APPENDICES

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APPENDIX A

930 F.3d 1123

United States Court of Appeals for the Ninth Circuit

Lori RODRIGUEZ, et al., Plaintiffs-Appellants,

v.

CITY OF SAN JOSE; SAN JOSE POLICE DEPARTMENT; STEVEN VALENTINE, Defendants-Appellees.

No. 17-1714

Argued January 14, 2019

Decided July 23, 2019

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

[*1127] Opinion by Judge Friedland

FRIEDLAND, Circuit Judge:

Immediately after detaining Edward Rodriguez for a mental health evaluation in response to his wife Lori Rodriguez's 911 call, San Jose police officer Steven Valentine seized twelve firearms from the Rodriguez residence without a warrant.[1] The City of San Jose ("the City") later petitioned in California Superior

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

Court to retain the firearms under California Welfare & Institutions Code § 8102 on the ground that the firearms would endanger Edward or another member of the public. Lori objected that the confiscation and retention of the firearms, in which she had ownership interests, violated her Second Amendment right. The court granted the City's petition over Lori's objection. Lori appealed that decision, and the California Court of Appeal affirmed.

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

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

I.

A.

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

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

[*1128] Concluding that Edward was in the midst of an acute mental health crisis that made him a danger to himself and others, Officer Valentine and other officers on the scene decided to seize and detain him pursuant to California Welfare & Institutions Code § 5150 for a mental health evaluation. Section 5150 allows an officer, upon probable cause that an individual is a danger to himself or another because of a mental health disorder, to take the person into custody and place him in a medical facility for 72-hour treatment and evaluation. Cal. Welf. & Inst. Code § 5150 (2013); see also Cal. Welf. & Inst. Code § 5150(a) (2019) (same). The officers detained Edward and placed him in restraints in an ambulance to travel to a nearby hospital for a psychological evaluation.

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

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

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

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

B.

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

[*1129] The court granted the City's petition. The court acknowledged that Lori could legally "walk . . . into any gun store and qualify to buy a handgun . . . and put [it] in that gun safe." But it held that the City was nevertheless authorized to take the "low hanging fruit" of the guns the Rodriguezes already owned, irrespective of Lori's ability to buy more, because of the danger that Edward presented. Stating that it was not

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release from the hospital. Cal. Welf. & Inst. Code § 8103(f)(1) (2013).

"ignoring [Lori's] Constitutional Rights," the court concluded that it was not appropriate to return the firearms given the public safety concerns at stake.

Lori appealed to the California Court of Appeal, arguing that the superior court order was not supported by substantial evidence of danger and that it violated her Second Amendment right to keep and bear arms. In April 2015, the appellate court affirmed. *City of San Jose* v. *Rodriguez,* No. H40317, 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988 (Cal. Ct. App. Apr. 2, 2015) ("*Rodriguez I*"). The court held that there was substantial evidence supporting the superior court's determination that returning the guns to the Rodriguez home would likely result in endangering Edward or others. 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988, at *5-6, 9. On the constitutional issue, the court held that Lori had not demonstrated a viable Second Amendment claim under the United States Supreme Court's case law. 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988, at *6-9. The court also explained that Lori had "other viable options," including selling or storing the guns outside the home, and "that the procedure provided by [California Penal Code] section 33850 *et seq.* for return of firearms in the possession of law enforcement remains available to Lori."[4] 2015 Cal.

[4] The recovery procedures in California Penal Code § 33850 *et seq.* were expressly incorporated into California Welfare & Institutions Code § 8102 while Lori's state court appeal was pending. *Rodriguez I*, 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988, at *8. The California Court of Appeal ordered supplemental briefing on the implications for Lori's claims of that statutory change and of the availability of procedures under California Penal Code § 33850 *et seq.* for the return of firearms.

App. Unpub. LEXIS 2315, 2015 WL 1541988, at *7-8. Ultimately, the court concluded "that Lori ha[d] failed to show that the trial court's . . . order violate[d] the Second Amendment." 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988, at *9.

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

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

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

Defendants moved for summary judgment, raising various defenses including that SAF and CGF lacked Article III standing, but not including estoppel defenses to any of Plaintiffs' federal law claims. The

district court granted summary judgment to Defendants. The court **[*1130]** rejected Defendants' argument that SAF and CGF lacked Article III standing but ruled that all of Plaintiffs' claims failed on the merits.

II.

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

A.

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

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[5] Although the *Rooker-Feldman* doctrine, which limits our authority to review the judgments of state courts, sometimes overlaps with preclusion doctrine, *see Noel v. Hall*, 341 F.3d 1148, 1160-61 (9th Cir. 2003), we have assured ourselves that *Rooker-Feldman* does not deprive us of jurisdiction here. Lori did not name the California state courts or any of its judges as defendants in her Complaint. Nor does she seek relief from the state court judgment, which *authorizes* the City to keep the guns but does not *require* the City to do so. Rather, Lori complains "of a legal injury caused by an adverse party." *Id.* at 1163. The *Rooker-Feldman* doctrine accordingly does not apply. *See id.* at 1161-64.

The United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. As implemented under 28 U.S.C. § 1738, federal courts must "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). This requirement has equal force in cases brought under 42 U.S.C. § 1983. *See Allen v. McCurry*, 449 U.S. 90, 97-98, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

We therefore look to California law, which defines two main forms of preclusion: claim, also known as res judicata; and issue, also known as collateral estoppel. Claim preclusion "provid[es] that 'a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'"[6] *White v. City of Pasadena,* 671 F.3d 918, 926 (9th Cir. 2012) (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008)*).* "Issue preclusion, in contrast, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination

[6] "Claim" in this California state law context refers to a "'cause of action' [that] is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." *Mycogen Corp. v. Monsanto Co.,* 28 Cal. 4th 888, 123 Cal. Rptr. 2d 432, 51 P.3d 297, 306 (Cal. 2002). In this opinion, we refer to Lori's federal causes of action as "claims" without intending to suggest that her separate federal causes of action would necessarily count as separate "claims" for purposes of California state law preclusion.

essential to the prior judgment, even if the issue recurs in the context of a different claim." *Id.* (quoting *Taylor*, 553 U.S. at 892).

Defendants failed to raise either form of preclusion in response to Lori's Second Amendment **[*1131]** claim in their summary judgment briefing in the district court or in their principal brief to our court. Only after we requested supplemental briefing on preclusion did the parties address it. Defendants' omissions would typically effect a forfeiture. *See AE ex rel. Hernandez v. County of Tulare,* 666 F.3d 631, 638 (9th Cir. 2012); Clements v. Airport Auth. of Washoe Cty., 69 F.3d 321, 328-30 (9th Cir. 1995).[7]

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

This balancing in large part turns "upon the type of preclusion at stake" and generally favors forgiving forfeiture of issue preclusion more often than claim preclusion. *Id.* Both doctrines vindicate private interests in repose and in avoiding the cost of duplicative litigation. And both serve the public interest in conserving judicial resources by ensuring that courts do not revisit matters that were already litigated—or should have been. But issue preclusion

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

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

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

Under California law, issue preclusion applies when six criteria, named the "*Lucido* factors" after the California Supreme Court's seminal case on the doctrine, *Lucido v. Superior Court*, 51 Cal. 3d 335, 272 Cal. Rptr. 767, 795 P.2d 1223 (Cal. 1990), are satisfied:

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

> precluded "must have been actually litigated in the former proceeding"; (3) the issue to be precluded "must have been necessarily decided in the former proceeding"; (4) "the decision in the former proceeding must be final and on the merits"; (5) "the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding"; and (6) application of issue preclusion must be consistent with the public policies of **[*1132]** "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation."

