No. 17–17144

In the United States Court of Appeals for the Ninth Circuit

LORI RODRIGUEZ, *et al.*,

Plaintiffs–Appellants,

v.

CITY OF SAN JOSE, *et al.*,

Defendants–Appellees.

Appeal from the United States District Court
for the Northern District of California
The Honorable Edward J. Davila
Case No. 5:15–cv–03698–EJD

BRIEF OF *AMICUS CURIAE* MILLENNIAL POLICY CENTER IN SUPPORT OF APPELLANTS AND REVERSAL

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QUESTION PRESENTED

Can a city confiscate and retain possession of constitutionally-protected arms kept by a law-abiding citizen for self-defense in her home based on another person's firearms disability?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Millennial Policy Center states that it is a non-profit corporation, incorporated in Colorado. Millennial Policy Center has no parent corporations, nor is there any publicly held corporation that owns more than 10% of its stock.

/s/ *Joseph G.S. Greenlee*
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STATEMENT OF *AMICUS CURIAE*

Millennial Policy Center ("MPC") is a research and educational center whose mission is to develop and promote policy solutions that advance freedom, opportunity, and economic vitality for the Millennial Generation. To secure liberty for younger and future generations, MPC has a keen interest in the long-term viability of the constitutionally-protected right to keep and bear arms and the reasonableness and legality of any restrictions sought to be placed upon that right.

CONSENT TO FILE

All parties have consented to the filing of this brief.[1]

SUMMARY OF FACTS

In 2013, Lori Rodriguez reported to the police that her husband, Edward Rodriguez, was suffering a mental health episode. The San Jose Police detained Mr. Rodriguez and sent him to a hospital. Then, over

[1] No counsel for a party in this case authored this brief in whole or in part. No party or counsel for a party contributed money intended to fund the preparation and submission of this brief. No person other than *amicus curiae* and its supporters contributed money intended to fund preparing or submitting this brief.

Mrs. Rodriguez's objection, the San Jose Police confiscated twelve firearms from the gun safe in the home. One of these firearms belongs solely to Mrs. Rodriguez and is registered in her name. The other firearms were registered in her husband's name, but belonged to her also as community property.

Now that her husband is a prohibited person, Mrs. Rodriguez changed the lock on the safe, transferred all the firearms into her name only, and vowed to prevent her husband from accessing them. Yet, the City of San Jose refuses to return the firearms to her, acknowledging that she is a law-abiding, responsible citizen legally capable of purchasing and possessing firearms, but maintaining that she would be safer without a firearm in the home.

Mrs. Rodriguez cannot afford new firearms. Thus, she is dependent on San Jose returning the firearms she lawfully owns to exercise her constitutional right to keep and bear arms.

SUMMARY OF ARGUMENT

The issue here is whether the confiscation and continued retention of a law-abiding citizen's constitutionally-protected arms based on someone else's firearms disability violates the Second Amendment.

This Court applies a Two-Part Test to Second Amendment challenges. In Part One, the Court determines whether the challenged conduct burdens the Second Amendment. Specifically, the government must prove that its conduct falls beyond the historical understanding of the scope of the right to keep and bear arms. In Part Two, the Court determines and applies the appropriate level of scrutiny. This requires the Court to consider how close the challenged conduct comes to the core of the Second Amendment right, and the severity of the burden on the right.

San Jose has burdened Mrs. Rodriguez's Second Amendment right by preventing her—a law-abiding, responsible citizen—from keeping arms in defense of hearth and home. San Jose has offered no evidence nor argument to the contrary. Therefore, the Court must proceed to Part Two of the test.

Second Amendment challenges require some form of heightened scrutiny; rational basis review is insufficient. Strict scrutiny requires that the challenged conduct be the least restrictive means available, while intermediate scrutiny requires that it not be substantially more burdensome than necessary.

San Jose's confiscation and continued retention of Mrs. Rodriguez's firearms fails any standard of heightened scrutiny. It does not serve the City's public safety interest, and even counteracts it.

A city may not disarm a law-abiding, responsible citizen because it thinks she is better off without a firearm in the home. Such a decision is beyond the scope of government and belongs solely to the law-abiding citizen. Moreover, by disarming Mrs. Rodriguez, rather than protecting her as it intended, San Jose has left her vulnerable and defenseless.

