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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

SAN FRANCISCO VETERAN POLICE)
OFFICERS ASSOCIATION,)
Plaintiffs,)
vs.)
CITY AND COUNTY OF)
SAN FRANCISCO, EDWIN LEE,)
GREG SUHR,)
Defendants.)

Case No. C 13-053510 WHA
SAN FRANCISCO, CA
Tuesday, February 11, 2014
10:15 a.m.

TRANSCRIPT OF PROCEEDINGS

(MOTION HEARING AND CASE MANAGEMENT CONFERENCE)

APPEARANCES:

For Plaintiffs:

MICHEL & ASSOCIATES, P.C.
180 E. Ocean Blvd
Suite 200
Long Beach, CA 90802
(562)216-4444
email: abarvir@michelawyers.com
BY: ANNA MARIE BARVIR, ESQ.
CLINTON BARNWELL MONFORT, ESQ.

For Defendants:

OFFICE OF THE CITY ATTORNEY
1 Dr. Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, CA 94102
(415)554-4633
email: christine.van.aken@sfgov.org
BY: CHRISTINE VAN AKEN, ESQ.

Reported by:

MARGARET "MARGO" GURULE, CSR #12976
PRO TEM COURT REPORTER, USDC

1 TUESDAY, FEBRUARY 11, 2014 10:16 A.M.

2 P R O C E E D I N G S

3 THE CLERK: Civil 13-5351, San Francisco
4 Veterans Police Officers Association vs. City and County
5 of San Francisco.

6 This matter is on for a motion and case
7 management conference. Counsel, can you please state
8 your appearances for the record.

9 MS. BARVIR: Good morning, Your Honor. Anna
10 Barvir from Michel & Associates, PC, for Plaintiffs, San
11 Francisco Veterans Police Officers Association, and my
12 Co-counsel, Clinton Monfort.

13 MR. MONFORT: Good morning, Your Honor.

14 THE COURT: Welcome.

15 MS. VAN AKEN: Good morning, Judge Alsup.
16 Christine Van Aken, for City and County of San
17 Francisco, Chief of Police, and Mayor.

18 THE COURT: Okay. Before we get started, I
19 want to ask you a case management question, and that is
20 how soon can we bring this case to trial? And the
21 reason I ask this upfront is that the party who wins
22 this motion will want to drag it out forever, and the
23 other side will want a prompt trial.

24 I didn't just fall off the turnip truck. So
25 before you get a ruling, I want to know whether we can

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1 try this case, say, in April or May. What does the City
2 and County say?

3 MS. VAN AKEN: I would say June or July is
4 more appropriate. There are a lot of experts, and I'm
5 sure we would all want to take depositions. Beyond
6 that --

7 THE COURT: All right. Let's hear -- all
8 right. June or July. How about the plaintiffs?

9 MS. BARVIR: Your Honor, I think that the
10 plaintiffs' position is that, no matter who is going to
11 win this particular motion, it's going to be going up
12 immediately to the Ninth Circuit. That's
13 particularly --

14 THE COURT: So you don't care if we have an
15 early trial?

16 MS. BARVIR: I would say that the City is
17 probably right, that it's going to probably need to go
18 later in the summer, in fact, what would need to happen.

19 THE COURT: Well, June or July is not later in
20 the summer. That's earlier in the summer.

21 MS. BARVIR: I'm sorry, could you repeat the
22 question?

23 THE COURT: Will you be ready to try the case
24 in June or July, assuming cooperation from the other
25 side.

1 MS. BARVIR: We would certainly want to do it
2 as early as possible, since the effective date --

3 THE COURT: Please answer my question.

4 MS. BARVIR: We would be ready to go to trial
5 before June, yes.

6 THE COURT: Thank you. All right. This is
7 your -- the second question I have is for the City, and
8 then I'm going to let each of you make your arguments.

9 If the motion is denied and if the plaintiffs,
10 individual plaintiffs, turn over their magazines, and
11 then ultimately the plaintiffs prevail in this case,
12 will the City return their magazines to them?

13 MS. VAN AKEN: Your Honor, we would be
14 prohibited under state law from doing that. I think
15 that -- so I think it's not a matter of the City's
16 cooperation. I think it's a -- it would be difficult, I
17 think, for the police department to say they were going
18 to violate --

19 THE COURT: How would that be illegal, if I
20 ordered you to do it?

21 MS. VAN AKEN: Well, I guess if we had a court
22 order, then federal law would trump state law in this
23 instance. There is a state law that prohibits a
24 22-round --

25 THE COURT: You're about to talk yourself into

1 irreparable injury.

2 MS. VAN AKEN: Your Honor, we addressed this
3 in the papers. If that is the case, there is only
4 irreparable injury here because these plaintiffs chose
5 to sue only San Francisco and not the State of
6 California. But that's avoidable --

7 THE COURT: Come on, answer my question.

8 MS. VAN AKEN: There is actually a simple --

9 THE COURT: Answer my question.

10 MS. VAN AKEN: Plaintiffs could avoid
11 irreparable injury by taking the magazines out of San
12 Francisco and storing them out of San Francisco. If we
13 were ordered by this court to release their weapons and
14 give them back to them, if they were ultimately
15 vindicated in this case, we would do that.

16 THE COURT: Well, if it gets to that point,
17 that's what I'm going to order. But we're not to that
18 point yet.

19 MS. VAN AKEN: Sure.

20 THE COURT: All right. So let's hear from the
21 moving side, moving party. Go ahead.

22 MS. BARVIR: Thank you, Your Honor. This case
23 is about the Second Amendment right to protect arms by
24 law-abiding citizens that are typically possessed or in
25 common use for lawful purposes. This is not about

1 military arms --

2 THE COURT: It is my experience -- I have been
3 on this job for 15 years -- that people -- most of
4 the -- not all of them. I can't say categorically. But
5 I can say a large number of these big magazines are used
6 by drug dealers and criminals and law enforcement.
7 Thankfully law enforcement has their share of these,
8 too, so that they know they're up against people with
9 bigtime weapons.

