No. _____

In The
Supreme Court of the United States

RICHARD GLOVER, INDIVIDUALLY,

Petitioner,

v.

RICHARD MATHIS, SPECIAL ADMINISTRATOR OF THE ESTATE OF JOE ROBINSON MATHIS AND AS TRUSTEE OF THE JOE ROBINSON MATHIS AND ELEANOR MARGHERITE MATHIS TRUST, AKA JOE R. MATHIS; JAMES MATHIS, INDIVIDUALLY; AND ANTHONY MATHIS, INDIVIDUALLY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

CRAIG R. ANDERSON, ESQ.
MICAH S. ECHOLS, ESQ.
Counsel of Record
BRIAN R. HARDY, ESQ.
MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, NV 89145
(702) 382-0711
mechols@maclaw.com
Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

This case involves the applicability of a qualified immunity defense to a Fourteenth Amendment procedural due process claim against a Nevada public administrator who was permitted by Nevada statute to enter into the home of a deceased person and secure the property. *See* Nev. Rev. Stat. § 253.0405 (1999). Despite the authorizing statute, the Ninth Circuit determined on two occasions that Petitioner, Richard Glover ("Glover"), was not entitled to qualified immunity. *Mathis v. County of Lyon*, 633 F.3d 877 (9th Cir. 2011); *Mathis v. County of Lyon*, 591 Fed. App'x 635 (9th Cir. 2015). The Ninth Circuit held that Glover's actions violated Fourteenth Amendment procedural due process by not providing predeprivation notice to the deceased person's potential heirs. Although the Nevada statute had never been construed by any court, the Ninth Circuit also held that the law was clearly established. The questions presented are:

1. Whether a public official acts within the bounds of Fourteenth Amendment procedural due process when he secures property, as expressly permitted by state statute, without providing predeprivation notice and a hearing.

2. Whether a public official is entitled to qualified immunity when he secures property without providing predeprivation notice and a hearing, as expressly permitted by state statute, and no court has defined the contours of the statute.

PARTIES TO THE PROCEEDINGS

Glover was the defendant-appellant in the Ninth Circuit Court of Appeals and is a defendant in the United States District Court, District of Nevada.

Respondents, Richard Mathis, Special Administrator of the Estate of Joe Robinson Mathis and as Trustee of the Joe Robinson Mathis and Eleanor Margherite Mathis Trust, aka Joe R. Mathis; James Mathis; and Anthony Mathis (collectively "Plaintiffs") were the plaintiffs-appellees in the Ninth Circuit Court of Appeals and are the plaintiffs in the United States District Court, District of Nevada.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Glover is an individual.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Glover respectfully petitions this Court for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this matter.

OPINIONS BELOW

The Ninth Circuit's unreported decision, *Mathis v. County of Lyon*, 591 Fed. App'x 635 (9th Cir. 2015) affirming the denial of qualified immunity in summary judgment proceedings is reprinted in the Appendix (App.) at 1a-3a. The District Court's unreported decision denying qualified immunity in summary judgment proceedings is reprinted at App. 4a-51a. The Ninth Circuit's reported opinion, *Mathis v. County of Lyon*, 633 F.3d 877 (9th Cir. 2011), affirming the denial of qualified immunity in dismissal proceedings is reprinted at App. 52a-73a. The District Court's unreported decision denying qualified immunity in dismissal proceedings is reprinted at App. 74a-87a. The Ninth Circuit's unreported decision denying rehearing en banc in the summary judgment qualified immunity appeal is reprinted at App. 88a-89a.

JURISDICTION

The Ninth Circuit filed its decision on February 4, 2015. App. 1a-3a. Glover timely filed a petition for rehearing en banc, which the Ninth Circuit denied on March 20, 2015. App. 88a-89a. This Court has

jurisdiction according to 28 U.S.C. § 1254(1) and Supreme Court Rules 13.1 and 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> 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.

Nev. Rev. Stat. § 253.0405 (1999) provides:

> **NRS 253.0405 Circumstances under which public administrator may secure property of deceased.** Before the issuance of the letters of administration for an estate, before filing an affidavit to administer an estate pursuant to NRS 253.0403 or before petitioning to have an estate set aside pursuant to NRS 253.0425, the public administrator may secure the property of a deceased person if the administrator finds that:

1. There are no relatives of the deceased who are able to protect the property; and

2. Failure to do so could endanger the property.

STATEMENT OF THE CASE

A. Joe Mathis' Passing in May 2006 and the Related Events.

Joe Mathis ("Mr. Mathis") passed away in his Wellington, Nevada home presumably sometime in May 2006.[1] App. 5a. After Mr. Mathis' passing, Deputy Sheriff Abel Ortiz ("Ortiz") discovered him on May 29, 2006 after performing a welfare check at the Mathis home, where Mr. Mathis lived alone. App. 5a, 54a. Ortiz contacted a funeral home to remove the body and locked and sealed the home. App. 5a. Mr. Mathis is survived by his three sons, Richard Mathis ("Richard"), James Mathis ("James"), and Anthony Mathis ("Anthony"). *Id.*

Later in the day on May 29, 2006, Ortiz tried to contact Richard, who lived in Las Vegas, Nevada, but was unsuccessful. *Id.* Ortiz was able to contact James in Washington state and Anthony in Quebec, Canada.

[1] Wellington, Nevada is a rural, unincorporated town in Southwest Lyon County, Nevada.

Id. Ortiz received information that James or Anthony would arrive in Wellington "within several days." *Id.*

On May 30, 2006, Ortiz contacted Glover, who was the public administrator for Lyon County, Nevada. *Id.* It is undisputed that Mr. Mathis was known in the town as a jeweler and that the Mathis home contained weapons. App. 23a. On this same day, Glover entered the Mathis home to locate weapons and other valuables to secure them according to Nev. Rev. Stat. § 253.0405. App. 5a. Glover removed some of the personal property from the Mathis home and took it to his storage locker. *Id.*

After Plaintiffs eventually arrived in Wellington, they recovered the personal property that Glover had removed from the Mathis home. App. 6a. Glover first met at least one of the Mathis sons at his storage locker where the personal property removed from the Mathis home was stored. App. 33a. Nevertheless, Plaintiffs retained counsel and filed a missing property report with the Sheriff's Department, alleging that Glover had retained some of the personal property removed from the Mathis home. App. 6a. Plaintiffs alleged that Glover had retained some unspecified personal property from the Mathis home because Glover voluntarily returned to Plaintiffs an archery bow that was not listed on Glover's inventory list. *Id.* Not satisfied with the personal property items that Glover returned, after their safekeeping in his storage locker, Plaintiffs filed a lawsuit. *Id.*

B. Plaintiffs' Lawsuit and the District Court's Initial Denial of Qualified Immunity as to the Fourteenth Amendment Procedural Due Process Claim in the Dismissal Proceedings.

In their lawsuit, Plaintiffs asserted numerous state and federal claims against Glover and Lyon County. App. 6a. In the context of Glover's Fed. R. Civ. P. 12(c) motion for judgment on the pleadings, the District Court dismissed Plaintiffs' Fourth Amendment unlawful entry claim based upon qualified immunity. App. 84a. The District Court concluded that "Plaintiffs have not shown that Glover had fair warning that his specific conduct as a public administrator would violate Plaintiffs' clearly established right." *Id.* The District Court elaborated, "Glover had statutory authority to enter property as the public administrator, and further, Glover had statutory authority to secure property." *Id.* On this basis, the District Court determined that Glover was entitled to qualified immunity for Plaintiffs' Fourth Amendment claim. App. 85a. But, in addressing Plaintiffs' Fourteenth Amendment procedural due process claim, the District Court concluded, "Plaintiffs may be entitled to a remedy." *Id.* Accordingly, the District Court denied Glover's qualified immunity defense as to Plaintiffs' Fourteenth Amendment procedural due process claim. App. 86a-87a.

C. The Ninth Circuit's Opinion Affirming the Denial of Qualified Immunity as to the Fourteenth Amendment Procedural Due Process Claim in the Dismissal Proceedings.

Glover exercised his appeal rights to the Ninth Circuit based upon the denial of qualified immunity as to Plaintiffs' Fourteenth Amendment procedural due process claim. *See Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817 (1985). In a divided opinion, the Ninth Circuit majority, Circuit Judge Procter Hug, Jr. and District Judge James S. Gwin (of the Northern District of Ohio sitting by designation), concluded that "the failure to give notice and an opportunity to respond before Glover took the items from the house violated due process." App. 56a. The majority also concluded that Glover was not entitled to qualified immunity because "[t]he right to notice and hearing prior to a public official's administrative taking of property is clearly established." *Id.* (citing *Fuentes v. Shevin*, 407 U.S. 67, 82, 97 (1972); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993)). Thus, the majority affirmed the District Court's denial of qualified immunity. App. 56a-57a.

In his dissenting opinion, Circuit Judge Jay S. Bybee concluded that there was no Fourteenth Amendment procedural due process violation and that Glover was entitled to qualified immunity. App. 58a-73a. Judge Bybee first observed that "neither the Supreme Court nor any circuit has addressed what process is due to the relatives of a deceased in

analogous circumstances. . . ." App. 59a. Because of the majority's conclusion that Glover was not entitled to qualified immunity, Judge Bybee's dissenting opinion explained at length why the "majority has erred at each step of the qualified immunity analysis." *Id.* (citation omitted).

Judge Bybee first recited the two-step procedural due process analysis of (1) the existence of a liberty or property interest and (2) procedures attendant to deprivation that are constitutionally sufficient. App. 60a (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). Assuming that Plaintiffs had a right to assert a property interest in the personal property from the Mathis home, Judge Bybee then looked to the three-step procedural protections required by the Constitution: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation and the probable value of additional procedural safeguards; and (3) the governmental interest, including the fiscal and administrative burdens of additional procedures. App. 63a (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976)). Judge Bybee first concluded that "the property deprivation Plaintiffs complain of occurs – and terminates – before a decedent's relatives are entitled to possess the decedent's property." App. 63a (citing Nev. Rev. Stat. § 143.020). Because of the period of limbo after the decedent has passed and before the heirs can acquire a property interest in the personal property, Judge Bybee acknowledged that Nev. Rev. Stat. § 253.0405 addresses this period "by specifying that

the public administrator may secure the property of the deceased '[b]efore the issuance of the letters of administration for an estate.'" App. 64a. Ultimately, because of Plaintiffs' attenuated interest in the personal property at the time of Mr. Mathis' death, the dissenting opinion concluded that "the first *Mathews* factor does not support predeprivation process" under the circumstances of this case. App. 65a.

With regard to the second *Mathews* factor, Judge Bybee held that "the value of predeprivation process is minimal because such process may jeopardize the very property a public administrator seeks to preserve." *Id.* Elaborating on the purpose of Nev. Rev. Stat. § 253.0405, Judge Bybee explained that if "the public administrator must conduct a hearing before securing property that is in danger of being lost, the purpose of the statute is defeated: conducting that very hearing may well prevent the public administrator from securing the endangered property before it is lost." App. 66a (citation omitted).

Finally, "because of the government's strong interest in preserving the decedent's estate and the impracticality of determining who has an interest in that estate in the immediate aftermath of a decedent's death, the third *Mathews* factor does not support predeprivation process." App. 68a. In summary, Judge Bybee held that there was no procedural due process violation: "Upon weighing the *Mathews* factors, I cannot conclude that a public administrator is constitutionally required to give notice and a hearing before securing the property of the deceased

when no one else can do so and when that property is in danger of being lost." *Id.* The dissenting opinion also distinguished the majority's two cited cases for a predeprivation hearing to satisfy procedural due process because they did not involve exigent circumstances, as contemplated by the Nevada statute. App. 70a.

On the qualified immunity issue, Judge Bybee concluded that Glover was entitled to immunity because "there was – and still is – no case law balancing the *Mathews* factors in the particular context of a public administrator's securing the property of the deceased." App. 71a. Additionally, "Plaintiffs' procedural due process rights were not derivative of a bright-line constitutional rule, but rather depended on a complicated balancing test whose outcome was – at best – uncertain." App. 71a-72a (citing *Humphries v. Cnty. of Los Angeles*, 554 F.3d 1170, 1202 (9th Cir. 2009) ("A procedural due process analysis that requires a complicated balancing test is sufficiently unpredictable that it was not unreasonable for [a state official] to comply with [constitutionally-inadequate statutory] provisions."), *overruled on other grounds by Los Angeles Cnty., Cal. v. Humphries*, 131 S.Ct. 447 (2010); *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 983 (9th Cir. 1998) ("[B]ecause procedural due process analysis essentially boils down to an ad hoc balancing inquiry, the law regarding procedural due process claims can rarely be considered clearly established at least in the absence of closely corresponding factual and legal precedent."

(internal quotation marks and citations omitted)). Judge Bybee summarized his dissenting opinion by stating, "I don't know how we could expect Glover to have anticipated that, by following Nevada law, he was violating the Fourteenth Amendment." App. 72a.

D. The District Court's Subsequent Denial of Qualified Immunity as to the Fourteenth Amendment Procedural Due Process Claim in the Summary Judgment Proceedings.

On remand from the first appeal, Glover developed the factual record and then moved for summary judgment on Plaintiffs' Fourteenth Amendment procedural due process claim on the basis of qualified immunity, which the District Court denied. App. 49a-50a. The District Court also took the additional step of granting summary judgment to Plaintiffs on their procedural due process claim: "It is uncontroverted that Glover entered the home and seized personal property without first notifying any of the Mathis Brothers of his intentions and without giving them an opportunity to be heard." App. 29a. The District Court reached this conclusion despite Glover's reliance upon the authorizing language of Nev. Rev. Stat. § 253.0405. Thus, Glover's asserted qualified immunity defense as to Plaintiffs' Fourteenth Amendment due process claim was once again denied. App. 49a-50a.

E. The Ninth Circuit's Decision Affirming the Denial of Qualified Immunity as to the Fourteenth Amendment Procedural Due Process Claim in the Summary Judgment Proceedings.

On the basis of *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834 (1996), Glover filed a second appeal to the Ninth Circuit to challenge the denial of his qualified immunity defense in light of the summary judgment record and heightened standard of review. *See id.*, 516 U.S. at 311, 116 S.Ct. at 841 (concluding that multiple appeals from the denial of qualified immunity are available at different stages of the case). In the second appeal, the Ninth Circuit perceived the factual and legal issues as being identical. App. 1a-3a. The Ninth Circuit's 2015 decision simply referred to its earlier 2011 opinion and restated that Glover violated Plaintiffs' procedural due process rights by securing personal property from the Mathis home without predeprivation notice and an opportunity for Plaintiffs to be heard, even though Glover acted in reliance upon Nev. Rev. Stat. § 253.0405. *Id.* The Ninth Circuit's 2015 decision concludes that Glover's requirement to provide predeprivation notice and an opportunity to be heard was clearly established, such that qualified immunity was not available to him, once again relying upon *Fuentes v. Shevin*, 407 U.S. 67, 82, 97 (1972) and *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). App. 3a. The Ninth Circuit denied Glover's petition for rehearing en banc. App. 88a-89a.

REASONS FOR GRANTING THE PETITION

A. Review Is Necessary to Resolve a Conflict Regarding Whether a Public Official Acts Within the Bounds of Fourteenth Amendment Procedural Due Process When He Secures Property, as Expressly Authorized by State Statute, Without Providing Predeprivation Notice and a Hearing.