On a grand scale, San Jose will harm public safety by deterring people from reporting the mentally ill out of fear that they themselves will be disarmed. By disarming Mrs. Rodriguez, the City will give pause to anyone wanting to report their spouse, family member, or roommate.

San Jose's conduct also fails heightened scrutiny because substantially less burdensome alternatives are available. In fact,

already-existing California law provides requirements for gun-owners living with prohibited persons. These laws, which ensure safe storage and criminalize the act of knowingly providing the prohibited person access to firearms, both prevent the prohibited person from acquiring firearms and protect the law-abiding person's right to keep arms for self-defense in the home.

ARGUMENT

I. THIS COURT APPLIES A TWO-PART TEST TO SECOND AMENDMENT CHALLENGES.

This Court has adopted a Two-Part Test for Second Amendment challenges. *United States v. Chovan*, 735 F.3d 1127, 1136–37 (9th Cir. 2013). "The two-step Second Amendment inquiry . . . (1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *Id.* at 1136.

Application of the Two-Part Test in this case establishes that San Jose has violated Mrs. Rodriguez's Second Amendment rights.

A. Part One

"In the first step, we ask whether the challenged law burdens conduct protected by the Second Amendment, based on a historical understanding of the scope of the Second Amendment right, or whether the challenged law falls within a well-defined and narrowly limited category of prohibitions that have been historically unprotected." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (internal citations, quotations, and brackets omitted).

i. San Jose Must Prove that Mrs. Rodriguez's Second Amendment Right is Not Burdened.

The government bears the burden of proving that challenged conduct falls beyond the historical scope of the Second Amendment. As this Court explained in *Jackson*:

> To determine whether a challenged law falls outside the historical scope of the Second Amendment, we ask . . . *whether the record includes persuasive historical evidence* establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment.

746 F.3d 953, 960 (9th Cir. 2014) (emphasis added). In *Jackson*, the sale of ammunition was protected because the government failed to prove that historically it was not:

> Conducting our historical review, we conclude that prohibitions on the sale of ammunition do not fall outside the historical understanding of the scope of the Second Amendment right. *Heller* does not include ammunition regulations in the list of "presumptively lawful" regulations. Nor has San Francisco pointed to historical prohibitions discussed in case law or other historical evidence in the record before us indicating that restrictions on ammunition fall outside of the historical scope of the Second Amendment.

Id. at 968 (internal quotations, citations, and brackets omitted).

Likewise, "because of the lack of historical evidence in the record before" this Court in *Chovan*, it assumed a domestic violence misdemeanant's "Second Amendment rights are intact." 735 F.3d at 1137 (quoting *United States v. Chester*, 628 F.3d 673, 681-82 (4th Cir. 2010)).

Sister circuits similarly require the government to prove that a challenged activity falls beyond the historical scope of the Second Amendment. *See Ezell v. City of Chicago*, 651 F.3d 684, 702-03 (7th Cir. 2011); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 688 (6th Cir.

2016) (en banc); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 (2d Cir. 2015); *Chester*, 628 F.3d at 681-82.

In this case, San Jose failed to provide any historical evidence justifying the confiscation of a law-abiding citizen's firearms based on another person's prohibited status. Indeed, San Jose failed to even offer such an argument. Therefore, the presumption that San Jose has burdened Mrs. Rodriguez's Second Amendment rights remains unrebutted.

ii. The Second Amendment Protects Mrs. Rodriguez's Right to Keep Arms.

The Supreme Court held in *District of Columbia v. Heller* that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592 (2008). The Court stated that "[t]he inherent right of self-defense has been central to the Second Amendment right," and that "the home [is] where the need for defense of self, family, and property is most acute." *Id.* at 628.

Identifying the core of the right, the *Heller* Court declared that the Second Amendment "surely elevates above all other interests the right

of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

Mrs. Rodriguez is protected by the very core of the Second Amendment right. She is a law-abiding, responsible citizen seeking to use arms in defense of hearth and home. San Jose has confiscated and refuses to return the arms that she kept for self-defense in her home. This is a direct burden on her Second Amendment right to keep and bear arms. Therefore, the Court must proceed to Part Two.