10 Now, I see that a lot. I see precious few

11 cases where a homeowner has warded off an intruder with
12 ten or more bullets. Now, you gave me one declarati on
13 that has some rank hearsay in there to that effect.
14 Maybe it's true. I don't know.

15 So I will -- I read that with great interest.
16 But for you to start off saying that it's commonplace
17 for law-abiding citizens to ward off criminals and to
18 guard home and hearth with these oversize magazines that
19 are heavy to hold in your hand, you know, I just don't
20 buy it.

21 MS. BARVIR: There's a few things -- I'm
22 sorry.

23 THE COURT: So, you -- I want you to know that
24 just to say a lot of people own guns. You know, God
25 bless America; we have the right to have handguns.

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1 Good.

2 But these things -- weapons of mass
3 destruction, I'm not so sure.

4 MS. BARVIR: There's a few --

5 THE COURT: Go ahead.

6 MS. BARVIR: There's a few things I want to
7 say to that, Your Honor.

8 THE COURT: Go ahead.

9 MS. BARVIR: First, we're not talking about
10 these large, oversize magazines, drums of 100 rounds or
11 even 30 rounds or even 21 rounds. We're talking about
12 magazines of 10 rounds or more, more than 10 rounds.

13 These are standard.

14 THE COURT: Is it 10, or is it more than 10?

15 MS. BARVIR: It's more than 10. I'm sorry.

16 THE COURT: Is that correct? My law clerk
17 told me 10 or more.

18 MS. VAN AKEN: More than 10 rounds are
19 prohibited under the law.

20 THE COURT: All right. Then he was wrong,
21 but -- okay. So it's 11 or more?

22 MR. BARVIR: Yes. These are not extremely
23 oversized. Calling them mega magazines or large-capacity
24 magazines doesn't make that so. These are just standard
25 magazines that are sold with millions of the most

1 commonly-possessed handguns in this country.

2 Just the fact that we may not see a large
3 number of stories where you have heard 15 shots were
4 fired, 21 shots were fired, in a defense of gun use,
5 isn't that -- that isn't the problem. It doesn't really
6 control here whether or not these arms are protected.
7 The fact that Americans commonly choose them and prefer
8 them for lawful self-defense is what protects -- and
9 other lawful purposes is what protects them.

10 THE COURT: Well, the evidence says that you
11 have zero evidence that they used them for self-defense.

12 MR. BARVIR: I don't think so.

13 THE COURT: What is your evidence to that
14 effect?

15 MS. BARVIR: The evidence that plaintiff put
Page 7

16 forward is --

17 THE COURT: Read it to me, where it says that
18 these oversize magazines have been purchased for home
19 self-defense and are commonplace in home self-defense.
20 I mean, I didn't find that. Maybe it's there somewhere.

21 MS. BARVIR: Plaintiffs have provided pages
22 of -- substantial pages of evidence that show that there
23 are million -- in response, that at least 75 million of
24 these magazines in the homes of Americans are sold and
25 manufactured --

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1 THE COURT: Well, your evidence doesn't even
2 show that. They could be in criminals' hands,
3 criminals, that are out there to get you and me --

4 MS. BARVIR: They certainly are in the hands
5 of criminals.

6 THE COURT: -- selling drugs --

7 MS. BARVIR: I don't think that --

8 THE COURT: Felons in possession, they're
9 homeowners, too.

10 MS. BARVIR: I don't think that plaintiffs are
11 disagreeing that they are in the hands of criminals.
12 It's definitely true. Indeed -- excuse me. The fact
13 that they're in the hands of criminals doesn't take them
14 out of protection for law-abiding citizens.

15 They -- I think it would be silly to suggest
16 that 75 million magazines are just in the hands of
17 criminals. They're in widespread use by people who pass

18 federal and state background checks.

19 THE COURT: I agree with that. You're right
20 about that. You can't assume that every one of those
21 are criminals or even law enforcement. But you don't
22 have any breakdown there. We don't know the real extent
23 to which these high magazines -- high-capacity magazines
24 are really used for home defense as opposed to even
25 other legitimate uses like sporting events. That's not

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1 home defense. Sporting events and target shooting and
2 all that, that's not home defense.

3 MS. BARVIR: That doesn't take them away from
4 being protected, though.

5 THE COURT: Yes, it does.

6 MS. BARVIR: The lawful --

7 THE COURT: The Supreme Court says it's home
8 and hearth. It doesn't say "target practice."

9 Where does the Supreme Court list "target
10 practice"? Where is that protected?

11 MS. BARVIR: If we're talking about
12 protection, the Supreme Court in Heller said, Protection
13 is based on lawful use for -- "common use for lawful
14 purposes," not limited to self-defense. It also
15 includes recreational purposes, hunting and sporting
16 purposes. However --

17 THE COURT: It said that?

18 MS. BARVIR: It does say that.

19 THE COURT: The Supreme Court said "hunting
20 purposes"?

21 MS. BARVIR: The Supreme Court said "lawful
22 purposes." Of course, it was talking about
23 self-defense, but it doesn't eliminate other lawful
24 purposes.

25 THE COURT: All right. Go ahead.

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1 MS. BARVIR: But to be -- when it comes down
2 to it, it is the City who has the burden of providing
3 evidence that these items are unprotected. The Ninth
4 Circuit has suggested that -- has instructed that.

