

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

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

LORI RODRIGUEZ; et al.,
Plaintiffs - Appellants,

vs.

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

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

APPELLANTS' OPENING BRIEF

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These institutional plaintiffs have provided funding for this suit.

Dated: February 26, 2018

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

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I. INTRODUCTION

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court gave assurances it was not casting “doubt on longstanding prohibitions on the possession of firearms by [...] the mentally ill, [...].” *Id.*, at 626. This case does not challenge those assurances.

This case is a challenge to the policies of the City of San Jose that abrogate the rights of family members who choose therapeutic intervention for a loved one, and who then wish to continue cohabiting with and supporting a loved one subject to a mental health firearm prohibition. This case challenges the idea that the suspension of a fundamental right for one person, should work a corruption of blood against that person’s family members; an idea that is foreign to this country. It is even forbidden as a punishment for treason. U.S. CONST., ART. III, SEC. 3, CL 2.

Lori Rodriguez has the means, the will, and the knowledge necessary to deny her husband (currently prohibited) from having access to her firearms. California has sanctioned her means and has approved her re-acquisition of firearms – firearms that should never have been seized from her in the first place. Yet the City of San Jose persists in violating her rights by refusing to return Lori’s firearms to her.

All of the decisions made by government actors up to this point have been wrong, and their decisions have become less rational as the case has dragged on. Even if Officer Valentine’s initial seizure of Lori’s (and her husband’s) firearms can be justified (Appellants do not concede that it can be.) – the City’s subsequent failure to return her gun and the firearms that she lawfully transferred from her husband to herself violates the Constitution.

Lori Rodriguez is eligible to own firearms. She has passed a gun-safety test required for firearm ownership. She has passed a government background check. She owns a government approved gun-safe for the secure storage of firearms. She understands her legal duties as they relate to her husband who is currently prohibited from possessing firearms. She has had the combination to the gun safe changed and keeps the only key that unlocks the combination dial. The City of San Jose has even admitted, before three different tribunals, that no law prevents Lori Rodriguez from going to a licensed gun store to buy a new and different gun. Yet the City irrationally refuses to return the guns that Lori already owns to her. [ER 11:153-172]¹

¹ Citation form: ER Tab # : ER Page #. Such that “ER 11:153-172” refers to the Document under Tab #11, at ER Page numbers 153-172.

Indeed, the relevant government agency with the power to deny the transfer and ownership of firearms – the California Department of Justice – has approved the release to Lori Rodriguez of the firearms she currently owns and which are currently being held by the City of San Jose. [ER 11:178-188, ER 11:194-217]

In a case filled with ironic twists and turns, just one month after a Superior Court refused to release Lori's firearms to her, the California Legislature enacted statutes to expressly provide a way for gun owners to safely and legally keep firearms in a home where a prohibited person lives. Prior to that, the same mechanism was implied by the existing regulatory scheme and was exactly the remedy Lori proposed to the City of San Jose in pre-litigation correspondence. [ER 11:158-162] Assembly Bill 500 and a companion Senate Bill 363, were signed by the Governor on October 11, 2013. [ER 14:349-379]

These 2013 laws amended multiple sections of the California Penal Code and added several other sections. The relevant changes to the law for purposes of this case, is the requirement that firearms be secured in a locked gun safe when the owner lives with another person who is prohibited from possessing, receiving or purchasing a firearm. California Penal Code § 25135.

Maybe that is why the California Court of Appeals for the Sixth District wrote in 2015: "**[W]e believe that the record on appeal shows that the procedure provided by section 33850 et seq. for return of firearms in the possession of law enforcement remains available to Lori.**" *City of San Jose v. Rodriguez*, 2015 Cal.App.Unpub. LEXIS 2315, 2326. (Emphasis added.) But, neither the intervening change in the gun storage law, nor the Court of Appeal's instructions that Lori's firearms be returned to her after she complies with California Penal Code § 33850 *et seq.*, were persuasive to the City of San Jose, or the District Court below. More than five (5) years after they were (wrongfully) seized, Lori still does not have possession of her firearms.

Maybe the mix of firearms and mental health frightens government actors. Maybe that fear deprives them of their capacity for making logical, dispassionate, ministerial decisions, when fundamental rights they might view as anachronistic are in that mix. But the whole point of setting down rights in written constitutions is to nullify those biases and passions, and render them impotent when the law has already spoken.

From *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010):

The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose

restrictions on law enforcement and on the prosecution of crimes fall into the same category. *See, e.g., Hudson v. Michigan*, 547 U.S. 586, 591, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006) ("The exclusionary rule generates 'substantial social costs,' *United States v. Leon*, 468 U.S. 897, 907, [104 S. Ct. 3405, 82 L. Ed. 2d 677] (1984), which sometimes include setting the guilty free and the dangerous at large"); *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (reflecting on the serious consequences of dismissal for a speedy trial violation, which means "a defendant who may be guilty of a serious crime will go free"); *Miranda v. Arizona*, 384 U.S. 436, 517, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (Harlan, J., dissenting); *id.*, at 542, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (White, J., dissenting) (objecting that the Court's rule "[i]n some unknown number of cases . . . will return a killer, a rapist or other criminal to the streets . . . to repeat his crime"); *Mapp*, 367 U.S., at 659, 81 S. Ct. 1684, 6 L. Ed. 2d 1081. [...]