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

The first three factors can be addressed together, as they all involve assessing the California Court of Appeal's Second Amendment analysis and the similarity of the argument it addressed to the argument advanced here. As she does now, Lori contended in the state court proceedings that Defendants were violating her "right to keep and bear arms" by refusing to return the firearms because of her husband's prohibited status, even though "she was not prohibited from acquiring or possessing firearms and had promised to take all steps required under California law to secure the firearms in a gun safe." *Rodriguez I,* 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988, at *2, 6-7. The California Court of Appeal

expressly rejected this argument and the notion that the Second Amendment required returning her the guns. Highlighting that Lori had not pointed to any authority to the contrary, the court stated that the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), suggested that the Second Amendment did not "extend[] to keeping and bearing either any particular firearms or firearms that have been confiscated from a mentally ill person." *Rodriguez I,* 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988, at *7 (emphasizing that "the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose'" (quoting *McDonald*, 561 U.S. at 786)). Ultimately, the court concluded "that Lori ha[d] failed to show that the trial court's . . . order violate[d] the Second Amendment." 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988, at *9.

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

the premises underlying the state court's Second Amendment analysis.[8]

[*1133] First, the fact that Lori obtained exclusive ownership is irrelevant for preclusion purposes because the state appellate court already assumed that Lori had an ownership interest in the guns under California's community property laws. *See Rodriguez I,* 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988, at *6 (stating that the parties stipulated that Lori had standing to assert a *Second Amendment* right to the firearms based on her community property interest in them). Moreover, it is undisputed that at least one of the twelve guns, Lori's personal handgun, was always her separate property—accordingly, the court must have considered her exclusive ownership of that gun as part of its analysis and determined that

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[8] Lori also points to the California Legislature's passage of California Penal Code § 25135 in October 2013, at the same time that California Penal Code § 33850 *et seq.* was expressly incorporated into California Welfare & Institutions Code § 8102, as support for her contention that issue preclusion does not bar her Second Amendment claim. *See supra* n.4. According to Lori, because California Penal Code § 25135 criminalizes keeping firearms in a home with a prohibited person unless they are kept in the statutorily prescribed manner, and because she would keep the firearms in a gun safe that she contends would comply with that statute, California law expressly authorizes her to possess the firearms. Lori is wrong on two levels. First, even if Lori would not be violating a criminal statute if the guns were returned to her, nothing in California Penal Code § 25135 suggests that complying with that statute vitiates a California court order forfeiting firearms under California Welfare & Institutions Code § 8102. Second, California Penal Code § 25135 had been in effect for more than a year when the California Court of Appeal published its decision, so there is nothing new about its passage that causes the issue here to be different from the issue decided by the state appellate court.

ownership did not affect the outcome under the Second Amendment.

Second, the fact that Lori has now completed the procedural requirements of California Penal Code § 33850 *et seq.* to be eligible for the return of her firearms does not make her current situation materially different from that considered by the California Court of Appeal. The court requested and received supplemental briefing from both parties on the effect of § 33850 *et seq.* on Lori's Second Amendment right. After considering the parties' arguments, and after observing that "[a]ccording to Lori, the evidence showed that she is not prohibited from owning or possessing firearms" and that "she could secure [the guns, if returned] in a gun safe to prevent Edward from having unauthorized a access," *Rodriguez I,* 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988, at *5, the state appellate court held that the seizure and retention did not violate Lori's right to keep and bear arms.

Although the court noted that "the record on appeal shows that the procedure provided by section 33850 *et seq.* for return of firearms in the possession of law enforcement remains available to Lori," 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988, at *8, it did not hold that completing the section's procedural requirements would alter the Second Amendment analysis. Instead, the appellate court concluded that "Lori ha[d] failed to show that the trial court's . . . order violate[d] the Second Amendment by precluding her from keeping firearms for home protection." 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988, at *9. In other words, as we understand the appellate court's decision, whether Lori might alternatively be able to

regain the guns through a state administrative procedure was not necessary to the court's conclusion that her Second Amendment right had not been violated. See 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988, at *8-9. We therefore conclude that the state court considered and rejected a Second Amendment argument identical to the one before us now.

We next turn to the fifth *Lucido* factor and ask whether the parties against whom preclusion is being sought are the same as, or in privity with, the parties in the former proceeding. *See Lucido*, 795 P.2d at 1225. The two organizational plaintiffs, SAF and CGF, have joined Lori in her federal suit but were not present in the state court proceedings. We hold that because the organizational plaintiffs do not have Article III standing, Lori is the sole plaintiff against whom preclusion would be applied, so the fifth *Lucido* factor is satisfied.[9]

[*1134] Plaintiffs admit that Lori is not a member of either SAF or CGF, and the organizations do not appear to assert that they have standing on behalf of any other member. They accordingly do not have standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S. Ct.

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[9] The fifth *Lucido* factor would also be satisfied if SAF and CGF were in privity with Lori. Because Lori is not one of their members, and because the nature of the relationship between Lori and the organizations—including whether SAF or CGF had any involvement in the state court proceedings—is unclear from the record, we have addressed this *Lucido* factor by analyzing the organizational plaintiffs' standing instead of attempting to apply the state law criteria for privity. *See Lynch v. Glass*, 44 Cal. App. 3d 943, 119 Cal. Rptr. 139, 141-43 (Ct. App. 1975).

2434, 53 L. Ed. 2d 383 (1977) (holding that an organization may establish standing if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit").

Even absent a member with standing, however, an organizational plaintiff "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Am. Fed'n of Gov't Emps. Local 1 v. Stone, 502 F.3d 1027, 1032 (9th Cir. 2007)* (quoting *Warth v. Seldin, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975))*. Of course, to do so, organizations must satisfy the traditional standing requirements of (1) injury in fact, (2) causation, and (3) redressability. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest, 624 F.3d 1083, 1088 (9th Cir. 2010)* (citing *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*.

Our "in its own right" line of organizational standing case law stems from the Supreme Court's decision in *Havens Realty Corp. v. Coleman, 455 U.S. 363, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982)*. There, a fair housing organization alleged in its complaint that it "ha[d] been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing" and that the organization had needed "to devote significant resources to identify and counteract" those practices. *Id. at 379*. The Supreme Court held that those allegations were sufficient to establish standing at the motion to dismiss stage,

explaining that "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitute[d] far more than simply a setback to the organization's abstract social interests." *Id.*

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

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

the organizations to **[*1135]** expend resources in representing clients they otherwise would spend in other ways." *Id. at 748* (citing *Havens*, 455 U.S. at 379).

Similarly, in *People for the Ethical Treatment of Animals v. United States Department of Agriculture,* 797 F.3d 1087, 418 U.S. App. D.C. 223 (D.C. Cir. 2015), the plaintiff organization alleged that it had needed to expend additional resources to ensure the humane treatment of birds because the USDA had failed to apply the protections of the *Animal Welfare Act* to birds even after promising for ten years to do so. *Id.* at 1089, 1094-95. The D.C. Circuit held that because the plaintiff had specifically alleged how it diverted resources to address the USDA's failure to apply the Act to birds, there was enough evidence of injury to satisfy Article III's standing requirements. *Id.* at 1096-97.[10]

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[10] Writing separately in *People for the Ethical Treatment of Animals*, Judge Millett contended that there is "grave tension" between the expansion of *Havens*-based organizational standing and broader Article III standing principles. *Id.* at 1099-1106 *(Millett, J., dubitante).* Although Judge Millett recognized that, under current precedent, an organizational plaintiff's expenditure of resources can be sufficient to establish standing, she expressed concern that the doctrine allows an organization to bring suit "every time [it] believes that the government is not enforcing the law as much, as often, or as vigorously as it would like." *Id.* at 1103. She found this "hard to reconcile with the general rule that a plaintiff's voluntary expenditure of resources to counteract governmental action that only indirectly affects the plaintiff does not support standing." *Id.* at 1099 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410-16, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)*)*; *see also Fair Hous. Council v. Roommate.com, LLC*, 666 F.3d 1216, 1224-27 (9th Cir. 2012) (Ikuta, J., concurring and dissenting) (criticizing our case law holding "that an

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

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organization with a social interest in advancing enforcement of a law was injured when the organization spent money enforcing that law," because "[t]his looks suspiciously like a harm that is simply 'a setback to the organization's abstract social interests,' [which] *Havens* indicated was not a 'concrete and demonstrable injury,'" and urging en banc reconsideration of our organizational standing doctrine). We share many of these concerns but are bound to apply current precedent regardless. *See E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1242-43 (9th Cir. 2018) (recognizing these criticisms of *Havens*-based organizational standing but also recognizing that three-judge panels of our court may not depart from prior precedent). In any event, these concerns are not directly implicated here because, as we explain below, SAF and CGF lack standing even under the line of standing case law that Judge Millett and Judge Ikuta believe has gone astray.

requested relief would redress any broader harm that the organizations work to combat.

