

Appellate Case No.: 17-17144

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LORI RODRIGUEZ; ET AL,

Appellants,

vs.

CITY OF SAN JOSE; ET AL,

Appellees.

**BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES AND
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN
SUPPORT OF APPELLEES**

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

T. PETER PIERCE (BAR NO. 160408)

ppierce@rwglaw.com

KYLE H. BROCHARD (BAR NO. 293369)

kbrochard@rwglaw.com

STEVEN A. NGUY (BAR NO. 307263)

snguy@rwglaw.com

RICHARDS, WATSON & GERSHON

A Professional Corporation

44 Montgomery Street, Suite 3800

San Francisco, California 94104-4811

Telephone: 415.421.8484

Facsimile: 415.421.8486

Attorneys for Amici Curiae

League of California Cities and International


Municipal Lawyers Association

CORPORATE DISCLOSURE STATEMENT

Amici Curiae League of California Cities and International Municipal
Lawyers Association have no parent corporations and have no stock. Therefore,
no publicly held corporation owns 10% or more of their stock.

Dated: July 2, 2018

RICHARDS, WATSON & GERSHON
A Professional Corporation
T. PETER PIERCE
KYLE H. BROCHARD
STEVEN A. NGUY

By: 

T. PETER PIERCE
Attorneys for Amici Curiae

Table of Contents

	Page No.
INTEREST OF AMICI CURIAE	6
FED. R. APP. P. 29(c)(5) STATEMENT	6
FED. R. APP. P. 29(a) STATEMENT	7
PROCEDURAL BACKGROUND	7
INTRODUCTION AND SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. Keeping a firearm away from a mentally unstable person is a proper exercise of the state police power	11
II. If adequate safeguards cannot be provided, the court has the authority to deny the release of firearms	13
CONCLUSION	16

Table of Authorities

Page No.

Cases

<i>Alkmeon Naviera, S.A. v. M/V Marina L</i> , 633 F.2d 789 (9th Cir.1980)	14
<i>City of San Diego v. Boggess</i> , 216 Cal.App.4th 1494 (2013)	8, 11, 12, 13
<i>City of San Jose v. Rodriguez</i> , H040317, 2015 WL 1541988 (Cal. Ct. App., Apr. 2, 2015)	9
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	11, 12
<i>Henderson v. U.S.</i> , 135 S.Ct. 1780 (2015)	9, 13, 14
<i>Keystone Bituminous Coal Ass'n v. DeBenedictis</i> , 480 U.S. 470 (1987)	11
<i>Knaubert v. Goldsmith</i> , 791 F.2d 722 (9th Cir.1986)	14
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010)	11, 12
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996)	11

Table of Authorities

Page No.

Statutes

18 United States Code, Section 922(g) 15

California Welfare and Institutions Code:

Section 5150..... 8, 12

Section 8102..... passim

Section 8102(a) 9

Section 8103..... 8, 9, 12, 15

Section 8103(f)..... 8

Section 8103(f)(1)..... 8, 12

Federal Rules of Appellate Procedure, rule 29(c)(5) 6

INTEREST OF AMICI CURIAE

Amici Curiae League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The International Municipal Lawyers Association (“IMLA”) is a nonprofit professional organization of more than 2,500 local government attorneys. Since 1935, IMLA has served as a national, and now international, resource for legal information and cooperation on municipal legal matters. Its mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local governments. It does so in part through extensive *amicus* briefing before the U.S. Supreme Court, the U.S. Courts of Appeals, and state appellate courts.

FED. R. APP. P. 29(c)(5) STATEMENT

As required by Rule 29(c)(5) of the Federal Rules of Appellate Procedure, the amici curiae state that this brief was not authored by counsel for a party to this

action. No party, or counsel to a party, or any person provided any financial support or funding for preparing or submitting this brief.

FED. R. APP. P. 29(a) STATEMENT

Under Rule 29(a) of the Federal Rules of Appellate Procedure, all of the parties to this appeal have consented to the filing of this amicus brief.

PROCEDURAL BACKGROUND

On September 29, 2017, the United States District Court for the Northern District of California granted the motion for summary judgment filed by appellees City of San Jose, the City of San Jose Police Department, and Officer Steven Valentine (collectively the “Appellees”). Appellants Lori Rodriguez, the Second Amendment Foundation, Inc. (“SAF”), and the Calguns Foundation (“Calguns”) appealed and filed their opening brief on February 26, 2018. Appellees filed their Answering Brief on June 25, 2018.

INTRODUCTION AND SUMMARY OF ARGUMENT

The California Legislature, under its police power, has enacted a number of regulatory measures designed to protect the general public from gun violence. This case involves the proper application of those regulatory measures, specifically, California Welfare and Institutions Code sections 8102 and 8103.