5 And so, like with the handgun ban at issue in
6 Heller, Section 619 poses a flat ban on these items that
7 are overwhelmingly chosen by law-abiding citizens for
8 the lawful purpose of self-defense. That is amendable
9 to the Second Amendment. Protection for these common
10 arms --

11 THE COURT: Please slow down just a little bit
12 because I know the court reporter is having trouble
13 getting it. It's okay. We have -- we don't have all
14 the time in the world, but I want to make sure that your
15 points are clearly laid out. So you can slow down just
16 a bit.

17 MS. BARVIR: Thank you, Your Honor -- and that
18 would be invalid under any tests the Court should apply,
19 or could apply. So they're categorically invalid.

20 For this reason, the plaintiffs argue that
21 they are exceedingly likely to succeed on the merits of
22 their claims, and the record of preliminary injunction

23 factors fall in favor of relief, including a presumption
24 of irreparable harm, balance of equities and public
25 interest shifting sharply in plaintiffs' favor.

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1 At the very least, plaintiffs have at least
2 raised some serious questions of constitutional import
3 that are here on first impression. This woman's
4 preliminary relief, a temporary stay of the enforcement
5 of the law, to preserve the status quo and to preserve
6 what is very likely --

7 THE COURT: If you show the equities sharply
8 tip in your favor.

9 MS. BARVIR: Because we have -- because
10 plaintiffs have raised that constitutional claim, that
11 it's in the public's interest and the balance of
12 equities does tip in plaintiffs' favor, so that -- I
13 would think that -- I would say that that's where we
14 have made that showing.

15 THE COURT: So does it matter that small
16 school children are massacred every week or every month
17 with somebody who has a large magazine and maybe that is
18 going to happen in San Francisco? Does that factor in
19 here somewhere?

20 MS. BARVIR: That's a very horrifying
21 proposition, and we're seeing it with alarming
22 regularity, and we continue to see that. But honestly,
23 the fact that a criminal may misuse these firearms and
24 someone may die isn't something that is going to or
25 should be weighed when we're talking about this

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1 constitutional right.

2 The Supreme Court and other circuits have held
3 in accord, have suggested that body counts are not going
4 to be what matters. We're not talking about, you know,
5 which side has more people dying because they cannot use
6 these arms or because people are using these arms. The
7 fact of the matter is, as the State -- as the City has
8 discussed, the State has already banned the sale on the
9 transfer of these. So they're not going to have any
10 delusion of these arms -- these magazines coming
11 into the City. They're already here. And so it's going
12 to preserve the status quo and protect what is likely to
13 be plaintiffs' constitutional rights.

14 THE COURT: All right.

15 MS. BARVIR: Okay?

16 THE COURT: Let's hear from the other side.

17 MS. VAN AKEN: Your Honor, I want to just
18 start with the point that the Court raised initially,
19 which is the evidence that these are used in
20 self-defense, and there is none. There are some
21 anecdotal accounts in the record.

22 THE COURT: I recently read with interest the
23 declaration of Massad Ayoob.

24 MS. VAN AKEN: Yes, Your Honor.

25 THE COURT: All right. And he laid out a few

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1 examples, I guess based on newspaper reports?

2 MS. VAN AKEN: Right, and a couple of books.

3 THE COURT: And so there were some cases where
4 somebody who fired 15 times -- it appeared to me that
5 that person did not have any training in firearms, and
6 therefore, had to shoot 15 times. But that was one
7 example where -- her name was Ms. Gonzales.

8 MS. VAN AKEN: Yeah, there are two anecdotal
9 accounts of home self-defense. One is Ms. Gonzales in
10 1997 in Jacksonville, Florida, according to other
11 newspaper accounts.

12 THE COURT: 1997?

13 MS. VAN AKEN: 1997.

14 THE COURT: Did he say what year that was?

15 MS. VAN AKEN: He doesn't. I included --

16 THE COURT: Well, I must say I thought it was
17 recent, just from the way it was presented in this
18 declaration --

19 MS. VAN AKEN: Yes.

20 THE COURT: But you're saying it goes back to
21 1997? Well, that is 15-plus years ago.

22 MS. VAN AKEN: Exhibit 25 to my declaration,
23 Your Honor, is newspaper accounts about that story.

24 THE COURT: So we had --

25 MS. VAN AKEN: It's very old.

2 examples where a high-magazine thing was used to defend
3 a home?

4 MS. VAN AKEN: One of them is not even
5 necessarily a home, Your Honor. The other possibly-home
6 example is a jewelry store owner who lived in the back
7 of his shop. Maybe that's home defense, maybe it's not.
8 But they don't name the place, the time or the -- they
9 say it's in South Carolina. They don't name the guy.
10 So I don't know who it was and didn't run that down.

11 Then we also have -- the NRA keeps a database
12 of armed self-defense stories, and you know, these are
13 self-serving accounts; they're anecdotal; they're not
14 verified.

15 THE COURT: But they really are -- I mean, I
16 read in the paper over the weekend about a grandmother
17 in Marin County who fired a shotgun blast into the
18 ground and scared away two burglars.

19 MS. VAN AKEN: Right, and that's typical.

20 THE COURT: Okay. I accept that that's
21 probably true.

22 MS. VAN AKEN: Right.

23 THE COURT: But that is a regular old shotgun.

24 MS. VAN AKEN: Right. And that's typical
25 for -- I don't think these self-serving accounts are

1 particularly reliable, but they're the best we have.
2 And if you look at those, which the City's expert, Lucy
3 Allen, has done, you find that, in most cases, people

4 fire no shots, just a couple of shots.

5 The average number of shots across about 400
6 instances is 2.2, a far cry from 10. So there is no
7 evidence that people regularly need more than 10 rounds
8 to defend themselves in the home. But there is good
9 evidence that these magazines are, in accord with this
10 Court's intuition and experience, often used by
11 criminals.