According to Nev. Rev. Stat. § 253.0405, Glover was entitled to "secure the property" within the Mathis home "if [Glover] finds" that "1. There are no relatives of the deceased who are able to protect the property; and 2. Failure to do so could endanger the property." Within the Ninth Circuit itself, there was sharp disagreement over what level of procedural due process was owed to Plaintiffs under the Fourteenth Amendment. App. 1a-3a, 52a-73a. The Ninth Circuit's division on the level of procedural due process owed reflects a similar division among other courts. When is a public official required to provide predeprivation notice and a hearing before securing property to stay within the bounds of Fourteenth Amendment procedural due process? And, does the public official's reliance upon the express permission of a state statute alter the Fourteenth Amendment procedural due process analysis? Glover asks this Court to grant this petition for a writ of certiorari to resolve these procedural due process questions.

1. Fourteenth Amendment Procedural Due Process Rights Do Not Always Require Predeprivation Notice and a Hearing.

In the Ninth Circuit's 2011 majority opinion, Plaintiffs' right to a predeprivation notice and a hearing was treated as mandatory. App. 56a (citing *Fuentes v. Shevin*, 407 U.S. 67, 82, 97 (1972) (a later hearing does not remedy the prior deprivation in a replevin case); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) ("the right to prior notice and a hearing is central to the Constitution's command of due process" absent extraordinary circumstances)). The Ninth Circuit's 2015 decision confirms the majority opinion. App. 1a-3a. In contrast, the dissenting opinion held that predeprivation notice and a hearing were not required "where providing predeprivation process is impracticable or 'where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous determination.'" App. 68a-69a (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978)).

Several courts have held that temporary suspensions, as in the instant case, do not require predeprivation hearings. *See Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 140 (1988) (temporary suspension of an indicted bank officer); *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (temporary suspension of a horse

trainer suspected of doping); *Gilbert v. Homar*, 520 U.S. 924, 932 (1997) (temporary suspension of a police officer based on a drug-related charge). As this Court has previously articulated, "[I]t is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination." *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599, 70 S.Ct. 870, 873 (1950) (citations omitted). In line with this reasoning, Nev. Rev. Stat. § 253.0405 gave Glover the discretion to secure the personal property in the Mathis home.

Citing to precedent from this Court, the Third Circuit approved the condemnation of real property without a predeprivation hearing because of the presence of mold. *See Elsmere Park Club, L.P. v. Town of Elsmere*, 542 F.3d 412, 417 (3d Cir. 2008) (citing *Parratt v. Taylor*, 451 U.S. 527, 539, 101 S.Ct. 1908 (1981) (stating that no predeprivation hearing is necessary where there is "the necessity of quick action by the State" or where "providing any meaningful predeprivation process" would be impractical)). As this Court explained, "A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." *See Mathews v. Eldridge*, 424 U.S. 319, 331, 96 S.Ct. 893, 900 (1976) (citations omitted). In summary, predeprivation notice and a hearing are not always required, as the Ninth Circuit

held, before the government can take control of property, even in the absence of an authorizing state statute.

2. When a Public Official Secures Property, as Expressly Permitted by State Statute, Procedural Due Process Rights Under the Fourteenth Amendment Are Even Less Certain.

When a public official's actions are based upon an authorizing state statute, courts are divided on what level of procedural due process under the Fourteenth Amendment is owed. For example, in *Zinermon v. Burch*, 494 U.S. 113, 129, 110 S.Ct. 975, 985 (1990), this Court acknowledged *Parratt* and held that procedural due process was limited to an "available [ ] tort remedy that could adequately redress the loss. . . ." The *Zinermon* court continued, "[N]o matter how significant the private interest at stake and the risk of its erroneous deprivation, the State cannot be required constitutionally to do the impossible by providing predeprivation process." *Id.* (citation omitted).

Similarly, the Eighth Circuit has determined that actions taken in reliance on state statutes or rules are objectively reasonable, even if the statute or regulation is later declared unconstitutional. *See Landrum v. Moats*, 576 F.2d 1320, 1327, n. 14 (8th Cir. 1978). Under this line of reasoning, public officials are not tasked with guessing whether an authorizing state statute will later be held unconstitutional to rely

upon the statute for their conduct. This Court has also held in *Michigan v. DeFillippo*, 443 U.S. 31, 38, 99 S.Ct. 2627, 2632 (1979), in the context of procedures prior to an arrest, that "[p]olice are charged to enforce laws until and unless they are declared unconstitutional. . . . Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement."

The First Circuit has also confirmed a city's decision to summarily carry out the demolition of residential buildings based upon an authorizing Massachusetts statute and the city's claimed emergency. *See South Commons Condominium Ass'n v. Charlie Arment Trucking, Inc.*, 775 F.3d 82 (1st Cir. 2014). The First Circuit explained that because of the emergency situation, a predeprivation hearing was not required. *Id.* at 86 (citation omitted). The court also acknowledged that "under Massachusetts law, an official may conclude in a particular case that there is an immediate need to address a danger – and thus proceed in the summary fashion . . . – when, in hindsight, there was no need to rush." *Id.* at 89. The First Circuit also clarified that although "some such calls may be mistaken does not show that the process for making them was constitutionally improper." *Id.* Under these cases, the public official's reliance upon an authorizing state statute provided a complete defense to Fourteenth Amendment procedural due process claims.

Adversely, in *Lawrence v. Reed*, 406 F.3d 1224, 1232 (10th Cir. 2005), the Tenth Circuit held, "[O]fficers can rely on statutes that authorize their conduct – but not if the statute is obviously unconstitutional." In the context of an officer's reliance upon a Wyoming state statute for removing derelict vehicles, the Tenth Circuit explained that procedural due process rights remained intact because "the ordinance provides no hearing whatsoever; an officer need not understand the niceties of *Mathews* to know that it is unconstitutional." *Id.* at 1233. The Ninth Circuit has also held that a postdeprivation hearing was insufficient to protect procedural due process rights, even though a California statute authorized the coroner to remove body tissue from a corpse in the course of an autopsy. *See Newman v. Sathyavaglswaran*, 287 F.3d 786, 799 (9th Cir. 2002) (citations omitted). Despite the authorizing statute, the Ninth Circuit reasoned that the government could not "finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Id.* (citation and internal quotation marks omitted).

In reviewing a Pennsylvania garnishment statute, the Third Circuit concluded that because the statutory garnishment procedure did not provide a prompt postdeprivation procedure, it did not comport with procedural due process. *See Jordan v. Fox, Rothchild, O'Brien & Frankel*, 20 F.3d 1250, 1270 (3d Cir. 1994). Thus, under this contrary line of authority, the public official's reliance upon the authorizing

state statute was essentially irrelevant to the constitutional inquiry, as the Ninth Circuit held in the instant case.

In summary, the Court should grant this petition to resolve the conflict of decisions regarding the level of procedural due process afforded under the Fourteenth Amendment in the context of a public official's reliance upon an authorizing state statute.

B. Courts Are Divided on the Test for Qualified Immunity When a Public Official Relies Upon an Authorizing State Statute for His Conduct.

Numerous published opinions from this Court and the United States Courts of Appeals typically analyze qualified immunity using a two-step process. *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808 (2009) (extending qualified immunity to public officials when there is no constitutional violation or, alternatively, when the constitutional right was not clearly established). However, when a public official relies upon an authorizing state statute to act, courts are divided on whether the state statute should factor into the qualified immunity analysis. *See, e.g., Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1251-1252 (10th Cir. 2003) ("'[R]eli[ance] on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question' is a relevant factor in considering the objective legal reasonableness of a state official's action."). So, the essential question for this

qualified immunity test asks: "What role does an authorizing state statute have in evaluating a public official's conduct in the context of a qualified immunity analysis?" On this alternative basis, Glover asks this Court to grant this petition for a writ of certiorari to resolve the differing qualified immunity tests.

1. A Qualified Immunity Analysis Under This Court's Precedent and the United States Courts of Appeals Typically Involves Two Steps.

In *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808 (2009), this Court confirmed the two-part qualified immunity analysis first articulated in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001). *Pearson* clarified that a court analyzing qualified immunity does not have to determine first whether there has been a constitutional violation, but may instead determine whether the alleged constitutional right was clearly established. *Id.*, 555 U.S. at 236, 129 S.Ct. at 818. Numerous courts, including the Ninth Circuit in the instant case, have employed the *Saucier* two-part test with the clarification of *Pearson* that the order of the analysis is not important. App. 59a, n. 3 (citing *Krainski v. Nevada ex rel. Bd. of Regents*, 616 F.3d 963, 968 (9th Cir. 2010)). When the qualified immunity analysis does not involve a state statute authorizing the public official's conduct, the two-part test is relatively straightforward. However, the converse is not true.

2. Other Courts Have Formulated Different Tests for Qualified Immunity When a State Statute Authorizes the Conduct of the Public Official.

When a state statute appears to justify a public official's conduct, courts have come up with varying qualified immunity tests and results. In its qualified immunity analysis in the instant case, the Ninth Circuit simply ignored the fact that Glover's conduct was authorized by Nevada statute. The Ninth Circuit's approach to the qualified immunity analysis was contrary to its own precedent. *See Humphries v. Cnty. of Los Angeles*, 554 F.3d 1170, 1202 (9th Cir. 2009) (stating that an officer who acts in reliance on a duly-enacted statute is ordinarily entitled to qualified immunity, unless the statute is "obviously" unconstitutional). Notably, none of the courts in the instant case have deemed Nev. Rev. Stat. § 253.0405 unconstitutional.

In a similar line of reasoning, the Tenth Circuit considers an authorizing state statute to be only a relevant "factor" in analyzing qualified immunity. *See Roska*, 328 F.3d at 1251-1252 ("'[R]eli[ance] on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question' is a relevant factor in considering the objective legal reasonableness of a state official's action."). In fact, the Tenth Circuit has fashioned a test to address whether a public official's reliance upon a state statute for his conduct is reasonable in a qualified immunity analysis. *Id.* at 1253 (outlining four factors for this test,

including: (1) the degree of specificity with which the statute authorized the conduct in question; (2) whether the officer in fact complied with the statute; (3) whether the statute has fallen into desuetude; and (4) whether the officer could have reasonably concluded that the statute was constitutional); *see also Lawrence*, 406 F.3d at 1233 ("[T]he ordinance provides no hearing whatsoever; an officer need not understand the niceties of *Mathews* to know that it is unconstitutional.").

Likewise, the Sixth Circuit considers an authorizing state statute in a qualified immunity analysis but does not allow the statute to completely justify the public official's actions. *See Denton v. Rievley*, 353 Fed. App'x 1, 6 (6th Cir. 2009); *see also Gates v. Texas Dep't of Prot. and Regulatory Servs.*, 537 F.3d 404, 421 (5th Cir. 2008) ("A statutory command to investigate allegations within twenty-four hours is not a license to ignore the Fourth Amendment, and it is unreasonable for the defendants to think otherwise.") (citation omitted).

In stark contrast, the Eighth Circuit defers to state law and has held that qualified immunity "protects public officials who act in good faith while performing discretionary duties that they are obliged to undertake." *Kloch v. Kohl*, 545 F.3d 603, 609 (8th Cir. 2008); *see also Landrum*, 576 F.2d at 1327, n. 14 (holding that actions taken in reliance on state statutes or rules are objectively reasonable, even if the statute or regulation is later declared unconstitutional). The Sixth Circuit has also adopted a similar test

that has not changed, even after *Saucier*: "[A]n individual officer has a qualified privilege or immunity from liability for constitutional claims based on good faith performance of his duties in accordance with statutory or administrative authority. . . ." *Garner v. Memphis Police Dep't*, 600 F.2d 52, 54 (6th Cir. 1979). The *Garner* opinion also notes that its test for qualified immunity based upon an authorizing state statute has been confirmed by this Court. *Id.* (citing *Butz v. Economou*, 438 U.S. 478, 496-508, 98 S.Ct. 2894 (1978)). Therefore, on this alternative basis, the Court should grant this petition for a writ of certiorari to clarify whether the *Saucier* two-part qualified immunity test is altered when a public official relies upon a state statute for his conduct.

C. The Conflict of Opinions on Qualified Immunity as to Fourteenth Amendment Procedural Due Process Claims, Under Similar Circumstances, Evidences That the Law Was Not Clearly Established at the Time of the Events of this Case.

In a qualified immunity analysis, a public official cannot be liable for constitutional harms unless they were clearly established at the time of the official's acts. *See Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986). And, the "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* Even if the Court does not reach the merits of the Fourteenth Amendment procedural due process issues or the proper qualified immunity test

involving an authorizing state statute, the Court should, nevertheless, grant this petition for a writ of certiorari since Plaintiffs' constitutional rights were not clearly established. Specifically, the complex analysis and differing legal authorities demonstrate that the constitutional questions are not "beyond debate." And, the contours of Nev. Rev. Stat. § 253.0405, and similar statutes from other states, have never been defined by any court, thus further evidencing that the constitutional questions are not clearly established.

1. The Debate on Whether Qualified Immunity Should Apply to Fourteenth Amendment Procedural Due Process Claims Under Similar Circumstances Favors Its Application.

The general rule of qualified immunity is intended to provide government officials with the ability "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 3019 (1984). For a constitutional right to be clearly established for purposes of qualified immunity, the law cannot be established generally, but must be specific. *See Wilson v. Layne*, 526 U.S. 603, 615, 119 S.Ct. 1692 (1999). The fact that there is not a single judicial opinion defining the constitutional right, while not necessary, weighs in favor of the conclusion that the law is not clearly established. *See Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011). "Qualified immunity gives

government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Id.* at 2085.

In procedural due process cases, the law is only clearly established when there is precedent that closely parallels the facts of the instant case. *See Brewster*, 149 F.3d at 983 ("[B]ecause procedural due process analysis essentially boils down to an ad hoc balancing inquiry, the law regarding procedural due process claims can rarely be considered clearly established at least in the absence of closely corresponding factual and legal precedent.") (internal quotation marks and citations omitted). Notably, the Ninth Circuit rejected *Brewster* as asserted by Judge Bybee's dissenting opinion, even though the Ninth Circuit was unable to identify a factually similar case. App. 1a-3a, 72a.

Without reaching the issue of what level of Fourteenth Amendment procedural due process was required in this case, the Court should, alternatively, conclude that Plaintiffs' constitutional rights are not clearly established and grant qualified immunity to Glover. *See, e.g., Stanton v. Sims*, 134 S.Ct. 3, 7 (2013) ("We do not express any view on whether Officer Stanton's entry into Sims' yard in pursuit of Patrick was constitutional. But whether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.' ") (citation omitted).

2. Since No Court Has Defined the Contours of Nev. Rev. Stat. § 253.0405, or Similar Statutes in Other States, the Fourteenth Amendment Procedural Due Process Rights Were Not Clearly Established.

As Judge Bybee's dissenting opinion stated, "I don't know how we could expect Glover to have anticipated that, by following Nevada law, he was violating the Fourteenth Amendment." App. 72a. The contours of Nev. Rev. Stat. § 253.0405 have never been defined by any court. And, even within the present case, the statute was not declared unconstitutional by any court. Other states have similar statutes that allow public administrators to take control of property after the passing of an individual. *See* Cal. Prob. Code § 7601 (Property over which county public administrator shall take prompt possession or control) ("If no personal representative has been appointed, the public administrator of a county shall take prompt possession or control of property of a decedent in the county that is deemed by the public administrator to be subject to loss, injury, waste, or misappropriation, or that the court orders into the possession or control of the public administrator after notice to the public administrator. . . ."); Idaho Code Ann. § 14-102 (Estates to be administered) ("Every public administrator must make an initial determination of the absence of an heir or will, and take charge of the estates of persons who, upon their death, reside within his county. . . ."); Mont. Code Ann. § 72-15-102 (When public administrator to take charge of estate)

("A public administrator . . . shall take charge of estates of persons dying within the administrator's county as follows: (a) estates of decedents for which no administrators are appointed and that, in consequence of the lack of administration, are being wasted, uncared for, or lost. . . ."). Like Nevada's authorizing statute, these statutes have not been stricken as unconstitutional, and the contours of these statutes have never been defined in the context of Fourteenth Amendment procedural due process. Thus, in securing the personal property from the Mathis home, Glover only had the plain language of Nev. Rev. Stat. § 253.0405 to rely upon, which authorized his conduct.