Each organization has produced a single affidavit from a high-ranking official to attempt to establish Article III standing. In his affidavit, SAF's executive vice president asserted only that the organization's purpose "include[s] education, research, **[*1136]** publishing and legal action focusing on the Constitutional right to privately own and possess firearms [as well as] the consequences of gun control and legislation that impacts the 'right to keep and bear arms.'" CGF's executive director similarly framed CGF's mission as "promoting education for all stakeholders about California and federal firearms laws . . . and defending and protecting the civil rights of California gun owners." Both organizations also allege that they expend resources advising and assisting members and non-members in navigating California's gun laws and attempting to recover confiscated firearms. But neither organization presents any evidence of expending resources to assist Lori apart from incurring litigation costs as co-plaintiffs in her federal litigation.

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

demonstrated Article III standing.[11] And without the presence of the organizational plaintiffs, we are left considering issue preclusion against only Lori, the same party who litigated the state court proceedings. The fifth *Lucido* factor is thus satisfied.

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

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

For these reasons, we hold that Lori's Second Amendment challenge is precluded under California law. We therefore affirm judgment for Defendants on Lori's Second Amendment claim without further analysis.

B.

Lori also argues that the officers' warrantless confiscation of her firearms on the night of her husband's hospitalization violated her Fourth Amendment rights. "A seizure conducted without a warrant is '*per se* unreasonable under the Fourth Amendment,'" with some limited exceptions. *United States v. Hawkins,* 249 F.3d 867, 872 **[*1137]** (9th Cir. 2001) (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993)*).*[12] We hold that an exception to the warrant requirement applies here, so we reject Lori's Fourth Amendment claim.[13]

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

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

The Supreme Court has recognized a category of police activity relating to the protection of public health and safety—a category commonly referred to as the "community caretaking function"—that is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). Searches and seizures performed under the community caretaking function, like those performed pursuant to the criminal investigatory function, are subject to the Fourth Amendment's warrant requirement. *See United States v. Erickson*, 991 F.2d 529, 531-32 (9th Cir. 1993) (holding that the "community caretaking function . . . cannot itself justify a warrantless search"). Thus, the government must demonstrate that a search or seizure conducted to protect public health or safety but without a warrant falls within an exception to the warrant requirement.

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

The first category, termed the "emergency exception," authorizes a warrantless home entry where officers "ha[ve] an objectively reasonable basis for concluding that there [i]s an immediate need to protect others or themselves from serious harm; and [that] the search's scope and manner [a]re reasonable to meet the need." *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008). As with many exceptions to the warrant requirement, we "judge whether or not

the emergency exception applies in any given situation based on the totality of the circumstances," with the government bearing the burden of showing "that the search at issue meets these parameters." *Hopkins v. Bonvicino*, 573 F.3d 752, 764 (9th Cir. 2009) (quoting *United States v. Stafford*, 416 F.3d 1068, 1074 (9th Cir. 2005)). That burden includes "show[ing] that a warrant could not have been obtained in time." *United States v. Struckman,* 603 F.3d 731, 738 (9th Cir. 2010) (quoting *United States v. Good*, 780 F.2d 773, 775 (9th Cir. 1986)).[14]

[*1138] Until now, our case law on seizures under the community caretaking function has related solely to the second category: impounding vehicles that "jeopardize public safety and the efficient movement of vehicular traffic," oftentimes after the driver has been detained or has otherwise become incapacitated. *Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005) (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368-69, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976)*)*; *see also United States v. Jensen*, 425 F.3d 698, 706 (9th Cir. 2005) ("Once the arrest [of the driver] was made, the doctrine allowed law enforcement

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

officers to seize and remove any vehicle which may impede traffic, threaten public safety, or be subject to vandalism."). In those cases, to determine whether the seizure was reasonable, we balanced the urgency of the public interest in safe, clear roads against the private interest in preventing the police from interfering with a person's property. *Compare United States v. Torres*, 828 F.3d 1113, 1120 (9th Cir. 2016) (holding that it did not violate the Fourth Amendment to impound a vehicle that, among other concerns, was "positioned in a manner that could impede emergency services") *with United States v. Caseres,* 533 F.3d 1064, 1075 (9th Cir. 2008) (concluding that it was constitutionally unreasonable for police to impound a car when the car was lawfully parked near the arrested driver's residence and when there was no showing that the car was likely to be stolen or vandalized, or to impede traffic).[15] These vehicle seizure cases are similar to the emergency exception home entry cases because they allow the police to respond to an immediate threat to community safety.

A seizure of a firearm in the possession or control of a person who has been detained because of an acute mental health episode likewise responds to an immediate threat to community safety. We believe the same factors at issue in the context of emergency exception home entries and vehicle impoundments—(1) the public safety interest; (2) the urgency of that public interest; and (3) the individual property, liberty, and privacy interests—must be balanced,

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

based on all of the facts available to an objectively reasonable officer, when asking whether such a seizure of a firearm falls within an exception to the warrant requirement.

Other circuits have looked at precisely such factors in analyzing whether guns could be seized without a warrant to protect the gun owner or those nearby. For example, in *Mora v. City of Gaithersburg*, 519 F.3d 216 (4th Cir. 2008), a firefighter (Mora) called 911 and told the operator that "he was suicidal, had weapons in his apartment, could understand shooting people at work, and said, 'I might as well die at work.'" *Id.* at 220. After confirming with one of Mora's coworkers that his threats should be taken seriously, but without first obtaining a warrant, police drove to Mora's apartment and found him loading his vehicle with suitcases and gym bags. *Id.* The police confiscated the bags and found a gun inside. *Id.* Police then took Mora's keys, entered his apartment, and discovered a large gun safe containing twenty-one guns and keys to a second safe. **[*1139]** *Id.* They ultimately located forty-one firearms, ammunition, and survivalist literature throughout the apartment. *Id.* The police detained Mora for a mental health evaluation and then seized the firearms without a warrant. *Id.*

The Fourth Circuit held that the officers had not violated Mora's Fourth Amendment rights. The Fourth Circuit "identif[ied] the individual and governmental interests at stake and balanc[ed] them for reasonableness in light of the circumstances." *Id.* at 223. Weighing the government's interest in "[p]rotecting the physical security of its people" from "an individual who intends slaughter" against the private interests in liberty, privacy, and property, the

court observed that "[r]especting the rights of individuals has never required running a risk of mass death." *Id.* at 223-24. Rather, the court explained that "[a]s the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action." *Id.* at 224. Applying these principles, the Fourth Circuit held that the officers had "a sound basis for seizing Mora's weapons, whether or not they were contraband or evidence." *Id.* at 227. The court also rejected the argument that Mora's previous removal from the scene diminished the public safety justification for seizing the guns because the officers had no idea whether Mora's "confederates might possess access to Mora's considerable store of firearms, or whether Mora himself might return to the apartment more quickly than expected." *Id.* at 228.

The D.C. Circuit considered similar factors in *Corrigan v. District of Columbia*, 841 F.3d 1022, 426 U.S. App. D.C. 358 (D.C. Cir. 2016), and ultimately held that there was not a sufficiently imminent threat to justify the warrantless search of a home and seizure of guns found inside. *Id.* at 1035. In that case, the police were dispatched in the middle of the night to a military veteran's (Corrigan's) home for what they believed to be an "attempted suicide." *Id.* at 1026. They learned from his ex-girlfriend and landlord that Corrigan had weapons, had recently ended a romantic relationship, and was under psychiatric care for PTSD and depression. *Id.* at 1026. After the police attempted to contact him numerous times over the course of several hours, Corrigan woke up and voluntarily came outside. *Id.* at 1026-27. He surrendered himself into the officers' custody, though he refused to consent to a search of his home. *Id.* at 1027.