12 We know that police shootings occur with
13 large-capacity magazines twice as often as we believe
14 large-capacity magazines present --

15 THE COURT: I remember about 10 years ago
16 there was that terrible incident, I think Espinosa was
17 his name --

18 MS. VAN AKEN: Yes, that was a large-capacity
19 magazine.

20 THE COURT: -- in which our officers had
21 ordinary six-guns and the bad guy had high-capacity, and
22 Espinosa -- Officer Espinosa was killed.

23 MS. VAN AKEN: Yes, sir, Isaac Espinosa was
24 killed.

25 THE COURT: So SFPD went to getting the same

1 kind of weapons. Well, okay. Your ordinance would
2 certainly allow police officers to have those kind of
3 weapons.

4 MS. VAN AKEN: Yeah.

5 THE COURT: All right. Go ahead.

6 MS. VAN AKEN: So we know that they're not
Page 15

7 often used in lawful self-defense. They are often used
 8 by criminals. Police shootings are one example. Mass
 9 shootings, there is an incredibly high correlation
 10 between use of large-capacity magazines and mass
 11 shooters, even under their expert's account, of
 12 instances where magazine capacity was known.

13 THE COURT: Those are some of the ones -- I
 14 was trying to remember this. Go through and remind
 15 me -- just say the last year or year and a half or so --

16 MS. VAN AKEN: Yeah.

17 THE COURT: -- of the instances of mass
 18 shootings where a high-capacity clip was used.

19 MS. VAN AKEN: Well, just the most notorious
 20 one, the Gabrielle Giffords shooting in Tucson, the
 21 Newtown Shooting where 20 school children and 6 other
 22 innocent civilians were murdered. The Lucy Allen Table
 23 I lists many of them.

24 Let's see, we had the Washington Navy -- the
 25 Washington Navy Yard -- no, wait, we don't know the

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1 magazine capacity.

2 We know the Herkimer, New York, Upstate New
 3 York, the Sikh temple, there was a shooting. This is
 4 all within the last -- since 2012.

5 THE COURT: Well, but stick to ones with high
 6 capacity.

7 MS. VAN AKEN: Yes. So the ones with high
 8 capacity from 2013 and 2012 are -- we have Upstate New

9 York, Herkimer, New York, March 2013; Newtown School
10 Shooting -- that's in Minneapolis, Minnesota. Sorry,
11 Your Honor. Upstate New York was not a large-capacity
12 magazine. It was a -- and there were only five
13 fatalities.

14 We have a Sikh temple in Oak Creek, Wisconsin.
15 We have the Aurora Theater Shooting in Aurora, Colorado.
16 That's in June of 2012.

17 THE COURT: Was that a high capacity?

18 MS. VAN AKEN: Yes.

19 THE COURT: My memory of that one is that
20 the -- when he stopped to reload, somebody tackled him.

21 MS. VAN AKEN: That was the Tucson shooting.
22 I think the shooter -- you know, I don't know how the
23 Aurora shooter was actually apprehended. He had a
24 100-round drum, though, and he shot -- he shot -- he
25 killed 12 people and he injured 58 people.

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1 We have a shooting at an IHOP in Carson City,
2 Nevada, where five people were killed. And now we're in
3 2011. So this is just -- what I have just read, I have
4 just given you five or six instances in the last couple
5 of years alone.

6 The Lucy Allen chart, which is attached as
7 Table 1 to her declaration, lists 69 mass shootings
8 since 1982 and shows whether a large-capacity magazine
9 was used or not. Large-capacity magazines were used in
10 85 percent of those shootings.

11 The plaintiffs' expert, Gary Kleck, assembled
Page 17

12 a different database of mass shootings. He used
13 slightly different criteria. And in cases where
14 magazine capacity was known, even in his dataset, there
15 is an 88 percent correlation between mass shootings and
16 use of large-capacity magazines.

17 Now, we don't always know when magazines are
18 used because we're all relying on newspaper reports of
19 these incidents, and so sometimes they don't list the
20 magazine size. So, you know, there are cases where we
21 don't know.

22 But even if you take those cases -- you know,
23 I assume that, in every case where we don't know a
24 large-capacity magazine wasn't used, plaintiffs --
25 defendant's expert, Christopher Koper, shows that there

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1 was -- there is an association of -- oh, it's in his
2 declaration. I'll get it for you. It's 85 percent if
3 you just count ones where you know the magazine
4 capacity. And I don't recall what it is for when you
5 count unknowns as a "no large capacity." So there is a
6 strong association here.

7 And there is no evidence that large-capacity
8 magazines are used for self-defense with any degree of
9 regularity.

10 THE COURT: What do you say to the argument,
11 though, that, okay, all of that may be true, but there
12 are so many, out of these high-capacity magazines that
13 have been sold in America, that it must be deemed that

14 they are common in many households and that these are
15 commonly used to protect the home.

16 MS. VAN AKEN: That people think they need
17 them, even if they --

18 THE COURT: Even if they're not used, they
19 have them there. They take comfort in the fact that
20 they've got that firearm that can shoot 11 bullets, and
21 that gives them some comfort and security, even if it
22 never has to be used. So what do you say to that point?

23 MS. VAN AKEN: Well, you know, so common use
24 in Heller -- what the Heller Court uses common use for
25 is to say whether a firearm is within the protection of

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1 the Second Amendment or not. This is in Roman Numeral
2 III of the Heller opinion, it says not all firearms are
3 protected by the Second Amendment. Some are not.
4 Machine guns are not, for example. They are not in
5 common use.

6 So that's just our test for whether we're even
7 talking about the Constitution at all, or we're just in
8 rational basis review. So even if you accept that these
9 are in common use, you still have to say, how do we look
10 at this resolution?

11 And plaintiffs want to conflate common use
12 with absolute protection, with strict scrutiny for any
13 regulation. But that's not what the Heller decision
14 says. Heller said, Look, we are talking about handguns
15 here. We're talking about a ban on any handgun at all
16 and a ban on even unlocking your long gun, even in the

17 event of a self-defense emergency. Under any standard
18 of review, that fails.