B. Part Two

In Part Two, this Court determines and applies the appropriate level of scrutiny:

> the level of scrutiny in the Second Amendment context should depend on the nature of the conduct being regulated and the degree to which the challenged law burdens the right. More specifically, the level of scrutiny should depend on (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right.

Chovan, 735 F.3d at 1127 (internal citations and quotations omitted).

i. The Court Must Apply *Heightened* Scrutiny.

For Second Amendment challenges, the *Heller* Court unequivocally ruled out rational basis review:

> Obviously, [rational-basis review] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms . . . If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

Heller, 554 U.S. at 628 n.27.

This Court has repeatedly recognized that heightened scrutiny is required for Second Amendment challenges. *See United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) ("In *Heller*, the Supreme Court did not specify what level of scrutiny courts must apply to a statute challenged under the Second Amendment. The *Heller* Court did, however, indicate that rational basis review is not appropriate."); *Jackson*, 746 F.3d at 960 ("While *Heller* did not specify the appropriate level of scrutiny for Second Amendment claims, it nevertheless confirmed that rational basis review is not appropriate."); *Van Der Hule*

v. Holder, 759 F.3d 1043, 1051 (9th Cir. 2014) ("Second Amendment questions are reviewed under heightened scrutiny"). Sister circuits agree that rational basis is prohibited. *See* David B. Kopel & Joseph G.S. Greenlee, The Federal Circuits' Second Amendment Doctrines, 61 ST. LOUIS U. L.J. 193, 274 n.486 (2017) (citing twenty-three federal Circuit Court cases expressly rejecting rational basis as insufficient for Second Amendment challenges).

ii. Strict Scrutiny Should Apply to the Confiscation and Continued Retention of Mrs. Rodriguez's Firearms.

As explained above, the severity of scrutiny depends on "(1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right." *Chovan*, 735 F.3d at 1138. This Court has previously identified the polar ends of the spectrum:

> A law that imposes such a severe restriction on the core right of self-defense that it "amounts to a destruction of the [Second Amendment] right," is unconstitutional under any level of scrutiny. *Heller,* 554 U.S. at 629, 128 S.Ct. 2783 (internal quotations omitted). By contrast, if a challenged law does not implicate a core Second Amendment right, or does not place a substantial

> burden on the Second Amendment right, we may apply intermediate scrutiny.

Jackson, 746 F.3d at 961. Additionally, "[a] law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016).

1. How Close the Burden Comes to the Core of the Second Amendment Right

Heller identified the core of the Second Amendment as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. By confiscating the arms that Mrs. Rodriguez—a law-abiding, responsible citizen—kept to defend hearth and home, San Jose struck at the core of the Second Amendment right.

2. The Severity of the Burden on the Right

The confiscation of every single arm Mrs. Rodriguez kept for self-defense in her home is akin to a destruction of her Second Amendment right, which would be "unconstitutional under any level of scrutiny." *Jackson*, 746 F.3d at 961 (citing *Heller*, 554 U.S. at 629). San Jose

concedes that Mrs. Rodriguez is a law-abiding citizen and that it is legal for her to purchase and possess firearms. Nevertheless, San Jose confiscated her firearms and refuses to return them.

The district court determined that San Jose's confiscation and retention of Mrs. Rodriguez's firearms does not violate her Second Amendment right because, "despite the City's decision (under § 8102) not to return the guns it confiscated, [Mrs. Rodriguez] concedes that she is free to own and possess other guns that she lawfully acquires. The Second Amendment protects the right to keep and bear arms in general, but it does not protect the right to possess specific firearms." ER 3:010 (citations omitted) (emphasis in original).

The fact that a person can—if she goes to enough trouble and expense—compensate for the government's violation of her constitutional right hardly minimizes the severity of the violation. Taken to its logical conclusion, the government could repeatedly confiscate a law-abiding citizen's firearms simply because the person could theoretically acquire new ones. Fundamental rights must not tolerate such burdens. For instance, San Jose could not seize an

automobile from a resident as long as she owns a second automobile or could lawfully acquire another.