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

The D.C. Circuit held that the search was unreasonable under the Fourth Amendment. *Id. at 1035.* Emphasizing that the police "had been on the scene for five hours and fully secured the area prior to the [] entry and search," as well as the fact that Corrigan had surrendered peacefully, *id.* at 1034, the court concluded that "there was no objectively reasonable factual basis for the [police] to believe an *imminently dangerous hazard* could be present in Corrigan's home, particularly after completing the 'sweep,'" *id.* at 1031 (emphasis added).

Applying the same analytical framework, we hold that the warrantless seizure of the Rodriguezes' guns was appropriate. The seizure of the firearms did affect a serious private interest in personal property kept in the home. On the other **[*1140]** hand, the public interest at stake here was also very significant. San Jose police officers had previously been to the home on prior occasions because Edward was acting erratically, and on the day in question, Edward was ranting about the CIA, the army, and other people watching him. He also mentioned "[s]hooting up schools," specifically referencing the guns in the safe. Edward's threats may not have been as explicit as the threats made in *Mora*, but a reasonable officer would have been deeply

concerned by the prospect that Edward might have had access to a firearm in the near future. Consequently, there was a substantial public safety interest in ensuring that the guns would not be available to Edward should he return from the hospital.

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

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

Lori asserts two primary counterarguments to the conclusion that there was sufficient urgency to justify the warrantless seizure of the firearms. First, she argues that any urgency was diminished because she could change the combination to the gun safe, preventing Edward from accessing the guns. But even assuming Lori could have changed the combination before Edward could have returned, it was reasonable to believe that Edward, who weighed 400 pounds, could have overpowered her to gain access to the guns.

Second, Lori contended at oral argument that telephonic warrants are available in San Jose and that the officers could have obtained such a warrant more quickly than Edward could have returned if the hospital had not admitted him. But she has offered no support for either assertion. And without evidence or other support for her conclusory statements, Lori has not carried her burden in opposing summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).[16]

Our holding that the warrantless seizure of the guns did not violate the Fourth Amendment is limited to the particular circumstances here: the officers had probable cause to detain involuntarily an individual experiencing an acute mental health episode and to send the individual for evaluation, they expected the individual would have access to firearms and present a serious public safety threat if he returned to the home, and they did not know how quickly the individual might return. Under these circumstances, the urgency of a significant public safety interest was sufficient to outweigh the significant privacy **[*1141]** interest in personal property kept in the home, and a warrant was not required.

III.

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

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

APPENDIX B

773 Fed. Appx. 994

Notice: Please refer to Federal Rules of Appellate Procedure Rule 32.1 governing the citation to unpublished opinions.

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

Argued: January 14, 2019

Filed: July 23, 2019

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

[*994] MEMORANDUM*

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

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

that the seizure and retention of her firearms violated her rights under the Second, Fourth, Fifth, and Fourteenth Amendments, and under California Penal Code § 33800 *et seq*. **[*995]** We affirm the summary judgment in favor of Defendants on the Second and Fourth Amendment claims in a concurrently filed opinion, and we address the remaining claims herein. We affirm judgment for Defendants on those claims as well.

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

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

additional process, after she fulfilled the statute's two requirements.

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

Second, Lori contends that because the Takings Clause applies to personal property, Defendants' seizure and retention of her firearms means her private property was taken for public use without just

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

compensation, violating the Fifth Amendment. Again, her arguments are unavailing.

The Takings Clause, as relevant here, protects "against a direct appropriation of property—personal or real," *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427, 192 L. Ed. 2d 388 (2015), and such an appropriation "triggers a 'categorical duty to compensate the former owner' under the Takings Clause." *Fowler v. Guerin,* 899 F.3d 1112, 1117 (9th Cir. 2018) (quoting *Brown v. Legal Found. of Wash.,* 538 U.S. 216, 233, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003)). **[*996]** As she conceded at oral argument, Lori still has title to her property and can sell it to a third-party licensed firearms dealer, *see* Cal. Penal Code § 33870(a), and Defendants have agreed that Lori can still store her firearms at a location other than her home or even keep them in her home if they are rendered inoperable. Lori's Takings Clause claim therefore fails. *Cf. Horne,* 135 S. Ct. at 2428 (explaining that raisin growers had an actionable Takings Clause claim because they lost "the entire 'bundle' of property rights in the . . . raisins [the government appropriated]—'the rights to possess, use and dispose of' them"(citation omitted)).

AFFIRMED.

APPENDIX C

2017 U.S. Dist. LEXIS 162977

United States District Court for the Northern District of California, San Jose Division

LORI RODRIGUEZ, et al., Plaintiffs,
v.
CITY OF SAN JOSE, et al., Defendants.

Case No. 5:15-cv-03698-EJD

Decided/Filed: September 29, 2017

Opinion by: EDWARD J. DAVILA, United States District Judge.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Re: Dkt. Nos. 22, 28

Plaintiffs Lori Rodriguez, the Second Amendment Foundation, Inc. ("SAF"), and the Calguns Foundation, Inc. ("Calguns") bring claims against Defendants the City of San Jose, the City of San Jose's Police Department, Officer Steven Valentine, and several Doe defendants arising from Defendants' confiscation and retention of firearms registered to Lori and her husband. Plaintiffs and Defendants have both moved for summary judgment. Plaintiffs' motion will be denied and Defendants' motion will be granted.

C2

I. BACKGROUND

In 2013, Edward Rodriguez suffered a mental episode at his home. Defs.' Mot. for Summ. J. ("MSJ") 2, Dkt. No. 22. His wife, Plaintiff Lori **[*2]** Rodriguez, called the police, and the San Jose Police responded. *Id.* An officer detained Edward under Welfare & Institutions Code § 5150 and ordered paramedics to take him to a hospital. *Id.* at 3; Pls.' Mot. for Cross-Summ. J. ("Cross-MSJ") 3, Dkt. No. 28. An officer told Lori that he was required to confiscate guns in the house. Cross-MSJ 3. He asked Lori to provide the combination to the gun safe in the house, and she complied. *Id.* at 3-4. The officer confiscated eleven guns registered to Edward and one gun registered to Lori. MSJ 4.

The City petitioned the Superior Court for a hearing under Welfare & Institutions Code § 8102 to determine whether the guns should be returned to Edward. MSJ 4; Cross-MSJ 4. The court decided that the guns could not be returned to Edward because he is a "prohibited person" under Welfare & Institutions Code § 8103. MSJ 4-5; Cross-MSJ 4-5. Lori appealed, and the California Court of Appeals affirmed. MSJ 5; Cross-MSJ 5; *City of San Jose v. Rodriguez,* H04031, 2015 WL 1541988 (Cal. Ct. App. Apr. 2, 2015).

The City has not returned the guns. Plaintiffs filed this action in 2015, bringing claims for violations of the Second Amendment, the Fourth Amendment, the Fifth Amendment, the Fourteenth Amendment, and Cal. Penal Code §§ 33800 *et seq*. Compl. ¶¶ 42-56, Dkt. No. 1. Now before the Court are Plaintiffs' motion for summary judgment and **[*3]** Defendants' cross-motion for summary judgment.

II. LEGAL STANDARD

"Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Samuels v. Holland Am. Line-USA, Inc.,* 656 F.3d 948, 952 (9th Cir. 2011) (citing Fed. R. Civ. P. 56(a)). The Court "must draw all reasonable inferences in favor of the nonmoving party." *Id.* "The central issue is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986)).

III.DISCUSSION

A. Standing

Defendants argue that Plaintiffs SAF and Calguns (but not Lori Rodriguez) lack Article III standing to pursue their claims. "[A]n organization has 'direct standing to sue [when] it show[s] a drain on its resources from both a diversion of its resources and frustration of its mission.'" *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (quoting *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir.2002)). The Court agrees with SAF and Calguns that they have standing because they divert resources to assist gun owners to recover their property after seizure, they engage in related public education activities, they litigate cases like this one, and they have members in California that are affected. Cross-MSJ 7.