19 So Heller doesn't say that just because it's a
20 common weapon, it's -- you can't -- it fails any
21 standard of review to prohibit it. Heller says, We are
22 talking about the quintessential self-defense weapon,
23 the one that is overwhelmingly chosen by Americans for
24 self-defense.

25 That's not the case with large-capacity

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1 magazines, and that's exactly what the D.C. Circuit
2 found in the Heller II Decision. It said, Let's assume
3 these are in common use. But still, prohibiting them is
4 akin to a restriction on the manner of bearing arms.
5 You may still bear arms. You have innumerable choices
6 of handguns and firearms and long guns available to you.
7 You simply may not equip those guns with this particular
8 kind of equipment that has special dangers.

9 So it is not a blanket prohibition on the use
10 of arms in the home. In fact, it doesn't even
11 appreciably affect the use of arms in the home because
12 it is so rare that such arms are even needed.

13 I mean, the point is: Handguns are incredibly
14 useful for self-defense in a home. That's what Heller
15 says. Large-capacity magazines are not. Depriving
16 people of them only takes away a tiny fraction of the
17 usability of their handguns. And it's shocking to hear,
18 in making this assessment, that body counts don't

19 matter. Heller does not teach that.

20 Every circuit that has looked at a large --
21 only the D.C. Circuit has looked at large-capacity
22 magazine bans, but now we have four District Courts who
23 have weighed it. And they all agree these restrictions
24 are constitutional.

25 THE COURT: I know about Heller but tell me

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♀

1 about the three Districts -- is it three or four?

2 MS. VAN AKEN: It's now four, but one was --

3 THE COURT: So describe those decisions and
4 where they were?

5 MS. VAN AKEN: Sure. And these are all either
6 cited in our brief or I did a Notice of Supplemental
7 Authority. Cuomo -- New York State Rifle & Pistol
8 Association vs. Cuomo, a Northern District of New York
9 case, evaluating New York's restriction, passes
10 intermediate scrutiny.

11 Kampffer vs. Cuomo.

12 THE COURT: That was on high capacity?

13 MS. VAN AKEN: That was -- Cuomo -- New York
14 State Rifle & Pistol Association is on high capacity and
15 assault weapons, and they're very related because the
16 same arguments are made about both.

17 Kampffer is only about assault weapons.

18 Shew v. Malloy is the one that we brought to
19 the Court's attention in a recent notice. The decision
20 came out on January 31st, after we had briefed it. So I
21 think, by February 4th, I had sent a Notice of

22 Supplemental Authority. That was on large-capacity
23 magazines, as well as on assault weapons.

24 THE COURT: All right. Now, have any
25 decisions gone the other way?

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1 MS. VAN AKEN: No.

2 THE COURT: Just on these high capacity?

3 MS. VAN AKEN: No.

4 THE COURT: Did the high capacity in those
5 cases go down as low as 11 or is -- in other words,
6 counsel a minute ago said we're not dealing with, you
7 know, 100; we're dealing with 11.

8 MS. VAN AKEN: Yeah.

9 THE COURT: So were the numbers comparable in
10 those cases?

11 MS. VAN AKEN: They were the same. In the New
12 York State Rifle & Pistol Association vs. Cuomo, the
13 Court also considered the additional restriction that
14 you can't load any magazine with more than seven
15 bullets.

16 The Court said that doesn't pass muster
17 because it's really unenforceable and arbitrary. But it
18 upheld the restriction that's identical to San
19 Francisco's: that you can't have a magazine with
20 capacity for 11 or more identical.

21 THE COURT: All right. So go ahead and make
22 your last point, and let me then hear from the other
23 side.

24 MS. VAN AKEN: We would certainly, if the
25 Court were to accept plaintiffs' magazines pending the

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1 final disposition of this case, if ordered to do so, we
2 would certainly do that which would mitigate any claim
3 of irreparable harm here.

4 And the balance of equities -- body counts do
5 matter. These tragedies do matter, and they are all
6 preventable and avoidable, and we don't have to sit by
7 while they continue.

8 THE COURT: All right. Tell me this -- and I
9 want to ask the other side this, too. This is a case
10 management issue, and that is, on discovery -- you all
11 have so many of these experts and things. Now, who --
12 give me some priorities in terms of what discovery you,
13 on your side, would like to take the most. Not to say
14 you can't do it all, but what are some priority items
15 for discovery for you?

16 MS. VAN AKEN: I think that brief depositions
17 of the plaintiffs and depositions of the experts whose
18 declarations plaintiffs have offered on this motion.

19 THE COURT: What do you think are the main
20 differences between the experts on the two sides?

21 MS. VAN AKEN: I would like to explore the
22 basis of knowledge for Mr. Ayoob's, Mr. Curcuruto's and
23 Mr. Helsley's declarations, because I don't find it
24 obvious what methodology they're using and why it's
25 reliable from those declarations. That is the main

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1 difference. I think -- I think, you know, probably this
2 is a case -- well, I'll leave it at that.

3 THE COURT: All right. Let's go to the other
4 side now. You get a -- I want you to respond to that
5 question, but also to anything else that you would like
6 to bring up that Counsel has argued.

7 MS. BARVIR: Thank you, Your Honor. Regarding
8 discovery that plaintiffs would like to take in this
9 case, we would like to seek depositions of the City's
10 experts that they put forth in the declarations to this
11 motion, particularly Lucy Allen and Christopher Koper.

12 THE COURT: Are all of these experts here in
13 San Francisco?

14 MS. VAN AKEN: No.

15 THE COURT: Or where are the experts located?

16 MS. BARVIR: Ours are from the East Coast, I
17 believe, yeah.

18 THE COURT: Yours are East Coast?

19 MS. BARVIR: Yeah.

20 THE COURT: And where are yours from?

21 MS. VAN AKEN: I have some in the Bay Area --
22 one in the Bay Area -- two in the Bay Area, and mostly
23 on the East Coast.