Can the government make and enforce rules that disqualify some individuals from exercising the right to have a gun? Yes.

Can the government make and enforce rules to insure the lawful transfer and storage of firearms to prevent unauthorized or illegal access to firearms? Yes.

Do our laws and constitutions permit unbridled license to any branch of government to bootstrap new rules that have no basis in law or history (or reason for that matter) that have the effect of depriving a law-abiding person from exercising her right to keep and bear arms, just because she is related to, and lives with, someone who is disqualified from exercising that right? That answer must be a resounding – No.

A. Jurisdictional Statement

Federal question jurisdiction arises under the SECOND, FOURTH, FIFTH and FOURTEENTH AMENDMENTS to the United State Constitution because a state actor has violated the fundamental rights of the plaintiffs and is therefore actionable under 42 U.S.C. §§ 1983, 1988.

In addition to prospective injunctive relief, Plaintiff-Appellants are seeking declaratory relief. Both the District Court and this Appellate Court have jurisdiction pursuant to 28 U.S.C. §§ 2201 and 2202.

As this action arises under the United States Constitution, this Court and the District Court have jurisdiction pursuant to 28 U.S.C. § 1331.

The state law claim (California Penal Code § 33850 *et seq.*) is closely related to the federal claims and forms part of the same case or controversy. The District Court and this Court have supplemental jurisdiction. 28 U.S.C. § 1367.

Appellate jurisdiction is based on 28 U.S.C. § 1291. The order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Cross-Motion for Summary [ER 3:008-013] was filed on October 2, 2017.

The Judgment [ER 2:006] was filed on October 3, 2017.

The Notice of Appeal [ER 1:002-004] was filed on October 20, 2017.

B. Statement of Issues

May the City of San Jose and/or Officer Valentine, seize – without a warrant or valid consent – and retain, without lawful authority, the safely and effectively stored firearms of a law-abiding citizen, on the grounds that a co-habitant is disqualified from possessing firearms?

May the City of San Jose refuse to return firearms owned by a law-abiding citizen, when she has the means to safely store those firearms in a government approved gun safe, in accordance with existing law?

May the City of San Jose defy state law relating to release of firearms, once an owner has been cleared to recover those firearms by the state agency that has the statutory power to insure lawful possession, transfer and safe storage?

C. Statement of Primary Authority

The full text of the SECOND AMENDMENT, FOURTH AMENDMENT, FIFTH AMENDMENT, FOURTEENTH AMENDMENT and California Penal Code §§ 25135, 33850, 33885, are set forth in the addendum.

II. STATEMENT OF THE CASE

A. Procedural Posture

The procedural history of the case as it took place in state court is recounted below in the Statement of Facts.

A complaint alleging violations of various constitutional rights and one state law claim was filed in the District Court on August 12, 2015. [ER 4:015-024] Cross-motions for summary judgment were argued to the District Court on November 10, 2016. Several supplemental authorities were filed with the District Court after the matter was submitted. The District Court filed an order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Cross-Motion for Summary [ER 3:008-013] on October 2, 2017. A Judgment [ER 2:006] in favor of the Defendants was filed on October 3, 2017. The Notice of Appeal [ER 1:002-004] was filed on October 20, 2017.

B. Statement of Facts

Appellant Lori Rodriguez is married to Edward Rodriguez. On the night of January 24, 2013, Edward needed help. Lori called the San Jose Police Department for that help. The police took Edward to the hospital where he was placed on a psychiatric detention hold under California's Welfare & Institutions Code (WIC) § 5150. [ER 4:018, ER 7:136] The San Jose Police officers professionally and compassionately assisted Edward. [ER 13:270]

After Edward was on his way to the hospital, Defendant-Appellee Valentine told Lori Rodriguez that he had a legal duty to confiscate all

firearms in the Rodriguez home; and that Lori was required, to surrender the firearms by providing the combination to the gun safe. None of the firearms were outside of the safe until it was opened by the San Jose Police Department. [ER 12:221, ER 13:245-248, ER 13:255, ER 13:261, ER 13:268-269, ER 13:278-279]

Lori's gun safe is compliant with state law for the safe storage of firearms. [ER 6:060-061]

Lori objected to the seizure of the firearms from the gun safe in her home, and in particular she objected to the seizure of the firearm registered to her. [ER 11:154-156, ER 13:243, ER 13:268, ER 13:277] However Defendant Valentine insisted that he had a duty to seize all the firearms. [ER 11:156, ER 13:258-263, 267]

Lori did not want to delay, interfere or obstruct the police officers in the discharge of their duties, as they represented them to her, in part because she believed this might be a crime. In that frame of mind, Lori provided the combination to the gun safe. [ER 13:267, ER 11:156]

The Appellee-Defendants had not obtained a warrant to seize firearms from the Rodriguez home, nor had they obtained Lori's consent to seize them, particularly with regard to the firearm registered to Lori. [ER 11:154-157, ER 13:244, ER 13:258-260, ER 13:268]