B. Second Amendment

Plaintiffs allege that Defendants have **[*4]** violated Plaintiffs' "constitutional right to keep and bear arms under the Second Amendment." Compl. ¶¶ 42-44. However, despite the City's decision (under § 8102) not to return the guns it confiscated, Lori concedes that she is free to own and possess other guns that she lawfully acquires.[1] Cross-MSJ 8. The Second Amendment protects the right to keep and bear arms in general, but it does not protect the right to possess *specific* firearms. *See City of San Diego v. Boggess*, 216 Cal. App. 4th 1494, 1503 (2013) ("[S]ection 8102 does not eliminate a detainee's right to possess any and all firearms. Rather, as City points out, it implicates only the detainee's property right in the *specific* firearms confiscated by law enforcement.") (emphasis added); *Rodriguez*, 2015 WL 1541988, at *7 ("[T]he 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.") (emphasis added). As such,

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[1] Lori could sell the firearms at issue to a licensed dealer under Cal. Penal Code § 33850(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*.") (emphasis added). Apparently, Lori could then purchase those guns from the dealer.

Defendants' motion for summary judgment must be granted as to Plaintiffs' Second Amendment claim.

C. Fourth Amendment

Plaintiffs allege that Defendants' confiscation of the guns and their decision not to return the guns to Lori constitute an unreasonable **[*5]** seizure under the Fourth Amendment. Compl. ¶¶ 45-47. Plaintiffs do not challenge the reasonableness of the search of Lori and Edward's home; rather, they challenge the reasonableness of Defendants' confiscation and retention of the firearms. Cross-MSJ 12-14.

The Court finds that, under the circumstances, the confiscation of the guns was entirely reasonable. Edward was detained for mental health reasons under § 5150, and the officer on the scene confiscated the guns under § 8102. This is precisely the type of scenario that § 8102 is designed to address. *See* Welfare & Institution Code § 8102 ("Whenever a person, who has been detained or apprehended for examination of his or her mental condition . . . , 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.") (emphasis added). It was not unreasonable for the officer to follow the statutory procedure for confiscating deadly weapons from a person "who has been detained . . . for examination of his or her mental condition." **[*6]** *Id.*

The City's continued retention of the guns is likewise reasonable. Plaintiffs challenged the City's petition before the Superior Court and received a full

evidentiary hearing. That court's decision received a full review and a written opinion from the California Court of Appeals, which affirmed the trial court's decision to grant the City's petition. *See Rodriguez,* 2015 Cal. App. Unpub. LEXIS 2315, 2015 WL 1541988.

Accordingly, Defendants' motion for summary judgment will be granted as to Plaintiffs' Fourth Amendment claim.

D. Fifth Amendment

Plaintiffs allege that the City's confiscation and retention of the guns is a "taking of property without just compensation" under the Fifth Amendment. Compl. ¶¶ 48-50. Plaintiffs' claim fails because "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Bennis v. Michigan*, 516 U.S. 442, 452 (1996). Here, Defendants lawfully exercised their forfeiture authority under § 8102. That exercise does not constitute a taking of property without just compensation. Defendants' motion for summary judgment will be granted as to Plaintiffs' Fifth Amendment claim.

E. Fourteenth Amendment

Lori alleges that Defendants' confiscation and retention of the guns constituted a "violation her due process **[*7]** rights (administrative return of property) under the Fourteenth Amendment" (and Calguns and SAF allege a similar claim on behalf of their members). Compl. ¶¶ 51-53. In their summary judgment briefing, Plaintiffs clarify that they allege a procedural due process violation based on the City's refusal to return the firearms following the Court of Appeals'

decision. Dkt. No. 43 at 12. Defendants cite the Court of Appeals' statement that "the procedure provided by section 33850 *et seq*. for return of firearms in the possession of law enforcement remains available to Lori." *Rodriguez*, 2015 WL 1541988, at *8.

Defendants appear to argue that this language requires the City to return the firearms to Lori. But Defendants misread the court's decision: the court did not order the City to return the firearms to Lori; rather, it addressed Lori's two challenges to the City's petition—on the grounds (1) insufficiency of evidence and (2) violation of her Second Amendment rights—and noted that Lori had not yet chosen to pursue remedies under Penal Code § 33800. No procedural due process violation arises from the City's decision not to return the guns to Lori, since the Court of Appeals did not require it to do so. As such, Defendants' motion for summary judgment will be granted as to Plaintiffs' **[*8]** Fourteenth Amendment claim.

F. Penal Code § 33800 *et seq*.

Plaintiffs bring a claim for violation of Cal. Penal Code § 33800 *et seq*. However, summary judgment must be granted in Defendants' favor because that statute does not authorize an independent cause of action. *See Calhoun v. City of Hercules Police Dep't,* No. 14-CV-01684-VC, 2014 WL 4966030, at *3 (N.D. Cal. Oct. 3, 2014), *aff'd*, 675 F. App'x 656 (9th Cir. 2017) ("California Penal Code § 33855 lays out the procedures that a law enforcement agency must follow before it can return a confiscated firearm, but it does not, in itself, provide a cause of action to a plaintiff who believes he is entitled to his firearm.").

IV. CONCLUSION

Defendants' motion for summary judgment (Dkt. No. 22) is GRANTED. Plaintiffs' motion for summary judgment (Dkt. No. 28) is DENIED. The Clerk shall close this file.

IT IS SO ORDERED.
Dated: September 29, 2017
/s/ Edward J. Davila
EDWARD J. DAVILA
United States District Judge

APPENDIX D

2019 U.S. App. LEXIS 28877

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

Filed: September 24, 2019

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

ORDER

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Friedland has voted to deny the petition **[*2]** for rehearing en banc, and Judge Wallace and Judge Clifton so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *Fed. R. App. P. 35.*

The petitions for rehearing and rehearing en banc are DENIED.

APPENDIX E

2015 Cal. App. Unpub. LEXIS 2315

Notice: Not to be published in official reports. California Rules of Court, Rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by Rule 8.1115(b). This opinion has not been certified for publication or ordered published for the purposes of Rule 8.1115.

Court of Appeal of California, Sixth Appellate District

CITY OF SAN JOSE, Plaintiff and Respondent,

v.

EDWARD V. RODRIGUEZ, Defendant; LORI RODRIGUEZ, Intervener and Appellant.

No. H040317

Opinion filed April 2, 2015

Judges: BAMATTRE-MANOUKIAN, ACTING P. J.; MIHARA, J., GROVER, J. concurred.

Opinion by: BAMATTRE-MANOUKIAN, ACTING P. J.

I. INTRODUCTION

The City of San Jose police officers who responded to a domestic disturbance call at the home of Edward V. Rodriguez determined that he was a danger to himself and others and had him transported to Santa Clara Valley Medical Center for 72-hour treatment and evaluation under Welfare and Institutions Code

section 5150.[1] The police officers also seized 12 firearms from the home pursuant to section 8102, subdivision (a), which requires confiscation of any firearms owned by or found in the possession or control of a person detained for an examination of his or her mental condition.

The City of San Jose (City) subsequently filed a petition for disposition of the firearms in which the City requested a court order allowing forfeiture of the confiscated firearms pursuant to section 8102, subdivision (c). Edward V. Rodriguez's wife, appellant Lori Rodriguez, opposed the petition and sought return of the firearms to her.[2] After an evidentiary hearing, the trial court determined that return of the confiscated firearms to the Rodriguez home **[*2]** would be likely to result in the endangerment of Edward or others, and granted City's petition.

