No. 19-55376

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, RICHARD LEWIS, PATRICK LOVETTE, DAVID MARGUGLIO, CHRISTOPHER WADDELL, AND CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., A CALIFORNIA CORPORATION,
Plaintiffs and Respondents,

V.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Defendant and Appellant.

On Appeal from the United States District Court
for the Southern District of California
No. 17-cv-1017-BEN-JLB
The Honorable Roger T. Benitez, Judge

APPELLANT'S EXCERPTS OF RECORD
VOLUME ONE

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July 15, 2019

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

VIRGINIA DUNCAN, RICHARD LEWIS, PATRICK LOVETTE, DAVID MARGUGLIO, CHRISTOPHER WADDELL, and CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., a California corporation,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California; and DOES 1-10,

Defendants.

17-cv-1017-BEN-JLB

NOTICE OF APPEAL

Judge: Hon. Roger T. Benitez
Courtroom: 5A
Action Filed: May 17, 2017

PLEASE TAKE NOTICE that Defendant Xavier Becerra, in his official capacity as the Attorney General of the State of California, hereby appeals to the United States Court of Appeals for the Ninth Circuit from this Court's final judgment, entered on March 29, 2019 (Dkt. No. 88), including the Court's Order Granting Plaintiffs' Motion for Summary Judgment, Declaring California Penal Code § 32310 Unconstitutional and Enjoining Enforcement, issued on March 29, 2019 (Dkt. No. 87).

Dated: April 4, 2019

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

VIRGINIA DUNCAN, RICHARD LEWIS, PATRICK LOVETTE, DAVID MARGUGLIO, CHRISTOPHER WADDELL, and CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., a California corporation,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California; and DOES 1-10,

Defendants.

17-cv-1017-BEN-JLB

REPRESENTATION STATEMENT

[Fed. R. App. P. 12(b)]

Judge: Hon. Roger T. Benitez
Courtroom: 5A
Action Filed: May 17, 2017

Pursuant to Federal Rule of Appellate Procedure 12(b), Defendant-Appellant Xavier Becerra, in his official capacity as the Attorney General of the State of California, hereby submits the following Representation Statement identifying all parties to the action along with the names, addresses, and telephone numbers of their respective counsel:

Defendant-Appellant Xavier Becerra is represented in this matter by the following counsel:

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Plaintiffs-Appellees Virginia Duncan, Richard Lewis, Patrick Lovette, David Marguglio, Christopher Waddell, and the California Rifle & Pistol Association, Inc. are represented in this mater by the following counsel:

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Dated: April 4, 2019

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/s/ John D. Echeverria

JOHN D. ECHEVERRIA
Deputy Attorney General
Attorneys for Defendant Attorney General Xavier Becerra

CERTIFICATE OF SERVICE

Case Name: **Virginia Duncan, et al. v. Xavier Becerra** Case No.: **17-cv-1017-BEN-JLB**

I hereby certify that on April 4, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

NOTICE OF APPEAL

REPRESENTATION STATEMENT

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 4, 2019, at Los Angeles, California.

John D. Echeverria	/s/ John D. Echeverria
Declarant	Signature

United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Virginia Duncan; Patrick Lovette; David Marguglio; Christopher Waddell; California Rifle & Pistol Association, Incorporated

Plaintiff,

V.

Xavier Becerra, in his official capacity as Attorney General of the State of California

Defendant.

Civil Action No. 17cv1017-BEN-JLB

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

Plaintiffs' motion for summary judgment is granted. California Penal Code § 32310 is hereby declared to be unconstitutional in its entirety and shall be enjoined. Defendant Attorney General Xavier Becerra, and his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with him, and those duly sworn state peace officers and federal law enforcement officers who gain knowledge of this injunction order, or know of the existence of this injunction order, are enjoined from enforcing California Penal Code section 32310. Defendant Becerra shall provide, by personal service or otherwise, actual notice of this order to all law enforcement personnel who are responsible for implementing or enforcing the enjoined statute. The government shall file a declaration establishing proof of such notice.

Date: 3/29/19

CLERK OF COURT
JOHN MORRILL, Clerk of Court
By: s/ A. Finnell-Yepez
A. Finnell-Yepez, Deputy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

VIRGINIA DUNCAN, et al., Plaintiffs, v. XAVIER BECERRA, in his official capacity as Attorney General of the State of California, Defendant.	Case No.: 3:17cv1017-BEN (JLB) **ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, DECLARING CALIFORNIA PENAL CODE § 32310 UNCONSTITUTIONAL and ENJOINING ENFORCEMENT**

Individual liberty and freedom are *not* outmoded concepts. "The judiciary is – and is often the only – protector of individual rights that are at the heart of our democracy." -- Senator Ted Kennedy, Senate Hearing on the Nomination of Robert Bork, 1987.[1]

I. INTRODUCTION

As two masked and armed men broke in, Susan Gonzalez was shot in the chest. She made it back to her bedroom and found her husband's .22 caliber pistol. Wasting the first rounds on warning shots, she then emptied the single pistol at one attacker. Unfortunately, now out of ammunition, she was shot again by the other armed attacker.

[1] Norma Vieira & Leonard Gross, *Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations* 26 (Southern Illinois University Press 1998).

She was not able to re-load or use a second gun. Both she and her husband were shot twice. Forty-two bullets in all were fired. The gunman fled from the house—but returned. He put his gun to Susan Gonzalez's head and demanded the keys to the couple's truck.[2]

When three armed intruders carrying what look like semi-automatic pistols broke into the home of a single woman at 3:44 a.m., she dialed 911. No answer. Feng Zhu Chen, dressed in pajamas, held a phone in one hand and took up her pistol in the other and began shooting. She fired numerous shots. She had no place to carry an extra magazine and no way to reload because her left hand held the phone with which she was still trying to call 911. After the shooting was over and two of the armed suspects got away and one lay dead, she did get through to the police. The home security camera video is dramatic.[3]

A mother, Melinda Herman, and her nine-year-old twins were at home when an intruder broke in. She and her twins retreated to an upstairs crawl space and hid. Fortunately, she had a .38 caliber revolver. She would need it. The intruder worked his way upstairs, broke through a locked bedroom door and a locked bathroom door, and opened the crawl space door. The family was cornered with no place to run. He stood staring at her and her two children. The mother shot six times, hitting the intruder five

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[2] *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1130-31 (S.D. Cal. 2017) (citing *Jacksonville Times-Union*, July 18, 2000).

[3] Lindsey Bever, *Armed Intruders Kicked in the Door*, Washington Post (Sept. 24, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/09/24/armed-intruders-kicked-in-the-door-what-they-found-was-a-woman-opening-fire/?noredirect=on&utm_term=.80336ab1b09e; *see also YouTube*, https://youtu.be/ykiSTkmt5-w (last viewed Mar. 20, 2019); Habersham, Raisa, *Suspect Faces Murder Charge 18 Months After Homeowner Shot at Him, Intruders,* The Atlanta-Journal-Constitution (Mar. 30, 2018) https://www.ajc.com/news/crime--law/suspect-faces-murder-charge-months-after-homeowner-shot-him-intruders/W4CW5wFNFdU6QIEFo0CtGM (last visited Mar. 27, 2019). Although this news account is not in the parties' exhibits, it is illustrative.

times, when she ran out of ammunition. Though injured, the intruder was not incapacitated. Fortunately, he decided to flee.[4]

A. A Need for Self-Defense

In one year in California (2017), a population of 39 million people endured 56,609 robberies, 105,391 aggravated assaults, and 95,942 residential burglaries.[5] There were also 423 homicides in victims' residences.[6] There were no mass shootings in 2017. Nationally, the first study to assess the prevalence of defensive gun use estimated that there are 2.2 to 2.5 million defensive gun uses by civilians each year. Of those, 340,000 to 400,000 defensive gun uses were situations where defenders believed that they had almost certainly saved a life by using the gun.[7] Citizens often use a gun to defend against criminal attack. A Special Report by the U.S. Department of Justice, Bureau of Justice Statistics published in 2013, reported that between 2007 and 2011 "there were 235,700 victimizations where the victim used a firearm to threaten or attack an offender."[8] How many more instances are never reported to, or recorded by, authorities? According to another U.S. Department of Justice, Bureau of Justice Statistics, Special Report, for each

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[4] Robin Reese, *Georgia Mom Shoots Home Invader, Hiding With Her Children*, ABC News (Jan. 8, 2013), https://abcnews.go.com/US/georgia-mom-hiding-kids-shoots-intruder/story?id=18164812 (last viewed Mar. 22, 2019) (includes video and recording of 911 call). Although this news account is not in the parties' exhibits, it is illustrative.

[5] Xavier Becerra, *Crime in California (2017)* and *Homicide in California (2017),* (https://openjustice.doj.ca.gov/resources/publications). Under Rules of Evidence 201(b) courts may take judicial notice of some types of public records, including reports of administrative bodies.

[6] *Id.*

[7] *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self–Defense with a Gun,* 86 J. Crim. L. & Criminology 150, 164, 177 (1995) (cited in *Heller v. D.C. (Heller II)*, 670 F.3d 1244, 1262 (D.C. Cir. 2011).

[8] *See* Planty, Michael and Truman, Jennifer, *Firearm Violence, 1993-2011* (2013), at p.11 and Table 11 www.bjs.gov/content/pub/pdf/fv9311.pdf (last visited Mar. 19, 2019). Under Rules of Evidence 201(b) courts may take judicial notice of some types of public records, including reports of administrative bodies.

year between 2003 and 2007, an estimated 266,560 burglaries occurred during which a person at home became a victim of a violent crime or a "home invasion."[9] "Households composed of single females with children had the highest rate of burglary while someone was at home."[10] Of the burglaries by a stranger where violence occurred, the assailant was armed with a firearm in 73,000 instances annually (on average).[11] During a burglary, rape or sexual assault occurred 6,387 times annually (on average), while a homicide occurred approximately 430 times annually (on average).[12]

Fortunately, the Second Amendment protects a person's right to keep and bear firearms. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. "As interpreted in recent years by the Supreme Court, the Second Amendment protects 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 676–77 (9th Cir. 2017), *cert. denied sub nom. Teixeira v. Alameda Cty.*, 138 S. Ct. 1988 (2018) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)). At the core of the Second Amendment is a citizen's right to have in his and her home for self-defense common firearms. *Heller*, 554 U.S. at 629. "[O]ur central holding in *Heller* [is] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

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[9] Catalano, Shannan, *Victimization During Household Burglary*, U.S. D.O.J., Bureau of Justice Statistics (Sept. 2010) https://www.bjs.gov/content/pub/pdf/vdhb.pdf (last visited Mar. 28, 2019). Under Rules of Evidence 201(b) courts may take judicial notice of some types of public records, including reports of administrative bodies.

[10] *Id*. at p.3.

[11] *Id*. at p.10.

[12] *Id.*

As evidenced by California's own crime statistics, the need to protect one's self and family from criminals in one's home has not abated no matter how hard they try. Law enforcement cannot protect everyone. "A police force in a free state cannot provide everyone with bodyguards. Indeed, while some think guns cause violent crime, others think that wide-spread possession of guns on balance reduces violent crime. None of these policy arguments on either side affects what the Second Amendment says, that our Constitution protects 'the right of the people to keep and bear Arms.'" *Silveira v. Lockyer*, 328 F.3d 567, 588 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing *en banc*). However, California citizens, like United States citizens everywhere, enjoy the right to defend themselves with a firearm, if they so choose. To protect the home and hearth, citizens most often choose a handgun, while some choose rifles or shotguns.

B. Are 10 Rounds Always Enough?

If a law-abiding, responsible citizen in California decides that a handgun or rifle with a magazine larger than 10 rounds is the best choice for defending her hearth and home, may the State deny the choice, declare the magazine a "nuisance," and jail the citizen for the crime of possession? The Attorney General says that is what voters want in hopes of preventing a rare, but horrible, mass shooting. The plaintiffs, who are also citizens and residents of California, say that while the goal of preventing mass shootings is laudable, banning the acquisition and possession of magazines holding more than 10 rounds is an unconstitutional experiment that poorly fits the goal. From a public policy perspective, the choices are difficult and complicated. People may cede liberty to their government in exchange for the promise of safety. Or government may gain compliance from its people by forcibly disarming all.[13] In the United States, the Second Amendment

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[13] *E.g.,* on November 10, 1938, the day after the horrific Night of Broken Glass, or *Kristallnacht*, the Nazis issued an order that "Jews may not henceforth buy or carry weapons," and those found in possession of arms "would be sent to concentration camps

takes the legislative experiment off the table.[14] Regardless of current popularity, neither a legislature nor voters may trench on constitutional rights. "An unconstitutional statute adopted by a dozen jurisdictions is no less unconstitutional by virtue of its popularity." *Silveira*, 312 at 1091.

C. Mass Shooting vs. Common Crimes

When they occur, mass shootings are tragic. Innocent lives are senselessly lost while other lives are scarred forever. Communities are left shaken, frightened, and grieving. The timeline of the tragedy, the events leading up to the shooting, and the repercussions on family and friends after the incident, fill the national media news cycle for days, weeks and years. Who has not heard about the Newtown, Connecticut, mass shooting at Sandy Hook Elementary School, or the one at a high school in Parkland, Florida? But an individual victim gets little, if any, media attention, and the attention he or she gets is local and short-lived. For example, who has heard about the home invasion attack on Melinda Herman and her twin nine-year old daughters in Georgia only one month after the Sandy Hook incident?[15] Who has heard of the attacks on Ms. Zhu Chen

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for twenty years." *First Anti-Jew Laws Issued, Possession of Arms*, New York Times (Nov. 11, 1938).

[14] "To be sure, assault rifles and large capacity magazines are dangerous. But their ability to project large amounts of force accurately is exactly why they are an attractive means of self-defense. While most persons do not require extraordinary means to defend their homes, the fact remains that some do. Ultimately, it is up to the lawful gun owner and not the government to decide these matters. To limit self-defense to only those methods acceptable to the government is to effect an enormous transfer of authority from the citizens of this country to the government—a result directly contrary to our constitution and to our political tradition. The rights contained in the Second Amendment are 'fundamental' and 'necessary to our system of ordered liberty.' The government recognizes these rights; it does not confer them." *Friedman v. City of Highland Park*, 784 F.3d 406, 417-18 (7th Cir. 2015) (Manion, J., dissenting).

[15] Phillips, Rich, *Armed Mom Takes Down Home Invader*, CNN (Jan. 11, 2013) https://www.cnn.com/2013/01/10/us/home-invasion-gun-rights (includes video) (last visited Mar. 22, 2019).

or Ms. Gonzalez and her husband?[16] Are the lives of these victims worth any less than those lost in a mass shooting? Would their deaths be any less tragic? Unless there are a lot of individual victims together, the tragedy goes largely unnoticed.

That is why mass shootings can seem to be a common problem, but in fact, are exceedingly rare. At the same time robberies, rapes, and murders of individuals are common, but draw little public notice. As in the year 2017, in 2016 there were numerous robberies, rapes, and murders of individuals in California and no mass shootings.[17] Nevertheless, a gubernatorial candidate was successful in sponsoring a statewide ballot measure (Proposition 63). Californians approved the proposition and added criminalization and dispossession elements to existing law prohibiting a citizen from acquiring and keeping a firearm magazine that is able to hold more than 10 rounds. The State now defends the prohibition on magazines, asserting that mass shootings are an urgent problem and that restricting the size of magazines a citizen may possess is part of the solution. Perhaps it is part of the solution.

Few would say that a 100 or 50-round rifle magazine in the hands of a murderer is a good idea. Yet, the "solution" for preventing a mass shooting exacts a high toll on the everyday freedom of ordinary law-abiding citizens. Many individual robberies, rapes, and shootings are not prevented by the State. Unless a law-abiding individual has a firearm for his or her own defense, the police typically arrive after it is too late. With rigor mortis setting in, they mark and bag the evidence, interview bystanders, and draw a chalk outline on the ground. But the victim, nevertheless, is dead, or raped, or robbed, or traumatized.

As Watson County Sheriff Joe Chapman told CNN about Melinda Herman and her twin nine-year-old daughters in the attic (the third incident described above), "[h]ad it not

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[16] *See* n.2-3, *supra*.

[17] Xavier Becerra, *Crime in California (2016)* and *Homicide in California (2016)*, (https://openjustice.doj.ca.gov/resources/publications).

turned out the way that it did, I would possibly be working a triple homicide, not having a clue as to who it is we're looking for."[18] The Second Amendment protects the would-be American victim's freedom and liberty to take matters into one's own hands and protect one's self and family until help arrives.

D. California Law Makes it a Crime to Have More Than 10 Rounds

For all firearms, California law allows only the acquisition and possession of magazines that hold ten rounds or less.[19] Claiming that the *average* defensive use of a gun requires firing only 2.2 rounds, the State's voters and legislators have decided that a responsible, law-abiding citizen *needs* no more than ten rounds to protect one's self, family, home, and property. "No one except trained law enforcement should be able to possess these dangerous ammunition magazines [which hold more than 10 rounds]." Proposition 63; *A.G.'s Oppo. to P's Motion for Summary Jgt.*, at 20 ("LCMs *are not necessary* to exercise 'the fundamental right of self defense in the home.'") (emphasis added); *A.G.'s Oppo. to P's Motion for Summary Jgt.*, at 21 ("There is simply no study or systematic data to suggest that LCMs are *necessary* for self-defense.") (emphasis added) (citations omitted). Susan Gonzalez and her husband, the single woman awoken in the night, and the mother home alone with her nine-year-old twin daughters all needed to fire considerably more than 2.2 shots to protect themselves.[20] In fact, Gonzalez and the mom of twins ran out of ammunition.

In other words, a Californian may have a pistol with a 10-round magazine in hopes of fighting off a home invasion robbery. But if that Californian grabs a pistol containing a 17-round magazine, it is now the home-defending victim who commits a new crime.

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[18] Phillips, Rich, *Armed Mom Takes Down Home Invader*, CNN (Jan. 11, 2013) https://www.cnn.com/2013/01/10/us/home-invasion-gun-rights (includes video) (last visited Mar. 22, 2019)

[19] There is an exception for "tubular" magazines which are typically found in lever action rifles.

[20] *See* n.2-4, *supra*.

That is because California law declares acquisition and possession of a magazine able to hold more than ten rounds (*i.e.,* a "large capacity magazine" or "LCM") a crime. *See* Cal. Penal Code § 32310;[21] § 16740.[22] For simple possession of a magazine holding

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[21] Section 32310 states:
(a) Except as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives any large-capacity magazine is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170.
(b) For purposes of this section, "manufacturing" includes both fabricating a magazine and assembling a magazine from a combination of parts, including, but not limited to, the body, spring, follower, and floor plate or end plate, to be a fully functioning large-capacity magazine.
(c) Except as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, commencing July 1, 2017, any person in this state who possesses any large-capacity magazine, regardless of the date the magazine was acquired, is guilty of an infraction punishable by a fine not to exceed one hundred dollars ($100) per large-capacity magazine, or is guilty of a misdemeanor punishable by a fine not to exceed one hundred dollars ($100) per large-capacity magazine, by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.
(d) Any person who may not lawfully possess a large-capacity magazine commencing July 1, 2017 shall, prior to July 1, 2017:
(1) Remove the large-capacity magazine from the state;
(2) Sell the large-capacity magazine to a licensed firearms dealer; or
(3) Surrender the large-capacity magazine to a law enforcement agency for destruction.
Cal. Penal Code § 32310 (2019)(West).

[22] Section 16740 states:
As used in this part, "large-capacity magazine" means any ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include any of the following:
(a) A feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.
(b) A .22 caliber tube ammunition feeding device.
(c) A tubular magazine that is contained in a lever-action firearm.

more than 10 rounds, the crime is an infraction under § 32310(c). It is a much more serious crime to acquire a magazine holding more than 10-rounds in California by importing, buying, borrowing, receiving, or manufacturing. These acts may be punished as a misdemeanor or a felony under § 32310(a) ("any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives any large-capacity magazine is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170"). Under the subsection's provision, "or imprisonment pursuant to subdivision (h) of Section 1170," punishment

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Cal. Penal Code § 16740 (2019)(West).

may be either a misdemeanor or a felony.[23] California's gun laws are lengthy and complicated.[24] The statutes concerning magazines alone are not simple.[25]

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[23] *See e.g., People v. Le Bleu*, 2018 Cal. App. Unpub. LEXIS 7851*1 (Nov. 13, 2018) ("count 5 charged him with felony receipt of a large-capacity magazine (Pen. Code, § 32310, subd. (a))."); *People v. Obrien*, 2018 Cal. App. Unpub. LEXIS 4992*1 (July 23, 2018) (based on handgun with 16 rounds of ammunition found under car seat, "[t]he People charged Obrien in a three-count felony complaint with . . . manufacturing, importing, keeping for sale, or giving or receiving a large capacity magazine (§ 32310, subd. (a))."); *People v. Rodriguez*, 2017 Cal. App. Unpub. LEXIS 5194*1 (July 26, 2017) ("Defendant Santino Rodriguez pleaded no contest to possessing a large-capacity magazine, a felony, and the trial court placed him on probation for three years."); *People v. Verches*, 2017 Cal. App. Unpub. LEXIS 3238*11-12 (May 9, 2017) (California resident who purchased three 30-round magazines at Nevada gun show and returned to California charged with felony importation of a large capacity magazine under former Cal. Pen. Code § 12020(a)(2)).

[24] In a dissent, Judge Tallman describes as "substantial" the burden imposed by the myriad anti-gun legislation in California and the decisions upholding the legislation. Judge Tallman notes, "Our cases continue to slowly carve away the fundamental right to keep and bear arms. Today's decision further lacerates the Second Amendment, deepens the wound, and resembles the Death by a Thousand Cuts." *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 694 (9th Cir. 2017), *cert. denied sub nom. Teixeira v. Alameda Cty., Cal.*, 138 S. Ct. 1988 (2018).

[25] Here is an example of the way in which the state's firearm laws are so complex as to obfuscate the Second Amendment rights of a citizen who intends to abide by the law. A person contemplating either returning home from an out-of-state hunting trip with a 30-round rifle magazine or who is considering buying, borrowing, or being given, or making his own 15-round handgun magazine, will have to do the following legal research.

First, he or she must find and read § 32310. Hardly a model of clarity, § 32310(a) begins with references to unnamed exceptions at "Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2." Once the reader finds the exceptions and determines that he or she is not excepted, he or she must still find the definition of a "large-capacity magazine," itself something of a misnomer. Section 32310 is no help. "Large-capacity magazines" are defined in a distant section of the Penal Code under § 16740 and defined in terms of an uncommonly small number of rounds (10). *See* n.22, *supra*. Having found § 16740, and now mentally equipped with the capacity-to-accept-more-than-10-rounds definition of a "large capacity magazine," the citizen reader can return to § 32310(c) and find that mere possession is unlawful and punishable as an increasingly severe infraction.

Unfortunately, he or she may incorrectly believe that criminal possession will be his or her only crime if the hunter brings a large capacity magazine back home from the hunting trip, because that is criminalized as "importing" under § 32310(a).

And § 32310(a) also covers buying, receiving, and making his or her own large capacity magazine. Even if the citizen realizes that he or she commits a crime by importing, buying, receiving, or manufacturing a large capacity magazine, the citizen will probably read § 32310(a) as punishing these crimes as misdemeanors. However, the careful reader who follows up on the odd reference to section (h) of § 1170 may understand that these offenses may also be punished as felonies. Section 1170(h)(1) states, "[e]xcept as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in the county jail for 16 months, or two or three years." California refers to such crimes that may be punished as either felonies or misdemeanors as "wobblers." And is the citizen wrong to think that simply *loaning* a large capacity magazine *is* lawful under § 32415? Section 32415, titled *Loan of lawfully possessed large-capacity magazine between two individuals; application of Section 32310*, states,

> Section 32310 does not apply to the loan of a lawfully possessed large-capacity magazine between two individuals if all of the following conditions are met: (a) The person being loaned the large-capacity magazine is not prohibited by Chapter 1 (commencing with Section 29610), Chapter 2 (commencing with Section 29800), or Chapter 3 (commencing with Section 29900) of Division 9 of this title or Section 8100 or 8103 of the Welfare and Institutions Code from possessing firearms or ammunition[; and] (b) The loan of the large-capacity magazine occurs at a place or location where the possession of the large-capacity magazine is not otherwise prohibited, and the person who lends the large-capacity magazine remains in the accessible vicinity of the person to whom the large-capacity magazine is loaned.

It is enough to make an angel swear. Suffice it to say that either the law-abiding hunter returning home with a 30-round rifle magazine, or the resident that receives from another a 15-round pistol magazine, or the enthusiast who makes a 12-round magazine out of a 10-round magazine, may be charged not with a minor infraction but with a felony. And perhaps not ironically, conviction as a felon carries with it the complete forfeiture of Second Amendment rights for a lifetime. For Second Amendment rights, statutory complexity of this sort extirpates as it obfuscates. And in the doing, it violates a person's constitutional right to due process. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally*).

Absent from these provisions is any qualifying language: *all* forms of possession by ordinary citizens are summarily criminalized. For example, the statutes make no distinction between possessing and storing a 15-round magazine at home (a reasonable non-threatening act) and carrying a rifle with a 100-round magazine while sitting outside a movie theatre or school (a potentially threatening and suspicious act). Each constitutes criminal possession and is prohibited outright. *C.f.*, *Friedman v. City of Highland Park*, 784 F.3d 406, 417 (7th Cir. 2015) (Manion, J., dissenting) ("Notably absent from this provision is any qualifying language: *all* forms of possession are summarily prohibited. Other laws notwithstanding, the ordinance makes no distinction between storing large-capacity magazines in a locked safe at home and carrying a loaded assault rifle while walking down Main Street. Both constitute 'possession' and are prohibited outright."). According to the U.S. Supreme Court's reasoning, acquiring, possessing, or storing a commonly-owned 15-round magazine at home for self-defense is protected at the core of the Second Amendment. Possessing a loaded 100-round rifle and magazine in a crowded public area may not be.

All Californians, like all citizens of the United States, have a fundamental Constitutional right to keep and bear common and dangerous arms. The nation's Founders used arms for self-protection, for the common defense, for hunting food, and as a check against tyranny. *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 686 (9th Cir. 2017)

Unfortunately, firearm regulations are often complex and prolix. For example, U.S. House of Representative Steve Scalise, R-La., remarked that a hunter would need to bring along an attorney to make sure the hunter did not accidently commit a felony under recently proposed federal legislation. According to PBS News Hour, Scalise said, "'What it would do is make criminals out of law-abiding citizens . . . . If you go hunting with a friend and your friend wants to borrow your rifle, you better bring your attorney with you because depending on what you do with that gun you may be a felon if you loan it to him.'" Matthew Daly, *Gun control legislation pass House, but faces dim prospects in Senate,* PBS News Hour, https://www.pbs.org/newshour/politics/gun-control-legislation-pass-house-but-faces-dim-prospects-in-senate (last visited Mar. 1, 2019).