Further, the argument that the availability of alternative arms can justify the unavailability of preferred arms was expressly rejected by *Heller*. 554 U.S. at 629 ("It is no answer to say [] that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.,* long guns) is allowed.").

What is more, it would be prohibitively expensive for Mrs. Rodriguez to replace the confiscated arms. Repurchasing the same firearms she already owned would cost Mrs. Rodriguez approximately $10,000.[2] Mrs.

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[2] Mrs. Rodriguez's research showed that her confiscated firearms are worth more than $10,000. ER 11:157. This is consistent with the research conducted by *amicus curiae*, provided below, which shows that the confiscated firearms can be replaced for $9,770.93, excluding background checks, shipping, and other transaction costs. These arms are detailed in the record at ER 11:189–217.

1) .44 caliber Smith & Wesson Magnum revolver. Model 629 6 classic. MSRP $989.00. *Model 629 Classic*, SMITH&WESSON, https://www.smith-wesson.com/firearms/model-629-classic (last visited March 3, 2018).

2) 12-gauge Browning single-barrel shotgun. Model: Gold Hunter. MSRP $1,190.00 (no longer in production). *Gold Hunter*, BROWNING, http://www.browning.com/products/firearms/shotguns/gold-shotguns/Discontinued/gold-hunter.html (last visited March 3, 2018).

3) 12-gauge Browning double-barrel shotgun. Model: Citori. MSRP: $2,139.99. *Citori CXS*, BROWNING,

http://www.browning.com/products/firearms/shotguns/citori/current-production/cxs.html (last visited March 3, 2018).

4) .22 caliber Ruger semi-automatic rifle. Model: 1022. MSRP: $419.00. *Ruger 10/22 Sporter*, RUGER, https://ruger.com/products/1022Sporter/specSheets/1102.html (last visited March 3, 2018).

5) .30 caliber Ruger handgun. Model: Carbine. MSRP: $669.00. *Ruger New Model Blackhawk Blued*, RUGER, https://ruger.com/products/newModelBlackhawkBlued/specSheets/0505.html (last visited March 3, 2018).

6) .22 caliber Winchester rifle. Model 290. Estimated MSRP: $250.00 (no longer in production). *Winchester Model 290*, GUN COLLECTIONS ONLINE, http://guncollectionsonline.com/winchester290.htm (last visited March 3, 2018).

7) .22 caliber Marlin semi-automatic rifle. Model: Glenfield 60. MSRP: $209.00. *Model 60*, MARLIN, https://www.marlinfirearms.com/rimfire/model-60/model-60 (last visited March 3, 2018).

8) .22 caliber Remington semi-automatic rifle. Model: 552 BDL Speedmaster. MSRP: $707.00. *Model 552 BDL Speedmaster*, REMINGTON, https://www.remington.com/rifles/rimfire/model-552-speedmaster/model-552-bdl-speedmaster (last visited March 3, 2018).

9) Browning semi-automatic rifle. Model: Safari Bar Mark II. MSRP: $1,229.99. *BAR Mark II Safari*, BROWNING, http://www.browning.com/products/firearms/rifles/bar/current-production/bar-mark-ii-safari.html (last visited March 3, 2018).

10) .44 caliber Dan Wesson Magnum revolver. Model: 744 VH. MSRP: Unknown (no longer in production). Used firearm available for $759.00. *Dan Wesson 744 VH, 44 Magnum 6 Inch Barrel*, ARMSLIST, http://www.armslist.com/posts/3595055/colorado-springs-colorado-handguns-for-sale--dan-wesson-744-vh--44-magnum-6-inch-barrel- (last visited March 3, 2018).

11) 12-gauge Winchester single-barrel shotgun. Model: Ranger 120. MSRP: Unknown (no longer in production). Used firearm available for

Rodriguez explained that she has not purchased another firearm since hers were confiscated because "[m]oney has been tight lately" and "there's other things that we need to spend money on." ER 13:288.