After seizing Lori's firearms, the San Jose Police Department refused to return the firearms, even after assurances by Lori that she would have the safe combination changed and that she knew and understood her duty to prevent Edward from gaining access to the firearms. Instead the City passed the decision on to a Santa Clara Superior Court judge under the hearing procedures set forth in WIC § 8102, where the City was the petitioner and Edward the respondent. [ER 11:154-161]

This required Lori to hire an attorney to schedule a hearing and intervene in that case to get her property back. Despite hearing evidence that Lori could obtain new firearms because she was: A.) not prohibited herself from acquiring firearms, and B.) owned a California approved gun safe that she had already paid to have the combination changed, the Superior Court Judge ordered the City to keep Lori's personal firearm, along with the remaining firearms that were registered to Edward. The matter was appealed. [ER 11:154-172]

While the case was docketed with the Court of Appeal, California amended its laws with respect to the secure storage of firearms when a law-abiding gun owner lives with a prohibited person. Assembly Bill 500 (2013) and its companion Senate Bill 363 (2013), were signed by the Governor on October 11, 2013. [ER 14:351-379]

These 2013 laws amended multiple sections of the California Penal Code (§§ 11106, 16520, 16540, 16850, 23510, and 28220) and added several other sections (§§ 17060, 25135, and 28255). The relevant change to the law for purposes of this case, is the requirement that firearms be secured in a locked gun safe when the owner of a firearm lives with another person who is prohibited from possessing, receiving or purchasing a firearm. California Penal Code § 25135. This was the exact proposal Lori made in her pre-litigation request to resolve the matter. [ER 11:158-162]

Although the Sixth District affirmed the trial court order on the specific petition filed by the City (in an unpublished opinion), it also wrote: "**[W]e believe that the record on appeal shows that the procedure provided by section 33850 et seq. for return of firearms in the possession of law enforcement remains available to Lori.**" *City of San Jose v. Rodriguez*, 2015 Cal.App.Unpub. LEXIS 2315, 2326. (Emphasis added.)

Thus the Sixth District Court of Appeal breathed new life into Lori's efforts to recover her property, but also passed the decision back to the City of San Jose, provided that Lori could successfully transfer and register all firearms (excluding the one she already owned) from Edward

to herself. She tried to do that, but to no avail. [ER 6:098-099, ER 11:153-217, ER 13:287-288]

As she has been proposing since April of 2013 [ER 11:158-162], Lori completed the transfer and re-registration process. All of the firearms now belong to Lori. She obtained a release for those same firearms through the procedure outlined in California Penal Code § 33850 *et seq.* That should have ended the matter. It did not. The City of San Jose is still refusing to return Lori's property to her. [ER 11:153-217]

III. ARGUMENT

A. Summary of Argument

The warrantless seizure of firearms from Plaintiff/Appellant's gun safe, violates the Second Amendment and Fourth Amendment.

Defendant/Appellees' refusal to return valuable property, when the owner has complied with all administrative procedures for its return, is a taking of property that violates the Fifth and Fourteenth Amendment.

When that valuable property is a firearm, useful for self-defense, the conversion of said property also violates the Second Amendment.

The City of San Jose's refusal to return Lori Rodriguez's property, in accordance with state law, violates that state law and the Fourteenth Amendment's guarantee of procedural due process.

B. Standard of Review

A district court's decision on cross motions for summary judgment is reviewed de novo. *See Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011); *Travelers Prop. Cas. Co. of Am. v. ConocoPhillips Co.*, 546 F.3d 1142, 1145 (9th Cir. 2008); *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002).

The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *See Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). On review, the appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Frudden v. Pilling*, 877 F.3d 821, 828 (9th Cir. 2017); *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004).

C. Appellant's Second Amendment Rights Were and Are Being Violated.

1. SECOND AMENDMENT - WRONGFUL TAKING

At the time she was compelled to open her gun safe (after her husband had left for the hospital), Lori Rodriguez was not a felon. Lori

Rodriguez was not being detained for mental-health observation. She was not seeking to carry firearms in sensitive places or government buildings. She was not engaging in the commercial sale or purchase of firearms. She wanted to keep firearms that already belonged to her.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008) the Supreme Court completely and utterly rejected any notion that the rights protected by the SECOND AMENDMENT are a collective right. The analysis here is the same. A wife can not lose or gain fundamental rights based on her husband's status. She can only be disqualified by her own conduct or status. None of the "longstanding prohibitions" from *Heller* [at 626] are remotely applicable in this case.

Even if the policy (which Appellants do not concede) of confiscating all firearms in which Edward (because of his mental health status) had some ownership interest was valid; there is no constitutionally valid interest in Officer Valentine's seizure of the one firearm (a handgun) that unquestionably belonged to, and was registered to Lori. [ER 11:154-156, ER 13:243, ER 13:258-263, ER 13:267-268, ER 13:277]

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

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

District of Columbia v. Heller,
554 U.S. 570, 582 (2008)

At a minimum, the seizure of her personal firearm that night was a clear violation of Lori's SECOND AMENDMENT rights. Based on this single undisputed fact, Lori Rodriguez should have prevailed below on this issue. The District Court erred by declining to do so.