Other courts have extended qualified immunity to public officials when the contours of a state statute authorizing the public official's conduct have not been defined. In *S.P. v. City of Takoma Park, Maryland*, 134 F.3d 260 (4th Cir. 1998), the Fourth Circuit determined that it was reasonable for officers to believe that they had the right to commit the plaintiff into a mental institution based upon a Maryland statute and held that because "the contours of such a right were not clearly established so as to make the unlawfulness of these officers' actions apparent, we affirm the district court's order granting the officers qualified immunity and dismissing her claim." *Id.* at 265-266.

Likewise, the Fifth Circuit extended qualified immunity to public officials when they relied upon a Texas state statute to seize vehicles that were

suspected as being stolen. *See Wren v. Towe*, 130 F.3d 1154, 1160 (5th Cir. 1997); *see also Garner*, 600 F.2d at 54 (holding that a policeman was entitled to assert, as a complete defense, a qualified immunity defense from liability for constitutional claims based on his reliance on Tennessee law, which allows an officer to kill a fleeing felon rather than run the risk of allowing him to escape apprehension).

Prior Ninth Circuit case law has extended qualified immunity to a public official when the constitutional right was not clearly established in the situation of the public official refusing to renew a professional license unless the licensee's social security number was disclosed. *See Dittman v. California*, 191 F.3d 1020 (9th Cir. 1999) ("[T]here was no clear case law in either the federal courts or the state courts of California establishing that the issuance of a professional license may not be conditioned on the licensee's disclosure of her social security number . . . [I]t was reasonable for defendant [ ] to believe that § 30 was constitutional and to enforce its mandates against [p]laintiff."); *see also Kloch v. Kohl*, 545 F.3d 603, 609 (8th Cir. 2008) ("Qualified immunity protects public officials who act in good faith while performing discretionary duties that they are obligated to undertake. [Defendant] had a statutory obligation to enforce the laws of his state. His decision to enforce a law of arguable constitutional validity falls within the ambit of protected official discretion.") (citations omitted). In essence, a public official's compliance with an authorizing state statute should not give rise

to constitutional claims, just as Judge Bybee articulated in his dissenting opinion. App. 72a.

Therefore, the Court should grant this petition on the basis of qualified immunity since the law governing Plaintiffs' Fourteenth Amendment procedural due process claim was not clearly established. Moreover, Glover's reliance upon the authorizing language of Nev. Rev. Stat. § 253.0405 was reasonable, and the contours of this statute have never been defined.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CRAIG R. ANDERSON, ESQ.
MICAH S. ECHOLS, ESQ.
Counsel of Record
BRIAN R. HARDY, ESQ.
MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, NV 89145
(702) 382-0711
mechols@maclaw.com
Counsel for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD MATHIS, Special Administrator of the Estate of Joe Robinson Mathis and as Trustee of the Joe Robinson Mathis and Eleanor Margherite Mathis Trust, AKA Joe R. Mathis; JAMES MATHIS; ANTHONY MATHIS, individually, Plaintiffs-Appellees, v. COUNTY OF LYON, a Political Subdivision of the State of Nevada Defendant, And RICHARD GLOVER, individually, Defendant-Appellant.	No. 14-15912 D.C. No. 2:07-cv-00628-APG-GWF Filed: 02/04/15 MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Submitted February 2, 2015**
San Francisco, California

Before: TALLMAN and RAWLINSON, Circuit Judges, and MURPHY, District Judge.***

Richard Glover brings an interlocutory appeal, after cross-motions for summary judgment, from the district court's decision denying him qualified immunity on Plaintiffs-Appellees' Fourteenth Amendment procedural due process claim. We have jurisdiction under 28 U.S.C. § 1291 (2012), *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), and we affirm.

In *Mathis v. County of Lyon*, 633 F.3d 877, 878-79 (9th Cir. 2011), we previously considered whether the district court erred in holding, subsequent to a motion to dismiss, that Appellant Glover was not entitled to the defense of qualified immunity. We found no error when we held that "the failure to give notice and an opportunity to respond before Glover took the items from the house violated due process" and that "[t]he right to notice and hearing prior to a public official's administrative

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** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Stephen Joseph Murphy III, United States District Judge for the Eastern District of Michigan, sitting by designation.

taking of property is clearly established." *Id.* at 879 (citing *Fuentes v. Shevin*, 407 U.S. 67, 82, 97 (1972) and *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993)).

Because it is an undisputed fact that Glover gave no notice or an opportunity for a pre-deprivation hearing before removing personal property from Plaintiffs-Appellees' deceased father's home, our decision in Mathis controls, and Glover is not entitled to qualified immunity.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RICHARD MATHIS, Individually, as Special Administrator of the Estate of Joe Robinson Mathis (a/k/a Joe R. Mathis), and as Trustee of the Joe Robinson Mathis and Eleanor Margherite Mathis Trust; JAMES MATHIS; and ANTHONY MATHIS, Plaintiffs, v. COUNTY OF LYON and RICHARD GLOVER, in his individual capacity, Defendants.	Case. No. 2:07-cv-00628-APG-GWF Filed: 04/11/14 ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS AND DENYING MOTION TO STRIKE (Dkt. Nos. 160, 161, 189, 190, and 199)

I. BACKGROUND

The Court has recited the factual background of this case on multiple occasions. (Dkt. Nos. 61, 186.) The following is a brief recitation of the relevant, uncontested facts as best the Court can determine from the pleadings and the moving papers. Additional facts are discussed as necessary in the analysis below.

On May 29, 2006, Deputy Sheriff Abel Ortiz ("Ortiz") discovered Joseph R. Mathis ("Joseph") deceased in his home in Wellington, Nevada. Ortiz pronounced Joseph dead on the scene and called a funeral home to remove the body. After the body was removed, Ortiz locked and sealed the home.

Joseph had three sons: Richard Mathis ("Richard"), James Mathis ("James"), and Anthony Mathis ("Anthony") (collectively, the "Mathis Brothers," "Brothers," or "Plaintiffs"). Richard is the trustee of the Joe Robinson Mathis and Eleanor Margherite Mathis Trust (the "Mathis Trust") and the special administrator of Joseph's estate. At the time of Joseph's death, David McNinch was the successor trustee to the Mathis Trust. Richard was appointed interim trustee on July 17, 2006.

Later in the day on May 29, 2006, Ortiz unsuccessfully attempted to contact Richard Mathis, who lived in Las Vegas. He then was able to contact James in Washington state and Anthony in Quebec, Canada. The precise details are inconsistent, but either James or Anthony informed Ortiz that they would arrive in Wellington within several days.

On May 30, 2006, Ortiz contacted Richard Glover, the elected Public Administrator of Lyon County and informed him of Joseph's death. Without notifying the Mathis Brothers, Glover entered Joseph's home to locate and weapons and valuables. He removed some of the personal property from the House and took it to his storage locker.

Upon their arrival in Wellington, the Mathis Brothers obtained counsel and were able to recover some of the personal property that Glover had seized. The Mathis Brothers filed a missing property report with the Sheriff's Department and requested an investigation into Glover's conduct. Ultimately, criminal charges were not filed against Glover. Glover gave the Mathis Brothers an inventory list of everything he had seized, but the list proved inaccurate when Glover later returned an unlisted archery bow that he found in his storage unit. Plaintiffs contend that Glover still retains some of their personal property and that he tried to sell some of it at a public auction.

On May 14, 2007, the Mathis Brothers filed the Complaint in this Court asserting various state and federal claims for relief. Glover faces federal claims under 42 U.S.C. § 1983 for alleged violations of the Fourth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. For Glover's alleged constitutional violations, Lyon County faces § 1983 claims under the doctrine of municipal liability established by *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 (1978). The state law claims include conversion, trespass to land, and breach of fiduciary duty against Glover, and negligent supervision against the County.

On September 9, 2008, the Court dismissed the Equal Protection claims. (Dkt. No. 61.) The Court held that Glover is entitled to qualified

immunity for the Fourth Amendment claims, but not for the Fourteenth Amendment due process claims. The Ninth Circuit upheld the denial of qualified immunity, and did not address the grant of qualified immunity. *Mathis v. Cnty. of Lyon*, 633 F.3d 877, 879 (9th Cir. [2011]). The Court also held that Glover was not a final-policymaker in his role as Public Administrator, thereby precluding one method of establishing municipal liability under *Monell*.

On October 12, 2012, the County moved for summary judgment. (Dkt. No. 159.) On October 15, Glover moved for summary judgment (Dkt. No. 160), and Plaintiffs moved for partial summary judgment as to the procedural due process claims and the state law negligent supervision claim. (Dkt. No. 161).

On July 12, 2013, the Court reconsidered its earlier dismissal order (Dkt. No. 61), and held that Glover was a final policy-maker for the County in the area of securing property of a deceased. (Dkt. No. 186.)

Subsequently, the County submitted a renewed motion for summary judgment (Dkt. No. 189), which rendered moot their prior summary judgment motion (Dkt. No. 159), and Plaintiffs filed a motion for partial summary [judgment] against Lyon County as to the search and seizure claims (Dkt. No. 190). This Order resolves the outstanding motions for summary judgment: docket nos. 160, 161, 189, and 190.

II. ANALYSIS

A. Standing / Real-Party-in-Interest

A trust is properly viewed as an entity with enforceable civil rights. *See Marin v. Leslie*, 337 F. App'x 217, 219–20 (3d Cir. 2009); RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. a (2003). A trust, however, like a corporation, is not a natural person capable of taking action on its own behalf. The trustee is the person so empowered, and may sue on behalf of the trust to accomplish the purposes of the trust or otherwise protect the property held in trust. NRS §§ 163.023, 163.4147. "As a general proposition, the creation of a trust divides title to the trust property, placing legal title in the trustee and equitable title in the beneficiary." 76 AM.JUR. 2d *Trusts* § 258 (2010), *cited in Goodrich v. Briones (In re Schwarzkopf)*, 626 F.3d 1032, 1039 (9th Cir. 2010). In federal court, a trustee of an express trust may sue in her own name without joining the trust on whose behalf the action is brought. FED. R. CIV. P. 17(a)(1)(E).

Richard Mathis was not appointed as interim trustee until July 17, 2006—about six weeks after his father's death. (Dkt. No. 198-1 at 2.) The trustee at the time of Joseph's death was McNinch. (Dkt. No. 194-5 at 10–11.) Nonetheless, Richard has capacity to enforce the purposes of the Mathis Trust—care

and protection of the Trust Property[1] for the ultimate benefit of the beneficiaries. The County has not presented any authority to support its position that a trust's claim for relief may be brought only by the trustee in place at the time of the injury. If that were so, an apathetic trustee could unfairly deprive the beneficiaries of relief for harm to trust property. There may be some temporal cut-off for claims related to past injuries, but this case does not so concern the Court.

In addition, the three Mathis Brothers, as beneficiaries, have equitable interests that this Court can enforce. *See In re Schwarzkopf*, 626 F.3d at 1039. By operation of Joseph's will (Dkt. No. 194-4) and the trust instrument (Dkt. No. 194-5), they have vested equitable interests in the Trust Property and are "regarded as the real owner[s] of [the] property." *See id.* (applying California law); *Expert Masonry, Inc. v. Boone County, Ky.*, 440 F.3d 336, 338–39 (6th Cir. 2006) (vested property interests are protected by Due Process Clause); *Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist.*, 935 F. Supp. 2d 968 (2013). Under the Trust Instrument, there appears to be no contingency capable of divesting the Mathis Brothers of their 1/6 mandatory interest in the Trust Property. (*See* Dkt. No. 194-5.) In other words, the trustee had and has no discretion

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[1] "Trust Property" refers to the Mathis House and all personal property therein that belonged to Joseph.

to *not* distribute the 1/6 shares in the Trust Property to the Brothers. NRS § 163.4185(1)(a).

To the extent the Trust Property was still held in trust at the time of the alleged violations or possessed by the Public Administrator (and thus incapable of distribution), the Mathis Brothers have enforceable rights as beneficiaries with vested equitable interests in the Trust Property. To the extent the Trust Property had already been distributed at the time of the alleged violations, the Mathis Brothers have enforceable rights as partial title owners of the Trust Property. Under either formulation, the Mathis Brothers have standing to sue. Finally, the Mathis Brothers have enforceable rights in relation to their personal property that was stored at the Mathis House.

B. Summary Judgment Standard

The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* "Summary judgment is

inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence.

See Adickes v. S.H. Kress & Co., 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely

colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

C. Federal Claims—42 U.S.C. § 1983

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Section 1983 provides a mechanism for the private enforcement of substantive rights conferred by the U.S. Constitution and federal statutes. *Graham v. Connor*, 490 U.S. 386, 393–94 (1989). Section 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). "To state a claim under § 1983, a plaintiff must [1] allege the violation of a right secured by the Constitution and laws of the United States, and must [2] show that the alleged deprivation was committed by a person

acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988).

Plaintiffs' remaining Section 1983 claims are under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. The Fourth Amendment is applicable against state and local governments by incorporation through the Fourteenth Amendment. *Colorado v. Bannister*, 448 U.S. 1, 2 (1980). This Court previously held that Glover enjoys qualified immunity for the Fourth Amendment claims. (Dkt. No. 61.) Conversely, the Court held that he does not enjoy qualified immunity for the Fourteenth Amendment procedural due process claims—a holding the Ninth Circuit affirmed. *Mathis*, 633 F.3d at 879. Qualified immunity is not a defense available to local government units, such as counties. *Eng v. Cooley*, 552 F.3d 1062, 1064 n.1 (9th Cir. 2009). Thus, the County may be liable for Glover's alleged constitutional violations notwithstanding any personal immunity he enjoys.

In *Monell*, the Supreme Court held that local government units are "persons" for the purposes of Section 1983. 436 U.S. at 690. A plaintiff may establish *Monell* liability by showing at least one of the following:

> (1) conduct pursuant to an official policy inflicted the injury; (2) the constitutional tort was the result of a "longstanding practice or custom which

> constitutes the standard operating procedure of the local government entity;" (3) the tortfeasor was an official whose acts fairly represent official policy such that the challenged action constituted official policy; or (4) an official with final policy-making authority "delegated that authority to, or ratified the decision of, a subordinate."

Price v. Sery, 513 F.3d 962, 966 (9th Cir. 2008). Plaintiffs assert claims under the first and third of these methods (official policy and final policy-maker). "Generally, a municipality is liable under *Monell* only if a municipal policy or custom was the 'moving force' behind the constitutional violation. . . . In other words, there must be 'a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.'" *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d, 950, 957 (9th Cir. 2008) (quoting *City of Canton v. Harris*, 489 U.S. 378, 385 (1989)).

As to the first method, the plaintiff must prove that the official "committed the alleged constitutional violation pursuant to a formal governmental policy or a 'longstanding practice or custom which constitutes the *standard operating procedure* of the local government entity.'" *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992) (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (emphasis added)). Whether the

official acted pursuant to policy or custom is a question of fact. *Villegas*, 541 F.3d at 964.