On appeal, Lori contends that the trial court erred because the order granting City's petition is not supported by substantial evidence of danger and also violates her right to keep and bear arms under the Second Amendment to the United States Constitution. For the reasons stated below, we determine that the trial court's order under section 8102, subdivision (a) is supported by substantial evidence. We also determine that Lori has not shown that her Second Amendment rights were violated by the trial court's order.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Since Edward V. Rodriguez and appellant Lori Rodriguez have the same surname, we will refer to them by their first names for purposes of clarity and meaning no disrespect.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *City's Petition for Disposition of the Firearms*

On February 22, 2013, City filed a petition for disposition of the firearms pursuant to section 8102, subdivision (c) that named Edward as the respondent. City stated that the firearms that were the subject of the petition came into police custody on January 24, 2013, when police officers responding to a domestic disturbance call at the Rodriguez home determined that Edward was a danger to himself or others. Edward was then transported to a medical **[*3]** center on a 72-hour hold for medical treatment and a psychological evaluation pursuant to section 5150. After Edward was transported, police officers conducted a protective sweep and confiscated 12 firearms from the home.

In its petition, City requested that the trial court make a finding under section 8102 as to whether return of the weapons would be likely to endanger Edward or others and, if the finding of danger was made, order that the petition be granted and the weapons forfeited. Alternatively, if no finding of danger was made, City requested that the San Jose Police Department retain custody of the weapons for no more than two years unless Edward obtained a court order allowing their return.

B. *Lori's Response to City's Petition*

Edward did not file a response to City's petition for disposition of firearms. Lori filed a response in opposition to the petition in which she designated herself as Edward's "co-respondent." In her supporting declaration, Lori stated that she had been married to

Edward for nearly 20 years; Edward was placed on a psychiatric hold pursuant to section 5150 on January 24, 2013; Edward was currently prohibited from owning, acquiring, or possessing firearms or ammunition; and the confiscated **[*4]** firearms had been kept in a safe in their home and were community property.

Lori further declared that no firearms were involved in the event that triggered Edward's January 24, 2013 episode; she had opened the gun safe for the police officers who took all of their firearms; and she acknowledged that she had a legal duty to prevent Edward from obtaining access to any firearms or ammunition under her control while he remained a prohibited person. Additionally, Lori attached documents to her declaration that showed her ownership of a firearm safe and her April 2013 change to the safe's combination.

In her hearing brief, Lori argued that the trial court had "no power to interfere with [her] Second Amendment 'right to keep and bear arms,'" since she was not prohibited from acquiring or possessing firearms and had promised to take all steps required under California law to secure the firearms in a gun safe.

On June 21, 2013, the parties filed a stipulation and order stating that the parties agreed that "Lori Rodriguez has standing in this action in that she has at least a community property interest in the firearms at issue in these proceedings."

C. *Evidentiary Hearing*

The following is a summary of the evidence **[*5]** presented at the August 9, 2013 evidentiary hearing on City's petition.

On January 24, 2013, Police Officer Steven Valentine and other City of San Jose police officers arrived at the Rodriguez home to investigate a domestic disturbance. They were responding to Lori's 911 call regarding Edward's behavior and her concern that he might be suffering from a mental illness. Police officers had previously responded to at least two calls of a domestic disturbance at the Rodriguez home and were aware that there were firearms in the home.

Upon his arrival at the Rodriguez home on January 24, 2013, Officer Valentine observed that Edward was perspiring heavily and had rapid respiration. Officer Valentine also observed that Lori was afraid of Edward. Edward claimed that he was affiliated with the CIA, was acting irrationally, and had bizarre and aggressive mannerisms. Officer Valentine believed that Edward was delusional.

When Officer Valentine asked Edward if he wanted to hurt himself, Edward responded by attempting to break his own thumb. Based on his observations and Edward's attempt to hurt himself, Officer Valentine determined that Edward, who weighed nearly 400 pounds, was a danger to himself **[*6]** and others.

San Jose Fire Department personnel and medical personnel arrived to transport Edward to Santa Clara Valley Medical Center (VMC) for a 72-hour hold and psychological evaluation pursuant to former section

5150.[3] After Edward was secured on the gurney, he continued to break the restraints. Medical personnel requested that a police officer accompany them in the ambulance. Edward was then transported to VMC, where he was determined to be a danger to himself and others and admitted to the hospital pursuant to former section 5151[4] and section 5152.[5]

Officer Valentine remained at the Rodriguez home after Edward was transported. He advised Lori that that he would need to confiscate the weapons in the home pursuant to section 8102. Lori unlocked a gun safe by using the key she kept in her possession and a combination lock. Police officers then removed 12 firearms, including three revolvers, three shotguns, a handgun, a rifle, and four semi-automatic **[*8]** rifles. Police officers did not find any firearms outside the gun safe. The firearms had been purchased by Lori or Edward or acquired from her family. Although one

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[3] At the time of Edwards's detention, former section 5150 provided in part: "When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team provided by Section 5651.7, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Social Services as a facility for 72-hour treatment and evaluation."

[5] Section 5152, subdivision (a) provides in part: "Each person admitted to a facility for 72-hour treatment and evaluation under the provisions of this article shall receive an evaluation as soon as possible after he or she is admitted and shall receive whatever treatment and care his or her condition requires for the full period that he or she is held."

firearm belonged to Lori, all 12 firearms were confiscated because Edward had access to them.

In February 2013, City filed a petition for disposition of the firearms to which Lori filed a response in April 2013. In May 2013, Lori received notification from the California Department of Justice Bureau of Firearms that she is eligible to both possess and purchase firearms. At the hearing, Lori testified that she has not committed a felony and has not been detained under section 5150.

D. *Trial Court Order*

In its order of September 30, 2013, the trial court granted City's petition for disposition of weapons. The order also states: "The City agrees to hold the weapons pending final disposition or resolution of this matter in accordance with its general practices."

During the hearing on the petition, the trial court provided the court's reasoning for granting the petition. The court stated: "I mean the elephant in the room is [Edward] goes back and somehow he overpowers [Lori] or pressures her or something to open the safe. I mean that's a real **[*9]** concern I have. At the end of the day this is a public safety issue. The guns are right there. They're low hanging fruit. Yeah, they're behind the safe. But, you know, I don't know the dynamics of the relationship. I know the police have been out there. I know there is a history of instability. I'm real concerned about releasing these weapons back to home, even behind the safe, when he's got . . . the ability to, you know, coerce [Lori] somehow into opening that safe. That concerns me."

The trial court also stated: "[A]t the end of the day, is what my responsibility is, is public safety. And

that's what guides me. And I'm not saying I'm ignoring her Constitutional Rights or anybody else's rights. . . . I have to determine whether it's appropriate to release those guns given the facts in this particular case and the situation." The court then ruled, "I'm not going to order the release of the guns to the respondent. I don't think it's appropriate under the circumstances."

The trial court's order did not require forfeiture or destruction of the confiscated firearms. During the hearing, City's attorney noted that other options were available for disposition of the firearms: "The City has proposed **[*10]** a few options. Either the guns be held at another location away from the home. They could also be sold. The City is certainly interested or willing to enter into that type of stipulation to sell them through a third party gun dealer. Or they could be held in the house if they're rendered inoperable."

As to Lori's claim of a community property interest in the confiscated firearms, the trial court stated: "I think there are viable alternatives that need to be explored. This is the community possession of the respondent and whether it's by sale or release to a separate place. I'm going to let you folks work that out. So with respect to the request to release the guns back to [Lori], I'm going to deny that request."

Thereafter, Lori filed a notice of appeal from the September 30, 2013 order.

III. DISCUSSION

On appeal, we understand Lori to challenge the trial court's order granting City's petition for disposition of firearms on two grounds, insufficiency of the evidence and violation of her Second Amendment right to keep and bear arms. We will begin our

evaluation of her claims with an overview of the statutory framework for the confiscation of firearms from a person who has been detained for examination **[*11]** of his or her mental condition and the disposition of confiscated firearms.