None of the "longstanding prohibitions" or "presumptively lawful" (though rebuttable) exceptions as published in *Heller* apply here. Officer Valentine is not entitled to qualified immunity. While it is true that a government official "cannot be expected to predict the future course of constitutional law, but [the official] will not be shielded from liability" for acts that violate clearly established constitutional rights. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978) (citations omitted); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This inquiry must be "undertaken in light of the specific context of the case." *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part on other grounds by Pearson*

v. Callahan, 555 U.S. 223, 236 (2009). See also *A.D. v. Markgraf*, 636 F.3d 555, 561 (9th Cir. 2011); *Delia v. City of Rialto*, 621 F.3d 1069, 1078 (9th Cir. 2010); *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1240-41 (9th Cir. 2010).

Additionally, if Officer Valentine is to be believed (and he should be) that he was enforcing a policy of the City of San Jose, then the City and its Police Department are also liable for violating Lori's rights that night. [ER 6:041-042, ER 6:125-126]

“Official municipal policy includes the decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.” *Connick v. Thompson*, 563 U.S. 51, 60-61 (2011). A policy “promulgated, adopted, or ratified by a local governmental entity’s legislative body unquestionably satisfies *Monell’s* policy requirement.” *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *overruled on other grounds by Bull v. City & County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc).

2. SECOND AMENDMENT - WRONGFUL RETENTION

Perhaps the most dissonant aspect of this case is the uncontradicted proposition that Lori cannot be prohibited from acquiring new firearms

and keeping them in her California approved gun safe in the home she still shares with her husband Edward.

Yet the City of San Jose manifestly refuses to permit Lori to recover her firearms under the procedures set forth in Penal Code § 33850 *et seq.*, as they were directed to by the Sixth District Court of Appeal. [ER 6:098-099, ER 11:153-217, 13:287-288]

The City's² policies and decision-making in this matter cannot withstand even rational basis review, because San Jose's actions are a *de facto* forfeiture, without legal cause, of all of Lori's arms, that are useful for self-defense. *U.S. v. Chovan*, 735 F.3d 1127 (9th Cir. 2013).

The State of California already imposes criminal liability on anyone who, knowing that a person is prohibited from owning/possessing firearms based on mental health status, gives or lends that person a gun. Welfare & Institutions Code § 8101. Aiding and abetting a known prohibited person to obtain a firearm is also a separate and distinct crime. Penal Code §§ 30, 31. California's Penal Code similarly imposes criminal liability on anyone failing to properly store firearms in their home when they co-habit with a prohibited person. Penal Code § 25135.

² It is conceded that Officer Valentine is not liable on any of the unlawful retention claims.

This last statute was signed into law while this case was docketed with the Sixth District Court of Appeal. [ER 14:351-379]

Lori had already promised to comply with common sense safe storage of her firearms. She was already in fact complying with that policy, even though it was not yet the law. And has always been ready, willing, and able to comply with this policy after it became law. [ER 11:153-172] Lori's fundamental rights and the codified policy of the State of California for safe storage of firearms cannot be second guessed by the City of San Jose and its Police Department.

A choice among alternatives by a municipal official with final decision-making authority may serve as the basis of municipal liability. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986); *Waggy v. Spokane Cty. Wash.*, 594 F.3d 707 at 713 (9th Cir. 2010)(explaining that a policy has been defined as a deliberate choice, made from among various alternatives, to follow a course of action); *Long v. Cty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006); *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir. 2002) (per curiam); *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992); *see also City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (emphasizing that critical inquiry is whether official has final decision-making authority).

Not-with-standing the City’s bone-headed refusal to return her property when she first proposed it in April of 2013 [ER 11:158-162], San Jose’s refusal to return the property after the California Court of Appeal instructed them to do so is that “choice among alternatives.”

The District Court in this action compounded the error with a finding that a free-floating, abstract right to keep and bear arms is not violated, as long as only a particular gun is seized or retained. [ER 3:010-011] This is not legal reasoning, this is sophistry.

In *Nelson v. Colorado*, 581 U.S. ___, 137 S. Ct. 1249 (2017), the Supreme Court directed all courts³ to use the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) to determine whether a forfeiture procedure is offensive to fundamental principles of justice.

The *Mathews* test evaluates: (A) the private interest effected; (B) the risk of erroneous deprivation of that interest through the procedures used; (C) the governmental interest at stake. In this case:

- A. Lori has a fundamental, right to keep and bear the arms that she already owns. She has a property interest and a financial stake in the guns as valuable personal property. She also has

³ *Nelson* was decided and brought to the District Court’s attention before judgment was entered below. [Docket Entry: 48]

a statutory right under California Penal Code § 33850 *et seq.*, to recover property that the State's Firearm Bureau has cleared for release to her.