The Eighth Circuit addressed a similar issue in *Walters v. Wolf*, 660 F.3d 307 (8th Cir. 2011). The court expressly left open "the possibility that some plaintiff could show that a state actor violated the Second Amendment by depriving an individual of a specific firearm that he or she otherwise lawfully possessed for self-defense." *Id.* at 318. However, the plaintiff in that case, whose firearms had been seized when he was arrested, "failed to make such a showing," because "[t]he defendants' policy and action affected *one* of Walters's firearms, which was lawfully seized." *Id.* (emphasis in original).[3] Mrs. Rodriguez makes a much stronger showing here. *All* her firearms were seized. She was a law-

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$369.95. *Winchester Model 120 12 Gauge*, COLLECTORS FIREARMS, http://www.collectorsfirearms.com/winchester-model-120-12-gauge-w9037/ (last visited March 3, 2018).

12).357 Smith & Wesson Magnum revolver. Model: 586. MSRP: $839.00 *Model 586 4" Barrel*, SMITH&WESSON, *http*://www.smith-wesson.com/firearms/model-586-4-barrel (last visited March 3, 2018).

[3] Notably, the Eighth Circuit held that the City's failure to return the firearm violated the plaintiff's due process rights.

abiding citizen at every point throughout this action. And she has established that she cannot afford new firearms.

iii. San Jose's Confiscation of Mrs. Rodriguez's Firearms Serves No Governmental Interest.

No matter what level of heightened scrutiny applies, San Jose must prove that its procedure of confiscating and retaining Mrs. Rodriguez's firearms is narrowly tailored to its interest in public safety—the degree to which it must be narrowly tailored depends on the level of scrutiny. "In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." *Bernal v. Fainter*, 467 U.S. 216, 219 (1984). "To satisfy [intermediate scrutiny], a regulation need not be the least []restrictive means of advancing the Government's interests." Rather, the government must prove that "the means chosen do not 'burden substantially more [conduct] than is necessary to further the government's legitimate interests.'" *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

San Jose fails either test; its actions, though well-intended, counteract public safety.

1. San Jose Has Merely Disarmed a Reasonable, Law-Abiding Citizen.

San Jose has disarmed a reasonable, law-abiding citizen and deprived her of the right to self-defense in her home by confiscating and retaining her firearms. This cannot be considered "narrowly tailored" to any legitimate government interest. Indeed, the Supreme Court held a law that likewise precluded self-defense in the home categorically unconstitutional in *Heller*:

> We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. *This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional*.

Heller, 554 U.S. at 630 (emphasis added).

2. By Depriving Mrs. Rodriguez of Her Firearms, San Jose is Leaving Her Vulnerable Rather Than Protecting Her.

San Jose argues that it has disarmed Mrs. Rodriguez for her own safety. The City told the Superior Court that "[w]hile Lori Rodriguez has promised and pledged to maintain the weapons in a safe without providing access to Mr. Rodriguez . . . the City believes that there is just

too much of a risk that Mr. Rodriguez would be able to access those weapons [] either through coercing Ms. Rodriguez or overpowering her." ER 6:057.

The Superior Court found this reasoning persuasive, expressing concern that her husband could "overpower[] her or pressure[] her or something to open the safe." ER 6:072.

Mrs. Rodriguez does not feel threatened by her husband, nor did she fear him the day she reported his behavior to the police. She stated that she was "[n]ot afraid for safety. Just he needed help." ER 6:068.

Ironically, in trying to protect Mrs. Rodriguez by disarming her, San Jose has left her vulnerable and defenseless. Her husband weighs approximately 400 pounds. If he is the threat to Mrs. Rodriguez that the City worries he is, Mrs. Rodriguez would require a weapon to adequately defend herself.

Nevertheless, this is not San Jose's decision to make. As a law-abiding, responsible citizen, Mrs. Rodriguez can decide how to best protect herself. It is a sacred decision that can make the difference between life and death. And the Second Amendment ensures that it is the law-abiding citizen, rather than the government, who makes it.

"The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634 (emphasis in original).

The *Heller* Court explained that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Id.* at 636. And the Court held that these policy choices include bans on handguns kept for self-defense in the home and bans on functional firearms in the home. San Jose has effectively applied both bans to Mrs. Rodriguez simultaneously by confiscating $10,000 worth of firearms, leaving her unarmed and unable to afford new arms. This is unconstitutional.

