, on the other hand, section 8102 authorizes confiscation of guns in this specific context and provides an easy and inexpensive court process initiated by the government, with the government bearing the burden of establishing a reason for not returning the guns. (Cal. Welf. & Inst. Code §8102.) The process involved an evaluation of the danger of returning the guns to the household where the spouse of the claimant experienced a mental situation requiring the police to take him into custody for a psychological evaluation. (ER 44-77.)

Panzella demonstrates that Rodriguez received ample due process in the superior court proceedings initiated by the City. The procedure under section 8102 satisfied due process because it required the City to bear the burden of establishing that it would be dangerous to return the confiscated guns to Rodriguez. (*See Rupp*, 85 Cal. App. 4th at 419-20.)

Rodriguez points to the part of *Panzella* that emphasizes that the claimant was not otherwise prohibited from purchasing weapons. (AOB 22.) The Second Circuit stated that because the claimant could still buy guns, the county could not rely on any safety interest. (*Panzella*, 863 F.3d at 219.) That statement was made in the discussion of the three *Matthews* factors to determine whether the hearing process demanded by the county satisfied due process. (*Id.* at 218-19.)

Government's interest is one factor in determining whether the process afforded is fair given the nature of the property interest and the risk of erroneous deprivation. (*Id.*) *Panzella* did not consider the claimant's Second Amendment rights, so the statement does not support Rodriguez's argument.

The City did not violate the Second Amendment and there are no grounds for injunctive relief.

3. Arguments of amicus Cal Rifle are without merit.

According to amicus California Rifle and Pistol Association ("Cal Rifle"), because the Second Amendment addresses confiscation of guns, the district court

erred when it found that the Second Amendment right does not extend to any particular gun. (Cal Rifle's brief at 10.) Relying on *Heller*, Cal Rifle claims that the Second Amendment includes the right to the return of seized guns and extends to specific lawfully owned guns. (*Id.* at 10-12.)

Cal Rifle appears to claim that the City violated Rodriguez's Second Amendment rights by refusing to return the guns to her. (Cal Rifle's brief at 9-15.) The arguments of Cal Rifle ignore the context of this case. Like Rodriguez, Cal Rifle disregards the fact that it was the superior court in the first place, affirmed by the state court of appeal, who decided that the guns should not be returned to her. (ER 75 & 84.)

Cal Rifle also implies that the seizure of the guns was improper, arguing that "[i]mplicit in the right to bear arms is the right to have seized arms returned if the seizure is not warranted." (Cal Rifle's brief at 11; *see also id.* at 12.) Cal Rifle does not explain, however, why the seizure in this case was allegedly "not warranted." Cal Rifle ignores the fact that California Welfare and Institutions Code section 8102(a) required seizure of the guns from the Rodriguez home when her husband was taken into custody for a psychiatric evaluation. (Cal. Welf. & Inst. Code §8102(a).)

Cal Rifle also attempts to argue that because government may not seize guns without a good reason, it must return them, so that must mean that the

Second Amendment protects the right to specific improperly seized guns. (Cal Rifle's brief at 11-12.) Cal Rifle presents no authority for that conclusion. And that reasoning does not apply here because the guns were removed under section 8102, so the removal was not unwarranted. Lawful seizure and retention of guns does not violate the Second Amendment.

4. According to other circuit courts, there is no right to specific firearms under the Second Amendment.

Cal Rifle essentially asserts a right to keep and bear a specific firearm. Although this Circuit has not yet addressed this issue, post-*Heller* decisions in other circuits hold that the Second Amendment does not protect the right to have a particular gun. Those decisions are summarized below.

a. *Walters v. Wolf*

In *Walters v. Wolf*, 660 F.3d 307 (8th Cir. 2011), the plaintiff's car was stopped for a license plate violation. (*Id.* at 309.) When a records check revealed an outstanding warrant against him, the police officer asked whether he had any weapons in the car. (*Id.*) The plaintiff had a loaded gun and ammunition in the car's center console. (*Id.*) The plaintiff was arrested and the gun was seized. (*Id.*) He had bought the gun legally, it was properly registered to him, and he held a valid permit to conceal and carry it. (*Id.*) When criminal charges against him were

dismissed he applied for return of the gun and ammunition. (*Id.*) The city refused to return them without a court order (*Id.* at 309-10.)

The plaintiff sued under section 1983 for violation of due process and the Second Amendment. (*Id.* at 310.) The district court ruled that “*Heller* and *McDonald* did not establish the right to possess a specific firearm that [Walters] asserts here.” (*Id.* at 311.) The district court decided that in order to establish a Second Amendment violation, the plaintiff must “do more than show that the City kept him from possessing one particular firearm,” and must “show that the City kept him from acquiring any other legal firearm.” (*Id.* at 316.)