- B. The risk of erroneous deprivation of these interests is emphasized by the Defendants' admission that Lori can acquire other firearms, even while they continue to deprive her of the ones she already owns. This is not only an erroneous deprivation of her interests, it is an irrational deprivation of her interests.
- C. The government interest at stake? None. Unless the City is making the argument that it wants to enforce a Superior Court judgment that was unequivocally modified by the state's Appellate Court. But this exact same argument was made by the dissenting opinion in *Nelson*. It is not persuasive here either. The government can never have an interest in depriving someone of property when that person has complied with all of the administrative duties the law imposes on them to recover that property.

Another small irony of this case, is that while Lori Rodriguez is in the same position as the Petitioners in the *Nelson* case; she has actually

gone above and beyond the ministerial procedures that the dissent in *Nelson* wanted to see exhausted. Lori has already complied with all the provisions for safe storage, background check, and transfer of her husband's firearms to her. See Penal Code §§ 25135 and 33850 *et seq.*

Finally, there is very strong persuasive authority from the Second Circuit, dealing specifically with the return of firearms after a law enforcement confiscation. The case of *Panzella v. Sposato*, 863 F.3d 210 (2nd Cir. 2017) was published after the cross-motions for summary judgment were submitted to the District Court, but before its decision.

The essential facts of *Panzella* were that firearms belonging to Panzella were confiscated and held by law enforcement. Panzella, who was not prohibited from possessing firearms when she sought their recovery, wanted them back. The Nassau County Sheriff's Office refused to return them. Panzella sued and prevailed. The *Panzella* Court employed the test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), which had recently been cited with approval by the Supreme Court in *Nelson v. Colorado*, 581 U.S. ___, 137 S. Ct. 1247 (2017).

In this case, the Defendants have admitted in the state court proceedings and during the arguments for summary judgment below, that Lori Rodriguez is not prohibited from acquiring new and different

firearms. This uncanny set of facts also arose in *Panzella*: “The County cannot, therefore, rely on any safety interest, given that Panzella can buy another longarm, or any other legal firearm for that matter.”

Panzella v. Sposato, 863 F.3d 210, 219 (2nd Cir. 2017).

The un-controverted facts are that Lori has a gun safe, she changed the combination, and provided uncontradicted assurances that she would not allow her husband access to the firearms in that safe. Thus, Lori has complied with all of California’s laws regarding the transfer, ownership, possession and safe-storage of firearms in this jurisdiction.

Federal law is even in accord with this policy. Several BATFE advisory opinions state that spouses and children who live with prohibited persons can comply with federal law by denying access to firearms through the simple expedient of locking them in enclosures to which the prohibited person has no access.^{4 5 6}

⁴ Acting Assistant Director (Criminal Enforcement, CC-32, 505, FE:LLN (Mar. 30, 1983), in response to Freedom of Information Act Request, CM:D:EAO, 920582 (Oct. 30, 1992).

⁵ Phillip C. McGuire, Associate Director (Law Enforcement), CC-35, 867, FE:JBP (Mar. 4, 1987), in response to Freedom of Information Act Request, CM:D:EAO, 920582 (Oct. 30, 1992).

⁶ Richard Cook, Chief, Firearms Division, CC-39, 140, FE:FAB (Oct. 23, 1990), in response to Freedom of Information Act Request, CM:D:EAO, 920582 (Oct. 30, 1992).

Lori Rodriguez has a fundamental right to keep and bear the arms that she already owns. The City's failure to release them violates the Constitution, state law, and common sense.

D. Appellant's Fourth Amendment Rights Were Violated.

1. FOURTH AMENDMENT - WRONGFUL TAKING

The District Court's treatment of Lori Rodriguez's FOURTH AMENDMENT claims were even less serious than its treatment of her SECOND AMENDMENT claims, with less justification given the greater body of law under the FOURTH AMENDMENT. [ER 3:008-013]

There was no claim made for a warrantless search, because there was no search. Lori freely and voluntarily acknowledged the existence of guns in the gun safe in her house when she was asked about them by Officer Valentine that night. What she did not freely and voluntarily consent to was the seizure of those firearms. [ER 11:154-156, ER 13:243, ER 13:268, ER 13:277]

Defendant Valentine insisted that he had a duty to seize all the firearms. [ER 11:156, ER 13:258-263, 267] Not wanting to delay, interfere or obstruct the police officers in the discharge of his (as he stated them to her) duties, Lori provided the combination to the gun safe. [ER 13:267, ER 11:156]

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

Next, without any irony whatsoever, the District Court cites Welfare & Institutions Code (WIC) § 8102 for the proposition that government agents are authorized to indiscriminately seize any and all firearms in a home, when detaining or apprehending someone for psychiatric evaluation, even if the firearms belong to someone else who happens to live in the same home. This is just shy of a general writ of assistance for the categorical confiscation personal property – a practice by Great Britain that directly inspired the FOURTH AMENDMENT, and probably contributed in no small way to events that inspired the American Revolution and our commitment to written constitutions limiting government power. *See generally: Maryland v. Garrison*, 480 U.S. 79 (1987), and *United States v. Leon*, 468 U.S. 897 (1984).