(en banc) ("[T]he right to bear arms, under both earlier English law and American law at the time the Second Amendment was adopted, was understood to confer a right upon individuals to have and use weapons for the purpose of self-protection, at least in the home."), and ("The British embargo and the colonists' reaction to it suggest . . . the Founders were aware of the need to preserve citizen *access* to firearms in light of the risk that a strong government would use its power to disarm the people. Like the British right to bear arms, the right declared in the Second Amendment of the U.S. Constitution was thus 'meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.'") (citations omitted).

Today, self-protection is most important. In the future, the common defense may once again be most important. Constitutional rights stand through time holding fast through the ebb and flow of current controversy. Needing a solution to a current law enforcement difficulty cannot be justification for ignoring the Bill of Rights as bad policy. Bad political ideas cannot be stopped by criminalizing bad political speech. Crime waves cannot be broken with warrantless searches and unreasonable seizures. Neither can the government response to a few mad men with guns and ammunition be a law that turns millions of responsible, law-abiding people trying to protect themselves into criminals. Yet, this is the effect of California's large-capacity magazine law.

II. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs have challenged California's firearm magazine law as being unconstitutional. They now move for summary judgment. The standards for evaluating a motion for summary judgment are well known and have changed little since discussed by the U.S. Supreme Court thirty years ago in a trilogy of cases (*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986)). The standards need not be repeated here.

A. The Second Amendment

Plaintiffs contend that there is no genuine dispute that the Second Amendment to the United States Constitution protects the individual right of every law-abiding citizen to acquire, possess, and keep common firearms and their common magazines holding more than 10 rounds – magazines which are typically possessed for lawful purposes. Plaintiffs also contend that the state of California has not carried its burden to demonstrate a reasonable fit between the flat ban on such magazines and its important interests in public safety. Plaintiffs contend that the state's magazine ban thus cannot survive constitutionally-required heightened scrutiny and they are entitled to declaratory and injunctive relief as a matter of law. Plaintiffs are correct.

1. The Supreme Court's Simple Heller Test

In *Heller,* the U.S. Supreme Court provided a simple Second Amendment test in crystal clear language. It is a test that anyone can understand. The right to keep and bear arms is a right enjoyed by law-abiding citizens to have arms that are not unusual "in common use" "for lawful purposes like self-defense." *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008); *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1271 (2011) (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."). It is a hardware test. Is the firearm hardware commonly owned? Is the hardware commonly owned by law-abiding citizens? Is the hardware owned by those citizens for lawful purposes? If the answers are "yes," the test is over. The hardware is protected.

Millions of ammunition magazines able to hold more than 10 rounds are in common use by law-abiding responsible citizens for lawful uses like self-defense. This is enough to decide that a magazine able to hold more than 10 rounds passes the *Heller* test and is protected by the Second Amendment. The simple test applies because a magazine is an essential mechanical part of a firearm. The size limit directly impairs one's ability to defend one's self.

Neither magazines, nor rounds of ammunition, nor triggers, nor barrels are specifically mentioned in the Second Amendment. Neither are they mentioned in *Heller*. But without a right to keep and bear triggers, or barrels, or ammunition and the magazines that hold ammunition, the Second Amendment right would be meaningless. *Fyock v. City of Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) ("[T]o the extent that certain firearms capable of use with a magazine—*e.g.*, certain semi-automatic handguns—are commonly possessed by law-abiding citizens for lawful purposes, our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable."); *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc) ("We recognized in *Jackson* that, although the Second Amendment 'does not explicitly protect ammunition, [but] without bullets, the right to bear arms would be meaningless.' *Jackson* thus held that 'the right to possess firearms for protection implies a corresponding right' to obtain the bullets necessary to use them.") (citations omitted); *see also Ass'n of N.J. Rifle & Pistol Clubs v. A.G. N.J.,* 910 F.3d 106, 116 (3rd Cir. 2018) ("The law challenged here regulates magazines, and so the question is whether a magazine is an arm under the Second Amendment. The answer is yes. A magazine is a device that holds cartridges or ammunition. Regulations that eliminate 'a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose.' Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment.") (citations omitted). Consequently, the same analytical approach ought to be applied to both firearms and the ammunition magazines designed to make firearms function.

Under the simple test of *Heller*, California's § 32310 directly infringes Second Amendment rights. It directly infringes by broadly prohibiting common firearms and their common magazines holding more than 10 rounds, because they are not unusual and are commonly used by responsible, law-abiding citizens for lawful purposes such as self-

defense. And "that is all that is needed for citizens to have a right under the Second Amendment to keep such weapons." *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Justices Thomas and Scalia dissenting from denial of certiorari) (commenting on what *Heller*'s test requires). Although it may be argued that a 100-round, or a 50-round, or possibly even a 30-round magazine may not pass the *Heller* hardware test, because they are "unusual," the State has proffered no credible evidence that would support such a finding. Using the simple *Heller* test, a decision about firearm hardware regulations could end right here.

This is not to say the simple *Heller* test will apply to non-hardware firearm regulations such as gun store zoning laws,[26] or firearm serial number requirements.[27] *Cf. Ass'n of N.J. Rifle & Pistol Clubs v. A.G. N.J.*, 910 F.3d 106, 127 (3rd Cir. 2018) (Bibas, J., dissenting) ("Not every gun law impairs self-defense. Our precedent applies intermediate scrutiny to laws that do not affect weapons' function, like serial-number requirements. But for laws that do impair self-defense, strict scrutiny is apt.").

2. Commonality

Magazines holding more than 10 rounds are used for self-defense by law-abiding citizens. And they are common.[28] Lawful in at least 41 states and under federal law, these magazines number in the millions. Plaintiff's Exh. 1 (James Curcuruto Report), at 3 ("There are at least *one hundred million* magazines of a capacity of more than ten rounds in possession of American citizens, commonly used for various lawful purposes

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[26] *Teixeira,* 873 F.3d at 670.

[27] *United States v. Marzzarella*, 614 F.3d 85, 101 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011) ("[W]e hesitate to say Marzzarella's possession of an unmarked firearm [without a serial number] in his home is unprotected conduct. But because § 922(k) would pass muster under either intermediate scrutiny or strict scrutiny, Marzzarella's conviction must stand.").

[28] Some magazine sizes are, no doubt, more common than others. While neither party spends time on it, it is safe to say that 100-round and 75-round magazines are not nearly as common as 30-round rifle magazines and 15-round pistol magazines.

including, but not limited to, recreational and competitive target shooting, home defense, collecting and hunting.") (emphasis added); Plaintiff's Exh. 2 (Stephen Helsley Report), at 5 ("The result of almost four decades of sales to law enforcement and civilian clients is millions of semiautomatic pistols with a magazine capacity of more than ten rounds and likely *multiple millions* of magazines for them.") (emphasis added); *Fyock,* 779 F.3d at 998 ("[W]e cannot say that the district court abused its discretion by inferring from the evidence of record that, at a minimum, magazines are in common use. And, to the extent that certain firearms capable of use with a magazine — e.g., certain semi-automatic handguns — are commonly possessed by law-abiding citizens for lawful purposes, our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable."); *Ass'n of N.J. Rifle & Pistol Clubs,* 910 F.3d at 116 ("The record shows that *millions of magazines* are owned, often come factory standard with semi-automatic weapons, are typically possessed by law-abiding citizens for hunting, pest-control, and occasionally self-defense and there is no longstanding history of LCM regulation.") (citations omitted) (emphasis added); *NYSR&PA v. Cuomo*, 804 F.3d 242, 255-57 (2nd Cir. 2015) (noting large-capacity magazines are "in common use" as the term is used in *Heller* based on even the most conservative estimates); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("We think it clear enough in the record that . . . magazines holding more than ten rounds are indeed in 'common use'. . . . As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000. *There may well be some capacity above which magazines are not in common use but*, if so, the record is devoid of evidence as to what that capacity is; in any event, *that capacity surely is not ten*.") (emphasis added); *cf. Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (noting imprecision of the term "common" by applying the Supreme Court test in *Caetano* of 200,000 stun guns owned and legal in 45 states being "common"); *Wiese v. Becerra*, 306 F. Supp. 3d 1190, 1195

n.3 (E.D. Cal. 2018) ("[T]he court holds that California's large capacity magazine ban burdens conduct protected by the Second Amendment because these magazines are commonly possessed by law-abiding citizens for lawful purposes . . . ."); *Ass'n of N.J. Rifle & Pistol Clubs v. Grewal*, 2018 U.S. Dist. LEXIS 167698, at *32-33 (D. N.J. Sep. 28, 2018) ("[T]he Court is satisfied, based on the record presented, that magazines holding more than ten rounds are in common use and, therefore, entitled to Second Amendment protection."); *compare United States v. McCartney*, 357 F. App'x 73, 76 (9th Cir. 2009) ("Silencers, grenades, and directional mines are not 'typically possessed by law-abiding citizens for lawful purposes,' and are less common than either short-barreled shotguns or machine guns. The weapons involved in this case therefore are not protected by the Second Amendment.") (citations omitted).

The Attorney General argues, even so, that it is permissible to ban common handguns with common magazines holding more than 10 rounds because the possession of firearms with *other* smaller magazines is allowed.[29] But *Heller* says, "[i]t is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." 554 U.S. at 629; *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito, J., and Thomas, J., concurring) ("But the right to bear other weapons is 'no answer' to a ban on the possession of protected arms."). *Heller* says, "It is enough . . . that the American people have considered the handgun to be the quintessential self-defense weapon." *Id.* California's complete prohibition of common handguns with commonly-sized magazines able to hold more

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[29] California is now in the unique position of being able to say that many firearms are currently sold with magazines holding 10 rounds or less because it banned selling firearms with larger magazines 20 years ago; since that time the marketplace has adapted. Neither party addresses the larger question of whether a state may infringe on a constitutional right, and then argue that alternatives exist because the marketplace has adjusted over time. The question is not answered here.

than 10 rounds is invalid.[30] "A weapon may not be banned unless it is *both* dangerous *and* unusual." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1031 (2016) (Alito, J., and Thomas, J., concurring) (emphasis in original).

To the extent that magazines holding more than 10 rounds may be less common within California, it would likely be the result of the State long criminalizing the buying, selling, importing, and manufacturing of these magazines. Saying that large capacity magazines are uncommon because they have been banned for so long is something of a tautology. It cannot be used as constitutional support for further banning. *See Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 409 (7th Cir. 2015) ("Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly used. A law's existence can't be the source of its own constitutional validity.").

Since the 1980s, one of the most popular handguns in America has been the Glock 17 pistol, which is designed for, and typically sold with, a 17-round magazine. One of the most popular youth rifles in America over the last 60 years has been the Ruger 10/22. Six million have been sold since it was introduced in 1964. It is designed to use magazines manufactured by Ruger in a variety of sizes: 10-round, 15-round, and 25-round. Over the last three decades, one of the most popular civilian rifles in America is the much maligned AR-15 style rifle. Manufactured with various characteristics by numerous companies, it is estimated that more than five million have been bought since the 1980s. These rifles are typically sold with 30-round magazines. These commonly-

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[30] "There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629.

owned guns with commonly-sized magazines are protected by the Second Amendment and *Heller*'s simple test for responsible, law-abiding citizens to use for target practice, hunting, and defense.

3. Lethality is Not the Test

Some say that the use of "large capacity magazines" increases the lethality of gun violence. They point out that when large capacity magazines are used in mass shootings, more shots are fired, more people are wounded, and more wounds are fatal than in other mass shootings.[31] That may or may not be true. Certainly, a gun when abused is lethal. A gun holding more than 10 rounds is lethal to more people than a gun holding less than 10 rounds, but it is not constitutionally decisive. Nothing in the Second Amendment makes lethality a factor to consider because a gun's lethality, or dangerousness, is assumed. The Second Amendment does not exist to protect the right to bear down pillows and foam baseball bats. It protects guns and every gun is dangerous. "If *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1031 (2016) (Alito, J. and Thomas, J., concurring); *Maloney v. Singas*, 2018 U.S. Dist. LEXIS 211546 *19 (E.D.N.Y. Dec. 14, 2018) (striking down 1974 ban on possession of dangerous nunchaku in violation of the Second Amendment and quoting *Caetano*). "[T]he relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Id.*

California law presently permits the lethality of a gun with a 10-round magazine. In other words, a gun with an 11-round magazine or a 15-round magazine is apparently too lethal to be possessed by a law-abiding citizen. A gun with a 10-round magazine is not. Missing is a constitutionally-permissible standard for testing acceptable lethality. The Attorney General offers no objective standard. *Heller* sets out a commonality

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[31] *See generally*, DX-3 Revised Expert Report of Dr. Louis Klarevas.

standard that can be applied to magazine hardware: is the size of the magazine "common"? If so, the size is constitutionally-protected.

If the "too lethal" standard is followed to its logical conclusion, the government may dictate in the future that a magazine of eight rounds is too lethal. And after that, it may dictate that a gun with a magazine holding three rounds is too lethal since a person usually fires only 2.2 rounds in self-defense. This stepped-down approach may continue[32] until the time comes when government declares that only guns holding a single round are sufficiently lacking in lethality that they are both "safe" to possess *and* powerful enough to provide a means of self-defense.[33]

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[32] Constitutional rights would become meaningless if states could obliterate them by enacting incrementally more burdensome restrictions while arguing that a reviewing court must evaluate each restriction by itself when determining its constitutionality. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 953 (9th Cir. 2016) (Callahan, J., dissenting).

[33] Artificial limits will eventually lead to disarmament. It is an insidious plan to disarm the populace and it depends on for its success a subjective standard of "necessary" lethality. It does not take the imagination of Jules Verne to predict that if all magazines over 10 rounds are somehow eliminated from California, the next mass shooting will be accomplished with guns holding only 10 rounds. To reduce gun violence, the state will close the newly christened 10-round "loophole" and use it as a justification to outlaw magazines holding more than 7 rounds. The legislature will determine that no more than 7 rounds are "necessary." Then the next mass shooting will be accomplished with guns holding 7 rounds. To reduce the new gun violence, the state will close the 7-round "loophole" and outlaw magazines holding more than 5 rounds determining that no more than 5 rounds is "necessary." And so it goes, until the only lawful firearm law-abiding responsible citizens will be permitted to possess is a single-shot handgun. Or perhaps, one gun, but no ammunition. Or ammunition issued only to persons deemed trustworthy.

This is not baseless speculation or scare-mongering. One need only look at New Jersey and New York. In the 1990's, New Jersey instituted a prohibition on what it would label "large capacity ammunition magazines." These were defined as magazines able to hold more than 15 rounds. Slipping down the slope, last year, New Jersey lowered the capacity of permissible magazines from 15 to 10 rounds. *See* Firearms, 2018 N.J. Sess. Law Serv. Ch. 39 (ASSEMBLY No. 2761) (WEST). At least one bill had been offered that would have reduced the allowed capacity to only five rounds. (*See* New Jersey Senate Bill No. 798, introduced in the 2018 Session, amending N.J.S. 2C:39-1(y)

As a matter of public policy, people can debate who makes the decision about how much lethality a citizen can possess. As policy, the State says a law-abiding, responsible person needs only 10 rounds. If you judge for yourself that you will need more than 10 rounds, however, the crime is yours. And, too bad if you complied with the law but needed 11 rounds to stop an attacker, or a group of attackers, or a mob. Now, you are dead. By living a law-abiding, responsible life, you have just become another "gun violence" statistic. And your statistic may be used to justify further restrictions on gun lethality for future law-abiding citizens.

4. Conclusion Under Heller Test

In *Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess a "lawful firearm in the home operable for the purpose of immediate self-defense.'" *Pena v. Lindley*, 898 F.3d 969, 975 (9th Cir. 2018), *pet'n for cert. filed* (1/3/19) (quoting *Heller*, 554 U.S. at 635). "The Court also wrote that the amendment 'surely elevates above all other interests the right of *law-abiding*, *responsible*

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definition of large capacity magazine from 15 to 5 rounds.) Less than a decade ago, sliding down the slope ahead of its neighbor, New York prohibited magazines able to hold more than 10 rounds *and* prohibited citizens from filling those magazines with more than 7 rounds (*i.e.,* a seven round load limit). "New York determined that only magazines containing seven rounds or fewer can be safely possessed." *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 264 (2nd Cir. 2015) (declaring unconstitutional New York seven round load limit).

Other than the commonality test, there should be no restriction on how many rounds in a magazine a citizen may use for self-defense or to bring for use in a militia. Otherwise, what the Founders sought to avoid will be accomplished in our lifetime. "The problem the Founders sought to avoid was a disarmed populace. At the margins, the Second Amendment can be read various ways in various cases, but there is no way this Amendment, designed to assure an armed population, can be read to allow government to disarm the population." *Silveira v. Lockyer*, 328 F.3d 567, 588 (9th Cir. 2003) (Kozinski, J., dissenting).

citizens to use arms in defense of hearth and home.'" *United States v. Torres*, 911 F.3d 1253, 1259 (9th Cir. 2019) (quoting *Heller*, 554 U.S. at 635).

California's law prohibiting acquisition and possession of magazines able to hold any more than 10 rounds places a severe restriction on the core right of self-defense of the home such that it amounts to a destruction of the right and is unconstitutional under any level of scrutiny. *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 961 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2799 (2015) ("A law that imposes such a severe restriction on the core right of self-defense that it 'amounts to a destruction of the Second Amendment right,' is unconstitutional under any level of scrutiny.") (citing *Heller*, 554 U.S. at 629); *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 945 (2018) ("A law that imposes such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny.") (citation omitted). The criminalization of a citizen's acquisition and possession of magazines able to hold more than 10 rounds hits directly at the core of the right of self-defense in the home. It is a complete ban on acquisition. It is a complete ban on possession. It is a ban applicable to all ordinary law-abiding responsible citizens. It is a ban on possession that applies inside a home and outside a home.[34]

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[34] "Possession" is a broad concept in California criminal law. Possession may be actual or constructive. "[Possession] does not require that a person be armed or that the weapon [ ] be within a person's immediate vicinity." *In re Charles G.*, 14 Cal. App. 5th 945, 951 (Ct. App. 2017), *as modified* (Aug. 31, 2017) (citations omitted). "Rather, it encompasses having a weapon in one's bedroom or home or another location under his or her control, even when the individual is not present at the location." *Id.*; *People v. Douglas*, No. B281579, 2019 WL 621284, at *4 (Cal. Ct. App. Feb. 13, 2019) (male defendant had constructive possession of box of ammunition in bedroom dresser drawer where men's clothing was found mixed with girlfriend's clothing); *People v. Osuna*, 225 Cal. App. 4th 1020, 1029 (2014), *disapproved on other grounds, People v. Frierson*, 4 Cal. 5th 225 (2017) ("A defendant possesses a weapon when it is under his dominion and control. A defendant has actual possession when the weapon is in his immediate

California's ban goes farther than did the District of Columbia's ordinance in *Heller*. With respect to long guns, in the *Heller* case, while a citizen was required to keep his or her self-defense firearm inoperable, he or she could still possess the rifle – yet it failed the simple *Heller* test. *Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799 (2015) (Thomas, J., dissenting from denial of certiorari) ("Less than a decade ago, we explained that an ordinance requiring firearms in the home to be kept inoperable, without an exception for self-defense, conflicted with the Second Amendment because it "made it impossible for citizens to use their firearms for the core lawful purpose of self-defense.") (citing *Heller*). A government regulation that allowed a person to acquire an arm and allowed a person to possess the arm still failed the *Heller* test. California's law, which neither allows acquisition, nor possession, nor operation, in the home for self-defense must also fail the *Heller* test.

The California ban leaves no room for an ordinary citizen to acquire, keep, or bear a larger capacity magazine for self-defense. There are no permitted alternative means to possess a firearm holding more than 10 rounds for self-defense, regardless of the threat. *Compare, e.g., Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016) (18 U.S.C. § 922(d)(3) prohibition on selling firearm to marijuana card holder was not severe burden on core Second Amendment rights because the bar applied to "only the sale of firearms to Wilson — not her *possession* of firearms") (emphasis added); *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (describing *Heller II*'s reasoning that the District of Columbia's gun registration requirements were not a severe burden because they do not prevent an individual from *possessing* a firearm in his home or elsewhere). Simply put,

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possession or control. He has constructive possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others."). The concept of constructive possession of a firearm can also be found in federal criminal law. *See e.g., United States v. Schrag*, 542 F. App'x 583, 584 (9th Cir. 2013) (defendant had constructive possession of wife's pistol found on top of refrigerator in the home in violation of probation condition).

§ 32310's ban on common magazines able to hold more than 10 rounds flunks the simple *Heller* test. Because it flunks the *Heller* test, there is no need to apply some lower level of scrutiny. *Cf. Wrenn v. D.C.*, 864 F.3d 650, 666 (D.C. Cir. 2017) ("*Heller I*'s categorical approach is appropriate here even though our previous cases have always applied tiers of scrutiny to gun laws.").

In addition to their usefulness for self-defense in the home, of course, larger capacity magazines are also lawful arms from home with which militia members would report for duty. Consequently, possession of a larger capacity magazine is also categorically protected by the Second Amendment under *United States v. Miller,* 307 U.S. 174 (1939). "*Miller* and *Heller* recognized that militia members traditionally reported for duty carrying 'the sorts of lawful weapons that they possessed at home,' and that the Second Amendment therefore protects such weapons as a class, regardless of any particular weapon's suitability for military use.'" *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1032 (2016) (Alito, J., concurring) (citations omitted).

B. The Historical Prohibitions Exception

The State argues that the *Heller* test is a non-issue because the *Heller* test does not apply to historically-accepted prohibitions on Second Amendment rights. Large capacity magazines have been the subject of regulations since the 1930s according to the State. Based on this view of history, the State asserts that magazine capacity regulations are historically accepted laws beyond the reach of the Second Amendment. If its historical research is accurate, the State would have an argument. "At the first step of the inquiry, 'determining the scope of the Second Amendment's protections requires a textual and historical analysis of the amendment.'" *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017), *cert. denied sub nom. Teixeira v. Alameda Cty., Cal.*, 138 S. Ct. 1988 (2018) (citation omitted). Courts ask whether the challenged law "falls within a 'well-defined and narrowly limited' category of prohibitions 'that have been historically unprotected,'" *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 960 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 2799 (2015) (citations omitted). "To determine whether a challenged

law falls outside the historical scope of the Second Amendment, we ask whether the regulation is one of the 'presumptively lawful regulatory measures' identified in *Heller*, or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Id.* (citations omitted).

History shows, however, restrictions on the possession of firearm magazines of any size have no historical pedigree. To begin with the regulation at issue, Cal. Penal Code § 32310, applies to detachable magazines. The detachable magazine was invented in the late 19th Century. "In 1879, Remington introduced the first 'modern' detachable rifle magazine. In the 1890s, semiautomatic pistols with detachable magazines followed. During WWI, detachable magazines with capacities of 25 to 32-rounds were introduced." Plaintiff's Exh. 2 (Stephen Helsley Report), at 4.

The oldest statute limiting the permissible size of a detachable firearm magazine, on the other hand, is quite young. In 1990, New Jersey introduced the first ban on detachable magazines, banning magazines holding more than 15 rounds. N.J.S. 2C:39 (1990). Eight other states eventually followed. The federal government first regulated detachable magazines in 1994. The federal statute addressed magazines holding more than 10 rounds but lapsed in 2004 and has not been replaced.

To sum up, then, while detachable firearm magazines have been common for a century, government regulation of the size of a magazine is a recent phenomenon and still unregulated in four-fifths of the states. The record is empty of the persuasive historical evidence needed to place a magazine ban outside the ambit of the Second Amendment. Thus, it can be seen that California's prohibition on detachable ammunition magazines larger than 10 rounds is a type of prohibition that has not been historically accommodated by the Second Amendment.

Faced with a dearth of magazine capacity restrictions older than 1990, the Attorney General pivots and tries a different route. He argues that the historical prohibition question is not one of detachable magazine size, but instead is a question of firearm "firing-

capacity." With this change of terms and shift of direction, the Attorney General contends that firearm firing-capacity restrictions have been subject to longstanding regulation dating back to the 1920s. Yet, even his new focus falters under a close look at the historical record.

First, firearms with a firing-capacity of more than 10 rounds existed long before the 1920s. Plaintiff's Exh. 2 (Stephen Helsley Report), at 4 ("Firearms with a capacity exceeding10-rounds date to the 'dawn of firearms.' In the late-l5th Century, Leonardo Da Vinci designed a 33-shot weapon. In the late 17th Century, Michele Lorenzoni designed a practical repeating flintlock rifle . . . . Perhaps the most famous rifle in American history is the one used by Lewis and Clark on their 'Corps of Discovery" expedition between 1803 and 1806—the magazine for which held twenty-two .46 caliber balls. Rifles with fixed magazines holding 15-rounds were widely used in the American Civil War. During that same period, revolvers with a capacity of 20-rounds were available but enjoyed limited popularity because they were so ungainly."). Yet, despite the existence of arms with large firing-capacity during the time of the adoption of the Second Amendment, more than a century passed before a firing-capacity law was passed.

It is interesting to note that during the Nation's founding era, states enacted regulations for the formation and maintenance of citizen militias. Three such statutes are described in *United States v. Miller*, 307 U.S. 174 (1939). Rather than restricting firing capacity, they required firing capacity. These statutes required citizens to equip themselves with arms and a minimum quantity of ammunition for those arms. None placed an upper limit of 10-rounds, as § 32310 does. Far from it. Each imposed a floor of at least 20-rounds. *Id.* at 180-83 (Massachusetts law of 1649 required carrying "twenty bullets," while New York 1786 law required "a Box therein to contain no less than Twenty-four Cartridges," and Virginia law of 1785 required a cartridge box and "four pounds of lead, including twenty blind cartridges"). In 1776, Paul Revere's Minutemen (a special group of the Massachusetts militia) were required to have ready 30 bullets and gunpowder. These early American citizen militia laws suggest that, contrary to the idea of a firing-capacity

upper limit on the number of rounds a citizen was permitted to keep with one's arms, there was an obligation that citizens would have at least 20 rounds available for immediate use. Simply put, there were no upper limits; there were floors and the floors were well above 10 rounds.

The Attorney General makes no mention of the founding-era militia firing-capacity minimum requirements. Instead he focuses on a handful of Thompson machine gun-era statutes. In 1927, Michigan passed a restriction on firearms with a firing-capacity over 16 rounds. Rhode Island restricted arms with a firing-capacity over 12 rounds. Ohio began licensing firearms with a firing-capacity over 18 rounds in 1933. All were repealed. The District of Columbia first restricted firearms with a firing-capacity of 12 or more rounds in 1932. None of these laws set the limit as low as ten.