California Welfare & Institutions Code section 8102 authorizes law enforcement agencies to confiscate weapons belonging to individuals who, if allowed access to such weapons, are likely to endanger themselves or others. *City of San Diego v. Boggess*, 216 Cal.App.4th 1494, 1500 (2013). Section 8103(f) regulates possession of firearms by mentally unstable individuals. The statute prohibits any person “admitted to a designated facility ... because that person is a danger to himself, herself or others ...” from possessing firearms for a period of five years. California Welfare & Institutions Code § 8103(f)(1). These regulations are properly within the State’s police power to protect the public health, welfare, and safety.

Edward Rodriguez suffered a mental episode at his home. Appellant Lori Rodriguez, his wife, called the police for help. Officers of the City of San Jose Police Department responded and detained Edward for a mental health evaluation under California Welfare & Institutions Code section 5150. The officers also took

possession of twelve firearms that were stored in the house--eleven belonging to Edward and one belonging to Lori--as they are required to do under California Welfare & Institutions Code section 8102(a).

The City of San Jose (“City”) then filed a petition in the California trial court under Welfare & Institutions Code section 8102 to determine the proper disposition of the firearms. Lori sought to have the firearms returned to her. The court declined to return them. Edward was prohibited from possessing firearms under Welfare & Institutions Code section 8103, and the state trial court “was not convinced by Lori's testimony that she could safely store the firearms and prevent Edward from having access to them.” *City of San Jose v. Rodriguez*, H040317, 2015 WL 1541988, at *6 (Cal. Ct. App., Apr. 2, 2015) (*Rodriguez*). The California Court of Appeal affirmed the trial court’s decision not to return the firearms to Lori. *See Rodriguez*, 2015 WL 1541988.

This is precisely the situation that Section 8102 is designed to address. The California trial court weighed the evidence and concluded that the safeguards proffered by Lori were not sufficient to prevent Edward from accessing the firearms. On those facts, the court’s decision to deny Lori’s request to have the guns returned to her was legally sound. (*See Henderson v. U.S.*, 135 S.Ct. 1780, 1784-87 (2015) (an individual prohibited from possessing firearms cannot evade

the prohibition “by arranging a sham transfer that leaves him in effective control of his guns.”).

Displeased with that outcome, Lori transferred all of the guns into her name and again sought to have them returned. The City, following the California trial court’s previous determination, did not release the guns. The City properly declined to return the firearms in a situation that has been judicially determined likely to endanger the individuals involved or others. Whether Lori or Edward own the firearms is ultimately irrelevant. Because Edward was prohibited from possessing firearms, personally or constructively, the City was obligated by law to refuse Lori’s request to return the firearms.

California properly implements regulatory measures to protect the public by authorizing law enforcement agencies to confiscate the firearms of mentally unstable individuals. Whether those firearms should be returned to a household inhabited by such a person is a decision properly reposed in the state courts. Here, California law prohibiting mentally unstable individuals from possessing firearms functioned exactly as designed. This Court should affirm the District Court’s judgment. A reversal would second guess California’s properly adopted regulatory regime, thereby undermining California’s sovereignty.

ARGUMENT

I. Keeping a firearm away from a mentally unstable person is a proper exercise of the state police power.

It is well-established that states have the sovereign right to protect the general welfare of the people through the exercise of their police power. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 503 (1987). Because the general welfare of the people is primarily and historically a matter of local concern, states “have great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (internal quotations omitted). California has long recognized that regulation of firearms is a proper exercise of that police power. *City of San Diego v. Boggess*, 216 Cal. App. 4th 1494, 1505 (2013) (“*Boggess*”).

The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) (“*Heller*”), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (“*McDonald*”), shaped the contours of the government’s power to regulate firearms. It is settled that “the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.” *McDonald*, 561 U.S. at 780. The Supreme Court, however, emphasized that Second Amendment protections are not unlimited. *Heller*, 554 U.S. at 626. Neither *Heller* nor

McDonald disturb such “presumptively lawful” longstanding regulatory measures as “prohibitions on the possession of firearms by felons and the mentally ill.”

Heller, 554 U.S. at 626-27 and fn. 26; *see also McDonald*, 561 U.S. at 786.

Sections 8102 and 8103 are examples of the “presumptively lawful” regulatory measures envisioned by the Supreme Court. Under its police power, California has instructed local law enforcement agencies to confiscate weapons from the mentally ill under California Welfare & Institutions Code section 8102. That statute “authorizes the seizure and possible forfeiture of weapons belonging to persons detained for examination under [California Welfare & Institutions Code] section 5150 because of their mental condition.” *Boggess*, 216 Cal. App. 4th at 1500. Section 8102 prohibits a person detained for examination of their mental condition “from recovering their seized firearms upon proof by the seizing agency that returning the weapon would be likely to result in endangering that person or others.” *Id.* at 1505. Similarly, under California Welfare & Institutions Code section 8103, a person detained and assessed under section 5150 who has been “admitted to a designated facility ... because that person is a danger to himself, herself or others ...” is thereafter prohibited from possessing firearms for a period of five years. Welf. & Inst. Code § 8103(f)(1).