Even if a legislature could authorize a “firearm writ of assistance” to seize any and all arms for safe keeping from the home of a mentally disturbed person, without context, discrimination or judicial oversight, the facts in this case are wholly different and undisputed: (1) Lori was not mentally disturbed, (2) Lori was not being detained under the Welfare & Institutions Code, (3) Officer Valentine knew that the revolver was Lori’s personal firearm and that it was registered to her, (4) Lori did not consent to its seizure, and (5) Officer Valentine did not obtain a warrant to seize Lori’s personal firearm from her locked gun safe. [ER 11:154-157, ER 13:244, ER 13:258-260, ER 13:268]

Assuming *arguendo* that WIC § 8102 authorized the seizure of Edward’s weapons (safely locked away in a gun safe), the plain language of WIC § 8102 only authorizes the confiscation of a mentally disturbed person’s weapons when they are “in his or her possession or under his or her control.” Edward was already on his way to the hospital when Officer Valentine decided to seize the all of the weapons, including Lori’s personal weapon, from the gun safe over Lori’s objections. None of the firearms were outside of the gun safe until the safe was opened by the San Jose Police Officers. [ER 12:221, ER 13:245-248, ER 13:255, ER 13:261, ER 13:268-269, ER 13:278-279]

The undisputed facts are that Edward did not have possession or control of any firearms while he was in an ambulance being transported to a hospital for psychiatric evaluation. The most that Officer Valentine should have been authorized to do under the Constitution is to inquire if Lori wanted the guns removed from the house, and if she didn't, then warn her that she had a duty to take steps to keep them from Edward by (something she did on her own) changing the combination to the safe.

One can even imagine a government form or acknowledgment (with language similar to what Lori provided [ER 11:158-166]) that the police can leave with a responsible family member in these circumstances once the medical aid is rendered and the patient is on the way to the hospital.

There is no ambiguity in the statute or case law regarding the warrantless seizure of Lori's gun. Even if a generous fog of ambiguity existed regarding Edward's guns (even though the District Court didn't attempt that analysis) – qualified immunity is not available to Officer Valentine because that doctrine only provides a shield in suits for damages. It is not available in a suit for declaratory or injunctive relief. *See L.A. Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993); *Am. Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991).

The FOURTH AMENDMENT remedies sought in this case are injunctive and declaratory. Plaintiffs/Appellants seek only to prevent future wrongs to other law-abiding gun owners on this cause of action.

Of course the City of San Jose's written policy [ER 6:041-042] on this issue subjects them to full liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

2. FOURTH AMENDMENT - WRONGFUL RETENTION

The City and/or the Police Department are the only policy makers and/or decision makers with the power to release Lori's firearms. Since her first encounter with the Defendants, Lori has offered, and actually complied, with every federal and state law required of her, in order to secure the return of her firearms and ensure that Edward is denied access to any firearms in their home. [ER 11:153-217]

Whether the government's wrongful retention of personal property sounds in the FIFTH AMENDMENT (see below) rather than the FOURTH, it is clear that even prohibited persons have the power to direct the disposition firearms. *Henderson v. United States*, 575 U.S. ___, 135 S. Ct. 1780 (2015). While Edward may be a prohibited person, it is undisputed that all of the firearms seized from the Rodriguez house that night are now the lawful, legally registered property of Lori Rodriguez and there

is no evidence presented by any party in this matter that she lacks the equipment (a gun safe), the ability, or the will to comply with California's safe storage laws. [11:178-217]

Lori completed that transfer, consistent with the Sixth District Court of Appeal's finding that such a transfer and release was an available remedy to recover her property. [ER 6:098-099] Even after all this, the City of San Jose refuses to release Lori's firearms to her.

So again, the City of San Jose is exercising "a choice among alternatives" by continuing to violate Lori's rights by refusing to return her property in accordance with state law. This is a basis for municipal liability. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986) and similar line of cases cited above.

E. Appellant's Fifth Amendment Rights are Being Violated.

In *Horne v. Dep't of Agriculture*, 569 U.S. 513 (2013), the Supreme Court confirmed that personal property is subject to a "takings" analysis. And in *Henderson v. United States*, 575 U.S. ___, 135 S. Ct. 1780 (2015), the Supreme Court extended that doctrine to firearms, even when the prior owner is otherwise prohibited from possessing firearms, providing that steps are taken to prevent a prohibited person from having access to the firearm.

“[T]o the extent a plaintiff may challenge on federal constitutional grounds the government’s retention of personal property after a lawful initial seizure in circumstances such as these, that challenge sounds in the Fifth Amendment rather than in the Fourth Amendment. A different result may well obtain when the government seizes a person rather than property. But where property is concerned, it would seem that the Fifth Amendment’s express protections for property provide the appropriate framework. In particular, the Takings Clause provides recourse where ‘private property [is] taken for public use, without just compensation.’” *Denault v. Ahern*, 857 F.3d 76, 84 (1st Cir. 2017) (internal citations omitted).

As already argued above, the Supreme Court has set down a specific set of tests regarding forfeiture actions. *Nelson v. Colorado*, 581 U.S. ___, 137 S. Ct. 1249 (2017), directed all courts to use the balancing tests set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Furthermore, a sister-circuit, in a case remarkably similar to this case, has already applied the re-invigorated *Mathews* test to a case where a law enforcement agency refused to return firearms. *Panzella v. Sposato*, 863 F.3d 210 (2nd Cir. 2017). This Court should follow the Second Circuit’s example and order Lori’s firearms returned to her.