The *Walters* Eighth Circuit Court of Appeal reversed the case on procedural due process grounds but affirmed grant of summary judgment in favor of the city on the Second Amendment claim. (*Id.* at 318.) The *Walters* court decided that the city’s retention of a lawfully seized gun “did not prohibit Walters from retaining or acquiring other firearms.” (*Id.* at 318.)

b. *Sutterfield v. City of Milwaukee*

In *Sutterfield v. City of Milwaukee*, 751 F.3d 542 (7th Cir. 2014), police officers forcibly entered the plaintiff’s house to detain her for mental health evaluation after a 911 call from her psychiatrist that the plaintiff expressed an intent to kill herself with a gun. (*Id.* at 545.) The police seized the plaintiff’s handgun, gun licenses from other jurisdictions, and a BB gun made to realistically

resemble a Glock handgun. (*Id.* at 547.) The plaintiff argued that seizure of the gun violated her Second Amendment rights because *Heller* and *McDonald* recognize her right to have a gun at home for self-defense. (*Id.* at 571.)

The *Sutterfield* Seventh Circuit Court of Appeal noted: “Whether and to what extent the Second Amendment protects an individual’s right to possess a particular gun (and limits the power of the police to seize it absent probable cause to believe it was involved in a crime) is an issue that is just beginning to receive judicial attention.” (*Id.* at 571.) The court declined to address the merits of the plaintiff’s Second Amendment claim, explaining that the plaintiff’s argument as to “the reach and application of the Second Amendment in the law enforcement and community caretaking context” was insufficiently developed for the court to address this complex issue. (*Id.* at 572.)

This issue is a sensitive one, as it implicates not only the individual’s right to possess a firearm, but the ability of the police to take appropriate action when they are confronted with **a firearm that** may or may not be lawfully possessed, and which, **irrespective of the owner’s right to possess the firearm, may pose a danger to the owner or others.**

(*Id.*) (emphasis added) The *Sutterfield* court decline to address the merits of that argument also because the city had a procedure for citizens to seek return of a gun seized by the city, that the plaintiff used that procedure and did not contest its adequacy on appeal. (*Id.*)

c. *Rodgers v. Knight*

In *Rodgers v. Knight*, 781 F.3d 932 (8th Cir. 2015), after the plaintiff's arrest on a warrant and search of his residence, the police seized guns belonging to the plaintiff and his father as evidence relating to the crime of unlawful possession of a weapon. (*Id.* at 938.) After the criminal charges were dismissed, the police department returned the seized guns. (*Id.* at 938-39.) The plaintiffs alleged various constitutional violations, among them Second Amendment. (*Id.* at 938.) The Eighth Circuit Court of Appeal stated that “[l]awful seizure and retention of firearms . . . does not violate the Second Amendment. Indeed, this court has held that even the the *unlawful* retention of specific firearms does not violate the Second Amendment, because the seizure of one firearm does not prohibit the owner from retaining or acquiring other firearms.” (*Id.* at 941-42 (citing *Walters*, 660 F.3d at 317-18.)

5. Under this Court's two-part test, there was no Second Amendment violation.

Both amici for Rodriguez apply this Court's two-step analysis set forth in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), and *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), to claim that the City violated the Second Amendment. (Cal Rifle's brief at 12-15; & brief of amicus

Millennial Policy Center (“Millennial”) at 3-33.) Their analysis and conclusions are erroneous. There was no Second Amendment violation here.

This Court most recently articulated that test in *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017), explaining that “[w]e first ask ‘whether the challenged law burdens conduct protected by the Second Amendment,’ and, if so, we then determine the ‘appropriate level of scrutiny.’” (*Id.* at 682.) (citation omitted) “If we conclude that the ordinance imposes no ‘burden on conduct falling within the scope of the Second Amendment’s guarantee . . . our inquiry is complete,’” as a law that ‘burdens conduct that falls outside the Second Amendment’s scope, . . . passes constitutional muster.” (*Id.*) (citations omitted)

a. The City’s confiscation of the guns and decision not to return them did not violate Rodriguez’s Second Amendment rights.

“At the first step of the inquiry, ‘determining the scope of the Second Amendment’s protections requires a textual and historical analysis of the amendment.’” (*Id.*) (citations omitted) In the present case, that first step is satisfied by the *Heller* language that “longstanding prohibitions on the possession of firearms by . . . the mentally ill” are “presumptively lawful regulatory measures.” (*Heller*, 554 U.S. at 627 n.26.) Even though Rodriguez was not mentally ill herself, the guns in the Rodriguez household were subject to confiscation under

section 8102 because her husband was. While section 8102 was not directed at Rodriguez, it affected her indirectly.