24 I want to point out, too, though, Your Honor,
25 just for context, none of us is writing on a clean slate

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1 here. Four states enacted large-capacity magazine
2 restrictions or tightened the existing restrictions
3 after the Newtown tragedy.

4 Plaintiffs, you know, from all of those states
5 with sort of a small band of counsel who do these kinds
6 of Second Amendment cases, including my esteemed
7 colleague, have been involved. The experts that San
8 Francisco is using have been used in those cases, for
9 the most part. The same on the other side.

10 Their depositions have been taken in those
11 cases, some of them at least. Mr. Ayoob's, Mr.
12 Koper's -- Dr. Koper's.

13 THE COURT: Well, so these declarations that I
14 am seeing, then, these very same declarations been used
15 in other cases?

16 MS. VAN AKEN: They are not the same, they are
17 similar to what has been used in other cases. So I
18 think, in many of those cases, the Courts have chosen
19 not to -- to proceed immediately to summary judgment on
20 the basis of declarations and have decided in that
21 manner. So I think it is worth, before we travel too
22 far down the case management path here, in the event the
23 Court doesn't order a stay, to have a conversation and
24 see whether we would mutually agree to submit on the
25 papers, for instance, without depositions in this case,

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1 since they have occurred in other cases.

2 THE COURT: Well, the last time I had one of
Page 25

3 your ordinances -- a totally different situation -- I
4 proposed exactly that, and your side refused.

5 MS. VAN AKEN: I think Mr. Chagra is sitting
6 here in the courtroom and could speak to that, but I
7 would take a fresh look.

8 THE COURT: Yeah, he was the guy.

9 MS. VAN AKEN: Yes, I would take a fresh look
10 at that.

11 THE COURT: He was the guy who was sued. All
12 right.

13 And I keep interrupting you. You get to have
14 your say now.

15 MS. BARVIR: Thank you, Your Honor.

16 I just -- plaintiffs just want to point out
17 that what we're having here a lot about -- a lot of what
18 has gone on here today is this debate over how --

19 THE COURT: Hold on. Slow down. Please slow
20 down.

21 MS. BARVIR: -- it's a debate over how often
22 these are used for criminal purposes. That doesn't
23 really have an impact on whether or not these items are
24 protected.

25 The fact that criminals rarely fire 10 rounds

1 in any crime has been undisputed by the plaintiff -- by
2 the City. Plaintiffs have provided evidence that no
3 more than four shots are usually fired in most -- in the
4 large majority of crimes.

5 In these mass shootings, in the rare instances
6 when 10 or more rounds are fired, large-capacity --
7 magazines over 10 rounds are not what makes the
8 difference. And the City, while it's showing some sort
9 of correlation --

10 THE COURT: Well, but I disagree with you on
11 that. I know I have read this in the press, that some
12 of these mass shootings are underway. The guy runs out
13 of bullets and he's trying to reload and somebody
14 tackles him and that's the end of that guy. And good
15 for that heroic citizen.

16 And if they had had a high magazine, then more
17 people would have been killed before we got to that
18 interim point. I know I have read that.

19 MS. BARVIR: You've read -- you may have read
20 that, Your Honor. Unfortunately, the City has provided
21 only two instances in 30 years where that has actually
22 been -- is actually true. The two more recent instances
23 in the tragic Sandy Hook incident and the Gabby Giffords
24 shooting in Tucson, it has not been inferred. It's mere
25 speculation, and the City offers no more than

1 speculation that it was due to a magazine change that
2 required that the -- that children --

3 THE COURT: But I read that before this
4 lawsuit ever came up. I'm familiar. It doesn't just
5 make common sense to you that, here you are lying in a
6 room, and the guy runs out of bullets; you have got two
7 choices. Go tackle the guy now and try to disarm him,

8 or play dead.

9 MS. BARVIR: It certainly makes --

10 THE COURT: And hopefully the guy, when he
11 reloads, he doesn't shoot you.

12 MS. BARVIR: Exactly.

13 THE COURT: Okay. It's a hard position to be
14 in. But some heroic citizens have made that choice and
15 tackled the bad guy.

16 MS. BARVIR: That would be a heroic choice.
17 Unfortunately, in real life, it doesn't really happen
18 with all that much regularity, certainly not more often
19 than people need to fire 10 rounds in self-defense.

20 Regardless, the very -- what you're saying --
21 what you're saying here is someone was able to attack
22 that attacker when he ran out of bullets. The same
23 thing happens to people in their homes and outside of
24 their homes when they need to exercise self-defense. If
25 they run out of bullets, they will -- they can and have

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1 been overcome by their attackers.

2 A lot of times when people, sometime you'll
3 see people run out of bullets and the attacker will
4 willfully -- will thankfully spare their life. But if
5 they hadn't made -- if that attacker hadn't made that
6 choice, those victims would not be with us today.

7 I have -- Your Honor had asked for some more
8 instances of specific self-defense instances, and so
9 plaintiffs brought two -- we were traveling all day

10 yesterday, so we hadn't had much chance to get more --
11 but two instances. One -- we talked about Ms. Gonzales,
12 but two other instances where a woman, a young mother at
13 home with her two children, was come upon by an attacker
14 in their home.

15 She fired six -- she emptied her gun at him.
16 Six shots, hit him five times, and he still continued
17 his attack.

18 He eventually ran out of the house, got in his
19 car, drove away. He sustained a lot of injuries. But I
20 still, to this day, don't know if he died. The fact is
21 people -- people -- attackers can oftentimes absorb
22 many, many, many, many bullets into their bodies and
23 still continue their attacks. So it is not -- and so --

24 THE COURT: I don't buy that.

25 MS. BARVIR: It's --

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1 THE COURT: Come on. By what caliber? What
2 was it?