The District Court's bizarre citation to the case of *Bennis v. Michigan*, 516 U.S. 442, 452 (1996), is a further reflection of how unserious that court treated Plaintiffs' claims. Even if we assume *Bennis* is still good law in light of *Horne*, *Henderson*, and *Nelson*, the proposition that the trial court cited *Bennis* for has been abrogated in this Circuit, at least with respect to facts of this case. See *United States v. Ferro*, 681 F.3d 1105, 1112 (9th Cir. 2012).

Lori certainly qualifies as an "innocent" owner, especially of the one firearm that was personally registered to her prior to the seizure, and she most certainly became the law-abiding owner of the remaining firearms when the California Department of Justice confirmed the transfer of those registered firearms [ER 11:178-188] and authorized their release to her [ER 11:194-217]. This course of action was precisely the remedy proposed by the Sixth District Court of Appeal when it unequivocally stated that the procedures under Penal Code § 33850 for the recovery of Lori's firearms remained available to her. See *City of San Jose v. Rodriguez*, 2015 Cal.App.Unpub. LEXIS 2315, 2326.

The law is clear. The City of San Jose is exercising dominion and control over Lori's lawfully acquired, lawfully owned, prospectively (and retrospectively) safely stored personal property. This constitutes a

taking under the FIFTH AMENDMENT. Just compensation, at this point, would be a distant, secondary and wholly disappointing remedy.

Although never even offered, Lori does not want just compensation, she wants her property returned, to her gun safe, in her home.

F. Appellant's Fourteenth Amendment Procedural Due Process Rights and Statutory Rights Under Penal Code § 33850 are Being Violated.

Lori tendered the Law Enforcement Gun Releases to the City of San Jose in June of 2015. The only hearing subsequent to the July 6, 2015 notice that the City would refuse to comply with the releases, was the cross-motions for summary judgment heard in the District Court.

The procedural guarantees of the FOURTEENTH AMENDMENTS' Due Process Clause apply when property interests are at stake. "This Court has consistently held that some form of hearing is required before an individual is **finally deprived of a property interest**. *Wolff v.*

McDonnell, 418 U.S. 539, 557-558 (1974). [...]" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). [emphasis added, internal citations omitted]

The Sixth District Court of Appeal, interpreting state law, found that Lori could comply with Penal Code § 33850 *et seq.*, for the return of the firearms held by The City of San Jose. *See City of San Jose v. Rodriguez*, 2015 Cal. App. Unpub. LEXIS 2315, 2326. In other words, the Superior

Court hearing under Welfare & Institutions Code § 8102 did not finally deprive her of her property interest in the firearms.

Both the District Court and this Court are bound by the Sixth District's interpretation of Penal Code § 33850 *et seq.*, which supports Lori's right to recover her firearms. An intermediate state court's interpretation of state law is binding [on federal courts] if it was rendered in an earlier proceeding in the same case that is now in federal court. *Hicks v. Feiock*, 485 U.S. 624, 630, fn. 3 (1988).

It is undisputed that Lori complied with the procedures set forth at Penal Code § 33850 *et seq.* [ER 11:194-217] Furthermore, it defies logic and language to conclude that no cause of action exists for the failure of a law enforcement agency to return firearms to the complying gun owner when Penal Code § 33885 states plainly: “**In a proceeding for return of the firearm seized and not returned** pursuant to this chapter, where the defendant or cross-defendant is a law enforcement agency, the court shall award reasonable attorney fees and costs to the prevailing party.” [emphasis added]

The process due to Lori by the City of San Jose after she tendered the Law Enforcement Gun Release Letters [ER 11:194-217] was release of her firearms. Denial of administrative and ministerial duties by

government actors is actionable under the Fourteenth Amendment's Due Process Clause. *See: Memphis Light, Gas & Water v. Craft*, 436 U.S. 1 (1978).

What the Defendants (and the District Court) keep missing, is that the original Superior Court order was necessarily modified by the finding in the Court of Appeals that Lori only needed to comply with Penal Code § 33850 to recover her property.

So once again, the City of San Jose and/or the Police Department are the only policy makers and/or decision makers with the power to release Lori's firearms. And once again they are making a "choice among alternatives" that is actionable. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986) and similar cases cited above.

The District Court's citation to *Calhoun v. City of Hercules*, 2014 U.S. Dist. LEXIS 141224, [ER 3:013] is plain legal error, given that the district court in *Calhoun*⁷ permitted leave to amend "if Calhoun does not receive his firearm, and continues to believe that he has followed all

⁷ Apparently Mr. Calhoun got his guns back without further litigation. In two subsequent decisions in the *Calhoun* matter, the issue of returning firearms under Penal Code § 33850 *et seq.*, do not appear to have been at issue. *Calhoun v. City of Hercules Police Dep't*, 2015 U.S. Dist. Lexis 103422, and *see also: Calhoun v. City of Hercules Police Dep't*, 2017 U.S. App. LEXIS 2043 (9th Cir. Cal., Feb. 3, 2017).

procedures and is entitled to this firearm, then he can file an amended claim identifying the law that the Hercules Police Department has violated by refusing to return his firearm.” *Id.*, at 141233-34.