Analysis of laws that directly affect plaintiffs, such as prospective gun store operators in *Teixeira*, or a prospective shooting range operator in *Ezell v. City of Chicago* (“*Ezell II*”), 846 F.3d 888 (7th Cir. 2017), is helpful here. In those cases, the courts considered not only the Second Amendment and other rights of the directly affected plaintiffs, but also those of others who were affected indirectly, such as their potential customers. (*Teixeira*, 873 F.3d at 678.)

In *Teixeira*, plaintiffs who wished to open a gun store challenged a county zoning ordinance. (*Id.* at 673.) The county denied their request for a conditional use permit because they proposed to open the shop in a prohibited zone. (*Id.*) The county’s zoning ordinance directly addressed plaintiffs’ ability to sell guns, but also, by extension, impacted the ability of third persons to buy guns from them. This Court held that plaintiffs failed to state a claim that the zoning ordinance impedes county residents from acquiring guns. (*Id.* at 678.) The complaint in *Teixeira* did not adequately allege that county’s residents “cannot purchase firearms within the County as a whole, or within the unincorporated areas of the County in particular.” (*Id.*) The *Teixeira* Court found that the complaint’s exhibits showed that the county’s residents “may freely purchase firearms within the County.” (*Id.* at 679.) “In sum, based on the allegations in the complaint, *Teixeira*

fails to state a plausible claim on behalf of his potential customers that the ordinance meaningfully inhibits residents from acquiring firearms within their jurisdiction.” (*Id.* at 680-81.)

Similarly, here, section 8102 requires police to confiscate all guns from “a person, who has been detained or apprehended for examination of his or her mental condition,” who “is found to own, have in his or her possession or under his or her control, any firearm whatsoever.” (Cal. Welf. & Inst. Code §8102(a).) That statute thus directly addresses the ability of a 5150 detainee to own, possess, and control guns, but also, by extension, affects third persons’ rights, to the extent their guns happen to be possessed or controlled by the 5150 detainee. In this case, Rodriguez owned one of the guns her husband possessed or controlled. (ER 400.) She later obtained ownership of all of them and sought their recovery. (ER 178-88; ER 21 & 30.)

The *Teixeira* Court explained that “restrictions on a commercial actor’s ability to enter the firearms market may . . . have little or no impact on the ability of individuals to exercise their Second Amendment right to keep and bear arms.” (*Id.* at 687.) Similarly, here, restrictions on the ability of 5150 detainees to own, possess, and control guns have little impact on the ability of others to do so, even persons living with them and also owning or controlling the same guns, such as Rodriguez here. Confiscation of the guns under section 8102 and the City’s

compliance with the superior court's order in refusing to return them to Rodriguez do not affect her Second Amendment rights. This is because she is still free to have guns at home, just not those that her husband controlled when they were confiscated.

b. The City's actions did not affect the core of Rodriguez's Second Amendment rights and did not severely burden it because she may obtain and use other guns.

Assuming, however, for the sake of argument, that Rodriguez's Second Amendment rights were affected by the City's actions (i.e. confiscation under section 8102 and refusal to return the guns as decided by the superior court's order granting the City's petition), the second step in the analysis is how close those actions are to the core of Rodriguez's Second Amendment right and the severity of their burden on that right. (*Jackson*, 746 F.3d at 968.)

In *Jackson*, one of the laws this Court considered was a city ordinance barring the sales of hollow-point ammunition. (*Id.* at 958.) This Court found that the ban "burdens the core right of keeping firearms for self-defense only indirectly, because [the plaintiff] is not precluded from using the hollow-point bullets in her home if she purchases such ammunition outside" the city. (*Id.* at 968.) In the present case, it is undisputed that Rodriguez may obtain other guns to keep at home.

The *Jackson* Court also decided that the ban on hollow-point bullets does not place a substantial burden on the Second Amendment right because “[t]he regulation in this case limits only the manner in which a person may exercise Second Amendment rights” and “leaves open alternative channels for self-defense in the home” because the plaintiff may use a different type of bullets for self-defense, or may obtain the hollow-point ones outside the city. (*Id.*) Here, too, only the manner in which Rodriguez may exercise her rights is affected—she may not use the particular guns that have been confiscated but she may obtain and use other guns.

Like in *Jackson*, the City’s actions did not affect conduct at the core of Rodriguez’s Second Amendment rights and did not burden them severely (assuming, as stated earlier, and without conceding, that the City’s actions even affected her Second Amendment right). Therefore, intermediate scrutiny would apply, which asks whether the governmental interest is substantial. (*Jackson*, 746 F.3d at 968-69.)