3 MS. BARVIR: I'm not sure, Your Honor.

4 THE COURT: I have people, with the ordinary
5 handgun, get hit with one bullet.

6 MS. BARVIR: That's actually not true, Your
7 Honor.

8 THE COURT: At least in the body mass. The
9 odds are you're going to die.

10 MS. BARVIR: That's actually not --

11 THE COURT: But if you get hit in the hand,
12 okay, I can see you're going to survive that.

13 MS. BARVIR: That's actually not true, Your
14 Honor. The vast majority of people can survive far more
15 than one shot. There is -- we're talking about this.
16 But there is actually evidence out there that shows that
17 you can continue to have 30 to 45 seconds of action,
18 even being shot in the heart, with certain bullets.

19 But aside from that, we have shown --

20 THE COURT: What?

21 MS. BARVIR: It's true. It's true.

22 THE COURT: You're shot through the heart; you
23 drop dead immediately.

24 MS. BARVIR: It's not true.

25 THE COURT: Come on.

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1 MS. BARVIR: I guess I should --

2 THE COURT: I don't know where you get that
3 kind of information.

4 MS. BARVIR: But plaintiffs have provided
5 several self-defense instances where the attackers
6 absorbed many, many, many shots before they were taken
7 down. And even if they weren't absorbing many shots, if
8 they took 2 or 3 shots and there were 4 attackers, which
9 333- to 660,000 people who are victims of crimes face
10 annually, the likelihood that you are you going to shoot
11 more than 10 rounds is not some Hollywood, dreamed-up
12 scenario. It does happen.

13 But we can't really tell you with any real
14 certainty how many times is it, and our Declarant, Mr.

15 Massad Ayoob, explains the reason behind that.
16 "Multiple shots were fired" is usually what you hear.
17 You don't hear whether it was 2 or 12 or 14 or 21.
18 We just can't give you that with any real
19 certainty, but we do know that it happens. And for
20 every single person that requires more than 10 rounds,
21 that is the most severe burden that the Government is
22 placing on it.
23 If you need 10 rounds and you don't have it
24 and you die, there is nothing more severe than that.
25 This requires -- because they are flatly banning it.

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1 This is not a regulation here. They are flatly banning
2 protective items. None of the regulation is banned.
3 They cannot -- this is amendable to the Second Amendment
4 and they cannot stand under any level of scrutiny. And
5 the City, even if we do go with intermediate scrutiny,
6 has not met its burden, even under that test.

7 Compare -- just as you saw in Heller, where
8 there was compelling evidence -- and we do assert that
9 this is a compelling interest the Government has -- in
10 Heller, the District of Columbia had a compelling
11 interest in keeping handguns out of the hands of
12 criminals. Because keeping handguns -- excuse me -- but
13 that -- even though those items were overwhelmingly and
14 disproportionately protecting children by criminals,
15 81 percent of firearm homicides were committed with
16 handguns, which are only owned by about 40 percent of
17 Americans -- of guns are only about 40 percent of the

18 guns owned, they're highly disproportionately chosen.
19 But that could not even meet strict -- intermediate
20 scrutiny under Heller.

21 The same is true here. Plaintiffs really
22 would -- plaintiffs would like to see the status quo
23 preserved on all the merits as we move forward on the
24 merits of this claim, and we respectfully ask that the
25 Court rule upon our objection to the City's evidence.

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1 THE COURT: Well, why is your evidence any
2 better? You have new -- you're relying on newspaper
3 stories, too. Both sides have done that.

4 MS. BARVIR: I don't think that most of the --
5 the objections were not necessarily limited to the
6 newspaper clippings. Plaintiffs put a lot of questions
7 in the methodology of their reports that they provide,
8 not only reports provided by ideological groups
9 including Rounds Policy Center, Mayors Against Illegal
10 Guns, Brady Campaign. But the ones for -- especially
11 the Lucy Allen Declaration which talks about a review of
12 just 279 self-reported incidents of self-defensive gun
13 use over three years, when there is a reasonable
14 estimation that three million self-defensive gun uses
15 occurred in the same time. It's simply too small of a
16 sample to really determine how often more than 10 rounds
17 were fired in any self defense. And that's just one of
18 the many things that plaintiffs complained about, the
19 methodology of the reports.

20 THE COURT: Let me ask a different question.
21 If the law were upheld, these people who have these
22 high-capacity magazines can -- I'm pretty sure in most
23 cases buy a standard-size magazine. Am I right? In
24 other words, let's say -- I don't know what the standard
25 sizes would be. Maybe it's 8 bullets or 10 bullets.

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1 But if 11 or more is upheld as illegal, then the owners
2 of those guns would have to pay money to buy a magazine
3 that would comply with the law. But that could be done.
4 Do you at least concede that?

5 MS. BARVIR: That's true. But spending money
6 on another magazine is not the irreparable harm.

7 Plaintiffs are saying that this is a
8 constitutional right. And if we can't find that there
9 is a constitutional right to own these protected arms --
10 because standard magazines, you suggested you don't know
11 what that is. Plaintiffs' evidence shows that it is --
12 that the magazine that a firearm was intended to have,
13 be that 11 rounds, 15 rounds, 17 or 19 or more. But if
14 the Court disagrees that there is a constitutional
15 irreparable harm here, it would only be monetary
16 damages.

17 THE COURT: I have a different question for
18 you, and that is, listening to your argument, you would
19 think that it would be constitutionally required to
20 allow citizens to have machine guns.

21 MS. BARVIR: That's not true, Your Honor.
22 We --

23 THE COURT: But every argument you make would
24 support it. Now, I know you'd back off and say, Oh, no,
25 we don't go that far.