Mr. Calhoun was a pro se plaintiff (i.e., not entitled to collect attorney fees under Penal Code § 33885) and presumably unfamiliar with pleading rules, yet the *Calhoun* Court would have apparently permitted an amended pleading on this issue if the state actors in his case persisted in retaining his firearms. In this action the Plaintiff-Appellants have alleged several and various theories (including denial of procedural due process) that make San Jose’s refusal to release Lori's firearms unlawful. So even if this Court were to accept *Calhoun* as persuasive authority, and this Court was further prepared to ignore the plain language of Penal Code § 33885 that authorizes "proceedings for the return of firearm(s)" – the *Calhoun* case itself does not stand for the proposition advanced by the District Court below.

The Sixth District Court of Appeal could not have been any clearer than: "[W]e believe that the record on appeal shows that the procedure provided by section 33850 et seq. for return of firearms in the possession of law enforcement remains available to Lori." *City of San Jose v. Rodriguez*, 2015 Cal.App.Unpub. LEXIS 2315, 2326.

At the time of the Welfare & Institutions Code § 8102 hearing in Superior Court hearing, 11 of the 12 firearms were either unregistered or registered to Edward. If there was even a plausible justification to seize and hold those firearms, that justification disappeared when Lori took the Court of Appeals at face value, transferred and registered all of the firearms to her name through the procedures under Penal Code § 33850, and obtained the necessary releases and tendered those releases to the City of San Jose. [ER 11:153-217]

By complying with the instructions from the Court of Appeal, Lori Rodriguez has shifted the case from one about some guns (including one that undisputedly belonged to her) that were in her house, in a California approved gun safe – to a case about guns that have been lawfully registered and transferred to her, and authorized to be released to her under Penal Code § 33850. Of course Lori has an acknowledged and continuing duty to keep them in an approved gun safe pursuant to Penal Code § 25135.

What she needs now is for a court to take her rights under the United States Constitution seriously. This Court should order the return of her property and set forth clear guidelines to prevent future violations by individual officers and law enforcement agencies.

IV. CONCLUSION

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

So why deprive her of the firearms she already owns?

Even assuming the initial seizure of Edward's guns was justified (it was not), the government's power to forfeit any guns, evaporates against Lori's fundamental right to the "keep and bear" the firearm that she initially owned, the firearms she has since acquired, and the firearms for which she obtained the necessary releases, through the California Department of Justice's administrative procedures.

The decision to have firearms in her home is Lori's to make. It is her right under the Constitution. The government's only interest can be to require compliance with state law on transfer, ownership and storage.

The whole point of a written constitution is that a government may not substitute its judgment for the judgment of law-abiding citizens when they are exercising their rights.

[...] The very enumeration of the right [to keep and bear arms] takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case

basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

District of Columbia v. Heller,
554 U.S. 570, 634-35 (2008)

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

Respectfully Submitted on February 26, 2018,

/s/ Donald Kilmer

Attorney for Plaintiff/Appellants

Addendum

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

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

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

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

California Penal Code § 25135

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

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

- (1) The firearm is maintained within a locked container.
- (2) The firearm is disabled by a firearm safety device.

- (3) The firearm is maintained within a locked gun safe.
- (4) The firearm is maintained within a locked trunk.
- (5) The firearm is locked with a locking device as described in Section 16860, which has rendered the firearm inoperable.
- (6) The firearm is carried on the person or within close enough proximity thereto that the individual can readily retrieve and use the firearm as if carried on the person.

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

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

California Penal Code § 33850

Part 6: Control Of Deadly Weapons; Title 4: Firearms; Division 11:

Firearm In Custody Of Court Or Law Enforcement Agency Or Similar

Situation; Chapter 2: Return Or Transfer Of Firearm In Custody Or

Control Of Court Or Law Enforcement Agency

§ 33850 - (a) Any person who claims title to any firearm that is in the custody or control of a court or law enforcement agency and who wishes

to have the firearm returned shall make application for a determination by the Department of Justice as to whether the applicant is eligible to possess a firearm. The application shall include the following:

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

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

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

(4) For residents of California, the applicant's valid California driver's license number or valid California identification card number issued by the Department of Motor Vehicles. For nonresidents of California, a copy of the applicant's military

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

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

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

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

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

(c) Any person furnishing a fictitious name or address, or knowingly

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

California Penal Code § 33885

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

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

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of this Circuit because it consists of 7870 words and because this brief has been prepared in proportionally spaced typeface using WordPerfect Version X8 in Century Schoolbook 14 point font.

Dated: February 26, 2018.

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

NOTICE OF RELATED CASES

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

Dated: February 26, 2018.

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

CERTIFICATE OF SERVICE

On February 26, 2018, I served the foregoing APPELLANTS' OPENING BRIEF by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. I declare under penalty of perjury that the foregoing is true and correct.

Executed February 26, 2018,

/s/ Donald Kilmer

Attorney for Appellants