Concerning the third method, "[a] single decision by a municipal policymaker may be sufficient to trigger section 1983 liability under *Monell*, even though the decision is not intended to govern future situations." *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992). However, "[m]unicipal liability under section 1983 attaches only where 'a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'" *Id.* (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483–84 (1986)). Whether a deliberate choice was made among various alternatives is a question of fact. *See Quiroz v. Licalsi*, 2005 WL 3283708 at *33 (E.D. Cal. 2005).

The Court previously held that Glover was a final policy-maker for the County in the area of securing property during his tenure as Public Administrator. For *Monell* liability to attach under the final-policymaker theory then, the dispositive questions are (1) whether Glover committed the alleged constitutional violations; and (2) whether he deliberately chose to take the actions constituting those violations from among various alternatives. On summary judgment, the Court must determine whether there any genuine disputes of fact that a jury must resolve regarding either of these two questions. FED. R. CIV. P. 56(a).

1. Fourth Amendment (Third and Fourth Claims for Relief)

Plaintiffs allege an unconstitutional search of the Mathis House and an unconstitutional seizure of personal property found therein. At the time of the alleged violations, the House was held in the Mathis Trust. Some of the personal property belonged to Joseph (and thus the Mathis Trust upon his death) and some belonged to the brothers (who were storing it at the Mathis House).

To prevail on a Fourth Amendment claim for an unconstitutional search or seizure, the plaintiff must prove that (1) she had a legitimate expectation of privacy in the place searched or property seized; and (2) the search or seizure was unreasonable. *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). The Court assesses the Fourth Amendment violation in relation to the County's possible liability under *Monell*, as Glover has qualified immunity for the Fourth Amendment claim. The first issue to determine the County's liability is whether Glover violated the Fourth Amendment, which necessitates asking if Plaintiffs have Fourth Amendment "standing" and if the search was reasonable.

a. Legitimate Expectation of Privacy/ "Standing"

"To invoke Fourth Amendment protection, Plaintiffs must have both a subjective and an objectively reasonable expectation of privacy." *Katz v. U.S.*, 389 U.S. 347, 361 (1967). A property interest

alone is insufficient. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1035 (9th Cir. 2012). "There must also be an objectively reasonable expectation of privacy in that property interest." *Id.* "In order to determine whether an expectation of privacy is reasonable, 'Katz posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?'" *Id.* (quoting *Cal. v. Ciraolo*, 476 U.S. 207, 211 (1986)). The necessity of a reasonable (i.e., legitimate) expectation of privacy is also referred to as Fourth Amendment "standing." *Minn. v. Carter*, 525 U.S. 83, 87 (1998).

Courts may consider various factors to determine whether a claimant had a legitimate expectation of privacy. The ability to exclude others weighs strongly in favor of claimants, although it is not necessary to establish an exclusive possessory interest. *U.S. v. $40,955.00 in U.S. Currency*, 554 F.3d 752, 757 (9th Cir. 2009). A person who stores items in another's home may have a legitimate expectation of privacy in that home, depending on circumstance and factors such as whether periodically checking on the property is permitted. *See U.S. v. Davis*, 932 F.2d 752, 757 (9th Cir. 1991) (citing *U.S. v. Harwood*, 470 F.2d 322 (10th Cir. 1972)). However, mere ownership of stored items is insufficient to entitle the property's owner to challenge the search of the area in which the property was found. *Currency*, 554 F.3d at 757–58. The Court also may consider the severity of the

intrusion in determining whether Plaintiffs had a legitimate expectation of privacy. *U.S. v. Nerber*, 222 F.3d 597, 599–600 (9th Cir. 2000).

The home receives the greatest protection under the Fourth Amendment. *Payton v. N.Y.*, 445 U.S. 573, 585 (1980) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (internal quotation marks and citation omitted)). Consequently, the showing required to establish a legitimate expectation of privacy in the home is less than in a commercial or other non-residential space.

Fourth Amendment standing is a mixed question of law and fact; where the facts are stipulated or are found by a fact-finder, the court determines as a matter of law whether the claimant had a legitimate expectation of privacy in the place searched. *See U.S. v. Singleton*, 987 F.2d 1444, 1447 (9th Cir. 1993). On summary judgment then, the issues are whether there is a genuine dispute as to the Plaintiffs' subjective expectation that the Mathis House would not be subject to governmental intrusion and whether society views this expectation as objectively reasonable.

Upon Joseph's death (and before distribution of the Trust Property), the trustee had legal authority to exclude others from entering the House. Although McNinch, the then-trustee, did not take any overt acts to manifest an expectation of privacy, the owner of a home (or its representative, as in this

case), is presumed to subjectively expect privacy in the home. *Katz v. U.S.*, 389 U.S. 347, 362 (1967) ("[A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."). The Court determines that, as a matter of law, the owner (the Trust, for the benefit of the beneficiaries) had a legitimate expectation of privacy in the Mathis House. To the extent the Mathis House was already distributed in 1/6 shares to the Mathis Brothers, they had a legitimate expectation of privacy in the home as well.

The same is true for the Mathis Brothers concerning their stored personal property. It is undisputed that they had their father's permission to store the items there. It is also undisputed that upon Joseph's death, the Brothers acquired a vested equitable interest in the home which would shortly mature into an ownership and possessory interest. Partial ownership in the location where property is stored is sufficient to confer Fourth Amendment standing. *See Currency*, 554 F.3d at 757–58. The Mathis Brothers had a legitimate expectation of privacy in the Mathis House related to their personal property stored therein.

In sum, Plaintiffs have standing to challenge the search under the Fourth Amendment, as a matter of law.[2]

b. Reasonableness of the Search and Seizure

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton*, 445 U.S. at 586 (internal quotation marks and citation omitted). *See also Donovan v. Dewey*, 452 U.S. 594, 608 (1981) (Rehnquist, J., concurring) ("Absent consent or exigent circumstances, the government must obtain a warrant to conduct a search . . . in a private home."). This requirement applies to administrative searches as well as law enforcement searches. *Camara v. Municipal Court of City & County of San Francisco*, 387 U.S. 523, 534 (1967). Defendants counter this longstanding presumption with the assertions that (i) a warrant was not required because Anthony Mathis consented to the search; (ii) a warrant was not required because there were exigent circumstances; (iii) a warrant was not required under the community

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[2] Even if Glover mistakenly believed that all of the seized personal property belonged to Joseph (and thus was held in trust upon his death), that mistake of fact would not alter the "standing" analysis because the Mathis Brothers have standing in their own right in relation to their personal property.

caretaking doctrine; and (iv) Glover relied in good-faith on a Nevada statute authorizing the search.

i. Consent

The County relies on Anthony Mathis's declaration to argue that he consented to the search. (Dkt No. 198 at 16.) He testified that Deputy Ortiz told him that Ortiz would contact Glover. But the fact that Anthony was aware of Glover's potential involvement does not mean that Anthony knew that Glover intended to enter the House and remove property. There remains a question of fact as to whether Anthony consented. It is also unclear whether Anthony had authority to consent to a search of the home and seizure of property. The House was held in trust, and Richard (not Anthony) was the trustee.

ii. Exigent Circumstances

In the law enforcement context, exigent circumstances are present where a crime is in progress, police are chasing a fleeing felon, or there is a substantial risk of the destruction of contraband or evidence. *Huff v. City of Burbank*, 632 F.3d 539, 545–46 (9th Cir. 2011), *reversed on other grounds sub nom. Ryburn v. Huff*, 132 S. Ct. 987 (2012). Ongoing fires are deemed exigent circumstances that allow firefighters to enter a structure without a warrant for the purpose of extinguishing the fire. *Id.* at 545. Notably, however, return visits by the fire department to investigate for arson require a warrant. *Michigan v. Tyler*, 436 U.S. 499, 511 (1978).

Once the immediate danger is over, the government may not return without a warrant (unless another exception to the warrant requirement applies). Whether exigent circumstances justify a warrantless search is a mixed question of law and fact. *U.S. v. Mancinas-Flores*, 588 F.3d 677, 687 (9th Cir. 2009).

Here, it is undisputed that the House contained weapons and other valuables and that Joseph was known in the community to be a jeweler who worked at home. Nor is it disputed that Deputy Ortiz sealed the property after removing Joseph's body. Even if the County's version of the facts is true, the circumstance Glover faced was nowhere near the level of imminent danger or risk of harm necessary to find exigent circumstances. As a matter of law, exigent circumstances did not obviate the need for a warrant in this case.

iii. Community Caretaking Doctrine

The "community caretaking doctrine" allows police officers to impound vehicles that jeopardize public safety and the efficient movement of vehicular traffic. *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1025 (9th Cir. 2009) (internal quotation marks and citation omitted). The County admits that this doctrine has not been extended to protect non-law-enforcement defendants, yet argues that it should apply in this case because the weapons in the Mathis House presented a danger to the community. The doctrine is too narrow in scope to justify extending it as far as the County suggests. "Whether an

impoundment is warranted under this community caretaking doctrine depends on the location of the vehicle and the police officers' duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft." *Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005). The weapons were locked inside of a home that had been sealed by the Sheriff's Department. Although it is conceivable that someone knew the weapons were in an unattended home and thus ripe targets for theft, the community caretaking doctrine is premised on a much more immediate harm to the public. As a matter of law, the community caretaking doctrine does not excuse Glover's failure to obtain a warrant.

iv. Good-Faith Reliance on State Law

The County argues that the search and seizure were authorized under NRS § 253.0405.[3]

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[3] In 2006, when the events at issue occurred, NRS § 253.0405 provided:

Before the issuance of the letters of administration for an estate, before filing an affidavit to administer an estate pursuant to NRS 253.0403 or before petitioning to have an estate set aside pursuant to NRS 253.0425, the public administrator may *secure* the property of a deceased person if the administrator finds that:

1. There are no relatives of the deceased who are able to protect the property; *and*

2. Failure to do so could endanger the property.

Plaintiffs argue to the contrary, and that NRS § 259.1504[4] specifically precluded Glover's entry into the Mathis House. These arguments are misplaced, however.

The County is correct that qualified immunity protects individuals who reasonably misunderstand the law. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001) ("The . . . dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."); *Catlin v. City of Wheaton*, 574 F.3d 361, 369 (7th Cir. 2009) ("[Q]ualified immunity protects [officers] from liability where they reasonably misjudge the legal standard[.]"); MARTIN A. SCHWARTZ, 1A SECTION 1983 CLAIMS & DEFENSES § 9A.04[B][1] (4th ed. 2013). But the Court has already held that Glover has qualified immunity for the Fourth Amendment claims, and "local government units are not entitled to the qualified-

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NRS § 253.0405 (1999) (emphasis added). The "and" was amended to "or" in 2009. 2009 Nev. Laws Ch. 416 (S.B. 194) (2009).

[4] NRS § 259.150(2) provides that after a coroner seals the home of a decedent who "lived alone under circumstances indicating that no other person can reasonably be expected to provide immediate security for the deceased's property," only "the coroner, the coroner's deputy, a law enforcement officer or the executor or administrator of the deceased's estate" may enter the home.

immunity defense." *Burke v. Cnty. of Alameda*, 586 F.3d 725, 734 (9th Cir. 2009). Even if NRS § 253.0405 authorized the search—or if Glover reasonably believed the statute authorized the search—the County is liable under *Monell* if the search violated the Fourth Amendment and was performed in accord with County policy, practice, or custom.

As to the Fourth Amendment violation itself, good-faith reliance on state law is not an established exception to the warrant requirement. *See* 3 WAYNE R. LAFAVE, SEARCH & SEIZURE § 6.6(c) (5th ed. 2013) (warrantless entry generally requires "a compelling urgency"). Good-faith reliance can trigger the exclusionary rule in criminal cases. *See Ill. v. Krull*, 480 U.S. 340 (1987). But that is a rule of evidence, not liability, and its use is extremely limited in civil cases. *See U.S. v. Janis*, 428 U.S. 433, 456 (1976) ("intrasovereign" violations); *U.S. v. $493,850.00 in U.S. Currency*, 518 F.3d 1159, 1164 (9th Cir. 2008) (civil forfeiture cases); *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1448 (9th Cir. 1994) ("[B]ecause the deterrent effect of applying the exclusionary rule in civil cases is minimal and its cost is significant, as a general rule, evidence obtained in an unlawful manner will not be excluded from civil proceedings."). The Ninth Circuit has not determined whether the exclusionary rule applies to § 1983 causes of action, but the Fifth Circuit has held that it does not. *Willis v. Mullins*, 809 F. Supp. 2d 1227, 1234 (E.D. Cal. 2011) (citing *Wren v. Towe*, 130 F.3d 1154, 1158 (5th Cir. 1997)). Moreover, although

private party defendants acting under color of law may be entitled to a defense of subjective good-faith reliance on state law, that potential defense is irrelevant because Glover was acting as a government official when he committed the alleged violations. *See Wyatt v. Cole*, 504 U.S. 158, 169 (1992).

In short, whether Glover relied in good faith on NRS § 253.0405 is irrelevant for purposes of determining the County's *Monell* liability for Glover's alleged violations of the Fourth Amendment.

As to Plaintiffs' assertion that Glover's alleged violations of NRS §§ 259.0405 and 259.150 establish a constitutional violation, that argument fails because it is possible to violate state statute without also violating the federal Constitution.

Because there remains a genuine dispute of fact as to whether the Mathis Brothers consented to the search and seizure during their phone calls with Ortiz, summary judgment in Plaintiffs' favor is not appropriate. FED. R. CIV. P. 56(a).

2. County's Liability Under *Monell* for Glover's Alleged Fourth Amendment Violation

However, the Court must nonetheless address whether Glover acted in accord with County custom, policy, or practice. If, as to that issue, there are no genuine issues of material fact and the County is

entitled to judgment as a matter of law, then summary judgment would be appropriate.

a. Custom or Policy

Factual questions remain about whether the County had a custom or policy of allowing the public administrator to illegally enter homes and remove property found therein. Plaintiffs put forth evidence of other wrongdoing by public administrators that is quite similar to Glover's conduct. The County responds that it took appropriate action in each instance of wrongdoing. Plaintiffs' evidence, although uncontroverted on its face, would not be sufficient for a directed verdict because it does not go so far as to demonstrate that Glover's conduct represented the County's "standard operating procedure." *Price*, 513 F.3d at 962; *Darden*, 213 F.3d at 480. Thus, whether the County had a custom or policy of allowing the public administrator to illegally enter homes and remove property is a question of fact for the jury.

b. Final Policy-Maker

Likewise, fact questions remain concerning *Monell* liability arising from Glover's status as a final policy-maker. On the undisputed facts, it appears that Glover chose from among various alternatives. He could have contacted one of the Mathis Brothers before entering the home; he could have sought a warrant; and he could have had more extensive communication with Deputy Ortiz to investigate Ortiz's conversations with Anthony and

James to ascertain whether consent to a warrantless search was established. Whether Glover did, in fact, choose from among various alternatives is an issue is for the jury to resolve, however.

3. Fourteenth Amendment Procedural Due Process

a. Glover's Liability (Second Claim for Relief)

In *Mathis v. County of Lyon*, the Ninth Circuit held that "[t]he right to notice and hearing prior to a public official's administrative taking is clearly established." 633 F.3d at 879. Based on this statement of law, the Ninth Circuit held that Glover did not have qualified immunity for the Fourteenth Amendment procedural due process claims in this case. *Id.* This statement of law, applied to the undisputed facts of this case, render Glover individually liable for violating Plaintiffs' Fourteenth Amendment due process rights. It is uncontroverted that Glover entered the home and seized personal property without first notifying any of the Mathis Brothers of his intentions and without giving them an opportunity to be heard. The Court need not address the nature of the required "hearing" in this context because there was no notice.