Unlike the regulations struck down in *Heller* and *McDonald*, Sections 8102 and 8103 narrowly regulate the possession of firearms by those individuals who, if

allowed access to firearms, are likely a danger to themselves or others. These statutes are directly related to the public health, safety, and welfare because they authorize the dispossession of firearms from individuals who are potentially mentally unstable. “It is not unreasonable to conclude there is a significant risk that a mentally unstable gun owner will harm himself or others with the weapon.” *Bogges*, 216 Cal. App. 4th at 1500 (internal quotations omitted). California’s decision to confiscate firearms from individuals who are potentially mentally unstable, and to prohibit the return of firearms to those individuals is a proper exercise of police power. A judgment in favor of appellants would erode that proper exercise.

II. If adequate safeguards cannot be provided, the court has the authority to deny the release of firearms.

California Welfare & Institutions Code section 8102 tasks state courts with determining whether to return firearms confiscated from a mentally infirm person. Those courts are best equipped to decide whether return is likely to endanger that person or others.

The Supreme Court recently discussed in *Henderson v. United States*, 135 S. Ct. 1780 (2015) (“*Henderson*”), Congress’ analogous grant of authority to the Federal District Courts:

A court may also grant a felon's request to transfer his guns to a person who

expects to maintain custody of them, so long as the recipient will not allow the felon to exert any influence over their use. In considering such a motion, the court may properly seek certain assurances: for example, it may ask the proposed transferee to promise to keep the guns away from the felon, and to acknowledge that allowing him to use them would aid and abet a § 922(g) violation. See [*United States v. Zaleski*, 686 F.3d 90, 94 (C.A.2 2012)]; *United States v. Miller*, 588 F.3d 418, 420 (C.A.7 2009). **Even such a pledge, of course, might fail to provide an adequate safeguard, and a court should then disapprove the transfer.** See, e.g., *State v. Fadness*, 363 Mont. 322, 341–342, 268 P.3d 17, 30 (2012) (upholding a trial court's finding that the assurances given by a felon's parents were not credible).

Henderson, 135 S.Ct. at 1787, emphasis added.

Implicit in *Henderson*'s discussion of a court's equitable powers is the recognition that state trial courts are best positioned to determine whether the return of the firearms is proper. This accords with the longstanding deference that trial courts receive on issues of credibility and evidence. See *Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir.1986) (“[w]e can think of no sort of factual finding that is more appropriate for deferential treatment than is a state court's credibility determination”); see also, *Alkmeon Naviera, S.A. v. M/V Marina L*, 633

F.2d 789, 796 (9th Cir.1980) (the trial judge is in the best position to weigh the evidence and apportion fault.)

A court's equitable power to grant or deny a request to transfer firearms -- in the wake of the multiple prohibitions on possession under 18 U.S.C. § 922(g) -- provides an instructive analogue to Welfare & Institutions Code sections 8102 and 8103. Much like 18 U.S.C. § 922(g) in the federal arena, California Welfare and Institutions Code section 8102 tasks California's trial courts with determining whether it would be proper to return confiscated weapons. Both 18 U.S.C. § 922(g) and section 8102 were intended to protect public safety.

Here, Edward was prohibited from possessing firearms. The City of San Jose filed a petition under Section 8102, and Lori responded by requesting the firearms be released to her. Lori promised to keep them away from Edward and has said she would keep them in a safe. The state trial court was charged to decide whether returning the firearms would be likely to endanger Edward, Lori, or others. The state trial court did not believe there were adequate safeguards in place to prevent Edward from endangering himself, Lori, or others if the firearms were returned to the residence. The state trial court was in the best position to make that determination.

The only subsequent change is Lori's transfer of the firearms to her name. But ownership is not relevant. The relevant determination is whether the return of


the confiscated weapons would be likely to endanger the individuals involved or others. The California trial court's concern about Edward exercising control over the firearms is as justified today as it was when Lori called the police. This Court should not undermine the findings that the California trial court was properly tasked and positioned to make.

CONCLUSION

Affirming the judgment would give effect to California's properly adopted measures, and to the California trial court's findings in implementing California law.

Dated: July 2, 2018

RICHARDS, WATSON & GERSHON
A Professional Corporation
T. Peter Pierce
Kyle H. Brochard
Steven A. Nguy

By: 
T. Peter Pierce
Attorneys for *Amici Curiae*

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

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

- ☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- ☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is 2,206 words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- ☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- ☐ This brief complies with the longer length limit authorized by court order dated
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
- ☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- ☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- ☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or
Unrepresented Litigant

s/ T. Peter Pierce

Date

July 2, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

9th Circuit Case Number(s)

17-17144

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) July 2, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

s/ Robin Hale

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)