3. San Jose's Conduct Will Endanger the Public by Deterring People from Reporting the Mentally Ill.

The perverse effect of San Jose's treatment of Mrs. Rodriguez is that it will deter people from reporting mental health concerns for someone they live with. Anyone wanting to protect themselves and the public from a spouse, roommate, family member, or anyone else they live with will have to consider whether it is worth forfeiting their fundamental right to self-defense in their home. This chilling effect will result in

fewer individuals receiving the mental health treatment they need, and less protection for the public in general. Something that endangers the public is not tailored to an interest in protecting public safety.

4. San Jose Does Not Necessarily Achieve its Objective of Keeping Firearms Out of the Rodriguez Home.

San Jose's conduct is poorly tailored to its public safety interest because it does not prohibit firearms from the Rodriguez home. Mrs. Rodriguez could still lawfully purchase and possess firearms—if she could afford the expense. San Jose's counsel admitted to the Superior Court judge that "[t]here is nothing that will prevent" Mrs. Rodriguez from purchasing a new firearm and keeping it in her home. ER 6:071. Thus, any narrow tailoring is illusory, in the sense that Mrs. Rodriguez herself can unilaterally nullify it—it is entirely dependent on her financial ability. San Jose has successfully disarmed Mrs. Rodriguez for so long only because she cannot currently afford to purchase a new firearm, and certainly cannot afford to replace the $10,000 in firearms that San Jose confiscated.

5. The Ban on the Mentally Ill Does Not Apply to Mrs. Rodriguez.

The Court of Appeal for the Sixth Appellate District emphasized that the Supreme Court stated in *McDonald v. City of Chicago* that, "[w]e made 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.'" ER 6:095-096 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010)).

This is true, but it does not support San Jose's decision to confiscate and retain Mrs. Rodriguez's firearms. Rather, it shows how badly San Jose missed its mark. Mrs. Rodriguez is not mentally ill, and no ban on the mentally ill applies to her. Mrs. Rodriguez is a law-abiding citizen with the unrestrained constitutional right to keep arms for self-defense in her home. To treat her as if she were mentally ill violates *Heller*, which identified law-abiding, responsible citizens at the core of the Second Amendment's protections. *See Heller*, 554 U.S. at 635 (the right "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

6. It is No Justification that Mrs. Rodriguez May Sell or Store Her Firearms Outside Her Home.

The Court of Appeal determined that the burden on Mrs. Rodriguez's Second Amendment right is permissible, in part, because it "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." ER 6:096.

Storing firearms outside the home is not a viable option for someone who needs those arms for self-defense within the home. Indeed, this option entirely deprives Mrs. Rodriguez of her core Second Amendment right "to use arms in defense of hearth and home," "where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628, 635. "A law that imposes such a severe restriction on the core right of self-defense that it 'amounts to a destruction of the [Second Amendment] right,' is unconstitutional under any level of scrutiny." *Jackson*, 746 F.3d at 961 (quoting *Heller*, 554 U.S. at 629) (brackets omitted) (internal quotations omitted in original).

It is true that Mrs. Rodriguez may sell the confiscated firearms. Theoretically, she may even sell them and use the money to purchase

new firearms, or repurchase the same firearms, which can then be kept and possessed in her home. This does not demonstrate how trivial the burden is, as the district court believed, but instead it demonstrates the poor fit between San Jose's actions and its public safety interest. ER 3:010 n.1.

San Jose admitted "that the City has no evidence that [Mrs. Rodriguez], herself, is a prohibited party." ER 6:069. And as a law-abiding, responsible citizen, Mrs. Rodriguez may purchase and possess firearms. So, San Jose achieves its objective of disarming Mrs. Rodriguez only because she cannot afford to acquire new ones—that is, at least, unless she sells the confiscated arms. But that requirement, too, is impermissible under the Second Amendment. There is no justification for making Mrs. Rodriguez jump through hoops and incur expenses just to exercise a constitutional right that everyone agrees is fully intact. Nor has the City offered a justification.