Accordingly, the Court grants summary judgment in Plaintiffs' favor on this claim. The Court independently reaches this holding without consideration of the Ninth Circuit's statement that "the failure to give notice and an opportunity to

respond before Glover took the items from the house violates due process."

b. County's Liability Under *Monell* for Glover's Alleged Fourteenth Amendment Violation (Third and Fourth Claims for Relief)

Despite this, Plaintiffs are not entitled to summary judgment against the County under *Monell*. As with the Fourth Amendment claim, fact issues remain as to whether Glover's search and seizure without notice and an opportunity to respond represent the County's standard operating procedure.

Likewise, the issue of whether Glover deliberately chose from various alternatives is for a jury to resolve. Although it appears he made such a choice—as he could have expended a greater effort to reach one of the Mathis Brothers to explain his role and that he intended to enter and seize—the issue is not conclusively established such that the Court can decide the issue as a matter of law. Summary judgment is thus inappropriate on the claim for *Monell* liability against the County for Glover's violation of Plaintiffs' Fourteenth Amendment right to procedural due process. FED. R. CIV. P. 56(a).

D. <u>State Law Claims</u>

The County moved for summary judgment on the Fifteenth Claim for Relief (negligent supervision and training). (Dkt. No. 189 at 26.) Plaintiffs assert

that this is not a state law claim but rather a *Monell* claim asserting municipal liability for failure to train. As the Complaint clusters this claim with various state law claims and fails to even mention *Monell* or Section 1983 in relation to this claim, the Court agrees with the County that this claim should be treated as a claim under state law.

Glover moved for summary judgment on the other state law claims. (Dkt. No. 160.) His broad argument is that most of these claims require proof that he actually took and retained property belonging to Plaintiffs, and that Plaintiffs' list of missing items allegedly taken by him is insufficient because "opportunity alone is not enough to demonstrate the existence of a genuine dispute as to whether [he] took and retain[ed] the property." (*Id.* at 20.) Glover also contends that Plaintiffs' claims have various other defects. (*Id.*) Plaintiffs respond that there is more evidence than "opportunity alone" to demonstrate that Glover took and retained the property at issue. The Court addresses each claim in turn.

1. Intentional Infliction of Emotional Distress (Seventh Claim for Relief)

Under Nevada law, the tort of intentional infliction of emotional distress ("IIED") has three elements: "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress; (2) severe or extreme emotional distress suffered by the plaintiff; and

(3) actual or proximate causation." *Jordan v. State ex. rel. Dep't of Motor Vehicles & Pub. Safety*, 110 P.3d 30, 52 (Nev. 2005), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 181 P.3d 670 (Nev. 2008). To be extreme and outrageous, conduct must be "outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community." *Kahn v. Morse & Mowbray*, 117 P.3d 227, 237 n.18 (Nev. 2005) (internal quotation marks and citations omitted). "[P]ersons must necessarily be expected and required to be hardened . . . to occasional acts that are definitely inconsiderate and unkind." *Maduike v. Agency Rent-a-Car*, 953 P.2d 24, 26 (Nev. 1998) (internal quotation marks and citations omitted). Also, "[t]he less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress." *Chowdhry v. NLVH, Inc.*, 851 P.2d 859, 483 (Nev. 1993).

Glover argues that although searching a home for weapons and valuables may leave it in disarray, that does not rise to the level of outrageous conduct contemplated by this tort. He further argues that the removal of family heirlooms with substantial sentimental value is (at least arguably) authorized by statute and therefore not extreme and outrageous. He contends that the Mathis Brothers do not qualify for bystander liability because they were not present to witness the alleged harm, and the alleged harm was not violent or shocking. Lastly, he argues that he could not have had the requisite intent because, at the time of the search, (1) he was

not aware that the family had been contacted and would be in town soon; (2) he intended only to turn the property over to the family; and (3) he first met one of the Mathis Brothers at his storage facility. He cites to his own deposition as evidence of these facts. (Dkt. No. 160-1.)

Plaintiffs contend that the statute authorizes only "securing" property, not removing it. The Court previously held in this case, however, that removing property is within a public administrator's discretion to "secure" property. (Order Granting Pls' Mot. for Recons. 11, Dkt. No. 186.) Plaintiffs next contend that they qualify for bystander liability and that there are questions of fact as to whether Glover had the requisite intent (or acted recklessly) and whether his conduct was extreme and outrageous. They point out, in reliance on their depositions, that they manifested physical symptoms due to the emotional distress allegedly caused by Glover. Finally, they contend that bystander liability is not an issue as to the Plaintiffs' own personal property.

"[B]ystanders may recover for the [IIED] caused by witnessing the defendant's outrageous conduct to another where the bystander was a close relative of the person against whom the outrage was committed and where the defendant's conduct was 'violent and shocking.'" *State v. Eaton*, 710 P.2d 1370, 1375 (Nev. 1985) (quoting *Star v. Rabello*, 625 P.2d 90, 92 (Nev. 1981)) (emphasis added), *overruled on other grounds by State ex. rel. Dep't of Transp. v. Hill*, 963 P.2d 480 (Nev. 1998). The Nevada Supreme

Court and this Court have consistently applied the requirement that the third-party personally observe the harm. *See, e.g., Cardinale v. La Petite Academy, Inc.*, 207 F. Supp. 2d 1158, 1160 (D. Nev. 2002); *Nelson v. City of Las Vegas*, 665 P.2d 1141, 1145 (Nev. 1983).

Here, however, the Mathis Brothers were not third-party bystanders. They do not allege emotional harm in response to harm done to another (for example, their father). They contend they are the direct victims of the harm committed by Glover—that Glover intended to harm them directly by his actions. Bystander liability does not apply on these facts. At the time of the events at issue, the brothers had vested ownership and possessory interests in the House and the personal property that Glover removed. They had ownership and possessory interests (a right to possession if not actual possession) in their own personal property stored at the home.

Glover's argument that the sequence of events entirely precludes a finding of intent is unavailing. Glover could have recklessly disregarded the emotional state of the deceased's family members without even knowing who they were or when they would arrive. That he may have intended to return all of the property to them in a timely manner does not negate the shock of arriving to a home in disarray with valuables missing. A jury could reasonably conclude that he had the requisite intent (or acted recklessly). In light of the evidence of

physical symptoms, which slides the scale toward requiring less outrageous conduct, a jury could also reasonably find that Glover's conduct was sufficiently outrageous. That Plaintiffs were not present when Glover committed the acts is a fact for the jury to weigh. Therefore, summary judgment on the IIED claim is denied.

2. Trespass to Chattels/Conversion (Eighth and Eleventh Claims for Relief)

Trespass to chattels is the same as conversion except that conversion requires a greater amount of interference with one's personal property. "One who dispossesses another of a chattel is subject to liability in trespass for the damage done. If the dispossession seriously interferes with the right of the other to control the chattel, the actor may also be subject to liability for conversion." RESTATEMENT (SECOND) OF TORTS § 222 (1965). "A conversion occurs whenever there is a serious interference to a party's rights in his property." *Bader v. Cerri*, 609 P.2d 314, 317 (Nev. 1980), *overruled on other grounds by Evans v. Dean Witter Reynolds*, 5 P.3d 1043 (Nev. 2000). "The return of the property converted does not nullify the conversion. [But] [s]uch return does serve to mitigate damages." *Id.* Trespass to chattels and conversion are intentional torts, but "it is not necessary that the actor intended to commit what he knows to be a trespass or a conversion. It is, however, necessary that his act be one which he knows to be destructive of any

outstanding possessory right, if such there be." RESTATEMENT (SECOND) OF TORTS § 222 cmt. c (1965).

Glover first argues that there is insufficient evidence to show that he *retained* any of the alleged missing property, but that is not a dispositive issue. He could be liable for trespass to chattels or conversion for even a short-term interference with Plaintiffs' property, although the measure of damages would reflect the shorter duration of the interference. *See Bader*, 609 P.2d at 317. Any defenses Glover may have that rely on the legality of his conduct, either statutory or constitutional, depend on unresolved factual questions (as discussed above).

Glover next argues that none of the plaintiffs had a possessory right in the personal property seized. This is incorrect. Future possessory interests are cognizable under trespass to chattels, and the Mathis Brothers had vested interests in the personal property held in trust. RESTATEMENT (SECOND) OF TORTS § 220 (1965) ("One who commits a trespass to a chattel is subject to liability to another who is entitled to the future possession of the chattel for harm thereby caused to such other's interest in the chattel."). The Mathis Brothers had either present or future possessory interests in their own personal property stored at the home. Plaintiffs have sufficient possessory interests to claim trespass to chattels and conversion.

Glover lastly argues that he could not have intended to commit trespass to chattels or conversion because he had no reason to know that any of the property he seized belonged to anyone other than Joseph. But since Joseph had already died, the possessory rights in the personal property had to belong to somebody or something.[5] It is not necessary that Glover knew who had the possessory rights in the property, only that he knew he was interfering with those rights (whoever they belonged to). A reasonable jury could conclude that Glover had the requisite intent.

NRS §§ 143.070 and 143.100 permit a personal representative of the decedent to bring a conversion claim and provide for treble damages in some instances. The operation of these statutes is not relevant for this Order.

Summary judgment is denied for the trespass to chattels and conversion claims.

3. Claim and Delivery (Ninth Claim for Relief)

Plaintiffs assert "claim and delivery" under NRS § 31.840, a replevin statute which provides in

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[5] The Court admits it is possible that a person could die intestate with no heirs, and thus that person's property would escheat to the state. But barring that unlikely scenario, the possessory rights to a deceased's property must lie with someone or something (e.g., an heir, corporation or trust).

relevant part that "the plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to the plaintiff as provided in this chapter."

Glover contends that he does not retain any of Plaintiffs' personal property. If he is correct, there would be no property to deliver to Plaintiffs. However, Glover admits that he gave Plaintiffs a complete list of seized items and then found more of their property in storage. Plaintiffs prepared a list of the allegedly missing items, which Glover submitted as part of his answers to interrogatories. (Dkt. No. 160-1 at 140.) In light of this list and Glover's previous inaccurate statement that he had returned all of Plaintiffs' property, there is a genuine dispute whether Glover still retains any of Plaintiffs' personal property. Summary judgment on the "claim and delivery" claim is denied.

4. Injunction (Tenth Claim for Relief)

The reasoning for the injunction claim is the same as for replevin. If Glover retains any of Plaintiffs' personal property, then an injunction may be an adequate remedy. Summary judgment on the injunction claim is therefore denied.

5. Trespass to Land (Twelfth Claim for Relief)

"[T]o sustain a trespass action, a property right must be shown to have been invaded[.]" *Lied v.*

Clark County, 579 P.2d 171 (Nev. 1978). The *Restatement* is more specific:

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) remains on the land, or
>
> (c) fails to remove from the land a thing which he is under a duty to remove.

RESTATEMENT (SECOND) OF TORTS § 158 (1965).[6]

> [A] person who is in possession of land includes only one who
>
> (a) is in occupancy of land with intent to control it, or

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[6] The Nevada Supreme Court often relies on the *Restatement (Second) of Torts*, and on at least one occasion relied on it to decide whether an accused trespasser to land had privilege to enter the property. *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 247 (Nev. 2001); *see also Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 302 P.3d 1148, 1153 (Nev. 2013); *Cucinetta v. Deloitte & Touche, L.L.P.*, 302 P.3d 1099, 1099 (Nev. 2013).

> (b) has been but no longer is in occupancy of land with intent to control it, if, after he has ceased his occupancy without abandoning the land, no other person has obtained possession as stated in Clause (a), or
>
> (c) has the right as against all persons to immediate occupancy of land, if no other person is in possession as stated in Clauses (a) and (b).

Id. § 157.

Glover argues that he was statutorily authorized to enter the property of the deceased and that none of the Plaintiffs "had the specific legal right to possess the land or residence owned by Joe Mathis." (Dkt. No. 160 at 24.) Whether NRS § 253.0405 authorized the entry depends on the resolution of several factual questions (see above). By operation of the Will and Trust Instrument, the possessory interest in the home transferred to the Mathis Trust; consequently, the Trustee could enforce the Trust's right to exclude others under *Restatement* § 157(c). All three Mathis Brothers had vested possessory interests in the home, which also may be sufficient to exclude all others under *Restatement* § 157(c). Summary judgment on the trespass to land claim is denied.

6. Intrusion Upon Seclusion of Another (Thirteenth Claim for Relief)

Nevada recognizes the privacy tort of unreasonable intrusion upon the seclusion of another ("intrusion"). *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1279 (Nev. 1995) ("PETA"). "To recover for the tort of intrusion, a plaintiff must prove the following elements: (1) an intentional intrusion (physical or otherwise); (2) on the solitude or seclusion of another; (3) that would be highly offensive to a reasonable person. *Id.* "In order to have an interest in seclusion or solitude which the law will protect, a plaintiff must show that he or she had an actual expectation of seclusion or solitude and that that expectation was objectively reasonable." *Id.* The Nevada Supreme Court adopted these elements from the *Restatement (Second) of Torts*. *Id.* at 1278. "The defendant is subject to liability . . . only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs." RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1965).

Glover argues that any expectation of solitude was objectively unreasonable because Plaintiffs did not have the right to possess the home and that Glover could not have intended to intrude upon anyone's solitude because the home was unoccupied. Plaintiffs did not respond to Glover's arguments in

their response brief. (*See* Dkt. No. 170.) Plaintiffs' failure to respond constitutes a waiver of this claim. *Stichting Pensioenfonds ABP v. Countrywide Financial Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011). More importantly, on this point Glover's arguments have merit. Therefore, summary judgment is granted in the County's favor on the claim for intrusion upon seclusion.

7. Negligence (Fourteenth Claim for Relief)

Glover contends that Plaintiffs' inability to prove that he retained any personal property precludes this claim. As discussed above, however, a factual issue remains as to whether Glover retains any of the personal property. Thus, summary judgment is unavailable to Glover.

8. Breach of Fiduciary Duty (Sixteenth Claim for Relief)

Under Nevada law, "[a] fiduciary relationship exists when one has the right to expect trust and confidence in the integrity and fidelity of another." *Powers v. United Services Auto. Ass'n*, 979 P.2d 1286, 1288 (Nev. 1999). In other words, "[a] fiduciary relationship is deemed to exist when one party is bound to act for the benefit of the other party. Such a relationship imposes a duty of utmost good faith." *Hoopes v. Hammargren*, 725 P.2d 238, 242 (1986). "The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, since the person in whom trust and

confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." *Id.* (internal quotation marks and citation omitted). The existence of dominance or superiority in the relationship is a principal characteristic of a fiduciary relationship. *See U.S. v. Kim*, 184 F. Supp. 2d 1006, 1011 (N.D. Cal. 2002).

The Nevada Supreme Court has held that fiduciary duties arise as a matter of law in certain categories of relationships. *See, e.g., Powers v. United Servs. Auto. Ass'n*, 979 P.2d 1286, 1288 (Nev. 1999) (insurers and insured); *Cook v. Cook*, 912 P.2d 264, 266 (Nev. 1996) (attorney and client); *id.* (spouses); *Fick v. Fick*, 851 P.2d 445, 449–50 (Nev. 1993) (fiancés); *Leavitt v. Leisure Sports Inc.*, 734 P.2d 1221, 1224 (Nev. 1987) (corporate officers or directors and corporation).