A. *The Statutory Framework*

"Two firearm statutes come into play when a person is detained under section 5150 as a danger to himself [or herself] or others. Section 8103 will prohibit his [or her] possession of firearms for a five-year period.[6] Section 8102[7] authorizes confiscation of any weapons he [or she] already possesses." (*People v. Keil* (2008) 161 Cal.App.4th 34, 37, 73 Cal. Rptr. 3d 600 (*Keil*).) Section 8102 also authorizes "possible forfeiture of weapons belonging to persons detained for examination under section 5150 because of their mental condition. [Citations.]" (*City of San Diego v.*

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[6] Section 8103, subdivision (f)(1) provides in part: "No person who has been (A) taken into custody as provided in Section 5150 because that person is a danger to himself, herself, or to others, (B) assessed within the meaning of Section 5151, and *(C)* admitted to a designated facility within the meaning of Sections 5151 and 5152 because that person is a danger to himself, herself, or others, shall own, possess, control, receive, or purchase, or attempt to own, possess, control, receive, or purchase any firearm for a period of five years after the person is released from the facility." The person may request a hearing to lift the restriction. (§ 8103, subd. (f)(3).)

[7] Section 8102, subdivision (a) provides in part: "Whenever a person, who has been detained or apprehended **[*12]** for examination of his or her mental condition . . . 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."

Boggess (2013) 216 Cal.App.4th 1494, 1500, 157 Cal. Rptr. 3d 644 (*City of San Diego*).)

As stated in *City of San Diego*, "'[s]ection 8102 directly safeguards public health and safety by allowing law enforcement officers to confiscate any firearm in the possession or control of a person who is appropriately detained or apprehended for a mental examination. 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 herself] or others with the weapon.' [Citation.]" (*City of San Diego*, supra, 216 Cal.App.4th at p. 1500.)

The statutory scheme also provides the procedure for the return of the confiscated firearms to the person who was detained under section 5150. At the time of the August 2013 hearing on City's petition for disposition of firearms, former section 8102, subdivision (b) (now § 8102, subd. (b)(2)) provided in part: "Where the person is released, the professional person in charge of **[*13]** the facility, or his or her designee, shall notify the person of the procedure for the return of any firearm or other deadly weapon which may have been confiscated."

If the law enforcement agency that confiscated the firearms does not make the firearms available for return upon release of the detained person, the person may request a hearing on return of the firearms. (§ 8102, subds. (e), (f).) The law enforcement agency may also request a hearing: "Upon the release of a person as described in subdivision (b), the confiscating law enforcement agency shall have 30 days to initiate a petition in the superior court for a hearing to

determine whether the return of a firearm or other deadly weapon would be likely to result in endangering the person or others, and to send a notice advising the person of his or her right to a hearing on this issue." (§ 8102, subd. (c).) "Section 8102 thus 'places the onus upon law enforcement to initiate the forfeiture proceeding, and to bear the burden of proof on the issue of the danger presented by return of the weapons.' [Citations.]" (*City of San Diego, supra*, 216 Cal.App.4th at p. 1500.)

"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 **[*14]** may destroy the firearm within 180 days from the date that the court makes that determination, unless the person contacts the law enforcement agency to facilitate the sale or transfer of the firearm to a licensed dealer pursuant to Section 33870 of the Penal Code." (§ 8102, subd. (h).)

The standard of review for the trial court's order granting a petition for disposition of firearms under section 8102 is substantial evidence. (*City of San Diego, supra,* 216 Cal.App.4th at p. 1501.) "In determining whether a trial court's ruling is supported by substantial evidence, the appellate court should view the whole record in the light most favorable to the ruling, resolving all evidentiary conflicts and drawing all reasonable inferences supporting the court's decision. [Citation.]" (*Ibid.*) "We affirm if 'substantial evidence supports the court's determination that return of the firearms to appellant would be likely to result in endangering appellant or other persons.' [Citation.]" (*Keil, supra, 161 Cal.App.4th at p. 38.*)

B. *Analysis*

1. Substantial Evidence

We understand Lori to argue on appeal that the trial court's order granting City's petition for disposition of firearms and declining to return the firearms to her is not supported by substantial evidence. According to Lori, the evidence showed that she is not prohibited from owning or possessing **[*15]** firearms and if the confiscated firearms were returned to her, she could secure them in a gun safe to prevent Edward from having unauthorized access. Lori also offers to have the title to the firearms transferred to her. In addition, Lori points out that City's counsel conceded during the hearing that there is nothing to prevent her from buying more firearms and bringing them to the Rodriguez home.

In response, City relies on the statement in *City of San Diego* that "'[t]he court may properly consider whether the circumstances leading to the section 5150 detention might occur again and whether possession or control of those confiscated weapons in such circumstance would pose a risk of danger to appellant or to others.' [Citation.]" (*City of San Diego, supra,* 216 Cal.App.4th at p. 1502.) City asserts that the undisputed evidence shows that the circumstances here included Edward's behavior when Officer Valentine detained him, as well as Edward's size and the prior police responses to the Rodriguez home. City also asserts that return of the confiscated firearms to Lori would have "the practical effect of returning them to Edward," who is prohibited from accessing firearms.

We begin by noting that section 8102 expressly provides the procedure for the return of firearms **[*16]**

confiscated by a law enforcement agency only to the person who was detained under section 5150. Section 8102 is silent as to the return of the confiscated firearms to any other person. Accordingly, the only issue to be decided at a hearing under section 8102, subdivision (c) is whether return of the firearms to the previously detained person "would be likely to result in endangering the person or others." (§ 8102, subd, (c); see also id., subd. (h).) On appeal from a trial court order denying return of confiscated firearms under section 8102, the reviewing court decides the narrow issue of whether substantial evidence supports the trial court's determination that return of the firearms to the person who was detained under section 5150 would be likely to result in endangering that person or other persons. (*Keil, supra,* 161 Cal.App.4th at p. 38.)

In this case, Edward did not oppose the City's petition for disposition of the firearms. The parties filed a stipulation and order stating that the parties agreed that "Lori Rodriguez has standing in this action in that she has at least a community property interest in the firearms at issue in these proceedings." Since the parties stipulated that Lori has standing in this matter, we will consider whether the trial court's order granting City's petition is supported by **[*17]** substantial evidence that return of the firearms to the Rodriguez home would be likely to result in endangering Edward or others. (§ 8102, subds. (c), (h).)

Having reviewed the record in the light most favorable to the trial court's order (*City of San Diego, supra,* 216 Cal.App.4th at p. 1501), we agree with City that the trial court's order is supported by substantial evidence. The evidence showed that there had been two prior calls of a domestic disturbance at the

Rodriguez home; Lori made the 911 call regarding Edward's condition on the day of his detention; Lori appeared to be afraid of Edward; Edward's behavior was bizarre and delusional; Edward had attempted to break his own thumb; Edward weighed 400 pounds and had broken free of the gurney restraints; and medical personnel had requested that a police officer accompany them in the ambulance transporting Edward to the hospital. VMC personnel then determined that Edward was a danger to himself and others and he was admitted to the hospital pursuant to sections 5151 and 5152. Moreover, the trial court was not convinced by Lori's testimony that she could safely store the firearms and prevent Edward from having access to them. "'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" **[*18]** (*People v. Albillar* (2010) 51 Cal.4th 47, 60, 119 Cal. Rptr. 3d 415, 244 P.3d 1062.)

We therefore conclude that substantial evidence supports the trial court's order granting City's petition for disposition of firearms under section 8102 on the ground that return of the confiscated firearms to the Rodriguez home would be likely to result in endangering Edward or others.

2. Constitutional Claim

Lori's chief contention on appeal is that the trial court's order granting City's petition for disposition of firearms violates her Second Amendment right to keep and bear arms for home protection. She explains that "[d]epriving an owner of her own guns deprives her of the value of the property and means of exercising the core right of self-defense. [Citation.]" City urges that Lori's constitutional and community property rights

may be lawfully impacted by a lawful restriction on her husband Edward's property interest in the confiscated firearms.

At the outset, we note that Lori does not challenge the trial court's order as violating Edward's Second Amendment rights. Constitutional challenges to the trial court's refusal under section 8102 to return confiscated firearms to a person who was detained due to his or her mental condition have been rejected. (See *Rupf v. Yan* (2000) 85 Cal.App.4th 411, 427-428, 102 Cal. Rptr. 2d 157; *People v. One Ruger .22-Caliber Pistol* (2000) 84 Cal. App. 4th 310, 312, 100 Cal. Rptr. 2d 780.)