Additionally, the burden of selling the arms to acquire new firearms or the same ones is impractical. First, there is no proof that any firearms dealer would agree to purchase the firearms from her and immediately sell them back to her. Such a transaction could reasonably

be viewed as fraught with peril and avoided by a firearms dealer. Second, there is no proof that a dealer who is willing to engage in such a transaction would agree to sell the firearms back to Mrs. Rodriguez at a price she could afford. There is no incentive for a firearms dealer to engage in a transaction without a financial benefit, and Mrs. Rodriguez has established that she has not purchased new firearms during the pendency of this action because "[m]oney has been tight." ER 13:288.

Nor is it reasonable to require Mrs. Rodriguez to sell her firearms and use the proceeds to purchase cheaper, lower-quality firearms. Responsible citizens, like Mrs. Rodriguez, select their firearms with great care—as if their lives depend on it, because some day they might. They purchase the firearm that they feel most comfortable entrusting their lives with, and they pay more only if they determine the extra utility justifies the additional expense. *Heller* made clear that the Second Amendment precludes the government from making this choice for law-abiding citizens; rather, the choice of law-abiding citizens is conclusive. *Heller* held that handguns could not be prohibited, because "*[w]hatever the reason*, handguns are the most popular weapon chosen by Americans for self-defense in the home." 554 U.S. at 629 (emphasis

added). Mrs. Rodriguez has selected constitutionally-protected arms to defend her home, and "whatever the reason" for her selection, San Jose cannot compel her to use different arms for that purpose.

7. It is Unconstitutional for San Jose to Retain Possession of the Firearms Because Substantially Less Burdensome Alternatives Exist.

Strict scrutiny requires that San Jose take the least restrictive method of achieving its objective, while intermediate scrutiny requires that San Jose's method not be substantially more burdensome than alternative methods.

The Supreme Court most recently reaffirmed intermediate scrutiny's substantially less burdensome requirement in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). Applying intermediate scrutiny in the First Amendment context, the Court explained that "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 2540.

Many courts, including this one, have properly applied this approach in the Second Amendment context.

In his *Heller* dissent, Justice Breyer proposed an intermediate scrutiny-like balancing test, which considered "reasonable, but less restrictive, alternatives." *Heller*, 554 U.S. at 710 (Breyer, J., dissenting).

The D.C. Circuit, quoting *McCullen*, struck down a requirement for the triennial re-registration of firearms because less burdensome alternatives already existed. *Heller v. District of Columbia* ("*Heller III*"), 801 F.3d 264, 277–78 (D.C. Cir. 2015).

First, "the District's experts argued that re-registration 'will improve public safety by making sure that, in the time since [the gun owner] first registered, [he has] not fallen into a category of persons prohibited from owning a firearm.'" *Id.* at 277 (brackets in original). But "District officials and experts conceded [that] background checks could be conducted at any time without causing the registrations to expire." *Id.* (brackets in original). And this would be substantially less burdensome.

Second, the District argued that re-registration would help "to maintain the accuracy of the registration database." *Id.* at 278. But the already-existing "requirement that gun owners report relevant changes in their information" was substantially less burdensome. *Id.*

Third, the District argued that re-registration would help to "determine when firearms have been lost or stolen." *Id.* But the already-existing law requiring the immediate report of the loss or theft of a firearm was substantially less burdensome. *Id.*

Since these substantially less burdensome alternatives existed, the re-registration requirement failed intermediate scrutiny.

The Seventh Circuit, applying "not quite 'strict scrutiny,'" struck down a ban on firing ranges within city limits, because the safety concerns "may be addressed by more closely tailored regulatory measures" that are less burdensome. *Ezell*, 651 F.3d at 710.

In another case, *Moore v. Madigan*, the Seventh Circuit struck down a near-prohibition on carrying firearms in public after considering the less burdensome alternatives. 702 F.3d 933 (7th Cir. 2012). The court found that "Illinois has lots of options for protecting its people from being shot without having to eliminate all possibility of armed self-defense in public." *Id.* at 940. For instance, "limit[ing] the right to carry a gun to responsible persons" would be less burdensome while striking "a proper balance between the interest in self-defense and the dangers created by carrying guns in public." *Id.*

The Tenth Circuit upheld a firearms ban on persons subject to domestic violence restraining orders only after determining that there was not "a severable subcategory of persons as to whom the statute is unconstitutional." *United States v. Reese*, 627 F.3d 792, 803 (10th Cir. 2010). In other words, there was not a substantially less burdensome alternative that would prevent a severable subcategory of persons from being unnecessarily burdened.