Glover argues that he did not owe any fiduciary duties to Plaintiffs because his duties did not arise from a voluntary undertaking on their behalf but instead arose from statute. Glover relies on *Boorman v. Nevada Memorial Cremation Society*, which held that coroners are not fiduciaries of the family members of a decedent because coroners' investigative duties are imposed by law. 236 P.3d 4 (Nev. 2010).

Plaintiffs respond that the statute permits, but does not require, public administrators to secure property of a deceased. Accordingly, Plaintiffs argue,

Boorman is inapposite and Glover assumed a fiduciary duty to Joseph's heirs and devisees when he voluntarily seized personal property. Plaintiffs contend that "[p]ublic officials that handle public property and funds belonging to others have been found, under the common law, to owe fiduciary duties to the public." (Dkt. No. 170 at 22.) The cases that Plaintiffs cite only tangentially support their position, though. In *State v. Gaul*, a county treasurer violated his fiduciary duty to preserve public moneys. 691 N.E.2d 760, 768 (Ohio Ct. App. 1997). And in *Columbia Casualty Co. v. County of Westmoreland*, the court similarly held that public officials owe fiduciary duties to the public and must account for public moneys they hold as individuals. These cases do not hold, or even imply, that a public official owes a fiduciary duty to a private party on whose behalf the official ostensibly stores or possesses personal property. The analysis does not stop here, however.

Although *Boorman* is not on all fours with the instant facts, its discussion of "voluntariness" informs the Court's determination that Glover owed fiduciary duties to Plaintiffs. Like public administrators, coroners retain some discretion within their statutory mandate. "[A] county coroner is obligated to 'make an appropriate investigation' when there are 'reasonable ground[s] to suspect that a death has been occasioned by unnatural means." *Boorman*, 236 P.3d at 9 (quoting NRS § 259.050(1)). Once the coroner determines that a death may have

been "unnatural," she is *obligated* to perform an "appropriate" investigation.

Conversely, once a public administrator determines that there is no one available to protect the deceased's property and that the property is in danger, she is *permitted* (but not obligated) to take appropriate action to secure the property. The public administrator chooses to place herself in a position of superior knowledge and power. In many cases (if not the vast majority), the public administrator may be the only person who knows the location of seized property. Heirs and devisees may not have any way to check on the safety of their property or control where and how it is stored. Likewise, the public administrator is often placed in the position of searching a deceased's house alone with no supervision and choosing if and how to "secure" the real property and personal property. In this context, it must be that public administrators are bound to act for the benefit of the owners of seized property. Glover's broad duties arose under Nevada statute, but once he chose to "secure" the property by entering the home and seizing personal property, he assumed fiduciary duties toward Plaintiffs.[7]

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[7] The only case the Court found addressing this issue came to the same conclusion. *In re Estate of Blumenstein*, 959 N.Y.S. 2d 87 at *4 (N.Y. Surrogate Ct. 2012) (unreported) ("The Public Administrator, as fiduciary, had the duty to safeguard and protect assets of the estate, including the decedent's residence.").

Questions of fact remain as to whether Glover breached his fiduciary duties and (if so) whether that breach caused harm as alleged by Plaintiffs. Summary judgment is denied on the claim of breach of fiduciary duty.

9. Negligent Supervision and Training Against Lyon County (Fifteenth Claim for Relief)

"It is a basic tenet that for an employer to be liable for negligent hiring, training, or supervision of an employee, the person involved must actually be an employee." *Rockwell v. Sun Harbor Budget Suites*, 925 P.2d 1175, 1181 (Nev. 1996). Because Glover was an elected official rather than an employee, the County cannot be liable under this tort. The Nevada Supreme Court has not extended the tort of negligent supervision to elected officials, and this Court is not inclined to extend it absent clear direction from the Nevada Supreme Court. Therefore, Plaintiffs' motion for summary judgment on this claim is denied.

10. Constructive Fraud (Seventeenth Claim for Relief)

"Constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others or to violate confidence." *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 963 P.2d 465, 477 (Nev. 1998) (internal quotation marks and citation omitted). "Constructive fraud may arise when there

has been a breach of duty arising out of a fiduciary or confidential relationship." *Id.* (internal quotation marks and citation omitted).

Glover makes no argument as to this claim aside from asserting that he owed no fiduciary duties to Plaintiffs. Because the Court holds (above) that Glover owed Plaintiffs a fiduciary duty, summary judgment is denied on the constructive fraud claim.

11. Fraudulent or Intentional Misrepresentation (Eighteenth Claim for Relief)

Under Nevada law, the elements of fraudulent misrepresentation are:

> (1) A false representation made by the defendant; (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of relying on the misrepresentation.

Barmettler v. Reno Air, Inc., 956 P.2d 1382, 1386 (Nev. 1998).

Glover asserts that Plaintiffs' Complaint failed to allege damages or reliance. (Dkt. No. 160 at 28.) Plaintiffs respond that the alleged

misrepresentations pleaded in the Complaint imply damages and reliance. (Dkt. No. 170 at 22 (citing Compl. ¶ 161).) Plaintiffs conclusorily pleaded at least $10,000 in damages in the Complaint, but provide no detail as to how they were damaged. Even more deficient is the failure to plead reliance at all in the Complaint. (*See* Compl. ¶¶ 160–167.) Plaintiffs' response to the motion for summary judgment argues that they were "forced to rely on Glover's statements because they had no way of knowing what property Glover may have hidden and where that property could be[.]" (Dkt. No. 170 at 22–23.) But this is too late for Plaintiffs.

Glover established the absence of a genuine issue of fact as to reliance by pointing out Plaintiffs' failure to plead reliance. The Court cannot reasonably infer reliance based only on a laundry list of alleged misrepresentations. Allegations of reliance in the opposition to summary judgment need not be deemed true. Without any competent and admissible evidence from Plaintiffs to counter Glover's establishment of the absence of a factual issue for reliance, summary judgment must be granted on this claim.[8] *See Celotex*, 477 U.S. at 323–24.

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[8] In his reply brief, Glover argues that Plaintiffs could not have relied on his statements because they never trusted him to begin with. He submitted evidence indicating that they threatened to sue him when they first met and filed a criminal complaint against him several days later. (Glover Decl., Dkt. No. 176-3 at 16–17; James Mathis Decl., Dkt. No. 170-3 ¶ 4.) This certainly seems like strong evidence that Plaintiffs did not

Summary judgment on the fraudulent misrepresentation claim is granted in the County's favor.

E. Lyon County's Motion to Strike

The County moved to strike Plaintiffs' reply to one of its motions to dismiss. (Dkt. No. 199, seeking to strike Dkt. No. 197.) The issue is already resolved, however, as the Court granted Plaintiffs' motion to exceed the page limit shortly after the County filed its motion to strike. (Dkt. No. 202).

III. CONCLUSION

In accord of the foregoing, the Court hereby ORDERS:

1. Glover's motion for summary judgment (Dkt. No. 160) is GRANTED IN PART and DENIED IN PART. Judgment in Glover's favor is ordered for the Thirteenth Claim (intrusion upon seclusion) and the Eighteenth Claim (fraudulent misrepresentation). Summary judgment is denied as to all other claims for relief challenged in this motion.

2. Plaintiff's motion for partial summary judgment as to the Second, Third, and

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rely on Glover's alleged misrepresentations, but the reliance issue need not reach a jury because Plaintiffs failed to properly plead it.

Fifteenth Claims for Relief (Dkt. No. 161) is GRANTED IN PART and DENIED IN PART. Judgment is ordered in Plaintiffs' favor on the Second Claim (Fourteenth Amendment procedural due process against Glover). Summary judgment is denied as to the Third and Fifteenth Claims.[9]

3. Lyon County's motion for summary judgment (Dkt. No. 189) is DENIED.

4. Plaintiff's motion for partial summary judgment as to the Third and Fourth Claims for Relief (Dkt. No. 190) is DENIED.[10]

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[9] In its opposition to Plaintiffs' motion, the County argues that Richard Mathis should be dismissed from this suit because he did not reply to the County's first request for admissions and thereby admitted he has no property interest at stake in this litigation. (Dkt. No. 171 at 4–5.) The request for admissions was mailed to Richard on February 27, 2012. (Dkt. No. 171-1 at 4.) Richard counters that he timely mailed his response to the request on March 29, 2012, and attached his response to his reply brief. (Dkt. No. 177-17 at 7.) Richard's response was timely as it was mailed 31 days after being served. Although Rule 36(a)(3) allows only 30 days to respond, Rule 6(d) adds three days if service is effectuated by mail under Rule 5(b)(2)(C).

[10] Although labeled as a motion for partial summary judgment as to the First Claim for Relief, this was clearly an erroneous document title. This motion argues about the Third and Fourth Claims for Relief.

5. Lyon County's motion to strike (Dkt. No. 199) is DENIED.

Dated: April 11, 2014.

/s/ Andrew P. Gordon
ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD MATHIS, Special Administrator of the Estate of Joe Robinson Mathis and as Trustee of the Joe Robinson Mathis and Eleanor Margherite Mathis Trust, AKA Joe R. Mathis; JAMES MATHIS, individually; ANTHONY MATHIS, individually, *Plaintiffs-Appellees*, v. COUNTY OF LYON, a Political Subdivision of the State of Nevada *Defendant*, and RICHARD GLOVER, individually, *Defendant-Appellant.*	No. 08-17302 D.C. No. 2:07-cv-00628-KJD-GWF OPINION*

Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, District Judge, Presiding

Argued and Submitted
March 12, 2010—San Francisco, California

Filed February 1, 2011

Before: Procter Hug, Jr. and Jay S. Bybee, Circuit Judges, and James S. Gwin, District Judge.*

Opinion by Judge Hug;
Partial Concurrence and Partial Dissent
by Judge Bybee

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*The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

Keith L. Loomis, Reno, Nevada, for the appellant.

Paola M. Armeni, Las Vegas, Nevada, for the appellees.

OPINION

Hug, Circuit Judge:

This case concerns the actions of Richard Glover, the Public Administrator of Lyon County, Nevada, after the death of Joe Mathis. Before us is an interlocutory appeal based only on the allegations in the complaint denying qualified immunity for Glover's actions in entering Joe Mathis's home without a warrant and failing to give notice to his sons before doing so. The complaint makes the following allegations. On May 29, 2008, the deputy sheriff entered Joe Mathis's home on a welfare check and found him dead. He sealed the residence with the property inside. He then notified James Mathis, one of Joe Mathis's three sons. One of the sons, Anthony Mathis, notified the deputy that he would be coming to Smith Valley, where his father's home is located, on the next available flight and would be arriving on June 1st.

On the evening of May 30th, the deputy contacted Glover in his capacity as Public Administrator and advised him of the death of Joe Mathis. He informed him of the identity of the three sons and that Anthony Mathis would be arriving on the following day, June 1st, to take care of his father's property and funeral. On May 31st, Glover entered the residence and carried away personal property, some of which he stored and some of which he sold.

[1] The Mathis sons alleged that Glover and Lyon County violated their rights under the Fourth and Fourteenth Amendments of the United States Constitution, under the Nevada Constitution and for violations of Nevada state law. Glover and Lyon County moved for summary judgment on the pleadings for the Fourth Amendment allegations. Glover's motion was on the grounds that the complaint revealed that he was entitled to qualified immunity. The district court granted the motion stating:

> Glover is entitled to qualified immunity for the Fourth Amendment claim's relating to his initial entry on the property and securing the property of the estate. However, Glover is not entitled to qualified immunity for claims that he misappropriated property for his own benefit and failed to account for or inventory the property to enable his conversion of the property.

Only the denial of qualified immunity is subject to interlocutory review, not the granting of qualified immunity.[1] Glover maintains we should review the denial of qualified immunity based upon the last sentence in the district court's ruling. That sentence is best understood as relating to the allegations of the conversion of property in violation of state law. That interpretation is confirmed by the statement in the Mathis brief that they only base the Fourth Amendment violations upon the initial entry. Thus there is no denial of qualified immunity on the violation of Fourth Amendment rights before us. Glover also is not entitled to qualified immunity on Mathis' claim of a procedural due process violation under the Fourteenth Amendment. The right to notice and hearing prior to a public official's administrative taking of property is clearly established. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 82, 97 (1972) (a later hearing does not remedy the prior deprivation in a replevin case); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) ("the right to prior notice and a hearing is central to the Constitution's command of due process" absent extraordinary circumstances).

[2] There was no extraordinary circumstance here and the failure to give notice and an opportunity to respond before Glover took the items from the house violated due process. Glover was not

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[1] The granting of qualified immunity is reviewed only as a part of an appeal of a final judgment.

entitled to qualified immunity because the law was clearly settled.[2]

AFFIRMED.

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[2] The dissent would reach the peculiar result of granting qualified immunity to Glover on the due process issue. He dashed into the decedent's home just before one of the decedent's three sons was to arrive to take care of the property, which he well knew. Glover then removed the property and converted it to his own use, selling some of it. The legitimate purpose of "securing" the property does not necessitate the "removal" of the property. It was quite secure in the house. Had notice been given to the sons, and an opportunity to be heard, it is very doubtful that Glover could have removed the property and carried out his plan. The purpose of *Mathews v. Eldridge*, 424 U.S. 319 (1976), would have been well served by the notice and opportunity to respond.

BYBEE, Circuit Judge, concurring in part[1] and dissenting in part:

In the immediate aftermath of Joe Mathis's death, the public administrator of Lyon County, Richard Glover, entered the deceased's residence and secured some of his personal property. He did so under the authority of a state statute that allowed the public administrator to secure the property of the deceased if the administrator found that: (1) "[t]here are no relatives of the deceased who are able to protect the property;" and (2) "[f]ailure to do so could endanger the property." NEV. REV. STAT. § 253.0405 (1999).[2] Subsequently, Joe Mathis's three sons ("Plaintiffs") sued Glover, alleging, inter alia, that Glover violated their Fourteenth Amendment procedural due process rights. Specifically, Plaintiffs alleged that NRS § 253.0405 (the "Nevada statute") was facially unconstitutional because it failed to provide for notice and a hearing prior to the public

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[1] I agree with the majority that the district court granted Glover qualified immunity on the Fourth Amendment search and seizure claims. Accordingly, this part of the district court's ruling is not properly before us. *See Sanchez v. Canales*, 574 F.3d 1169, 1172 (9th Cir. 2009) ("The district court's grant of qualified immunity . . . is not independently interlocutorily appealable.").

[2] Both conditions are no longer required. The statute was amended in 2009 and, under the current statute, a public administrator may secure property when either condition is met.

administrator's securing the property of the deceased.

Although neither the Supreme Court nor any circuit has addressed what process is due to the relatives of a deceased in analogous circumstances—when the deceased has just died, when we don't know yet who stands to inherit the deceased's property, when no one has been appointed to administer the deceased's estate, and when the property deprivation is both temporary and effectuated only to preserve the deceased's estate—the majority cursorily concludes Glover is not entitled to qualified immunity because "[t]he right to notice and a hearing prior to a public official's administrative taking of property is clearly established." Maj. Op. at 2039.

The majority has erred at each step of the qualified immunity analysis.[3] First, the majority erred by holding that the Constitution requires predeprivation notice and a hearing before a public administrator secures the property of the deceased. And second, it erred by holding that the right to

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[3] When evaluating whether qualified immunity protects a state official, we generally engage in a two-step analysis. First, we consider "whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the [state official's] conduct violated a constitutional right." *Krainski v. Nevada ex rel. Bd. of Regents*, 616 F.3d 963, 968 (9th Cir. 2010). If so, we consider "whether the right was clearly established in light of the specific context of the case." *Id.*

predeprivation notice and a hearing—in the particular context of a public administrator securing the property of the deceased—was so clearly established at the time of the alleged violation that Glover should have known his conduct was illegal. I respectfully dissent.