The Attorney General names five additional states that enacted firing-capacity restrictions in the 1930s with capacity limits less than 10 rounds. But he is not entirely accurate. His first example is not an example, at all. For his first example, he says that, "[i]n 1933, South Dakota banned any 'weapon from which more than *five shots* or bullets may be rapidly or automatically, or semi-automatically discharged from a magazine [by a single function of the firing device].'" Def's Oppo. (4/9/18) at 4 (emphasis in original). Actually, this was not a ban. This was South Dakota's definition of a machine gun. S.D. Ch. 206 (S.B. 165) *Enacting Uniform Machine Gun Act*, § 1 (1933), Exh. A to Def.'s Request for Judicial Notice (filed 4/9/18) ("'Machine Gun' applies to and includes a weapon of any description by whatever name known, loaded or unloaded, from which more than five shots or bullets may be rapidly, or automatically, or semi-automatically discharged from a magazine, by a single function of the firing device."). In fact, the statute did not ban machine guns. The statute did not criminalize mere possession (except by a felon or by an unnaturalized foreign-born person). Unlike Cal. Penal Code § 32310, the South Dakota statute criminalized possession or use of a machine gun only "for offensive or aggressive purpose," (Ch. 206 § 3), and added a harsh penalty for use during a crime of violence. Ch. 206 § 2. Specifically excepted from the regulation was possession of a

machine gun for defensive purposes. Ch. 206 § 6(3) ("Nothing contained in this act shall prohibit or interfere with the possession of a machine gun . . . for a purpose manifestly not aggressive or offensive."). The 1933 South Dakota statute protected a law-abiding citizen's right to possess a machine gun with a firing-capacity over five rounds for self-defense and defense of home and family and any other purpose not manifestly aggressive or offensive. California's § 32310, in contrast, criminalizes for all reasons possession of a magazine holding more than 10 rounds. So much for the first example.

The Attorney General's second example of a longstanding firing-capacity prohibition is a Virginia ban enacted in 1934. However, like the first South Dakota example, the second example is not an example, at all. The Attorney General describes the law as a ban on firearms that discharge seven rounds rapidly. It is not ban. It also defines "machine gun."[35] It criminalizes the offensive/aggressive possession of a machine gun[36] and it imposes a death penalty for possessing/using a machine gun in the perpetration of a crime of violence.[37] However, most importantly, like the 1933 South Dakota statute, the 1934 Virginia statute protected a law-abiding citizen's right to possess a machine gun for self-defense and defense of home and family and any other purpose not manifestly

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[35] "'Machine gun' applies to and includes a weapon . . . from which more than seven shots or bullets may be rapidly, or automatically, or semi-automatically discharged from a magazine, by a single function of the firing device, and also applies to and includes weapons . . . from which more than sixteen shots or bullets may be rapidly, automatically, semi-automatically or otherwise discharged without reloading." Virginia Ch. 96, § 1(a) (1934), Ex. B to Def.'s Request for Judicial Notice (filed 4/9/18).

[36] "Unlawful possession or use of a machine gun for offensive or aggressive purpose is hereby declared to be a crime. . . ." Virginia Ch. 96, § 3 (1934), Ex. B to Def.'s Request for Judicial Notice (filed 4/9/18).

[37] "Possession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence is hereby declared to be a crime punishable by death or by imprisonment . . . ." Virginia Ch. 96, § 2 (1934), Ex. B to Def.'s Request for Judicial Notice (filed 4/9/18).

aggressive or offensive.[38] As discussed above, California's § 32310, in criminalizing possession of magazines holding more than 10 rounds, makes no distinction between use for an offensive purpose and use for a defensive purpose. So much for the second example.

The Attorney General's final three examples are state machine gun bans. The first cited is an Illinois enactment (in 1931) described as, "An Act to Regulate the Sale, Possession and Transportation of Machine Guns." Ex. C to Def.'s Request for Judicial Notice (filed 4/9/18). Louisiana enacted (in 1932) Act No. 80, the second cited, which likewise was passed "to regulate the sale, possession and transportation of machine guns." Ex. D to Def.'s Request for Judicial Notice (filed 4/9/18). The third cited example is like the first two. It is an Act passed by the South Carolina legislature in 1934 titled, An Act Regulating the Use and Possession of Machine Guns. Ex. E to Def.'s Request for Judicial Notice (filed 4/9/18). These three statutes are examples of machine gun bans that are prohibited because of their ability to continuously fire rounds with a single trigger pull, rather than their overall firing-capacity.

Machine guns[39] have been subject to federal regulation since the enactment of the National Firearms Act of 1934. *See Sonzinsky v. United States*, 300 U.S. 506, 511-12

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[38] "Nothing contained in this act shall prohibit or interfere with . . . The possession of a machine gun . . . for a purpose manifestly not aggressive or offensive." Virginia Ch. 96, §6(Third) (1934), Ex. B to Def.'s Request for Judicial Notice (filed 4/9/18).

[39] The Supreme Court knows the difference between the fully automatic military machine gun M-16 rifle, and the civilian semi-automatic AR-15 rifle. *See Staples v. United States*, 511 U.S. 600, 603 (1994) ("The AR-15 is the civilian version of the military's M-16 rifle, and is, unless modified, a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire."); *but see Kolbe v. Hogan*, 849 F.3d 114, 136 (4th Cir. 2017) ("Although an M16 rifle is capable of fully automatic fire and the AR-15 is limited to semiautomatic fire, their rates of fire (two seconds and as little as five seconds, respectively, to empty a thirty-round magazine) are nearly identical. Moreover, in many situations, the semiautomatic fire of an AR-15 is more accurate and lethal than the automatic fire of an M16. Otherwise, the AR-15 shares the military features — the very

(1937) ("The term 'firearm' is defined by § 1 [of the National Firearms Act] as meaning a shotgun or a rifle having a barrel less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive, if capable of being concealed on the person, *or a machine gun*. . . .") (emphasis added). Since machine guns are not typically possessed by law-abiding citizens for lawful purposes, they are not protected by the Second Amendment. *Heller*, 554 U.S. at 625; *Friedman v. City of Highland Park*, 784 F.3d 406, 408 (7th Cir. 2015) (*Heller* observed, "state militias, when called to service, often had asked members to come armed with the sort of weapons that were 'in common use at the time' and it thought these kinds of weapons (which have changed over the years) are protected by the Second Amendment in private hands, while military-grade weapons (the sort that would be in a militia's armory), such as machine guns, and weapons especially attractive to criminals, such as short-barreled shotguns, are not."). Because machine guns, like grenades and shoulder-fired rocket launchers, are not commonly possessed by law-abiding citizens for lawful purposes, they are specific arms that fall outside the safe harbor of the Second Amendment. Consequently, these machine gun statutes cited by the Attorney General do not stand as proof of long-standing prohibitions on the firing-capacity of Second Amendment-protected commonly possessed firearms.

To reiterate, the earliest regulation of a detachable ammunition magazine limit occurred in New Jersey in 1990 and limited the number of rounds to a maximum of 15. The earliest federal restriction on a detachable magazine was enacted in 1994, limited the maximum number of rounds to 10, and expired after ten years. As to the Attorney General's alternate argument about "firing-capacity," the earliest firing-capacity regulation appeared in the 1920s and 1930s in three states (Michigan, Rhode Island, and Ohio) and affected firearms able to fire more than 18, 16, or 12 rounds, depending on the state. No

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qualities and characteristics — that make the M16 a devastating and lethal weapon of war.").

regulation on "firing-capacity" set a limit as low as California's 10-round limit. Each was repealed and thus not longstanding. Two more states (North Dakota and Virginia) defined a machine gun. Interestingly, while penalizing machine gun use when purposed for aggressive or offensive use, both states also protected citizen machine gun possession for defensive use or any other use that was not manifestly aggressive or offensive. Three other states (Illinois, Louisiana, and South Carolina) simply defined and banned machine guns altogether. The District of Columbia appears to be the single jurisdiction where a firing-capacity restriction has been in place since the 1930s. Even there, the limit was not as low as California's limit of 10 rounds.

On this record, there is no longstanding historically-accepted prohibition on detachable magazines of any capacity. *Ass'n of N.J. Rifle & Pistol Clubs v. A.G. N.J.*, 910 F.3d 106, n.18 (3rd Cir. 2018) ("LCMs were not regulated until the 1920s, but most of those laws were invalidated by the 1970s. The federal LCM ban was enacted in 1994, but it expired in 2004. While a lack of longstanding history does not mean that the regulation is unlawful, the lack of such a history deprives us of reliance on *Heller*'s presumption that such regulation is lawful.") (citations omitted); *Heller v. D.C.*, 670 F.3d 1244, 1260 (D.C. Cir. 2011) ("We are not aware of evidence that prohibitions on either semi-automatic rifles or large-capacity magazines are longstanding and thereby deserving of a presumption of validity.").

Moreover, there is no longstanding historically-accepted prohibition on firearms according to their "firing-capacity" except in the case of automatic fire machine guns. On the other hand, there is an indication that founding-era state regulations, rather than restricting ammunition possession, mandated citizens of militia age to equip themselves with ready ammunition in amounts of at least 20 rounds.

C. The Heightened Scrutiny Test

1. Failing the Simple Heller Test

Section 32310 runs afoul of the Second Amendment under the simple *Heller* test. It fails the *Heller* test because it criminalizes a law-abiding citizen's possession of a

common magazine that is used for lawful purposes and prohibits its use for self-defense in and around the home. It strikes at the core of the inalienable Constitutional right and disenfranchises approximately 39 million state residents.

This conclusion should not be considered groundbreaking. It is simply a straightforward application of constitutional law to an experimental governmental overreach that goes far beyond traditional boundaries of reasonable gun regulation. That § 32310 was not challenged earlier is due in part to the Ninth Circuit's pre-*Heller* understanding that an individual lacked Second Amendment rights and thus lacked Article III standing to challenge gun regulations. *See Silveira v. Lockyer,* 312 F.3d 1052, 1066–67 (9th Cir. 2002), *as amended* (Jan. 27, 2003) ("Because we hold that the Second Amendment does not provide an individual right to own or possess guns or other firearms, plaintiffs lack standing to challenge the [California Assault Weapons Control Act]."). That was the state of the law when California passed its first iteration of § 32310[40] with a grandfather clause now called a "loophole" permitting citizens to keep and possess magazines able to hold more than 10 rounds.[41] The lack of an earlier constitutional challenge was also due to the recency of the Supreme Court's decision that the Second Amendment applies to the states. *See McDonald v. City of Chicago*, 561 U.S. 742, 784-85 (2010) ("Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective . . . that guarantee is fully binding on the States . . . ."). In other words, when California began experimenting with its larger-capacity magazine ban less than twenty years ago, it appeared that the Second Amendment conferred no rights on individual citizens and did not apply to the states, and that an individual lacked Article III standing in federal court to challenge the ban. During that time, California passed more and more gun regulations, constricting individual rights further and further, to the point where state undercover agents surveil California residents attending out-of-state

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[40] Former § 12020 was re-codified at § 32310, effective Jan. 1, 2012.
[41] The grandfather clause is now described by the State as a loophole.

gun shows, obtain search warrants for their homes, and prosecute those returning with a few thirty-round magazines. *See e.g., People v. Verches*, 2017 WL 1880968 (Cal. Ct. App. May 9, 2017) (California resident convicted of marijuana possession and importing three large-capacity magazines purchased at a Reno, Nevada gun show and placed on three years formal felony probation).

The magazine ban arbitrarily selects 10 rounds as the magazine capacity over which possession is unlawful. The magazine ban admits no exceptions, beyond those for law enforcement officers, armored truck guards, and movie stars. The ban does not distinguish between citizens living in densely populated areas and sparsely populated areas of the state. The ban does not distinguish between citizens who have already experienced home invasion robberies, are currently threatened by neighborhood burglary activity, and those who have never been threatened. The ban does not distinguish between the senior citizen, the single parent, and the troubled and angry high school drop-out. Most importantly, the ban does not distinguish between possession in and around one's home, and possession in or around outdoor concerts, baseball fields, or school yards. The ban on magazines that hold more than 10 rounds amounts to a prohibition on an entire class of "arms" that is overwhelmingly chosen by American citizens for the lawful purpose of self-defense. The prohibition extends to one's home where the need to defend self, family, and property is most acute. And like the ban struck down in *Helle*r, the California ban threatens citizens, not with a minor fine, but a substantial criminal penalty. *Heller*, 554 U.S. at 634 ("The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place. See D. C. Code § 7-2507.06."). "If a law burdens conduct protected by the Second Amendment . . . *Heller* mandates some level of heightened scrutiny." *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017), *cert. denied,* 138 S. Ct. 982 (2018). Under any level of heightened scrutiny, the ban fails constitutional muster.

2. The Tripartite Binary Test with a Sliding Scale and a Reasonable Fit

Beyond the simple *Heller* test, for a Second Amendment question, the Ninth Circuit uses what might be called a tripartite binary test with a sliding scale and a reasonable fit. In other words, there are three different two-part tests, after which the sliding scale of scrutiny is selected. Most courts select intermediate scrutiny in the end. Intermediate scrutiny, in turn, looks for a "reasonable fit." It is an overly complex analysis that people of ordinary intelligence cannot be expected to understand. It is the wrong standard. But the statute fails anyhow.

a. burden & scrutiny

First, a court must evaluate the burden and then apply the correct scrutiny. *United States v. Torres*, 911 F.3d 1253, 1258 (9th Cir. 2019); *Jackson*, 746 F.3d at 960 (citing *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013)). "This two-step inquiry: '(1) asks whether the challenged law burdens conduct protected by the Second Amendment; and (2) if so, directs courts to apply an appropriate level of scrutiny.'" *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017), *cert. denied,* 138 S. Ct. 982 (2018) (quoting *Jackson*, 746 F.3d at 960). As discussed, § 32310 burdens conduct protected by the Second Amendment.

b. presumptively lawful or historical regulation

In determining whether a given regulation falls within the scope of the Second Amendment under the first step of this inquiry, another two-step test is used. "[W]e ask whether the regulation is one of the 'presumptively lawful regulatory measures' identified in *Heller*, or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Id.* (citations omitted). If the regulation is presumptively lawful, the inquiry ends. Likewise, if the regulation is a historically approved prohibition not offensive to the Second Amendment, the inquiry ends.

Section 32310 fails both parts of the test. A complete ban on ammunition magazines of any size is not one of the presumptively lawful regulatory measures

identified in *Heller*. As discussed, neither is there any evidence that magazine capacity restrictions have a historical pedigree.

c. closeness to the core and severity of the burden

If the constitutional inquiry may continue, then the correct level of scrutiny must be selected. For that selection a third two-step evaluation is required. The first step measures how close the statute hits at the core of the Second Amendment right. The second step measures how severe the statute burdens the Second Amendment right. "Because *Heller* did not specify a particular level of scrutiny for all Second Amendment challenges, courts determine the appropriate level by considering '(1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right.'" *Bauer v. Becerra*, 858 F3d 1216, 1222 (9th Cir. 2017), *cert. denied,* 138 S. Ct. 982 (2018) (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). *Fyock v. City of Sunnydale*, 779 F.3d 991, 999 (9th Cir. 2015), recognized that a regulation restricting law-abiding citizens from possessing large-capacity magazines within their homes hits at the core of the Second Amendment. *Fyock* said, "[b]ecause Measure C restricts the ability of law abiding citizens to possess large capacity magazines within their homes for the purpose of self-defense, we agree with the district court that Measure C may implicate the core of the Second Amendment." *Id.; Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1278 (N.D. Cal. 2014), *aff'd sub nom. Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) ("[T]he court concludes that the Sunnyvale law burdens conduct near the core of the Second Amendment right."). "No one doubts that under *Heller I* this core protection covers the right of a law-abiding citizen to keep in the home common firearms for self-defense." *Wrenn v. D.C.*, 864 F.3d 650, 657 (D.C. Cir. 2017).[42]

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[42] And the core may extend beyond the home. "[W]e conclude: the individual right to carry common firearms beyond the home for self-defense—even in densely populated

Heller says the core of the Second Amendment is the right of law-abiding, responsible citizens to use arms in defense of their home. 554 U.S. at 635. Guided by this understanding, for selecting the appropriate level of judicial scrutiny, the Ninth Circuit uses a sliding scale. "[O]ur test for the appropriate level of scrutiny amounts to 'a sliding scale.'" *Silvester*, 843 F.3d at 821. "A law that imposes such a severe restriction on the fundamental right of self-defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny." *Bauer v. Becerra*, 858 F3d 1216, 1222 (9th Cir. 2017), *cert. denied,* 138 S. Ct. 982 (2018) (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). This is the case here.

d. the sliding scale of scrutiny – strict scrutiny

Further down the scale, a law that implicates the core of the Second Amendment right and severely burdens that right warrants *strict scrutiny*. *Pena v. Lindley*, 898 F.3d 969, 977 (9th Cir. 2018) ("We strictly scrutinize a 'law that implicates the core of the Second Amendment right and severely burdens that right.'") (citation omitted). Even if § 32310's complete ban did not amount to a destruction of Second Amendment rights, it would still merit the application of strict scrutiny. A law like § 32310 that prevents a law-abiding citizen from obtaining a firearm with enough rounds to defend self, family, and property in and around the home certainly implicates the core of the Second Amendment. When a person has fired the permitted 10 rounds and the danger persists, a statute limiting magazine size to only 10 rounds severely burdens that core right to self-defense.

A complete ban on a 100-round or 50-round magazine may be a mild burden. An annual limit on the number of larger capacity magazines that a citizen may purchase might place a moderate burden. A serial number requirement for the future manufacturing, importing, or selling of larger capacity magazines would not be a severe

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areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment's protections." *Wrenn v. D.C.*, 864 F.3d 650, 661 (D.C. Cir. 2017).

burden. Requiring a background check for purchasers of larger-capacity magazines may or may not be a severe burden. *See e.g., Heller II,* 670 F.3d at 1258 (reasoning that the District of Columbia's gun registration requirements were not a severe burden because they do not prevent an individual from possessing a firearm in his home).

But California's ban is far-reaching, absolute, and permanent. The ban on acquisition and possession on magazines able to hold more than 10 rounds, together with the substantial criminal penalties threatening a law-abiding, responsible, citizen who desires such magazines to protect hearth and home, imposes a burden on the constitutional right that this Court judges as severe. *Cf. Peruta v. Cty. of San Diego*, 824 F.3d 919, 950 (9th Cir. 2016) (en banc) (Callahan, J., dissenting) (courts should consider Second Amendment challenges to firearm restrictions in context to ensure the restrictions are not "tantamount to complete bans on the Second Amendment right to bear arms outside the home for self-defense"), *cert. denied*, 137 S. Ct. 1995 (2017).

Some have said that the burden is minor because there are other choices. *E.g., Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1278 (N.D. Cal. 2014), *aff'd sub nom. Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) ("Individuals have countless other handgun and magazine options to exercise their Second Amendment rights . . . Accordingly, a prohibition on possession of magazines having a capacity to accept more than ten rounds applies only the most minor burden on the Second Amendment."). But describing as minor, the burden on responsible, law-abiding citizens who may not possess a 15-round magazine for self-defense because there are other arms permitted with 10 or fewer rounds, is like saying that when government closes a Mormon church it is a minor burden because next door there is a Baptist church or a Hindu temple. Indeed, *Heller* itself rejected this mode of reasoning: "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.,* long guns) is allowed." 554 U.S. at 629; *see also Parker v. District of Columbia,* 478 F.3d 370, 400 (D.C. Cir. 2007) ("The District contends that since it only bans one type of firearm, 'residents still have access to hundreds more,' and thus its prohibition

does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as sabers were permitted."), *aff'd sub nom. Heller,* 554 U.S. at 570.

Others have acknowledged that the burden on a citizen may be severe but consider it a worthwhile tradeoff. *San Francisco Veteran Police Officers Ass'n v. City & Cty. of San Francisco*, 18 F. Supp. 3d 997, 1005 (N.D. Cal. 2014) ("Nonetheless, in those rare cases, to deprive the citizen of more than ten shots may lead to his or her own death. Let this point be conceded."). In a peaceful society, a 10-round limit may not be severe. When thousands of people are rioting, as happened in Los Angeles in 1992, or more recently with Antifa members in Berkeley in 2017, a 10-round limit for self-defense is a severe burden. When a group of armed burglars break into a citizen's home at night, and the homeowner in pajamas must choose between using their left hand to grab either a telephone, a flashlight, or an extra 10-round magazine, the burden is severe. When one is far from help in a sparsely populated part of the state, and law enforcement may not be able to respond in a timely manner, the burden of a 10-round limit is severe. When a major earthquake causes power outages, gas and water line ruptures, collapsed bridges and buildings, and chaos, the burden of a 10-round magazine limit is severe. When food distribution channels are disrupted and sustenance becomes scarce while criminals run rampant, the burden of a 10-round magazine limit is severe. Surely, the rights protected by the Second Amendment are not to be trimmed away as unnecessary because today's litigation happens during the best of times. It may be the best of times in Sunnyvale; it may be the worst of times in Bombay Beach or Potrero. California's ban covers the entire state at all times.

While *Chovan* instructs that the level of scrutiny depends on closeness to the core and "the severity of the law's burden," it offers no guide to evaluating the burden. *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). In *Jackson*, the burden of a regulation was not severe. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 964

(9th Cir. 2014) ("Section 4512 does not impose the sort of severe burden that requires the higher level of scrutiny."). In *Jackson*, the court found that the ordinance did not substantially prevent law-abiding citizens from using firearms to defend themselves in the home because it only regulated storage when not carrying them. *Id.* Consequently, the court found that the requirement did not impose a severe burden because, "San Franciscans are not required to secure their handguns while carrying them on their person." *Id.* In contrast, § 32310 imposes a complete ban on the acquisition and possession of a magazine able to hold more than 10 rounds. It is a crime whether a person is keeping and carrying the magazine for self-defense in the home, while using it for target practice to maintain proficiency, while brandishing it to protect property from rioters, or when needing it for hunting dangerous animals. Strict scrutiny applies.[43]

The State argues that the Ninth Circuit has already determined as a matter of law that intermediate scrutiny applies to large-capacity magazine bans, citing *Fyock*, 779 F.3d at 999. Def.'s Oppo. to Plaintiff's Mot. for Summary Judgment, at 14. Not so. In the context of an appeal from a preliminary injunction ruling, *Fyock* decided whether the

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[43] Strict scrutiny is also called for in the context of an armed defense of hearth and home because a person's privacy interests are protected by the Constitution. The protection for one's privacy may be near its zenith in the home. Other privacy invasions in the home are subjected to strict scrutiny. "This enactment involves . . . a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to 'strict scrutiny.'" *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (applying strict scrutiny to a Connecticut contraceptive criminal statute). "The Fourth and Fifth Amendments were described . . . as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred . . . to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.'" *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (applying strict scrutiny to contraceptive law) (citations omitted). Just as we would not allow "the police to search the sacred precincts of the marital bedrooms for telltale signs of the use of contraceptives," (*id.*), we should not allow the police to search the private environs of law-abiding, responsible citizens for self-defense magazines that the State deems too large and dangerous.

district court had abused its discretion. The district court made a preliminary judgment that the burden was not severe from Sunnyvale's large capacity magazine ban. The district court used its discretion and declined to issue a preliminary injunction. *Fyock* decided that the district court had not abused its discretion. Specifically, the *Fyock* court concluded, "For these reasons, there was no abuse of discretion in finding that the impact Measure C may have on the core Second Amendment right is not severe and that intermediate scrutiny is warranted." *Id.* *Fyock*'s conclusion about the severity of Sunnyvale's large-capacity magazine ban was fact-bound. It did not announce as a matter of law that magazine capacity bans of any kind never impose a severe burden on Second Amendment rights. Nor could it. Even the least searching form of heightened scrutiny (*i.e.,* intermediate scrutiny) requires the government to establish a reasonable fit.

That the assessment of Sunnyvale's ban was fact-bound is illustrated by its immediately preceding sentence, where the *Fyock* court noted the Sunnyvale ban permitted possession of large-capacity magazines for use with some firearms. *Id.* ("To the extent that a lawfully possessed firearm could not function with a lower capacity magazine, Measure C contains an exception that would allow possession of a large-capacity magazine for use with that firearm.") (citing Sunnyvale, Cal. Muni. Code § 9.44.050(c)(8)). It also imposed a minor penalty and did not make an exception for movie props or retired police officers. As this Court reads it, *Fyock* did not decide that all magazine bans merit only intermediate scrutiny.

Section 32310's wide ranging ban with its acquisition-possession-criminalization components exacts a severe price on a citizen's freedom to defend the home. Consequently, § 32310 merits strict judicial scrutiny. "A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016) (citing *Chovan*, 735 F.3d at 1138); *compare United States v. Torres*, 911 F.3d 1253, 1262 (9th Cir. 2019) (finding federal ban on firearm possession by an alien while in the United States is not a severe burden because alien may remove himself from the ban by acquiring lawful immigration status);

and Mahoney v. Sessions, 871 F.3d 873, 879 (9th Cir. 2017), *cert. denied sub nom. Mahoney v. City of Seattle, Wash.*, 138 S. Ct. 1441 (2018) (holding that a city policy regulating the use of department-issued firearms while police officers are *on duty* is not a severe Second Amendment burden).

Strict scrutiny requires the Government to prove that the restriction on a constitutional right furthers a compelling interest and is narrowly tailored to achieve that interest. *Mance v. Sessions*, 896 F.3d 699, 705-06 (5th Cir. 2018), *pet'n for cert. filed* (Nov. 19, 2018) (applying strict scrutiny in Second Amendment case). California's ban on magazines able to hold more than 10 rounds fails strict scrutiny. The State has not offered a compelling interest for the ban, arguing that intermediate scrutiny should be the test. If preventing mass shootings is the state's interest, it is not at all clear that it would be compelling since such events are exceedingly rare. If the state's interest is in forcing a "pause" during a mass shooting for a shooter to be apprehended, those events are even more rare.

More certain, however, is that the ban is not narrowly tailored or the least restrictive means of achieving these interests. Instead it is a categorical ban on acquisition and possession for all law-abiding, responsible, ordinary citizens. Categorical bans are the opposite of narrowly tailored bans. The § 32310 ban on possession applies to areas in the state where large groups gather and where no one gathers. It applies to young persons with long rap sheets and to old persons with no rap sheets. It applies to draft dodgers and to those who have served our country. It applies to those who would have 1000 large magazines for a conflagration and to those who would have one large magazine for self-defense. It applies to perpetrators as well as it applies to those who have been victims. It applies to magazines holding large, powerful rounds and to magazines holding small, more-impotent rounds. It applies to rifles with bump-stocks and pistols for purses.