The government interest in enforcing section 8102 is substantial. The court in *Rupf*, discussing section 8102, explained: “Respondent identifies the object of the statute as providing a means whereby authorities can confiscate firearms in an emergency situation and may keep firearms from mentally unstable persons. The legislative history of the statute expressly recognizes the urgency and importance

of such an objective” (*Rupf*, 85 Cal. App. 4th at 422.) (citations omitted)
“Section 8102 directly safeguards public health and safety It is not
unreasonable to conclude there is a significant risk that a mentally unstable gun
owner will harm himself or others with the weapon.” (*Id.* at 423.)

The *Rupf* court also stated that “as a practical matter, a weapon is subject to
confiscation under this section only when there is an underlying emergency.” (*Id.*)
And section 8102 “requires prompt return of the weapon following release of the
detainee, unless authorities timely seek to retain it by demonstrating that return of
the firearm will likely endanger the gun owner or others.” (*Id.*) Therefore,
government interest in enforcing section 8102 is substantial; it was substantial in
the present circumstances on the night when Rodriguez made the 911 call to San
Jose Police. (ER 93.) She was apparently concerned for the safety of her husband
and her own. (*Id.*)

Cal Rifle argues that it does not make sense for the City to retain the
confiscated guns and yet allow Rodriguez to buy new ones because the ostensible
goal of confiscation is not met. (Cal Rifle’s brief at 14.) The *Rupf* plaintiff made a
similar argument. (*Rupf*, 85 Cal. App. 4th at 425.) The *Rupf* plaintiff argued that
section 8102 does not prohibit a mentally unstable person from acquiring new
guns, and that it “only speaks to confiscation of those [guns] he currently owns,
controls, or has in his possession.” (*Id.*) As the *Rupf* court explained, the fact that a

person detained under section 5150, like Rodriguez's husband here, may obtain new guns does not make the statute infirm. "It is well established that a statute need not eliminate all evils at once to survive a challenge" that it is under-inclusive. (*Id.*) The Supreme Court of the United States noted that "[a]s a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied." (*Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 n.14 (1985).) Similarly, here, the fact that Rodriguez, and even her husband, may obtain new guns does not make the confiscation and retention of the guns irrational.

c. The City's actions satisfy both intermediate and strict scrutiny.

The next step in the analysis is to consider the fit between the City's actions and government interest in order to determine whether confiscation of the guns and following the state court's order not to return them to Rodriguez is substantially related to the City's (and the state's) important interest to prevent her husband from endangering himself and others. (*See Jackson*, 746 F.3d at 969.) "A municipality may rely on any evidence 'reasonably believed to be relevant' to substantiate its important interest" (*Id.*) Here, the superior court's order granting the City's petition and denying return of the guns to Rodriguez at a

minimum includes an implied finding that returning the guns to her would likely endanger her husband or others. (ER 84.) The City could reasonably rely on it and, indeed, had an obligation to follow it.

Cal Rifle maintains that the City's refusal to return the guns to Rodriguez is irrational because the City conceded that she can buy new guns and bring them home. (Cal Rifle's brief at 12-14.) Thus, according to Cal Rifle, withholding guns from Rodriguez achieves nothing. (*Id.* at 14.) That is incorrect. The guns that had been under her husband's control were no longer available to him. He could not obtain any guns for five years from his release from 5150 detention. (Cal. Welf. & Inst. Code §8103(f)(1).) While Rodriguez could obtain other guns, the decision to put guns in that household again would be hers alone. The *Jackson* Court pointed out that "intermediate scrutiny does not require the least restrictive means of furthering a given end." (*Jackson*, 746 F.3d at 969.) There is a reasonable fit between the government's goal of preventing Rodriguez's husband from endangering himself and others, and the City's decision to confiscate the guns under section 8102 and follow the trial court's affirmed order not to return them to that household. (*See id.* at 970.) Intermediate scrutiny is therefore satisfied.

The City's actions also satisfy strict scrutiny. The governmental interest in protecting the public from gun violence at the hands of a mentally disturbed persons is compelling, and the least restrictive means to prevent it is to remove

guns from immediate control of such persons, while not prohibiting their co-habitants, such as Rodriguez, from obtaining other guns.

Finally, citing *Jackson*, Cal Rifle incorrectly states that the district court improperly placed the burden on Rodriguez to show that her Second Amendment right was implicated. (Cal Rifle's brief at 12.) The district court's order does not give any indication to that effect. (*See* ER 10-11.) Cal Rifle's assertion is unsupported.