Lori's constitutional claim involves only her own Second Amendment right **[*19]** to keep and bear arms. For several reasons, we determine that Lori has not shown that her Second Amendment rights were violated by the trial court's September 30, 2013 order granting City's petition for disposition of firearms.

First, Lori acknowledges in her opening brief that the trial court's order does not bar her from acquiring new firearms, noting the trial court's "uncontradicted finding . . . that Lori cannot be prohibited from acquiring new firearms." Lori further acknowledges that under section 8101, she may not allow Edward access to any new firearms that she may acquire. Section 8101 provides: "(a) Any person who shall knowingly supply, sell, give, or allow possession or control of a deadly weapon to any person described in Section 8100 or 8103 shall be punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code, or in a county jail for a period of not exceeding one year, by a fine of not exceeding one thousand dollars ($1,000), or by both the fine and

imprisonment. [¶] (b) Any person who shall knowingly supply, sell, give, or allow possession or control of a firearm to any person described in Section 8100 or 8103 shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years."

Second, we understand Lori to argue that she has a Second Amendment right to return of **[*20]** the particular firearms that were confiscated under section 8102 for home protection. However, 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. In her briefing, she generally argues that the United States Supreme Court expanded Second Amendment rights in *District of Columbia v. Heller* (2008) 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (*Heller) and McDonald v. City of Chicago* (2010) 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (*McDonald*).

However, 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. Moreover, the *Heller* and *McDonald* decisions may be read to the contrary.

The *McDonald* court reiterated that "[i]n *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense." (*McDonald, supra,* 561 U.S. 742, 791.) However, the court also stated: "It is important to keep in mind that *Heller* while striking down a law that

prohibited the possession of handguns in the home, recognized *that the right to keep and bear arms is not* '*a right to keep and carry any weapon whatsoever in any manner whatsoever* and for whatever purpose.' [Citation.] We made **[*21]** it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' . . . . [Citation.]" (*McDonald*, supra, 561 U.S. at p. 786, italics added.)

Third, we note that the trial court's order does not actually require forfeiture or destruction of the confiscated firearms. Both the trial court and City's attorney suggested there were other viable options for disposition of the firearms, such as sale or storage outside the home.

Finally, we consider whether the provisions of Penal Code section 33850 *et seq.* impact Lori's Second Amendment claim. Lori has acknowledged that Penal Code section 33850 provides a procedure for the return of firearms in police custody to persons who claim ownership of the firearms.

Under Penal Code section 33850, a "person who claims title to any firearm" in law enforcement custody may seek the return of that firearm. (Pen. Code, § 33850, subd. (a).)[8] The person seeking return of any firearms must file an application for a Penal Code

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[8] Penal Code section 33850, subdivision (a) provides in part: "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."

section 33865 notification that specifies the make and model of the firearms that are being sought and provides detailed information about any handguns. (Pen. Code, §§ 33850, 33865, subd. (c)(3).) The firearms cannot be returned by a court or law enforcement agency unless the person seeking them obtains a Penal Code section 33865 notification that the person is eligible to **[*22]** possess a firearm and "the firearm has been recorded in the Automated Firearms System in the name of the individual who seeks its return." (Pen. Code, § 33855, subd. (b).)

After oral argument, we asked the parties to provide supplemental briefing with respect to the impact of Penal Code section 33850 *et seq.* on Lori's Second Amendment claim, by responding to the following questions: (1) "The record on appeal includes a copy of a May 8, 2013 Department of Justice Bureau of Fireams notice stating that Lori Rodriguez is 'eligible to both possess and purchase firearms as of the date the [personal firearms eligibility] check was completed.' What evidence in the record, if any, shows that Rodriguez either has or has not sought return of the confiscated firearms under the procedure provided by Penal Code section 33850 *et seq*?"; (2) "Assuming that Rodriguez has not sought return of the confiscated firearms under Penal Code section 33850 *et seq.*, what is the impact on her claim that the trial court's order of September 30, **[*23]** 2013, violates her rights under the Second Amendment?"; and (3) "Assuming that Rodriguez has sought return of the confiscated firearms under Penal Code section 33850 *et seq.*, what is the impact on her claim that the trial court's order of September 30, 2013, violates her rights under the Second Amendment?"

In their supplemental briefing, the parties agree that the record does not indicate that Lori has sought return of the confiscated firearms under the procedure provided by Penal Code section 33850 *et seq*. We understand Lori to contend that her failure to utilize the firearms return procedure provided by Penal Code section 33850 *et seq*. has no impact on her Second Amendment claim, for three reasons. First, Lori asserts that she properly sought return of the confiscated firearms by intervening in City's petition for disposition of firearms under section 8102. Second, Lori maintains that she may raise a constitutional claim without exhausting the administrative remedy provided by Penal Code section 33850 *et seq*. Finally, Lori appears to argue that the trial court proceedings on City's section 8102 petition precluded her from seeking return of the confiscated firearms under Penal Code section 33850.

City responds that whether or not Lori has sought return of the confiscated firearms under Penal Code section 33850 *et seq*. has no impact on her claim that the trial court's September 30, 2013 order violates her Second Amendment rights. City notes that prior **[*24]** to amendment in 2013, section 8102 was silent as to Penal Code section 33850 *et seq*.,[9] and emphasizes its

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[9] As amended in 2013, section 8102, subdivision (b) provides: "(1) Upon confiscation of any firearm or other deadly weapon from a person who has been detained or apprehended for examination of his or her mental condition, the peace officer or law enforcement agency shall issue a receipt describing the deadly weapon or any firearm and listing any serial number or other identification on the firearm and shall notify the person of the procedure for the return, sale, transfer, or destruction of any firearm or other deadly weapon which has been confiscated. A peace officer or law enforcement agency that provides the receipt

position that the trial court's order is constitutional because substantial evidence supports the trial court's finding that return of the confiscated firearms would likely endanger Edward and others.

The parties' supplemental briefing confirms that Lori has not sought return of the confiscated firearms under the procedure provided by Penal Code section 33850 et seq., although the firearms remain in the custody of law enforcement and Lori has obtained notification from the California Department of Justice Bureau of Firearms that she is eligible to both possess and purchase firearms. 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. Moreover, we believe that the record on appeal shows that the procedure provided **[*26]** by section 33850 et seq. for return of firearms in the

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and notification described in Section 33800 of the Penal Code satisfies the receipt and notice requirements. [¶] (2) If the person is released, the professional person in charge of the facility, or his or her designee, shall notify the person of the procedure for the return of any firearm or other deadly weapon which may have been confiscated. [¶] (3) Health facility personnel **[*25]** shall notify the confiscating law enforcement agency upon release of the detained person, and shall make a notation to the effect that the facility provided the required notice to the person regarding the procedure to obtain return of any confiscated firearm. [¶] (4) For purposes of this subdivision, the procedure for the return, sale, or transfer of confiscated firearms includes the procedures described in this section and the procedures described in Chapter 2 (commencing with Section 33850) of Division 11 of Title 4 of Part 6 of the Penal Code." (Stats. 2013, ch. 747, *§ 2*.)

possession of law enforcement remains available to Lori.

We therefore determine that Lori has failed to show that the trial court's September 30, 2013 order violates the Second Amendment by precluding her from keeping firearms for home protection. In the absence of any evidence that Lori's Second Amendment right to keep and bear arms was actually violated by the trial court's September 30, 2013 order granting City's petition for disposition of firearms under section 8102, we conclude that her Second Amendment claim lacks merit.

Having also determined that the order may be affirmed under section 8102 because the order is supported by substantial evidence that return of the confiscated firearms to the Rodriguez home would be likely to result in endangering Edward or others, we will affirm the order.

IV. DISPOSITION

The September 30, 2013 order is affirmed.

BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

MIHARA, J.

GROVER, J

APPENDIX F

Constitutional and Statutory Provisions Involved

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

(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

(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

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.