I

Fourteenth Amendment procedural due process analysis proceeds in two steps: "the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (internal citations omitted). I consider each step in turn.

A

"The types of interests that constitute . . . 'property' for Fourteenth Amendment purposes are not unlimited; the interest must rise to more than an abstract need or desire and must be based on more than a unilateral hope. [A]n individual claiming a protected interest must have a legitimate claim of entitlement to it." *Id.* (internal quotation marks and citations omitted).

Here, Plaintiffs posit two property interests: an ownership interest in their own personal property that they stored at their father's residence and an interest in their father's personal property as

devisees under Joe Mathis's will. Although the first interest is clearly a cognizable property interest under the Fourteenth Amendment, determining whether heirs have "a legitimate claim of entitlement," *id.*, to property devised to them under a will presents a more complicated question. The heirs' interest as devisees under a will is fundamentally different from a simple ownership interest. As devisees under a will, the heirs do not acquire a *possessory* interest in the decedent's property until the personal representative of the decedent's estate administers the estate, settles its debts, and delivers the remaining property to the heirs. *See* NEV. REV. STAT. § 143.020 (2009). Thus, while it is immediately apparent that an *ownership* interest in property vests the moment the owner acquires the property, the heirs' interest in property devised under a will may not vest until the will is probated and the estate is administered. *See* 80 AM. JUR. 2d *Wills* § 1289 (2002) (stating that although in some jurisdictions "a devisee becomes vested with the same right to, and interest in, the devised property [upon the death of the testator] . . . it has also been held that upon the death of the testator, all property, whether real or personal, passes directly to the personal representative, who holds legal title throughout the period of administration and distribution of the estate").

Nevada courts have held that "the title to real estate vests in the heirs of devisees at the moment of the death of [the] testator . . . subject only to the lien of the [personal representative] for the payment of

the debts and expenses of administration." *Wren v. Dixon*, 161 P. 722, 732 (Nev. 1916). Under this authority, the heirs' interest in the decedent's *real* property as devisees clearly qualifies as a property interest under the Due Process Clause. However, *Wren* is not dispositive here because Plaintiffs assert an interest in the decedent's *personal* property. So far as I can determine, Nevada courts have not addressed whether legal title to *personal* property devised under a will also vests in the devisees upon the testator's death. Nevertheless, even assuming that legal title does not vest immediately upon the testator's death and that the heirs thus have a temporary inchoate interest, this inchoate interest likely gives the heirs a legitimate claim of entitlement to the deceased's property. *See Allan v. Allan*, 223 S.E.2d 445, 449 (Ga. 1976) ("Even though the right is inchoate rather than vested, it is a legal right that will be protected. . . . [W]e hold that the defendant's interest in the real property as a devisee under the will is a legally protected interest [under the Due Process Clause]."); *cf. In re Chenoweth*, 3 F.3d 1111, 1112-13 (7th Cir. 1993) (holding that a devisee under a will acquires an entitlement to the devised property within the meaning of 11 U.S.C. § 541(a)(5)(A) upon the death of the testator). Accordingly, I am willing to assume that Plaintiffs also have a constitutionally cognizable interest in their father's personal property as devisees under the will. I now turn to the second step of the procedural due process analysis.

B

To determine what procedural protections the Constitution requires before a public administrator enters the residence of a deceased and secures the deceased's property, we balance (1) the private interest affected by the official action; (2) the risk of erroneous deprivation and the probable value of additional procedural safeguards; and (3) the governmental interest, including the fiscal and administrative burdens of additional procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). First, the private interest affected by a public administrator's actions is minimal because, as discussed above, a decedent's relatives do not have the right to possess the decedent's personal property until the decedent's estate is administered. *See* NEV. REV. STAT. § 143.020. Thus, under Nevada's statutory scheme, the property deprivation Plaintiffs complain of occurs—and terminates—before a decedent's relatives are entitled to possess the decedent's property.

Furthermore, this deprivation also occurs in the immediate aftermath of the decedent's death, when Nevada law does not even tell us who has the right to the possession of the decedent's property. Although "a personal representative has [the] right to the possession of all the . . . property of the decedent . . . until the estate is settled, or until delivered over by order of the court to the heirs or devisees," *id.*, "[n]o person has any power as a personal representative until [the court directs

issuance of letters testamentary]." *Id.* § 138.010. If the decedent's estate must be administered in the interim, the probate court can appoint a special administrator. *See* NEVADA CIVIL PRACTICE MANUAL § 34.21 (Jeffrey W. Stempel et al. eds., 2010) ("Special administrators are generally appointed . . . where [a personal representative] has not yet been appointed, and exigencies make it necessary to take prompt actions to marshal assets or otherwise preserve the estate."). However, in the short period between the death of a decedent and the appointment of a personal representative or a special administrator by the probate court, it is unclear who—if anyone—has the legal right to the possession of the decedent's property. The Nevada statute foresees this limbo period by specifying that the public administrator may secure the property of the deceased "[b]efore the issuance of the letters of administration for an estate." NEV. REV. STAT. § 253.0405. The role of a public administrator in Nevada anticipates the uncertainty of who may possess—and thus preserve and protect—the decedent's property in the immediate aftermath of the decedent's death.

The facts of this case confirm that the private interest affected by a public administrator's securing property is minimal. Here, Plaintiffs did not have the right to the possession of their father's property immediately after his death. At the time Glover entered the residence, not only had letters testamentary not been issued to the personal representative of the estate, but the decedent's will

also did not name any of the Plaintiffs as personal representatives of the estate. Additionally, Richard Mathis—one of the deceased's sons—was not appointed special administrator of the estate until well after Glover entered the residence. Accordingly, at the time Glover entered the residence, Plaintiffs had only a future interest in the decedent's personal property; Plaintiffs were potential beneficiaries who stood to inherit under the terms of their father's will after the estate was administered. Given the attenuated nature of this interest, the first *Mathews* factor does not support predeprivation process in the particular context of a public administrator securing the property of the deceased.[4]

Second, although a predeprivation hearing could reduce the risk of a public administrator erroneously securing the decedent's property, the value of predeprivation process is minimal because such process may jeopardize the very property a public administrator seeks to preserve. Under the Nevada statute, a public administrator may secure

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[4] Plaintiffs would have a significant property interest in any personal property that they themselves owned and stored at their father's residence. Here, for example, Plaintiffs claimed that some of the firearms and ammunition in their father's house were actually theirs. However, Glover could not have known that some of the property located in the deceased's residence actually belonged to the Plaintiffs. For purposes of securing the property, a public administrator is certainly entitled to presume that the property inside a decedent's residence is, in fact, the decedent's property.

the property of the deceased only in exigent circumstances, i.e., if the administrator finds that there are no relatives of the deceased able to secure the property and if failure to secure the property could endanger it. *See* NEV. REV. STAT. § 253.0405 (1999). Thus, once the public administrator makes the required statutory determination, he must out of necessity act quickly to preserve the decedent's estate. If, however, the public administrator must conduct a hearing before securing property that is in danger of being lost, the purpose of the statute is defeated: conducting that very hearing may well prevent the public administrator from securing the endangered property before it is lost.[5] Accordingly, the second *Mathews* factor does not support predeprivation process in the particular context of a public administrator securing the property of the deceased.

The facts of this case confirm this conclusion. When Glover entered the residence, the deceased's sons were unable to secure their father's property because they were not physically present in Lyon County. Accordingly, a predeprivation hearing could

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[5] Furthermore, Nevada law effectively "insures" the deceased's estate against loss for the temporary period in which the public administrator secures the deceased's property by requiring the public administrator, prior to taking his oath for office, to "[g]ive an official bond in an amount not less than $10,000, as required and fixed by . . . his or her county . . . , unless a blanket fidelity bond is furnished by the county." NEV. REV. STAT. § 253.020.

have reduced only the risk that Glover secured the deceased's property when the deceased's property was not actually in danger. Given that none of the Plaintiffs resided in Lyon County—one lived in Clark County while the other two lived out-of-state—the public administrator, who was on the spot, was in the best position to make this crucial determination in light of the particular conditions of the locality where the deceased had lived. I do not see how the opinion of relatives who are not around to secure the deceased's property—or to even assess for themselves whether the property is in danger and should be secured—would inform the public administrator's decision to secure the decedent's property.

Third, the government has a substantial interest in preserving a decedent's estate both because safeguarding property directly affects the welfare of its citizens (if the decedent's property is lost, the assets of the decedent's beneficiaries are diminished and the estate's creditors may go unpaid) and because the decedent's property may, in certain circumstances, escheat to the state. Additionally, the administrative burden of determining who is entitled to predeprivation process in the immediate aftermath of the decedent's death— perhaps the only time when the property of the deceased may need to be secured—is great. For example, the public administrator would have to investigate the deceased's family history, determine whether the deceased died testate or intestate, and, when appropriate, examine the decedent's will to ascertain

the identity of the named executors and beneficiaries, all at a time when the documents the public administrator needs—such as the decedent's will—may not be readily available.[6] Thus, because of the government's strong interest in preserving the decedent's estate and the impracticality of determining who has an interest in that estate in the immediate aftermath of a decedent's death, the third *Mathews* factor does not support predeprivation process.

Upon weighing the *Mathews* factors, I cannot conclude that a public administrator is constitutionally required to give notice and a hearing before securing the property of the deceased when no one else can do so and when that property is in danger of being lost. Although "traditionally . . . [an] opportunity for [a] hearing must be provided before the deprivation at issue takes effect," *Fuentes v. Shevin*, 407 U.S. 67, 82 (1983), a predeprivation hearing is not required in all circumstances. For example, where a state must of necessity act quickly, *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982), where providing predeprivation process is impracticable, *id.*, or "where the potential length or severity of the deprivation does not indicate a

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[6] While the public administrator must eventually investigate "[w]hether there are beneficiaries named on any asset of the estate," NEV. REV. STAT. § 253.0415, Nevada law sensibly does not require that this investigation occur before securing the estate's assets.

likelihood of serious loss and where the procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous determination," *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1, 19 (1978), postdeprivation process may satisfy the Constitution. When a public administrator secures the property of a deceased, he must of necessity act quickly to preserve the decedent's estate; he cannot immediately tell who has an interest in the property; and he effects a property deprivation of the most benign kind, a deprivation that is both temporary and that actually prevents the property's permanent loss. In such a case, postdeprivation process is all that is required.

The majority cites two cases to support its opposite conclusion, but these cases are easily distinguishable. In *Fuentes*, the Supreme Court addressed the constitutionality of two state statutes "authorizing the summary seizure of . . . chattels in a person's possession under a writ of replevin . . . simply upon the ex parte application of any other person who claim[ed] a right to them and post[ed] a security bond." 407 U.S. at 69-70. The Court held these statutes "work[ed] a deprivation of property without due process of law [because] they den[ied] the right to a prior opportunity to be heard before chattels [were] taken from their possessor." *Id.* at 96. Similarly, in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), the Court held that, "in the absence of exigent circumstances, [due process] prohibits the Government in a civil forfeiture case from seizing [the owner's home]

without first affording the owner notice and an opportunity to be heard." *Id.* at 46. Neither case, however, involved a seizure justified by exigent circumstances (i.e., a danger that the property in question could be lost unless seized) and, correspondingly, "a pressing need for prompt action." *Id.* at 56.

I would hold that the Due Process Clause of the Fourteenth Amendment does not require a pre-seizure hearing in the circumstances addressed by the Nevada statute: where a public administrator must act quickly to secure the property of the decedent in order to preserve it for the decedent's heirs. Consequently, I would uphold NRS § 253.0405 (1999) against a facial challenge.[7]

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[7] The majority's only response—that Glover "dashed into the decedent's home just before one of the decedent's three sons was to arrive . . . and converted [the property] to his own use, selling some of it"—is irrelevant. Maj. Op. at 2039 n.2. Of course, if Glover stole the property of the deceased he should be liable to Joe Mathis's estate under a state law action for conversion; he should be criminally prosecuted as well. But whether Glover "dashed into the decedent's home" and "converted [the property] to his own use" doesn't really matter when the Plaintiffs have brought a facial challenge to the Nevada statute. *See United States v. Kaczynski*, 551 F.3d 1120, 1124 (9th Cir. 2009) ("A facial challenge to a [statute] is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid." (alterations in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987))).

II

Even assuming Plaintiffs had a constitutional right to predeprivation notice and a hearing, it is hard to fathom that right was—and still is—clearly established. "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal quotation marks omitted). Although an official may violate clearly established law "even in novel factual circumstances . . . the salient question . . . is whether the state of the law [at the time of the alleged violation] gave [that official] fair warning that [his conduct] was unconstitutional." *Id.* at 741.

Here, the state of the law at the time Glover entered Joe Mathis's residence did not give Glover fair warning that he was violating the Constitution, for two reasons. First, there was—and still is—no case law balancing the *Mathews* factors in the particular context of a public administrator's securing the property of the deceased. And second, Plaintiffs' procedural due process rights were not derivative of a bright-line constitutional rule, but rather depended on a complicated balancing test whose outcome was—at best—uncertain. Accordingly, I would, at the very least, grant Glover qualified immunity. *See Humphries v. Cnty. of Los Angeles*, 554 F.3d 1170, 1202 (9th Cir. 2009) ("A procedural due process analysis that requires a complicated balancing test is sufficiently

unpredictable that it was not unreasonable for [a state official] to comply with [constitutionally-inadequate statutory] provisions."), *overruled on other grounds by Los Angeles Cnty., Cal. v. Humphries*, 131 S. Ct. 447 (2010); *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 983 (9th Cir. 1998) ("[B]ecause procedural due process analysis essentially boils down to an ad hoc balancing inquiry, the law regarding procedural due process claims can rarely be considered clearly established at least in the absence of closely corresponding factual and legal precedent." (internal quotation marks and citations omitted)). I don't know how we could expect Glover to have anticipated that, by following Nevada law, he was violating the Fourteenth Amendment.

* * * * *

Unlike the "broadly drawn" prejudgment replevin statutes in *Fuentes* which did not "limit the summary seizure of goods to special situations demanding prompt action," the Nevada statute is "narrowly drawn to meet . . . unusual condition[s]." *Fuentes*, 407 U.S. at 93 (citation omitted). It authorizes property seizures only in exigent circumstances: when the property of the deceased is in danger of being lost and when no one is able to protect it. I would thus uphold the Nevada statute because it applies only to "extraordinary situations" creating "a special need for very prompt action that justifie[s] the postponement of notice and hearing until after the seizure." *James Daniel Good Real*

Prop., 510 U.S. at 52-53. Alternatively, I would grant Glover qualified immunity against Plaintiffs' facial challenge. I respectfully dissent.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RICHARD MATHIS, individually and as special administrator of the estate of Joe Robinson Mathis, *et al.*, Plaintiffs, v. COUNTY OF LYON, a political subdivision of the state of Nevada, *et al.*, Defendants.	Case. No. 2:07-CV-00628-KJD-GWF Filed: 09/30/08 **ORDER**

Presently before the Court is Defendant Richard Glover's Motion for Partial Judgment on the Pleadings (#32). Also before the Court is Defendant Lyon County's Motion for Partial Judgment on the Pleadings (#35). Plaintiffs filed a consolidated response in opposition (#41) to both motions to which Defendant Glover replied (#42).