6. Arguments of amicus Millennial are without merit.

Amicus Millennial Policy Center ("Millennial") contends that confiscation and retention of guns based on someone else's prohibited status is analyzed under heightened scrutiny. (Millennial's brief at 3-4.) According to Millennial, the City does not pass either intermediate or strict scrutiny because a decision to disarm a law-abiding citizen does not belong to the City and because less burdensome alternatives are available under current California law. (*Id.* at 4-5 & 18-32.) Millennial argues that the severity of the alleged violation is not minimized by the fact that Rodriguez can buy new guns. (*Id.* at 12-14.) According to Millennial, *Heller* rejected the notion that other guns can justify the unavailability of chosen guns. (*Id.* at 14.)

The analysis set forth above in response to Cal Rifle's arguments applies here, as well. Notably, the *Heller* Court did not expressly adopt a constitutional

standard for evaluation of gun laws, but its discussion of other presumptively constitutional laws must mean a rejection of the strict scrutiny test for Second Amendment purposes. (*Heller*, 554 U.S. at 626-27 & *see id.* at 687-89 (Breyer, J., dissenting (quoting *Abrams v. Johnson*, 521 U.S. 74, 82 (1997); Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. Rev. 1171, 1197-98 (2009).)

C. The City did not violate Rodriguez’s rights under the Fourth Amendment.

1. The confiscation was reasonable and authorized by section 8102.

The Fourth Amendment only protects against unreasonable seizures of property. (*Soldal v. Cook County, Ill.*, 502 U.S. 56, 61 (1992).) Reasonableness is measured in objective terms by examining the totality of the circumstances. (*Florida v. Jimeno*, 500 U.S. 248, 250 (1991).) Rodriguez did not find any fault with Officer Valentine entering the home, with his detaining her husband for mental examination, or with his presence after her husband was transported for psychiatric evaluation. (ER 11.) She limited her challenge to “the reasonableness of Defendants’ confiscation and retention of the firearms.” (*Id.*) She never disputed the validity of her husband’s detention under Section 5150. She must therefore agree that Officer Valentine had probable cause to confiscate all guns that her husband owned, possessed, or could control.

Officer Valentine could not be sure that Rodriguez's husband would not obtain access to the guns and hurt himself or others when he was released from the 5150 hold. (ER 86-87 & 93.) The only way to ensure that this dangerous scenario did not occur was to confiscate the guns. That was a reasonable conclusion under the circumstances. Rodriguez had contacted the police because her husband was mentally unstable. (ER 86.) Her husband told Officer Valentine about guns in the safe, and the officer, following section 8102, asked Rodriguez to open it. (ER 121-22 & *see* Part IV.B. *supra*.) He correctly informed her of the law and she made the guns available to him by freely providing the key and the code to open it. (*See* Part IV.B *supra*.) There is no objective indication that anyone coerced, forced, or intimidated Rodriguez into opening the safe. (*See id.*) In fact, Officer Valentine advised her that she could refuse to open it. (ER 128 & 397-98.) It was reasonable, therefore, for Officer Valentine to conclude that Rodriguez voluntarily consented.

And whether Rodriguez consented to the guns' removal is irrelevant. (*See United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016).) Local police functions include community caretaking. (*Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).) The community caretaking doctrine recognizes that it can be reasonable under the Fourth Amendment to seize property to promote public safety in furtherance of a community caretaking purpose. (*Torres*, 828 F.3d at 1118.) Dealing with the mentally ill in a non-criminal context is just such a function, and section 8102

authorizes temporary removal of firearms from someone detained for a 5150 hold as a cooling-off period to prevent mentally ill individuals from using firearms to harm themselves or harm others—a legitimate risk in light of recurring mass shootings involving mentally ill people. Here, it was an emergency situation. The officers were responding to a 911 call about a mentally disturbed person who wanted to hurt himself and had access to guns. (ER 86-87.)

There was no way to predict how long Rodriguez’s husband would remain in 5150 detention at the hospital, or even whether he would be admitted. Once Rodriguez made the guns available to Officer Valentine and they were in plain view, section 8102 authorized their confiscation to further the important public safety goal of keeping guns away from the mentally ill.

Although Rodriguez maintains that she is a responsible person and that her husband could not access the firearms, that does not affect reasonableness of the seizure. Her husband owned eleven guns and stored them with her gun in a safe they jointly owned, in their home. (ER 9 & 85.) Given the important public safety goals served by section 8102, it was reasonable for Officer Valentine to confiscate all the guns and let the judicial process take its course. There is also no independent policy, practice, or custom Rodriguez could identify that requires officers to do anything other than what is required under constitutional state law.