Section 32310 is not narrowly tailored; it is not tailored at all. It fits like a burlap bag. It is a single-dimensional, prophylactic, blanket thrown across the population of the

state. As such, § 32310 fails strict scrutiny and violates the Second Amendment. *Cf. Mance v. Sessions*, 896 F.3d 390, 405 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing *en banc*) ("The ban on interstate handgun sales fails strict scrutiny. After all, a categorical ban is precisely the opposite of a narrowly tailored regulation. It applies to all citizens, not just dangerous persons. Instead of requiring citizens to comply with state law, it forbids them from even trying. Nor has the Government demonstrated why it needs a categorical ban to ensure compliance with state handgun laws. Put simply, the way to require compliance with state handgun laws is to require compliance with state handgun laws.").

e. intermediate scrutiny

Even under the lowest formulation of heightened scrutiny, intermediate scrutiny, Section § 32310 fails because it is not a reasonable fit. *Cf. Morris v. U.S. Army Corps of Engineers*, 990 F. Supp. 2d 1082, 1087 (D. Idaho 2014) (banning firearm with ammunition in camping tents imposed *severe burden calling for strict scrutiny but unconstitutional even under intermediate scrutiny*). Where a restriction "does not 'severely burden' or even meaningfully impact the core of the Second Amendment right, . . . intermediate scrutiny is . . . appropriate." *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017), *cert. denied,* 138 S. Ct. 982, 200 L. Ed. 2d 249 (2018) (citing *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016) and *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)) (applying intermediate scrutiny to California's $19 DROS fee). The State argues as a foregone conclusion that intermediate scrutiny is the correct point on the sliding scale for a regulation on magazines. According to the State, *Fyock*'s approval of "intermediate scrutiny" is controlling, and other courts have applied intermediate scrutiny to regulations on large capacity magazines. As discussed, *supra*, *Fyock* held that the district court did not abuse its discretion in finding Sunnyvale's magazine capacity restriction did not have a severe impact. 779 F.3d at 999. That approach was consistent with past cases analyzing the appropriate level of scrutiny under the second step of *Heller*, as the Ninth Circuit has typically applied intermediate scrutiny

– especially for non-hardware Second Amendment cases. *See e.g.*, *Silvester*, 843 F.3d at 823 (applying intermediate scrutiny to ten-day waiting period for the purchase of firearms); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014) (applying intermediate scrutiny to mandatory handgun storage procedures in homes and banning the sale of hollow-point ammunition in San Francisco); *Chovan*, 735 F.3d at 1138 (applying intermediate scrutiny to prohibition on domestic violence misdemeanants possessing firearms). But it is the wrong standard to apply here.

i. tailoring required: "a reasonable fit"

To pass intermediate scrutiny, a statute must still be a reasonable fit. "Our intermediate scrutiny test under the Second Amendment requires that (1) the government's stated objective . . . be significant, substantial, or important; and (2) there . . . be a 'reasonable fit' between the challenged regulation and the asserted objective." *Silvester*, 843 F.3d at 821–22 (quoting *Chovan*, 735 F.3d at 1139).

For intermediate scrutiny "the burden of justification is demanding and it rests entirely on the State." *Tyler v. Hillsdale County Sheriff's Dept.*, 837 F. 3d 678, 694 (6th Cir. 2016) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996) (considering the constitutionality of 18 U.S.C. § 922(g)(4)'s permanent gun ban for person previously treated for mental illness).

ii. four important California interests

In this case, the Attorney General identifies four State interests or objectives. Each is important. The State interests are: (1) protecting citizens from gun violence; (2) protecting law enforcement from gun violence; (3) protecting the public safety (which is like protecting citizens and law enforcement from gun violence); and (4) preventing crime. *See* Oppo. at 9; 17-18. The question then becomes, whether § 32310's ban on acquisition and possession of firearm magazines holding more than 10 rounds is a reasonable fit for achieving these important goals. This Court finds on the evidentiary record before it that § 32310—the prohibition on magazines able to hold more than 10

rounds and the acquisition-possession-criminalization components of § 32310—is not a reasonable fit.

The Attorney General says that empirical evidence is not required to shoulder his burden. Oppo. at 19. He says that the required substantial evidence demonstrating a reasonable fit can take other, softer forms such as "history, consensus, and simple common sense," as well as "correlation evidence" and even simply "intuition." Oppo. at 19-20. Intuition? If this variety of softer "evidence" were enough, all firearm restrictions except an outright ban on all firearms would survive review. Yet, as the Second Circuit cautioned, "on intermediate scrutiny review, the state cannot 'get away with shoddy data or reasoning.' To survive intermediate scrutiny, the defendants must show '*reasonable* inferences based on *substantial* evidence' that the statutes are substantially related to the governmental interest." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015), *cert. denied sub nom.*, *Shew v. Malloy*, 136 S. Ct. 2486 (2016) (citations omitted) (emphasis in original) (striking down New York State's 7-round magazine limit). When considering whether to approve a state experiment that has, and will, irrevocably harm law-abiding responsible citizens who want for lawful purposes to have common firearms and common magazines that hold more than 10 rounds, this Court declines to rely on anything beyond hard facts and reasonable inferences drawn from convincing analysis amounting to substantial evidence based on relevant and accurate data sets.

iii. the State's evidence

The State's theoretical and empirical evidence is not persuasive. Why 10 rounds as a limit? The State has no answer. Why is there no thought given to possession in and around a home? It is inconclusive at best. In fact, it is reasonable to infer, based on the State's own evidence, that a right to possess magazines that hold more than 10 rounds may promote self-defense – especially in the home – as well as being ordinarily useful for a citizen's militia use. California must provide more than a rational basis to justify its sweeping ban. *See e.g., Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) ("Illinois

had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban [on carrying guns in public] is justified by an increase in public safety. It has failed to meet this burden.").

Mass shootings are tragic. But they are rare events. And of these rare events, many are committed without large capacity magazines. For example, in the two high school incidents in 2018 one assailant used a shotgun and a .38 revolver (at Santa Fe High School, Santa Fe, Texas) while the other used an AR-15-style rifle but with 10-round magazines (at Stoneman Douglas High School in Parkland, Florida). In the attack at the Capital Gazette newspaper (Annapolis, Maryland), 5 people were killed and 2 injured by an assailant with a shotgun and smoke grenades. The Attorney General has not supplemented the record with a police report of the single mass shooting in California last year (at the Borderline Bar and Grill in Thousand Oaks, California). However, press reports indicate the shooter used a legally purchased pistol with an "extended" magazine.[44] Another report said seven 30-round magazines were found at the scene.[45] Eighteen years of a state ban on acquiring large-capacity magazines did not prevent the assailant from obtaining and using the banned devices. The news pieces do not report witnesses describing a "critical pause" when the shooter re-loaded. And the stories do not say where or how the 30-round magazines were acquired.

The findings from the Mayors Against Illegal Guns survey 2009-2013 (AG Exhibit 17), were addressed in the Order of June 28, 2017. *See also, AG Oppo. To Mot PI*, Gordon Declaration Exh. 59. The observations are still true. "To sum up, of the 92 mass killings occurring across the 50 states between 2013 and 2009, only ten occurred in

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[44] Aarthun, Sarah and Adone, Dakin, *What We Know About the Shooting at Borderline Bar & Grill*, CNN (Nov. 9, 2018) https://www.cnn.com/2018/11/08/us/thousand-oaks-bar-shooting-what-we-know/index.html (last visited Mar. 26, 2019).

[45] *Authorities Describe 'Confusion And Chaos' at Borderline Bar Shooting in California,* NPR (Nov. 28, 2018) https://www.npr.org/2018/11/28/671353612/no-motive-yet-found-for-mass-shooting-at-borderline-bar-and-grill (last visited Mar. 26, 2019).

California. Of those ten, the criminalization and dispossession requirements of § 32310 would have had no effect on eight of the shootings, and only marginal good effects had it been in effect at the time of the remaining two shootings. On this evidence, § 32310 is not a reasonable fit. It hardly fits at all. It appears on this record to be a haphazard solution likely to have no effect on an exceedingly rare problem, while at the same time burdening the Constitutional rights of many other California law-abiding responsible citizen-owners of gun magazines holding more than 10 rounds."

In opposition to the motion for summary judgment, the state attempts to bolster the data from the Mayors' survey with a Mother Jones Magazine 36-year survey of mass shootings from 1982 to 2018. See *Oppo. to MSJ* Exhibit 16.[46] The Mother Jones

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[46] This Court has observed that the quality of the evidence relied on by the State is remarkably thin. The State's reliance and the State's experts' reliance on compilations such as the Mother Jones Magazine survey is an example. The survey is found in the Attorney General's Opposition to Plaintiff's Motion for Summary Judgment at Exhibit 37. It purports to be a survey of mass shootings. It does not indicate how its data is selected, or assembled, or tested. It is unaccompanied by any declaration as to its accuracy. It is probably not peer-reviewed. It has no widely-accepted reputation for objectivity. While it might be something that an expert considers in forming an admissible opinion, the survey by itself would be inadmissible under the normal rules of evidence.

The State says that the survey "has been cited favorably in numerous cases," citing three decisions. *Id*. at n. 13. Of the three cases listed, however, the survey is not mentioned at all in one case, mentioned only as something an expert relied on in the second case, and mentioned only in passing as "exhaustive" but without analysis in the third. On the other hand, after the Attorney General's brief was filed, the Third Circuit noted issues with the Mother Jones Magazine survey, remarking, "Mother Jones has changed it definition of a mass shooting over time, setting a different minimum number of fatalities or shooters, and may have omitted a significant number of mass shooting incidents." *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 113 (3d Cir. 2018); see also *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Grewal*, No. 317CV10507PGSLHG, 2018 WL 4688345, at *5 (D.N.J. Sept. 28, 2018) (state's expert Lucy Allen admitted that the Mother Jones survey omitted 40% of mass shooting cases).

findings are even less convincing than those from the Mayors' survey. Mother Jones Magazine lists 98 mass shooting events in the last 36 years. This is an average of 2.72 events per year in the entire United States. Of the 98 events over the last 36 years, 17 took place in California. This is an average of one event every two years in the most populous state in the nation.

According to data from this 36-year survey of mass shootings, California's prohibition on magazines holding more than 10 rounds would have done nothing to keep a shooter from shooting more than 10 rounds. That is because normally the perpetrator brings multiple weapons.[47] The more weapons, the greater the firepower and the greater

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In another case about prison conditions, a Mother Jones Magazine article was stricken as inadmissible for purposes of summary judgment, which is how such writings would usually be treated. See *Aaron v. Keith*, No. 1:13-CV-02867, 2017 WL 663209, at *2 (W.D. La. Feb. 14, 2017) (striking a Mother Jones article from the record and remarking, "[t]he case law is consistent: newspaper articles are hearsay and do not constitute competent summary judgment evidence.").

[47] For example each of the following incidents involved multiple firearms: (1) Yountville 3/9/18: shotgun and rifle; (2) Rancho Tehema 11/14/17: two illegally modified rifles; (3) San Francisco 6/14/17: two pistols, one with 30-round magazine stolen in Utah (per http://www.foxnews.com/us/2017/06/24/police-ups-shooter-in-san-francisco-armed-with-stolen-guns.html); (4) Fresno 4/18/17: one revolver; (5) San Bernardino 12/2/15: (terrorists) two rifles, two pistols, and a bomb; (6) Santa Barbara 5/23/14: three pistols and two hunting knives; (7) Alturas 2/20/14: two handguns and a butcher knife; (8) Santa Monica 6/7/13: pistol, rifle assembled from parts, bag of magazines, and vest (per http://www.scpr.org/news/2013/06/09/37636/police-look-for-motive-in-santa-monica-shooting-on/); (9) Oakland 4/2/12: one pistol (with four 10-round magazines, per https://www.mercurynews.com/2012/04/04/oakland-university-shooting-one-goh-charged-with-seven-counts-of-murder-may-be-eligible-for-death-penalty/); (10) Seal Beach 10/12/11: two pistols and a revolver; (11) Goleta 1/30/06: one pistol (shooter lived in New Mexico where pistol and 15-round magazine were legally purchased, per https://www.independent.com/news/2013/jan/31/goleta-postal-murders/); (12) Orange 12/18/97: one rifle (actually a rifle, shotgun, and handgun, per LA Times article at http://articles.latimes.com/1997/dec/19/news/mn-172); (13) San Francisco 7/11/93: three pistols; (14) Olivehurst 5/1/92: sawed-off rifle and a shotgun; (15) Stockton 1/17/89: rifle and pistol; (16) Sunnyvale 2/16/88: two pistols, two revolvers, two shotguns, and a rifle; (17) San Ysidro 7/18/84: one pistol, one rifle, and a shotgun.

the potential for casualties. In 14 of the 17 California mass shooting events, multiple weapons were brought. For example, in the 1988 mass shooting event in Sunnyvale, the shooter brought two pistols, two revolvers, two shotguns, and a bolt action rifle (all obtained legally). No large capacity magazines were used. *See* AG Exh.16, at 736[48]; DX-10 at 517 (Appendix B, Case No.91).

California's large capacity magazine prohibition also had no effect on the three single weapon mass shooting events. In the Fresno event in April 2017, a revolver was used. For those unschooled on firearms, a revolver does not use a magazine of any size. In the next mass shooting event in Oakland in April 2012, the shooter used a pistol with four California-legal 10-round magazines. In the third mass shooting event in Goleta in January 2006, the shooter did use a pistol with a 15-round magazine.[49] However, the shooter resided in New Mexico. She purchased the firearm and its 15-round magazine legally in New Mexico. She then traveled into California to Goleta to the postal facility where she had been employed three years prior. By 2006, California already prohibited a person from bringing into the state a large capacity magazine, but it did not prevent the Goleta tragedy from taking place.

In fact, only three of the 17 California mass shooting events reported in the Mother Jones 36-year survey featured a large capacity magazine used by the shooter. One is the Goleta event described above where the magazine was legally purchased in another state and illegally brought into California. The second event is like the Goleta event. In San Francisco June 2017, a perpetrator used two pistols, both stolen. One pistol had a 30-round magazine.[50] This firearm was reported stolen in Utah and must have been illegally

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[48] The Mother Jones survey does not say that large capacity magazines were used.

[49] The Mother Jones survey does not say that large capacity magazines were used, however newspapers reported a 15-round magazine was found. See https://www.independent.com/news/2013/jan/31/goleta-postal-murders/.

[50] See http://www.foxnews.com/us/2017/06/24/police-ups-shooter-in-san-francisco-armed-with-stolen-guns (last visited Mar. 26, 2019).

imported into California.[51] The other pistol had been reported stolen in California, but news reports do not mention a large capacity magazine.[52] It bears noting that California's large capacity magazine prohibition did not prevent these mass shootings.

The third event is the Santa Monica June 2013 event where the shooter was armed with multiple firearms and 40 large-capacity magazines. As the Court pointed out in its earlier order, in the Santa Monica incident, the shooter brought multiple firearms. He used an AR-15, a revolver, and 3 zip guns. He reportedly possessed forty 30-round magazines. He killed five victims. The survey notes that the AR-15 and the illegal magazines may have been illegally imported from outside of California. Receiving and importing magazines holding any more than 10 rounds was already unlawful under California law at the time of the Santa Monica tragedy. In that instance, criminalizing possession of magazines holding any more than 10 rounds likely would not have provided any additional protection from gun violence for citizens or police officers. Nor would it have prevented the crime.

To summarize, the 36-year survey of mass shootings by Mother Jones magazine put forth by the AG as evidence of the State's need for § 32310, undercuts its own argument. The AG's evidence demonstrates that mass shootings in California are rare, and its criminalization of large capacity magazine acquisition and possession has had no effect on reducing the number of shots a perpetrator can fire. The only effect of § 32310 is to make criminals of California's 39 million law-abiding citizens who want to have ready for their self-defense a firearm with more than 10 rounds.

Some would say that this straight up reading and evaluation of the State's main evidence places "too high [an] evidentiary burden for the state.'" *Duncan v. Becerra*, 742 F. App'x 218, 223 (9th Cir. 2018) (dissent). They would say that "the question is not whether the state's evidence satisfies the district court's subjective standard of

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[51] *Id.*
[52] *Id.*

empiricism." *Id.* These voices would not test the state's evidence. They would not require the same rigor a judge usually employs to test the accuracy and persuasiveness of a party's evidence. Once the state offers any evidence, the evidence would simply be accepted and deemed sufficient to prove the reasonableness of the fit of the regulation for state's experimental solution.

For example, according to this view, the Mayors' survey "easily satisfies" the state's evidentiary burden. *Id.* It can be said that the Mother Jones Magazine survey does meet the very low standard of "relevant." But relevant evidence does not mean persuasive, substantial, or admissible evidence. That a survey of news articles collected by a biased interest group shows that out of 98 examples, not a single shooter was limited to 10 shots while § 32310 was in effect (or would have been limited to 10 shots if had § 32310 been in effect), is not substantial or persuasive evidence of § 32310's reasonable fit. Certainly, the evidence need not be perfect or overwhelming. But for a statute that trenches on a constitutional right, the state's explanation for such a law needs to have some enduring substance or gravitas, like the Liberty Bell.

Where did this idea come from, the idea that a court is *required* to fully credit evidence only "reasonably believed to be relevant?" *Fyock*, 779 F.3d at 1000. Or the critique that a court errs by employing a "subjective standard of undefined empirical robustness." *Duncan*, 742 F. App'x at 224 (dissent). *Pena v. Lindley*, 898 F.3d 969 (9th Cir. 2018) (*pet'n for cert. filed*) advances this soft approach. "We do not impose an unnecessarily rigid burden of proof." *Id.* at 979. We allow California to rely on any material reasonably believed to be relevant to substantiate its interests." *Id.* "We are weighing a legislative judgment, not evidence in a criminal trial." *Id.* "We should not conflate legislative findings with 'evidence' in the technical sense." *Id.* But, when did we jettison Senator Kennedy's observation and become deferential, if not submissive, to the State when it comes to protecting constitutional rights?

This is federal court. The Attorney General has submitted two unofficial surveys to prove mass shootings are a problem made worse by firearm magazines holding more

than 10 rounds. Do the surveys pass the Federal Rule of Evidence Rule 403 test for relevance? Yes. Are the surveys admissible under Federal Rule of Evidence Rule 802? No. They are double or triple hearsay. No foundation has been laid. No authentication attempted. Are they reliable? No. Are they anything more than a selected compilation of news articles – articles which are themselves inadmissible? No. Are the compilers likely to be biased? Yes.[53]

Where are the actual police investigation reports? The Attorney General, California's top law enforcement officer, has not submitted a single official police report of a shooting. Instead, the Attorney General relies on news articles and interest group surveys. Federal Constitutional rights are being subjected to litigation by inference about whether a pistol or a rifle in a news story might have had an ammunition magazine that held more than 10 rounds. This is not conflating legislative findings with evidence in the technical sense. This is simply evaluating the empirical robustness of evidence in the same objective way used every day by judges everywhere. Perhaps this is one more

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[53] The organization that published the Mayors' survey changed its name to Everytown for Gun Safety. Everytown for Gun Safety keeps a running tally of school shootings. A Washington Post piece noted that "Everytown has long inflated its total by including incidents of gunfire that are not really school shootings." The Washington Post identified an example of an Everytown shooting incident. There a 31-year old man committed suicide outside an elementary school that had been closed for seven months. "There were no teachers. There were no students." *See* John Woodward Cox and Steven Rich, *No, There Haven't Been 18 School Shootings in 2018 - That Number is Flat Wrong,* Wash. Post (Feb. 15, 2018) https://www.washingtonpost.com/local/no-there-havent-been-18-school-shooting-in-2018-that-number-is-flat-wrong/2018/02/15/65b6cf72-1264-11e8-8ea1-c1d91fcec3fe_story.html?noredirect=on&utm_term=.4100e2398fa0 (last visited Mar. 26, 2019).

The U.S. Department of Education does no better. It reported nearly 240 school-related shootings in 2015-2016. But NPR did an investigation and could confirm only 11 incidents. *See* Kamenetz, Anya, Arnold, Alexis, and Cardinali, Emily, *The School Shootings That Weren't*, NPR Morning Edition (Aug. 27, 2018), https://www.npr.org/sections/ed/2018/08/27/640323347/the-school-shootings-that-werent (last visited mar. 26, 2019).

reason why the Second Amendment has been described as "the Rodney Dangerfield of the Bill of Rights." *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willett, J., dissenting). Obeisance to *Heller* and the Second Amendment is offered and then given *Emeritus* status, all while its strength is being sapped from a lack of exercise.

According to *Pena*, "[w]e do not substitute our own policy judgment for that of the legislature," protests the Attorney General. *Pena*, 898 F.3d at 979. "We owe the legislature's findings deference," says the State. *Id.* This case is not about weak-kneed choice between competing policy judgments. Deference in the sphere of pure political policy is understandable. But that is not this case.

This case is about a muscular constitutional right and whether a state can impinge and imprison its citizens for exercising that right. This case is about whether a state objective is possibly important enough to justify the impingement. The problem with according deference to the state legislature in this kind of a case, as in the *Turner Broadcasting* approach, is that it is exactly the approach promoted by dissenting Justice Breyer and *rejected* by the Supreme Court's majority in *Heller*.[54] Yet, *Turner* deference arguments live on like legal zombies lurching through Second Amendment jurisprudence.

Even with deference, meaningful review is required. "Although we do accord substantial deference to the predictive judgments of the legislature when conducting intermediate scrutiny, the State is not thereby insulated from meaningful judicial review."

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[54] In his dissent, Justice Breyer made the ultimately-rejected deference argument clear: "There is no cause here to depart from the standard set forth in *Turner,* for the District's decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make. In fact, deference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions. Different localities may seek to solve similar problems in different ways, and a 'city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" *District of Columbia v. Heller*, 554 U.S. 570, 704-05 (2008) (Breyer, J., dissenting) (citations omitted).

Heller v. District of Columbia, 670 F.3d 1244, 1259 (D.C. Cir. 2011) (quoting *Turner II*, 520 U.S. at 195 & *Turner I*, 512 U.S. at 666) (internal quotations omitted)). Quite the contrary, a court must determine whether the legislature has "based its conclusions upon substantial evidence." *Turner II*, 520 U.S. at 196. Despite whatever deference is owed, the State still bears the burden "affirmatively [to] establish the reasonable fit we require." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). Simply noting that a study has been offered and experts have opined, is an inadequate application of intermediate scrutiny, even when according deference to the predictive judgment of a legislature. *Turner* itself shows why. There, the Supreme Court extensively analyzed over the course of *twenty pages* the empirical evidence cited by the government, and only then concluded that the government's policy was grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." *See Turner II*, 520 U.S. at 196-224.

There is another problem with according deference in this case. Strictly put, this case in not solely about legislative judgments because § 32310(c) and (d) are the products of a ballot proposition. No federal court has deferred to the terms of a state ballot proposition where the proposition trenches on a federal constitutional right:

> As one court stated, no court has accorded legislative deference to ballot drafters. Legislatures receive deference because they are better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon complex and dynamic issues. Because the referendum process does not invoke the same type of searching fact finding, a referendum's fact finding does not "justify deference."

Vivid Entm't, LLC v. Fielding, 965 F. Supp. 2d 1113, 1127 (C.D. Cal. 2013), *aff'd*, 774 F.3d 566 (9th Cir. 2014) (citations and internal quotations omitted); *see also California Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal.1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999) ("Because the referendum process does not invoke the same type of searching fact finding, a referendum's fact finding does not justify deference."). The initiative process inherently lacks the indicia of careful debate

that would counsel deference. *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995) (process of legislative enactment includes deliberation, compromise and amendment, providing substantial reasons for deference that do not exist with respect to ballot measures); *Yniguez v. Arizonans for Official English,* 69 F.3d 920, 945 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 43 (1997) (deference normally accorded legislative findings does not apply with same force when First Amendment rights are at stake; in addition, because measure was a ballot initiative, it was not subjected to extensive hearings or considered legislative analysis before passage); *Daggett v. Webster*, No. 98-223-B-H, 1999 WL 33117158, at *1 (D. Me. May 18, 1999) (no court has given legislative deference to a ballot proposition).

In this case, as in *Scully*, California argues that *Turner Broadcasting* requires deference be given to the predictive judgments embodied in its statute. The *Scully* court rejected the approach. It reasoned persuasively:

> [T]he deference formulation, however, ignores the context of the quotation which requires federal courts to "accord substantial deference to the predictive judgments of Congress." Thus, the deference recognized in *Turner* is the consequence, at least in part, of the constitutional delegation of legislative power to a coordinate branch of government, a factor not present in the instant case. Of course, this is not to say that the predictive judgments of state legislatures are not entitled to due weight. It would seem odd, however, that this court would be required to give greater deference to the implied predictive judgments of a state's legislation than the state's own courts would. In this regard, California courts accord deference to the predictive judgments of their legislature on a sliding scale, according significant deference to economic judgments, but employing "greater judicial scrutiny" "when an enactment intrudes upon a constitutional right." It is of course true that deference in the federal courts is not simply a function of the separation of powers doctrine. It also rests upon the legislative branch being "better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon . . . complex and dynamic" issues. Once again, given that the statutes at bar are the product of the initiative process, their adoption did not enjoy the fact gathering and evaluation process which in part justifies deference. In any event, the deference federal courts accord legislative predictive judgments "does not mean . . . that they are insulated from meaningful judicial review altogether. On the contrary, we have stressed in First Amendment cases that the deference

> afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'" Thus, courts are obligated to "assure that, in formulating its judgments, Congress has drawn reasonable inferences, based on substantial evidence."

California Prolife Council Political Action Comm, 989 F. Supp. at 1299 (citations omitted). The 2016 amendments to § 32310 were added by ballot measure and are owed no legislative deference by this Court. The remaining part of § 32310 is the product of ordinary legislation. Impinging on a federal constitutional right as it does, it is not insulated from meaningful judicial review.

The legislative deference doctrine fits better where the subject is technical and complicated. One example is the regulation of elections. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402–03 (2000) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments—at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge."). Another is the regulation of public broadcast media. *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 103 (1973) ("That is not to say we 'defer' to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem."). Even in these areas of deference, federal courts do not swallow whole a state's legislative judgment.

> Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the

> burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson v. Celebrezze, 460 U.S. 780, 789–90 (1983). From broadcasting regulation comes another example of deference. Even so, deference there does not mean merely observant acquiescence when First Amendment rights are concerned. "That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether. On the contrary, we have stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'" *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 129 (1989). Threats to Second Amendment rights ought to be treated with at least the same rigor.

The Attorney General argues that the state "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." This notion was first expressed in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). The context was a city zoning choice from a different era about where to permit adult theaters. Wrote the Court, "[i]t is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas." *Id.* "Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited" and "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice," the Court accorded the city authority to experiment. *Id.* That is not comparable to the deadly serious question of whether the state may experiment with a low 10-round limit on the number of shots a person may have in her pistol for protection. In any event, should courts be so deferential when the State chooses to experiment with other constitutionally protected rights?

The notion of permitting a city to experiment with zoning decisions about the unwanted secondary effects of adult commercial enterprises, was repeated in *City of*

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986), and echoed in *Jackson v. City and County of San Francisco*, 746 F.3d 953, 969 (9th Cir. 2014) (approving a city ban on sales of hollow point ammunition). *Jackson* was a Second Amendment case that reasoned that a city prohibition affected "only the sale of hollow-point ammunition within San Francisco, not the use or possession of such bullets" and concluded, "[s]uch a sales prohibition burdens the core right of keeping firearms for self-defense only indirectly, because Jackson is not precluded from using the hollow-point bullets in her home if she purchases such ammunition outside of San Francisco's jurisdiction." The *Jackson* hollow-point ordinance is far different than California's § 32310. Under § 32310, no person may use a magazine holding more than 10-rounds for self-defense in her home even if she purchases it outside of the state. Instead, she will become a criminal subject to arrest, prosecution, conviction, and incarceration. This kind of government experimentation, the Second Amendment flatly prohibits.