In another case, the Tenth Circuit upheld a firearms ban on United States Postal Service property. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015). The majority and the dissent disagreed as to the feasibility of a substantially less burdensome alternative. The dissenting judge argued that the USPS could issue permits allowing firearms in its parking lots. But the majority concluded that "an alternative system involving piecemeal exceptions and individual waivers would be wasteful and administratively unworkable." *Id.* at 1128.

This Court considered a substantially less burdensome alternative in *Jackson*, but upheld the challenged law because the proposed alternative was actually *more* burdensome:

> Jackson contends that San Francisco could have adopted less burdensome means of restricting hollow-point ammunition, for example by prohibiting the possession of hollow-point bullets in public, but allowing their purchase for home defense. . . . We [] doubt that the laws to which Jackson points are indeed less burdensome than section 613.10(g). Because section 613.10(g) affects only the sale of hollow-point ammunition, San Franciscans are free to use and possess hollow-point bullets within city limits. Under Jackson's "less burdensome" alternatives, individuals would face criminal prosecution for possessing such ammunition outside the home. Given the availability of alternative means for procuring hollow-point ammunition, section 613.10(g) imposes only modest burdens on the Second Amendment right.

746 F.3d at 969–70.

As was the case in *Heller III*, a substantially less burdensome alternative already applies to Mrs. Rodriguez. The state of California has an elaborate system of laws that ensures that prohibited persons are prevented access to firearms, while still protecting the right of law-abiding persons in the same home to keep arms for self-defense.

Cal. Penal Code § 25135 provides that:

> (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.

A violation of § 25135 is a misdemeanor. Additionally, Cal. Welf. & Inst. Code § 8101(b) makes it illegal for Mrs. Rodriguez to "knowingly supply, sell, give, or allow possession or control of a firearm to" her husband, and would subject her to "imprisonment . . . for two, three, or four years" if she violates the statute. § 8101(a) makes it illegal for her to "knowingly supply, sell, give, or allow possession or control of a

deadly weapon to" her husband, and would subject her to up to one year imprisonment and a one-thousand dollar fine.

The Court of Appeal for the Sixth Appellate District recognized that "the procedure provided by section 33850 et seq. for return of firearms in the possession of law enforcement remains available to [Mrs. Rodriguez]." ER 6:098–099. Such a transfer is now appropriate. Mrs. Rodriguez is in complete compliance with § 25135. She owns a Lincoln Model LX25 Liberty Safe, which San Jose stipulated meets all the requirements and regulations promulgated by the Office of the Attorney General of the State of California. ER 6:060–061. Indeed, San Jose's counsel acknowledged, "if you are going to purchase a gun safe this would be the safe to purchase." ER 6:061. And Mrs. Rodriguez has ensured that her husband cannot access the safe. She testified that she had a locksmith change the combination to the safe on April 26, 2013, to a combination her husband does not know. ER 6:065–066. And she declared under penalty of perjury that she possesses the only key to the safe (both the key and the combination are required to unlock the safe). ER 11:156.

Further, Mrs. Rodriguez testified that she fully understands the potential criminal liability and consequences of allowing her husband access to the safe, and that she is willing to assume the risk to be able to exercise her constitutional right to self-defense in her home. ER 6:067–068.

There is no reason for San Jose to deprive Mrs. Rodriguez of her constitutional right to keep arms for self-defense when California law already provides a substantially less burdensome alternative that allows Mrs. Rodriguez to exercise her fundamental right while still denying her husband access to firearms. Thus, San Jose's confiscation and continued retention of Mrs. Rodriguez's firearms fails intermediate scrutiny—and therefore any other level of scrutiny the Court may apply—and is unconstitutional.

CONCLUSION

The district court's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,115 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point, proportionately spaced Century Schoolbook font.

Dated this 5th day of March 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2018, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Ninth Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 5th day of March 2018.

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