2. The City's refusal to return the guns was reasonable.

The City reasonably refused to return the guns to Rodriguez because the City followed the superior court's order. Section 8102(h) provides that "if, after a hearing, the court determines that the return of the firearm or other deadly weapon would likely endanger the person or others, the law enforcement agency may destroy the firearm within 180 days from the date that the court makes that determination." (Cal. Welf. & Inst. Code §8102(h).) After the evidentiary hearing in which Rodriguez fully participated, superior court found that returning the guns to her would likely endanger her husband or others. (ER 84.) The City followed procedure authorized by state law and the court order affirmed on appeal. Until that order is set aside, the City's refusal to return the guns cannot be said to violate the Fourth Amendment or be motivated by any City policy, practice, or custom.

D. The City did not violate Rodriguez's rights under the Fifth Amendment.

Rodriguez claims a violation of the Fifth Amendment because the City has allegedly taken property without just compensation. (AOB 28-31.) She is incorrect. Government need not compensate for property lawfully acquired in the exercise of government authority, other than in eminent domain. (*Bennis v. Michigan*, 516 U.S. 442, 452 (1996).) There is no taking here because the City acquired the guns lawfully under section 8102 when Rodriguez's husband was

detained for a 5150 hold. Even an unlawful confiscation of a gun would not constitute a taking because an unlawful seizure of property is not a “public use,” and there would be other methods to recover the gun’s value. (*See Mateos-Sandoval v. County of Sonoma*, 942 F. Supp. 2d 890, 912 (N.D. Cal 2013).) (“Public use” does not encompass government acquisition of property by lawful forfeiture.)

The district court correctly relied on *Bennis* in deciding this claim. In *Bennis*, the Court considered the claimant’s argument that the state’s forfeiture of a car owned by a couple that the husband used for a tryst with a prostitute was a taking of private property for public use in violation of the Fifth Amendment. The *Bennis* Court disagreed with the claimant and explained that “the **property** in the automobile **was transferred by virtue of that proceeding from petitioner to the State**. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority. . . .” (*Bennis*, 516 U.S. at 452.) (emphasis added) Here, too, as a result of the court proceedings under section 8102, the guns lawfully transferred from Rodriguez and her husband to the City, and compensation for the guns under the Fifth Amendment is inappropriate.

Rodriguez relies on *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015). In *Horne*, the property was clearly taken for public use—the government

required a certain amount of free raisins from growers so that it could donate or sell them in noncompetitive markets with the goal of “promot[ing] the purposes of the raising marketing order.” (*Id.* at 2421 & 2428.) *Horne* does not apply here because the guns were not confiscated for the City’s use but to comply with section 8102.

Rodriguez also cites *Henderson v. United States*, 135 S. Ct. 1780 (2015). But *Henderson* does not even mention the Fifth Amendment so, contrary to Rodriguez’s argument, it does not extend the takings doctrine to firearms and does not affect the viability of the *Bennis* opinion concerning takings. (*See* AOB 28 & 30.)

If *Henderson* applies here at all, it supports the courts’ equitable power to determine disposition of guns under their jurisdiction. If the court is satisfied that the prohibited person will not later exercise control over the guns, the court has equitable power to approve the transfer. (*Id.* at 1784.) Conversely, if not so satisfied, the court may reject the requested transfer. Here, the superior court was concerned that Rodriguez would not keep the firearms away from her husband. (ER 72, 75 & 84.) In light of *Henderson*, any subsequent transfer of the guns would require court approval.

Contrary to Rodriguez’s argument, this Court’s opinion in *United States v. Ferro*, 681 F.3d 1105 (9th Cir. 2012), does not apply. *Ferro* interpreted a federal

forfeiture statute, 18 U.S.C. section 983 (the Civil Asset Forfeiture Reform Act (“CAFRA”)), and its effect on the Excessive Fines Clause of the Eighth Amendment. (*Id.* at 1112-13.) Neither is in issue here. Nor did *Ferro* discuss the Fifth Amendment. Therefore, that decision could not have “abrogated” the *Bennis* Fifth Amendment language. (AOB 30.) Because this case is not governed by CAFRA, Rodriguez’s argument that she qualifies as an “innocent owner” under that statute is not well taken. (*See id.*)

Nelson v. Colorado, 137 S. Ct. 1249 (2017), is a due process case and, like *Henderson*, does not mention the Fifth Amendment. (*See* AOB 29.) *Horne*, *Henderson* and *Nelson* are irrelevant to Rodriguez’s Fifth Amendment claim. *Panzella v. Sposato*, 863 F.3d 210 (2nd Cir. 2017), is not a Fifth Amendment case, either. Rodriguez’s Fifth Amendment claim has no merit.

E. The City did not violate Rodriguez’s Fourteenth Amendment rights.

California Welfare and Institutions Code sections 33800 *et seq.* do not mandate return of the guns to Rodriguez. That statutory scheme does not compel law enforcement to return guns, especially when other laws, like section 8102, apply. It only forbids law enforcement from returning guns to people in certain circumstances. (Cal. Penal Code §33855.)