No case has held that intermediate scrutiny would permit a state to impinge even slightly on the Second Amendment right by employing a known failed experiment. Congress tried for a decade the nationwide experiment of prohibiting large capacity magazines. It failed. California has continued the failed experiment for another decade and now suggests that it may continue to do so *ad infinitum* without demonstrating success. That makes no sense.

iv. the important interests of the State

The state has important interests. Public safety. Preventing gun violence. Keeping our police safe. At this level of generality, these interests can justify any law and virtually any restriction. Imagine the crimes that could be solved without the Fourth Amendment. The state could search for evidence of a crime anywhere on a whim. Without the First Amendment, the state could better police the internet. The state could protect its citizens from child pornography, sex trafficking, and radical terrorists. The state could limit internet use by its law-abiding citizens to, say, 10 hours a day or 10 websites a day. Perhaps it could put an end to Facebook cyberbullying.

The Attorney General articulates four important objectives to justify this new statutory bludgeon. They all swing at reducing "gun violence." The bludgeon swings to knock large capacity magazines out of the hands of criminals. If the bludgeon does not work, then the criminals still clinging to their large capacity magazines will be thrown in jail while the magazines are destroyed as a public nuisance. The problem is the bludgeon indiscriminately hammers all that is in its path. Here, it also hammers magazines out of the hands of long time law-abiding citizens. It hammers the 15–round magazine as well as the 100–round drum. And it throws the law-abiding, self-defending citizen who continues to possess a magazine able to hold more than 10 rounds into the same jail cell as the criminal. Gun violence to carry out crime is horrendous and should be condemned by all and punished harshly. Defensive gun violence may be the only way a law-abiding citizen can avoid becoming a victim. The right to keep and bear arms is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 783 (2010).

v. an ungainly "fit"

"[T]he next question in our intermediate scrutiny analysis is whether the law is 'narrowly tailored to further that substantial government interest.' . . . As the Supreme Court succinctly noted in a commercial speech case, narrow tailoring requires 'a fit between the legislature's ends and the means chosen to accomplish those ends.'" *Minority Television Project, Inc. v. F.C.C.*, 736 F.3d 1192, 1204 (9th Cir. 2013) (*quoting Bd. of Tr. of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989)).

The "fit" of § 32310 is, at best, ungainly and very loose. That is all that it takes to conclude that the statute is unconstitutional. The fit is like that of a father's long raincoat on a little girl for Halloween. The problem of mass shootings is very small. The state's "solution" is a triple extra-large and its untailored drape covers all the law-abiding and responsible of its 39 million citizens. Some of the exceptions make the "fit" even worse.

For example, § 32310 makes an exception for retired peace officers, but not for CCW holders or honorably discharged members of the armed forces. There is no evidence that a retired peace officer has better firearms training.[55] And in any event, for whatever training they receive, does it matter that they are trained to use a 10-round magazine, a 15-round magazine, a 30-round magazine, and if so, what is the difference? The State does not provide any insight. Another example is the exception for movie props. Why in the interest of public safety does the movie industry need to use a genuine large capacity magazine for a prop? Is it too far-fetched to require the Hollywood creators of Mickey Mouse, Jaws, and Star Wars, to use a non-working magazine in place of a genuine large capacity magazine? Most importantly by far, however, is that the cloak of the law needs at least some arm holes to fit. It has none because it ignores the fact that magazines holding more than 10 rounds are commonly possessed by law-abiding, responsible citizens, and it affords no room for these citizens to defend their homes against attack.

A reasonable fit to protect citizens and law enforcement from gun violence and crime, in a state with numerous military bases and service men and service women, would surely permit the honorably discharged member of the U.S. Armed Forces who has lawfully maintained a magazine holding more than 10 rounds for more than twenty years to continue to keep and use his or her magazine. These citizens are perhaps the best among us. They have volunteered to serve and have served and sacrificed to protect our country. They have been specially trained to expertly use firearms in a conflict. They have proven their good citizenship by years of lawfully keeping firearms as civilians.

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[55] A similar exception for retired police officers permitting possession and use of otherwise banned assault weapons in California, was declared unconstitutional in *Silveira v. Lockyer*, 312 F.3d 1052, 1091 (9th Cir. 2002) ("We thus can discern no legitimate state interest in permitting retired peace officers to possess and use for their personal pleasure military-style weapons. Rather, the retired officer's exception arbitrarily and unreasonably affords a privilege to one group of individuals that is denied to others, including plaintiffs.").

What possibly better citizen candidates to protect the public against violent gun-toting criminals.

Similarly, a reasonable fit would surely make an exception for a Department of Justice-vetted, privately-trained, citizen to whom the local sheriff has granted a permit to carry a concealed weapon, and who owns a weapon with a magazine holding more than 10 rounds. California's statute does not except such proven, law-abiding, trustworthy, gun-owning individuals. Quite the opposite. Under the statute, all these individuals will be subject to criminal prosecution, should they not dispossess themselves of magazines holding more than 10 rounds.

Ten years of a federal ban on large-capacity magazines did not stop mass shootings nationally. Twenty years of a California ban on large capacity magazines have not stopped mass shootings in California. Section 32310 is a failed policy experiment that has not achieved its goal. But it has daily trenched on the federal Constitutional right of self-defense for millions of its citizens. On the full record presented by the Attorney General, and evidence upon which there is no genuine issue, whatever the fit might be, it is not a reasonable fit.

vi. irony

Perhaps the irony of § 32310 escapes notice. The reason for the adoption of the Second Amendment was to protect the citizens of the new nation from the power of an oppressive state. The anti-federalists were worried about the risk of oppression by a standing army. The colonies had witnessed the standing army of England marching through Lexington to Concord, Massachusetts, on a mission to seize the arms and gunpowder of the militia and the Minutemen—an attack that ignited the Revolutionary war. With Colonists still hurting from the wounds of war, the Second Amendment guaranteed the rights of new American citizens to protect themselves from oppressors foreign and domestic. So, now it is ironic that the State whittles away at the right of its citizens to defend themselves from the possible oppression of their State.

vii. turning the Constitution upside down

In the year 2000, California started its "experiment" in banning magazines holding more than 10-rounds. The statute included a grandfather clause permitting lawful owners of larger magazines to keep them. *See Senate Committee Rpt (Perata) SB 23 (Mar. 1999)*, ("The purpose of this bill is to make all but the possession of 'large-capacity magazines' a crime punishable as an alternative misdemeanor/felony ('wobbler')"; "The bill would make it a crime to do anything with detachable large capacity magazines after January 1, 2000 – except possess and personally use them – punishable as a misdemeanor/felony."; "One could still possess those magazines after January 1, 2000.").[56] Relying at least in part on the State's representation, law-abiding citizens did not object. Time passed. Now, these still law-abiding owners of larger magazines are told that the grandfather clause is a dangerous "loophole" that needs closing. Section 2.12 of Proposition 63 declared, "Today, California law prohibits the manufacture, importation and sale of military-style, large capacity ammunition magazines, but does not prohibit the general public from possessing them. *We should close that loophole.* No one except trained law enforcement should be able to possess these dangerous ammunition magazines." (Emphasis added.) Plaintiffs who have kept their own larger capacity magazines since 1999, and now face criminal sanctions for continuing to possess them, no doubt feel they have been misled or tricked by their lawmakers.

The Attorney General explains that the grandfathering provision made the prior version of § 32310 very difficult to enforce. Because large capacity magazines lack identifying marks, law enforcement officers are not able to tell the difference between grandfathered magazines and more recently smuggled, or manufactured, illegal

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[56] http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml (last visited March 12, 2019).

magazines.[57] Consequently, explains the Attorney General, "the possession loophole in Section 32310 undermined existing LCM restrictions." Def.'s Oppo. to Ps' MSJ, at 7. In an analogous First Amendment case, the Supreme Court called this approach turning the Constitution upside down. The Court explained:

> We confronted a similar issue in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002), in which the Government argued that virtual images of child pornography were difficult to distinguish from real images. The Government's solution was "to prohibit both kinds of images." We rejected the argument that "protected speech may be banned as a means to ban unprotected speech," concluding that it "turns the First Amendment upside down." As we explained: "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."

Federal Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 474–75 (2007) (finding issues advocacy may not be suppressed even though it is sometimes difficult to distinguish it from advocacy for the election or defeat of a candidate which may be regulated). The analog is that the State may not now ban lawfully-kept large capacity magazines owned since 1999 as a means to ban large capacity magazines unlawfully manufactured or imported after January 1, 2000. Lawful arms do not become unprotected merely because they resemble unlawful arms. "The Government's proposed prophylaxis – to protect against the violations of the few, we must burden the constitutional rights of the many – turns the Second Amendment on its head. Our Founders crafted a Constitution to promote the liberty of the individual, not the convenience of the Government." *Mance v. Sessions*, 896 F.3d 390, 405 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing en banc), *pet'n for cert. filed* (Nov. 21, 2018).

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[57] California could have addressed this concern by requiring a serial number on manufactured or imported large capacity magazines, as did the federal law. *See e.g.,* 27 C.F.R. § 478.92(c)(1) ("Each person who manufactures or imports any large capacity ammunition feeding device manufactured after September 13, 1994, shall legibly identify each such device with a serial number.").

viii. other arguments

(1). uniquely dangerous?

The State argues that magazines able to hold more than 10 rounds are uniquely dangerous because they enable a shooter to fire more rounds in a given period, resulting in more shots fired, more victims wounded, more wounds per victim, and more fatalities. Actually, many larger capacity magazines are not uniquely dangerous because they are not much larger. For example, a 12 or 15-round magazine is commonly owned and only slightly larger than the permitted 10-round magazines and enables a shooter to fire slightly more rounds, resulting only sometimes in slightly more rounds fired, or slightly more victims wounded, or slightly more wounds per victim, or slightly more fatalities. Conversely, a 12 or 15-round magazine may be the slight, but saving, difference needed for an overwhelmed homeowner trying to protect herself from a group of attacking invaders. The State may be correct that a 100-round magazine is uniquely dangerous.

The State relies on expert witness, Professor Louis Klarevas. Professor Klarevas says that banning large capacity magazines will reduce violence and force shooters to take a critical pause. *See* DX-3. However, in a piece by Professor Klarevas dated 2011, he offers that the Tucson shooting would have likely still happened with a ban on high capacity magazines. He wrote, "But, even if . . . the federal government were to ban extended clips, the sad fact is that the Tucson shooting likely still would have happened . . . . Moreover, even if Loughner showed up with a six-bullet revolver as opposed to a 30-round Glock, he likely still would have shot people. What's more, a person set on inflicting mass casualties will get around any clip prohibitions by having additional clips on his person (as Loughner did anyway) or by carrying more than one fully loaded weapon."[58]

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[58] Klarevas, Louis, *Closing the Gap*, The New Republic (Jan. 13, 2011), https://newrepublic.com/article/81410/us-gun-law-reform-tucson (las visited May 1, 2018).

(2.) Kolbe v. Hogan

The State rests much of its argument on the decision in *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017) (en banc), *cert. denied,* 138 S. Ct. 469 (2017). The State cites *Kolbe's* observation that large capacity magazines enable a shooter to hit "multiple human targets very rapidly" and "contribute to the unique function of any assault weapon to deliver extraordinary firepower." Considering this, *Kolbe* found that assault weapons and large capacity magazines are military weapons, and that military weapons are not protected by the Second Amendment. It is interesting to note, that the Maryland statute at issue in that case did not ban the possession of a large capacity magazine. *Id.* at 123 ("The [Firearm Safety Act] does not ban the possession of a large-capacity magazine.").

Kolbe concluded that large capacity magazines were beyond the protection of the Second Amendment. *Id.* at 137. The court reached that conclusion based on the thought that such magazines are "most useful" in military service. *Id*. That large capacity magazines are useful in military service, there is no doubt. But the fact that they may be useful, or even "most useful," for military purposes does not nullify their usefulness for law-abiding responsible citizens. It is the fact that they are commonly-possessed by these citizens for lawful purposes that places them directly beneath the umbrella of the Second Amendment. *Kolbe*'s decision that large capacity magazines are outside the ambit of the Second Amendment is an outlier and unpersuasive. Beyond this, this Court is unpersuaded by *Kolbe*'s interpretation of *Miller* finding that weapons most useful for military service are not protected. The dissenting *Kolbe* judges persuasively pointed out that the approach turns Supreme Court precedent upside down. *Id.* at 156-57 (Traxler, Niemeyer, Shedd, and Agee, Js., dissenting) ("Under [that] analysis, a settler's musket, the only weapon he would likely own and bring to militia service, would be most useful in military service—undoubtedly a weapon of war—and therefore not protected by the Second Amendment. This analysis turns *Heller* on its head.").

(3.) Dr. Christopher S. Koper

The State relies on an expert, Dr. Christopher S. Koper.[59] Dr. Koper, in turn, relies in part on an analysis performed by a graduate student. DX-4 at 131. The graduate student, in turn, relies on a collection of data by Mother Jones Magazine from 1982 through 2012. *Id.* The resulting master's thesis is unpublished and unavailable. *Id*. at n.12. Dr. Koper also relies on studies in localities outside of California from the 1990s for which he notes that the "findings may not generalize well to other locations and the current timeframe." *Id*. at n. 14. He describes some of this evidence as "tentative." *Id.* at 133. Dr. Koper concedes that he knows of no studies on the effects on gun violence of California's ban on assault weapons in 1989 and the ban on larger magazines in 2000. *Id.* at n. 15. He notes that "it is difficult to assess trends in LCM use because of limited information." *Id.* at 137. Specifically, Dr. Koper notes the paucity of solid data on the

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[59] The Attorney General relies on expert reports of Christopher S. Koper, Lucy Allen, John J. Donohue, Louis Klarevas, and Daniel W. Webster. Each of the reports lacks an authenticating declaration. Under Rule 56(c)(4), "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Each of these expert reports fail to comply in several respects. First, the reports are not signed under penalty of perjury. Second, no person certifies that the statements are true and correct. Third, none of the reports are accompanied by any separate sworn declaration, an alternative mechanism that courts have found to satisfy Rule 56(c)'s functional concerns. *See, e.g., Am. Federation of Musicians of United States and Canada v. Paramount Pictures Corp.*, 2017 WL 4290742 (9th Cir. Sep. 10, 2018) (finding an unsworn expert report accompanied by the expert's sworn declaration satisfied the functional concerns behind Rule 56(c)(4)).

The Court has reviewed other courts' decisions on similar facts and concludes that these unsworn expert reports do not qualify for an exception, particularly because of those courts that accepted unsworn expert reports the reports otherwise satisfied Rule 56(c)'s requirements. For example, in *Single Chip Systems Corp. v. Intermec IP Corp.*, 2006 WL 4660129 (S.D. Cal. Nov. 6, 2006), the district court admitted unsworn expert reports where the reports stated in their introductions "that the contents were made on personal knowledge, that the facts would be admissible in evidence, and that the affiants [we]re competent to testify to the information contained herein." *Id.* at *6.

use of large capacity magazines. He explains, "[a]ssessing trends in LCM use is much more difficult because there was, and is, no national data source on crimes with LCMs, and few local jurisdictions maintain this sort of information." *Id.* at 139. He notes, "there is little evidence on how state LCM bans affect the availability and use of LCMs over time." *Id.* at n. 29. He states, "[p]erhaps most importantly, to the best of my knowledge, there have not been any studies examining the effects of LCM laws that ban LCMs without grandfathering, as done by the new California statute. Hence, these studies have limited value in assessing the potential effectiveness of California's new law." *Id.* Finally, Dr. Koper acknowledges that while he does have an opinion, it is *not* based on a study of § 32310. He explains, "I have not undertaken any study or analysis of this law." *Id.* at 146.

(4.) Daniel W. Webster

The State also relies on the expert report of Daniel W. Webster, a professor of health policy and management. *See* DX-18 at 775. Professor Webster also has an opinion, but foundational data is vaporous. For example, Webster notes that, "[u]nfortunately, data to more definitively determine the connections between ammunition capacity and gun violence outcomes—the number of shots fired, the rate of fire, the number of victims, the number of wounds per victims, lethality of woundings—have not been collected in any population." *Id.* at 780-81. For his own analysis, Webster relies, in part, on Dr. Koper's re-analysis, of his graduate student's analysis, of Mother Jones Magazine's collection of shooting incidents. *Id*. at 780 ("Similarly, Professor Christopher Koper's re-analysis of his student's data from Mother Jones magazine's study of public mass murders with firearm. . . ."). Webster also acknowledges the paucity of data-based analysis regarding mass shootings. He admits, "[a]lthough no formal, sophisticated analyses of the data on mass shootings in public places by lone shooters for the period 1982-2012 collected by Mother Jones magazine has been performed to my knowledge, a temporal pattern can be discerned that is consistent with a hypothesized protective effect of the federal assault weapon and LCM ban and a harmful

effect of the expiration of that ban." *Id.* at 787-88. He also says, "[t]o date, there are no studies that have examined separately the effects of an assault weapons ban, on the one hand, and a LCM ban, on the other hand . . . ." *Id.* at 790. Webster opines that a magazine limit lower than 10 rounds could be justified. *Id.* at 791.

(5.) John J. Donohue

The State also relies on the expert report of John J. Donohue, a professor of law at Stanford Law School. *See* DX-2. According to his report in this case, he also prepared an expert report in the *Fyock* case. *Id.* at ¶ 6. Some of his observations should be discounted. Professor Donohue reports that national surveys "consistently find a persistent decline in household gun ownership," describing a 2013 report from the Pew Research Center. *Id.* at ¶ 14 and n.5. He describes this as reliable social science data. *Id.* at ¶ 15. The Court reviewed the Pew Research piece he cited. The first sentence notes the absence of definitive data, cautioning that, "[t]here is no definitive data source from the government or elsewhere" on gun ownership rates.[60] It says that surveys provide conflicting results. In the paragraph directly following the portion quoted in Professor Donohue's expert report, the Pew Research report describes a Gallup Organization survey. That survey concludes not that there has been a persistent decline, but rather that the gun ownership rate of 43% is "the same as it was 40 years earlier."[61]

Professor Donohue also opines that private individuals, unlike police officers, "only need to scare off criminals (or hold them off until the police arrive)." *Id.* at ¶ 21. This is obviously a generalization. The generalization would not have been true for Susan Gonzalez or the mother of twins whose assailants were not scared off despite each victim emptying her gun. *See* n.2 & 4, *supra*. Instead of "holding them off till the police

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[60] Pew Research Center, *Why Own a Gun? Protection is Now Top Reason, Section 3: Gun Ownership trends and Demographics* (Mar. 12, 2013) http://www.people-press.org/2013/03/12/section-3-gun-ownership-trends-and-demographics (last visited Apr. 30, 2018), at 1.

[61] *Id*. at 2.

arrived," the only assailants remaining at the scene when the police arrived in any of the three incidents described above was a fatally-wounded assailant. Professor Donohue again generalizes in his conclusion opining that a 10-round magazine "is sufficient" and higher capacity magazines are "not required" for defending one's home. Dx-2 at 9. Again, generalizations like these are no more than generalizations, and personal, not expert, opinions. Yet, for such an important context as the defense of self and loved ones, generalizations are dangerous. Relying on generalizations like these may lead to a thousand underreported tragedies for law-abiding citizen victims who were supposed to need only 2.2 rounds and no more than 10 rounds to scare off criminal assailants.

(6.) Carlisle Moody

The State provides the deposition testimony of Carlisle Moody, a professor, who opines that, "[f]irearms fitted with large capacity magazines can be used to cause death and injury in public shooting incidents, and can also result in more rounds fired and more homicides in general than similar firearms with smaller magazines," but concedes this conclusion is simply theoretical. DX-7 at 472-73 (Q. And what is the basis for that statement? How did you arrive at that conclusion? A. Just theoretically."). Furthermore, the same can be said of a 10-round magazine versus a 7-round magazine, or a 7-round magazine versus a 2-round Derringer.

(7.) Sandy Hook commission

The State relies on the report of a commission reviewing the Sandy Hook shooting. DX-28. However, it misquotes the commission's findings, saying "[d]ue to their lethality, LCMs 'pose a distinct threat to safety in private settings as well as places of assembly." Def. Opposition to Plaintiff's Motion for Summary Judgment at 11. What was reported is, "[t]he Commission found that certain types of ammunition and magazines that were readily available at the time it issued its Interim Report posed a distinct threat to safety in private settings as well as in places of assembly." *Id.* at 1097. The commission goes on to recommend a ban on armor-piercing and incendiary bullets (a good idea) as well as large-capacity magazines (without specifying size). *Id.*

(8.) large magazines not characteristically used for home?

The State asserts that large capacity magazines are not "weapons of the type characteristically used to protect the home," citing *Hightower v. City of Boston*, 693 F.3d 61, 71 (1st Cir. 2012). *Hightower* was unconcerned with magazine size. Instead, it was a regulatory challenge brought by a former law enforcement officer whose permit to carry a revolver was revoked. Any inference to be drawn about magazines from the one-half sentence quoted is dicta. There is no convincing evidence that magazines holding more than 10 rounds are not characteristically used to protect one's home. The large numbers in circulation and human nature suggests otherwise. "The right to bear arms enables one to possess not only the means to defend oneself but also the self-confidence—and psychic comfort—that comes with knowing one could protect oneself if necessary." *Grace v. District of Columbia*, 187 F.Supp.3d 124, 150 (D.D.C. 2016).

(9.) large magazines cause collateral damage?

The State argues that where a larger capacity magazine-equipped firearm is used in lawful self-defense, the magazines can cause collateral damage and injury when civilians fire more rounds than necessary, thereby endangering themselves and bystanders. Yet, one of the State's experts, Lucy P. Allen, opines that defenders average only 2.3 shots per defensive incident and that no one has shot more than 10 rounds in defense.[62] This implies that on average, a magazine able to hold more than 10 rounds in the hands of a citizen firing in self-defense, will not cause any additional collateral damage and will not increase any danger to themselves or bystanders. State expert John J. Donahue goes farther and opines that private individuals only need to "brandish" a gun to scare off criminals. So, the notion that a stray round may penetrate a wall does not translate into

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[62] Gary Kleck testified that no one has researched the question of whether defensive gun use requires more than 10 rounds. Nevertheless, violent crimes where victims face multiple offenders are commonplace and it requires more than one round to shoot one attacker. DX-8 at 490.

any greater risk of bystander injury when a large capacity magazine is used by a defender since it will likely be used only for brandishing or for the average 2.3 shots. Even safer may be a large capacity magazine on an AR-15 type of rifle as it is likely to be more persuasive when brandished at criminal assailants than would a five-shot revolver. It is worth noting that in evaluating the strength of the government's fear of bystander injury, the State has not identified one incident where a bystander was hurt from a citizen's defensive gun use, much less a defensive use of a gun with a high capacity magazine. The worrisome scenario is improbable and hypothetical.

(10.) mass shooters prefer large magazines?

The State argues that mass shooters often use large capacity magazines precisely because they inflict maximum damage on as many people as possible. Perhaps this is true. There are no police investigative reports provided recounting a mass shooter's answer to the question: why select a large-capacity magazine. More importantly, many mass shooters do not select large capacity magazines, at all. The two incidents involving mass shootings at public high schools in 2018 are good examples. Instead of a pistol or rifle and large-capacity magazines, a shotgun and a revolver were the firearms selected by the mass shooter during the 2018 incident at Santa Fe High School in Galveston, Texas.[63] Also rejecting large capacity magazines last year, the shooter in the Parkland, Florida, high school mass shooting carried 150 rounds in 10-round magazines.[64]

Further undercutting the government's fear is the opinion of expert Gary Kleck, who says that mass shooters who do choose a high capacity magazine are mistaken in

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[63] https://www.usatoday.com/story/news/2018/05/19/texas-school-shooting-timeline-how-30-minute-attack-unfolded/625913002/ (last visited Mar. 13, 2019).

[64] McCardle, Mairead, *Report: Parkland Shooter Did Not Use High-Capacity Magazines*, National Review (Mar. 1, 2018) https://www.nationalreview.com/2018/03/report-parkland-shooter-did-not-use-high-capacity-magazines/ (last visited Mar. 22, 2019) ("The 19-year-old school shooter who killed 17 in Florida on Valentine's Day had 150 rounds of ammunition in 10-round magazines. Larger ones would not fit in his bag, Florida state senator Lauren Book revealed.").

thinking it will enable them to cause more harm. "Right. They can do everything that that mass shooter might want to do if they had 10-round magazines rather than 30-round magazines. There's a difference between hypothetical potential and the reality of mass shootings . . ." DX-8 at 492.

(11.) disproportionately used against police?

The State argues that large-capacity magazines are disproportionately used against police, citing an undated, unsigned, document created by an organization named the Violence Policy Center (DX-20 at 799-807). Def. Opposition to Plaintiff's Motion for Summary Judgment, at 18. The document says nothing about violence against police. Elsewhere, the State itself notes that between 2009 and 2013, large-capacity magazine firearms constituted less than half of the guns used in murders against police (41%). See DX-4 at 143. In the FBI's 2016 report on law enforcement officers killed and assaulted, the average number of rounds fired by a criminal at a police officer was 9.1. Since 2007, the average number of rounds fired has never exceeded 10, and for seven of the years the average was under 7.[65] In other words, regardless of the magazine size used by a criminal shooting at a police officer, the average number of rounds fired is 10 or less, suggesting that criminalizing possession of a magazine holding more than 10 will have no effect (on average).

The statistical average of 9.1 rounds fired is consistent with a declaration of Phan Ngo, Director of the Sunnyvale Department of Public Safety. In his declaration, Ngo states that as a Deputy Chief at the San Jose Police Department he oversaw a 2016 shooting of a police officer. He stated that "the suspect fired 9 rounds at the officers,

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[65] FBI 2016 Law Enforcement Officers Killed & Assaulted, at Table 18, https://ucr.fbi.gov/leoka/2016/tables/table-18.xls (last visited Mar. 19, 2019). Under Rules of Evidence 201(b) courts may take judicial notice of some types of public records, including reports of administrative bodies.

with an AR pistol type, semi-automatic weapon."[66] Ngo goes on to state that "also recovered at the scene was a Mag Pro 30 clip (large capacity magazine) that still had 21 [] rounds in the clip."[67] Fortunately, none of the officers were injured.

(12.) the critical "pause"

The State argues that smaller magazines create a "critical pause" in the shooting of a mass killer. "The prohibition of LCMs helps create a "critical pause" that has been proven to give victims an opportunity to hide, escape, or disable a shooter." Def. Oppo., at 19. This may be the case for attackers. On the other hand, from the perspective of a victim trying to defend her home and family, the time required to re-load a pistol after the tenth shot might be called a "lethal pause," as it typically takes a victim much longer to re-load (if they can do it at all) than a perpetrator planning an attack. In other words, the re-loading "pause" the State seeks in hopes of stopping a mass shooter, also tends to create an even more dangerous time for every victim who must try to defend herself with a small-capacity magazine. The need to re-load and the lengthy pause that comes with banning all but small-capacity magazines is especially unforgiving for victims who are disabled, or who have arthritis, or who are trying to hold a phone in their off-hand while attempting to call for police help. The good that a re-loading pause might do in the extremely rare mass shooting incident is vastly outweighed by the harm visited on manifold law-abiding, citizen-victims who must also pause while under attack. This blanket ban without any tailoring to these types of needs goes to show § 32310's lack of reasonable fit.