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1 But how do you distinguish between a machine
2 gun, which will definitely get rid of those criminals
3 when they come in the door, versus a high-capacity -- if
4 one is needed, why -- you know, if you're going to run
5 out of bullets at number 10, maybe you just squeeze off
6 a few 50 caliber rounds and just blow that door down as
7 the criminal is coming through. To me, that's just as
8 effective.

9 MS. BARVIR: That skips the most important
10 part of plaintiffs' argument. Are they common? Are
11 they protected to begin with? Are they protected under
12 Heller.

13 Heller categorically says that machine guns
14 are not protected. But if you take plaintiffs'
15 argument, you would show that they are not in common
16 use.

17 COURT REPORTER: Slow down. You have to slow
18 down.

19 THE COURT: Okay. That's a very good point.
20 That's a good point because machine guns are not in
21 common use.

22 What I'm still not certain of and whether your
23 record is good enough to show that high-capacity
24 magazines are in common use in defending the home. I'm

25 not sure this record shows that.

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1 What do you say to these other four decisions
2 that have gone against you at the District Court level,
3 as well as in the District of Columbia? What do you say
4 about that? And there is not a single decision your
5 way.

6 MS. BARVIR: Yes, the four District
7 opinions -- District Court opinions that the City has
8 provided did follow -- did go the other way.
9 Unfortunately, three of them coming out of New York or
10 the Second District are coming under a slightly
11 different test, especially -- *Kampfer* is especially not
12 on point here, considering it applies a different test
13 and finds that there has been a substantial burden
14 before we even apply immediate scrutiny.

15 That case is completely out of the water since
16 *Chovan* in the Circuit has required that anything that
17 protects any kind of Second Amendment protections are at
18 issue, intermediate scrutiny or higher.

19 The other cases, they are messy. They involve
20 bans on assault weapons that, while the City wants to
21 claim that they are still on point, it causes a mess.
22 Whether or not those arms are in common use for lawful
23 purposes was really at issue there, and the Courts have
24 to take a lot of look there.

25 Unfortunately, I don't know, with a lot of

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1 certainty what Tarry v. O'Malley was relying on. That
2 court only gave a one page for the reasons set in open
3 court, you know, view one side. I can't really give you
4 much there.

5 Heller II, on the other hand, we talk about
6 that. The plaintiffs talk about that a bit in their
7 briefs. Heller II went on farther for protection beyond
8 what Heller would have required and required like a
9 specific amount of -- a specific rule that they -- that
10 the arm -- that the magazines be particularly
11 well-suited to or preferred for lawful purposes,
12 including self-defense and sport. And they --
13 ultimately, the Heller II Court found that the evidence
14 was lacking in that case.

15 Plaintiffs have argued in their briefing that
16 the evidence here is much higher. The evidence provided
17 in this case is much -- it leans much more toward
18 proving that they are both well-suited to and preferred
19 by Americans for Self-defense, something that was
20 lacking in Heller II.

21 THE COURT: Okay. Is there any decision in
22 the United States that the Federal Courts, District
23 Court, whoever, that holds a high capacity-magazine law
24 to be unconstitutional under the Second Amendment?

25 MS. BARVIR: No, Your Honor, there is not.

1 But plaintiffs assert that Heller is what controls in
2 this case from the Supreme Court. When arms that are
3 often and overwhelmingly chosen by law-abiding Americans
4 are used for lawful purposes and protected, then a flat
5 ban is amenable to Second Amendment protection.

6 Heller did not even entertain these arguments
7 about you need to have some unknown number of examples
8 of handguns being fired in the home in self-defense in
9 order to get them protected and then in order for them
10 to not be able to be banned.

11 In Heller, you would -- you have experts that
12 have testified that, ever, a single shot was fired from
13 the gun in self-defense. But people owned them in their
14 homes, like fire insurance, in case they need them.

15 That's plaintiffs' argument.

16 THE COURT: City and County, I'll give you a
17 brief rebuttal response.

18 MS. VAN AKEN: Your Honor, I think we've
19 already traveled over most of the ground. My only point
20 that I want to make is that three of the decisions of
21 the four District Court decisions that I referred you
22 to, did involve the application of intermediate scrutiny
23 to a prohibition on large-capacity magazines.

24 So, you know, plaintiffs insist that Chovan,
25 the Ninth Circuit's recent decision, requires at least

1 intermediate scrutiny. Three District Courts have said
2 yes, it passes intermediate scrutiny. This serves
3 public safety interest because of the association

4 between large-capacity magazines and criminal use, and
5 the efficacy of a prohibition as demonstrated by the
6 Koper declaration.

7 The only decision that doesn't say that it
8 survives intermediate scrutiny is the one that says the
9 burden here is so minimal on self-defense -- and this
10 was specifically with respect to assault weapons -- the
11 burden is so minimal that we don't even -- we don't even
12 consider what level of scrutiny applies. So,
13 overwhelmingly, the authority indicates that
14 prohibitions like this are constitutional.

15 THE COURT: Okay. Under submission.

16 I don't have the answer for you.

17 MS. VAN AKEN: Thank you, Your Honor.

18 MS. BARVIR: Thank you, Your Honor.

19 MR. MONFORT: Thank you, Your Honor.

20 THE COURT: The 11:00 calendar, I've got to go
21 get my files. I'll be back in around five minutes.
22 Thank you.

23 (Hearing concluded at 11:02 a.m.)

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REPORTER'S CERTIFICATE

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I, MARGO GURULE, a Pro Tem Certified Shorthand

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Reporter for the United States Court, Northern District of

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California, hereby certify that the foregoing is a correct

6 transcript from the record of proceedings in the
7 above-entitled matter.

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9 Dated: March 10, 2014

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MARGARET "MARGO" GURULE
CSR No. 12976

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