1. Penal Code sections 33800 et seq. do not provide a separate procedure for recovering guns after a 5150 hold.

Rodriguez alleges a Fourteenth Amendment due process violation related to the City's refusal to return the guns to her after her June 2015 request. She appears to allege that the City violated her due process rights by not returning the guns to her under sections 33800 *et seq.*

California Penal Code sections 33800 *et seq.* outline the procedures a law enforcement agency must follow before it can release a gun in its custody. (Cal. Penal Code §§33800-33895.) Under those provisions, persons seeking return of a gun must submit an application to the California Department of Justice that includes their identifying information and a description of the gun (*e.g.*, make, model, serial number). (Cal. Penal Code §33850.) The California Department of Justice then performs a background check to determine eligibility to receive the gun. (Cal. Penal Code §33865(a).) If eligible, the applicant is given a written notification to present to law enforcement. (Cal. Penal Code §33865(c)(3).) Law enforcement may then return the gun if the person presents the written notification. (Cal. Penal Code §33855.)

This procedure does not consider how law enforcement acquired the gun—

a key consideration here. It was also not “intended to displace any existing law regarding the seizure or return of firearms.” (Cal. Penal Code §33800(c).) In view of those limitations, this procedure is not dispositive where section 8102 applies.

After the superior court entered its order, California Legislature amended section 8102 to incorporate the provisions of Penal Code section 33850 *et seq.*, but also left intact the courts’ role under section 8102 to determine whether the return of guns would likely endanger the person or others. (Cal. Welf. & Inst. Code §8102(b)(4) & (c).) (effective Jan. 1, 2014.) This demonstrates the Legislature’s intent that Penal Code sections 33800 *et seq.* do not provide a separate process when section 8102 also applies. Rodriguez, therefore, has no independent claim under sections 33800 *et seq.* because section 8102 controls.

2. There was no procedural due process violation because

Rodriguez had a hearing on the guns’ disposition in state court.

Procedural due process requires notice and an “opportunity to be heard at a meaningful time and in a meaningful manner.” (*Schneider v. County of San Diego*, 28 F.3d 89, 92 (9th Cir. 1994).) Section 8102 satisfies the requirements of procedural due process. (*Rupf*, 85 Cal. App. 4th at 420.)

Rodriguez had a full evidentiary hearing under section 8102 when she sought the return of her guns by intervening in the City’s petition in superior

court. (ER 55-77.) She had another hearing before the state court of appeal. Her claim therefore lacks merit.

As argued above, Rodriguez misunderstands the state appellate court's statement that "we 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." (ER 98-99.) Rodriguez claims that it is an order to return the guns to her. That interpretation is unreasonable because the court of appeal affirmed the lower court's decision against Rodriguez on her request for the return the guns to her. (ER 84 & 99.)

Rodriguez has had all the process due to her under the Fourteenth Amendment. In cases involving guns confiscated in connection with a 5150 hold, section 8102 and its hearing procedures apply. California Penal Code section 33800 *et seq.* was not "intended to displace any existing law regarding the seizure or return of firearms." (Cal. Penal Code §33800(c).)

3. There was no substantive due process violation because the City did not act arbitrarily in refusing to return the guns.

Substantive due process protects individuals from arbitrary deprivation of liberty by the government. (*Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006).) Courts will find a substantive due process violation only when the government's action "shocks the conscience." (*Id* at 847.) If Rodriguez's Fourteenth Amendment

claim is based on a violation of substantive due process, it fails. The City's refusal to return the guns to her is not arbitrary, nor does it shock the conscience; rather, it is based on the superior court's affirmed order. (*See Mora v. The City of Gaithersburg, MD*, 519 F.3d 216 (4th Cir. 2008) (finding no substantive due process claim for firearm seizure where deprivation was under the law and can be rectified by post-deprivation state remedies).)

F. Officer Valentine is entitled to qualified immunity.

Although the district court did not address qualified immunity, Rodriguez argues that Officer Valentine is not entitled to qualified immunity because allegedly his acts (presumably confiscation of the guns from the Rodriguez home) violated clearly established law. (AOB 15.)

Qualified immunity turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time." (*Anderson v. Creighton*, 483 U.S. 635, 639 (1987).) (citations & internal quotation marks omitted) It protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Pearson v. Callahan*, 555 U.S. 223, 231 (2009).)

Whether qualified immunity applies is based on: (1) whether the facts alleged show that the defendant violated a constitutional right; (2) whether the

right was clearly established at the time of the alleged violation; and (3) whether it would be clear to a reasonable officer that under the circumstances his or her conduct was unconstitutional. (*Id.* at 232.) Courts need not first determine whether the facts alleged or shown by plaintiff show a constitutional violation. (*Id.* at 236.)