I. Background

The Complaint (#1) filed on May 14, 2007 alleges that the Defendant Richard Glover ("Glover"), who was the Public Administrator of Lyon County, entered and removed property from the Plaintiffs' deceased Father, Joe Mathis', home

without the benefit of a warrant and without providing notice prior to removing the property. (Compl. ¶¶ 29–34.) Plaintiffs are Joe Mathis' ("the deceased") sons: Richard Mathis, individually and a special administrator and trustee of the deceased's estate; James Mathis, individually and as a beneficiary; and Anthony Mathis, individually and as a beneficiary.

The complaint alleges that prior to Glover entering and removing property, Deputy Sheriff Ortiz ("Deputy Ortiz") had discovered Joe Mathis dead, on May 29, 2006. Id. ¶ 16. Deputy Ortiz subsequently sealed and secured the premises and notified Plaintiff James Mathis by telephone. Id. ¶ 26. That same night, Plaintiff Anthony Mathis called Deputy Ortiz and stated that he would travel to Lyon County on the earliest flight and take care of the deceased's property and funeral. Id. ¶ 23. The next day, May 30, 2006, at 18:00 hours Deputy Ortiz contacted Glover and advised him of the deceased's death, the deceased's heirs, and the fact that Plaintiff Anthony Mathis was on his way. Id. ¶ 25.

Plaintiff Anthony Mathis arrived on June 1, 2006 and allegedly discovered that property had been removed from the deceased's home, including personal property belonging to Plaintiffs Richard, Anthony, and James Mathis. Id. ¶ 27. Plaintiff Anthony Mathis then reported the missing property to the Sheriff's Office, who, in turn, referred Plaintiff Anthony Mathis to Glover. Id. ¶ 28. Allegedly Glover admitted to Plaintiff Anthony Mathis that he had

entered and removed property. Id. ¶ 29. Further, Plaintiffs allege that Glover misrepresented the nature of personal property taken on the inventory, that Glover sold certain items from the deceased's estate under the premise the items belonged to another estate, and that Glover is still in possession of the remainder of personal property or has sold it for Glover's own benefit. Id. ¶¶ 30–34. Furthermore, Plaintiffs allege that they filed a stolen property report with the Lyon County Sheriff's Department, but that the Sheriff's Department refused to investigate the matter because of Glover's position as the public administrator. Id. ¶¶ 35–36.

II. Standard for Motion for Judgment on the Pleadings

The standard applied on a Rule 12(c) motion is similar to that of Rule 12(b)(6) motions. Subsequently, "judgment on the pleadings is proper when, talking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." Honey v. Distelrath, 195 F.3d 531, 532–33 (9th Cir. 1999) (citing Nelson v. City of Irvine, 143, F.3d 1196, 1200 (9th Cir. 1998)). Moreover, the allegations in the complaint also must be construed in the light most favorable to the nonmoving party. Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995).

However, allegations by the moving party must be enough to raise a right to relief above the level of speculation. Bell Atlantic Corp. v. Twombly,

127 S. Ct. 1955, 1964–65 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need to be detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level."); see Ove v. Gwinn, 264 F.3d 817, 821 (9th Cir. 1998) (stating conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss). Furthermore, though courts assume factual allegations as true, courts need not assume the truth of legal conclusions merely because they are cast in the form of factual allegations. Kay v. Placer County, 219 Fed. App'x 679, 681 (9th Cir. 2007) (citing W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)).

III. Analysis

In this case, Defendants Glover and Lyon County have moved for partial judgment on the pleadings on the basis that the complaint fails to set forth claims upon which relief can be granted, or in the alternative, that the claims are barred by qualified immunity. More specifically, Defendant Glover has moved for a partial judgment on the First and Second Causes of Action, and Defendant Lyon County has moved for partial judgment on the Third, Fourth, Fifth, and Sixth Causes of Action.

A. Lyon County's Liability for Glover's Actions under Monell

The Supreme Court has held that Congress intended local government units to be liable under 42 U.S.C. § 1983. See Monell v. Dep't of Social Servs. of City of New York, 436 U.S. 658 (1978). However, the Court limited that liability stating: "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature cause a constitutional tort. In particular, we conclude that a municipality cannot be liable solely because it employs a tortfeasor . . . ." 436 U.S. at 691.

A policy or custom may be demonstrated when an official with final policy-making authority acts. Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986). An individual is a final policy-maker when: (1) the official is not meaningfully constrained by policies not that of the official's own making; (2) the official's decisions are final; and (3) when the decision made is within the realm of the official's authority. See Randle v. City of Aurora, 69 F.3d 441, 448 (10th Cir. 1995).

In this case, Plaintiffs allege that the policy and custom of Lyon County, by not requiring Glover to get a warrant, was a cause of Plaintiffs' injury. Plaintiffs refer to cases that reason county officials and inspectors could not enter private property to abate nuisances without warrants. See Fouts v. County of Clark, 76 Fed. App'x 825 (9th Cir. 2003) (holding that county officials could not enter private

land to abate a nuisance without court authorization); Conner v. City of Linta Ana, 897 F.2d 1487, 1490 (9th Cir. 1990) (reasoning that even health, fire, or building inspectors entering to abate a suspected public nuisance or to perform a inspection cannot enter, in part, because a basic purpose of the Fourth Amendment is to safeguard against arbitrary invasions by government officials). However, this case is different. Here, the nature of the public administrator's duty is to quickly secure the deceased's property against waste and theft. See Nev. Rev. Stat. § 253.0405. Obtaining an administrative warrant is not required under state law. It is true, in this case, the deceased's family arrived at the deceased's home two days after the death, and it is true that Deputy Ortiz had locked the home, but neither of these facts by themselves are sufficient to immediately secure the property against waste or theft in the time between Oritz's actions and the family's arrival.

Furthermore, according to the cases cited above, determining whether Glover, as public administrator, is a policy-maker requires a look into the finality of the official's decisions. In this case, the Nevada Revised Statutes governing public administrators allow the public administrator to act only in situations of need, § 253.0405, and further, the statutes allow the board of county commissioners to investigate at any time any estate for which the public administrator is serving as administrator, § 253.091. Therefore, in accordance Pembaur's final decision making requirement, this Court finds that

Glover, acting as the public administrator, was not a final policy-maker of the county because a public administrator acts only as directed by statute and any act or decision by the public administrator is always subject to investigation by the board of commissioners. Furthermore, as reasoned by the Supreme Court in McMillian v. Monroe County, 117 S. Ct. 1734 (1997), where a sheriff was held not to be a county policy-maker because the sheriff executed state executive power, a public administrator is not wielding county authority, in fact, the public administrator is authorized by the state legislature and the county has little authority to grant power. See Nev. Rev. Stat. § 253.091 (stating the county only has power to establish regulations concerning the form of reports made by the public administrator).

Moreover, this Court's decision is in accord with the Ninth Circuit's decision in Davis v. Mason County, 927 F.2d 1473 (9th Cir. 1991), and the Tenth Circuit's decision in Randle. In Davis, the Ninth Circuit held that a sheriff is a final policy-maker in respect to the law enforcement policies concerning officer training because of the finality of the sheriff's decision. 927 F.2d at 1481. In this case, a public administrator, though generally not a policy-maker, may be considered a final policy-maker in respect to circumstances where the public administrator has final authority. E.g., Nev. Rev. Stat. § 253.0407 (giving the authority to the public administrator to donate or destroy certain property because, for example, it is a hazard to public health).

In Randle, the Tenth Circuit gave three guidelines to establishing a final-policy maker. Here, the first guideline establishes that a public administrator is not a policy-maker because the public administrator is constrained by state statute and has no authority to change or make new state statutes. Likewise, the second and third guidelines demonstrate that a public administrator is not a policy-maker because the public administrator's decisions are subject to review and because Glover's alleged acts of misappropriation are not within the realm of authority given to the public administrator.

Therefore, because this Court finds that Glover was not a final policy-maker and because the alleged official policy and custom of not requiring the public administrator to obtain search warrants is the result of state statute and not county policy, Lyon County is not liable under Monell since a county may only be liable for a action pursuant to official municipal policy, and not solely because it employs an alleged tortfeasor. Accordingly, the claims against Lyon County for any alleged search and seizure violation by Glover as contained in the Third and Fourth Causes of Action are dismissed.

B. Lyon County's Liability for the Alleged Violation of Plaintiffs' Equal Protection Rights

Plaintiffs assert that Lyon County is liable for violating their equal protection rights because Lyon County's Sheriff Department allegedly did not

investigate Plaintiffs' allegations of theft against Glover. However, the Court finds the Plaintiffs do not have standing to bring a equal protection claim in this case.

Generally, equal protection claims involve a group or class of people, however, the Supreme Court has recognized that a "class of one," or single person, can assert an equal protection claim when singled out by the government. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). The Supreme Court reasoned that allowing "class of one" claims is not a departure from the traditional principle; instead it was an application of the equal protection principle that legislative or regulatory actions apply without respect to persons. Engquist v. Oregon Dept. of Agr., 128 S. Ct. 2146, 2153 (2008). Class of one claims, therefore, arise when one person is singled out by the government, not when a widespread practice of the county affect a protected class.

In this case, Plaintiffs have argued that they are a class of one because the sheriff did not apply local rules uniformly to Plaintiffs when Plaintiffs filed a theft report. (Pls' Opp'n 32.) Furthermore, Plaintiffs admit they are not members of a suspect class. (Pls' Opp'n 32.) However, at the same time Plaintiffs claim they have been singled out. Plaintiffs assert that Lyon County's policy of not investigating public administrators was the standard operating procedure of Lyon County, (Compl. ¶ 85), the policy and custom of Lyon County, (Compl. ¶¶ 81, 89), and

was a widespread practice of Lyon County, (Compl. ¶ 88). Since Plaintiffs have already admitted they are not a suspect class, but have alleged that Lyon County had a widespread practice of not investigating claims against the public administrator, their equal protection claim is foreclosed. Thus, the Court grants Defendant Lyon County's motion for judgment on the pleadings and dismisses Plaintiff's Fifth and Sixth Causes of Action against Lyon County.

C. Glover's Qualified Immunity

The Ninth Circuit has held that when a defendant asserts qualified immunity in a motion to dismiss, the court need only look at the allegations in the complaint and, while accepting them as true, determine whether the complaint contains an allegation that would constitute a violation of a clearly established constitutional right. Pelletier v. Fed. Home Loan Bank of San Francisco, 968 F.2d 865, 872 (9th Cir. 1993). In this case, Plaintiffs assert that they have met this minimal standard to defeat a motion to dismiss because they have alleged that Glover acted with malice according to Wood v. Strickland, 420 U.S. 308, 321–22 (1975) (holding that qualified immunity is defeated if the government official's action violated a clearly established right, or the official acted with malice). However, the malice option was overruled in Harlow v. Fitzergerald, 457 U.S. 800, 817-18 (1982). Stated simply, the principle underlying qualified immunity is, "that government officials performing

discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable persons would have known." Id. at 818.

Therefore, this Court applies the standard that to defeat a qualified immunity claim, Plaintiff must allege enough to show that an official knew, or should have known, that their specific conduct was in violation of Plaintiffs' constitutional rights, and that Plaintiffs' rights were clearly established to the point of giving Glover fair warning of such a violation. See United States v. Lanier, 117 S. Ct. 1219, 1227 (1997); Anderson v. Creighton, 483 U.S. 635 (1987).

In this case, Plaintiffs have not met this standard according to their Fourth Amendment claims. Much of Plaintiffs' arguments focus on their allegations of malice, which is no longer sufficient. Plaintiffs have not shown that Glover had fair warning that his specific conduct as a public administrator would violate Plaintiffs' clearly established right. Moreover, even though notice that conduct may violate a constitutional right can be found in novel circumstances, that notice must still give the official fair warning that his actions would violate a clearly established right. However, here, Glover had statutory authority to enter property as the public administrator, and further, Glover had statutory authority to secure property. Therefore, it is not clear that Glover would have reason to know,

and fair warning, that his conduct violated Plaintiffs' Fourth Amendment rights. The Court finds that Glover is entitled to qualified immunity for Plaintiffs' Fourth Amendment claims relating to his initial entry on the property and securing the property of the estate. However, Glover is not entitled to qualified immunity for the claims that he misappropriated property for his own benefit and failed to properly account for or inventory the property to enable his conversion of the property.

D. Glover's and Lyon County's liability for allegations of violating Plaintiffs' Fourteenth Amendment rights

Plaintiffs have alleged that Glover acted under the color of law, (Compl. ¶ 46), and that Lyon County's policy or custom allowed Glover to deprive Plaintiffs of their personal property, (Compl. ¶ 69). Here, Defendants argue that Plaintiffs' claim is barred because Glover's actions were random and unauthorized or because a pre-deprivation hearing is not feasible. However, taking Plaintiffs' allegations as true as the Court must at this stage of the litigation, Plaintiffs may be entitled to a remedy. Therefore, the Court denies the motion to dismiss Plaintiffs' procedural due process claims.

E. Nevada Constitutional claims

Defendants assert that Plaintiffs' claims are barred because Nevada, either through the courts or through legislation, has not created a cause of action

for Nevada Constitution Article 1, § 8 and § 18 (§ 8 concerns, in part, violations of due process rights, similar to the U.S. Constitution's Fourteenth Amendment, and § 18 is similar to the U.S. Constitution's Fourth Amendment rights against unreasonable searches and seizures). On the other hand, Plaintiffs contend that Nevada has waived its sovereign immunity and that their Nevada state claims are supplemental claims in this suit. The Nevada constitutional claims are dismissed to the extent that the concurrent United States constitutional claims were dismissed. To the extent that the claims are not dismissed, the motion to dismiss is denied without prejudice.

IV. Conclusion

The Court grants Defendants' motion to dismiss for any alleged search and seizure claims based on the public administrator's initial entry into the home and securing the property of the estate, because of Glover's qualified immunity and because Glover is not a final policy-maker for Lyon County. Furthermore, the Court grants Defendant Lyon County's motion to dismiss Plaintiffs' equal protection claims because Plaintiffs have not adequately demonstrated proper standing to bring such a claim. However, the Court denies Defendants' motion to dismiss Plaintiffs' allegations that their procedural due process rights have been violated by Glover and Lyon County. The Court does not grant the motion to dismiss pertaining to the alleged Nevada Constitutional violations because the parties

have not sufficiently shown that Nevada has or has not created a cause of action for Nevada Constitutional violations of Article 1 §§ 8 and 18.

Accordingly, IT IS HEREBY ORDERED that Defendant Richard Glover's Motion for Partial Judgment on the Pleadings (#32) is **GRANTED in part and DENIED in part**;

IT IS FURTHER ORDERED that Defendant Lyon County's Motion for Partial Judgment on the Pleadings (#35) is **GRANTED in part and DENIED in part**.

DATED: September 30, 2008.

/s/ Kent J. Dawson
Kent J. Dawson
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD MATHIS, Special Administrator of the Estate of Joe Robinson Mathis and as Trustee of the Joe Robinson Mathis and Eleanor Margherite Mathis Trust, AKA Joe R. Mathis; et al., Plaintiffs-Appellees, v. COUNTY OF LYON, a Political Subdivision of the State of Nevada Defendant, And RICHARD GLOVER, individually, Defendant-Appellant.	No. 14-15912 D.C. No. 2:07-cv-00628-APG-GWF District of Nevada, Las Vegas Filed: 03/20/15 ORDER

Before: TALLMAN and RAWLINSON, Circuit Judges, and MURPHY, District Judge*

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*The Honorable Stephen Joseph Murphy III, District Judge for the U.S. District Court for the Eastern District of Michigan, sitting by designation.

Judges Tallman and Rawlinson have voted to deny the petition for rehearing en banc and Judge Murphy so recommends.

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 petition for rehearing en banc is denied.