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[66] Declaration of Chief Phan Ngo, in support of Amici Curiae the City and County of San Francisco, the City of Los Angeles, and the City of Sunnyvale, at para. 7, filed Oct. 19, 2017, in *Duncan v. Becerra*, Ninth Circuit Appeal No 17-56081 (docket 29).

[67] *Id.*

(13.) *Turner's* requirement

Lastly, the State argues that it is not required to prove that § 32310 will eliminate or reduce gun violence or mass shootings, or that there is scientific consensus as to the optimal way to reduce the dangerous impact of large-capacity magazines, or that § 32310 will not be circumvented by criminals. All that must be shown, it contends, is that the State "has drawn reasonable inferences based on substantial evidence," citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994). Def. Oppo., at n. 14.

Even *Turner* does not expect a judicial milquetoast naivete, but a muscular "meaningful review" and independent judgment of the facts. Remember, the *Turner* Court returned the case to the district court because of an inadequate record. *E.g., id.* at 667-68 ("The paucity of evidence . . . is not the only deficiency in this record. Also lacking are any findings concerning the actual effects . . . [and] the record fails to provide any judicial findings concerning the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests."); *id.* at 673 (Blackmun, J., concurring) ("Justice Kennedy asks the three-judge panel to take additional evidence on such matters as whether the must-carry provisions really respond to threatened harms to broadcasters [and] whether §§ 4–5 'will in fact alleviate these harms in a direct and material way.'"). Congress had set out numerous "unusually detailed statutory findings" within the Act being reviewed. *Id*. at 646. These "legislative facts" were the product of three years of congressional hearings. *Id*. at 632. It was in this unusual context in which the Court said that the predictive judgments of Congress are entitled to substantial deference.

No similar unusually detailed congressional findings or predictive judgments after years of hearings are present in the case of California Penal Code § 32310. On the contrary, the 2016 criminalization and dispossession amendments added in § 32310 (c) and (d) were not the product of legislative action, at all. These were, instead, the product of a complicated state referendum question known as Proposition 63. *Cf. Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994–95 (N.D. Cal. 2010), *aff'd sub nom. Perry v.*

Brown, 671 F.3d 1052 (9th Cir. 2012), and *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) ("That the majority of California voters supported Proposition 8 is irrelevant, as 'fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.'"). To the extent one could argue that federal courts owe some judicial deference to the judgment of a state legislature (as opposed to deference to a co-equal branch of the U.S. Congress), in passing the longer-standing part of § 32310, the 1999 California legislature was more concerned with defining assault weapons and judged the possession of a large capacity magazine should remain lawful.

(14.) *Turner*-style deference rejected in *Heller*

Turner-style deference for Second Amendment review was specifically argued for by Justice Breyer and rejected by the Court in *Heller*. *See e.g., Heller v. D.C.*, 670 F.3d 1244, 1280 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("It is ironic, moreover, that Justice Breyer's dissent explicitly advocated an approach based on *Turner Broadcasting*; that the *Heller* majority flatly rejected that *Turner Broadcasting*-based approach; and that the majority opinion here nonetheless turns around and relies expressly and repeatedly on *Turner Broadcasting*.").

(15.) even *Turner* requires tailoring for a reasonable fit

Even under *Turner*'s intermediate scrutiny, a reasonable fit requires tailoring, and a broad prophylactic ban on acquisition or possession of all magazines holding more than 10 rounds for all ordinary, law-biding, responsible citizens is not tailored at all. *Turner*, 512 U.S. at 682–83 (O'Connor, J., concurring in part and dissenting in part) ("A regulation is not 'narrowly tailored'—even under the more lenient [standard applicable to content-neutral restrictions]—where . . . a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals. . . . "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . ."). The State notes that Vermont enacted a recent prohibition on magazines holding more than 10 rounds for rifles or 15 rounds for a handgun. Def.'s Response to Plaintiffs' Supp. Brief, at n. 2. Vermont's regulation evidences more

tailoring than does § 32310 and makes room for a home owner to have 15 rounds (50% more) for defense.

(16.) "10" appears to be an arbitrary number

So, how did California arrive at the notion that any firearm magazine size greater than a 10-round magazine is unacceptable? It appears to be an arbitrary judgment. The Attorney General says it is not. Def's Response to Plaintiffs' Supp. Brief, at 9. He notes that other large-capacity magazine bans and the former federal ban settled on 10 rounds. The State does not, however, say why California (or any jurisdiction, for that matter) place the limit at 10. One author surmised from a comparison, that California lawmakers simply "borrowed the large-capacity magazine ban from the federal moratorium." Stricker, Brent W., *Gun Control 2000: Reducing the Firepower*, 31 McGeorge L. Rev. 293, 301. The State notes a 10-round limit was included in its firing-capacity legislation prohibiting machine guns in 1933. The significance of 10 rounds, however, is not addressed. Larger magazines were not commonplace in 1933. By 1999, when California first banned the sale, manufacturing, and importation of magazines able to hold more than 10-rounds (in former § 12020(a)(2)), larger magazines numbered in the millions.

While the State's more recent legislation imposing a ban on magazines able to hold more than 10 rounds (§32310(b), 2016 Cal. Legis. Serv. Ch. 58 (S.B. 1446) (WEST)) was superseded by Proposition 63's passage, the Attorney General does not identify any of the legislative discussions bearing on the 10-round limit. The 1994 federal ban with its 10-round limit lapsed in 2004. Federal law has no limit on permissible magazine size. In U.S. Sentencing Guidelines for firearm offenses (§2K2.1(a)) and the comments thereunder, a "large capacity magazine" is defined for purposes of sentencing as a magazine "that could accept more than 15 rounds of ammunition." *See* § 2K2.1 comment n.2 (2018); *United States v. Cherry*, 855 F.3d 813, 815 (7th Cir. 2017) (describing same); *United States v. Henry*, 819 F.3d 856, 867 (6th Cir. 2016) (same).

The State argues only that it is not required to explain why it has selected 10 as the number. Def's Response to Plaintiffs' Supp. Brief, at 9-10. Perhaps not. But the 10-

round limit appears to be arbitrary. A reasoned explanation or a considered judgment would tend to demonstrate why the "fit" of a total ban on magazines larger than 10-rounds is reasonable or how the ban is narrowly tailored. Perhaps it is an unintentional legacy from the 1930s when generally larger detachable magazines were rare, our military's popular WW I Colt .45 M1911 pistol held a magazine holding 7-8 rounds, and otherwise 5 or 6 shot revolvers ruled. Surly, *Turner* deference does not mean a federal court is relegated to rubber-stamping a broad-based arbitrary incursion on a constitutional right founded on speculative line-drawing and without any sign of tailoring for fit.

(17.) *Fyock v. Sunnyvale*

So, what about the *Fyock* decision. *Fyock*, like the Ninth Circuit decision in this case, are both appeals from preliminary injunction requests. Preliminary injunction appeals are reviewed narrowly. *Compare Fyock,* 779 F.3d at 995 ("As we have previously noted, there are limitations to interlocutory appeals of this nature given the narrow scope of our review: In some cases, parties appeal orders granting or denying motions for preliminary injunctions in order to ascertain the views of the appellate court on the merits of the litigation, but . . . due to the limited scope of our review . . . our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits."), *with Duncan v. Becerra*, 742 F. App'x 218, 220 (9th Cir. 2018) ("We do not 'determine the ultimate merits,' but rather 'determine only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand.'"). Preliminary injunction motions typically present complicated legal and factual questions on an abbreviated time frame. Orders are not final. Appellate review does not go to the merits but to whether the district court properly exercised judicial discretion or made a clear error of judgment. *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 (9th Cir. 2011) ("The grant or denial of a preliminary injunction lies within the discretion of the district court and we may reverse a district court only where it relied on an erroneous legal premise or abused its discretion.").

A preliminary injunction decision is a fact-bound decision. *Fyock* concerned a city ordinance covering only residents of Sunnyvale, California. This case concerns a state-wide statute. The Sunnyvale ordinance carved out exceptions for nine categories, including category eight ("Any person lawfully in possession of a firearm that the person obtained prior to January 1, 2000, if no magazine that holds fewer than 10 rounds of ammunition is compatible with the firearm and the person possesses the large-capacity magazine solely for use with that firearm."). *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1272 (N.D. Cal. 2014). The state statute § 32310 includes no exception like Sunnyvale's category eight. The Sunnyvale ordinance required non-exempt persons to, *inter alia*, remove their large capacity magazines from the City of Sunnyvale. *Id.* The state statute § 32310 requires non-exempt persons to remove their large-capacity magazines from California. The City of Sunnyvale is a small, populous, municipality with uniquely-trained public safety officers. The State of California is one of the largest states in the Union and includes everything from areas where populations are small and far from emergency services to the second largest city in the United States.

The district court in *Fyock*, found that " magazines having a capacity to accept more than ten rounds are in common use, and are therefore not dangerous and unusual." *Fyock,* 25 F. Supp. 3d 1267 at 1275. The district court found that it does not matter whether large capacity magazines are commonly used for self-defense explaining, "Second Amendment rights do not depend on how often the magazines are used. Indeed, the standard is whether the prohibited magazines are 'typically *possessed* by law-abiding citizens for lawful purposes,' not whether the magazines are often *used* for self-defense." *Id.* at 1276. The district court found that if few people require a particular firearm for self-defense, that should be a cause for celebration, not a reason to place large capacity magazines beyond Second Amendment protection. *Id.* ("The fact that few people 'will require a particular firearm to effectively defend themselves,'. . . should be celebrated, and not seen as a reason to except magazines having a capacity to accept more than ten rounds from Second Amendment protection."). The district court found that the large

capacity magazines qualify as "arms" for purposes of the Second Amendment. *Id.* The district court concluded that the Sunnyvale ordinance banned conduct that is protected by the Second Amendment. *Id.* at 1277. These are all points with which this Court agrees.

The divergence of opinion comes with the selection of the level of heightened scrutiny required. Like this Court's conclusion about § 32310, the district court in *Fyock* found that the Sunnyvale ordinance burdens conduct near the core of the Second Amendment right. *Id*. at 1278. But the district court in *Fyock* judged the burden of the Sunnyvale ordinance to be minor and applied intermediate scrutiny and found the fit of the ordinance to be reasonable. *Id.* at 1278-79. This Court, on the other hand, has considered the burden of the state statute on all the citizens of the state, finds the burden to be severe, and even under intermediate scrutiny, a reasonable fit to be lacking. These are ultimately informed judgment calls. The district court's *Fyock* judgment was preliminary. This Court's judgment is no longer preliminary. If this judgment is appealed, the Court of Appeals will have the opportunity to rule *on the merits*, for the first time.

California Penal Code § 32310 unconstitutionally impinges on the Second Amendment rights of law-abiding responsible ordinary citizens who would like to acquire and possess for lawful purposes firearm magazines able to hold more than 10 rounds. Section 32310 is a complete ban that fails the simple Supreme Court test of *Heller*. Alternatively, § 32310 strikes at the core of the Second Amendment right of self-defense and severely burdens that right, triggering strict scrutiny. Because the statute imposes a broad prophylactic ban that is the opposite of a regulation using the least restrictive means to achieve a compelling interest, § 32310 fails constitutional muster under the test of strict scrutiny. Finally, even under the modest and forgiving standard of intermediate scrutiny, § 32310 is a poor fit to accomplish the State's important interests. It hardly fits at all. Therefore, this statute fails intermediate scrutiny. While, it may be possible to fashion a restriction on uncommonly large magazines that is tailored to the manifold local contexts present across the entire state so as to achieve a reasonable fit,

here, the bottom line is clear. The State has not carried its burden to justify the restrictions on firearm magazines protected by the Second Amendment based on the undisputed material facts in evidence. That is not to be lamented. It ought to provide re-assurance. To borrow a phrase, "[j]ust as it is the 'proudest boast of our free speech jurisprudence' that we protect speech that we hate, [and] . . . the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive," it is the proudest boast of our Second Amendment jurisprudence that we protect a citizen's right to keep and bear arms that are dangerous and formidable. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1737 (2018).

III. The Takings Clause

Plaintiffs also contend that the State's confiscatory and retrospective ban on the possession of magazines over ten rounds without government compensation constitutes an unconstitutional taking. "For centuries, the primary meaning of "keep" has been "to retain possession of." There is only one straightforward interpretation of "keep" in the Second Amendment, and that is that "the people" have the right to retain possession of arms, subject to reasonable regulation and restrictions." *Silveira v. Lockyer*, 328 F.3d 567, 573 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc). The Attorney General asserts that, when the government acts pursuant to its police power to protect the safety, health, and general welfare of the public, a prohibition on possession of property declared to be a public nuisance is not a physical taking. *See* Oppo. at 22, (citing *Chicago, B. & Q. Railway Co. v. Illinois*, 200 U.S. 561, 593–594 (1906) and *Akins v. United States,* 82 Fed. Cl. 619, 622 (2008)). The Attorney General then cites a few courts that have rejected Takings Clause challenges to laws banning the possession of dangerous weapons. *See* Oppo. at 23 (citing *Akins*, 82 Fed. Cl. at 623–24 (restrictions on manufacture and sale of machine guns not a taking) and *Gun South, Inc. v. Brady*, 877 F.2d 858, 869 (11th Cir. 1989) (temporary suspension on importation of assault weapons not a taking)).

California has deemed large-capacity magazines to be a nuisance. *See* Cal. Pen. Code § 32390. That designation is dubious. The Supreme Court recognized a decade before *Heller*, "[g]uns in general are not 'deleterious devices or products or obnoxious waste materials.'" *Staples v. United States*, 511 U.S. 600, 610 (1994) (citation omitted). Casting a common sized firearm magazine able to hold more than 10 rounds as a nuisance, as a way around the Second Amendment, is like banning a book as a nuisance, as a way around the First Amendment. It conjures up images from Ray Bradbury's novel, *Fahrenheit 451*, of firemen setting books on fire, or in this case policemen setting magazines on fire.

Plaintiffs remonstrate that the law's forced, uncompensated, physical dispossession of magazines holding more than 10 rounds as an exercise of its "police power" cannot be defended. Supreme Court precedent casts doubt on the State's contrary theory that an exercise of the police power can never constitute a physical taking. In *Loretto*, the Supreme Court held that a law requiring physical occupation of private property was both "within the State's police power" *and* an unconstitutional physical taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court explained that whether a law amounts to a physical taking is "a separate question" from whether the state has the police power to enact the law. *Id.* at 425–26 ("It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."). In a similar vein, the Supreme Court holds that a law enacted pursuant to the state's "police powers to enjoin a property owner from activities akin to public nuisances" is not immune from scrutiny under the regulatory takings doctrine. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020–27 (1992). The Court reasoned that it was true "*[a] fortiori*" that the "legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* at 1026.

Recently, the Supreme Court summarized some of the fundamental principles of takings law in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017). "The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use, without just compensation. The Clause is made applicable to the States through the Fourteenth Amendment. As this Court has recognized, the plain language of the Takings Clause requires the payment of compensation whenever the government acquires private property for a public purpose, but it does not address in specific terms the imposition of regulatory burdens on private property." *Id.* at 1942 (quotations and citations omitted). *Murr* notes that almost a century ago, the Court held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

Takings jurisprudence is flexible. There are however, two guides set out by *Murr* for detecting when government regulation is so burdensome that it constitutes a taking. "First, with certain qualifications a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause. Second, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a complex of factors, including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Murr*, 137 S. Ct. at 1938 (citations and quotation marks omitted). "[A] physical *appropriation* of property g[ives] rise to a *per se* taking, without regard to other factors." *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015).

The dispossession requirement of § 32310(c) & (d) imposes a rare hybrid taking. Subsection (d)(3) is a type of physical appropriation of property in that it forces owners of large capacity magazines to "surrender" them to a law enforcement agency "for destruction." Thus, (d)(3) forces a *per se* taking requiring just compensation. But there are two other choices. Subsection (d)(2) forces the owner to sell his magazines to a

firearms dealer. It is a fair guess that the fair market value of a large capacity magazine I the shadow of a statute that criminalizes commerce and possession in the State of California, will be near zero. Of course, the parties spend little time debating the future fair market value for to-be-relinquished magazines. Subsection (d)(1) forces the owner to "remove" their large capacity magazines "from the state," without specifying a method or supplying a place. This choice obviously requires a place to which the magazines may be lawfully removed. In other words, (d)(1) relies on other states, in contrast to California, which permit importation and ownership of large capacity magazines. With the typical retail cost of a magazine running between $20 and $50, the associated costs of removal and storage and retrieval may render the process costlier than the fair market value (if there is any) of the magazine itself. Whatever stick of ownership is left in the magazine-owner's "bundle of sticks," it is the short stick.

Here, California will deprive Plaintiffs not just of the *use* of their property, but of *possession*, one of the most essential sticks in the bundle of property rights. Of course, a taking of one stick is not necessarily a taking of the whole bundle. *Murr*, 137 S. Ct. at 1952 (Roberts, C.J., dissenting) ("Where an owner possesses a full 'bundle' of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety."). Nevertheless, whatever expectations people may have regarding property regulations, they "do not expect their property, real or personal, to be actually occupied or taken away." *Horne*, 135 S. Ct. at 2427. Thus, whatever might be the State's authority to ban the sale or use of magazines over 10 rounds, the Takings Clause prevents it from compelling the physical dispossession of such lawfully-acquired private property without just compensation.

IV. CONCLUSION

Magazines holding more than 10 rounds are "arms." California Penal Code Section 32310, as amended by Proposition 63, burdens the core of the Second Amendment by criminalizing the acquisition and possession of these magazines that are commonly held by law-abiding citizens for defense of self, home, and state. The

regulation is neither presumptively legal nor longstanding. The statute hits at the center of the Second Amendment and its burden is severe. When the simple test of *Heller* is applied, a test that persons of common intelligence can understand, the statute fails and is an unconstitutional abridgment. It criminalizes the otherwise lawful acquisition and possession of common magazines holding more than 10 rounds – magazines that law-abiding responsible citizens would choose for self-defense at home. It also fails the strict scrutiny test because the statute is not narrowly tailored – it is not tailored at all. Even under the more forgiving test of intermediate scrutiny, the statute fails because it is not a reasonable fit. It is not a reasonable fit because, among other things, it prohibits law-abiding concealed carry weapon permit holders and law-abiding U.S Armed Forces veterans from acquiring magazines and instead forces them to dispossess themselves of lawfully-owned gun magazines that hold more than 10 rounds or suffer criminal penalties. Finally, subsections (c) and (d) of § 32310 impose an unconstitutional taking without compensation upon Plaintiffs and all those who lawfully possess magazines able to hold more than 10 rounds.[68]

Accordingly, based upon the law and the evidence, upon which there is no genuine issue, and for the reasons stated in this opinion, Plaintiffs' motion for summary judgment is granted.[69] California Penal Code § 32310 is hereby declared to be unconstitutional in its entirety and shall be enjoined.

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[68] This declaration concerns the current version of § 32310. But similar constitutional defects can be found in the prior iterations of the statute. The Court's declaration does not affect the definition of a large-capacity magazine where it is used in other parts of California's Penal Code to define gun-related crimes and to enhance penalties.

[69] The Attorney General asks the Court to take judicial notice of exhibits A through Q which are copies of statutes and ordinances from various jurisdictions. (Dkt. No. 53-1.) The request is granted. The Attorney General objects to various declarations submitted by Plaintiffs. (Dkt. No. 53-13.) Those objections are overruled. Plaintiffs object to various declaration and exhibits submitted by the Attorney General. (Dkt. No. 57-2.) Those objections are overruled.

This decision is a freedom calculus decided long ago by Colonists who cherished individual freedom more than the subservient security of a British ruler. The freedom they fought for was not free of cost then, and it is not free now.

IT IS HEREBY ORDERED that:

1. Defendant Attorney General Xavier Becerra, and his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with him, and those duly sworn state peace officers and federal law enforcement officers who gain knowledge of this injunction order, or know of the existence of this injunction order, are enjoined from enforcing California Penal Code section 32310.

2. Defendant Becerra shall provide, by personal service or otherwise, actual notice of this order to all law enforcement personnel who are responsible for implementing or enforcing the enjoined statute. The government shall file a declaration establishing proof of such notice.

DATED: March 29, 2019

HON. ROGER T. BENITEZ
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

VIRGINIA DUNCAN, ET AL,	.
PLAINTIFFS,	. NO. 17-CV-1017
V.	. MAY 10, 2018
XAVIER BECERRA, ET AL.,	. SAN DIEGO, CALIFORNIA
DEFENDANTS.	.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROGER T. BENITEZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: MICHEL & ASSOCIATES PC
BY: ANNA M. BARVIER AND CLINT MONFORT
180 EAST OCEAN BOULEVARD, STE. 200
LONG BEACH, CALIFORNIA 90802

FOR THE DEFENDANTS: OFFICE OF THE CALIFORNIA ATTORNEY GENERAL
BY: JOHN DARROW ECHEVERRIA
300 S. SPRING STREET, STE. 1702
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COURT REPORTER: JULIET Y. EICHENLAUB, RPR, CSR
USDC CLERK'S OFFICE
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SAN DIEGO, CALIFORNIA; MAY 10, 2018; 10:06 A.M.

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THE CLERK: ONE ON CALENDAR, 17CV1017, DUNCAN VS. BECERRA, ET AL; MOTION HEARING.

THE COURT: ALL RIGHT. COUNSEL, PLEASE REGISTER YOUR APPEARANCES FOR THE RECORD.

MS. BARVIR: ANNA M. BARVIR, B-A-R-V-I-R, FOR PLAINTIFF VIRGINIA DUNCAN.

MR. ECHEVERRIA: GOOD MORNING, YOUR HONOR. JOHN ECHEVERRIA, E-C-H-E-V-E-R-R-I-A, FOR DEFENDANT XAVIER BECERRA.

MR. MONFORT: GOOD MORNING, YOUR HONOR. CLINT MONFORT, ALSO FOR THE PLAINTIFF DUNCAN.

THE COURT: I'M SORRY; WHAT WAS YOUR LAST NAME?

10:06:05

MR. MONFORT: MONFORT, M-O-N-F-O-R-T.

THE COURT: ALL RIGHT. WELL, LET'S SEE. TODAY WE HAVE A MOTION FOR SUMMARY JUDGMENT FILED BY THE PLAINTIFF. AND I GUESS THE RECORD SHOULD REFLECT THAT IN SUPPORT OF THE MOTION, IN OPPOSITION TO THE MOTION, I HAVE, I BELIEVE TO BE APPROXIMATELY A FOOT AND A HALF OF EXHIBITS AND BRIEFS THAT HAVE BEEN FILED. I HAVE DONE MY BEST TO READ THROUGH ALL OF THIS AND TO TRY TO DIGEST IT. I CERTAINLY DON'T PROMISE THAT I RECALL EVERYTHING THAT I'VE READ, OR THAT I RECALL IT CORRECTLY, BUT I'VE CERTAINLY DONE MY BEST.

SO WHY DON'T WE BEGIN, FIRST OF ALL, WITH THE

10:07:18 PLAINTIFF. YOU TELL ME: WHAT IS THE STANDARD THAT I HAVE TO LOOK TO IN ORDER TO DECIDE THIS MOTION AND WHY YOU THINK I SHOULD RULE IN YOUR FAVOR? SO THE FLOOR IS YOURS.

MS. BARVIR: THANK YOU, YOUR HONOR. IN RESPONSE TO THE COURT'S QUESTION ABOUT THE STANDARD THAT PLAINTIFFS MUST MEET IN ORDER FOR THE COURT TO RULE IN OUR FAVOR, OBVIOUSLY ON A MOTION FOR SUMMARY JUDGMENT THERE NEEDS TO BE NO DISPUTED FACT, MATERIAL FACT, AND PLAINTIFFS SHOULD BE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

IN THE SECOND AMENDMENT CASE, ACCORDING TO NINTH CIRCUIT PRECEDENT, STEMMING FROM UNITED STATES VERSUS CHOVAN, THE PLAINTIFFS MUST SHOW THAT THE CONDUCT THAT THEY'RE BARRED FROM PARTICIPATING IN IS PROTECTED UNDER THE SCOPE OF THE SECOND AMENDMENT. THEN ONCE THEY'VE DONE THAT, IT BECOMES THE 10:08:28 BURDEN OF THE STATE TO ESTABLISH THAT THE LAW THAT THEY HAVE PASSED AND ENFORCED AGAINST PLAINTIFFS CAN MEET THE APPROPRIATE LEVEL OF HEIGHTENED REVIEW. THAT SHOULD BE STRICT SCRUTINY -- EXCUSE ME -- SHOULD BE AT LEAST INTERMEDIATE SCRUTINY.

BUT IN THIS CASE, BECAUSE THE LAW AT ISSUE IMPOSES A FLAT BAN ON ITEMS OVERWHELMINGLY CHOSEN BY LAW-ABIDING CITIZENS FOR THE CORE LAWFUL PURPOSE OF SELF-DEFENSE, IT IS INIMICAL TO SECOND AMENDMENT PROTECTIONS FOR SUCH ARMS AND IT IS INVALID UNDER UNDER ANY TEST THE COURT MAY APPLY. IT IS CATEGORICALLY INVALID AS THE COURT RECOGNIZED IN ITS ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION LAST JUNE.

10:09:07 THE COURT: CAN YOU DISTINGUISH FOR ME THE FYOCK CASE?

MS. BARVIR: THE FYOCK CASE, I BELIEVE, IS DISTINGUISHABLE BECAUSE THAT WAS ON APPEAL FROM THE DENIAL OF A MOTION FOR PRELIMINARY INJUNCTION. THE EVIDENCE IN THAT CASE WAS, THE -- EXCUSE ME. THE STANDARD OF REVIEW FOR THE COURT OF APPEALS IS GOING TO BE WHETHER OR NOT THE LOWER COURT ABUSED ITS DISCRETION. THE COURT THERE DID FIND THAT -- THE TRIAL COURT THERE FOUND THAT THE EVIDENCE WOULD BE SUFFICIENT TO SUSTAIN THE LAW. BUT AGAIN, ON APPEAL, THAT STANDARD ISN'T VERY HARD FOR THE STATE TO PROTECT.

WHEREAS HERE, WE'RE ON MSJ. WE'RE GOING TO BE LOOKING AT ALL THE EVIDENCE AND DETERMINING WHETHER WE HAVE SIMILAR OR SAME EVIDENCE AS SUBMITTED IN FYOCK. I DON'T THINK 10:09:52 WE DO. AND EVEN IF WE DID, THE STANDARD THAT WE'RE GOING TO BE LOOKING AT HERE IS OF MUCH FULLER RECORD, AND I THINK THAT WE HAVE SHOWN -- PLAINTIFFS HAVE SHOWN THAT THE STATE CANNOT SUSTAIN ITS BURDEN, CANNOT FULFILL ITS BURDEN UNDER ANY LEVEL OF SCRUTINY.