Officer Valentine is entitled to qualified immunity on the Second Amendment claim. Following *Heller* and *McDonald*, no decision has been found holding that the Second Amendment protects the right of an individual to have a specific gun. In fact, the trend is that the Second Amended does not offer such protection. (*See* Part VI.B.4.a-c, *supra.*) And no court has held that it is a violation of the Second Amendment to confiscate guns in connection with a 5150 hold in a situation such as here. Because there is no clearly established Second Amendment violation under the alleged circumstances, Officer Valentine is entitled to qualified immunity.

Officer Valentine is also entitled to qualified immunity on the Fourth Amendment claim. The “objective reasonableness” defense applies to Fourth Amendment challenges even though the Fourth Amendment constitutional standard is also objective reasonableness. (*Anderson v. Creighton*, 483 U.S. 635, 643-45 (1987); *Malley v. Briggs* 475 U.S. 335, 344-45 (1986).) Under this rule, officers can act unreasonably under the constitutional standard, but still have qualified immunity. (*Malley*, 475 U.S. at 343-46.)

Any objectively reasonable police officer in this situation would believe that it was lawful to confiscate the firearms. It was Rodriguez who called the police for assistance and the guns were stored in a safe that she and her husband owned together in their home. (ER 85.) These facts support a reasonable conclusion that Rodriguez's husband could obtain access to the guns upon his release. Therefore, it was necessary to confiscate them so that he could not use them to hurt himself or others in the event of a relapse. Officer Valentine asked Rodriguez to open the safe so he could take them, and she complied. (ER 87.) No additional steps were necessary for Officer Valentine to carry out his duty under section 8102.

There is no clearly established right under the Fourth Amendment that prohibits gun confiscation in connection with a 5150 hold when an arguably responsible party and a gun safe are present. Section 8102 requires police officers to confiscate guns during a 5150 hold. There is no case law to support Rodriguez's claim that it is unreasonable to confiscate guns if an allegedly California-approved gun safe and responsible person are present.

Finally, Officer Valentine is entitled to qualified immunity on the Fifth Amendment claim. No reasonable officer would believe that confiscating firearms under section 8102 would invoke the Takings Clause because the gun confiscation was authorized by law. It is also not clearly established law that a lawful confiscation of guns under section 8102 would require just compensation.

G. There is no municipal liability for following section 8102 and the trial court's order.

To show section 1983 liability by local government, plaintiffs must prove that an “action pursuant to official municipal policy caused their injury.” (*Connick v. Thompson*, 563 U.S. 51, 60 (2011).) (citation & quotation marks omitted) In order to impose constitutional liability against a government entity, a plaintiff must establish (1) that he or she possessed a constitutional right of which he or she was deprived; (2) that the municipality had a policy; (3) that this policy “amounts to deliberate indifference” to plaintiff’s constitutional right; and (4) that the policy is the “moving force behind the constitutional violation.” (*City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989).)

As explained above, San Jose Police Department’s Duty Manual mirrors California Welfare and Institutions Code section 8102. Rodriguez has not and cannot allege that section 8102 is unconstitutional on its face or as applied to her. That is because section 8102 survived a Second Amendment challenge post-*Heller* and *McDonald*. (*Boggess*, 216 Cal. App. 4th at 1503.) Because the City’s policy is identical to state law that was found constitutional, it is constitutional, too. As previously argued, section 8102 does not violate the Second Amendment right to keep and bear arms, the Fourth Amendment, or constitute a taking requiring just compensation.

VII. CONCLUSION

All the guns at the Rodriguez house, including the gun registered to Rodriguez herself, were properly removed from the house, without implicating her constitutional rights. The City lawfully declined to return the guns to her because it followed the state court's final decision. The City Defendants respectfully request this Court to affirm the district court's judgment in their favor.

Respectfully submitted,

RICHARD DOYLE, City Attorney

Dated: June 25, 2018

By: s/ Margo Laskowska
MARGO LASKOWSKA
Sr. Deputy City Attorney

Attorneys for Defendants-Appellees

STATEMENT OF RELATED CASES

Counsel for Defendants and Appellees hereby certifies that there are no cases related to this appeal known to be currently pending in this Court at this time.

Respectfully submitted,

RICHARD DOYLE, City Attorney

Dated: June 25, 2018

By: s/ Margo Laskowska
MARGO LASKOWSKA
Sr. Deputy City Attorney

Attorneys for Defendants-Appellees

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-17144

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- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
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Signature of Attorney or
Unrepresented Litigant

Date

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