NONE OF THE EVIDENCE THAT THE STATE HAS PROVIDED, NONE OF THE FACTUAL CLAIMS THEY'RE MAKING NOW, ARE REALLY ANY DIFFERENT FROM THE CLAIMS THEY WERE MAKING IN SUPPORT OF THEIR MPI. WHEN IT COMES DOWN TO IT, THE STATE HAS CHOSEN THE BROADEST POSSIBLE MEANS FOR FURTHERING ITS OBVIOUSLY COMPELLING PUBLIC INTEREST AND PUBLIC SAFETY. IT'S A FLAT BAN ON

10:10:38 LAW-ABIDING CITIZENS' ABILITY TO OWN WHAT WE BELIEVE ARE PROTECTED MAGAZINES THAT ARE NECESSARY FOR THE PROPER FUNCTION OF THEIR FIREARMS TO BE USED IN SELF-DEFENSE, AND BY CHOOSING THAT MEANS, TAKING THEM NOT ONLY FROM CRIMINALS WHICH MAY BE ONE WAY THE STATE CAN DO IT, THEY'RE CHOOSING TO TAKE THEM FROM ALL PEOPLE, LAW-ABIDING CITIZENS, INCLUDING PEOPLE LIKE PATRICK LOVETTE WHO'S OWNED THEM FOR 20-PLUS YEARS WITHOUT INCIDENT.

THE COURT: HOW MANY PEOPLE HAS HE SHOT OR INJURED WITH HIS GUNS?

MS. BARVIR: AS FAR AS PLAINTIFF IS AWARE, NO ONE EVER. MR. LOVETTE IS A TRAINED -- CERTIFIED AND TRAINED FIREARMS INSTRUCTOR. HE'S VERY CAREFUL WITH HIS FIREARMS AND HIS MAGAZINES. HE USES THOSE MAGAZINES TO TRAIN OTHER INDIVIDUALS IN THE CAREFUL AND SAFE, EFFICIENT USE OF FIREARMS

10:11:30 EQUIPPED WITH DETACHABLE MAGAZINES FOR USE IN SELF-DEFENSE AND IN DEFENSE OF OTHERS. HE'S NOT KNOWN TO HAVE HARMED ANYONE WITH AIRED SHOTS OR ANYTHING LIKE THAT.

THE COURT: YOU ALSO REPRESENT AN ORGANIZATION, DON'T YOU?

MS. BARVIR: CALIFORNIA RIFLE AND PISTOL ASSOCIATION, YES, YOUR HONOR.

THE COURT: HOW MANY OF YOUR MEMBERS HAVE SHOT OR KILLED ANYONE OR INJURED ANYONE WITH THEIR WEAPONS?

MS. BARVIR: I'M SORRY TO SAY I DON'T KNOW THE ANSWER TO THAT. BUT I WOULD ASSUME THAT IT'S VERY LOW. WE HAVE NOT

BEEN -- THE CALIFORNIA RIFLE AND PISTOL ASSOCIATION HAS NOT BEEN, HAS NOT COME FORWARD TO SAY THAT'S EVER HAPPENED. THE VAST MAJORITY OF MEMBERS AND SUPPORTERS OF CRPA ARE LAW-ABIDING CITIZENS WHO ARE SAFE WITH THEIR FIREARMS. THEY PRACTICE REGULARLY IN THE SAFE AND EFFICIENT USE OF THEIR FIREARMS FOR SELF-DEFENSE AND HUNTING AND COMPETITION. CRPA PROVIDES COMPETITIVE SHOOTING EVENTS WHERE THESE SORTS OF MAGAZINES ARE USED. NO ONE HAS EVER BEEN HARMED IN THOSE EVENTS. WHILE I DON'T KNOW THAT WE ESTABLISHED THAT IN THE EVIDENCE THAT'S BEFORE YOUR HONOR, THERE'S NOTHING TO SAY THAT -- THERE'S NO EVIDENCE OTHERWISE, EITHER.

10:11:56

THE COURT: I KEEP READING IN ALL THIS INFORMATION THAT THERE'S NO HUNTING USE FOR -- FIRST OF ALL, LET ME POINT OUT THAT A LOT OF WHAT WE'RE DEALING WITH HERE SORT OF SEEMS TO IN A WAY MORPH WITH DISCUSSIONS ABOUT WEAPONS LIKE THE AR-15 AND SO ON AND SO FORTH. WHAT WE'RE REALLY TALKING ABOUT HERE IS WHAT IS DUBBED AS A LARGE CAPACITY MAGAZINE. WE'RE NOT REALLY TALKING ABOUT AR-15S, ET CETERA. BUT OBVIOUSLY, A LOT OF THE DISCUSSION OF ONE MERGES WITH THE OTHER. THERE'S A LOT OF DISCUSSION IN HERE IN -- AND PARTICULARLY IN THE DEFENDANT'S FILINGS, THAT THESE WEAPONS ARE NOT USED -- LARGE CAPACITY, WHAT THEY CALL LARGE CAPACITY MAGAZINES ARE NOT USED FOR HUNTING. NOW IS THAT TRUE?

10:12:59

MS. BARVIR: IT MAY NOT BE AS TRUE IN CALIFORNIA CONSIDERING THE ACCESS TO ACQUIRE SUCH MAGAZINES HAS BEEN

BARRED TO NEW PEOPLE SINCE 2000, BUT IT'S NOT TRUE -- AS THE COURT WAS CALLING THEM -- AR'S AND SUCH FIREARMS THAT ARE CUSTOMIZABLE ARE USED IN SOME SORTS OF HUNTING APPLICATIONS. I KNOW THAT THERE'S PROBABLY SOME CONCERN THAT THERE'S HUNTING REGULATIONS IN CALIFORNIA WHERE CERTAIN TYPES OF BULLETS THAT MIGHT BE COMMON IN AR'S ARE NOT TO BE USED IN HUNTING BUT THAT'S --

THE COURT: SO SMALLER CALIBER.

MS. BARVIR: THEY'RE A SMALLER CALIBER --

THE COURT: FOR EXAMPLE, A RUGER M-14 WAS MODIFIED IN ORDER TO ALLOW A LARGER CALIBER BECAUSE ANYTHING LESS THAN 243 CANNOT BE USED TO HUNT DEER.

MS. BARVIR: CORRECT.

THE COURT: SO IT'S NOT A CORRECT STATEMENT TO SAY THAT LARGE CAPACITY MAGAZINES, AS THEY ARE DEFINED, ARE IN FACT NOT USED FOR HUNTING.

MS. BARVIR: THAT'S CORRECT, YOUR HONOR.

THE COURT: SO WHENEVER I SEE OR HEAR THAT, IT'S JUST BASICALLY AN UNSUPPORTED OPINION ON THE PART OF SOMEONE WHO SAYS THAT TO BE THE CASE.

MS. BARVIR: I THINK THAT'S RIGHT, YOUR HONOR. I THINK THERE'S A LOT OF MISUNDERSTANDING ABOUT WHAT TYPES OF FIREARMS AND AMMUNITION AND AMMUNITION MAGAZINES, I'M SORRY, MIGHT BE NEEDED OR NECESSARY FOR SOMEONE TO GO HUNTING. AND I THINK A LOT OF THAT TIME -- A LOT OF TIMES THAT COMES FROM

10:15:25 PEOPLE WHO ARE NOT FAMILIAR WITH THE SPORT.

ALSO, IF YOU NOTICE IN THE DECLARATION OF MRS. VIRGINIA DUNCAN, IT'S NOT PARTICULARLY HUNTING, BUT SHE DOES DO PREDATION MANAGEMENT, AND SHE'S REGULARLY DOING THIS SERVICE FOR RANCHERS AND FARMERS IN SOUTHERN CALIFORNIA AND SAN DIEGO COUNTY TO PROTECT THEIR LIVESTOCK AND THEIR PROPERTY FROM PACK HUNTING ANIMALS. IF THEY'VE SHOT ONE OR SHOOTING AT SEVERAL AND MISS THEM, AND THEY'RE COMING AT THEM, IT'S A HARD TARGET. A MOVING TARGET IS HARD TO ALWAYS HIT.

THE COURT: YOU MEAN LIKE A COYOTE?

MS. BARVIR: I THINK SHE SPECIFICALLY -- SHE SPECIFICALLY GOES AFTER COYOTE, YES.

THE COURT: EVER TRY TO SHOOT ONE?

MS. BARVIR: I'VE NEVER TRIED TO SHOOT A COYOTE, YOUR

10:16:11 HONOR. BUT IF THEY MISS, IF THERE'S MULTIPLE ANIMALS COMING AT THEM, IT'S DANGEROUS TO THE LIVESTOCK AS WELL AS THE RANCHERS AND FARMERS IF THEY'RE AROUND AND OF COURSE MS. DUNCAN AND HER HUSBAND WHO DO THIS PREDATION WORK.

THE COURT: BUT HUNTING, BY THE WAY, IS NOT SOMETHING THAT'S PROTECTED BY HELLER. A WEAPON THAT'S USED AND POSSESSED FOR HUNTING IS NOT NECESSARILY PROTECTED BY HELLER.

MS. BARVIR: I DON'T KNOW THAT IT'S NECESSARILY PROTECTED BY HELLER. WE HAVEN'T REALLY GOTTEN TO A DECISION THAT REALLY GETS THERE, BUT HELLER IS VERY CLEAR THAT IT PROTECTS FIREARMS THAT -- AND NOW WE KNOW AMMUNITION AND PARTS

10:16:47 THAT ARE USED IN LAWFUL PURPOSES. WHILE SELF-DEFENSE IS THE CORE AS HELLER RECOGNIZES, HELLER ALSO RECOGNIZES THERE ARE OTHER LAWFUL PURPOSES, AND HUNTING IS DEFINITELY SOMETHING THAT HAS A LONG, LONG TRADITION IN THIS COUNTRY. IT'S HOW PEOPLE SURVIVED BEFORE THE SUPERMARKET WAS REGULAR. SO I DEFINITELY THINK HELLER WOULD TELL US THAT HUNTING IS A PROTECTED ACTIVITY, AND USING FIREARMS FOR HUNTING WOULD BE A PROTECTED ACTIVITY. BUT YOU'RE RIGHT, IT DOESN'T LITERALLY COME OUT AND SAY HUNTING IS AS CORE AS SELF-DEFENSE.

THE COURT: LET ME ASK YOU A QUESTION: THERE'S A LOT OF DISCUSSION ABOUT THE FACT THAT THERE'S NO EVIDENCE THAT WHAT ARE NOW KNOWN AS LARGE CAPACITY MAGAZINES ARE USED FOR SELF-DEFENSE. IS THERE EVIDENCE?

MS. BARVIR: IS THERE EVIDENCE THAT THEY'RE USED FOR

10:17:43 SELF-DEFENSE?

THE COURT: THAT THEY HAVE BEEN USED.

MS. BARVIR: WELL, I'D START FIRST AND FOREMOST WITH THE STATE'S OWN EVIDENCE. THEIR EXPERT WITNESS LUCY ALLEN HAS FOUND AT LEAST TWO IN HER STUDIES. SO WHILE IT MAY BE RARE, WE DO KNOW THAT THIS DOES HAPPEN. I THINK YOUR HONOR TALKED ABOUT THE STORY OF MRS. SUSAN GONZALEZ AND HER HUSBAND MIKE AND THE MPI RULING WHO HAD THREE ASSAILANTS COME ON THEM IN THE NIGHT AND SHE RAN OUT OF AMMUNITION.

THE COURT: CAN YOU IMAGINE WHAT MUST HAVE BEEN GOING THROUGH HER MIND WHEN SHE PULLED THE TRIGGER THE LAST TIME

10:18:19 KNOWING THERE WERE NO MORE ROUNDS IN HER WEAPON?

MS. BARVIR: I'M SURE SHE THOUGHT SHE WAS GOING TO DIE. THE ASSAILANTS WERE STILL THERE.

THE COURT: BUT THAT'S OKAY BECAUSE AFTER SHE WAS KILLED LAW ENFORCEMENT WOULD COME IN AND SAY, OH, WE GOT ANOTHER STATISTIC; WE'VE GOT SOMEONE THAT'S BEEN KILLED. THAT'S SO SAD. BUT LET'S MOVE ON TO THE NEXT CASE.

MS. BARVIR: AND IF SHE WAS LIMITED TO 10 ROUNDS BY A LAW LIKE IN CALIFORNIA, THAT WOULD DEFINITELY BE A CASE WHERE WE DON'T HAVE AN EXAMPLE OF MORE THAN 10 ROUNDS BEING FIRED, AND IT WASN'T AN EFFECTIVE USE OF SELF-DEFENSE. SO THE STORIES THAT THE STATE HAS COMPILED OR LOOKED AT AND, YOU KNOW, SOME OF THE EXAMPLES THAT WE'VE GIVEN, ARE EXAMPLES OF EFFECTIVE SELF-DEFENSE. USUALLY, IT'S FEWER ROUNDS. BUT WHEN YOU'RE
10:19:04 LIMITED TO LESS THAN 10 ROUNDS, THAT'S NECESSARILY GOING TO BE THE CASE.

I ALSO WANT TO SAY A LITTLE BIT ABOUT THIS FOCUS ON WHETHER OR NOT THE PLAINTIFFS NEED TO ESTABLISH THAT THERE ARE, I DON'T KNOW, THERE'S SOME IMAGINARY THRESHOLD OF A NUMBER OF CASES WHERE PEOPLE HAVE NEEDED TO AND ACTUALLY FIRED MORE THAN 10 ROUNDS IN SELF-DEFENSE. THAT'S NOT THE STANDARD. HELLER DOESN'T TALK ABOUT A NEED TO EXERCISE THE RIGHT. AND I DON'T KNOW OF ANY CONSTITUTIONAL RIGHT CONTEXT WHERE THAT WOULD BE APPROPRIATE IN ANY EVENT. THE LAW DEPENDS -- EXCUSE ME, THERE'S NO SUPPORT IN HELLER. THERE'S NO SUPPORT IN ANY OF THE

10:19:46 OTHER CASES THAT I'M AWARE OF THAT WOULD SUGGEST YOU NEED TO HAVE SOME NUMBER OF CASES WHERE 11 OR MORE ROUNDS ARE FIRED. WHAT IS THE STANDARD IS, ARE THEY TYPICALLY POSSESSED FOR THESE LAWFUL PURPOSES BY LAW-ABIDING CITIZENS? SO THE REASON THAT PEOPLE POSSESS THESE --

THE COURT: WHAT'S THE EVIDENCE THAT THEY DON'T?

MS. BARVIR: THAT THEY DON'T POSSESS THEM FOR LAWFUL PURPOSES? I DON'T THINK THERE ARE ANY. THE CLAIM BY THE STATE IS THAT THEY'RE NOT REGULARLY FIRED MORE THAN 10 TIMES.

THE COURT: THANK GOODNESS.

MS. BARVIR: NOT THAT PEOPLE DON'T KEEP THEM FOR THAT PURPOSE; WHEREAS PLAINTIFFS HAVE SHOWN IN THE DECLARATIONS OF EACH OF THE PLAINTIFFS WHY THEY'VE CHOSEN -- WHETHER OR NOT THEY'RE RIGHT IN THEIR BELIEF THAT THEY MAY NEED THAT NUMBER OF

10:20:28 ROUNDS SOMEDAY TO FIGHT OFF AN ATTACKER, THAT'S WHY THEY CHOOSE THEM.

THE COURT: SO REFRESH MY RECOLLECTION. SO WHY MIGHT THEY NEED, SAY, 11 ROUNDS AS OPPOSED TO 10 ROUNDS?

MS. BARVIR: SOME OF THE PLAINTIFFS HAVE TALKED ABOUT WANTING TO KEEP OR KEEPING A MAGAZINE OVER 10 ROUNDS IN THERE HOME BECAUSE OF THE POTENTIAL IF MULTIPLE ATTACKERS WERE TO COME UPON THEM AND THEIR FAMILY IN THE HOME THEY WILL NOT HAVE ENOUGH ROUNDS TO EFFECTIVELY NEUTRALIZE THE THREAT OF SO MANY ASSAILANTS. IF YOU THINK ABOUT IT, YOU'D HAVE TO BE A PRETTY GOOD SHOT IF YOU HAVE FOUR PEOPLE COMING IN YOUR HOME AT NIGHT

IF YOU'RE LIMITED TO 10 ROUNDS. YOU'RE AWAKENED, STARTLED IN THE MIDDLE OF THE NIGHT, STRAGGLING FOR A FIREARM THAT IS LIMITED TO 10 ROUNDS, AND THEN YOU SHOOT OFF THREE, HIT ONE; IF THESE ASSAILANTS ARE UNDER SOME SORT OF INFLUENCE OR SOMETHING LIKE THAT, THEY MAY NOT EVEN FEEL IT. YOU HAVE TO BE A REALLY GOOD SHOT TO TAKE SOMEONE DOWN WITH ONE BULLET.

THE COURT: THE STATE MAKES THE ARGUMENT THAT, WELL, YOU KNOW, THERE'S AN EXCEPTION IN THIS LAW FOR LAW ENFORCEMENT BECAUSE LAW ENFORCEMENT IS TRAINED TO USE THESE WEAPONS. LAW ENFORCEMENT ALSO IS TRAINED TO HOPEFULLY HIT WHAT THEY SHOOT AT, RIGHT? AND THEY'RE ALSO TRAINED TO SHOOT AT TARGETS UNDER STRESSFUL CONDITIONS. DO YOU AGREE WITH THAT?

MS. BARVIR: I AGREE WITH THAT, YOUR HONOR, YES.

THE COURT: BUT THE AVERAGE HOMEOWNER IS NOT. THE AVERAGE HOMEOWNER IS SLEEPING, HEARS A NOISE, WAKES UP, SEES OR HEARS SOMEONE OR SOME PEOPLE, AND THEN STARTS FIRING, RIGHT, PERHAPS?

MS. BARVIR: PERHAPS. HOPEFULLY, THEY'VE BEEN TRAINED, AND I THINK MOST RESPONSIBLE GUN OWNERS ARE TRAINED IN THE USE OF FIREARMS. BUT THEY'RE NOT AS EXPERIENCED AS LAW ENFORCEMENT ARE IN THE SUDDEN STRESS AND THE PHYSIOLOGICAL IMPACTS THAT CREATES ON SOMEONE'S BODY.

THE COURT: SO AS I WAS READING THIS, IT DAWNED ON ME THAT THE PERSON WHO ACTUALLY NEEDS THE LARGER CAPACITY MAGAZINES FOR SELF-DEFENSE IS THE CIVILIAN WHO DOESN'T GET TO

10:22:51 GO TO THE FIRING RANGE, YOU KNOW, THREE TIMES A YEAR OR FOUR TIMES A YEAR; WHO DOESN'T GO THROUGH THE PROGRAMS, FOR EXAMPLE, DOWNSTAIRS AT THE MARSHAL'S OFFICE WHERE THEY HAVE THE VARIOUS SCENARIOS YOU GO THROUGH AND YOU GET TO IDENTIFY "DO I SHOOT OR NOT SHOOT," RIGHT? SO LAW ENFORCEMENT NEEDS FEWER ROUNDS BECAUSE THEY HAVE MORE TRAINING THAN THE AVERAGE CIVILIAN WHO IS AT HOME AND DOESN'T HAVE THAT CONSTANT KIND OF TRAINING. DOES THAT MAKE SENSE TO YOU?

MS. BARVIR: IT MAKES SENSE TO ME. YOU WOULD THINK THAT WOULD BE TRUE, BUT WE SEE PLENTY OF STORIES IN THE MEDIA THESE DAYS WHERE THAT'S NOT THE CASE FOR POLICE OFFICERS.

THE COURT: I UNDERSTAND, FACTUALLY. I UNDERSTAND. I HEAR YOU. I HEAR YOU. QUITE OFTEN -- BELIEVE ME, I SEE THE CASES ALL THE TIME, AND THEY DO THE BEST THEY CAN, BUT I

10:23:53 OFTENTIMES WONDER, MAYBE WHAT THEY REALLY NEED IS HOWITZERS OR LPG'S OR WHATEVER IN ORDER TO HIT WHAT THEY'RE SHOOTING AT.

MS. BARVIR: I'D LIKE TO SAY ONE THING THOUGH ABOUT THE STATE'S CONCERN TO WHAT YOUR HONOR IS SAYING ABOUT PEOPLE WHO ARE NOT AS -- YOU DON'T HAVE TO FIRE THEIR WEAPON AS OFTEN AS A POLICE OFFICER MIGHT, FOR INSTANCE. SO A HOMEOWNER WHO MIGHT HAVE TO SHOOT IN SELF-DEFENSE. SO THE STATE IS CONCERNED THAT THESE INDIVIDUALS, THEY ARE COMPLAINING THAT THEY NEED ALL THESE BULLETS, AND THEY'RE GOING TO SPRAY FIRE AND THEY'RE GOING TO HAVE ALL THESE STRAY BULLETS FIRING AROUND AND FAMILY MEMBERS --

10:24:36 THE COURT: HOW MANY TIMES HAS THAT HAPPENED?

MS. BARVIR: THAT'S WHAT I WAS GOING TO SAY, YOUR HONOR. THEY DON'T HAVE EVIDENCE OF THAT HAPPENING; ALTHOUGH, THEY CLAIM IT MIGHT. SO I WANT TO MAKE THAT POINT VERY CLEAR.

THE COURT: SO THE CASE OF SELF-DEFENSE, WHEN IT HASN'T HAPPENED, THE STATE SAYS, "SEE, YOU DON'T NEED IT BECAUSE IT HASN'T HAPPENED," AND THEN WHEN THE ISSUE COMES UP ABOUT SPRAYING OF BULLETS, THAT HASN'T HAPPENED, BUT THE STATE SAYS, "TAKE OUR WORD FOR IT; THIS HAS OR WILL HAPPEN."

MS. BARVIR: CORRECT. AND ALSO, I THINK THAT LEADS US ALSO TO CRIMINAL USE WHICH IS A MAJOR CONCERN AND POINT OF CONTENTION OF THE STATE IN ITS BRIEFING WHICH IS TO SUGGEST THAT CRIMINALS USE THESE AT DISPROPORTIONATE RATES. I THINK

10:25:22 THEY SPOKE SPECIFICALLY AT SOME POINTS ON VIOLENCE AGAINST LAW ENFORCEMENT OFFICERS AND OBVIOUSLY THE MASS SHOOTING EVENTS --

THE COURT: I NOTED THAT IN A COUPLE OF INCIDENTS THE STATE MENTIONS, THE WEAPONS THAT WERE ACTUALLY USED WERE MACHINE GUNS. FOR EXAMPLE, I THINK THE BIG BANK ROBBERY CASE THAT ONE OF THE STATE'S EXPERTS RELIED ON, THE WEAPONS THAT WERE BEING USED WERE AUTOMATIC WEAPONS WHICH I THINK HAD BEEN BANNED FOR A LONG TIME.

MS. BARVIR: EFFECTIVELY BANNED SINCE THE '80S. AND THEN, OF COURSE, WHEN YOU TALK ABOUT LAS VEGAS WHICH IS DEFINITELY AN OUTLIER.

10:26:05 THE COURT: I DON'T KNOW ANYTHING ABOUT LAS VEGAS. WE KNOW NOTHING ABOUT LAS VEGAS. AND IF THE STATE HAS ANY RECORDS ON WHAT ACTUALLY HAPPENED IN LAS VEGAS, I'D LOVE TO SEE IT BECAUSE ALL I READ IS BASICALLY HEARSAY UPON HEARSAY UPON HEARSAY, AND I READ THAT MAYBE THIS GUY HAD 42 WEAPONS.

MS. BARVIR: THEY WERE MADE TO FIRE AUTOMATICALLY WITH A -- WITH WHAT WAS CALLED A BUMP STOCK, AT LEAST THAT'S WHAT'S BEING REPORTED, YES. BUT WHEN YOU'RE TALKING ABOUT CRIMINAL USE GENERALLY, THE STATE WANTS TO SUGGEST THAT THESE TYPES OF MAGAZINES ARE NOT PROTECTED OR THEY'RE PARTICULARLY OR UNIQUELY DANGEROUS BECAUSE THEY'RE SO OFTEN USED IN CRIMES. BUT AGAIN, THE USE IN CRIME IS JUST AS -- IT'S JUST AS SIMILAR TO USE IN SELF-DEFENSE. IT'S LIKE -- THEY'RE NOT SHOOTING THEM MORE THAN 10 ROUNDS NECESSARILY. I THINK THE AVERAGE IS ABOUT 10:27:01 TWO JUST LIKE AN INDIVIDUAL USING IT IN SELF-DEFENSE. THE STATE WANTS TO HAVE ITS CAKE, RIGHT, SAYING IT'S CRIMINAL USE JUST BECAUSE THESE FIREARMS, THESE MAGAZINES ARE SHOWING UP AT CRIME SCENES; BUT IT'S NOT SELF-DEFENSE USE IF YOU DON'T SHOOT IT MORE THAN 10 TIMES. SO I THINK THAT'S AN ISSUE THAT I'D LIKE THE COURT TO CONSIDER AS WELL.

THE COURT: STATISTICALLY, STATISTICALLY, OUT OF ALL THE GUN CRIMES COMMITTED IN THE STATE OF CALIFORNIA -- LET'S JUST SAY THE LAST 10 YEARS -- HOW MANY OF THOSE HAVE INVOLVED LARGE CAPACITY MAGAZINES AS THEY'RE CURRENTLY DEFINED?

MS. BARVIR: I'M NOT ENTIRELY SURE. I CAN'T REMEMBER

10:27:49 OFF THE TOP OF MY HEAD.

THE COURT: I EXPECT THE STATE WOULD BE ABLE TO ANSWER THAT QUESTION.

MS. BARVIR: I HOPE SO.

THE COURT: THEY'LL HAVE THE ANSWER FOR ME AS TO HOW MANY GUN VIOLENCE CRIMES THERE HAVE BEEN AND STATISTICALLY -- AND BY THE WAY, JUST SO EVERYBODY UNDERSTANDS, ANY SHOOTING, ANY SHOOTING IS TRAGIC. IT'S TRAGIC. JUST LIKE ANY DRUNK DRIVING DEATH IS TRAGIC. RIGHT? WE HAVE TO ACKNOWLEDGE THAT.

MS. BARVIR: YES.

THE COURT: WE WOULD HOPE IT WOULD NEVER HAPPEN. BUT THAT'S NOT THE WAY THE REAL WORLD WORKS.

MS. BARVIR: CORRECT.

10:28:26 THE COURT: SO NOW I HOPE THE STATE HAS THE STATISTICS FOR ME AS TO HOW MANY GUN VIOLENCE INSTANCES THERE HAVE BEEN IN THE LAST 10 YEARS AND HOW MANY OF THOSE HAVE BEEN COMMITTED WITH A WEAPON THAT HAD A LARGE CAPACITY MAGAZINE AND HOW MANY HAVE BEEN COMMITTED SINCE THE SALE AND TRANSFER OF LARGE CAPACITY MAGAZINES WERE BANNED EXCEPT FOR THE GRANDFATHER CLAUSE. SO --

MS. BARVIR: I'D LIKE TO DIRECT THE COURT'S ATTENTION TO THE EXHIBIT ATTACHED TO THE BARVIR DECLARATION, MY DECLARATION, PROVIDED BY PROFESSOR MOODY. THAT KIND OF, I THINK, SPEAKS TO WHAT THE STATE -- WHAT THE COURT IS LOOKING

10:29:09 FOR HERE. WHILE I DON'T HAVE RAW NUMBERS OF THE NUMBER OF INCIDENTS -- YOU KNOW, WHAT TOTAL GUN DEATHS THERE ARE, HOW MANY GUN CRIMES THERE ARE AND SPECIFICALLY HOW MANY INVOLVE MAGAZINES OVER 10 ROUNDS, BUT WHAT PROFESSOR MOODY'S WORK SHOWS IS THAT THERE HASN'T BEEN A STATISTICALLY SIGNIFICANT IMPACT ON ANY SORTS OF CRIME, GUN VIOLENCE GENERALLY, MURDERS OF LAW ENFORCEMENT, MASS SHOOTINGS, MORE SPECIFICALLY IN CALIFORNIA. SO THE FEDERAL BAN WHICH WE SPEAK ABOUT -- BOTH SIDES SPEAK ABOUT A LOT IN THE EVIDENCE AND THE BRIEFING -- THE FEDERAL BAN PAIRED WITH CALIFORNIA'S SINCE 2000 ACQUISITION BAN HAS NOT HAD A STATISTICALLY SIGNIFICANT IMPACT ON GUN VIOLENCE.

THE STATE OBJECTS TO A LOT OF THAT CONTENT. I'D LIKE TO SAY ONE THING ABOUT THAT. THE STATE CLAIMS IT'S NOT REBUTTAL WITNESS TESTIMONY. THE STATE CLAIMS THAT KOPER AND

10:30:02 KLAREVUS AND ALLEN, THEIR EXPERTS, ARE NOT SAYING THINGS ABOUT GUN VIOLENCE IN CALIFORNIA AND MASS SHOOTINGS IN CALIFORNIA, BUT WHAT THEY ARE EXPLICITLY OPINING ON, WHAT THOSE EXPERTS ARE STATING IS THAT THEY BELIEVE THAT CAPACITY-BASED MAGAZINE RESTRICTIONS COULD HAVE SOME IMPACT, COULD HELP ALLEVIATE MASS SHOOTINGS, COULD BRING DOWN DEATH TOLLS, THINGS LIKE THAT. PROFESSOR MOODY IS PROVIDING HIS STATISTICAL ANALYSIS THAT SHOWS THAT THAT'S NOT TRUE. SO I'D LIKE THE COURT TO TAKE A LOOK AT THAT.

THE COURT: CONCEPTUALLY, IT'S TRUE. LOOK, CONCEPTUALLY --

10:30:40

MS. BARVIR: CONCEPTUALLY, ANYTHING IS POSSIBLE.

THE COURT: AND I READ THESE THINGS, AND IT'S ALMOST LIKE THEY CUT AND PASTE FROM EACH OTHER. IT'S LIKE -- IT'S KIND OF LIKE PLAYING THE GAME WE PLAYED AS KIDS, TELEPHONE, YOU KNOW, AND THEY JUST KEEP REPEATING THE SAME THING OVER AND OVER. I DON'T NEED AN EXPERT TO TELL ME THAT IF A WEAPON HAS 30 ROUNDS THAT IT CARRIES WITH IT THE POTENTIAL OF KILLING 30 PEOPLE, AND IF A WEAPON HAS 10 ROUNDS IT HAS THE POTENTIAL OF KILLING 10 PEOPLE. YOU DON'T HAVE TO BE A ROCKET SCIENTIST TO FIGURE THAT OUT, OF COURSE. AND IF YOU HAVE A GUN THAT HOLDS ONE ROUND, RIGHT, IT HAS THE POTENTIAL FOR KILLING ONE PERSON. RIGHT?

MS. BARVIR: CORRECT. BUT WHAT COMES FROM THAT IS, AS HAS BEEN SHOWN WITH MOST MASS SHOOTINGS WHERE THERE ARE

10:31:38

LARGER DEATH COUNTS AND MORE MEDIA ATTENTION, THESE PEOPLE THAT ARE COMMITTING THESE HEINOUS ACTS ARE NOT DOING IT WITH ONE GUN WITH SIX ROUNDS OR 10 ROUNDS OR 30 ROUNDS. THEY'RE DOING IT WITH MULTIPLE FIREARMS AND/OR MULTIPLE MAGAZINES. SO WHAT YOU HAVE TO LOOK AT IS: CAN RESTRICTING LAW-ABIDING CITIZENS TO 10 ROUNDS PER MAGAZINE IMPACT MASS SHOOTINGS AND VIOLENCE AGAINST LAW ENFORCEMENT TO SUCH AN EXTENT BECAUSE OF HOW LONG IT TAKES TO CHANGE A MAGAZINE OR JUST PICK UP A NEW FIREARM? THAT'S KIND OF THE ISSUE. YES, IF YOU HAVE ONE GUN WITH 30 ROUNDS IN IT, YOU COULD POTENTIALLY HIT MORE THAN ONE GUN WITH 10 ROUNDS IN IT, BUT THAT'S NOT HOW THESE EVENTS WORK OUT IN THE REAL

10:32:19 WORLD, AND I THINK THE EVIDENCE LAYS THAT OUT.

THE COURT: LET ME ASK YOU ABOUT THE SAN BERNARDINO SHOOTING. WHAT WEAPON WAS USED IN THAT SHOOTING? DO YOU KNOW?

MS. BARVIR: I DO, BUT I DON'T OFF THE TOP OF MY HEAD. I'M SORRY, YOUR HONOR.

THE COURT: DOES THE STATE KNOW?

MR. ECHEVERRIA: IT'S MY UNDERSTANDING THAT THEY WERE AR PLATFORM MODELS.

THE COURT: WHAT CAPACITY MAGAZINE?

MR. ECHEVERRIA: I BELIEVE THEY WERE 30 ROUND MAGAZINES, YOUR HONOR.

THE COURT: WHERE DID THEY GET THEM?

MR. ECHEVERRIA: I DO NOT KNOW.

THE COURT: DID THEY BUY THEM HERE IN CALIFORNIA?

10:32:47 MR. ECHEVERRIA: UNLIKELY.

THE COURT: SO THEY BROUGHT THEM FROM OUT OF STATE?

MR. ECHEVERRIA: I DON'T KNOW FOR SURE, YOUR HONOR, BUT THAT'S A FAIR ASSUMPTION.

THE COURT: OKAY. ALL RIGHT. GREAT. THANKS. I APPRECIATE YOUR CANDIDNESS.

MS. BARVIR: I BELIEVE DR. KLECK TALKS ABOUT THAT INSTANCE IN HIS EXPERT REPORT, YOUR HONOR.

THE COURT: AS I SAID, I READ ALL THIS, AND I WISH I COULD REMEMBER IT ALL, BUT I CAN'T. I JUST CAN'T. SO OUR RECOLLECTION IS THE SAN BERNARDINO MASS SHOOTING WHICH IS THE

10:33:15 ONE IN CALIFORNIA WHICH BASICALLY IS, I BELIEVE, THE LAST THAT WE HAD WAS BY SOMEONE -- AND THAT WAS A TERRORIST CASE, AS I RECALL. IT WAS THE HUSBAND AND WIFE WHO WERE --

MS. BARVIR: THAT'S WHAT THE REPORTS SHOWED, YES, YOUR HONOR.

THE COURT: AND THEY PURCHASED THE GUNS OUT OF STATE.

MS. BARVIR: AND THEY DIDN'T HAVE THEM BEFORE THE 2000 LAW WENT INTO EFFECT. SO THEY COULDN'T HAVE ACQUIRED THEM LEGALLY, YES, YOUR HONOR.

THE COURT: SO REGARDLESS, SO HERE WE HAVE A LAW THAT'S IN EFFECT. AND THE LAW SAYS YOU CAN'T BUY, TRANSFER, POSSESS UNLESS YOU OWNED IT BEFORE A CERTAIN DATE. AND THESE PEOPLE WHO WANTED TO KILL PEOPLE, GOT THEIR HANDS ON THESE GUNS

10:34:06 AND NOT WITHSTANDING THE LAW THAT WE HAD, THEY WENT AHEAD AND KILLED ALL THESE PEOPLE. RIGHT?

MS. BARVIR: CORRECT.

THE COURT: THAT'S MY RECOLLECTION OF WHAT I READ IN THERE. OKAY. GOOD. SO?

MS. BARVIR: ONE THING I WANTED TO SAY -- WE'RE TALKING A BIT ABOUT THE STATE, WHETHER OR NOT IT CAN ESTABLISH THAT THE LAW IS LIKELY TO HAVE SOME TYPE OF MATERIAL EFFECT, RIGHT? AND THAT MIGHT BE HARD FOR THE COURT TO GRAPPLE WITH AT THIS MSJ STAGE. THERE'S THE STATE SAYING, WELL, SURE, IT COULD POTENTIALLY IMPACT THIS TYPE OF VIOLENT CRIME AND THE --

10:34:45 THE COURT: HOW WOULD A TRIAL -- HOW WOULD A TRIAL --
MS. BARVIR: DO ANYTHING MORE?
THE COURT: -- YES, DO ANYTHING MORE?
MS. BARVIR: I THINK THAT'S A GOOD QUESTION. WE COULD POTENTIALLY SEE THE -- THE COURT COULD SEE THE EXPERTS AND WHO IS POTENTIALLY MORE AWARE. WE COULD PLAY IT OUT FOR THE COURT. WE'VE DONE IT IN DEPOSITIONS. SO I DON'T KNOW THAT COULD DO A WHOLE LOT MORE FOR YOU.
THE COURT: I READ THE EXCERPTS OF DEPOSITIONS THAT WERE FILED, BY THE WAY.
MS. BARVIR: BUT EVEN IF THE COURT DID GRAPPLE WITH WHETHER OR NOT WE COULD HANDLE THIS AT MSJ, WHICH WE BELIEVE YOU CAN BASED ON THE EVIDENCE THAT HAS BEEN PUT FORTH THAT ISN'T LIKELY TO MATERIALLY AFFECT THESE TYPES OF GUN VIOLENCE,
10:35:28 WHAT IT COMES DOWN TO IS THERE'S NO FIT HERE. THE STATE HAS CHOSEN THE BROADEST POSSIBLE MEANS. STRIPPING MAGAZINES NECESSARY FOR -- USED FOR SELF-DEFENSE, OWNED FOR SELF-DEFENSE AND OTHER LAWFUL PURPOSES BY LAW-ABIDING CITIZENS, TAKING THEM FROM THEIR HANDS AND THEIR HOMES SO THEY CAN PREVENT CRIMINAL MISUSE. HELLER TELLS US THAT'S INAPPROPRIATE. THE FIT IS NOT APPROPRIATE HERE. THIS ISN'T A QUESTION OF EXPERTS FIGHTING WHETHER OR NOT THE FIT IS APPROPRIATE, AND THE LEGISLATURE IS ENTITLED TO NO DEFERENCE ABOUT WHETHER THE FIT IS APPROPRIATE. THE COURT HAS THE POWER TO MAKE THAT DECISION. IT'S A LEGAL QUESTION.

10:36:04 THE COURT: IT'S INTERESTING YOU SHOULD MENTION THAT BECAUSE IN THE KOLBE CASE, THERE'S SOMETHING THAT REALLY PUZZLED ME. AND BY THE WAY, I THINK IT WAS IN THE WORMAN DECISION AS WELL WHICH, BY THE WAY, I KNOW JUDGE YOUNG SOMEWHAT. I RESPECT HIM HIGHLY. HE WAS THE FELLOW WHO MASTERMINDED OR MANAGED ALL THE TOBACCO CASES, IF I'M NOT MISTAKEN, AND I THINK HE DID A WONDERFUL JOB IN THAT REGARD. I DISAGREE WITH HIS OPINION FOR VARIOUS RESPECTS. BUT ONE OF THE THINGS THAT HE TALKED ABOUT AND KOLBE TALKS ABOUT THAT YOU JUST MENTIONED -- IN THE KOLBE CASE, AT PAGE 140, IT SAYS, QUOTE: IT IS THE LEGISLATURE'S JOB, NOT OURS, TO WEIGH CONFLICTING EVIDENCE AND MAKE POLICY JUDGMENTS, AND WE MUST ACCORD SUBSTANTIAL DEFERENCE TO THE PREDICTIVE JUDGMENTS OF THE LEGISLATURE. AND THAT COMES FROM KOLBE AND THEN IT'S REPEATED
10:37:19 IN THE WORMAN DECISION.

BUT AS A GOOD FRIEND OF MINE LIKES TO SAY, THAT ARROW LEFT THE BOW A LONG TIME AGO. IT CAUSES ME TO THINK ABOUT SOME THINGS. TELL ME WHAT YOU THINK ABOUT IT. SO BROWN VERSUS BOARD OF EDUCATION, THE LEGISLATURE SAT DOWN, HEARD EVIDENCE, MADE POLICY DECISIONS, AND THEY SAID SEPARATE BUT EQUAL IS OKAY. THEY MADE A POLICY DECISION AFTER HEARING THE EVIDENCE, AND THANK GOD ALONG COMES THE SUPREME COURT THAT SAYS, SORRY, THIS IS PROTECTED BY THE BILL OF RIGHTS, YOU'RE WRONG, AND WE HAD BROWN. THANK GOODNESS. RIGHT?

ROE VERSUS WADE, THE LEGISLATURE MADE A DECISION

10:38:22 CURTAILING ABORTION. THEY MADE A POLICY DECISION. ALONG COMES THE SUPREME COURT AND SAYS, WRONG. NOW IN THE ROE VERSUS WADE, THEY HAD TO FIRST FIND THERE WAS A RIGHT TO PRIVACY WHICH -- I'M NOT DISAGREEING WITH THE RESULT. I'M JUST SIMPLY SAYING I READ THE CONSTITUTION. I KEEP A COPY OF IT BY MY CHAIR WHERE I LOOK AT IT EVERY NOW AND THEN WHENEVER I SEE SOMETHING IN THE NEWS. SO I LOOK AT IT QUITE OFTEN. I'VE TRIED TO FIND THE WORD "PRIVACY" IN THERE. I CAN'T FIND IT. I'VE TRIED TO FIND THE WORD "ABORTION." I CAN'T FIND IT. SO THE SUPREME COURT SAID: NOT WITHSTANDING THE FACT YOU MAY HAVE MADE CERTAIN POLICY DECISION, IT VIOLATES THE CONSTITUTION. RIGHT?

MS. BARVIR: CORRECT.

THE COURT: RECENTLY, AND PERHAPS THE STATE CAN ENLIGHTEN ME ON THIS, A CASE THAT I KNOW REASONABLY WELL,

10:39:26 LAWRENCE VERSUS TEXAS, RIGHT? THE TEXAS LEGISLATURE SAID THERE WAS AN ACT PROHIBITING SODOMY. RIGHT? THEY MADE POLICY DECISIONS. SUPREME COURT SAID: NO, IT VIOLATES THE CONSTITUTION. ALONG COMES OBERGEFELL, PROPOSITION 8. NOW I'M SURE THE STATE REMEMBERS THIS QUITE WELL. THERE WAS A VOTE BY THE PEOPLE OF THE STATE OF CALIFORNIA. 54 OR 56 PERCENT VOTED AND SAID THE DEFINITION OF A MARRIAGE IS A MARRIAGE BETWEEN A MAN AND A WOMAN. RIGHT? ALONG COMES THE SUPREME COURT THAT SAYS: WRONG, THIS IS BEYOND YOUR POLICY-MAKING POWERS. THIS IS PROTECTED. IT IS PROTECTED BY SOMETHING CALLED THE BILL OF RIGHTS.

10:40:25 SO I'M HAVING A HARD TIME UNDERSTANDING, AND TRUST ME, I HAVE LOOKED AT THIS, AND WHEN I SEE JUDGE YOUNG, WHO I RESPECT, TALK ABOUT DEMOCRACY, AND I READ ABOUT THE KOLBE CASE, AND WE'RE SAYING, WAIT A MINUTE, WAIT A MINUTE, THESE ARE POLICY DECISIONS, AND I SAY TO MYSELF, WAIT, THAT ARROW LEFT BOW A LONG TIME AGO. IF IT'S SOMETHING THAT'S PROTECTED BY THE BILL OF RIGHTS, THE STATE DOESN'T HAVE THE LIBERTY TO MAKE THESE POLICY DECISIONS. YOU JUST CAN'T. SO I'M HAVING A HARD TIME TRYING TO FIGURE OUT -- AND I KNOW THE STATE IS GOING TO ENLIGHTEN ME WHEN ITS TURN COMES UP, TO TELL ME WHEN IS IT A POLICY DECISION AND WHEN IS IT NOT A POLICY DECISION. WHEN DOES THE COURT HAVE THE ABILITY TO SAY, ENOUGH IS ENOUGH; THIS IS PROTECTED BY THE BILL OF RIGHTS, AND NO MATTER HOW WISE YOU MAY THINK YOUR POLICY IS, IT JUST CAN'T PASS MUSTER. WHAT DO

10:41:40 YOU THINK?

MS. BARVIR: I THINK I WANT TO GO BACK TO THAT PHRASE "PREDICTIVE JUDGMENTS." STATES AND CITIES THAT ARE TRYING TO DEFEND GUN CONTROL LAWS THAT ARE BEING CHALLENGED ON SECOND AMENDMENT GROUNDS REGULARLY RESORT TO THIS LANGUAGE. AND THE HONORABLE JUDGES WHO WROTE THE WORMAN AND KOLBE OPINIONS -- YOU KNOW, THE PREDICTIVE JUDGMENT LANGUAGE COMES FROM SUPREME COURT CASE LAW, BUT I THINK THEY TAKE IT TOO FAR. I THINK WHAT THE CASE LAW IS REALLY CLEAR ABOUT IS, YES, THE LEGISLATURE IS ENTITLED TO SOME DEFERENCE WHEN IT COMES TO, DO WE HAVE A COMPELLING INTEREST? MAYBE EVEN IF THEY REASONABLY THOUGHT THE

10:42:20 LAW COULD BE EFFECTIVE. WHAT THEY DON'T GET THIS BROAD DEFERENCE TO, WHAT THE JUDICIAL BRANCH HAS THE RESPONSIBILITY TO LOOK AT, IS WHETHER OR NOT THE FIT IS APPROPRIATE, WHETHER IT REALLY IS LIKELY TO ADVANCE THE INTERESTS THAT ARE BEING STATED OR --

THE COURT: HOW DO WE DECIDE THAT FIT? SO THAT ASSUMES SOMETHING LESS THAN STRICT SCRUTINY, RIGHT? SO WE'RE NOW INTO A HEIGHTENED SCRUTINY BUT MORE THAN RATIONAL BASIS, BUT HOW DO WE DECIDE WHAT IS A REASONABLE FIT AND WHO DECIDES IT?

MS. BARVIR: YOU KNOW, OBVIOUSLY, THE LEGISLATURE IS GOING TO MAKE ITS DECISION FIRST. BUT IT'S THE RESPONSIBILITY OF THE JUDICIARY TO MAKE SURE THAT THE DECISIONS THEY'VE MADE ARE IN LINE WITH THE CONSTITUTION. ALL THOSE CASES THAT YOUR

10:43:15 HONOR JUST SPOKE OF ARE EXAMPLES OF THE JUDICIARY UPHOLDING ITS POWER AND AUTHORITY AND RESPONSIBILITY TO PROTECT THE CONSTITUTION, THE RIGHTS OF THE MINORITIES, FROM MOB RULE. I THINK IT'S DEFINITELY A HARD QUESTION, BUT IT'S SOMETHING THAT THE COURT IS GOING TO HAVE TO GRAPPLE WITH BUT --

THE COURT: IT KIND OF CUTS TO THE CHASE. WHEN I LOOK AT THIS CASE, IT CUTS TO THE CHASE. THE CHASE IS, WHO MAKES THE DECISION AND ON WHAT BASIS DO WE MAKE THE DECISION? RIGHT? AND THE GROUP THINK IS, WELL, AS LONG AS WE KNOW THESE THINGS ARE DANGEROUS, WE'RE GOING TO ALLOW IT; WE'RE GOING TO ALLOW RESTRICTIONS ON IT. RIGHT? EXCEPT FOR HELLER AND

10:44:14 CAETANO, RIGHT? BUT AS JUDGES, WE'RE EXPECTED TO EXERCISE OUR OWN INDEPENDENT THINKING.

MS. BARVIR: CORRECT.

THE COURT: BUT MY QUESTION THAT YOU PROBABLY CANNOT ANSWER, AND I DON'T THINK THE STATE WILL BE ABLE TO ANSWER FOR ME EITHER, IS: HOW DO WE MAKE THE DECISION OF HOW FAR CAN WE ALLOW THE STATE TO INTERFERE WITH WHAT IS AT LEAST ARGUABLY PROTECTED BY THE SECOND AMENDMENT? AND SO I NEED YOUR HELP.

MS. BARVIR: I RESPECT THAT YOUR HONOR IS CONSIDERING, LIKE, HOW FAR CAN THEY GO. THERE ARE LOTS OF CASES THAT HAVE MADE IT THROUGH THE PIPELINE AND THAT ARE KNOCKING ON THE SUPREME COURT'S DOOR ASKING HOW FAR CAN THE STATE GO. BUT WHAT WE HAVE HERE IS, AGAIN, THE BROADEST POSSIBLE MEANS. IF THE COURT FINDS THAT POSSESSION AND/OR

10:45:22 ACQUISITION OF MAGAZINES OVER 10 ROUNDS IS PROTECTED BY THE CONSTITUTION, HELLER IS VERY CLEAR, YOU SIMPLY CANNOT BAN IT.

THE COURT: WHAT DO I LOOK TO TO DECIDE WHETHER OR NOT A MAGAZINE IS BY ITSELF AN ARM THAT IS PROTECTED BY THE SECOND AMENDMENT?

MS. BARVIR: I THINK IN THE NINTH CIRCUIT YOU'RE GOING TO LOOK AT JACKSON AND TO RECOGNIZE FROM THE NINTH CIRCUIT'S DECISION THERE THAT WE'RE NOT LIMITED TO FIREARMS. WE'RE ALSO PROTECTING THE RIGHTS OF THOSE THINGS THAT ARE NECESSARY TO MAKE OUR FIREARMS USABLE AND EFFECTIVE. AND THAT MEANS AMMUNITION. IT MEANS PARTS THAT ARE NECESSARY TO THE

10:46:04 OPERATION. AS THE EVIDENCE AND THE BRIEFING FROM PLAINTIFF SHOW, DETACHABLE MAGAZINES ARE NECESSARY TO THE FUNCTION OF ALL THOSE FIREARMS THAT REQUIRE THEIR USE.

THE COURT: BUT THEY'RE NOT BANNING ALL MAGAZINES.

MS. BARVIR: THAT'S CORRECT, YOUR HONOR.

THE COURT: SO SAY, FOR EXAMPLE, A GLOCK 17 WHERE YOU CAN USE A 10-ROUND MAGAZINE, RIGHT?

MS. BARVIR: YES.

THE COURT: OKAY. SO THEY'RE NOT COMPLETELY BANNING ALL MAGAZINES. IF THEY WERE, IT WOULD BE ONE STORY. BUT THEY'RE NOT. SO HOW DO YOU RESPOND TO THAT?

MS. BARVIR: I THINK I HAVE A FEW RESPONSES. FIRST, JUST SAYING THAT THEY'RE NOT BANNING EVERY SINGLE MAGAZINE KIND OF TAKES US BACK TO HELLER. THEY WEREN'T BANNING ALL TYPES OF

10:46:50 FIREARMS EITHER IN THE DISTRICT OF COLUMBIA.

THE COURT: BUT THEY WERE BANNING ALL HANDGUNS.

MS. BARVIR: ALL HANDGUNS, YEAH. BUT THE COURT TELLS US JUST BECAUSE THERE'S AN OPTION TO USE SOMETHING ELSE ISN'T ENOUGH TO PROTECT THE RIGHT. SINCE MAGAZINES, AT LEAST 15 TO 17 ROUNDS FOR HANDGUNS AND 24 TO 30 ROUNDS FOR RIFLES, ARE COMMONLY POSSESSED BY LAWFUL PURPOSES BY LAW-ABIDING CITIZENS, THEY'RE PROTECTED. YOU CAN'T HAVE THE STATE COME BACK AND SAY, WELL, JUST BECAUSE YOU CAN USE 10 ROUNDS OR FEWER AND THEY'RE AVAILABLE, THAT'S NOT A JUDGMENT THAT THE STATE CAN MAKE WHEN THESE TYPES OF ARMS ARE PROTECTED BY THE CONSTITUTION. SO THAT

10:47:28 WOULD BE MY RESPONSE. AND ADDITIONALLY, EXCUSE ME --

THE COURT: YOU LOST YOUR TRAIN OF THOUGHT.

MS. BARVIR: LOST MY TRAIN OF THOUGHT. I'M SORRY.

THE COURT: LET ME INTERRUPT YOU WITH ONE OF MY QUESTIONS. IN READING KOLBE, I WAS A LITTLE CONFUSED BECAUSE IN ONE PART THEY TALK ABOUT AR'S BEING POSSESSED BY ONLY ONE PERCENT OF THE POPULATION. SO WHAT THEY WERE TRYING TO DO IN THE KOLBE OPINION IS TO ESSENTIALLY EXPLAIN THAT THEY WERE NOT IN COMMON USE. BUT THEN IN ANOTHER PART OF KOLBE THEY SAID -- AGAIN, KEEPING IN MIND THAT A LOT OF THIS IS SORT OF MERGING OR BLENDING IN WITH THE OTHER -- IT SAYS: THE PLAINTIFF'S EVIDENCE REFLECTS THAT SINCE IT WAS FIRST MARKETED TO THE PUBLIC IN 1963, THE AR-15 HAS BECOME THE MOST POPULAR CIVILIAN RIFLE DESIGNED IN AMERICA AND IS MADE IN MANY VARIATIONS BY

10:48:56 MANY COMPANIES.

SO I WAS A LITTLE CONFUSED WHEN I WAS READING KOLBE. ON THE ONE HAND THEY SAY, WELL, THEY'RE ONLY OWNED BY ONE PERCENT OF THE POPULATION. AND THEN THEY SAID, BUT IT'S BECOME THE MOST POPULAR CIVILIAN RIFLE DESIGNED IN AMERICA. I WAS A LITTLE CONFUSED BY THAT. DO YOU HAVE ANY NUMBERS ON HOW POPULAR ARE WEAPONS IN CALIFORNIA THAT USE MAGAZINES OF MORE THAN 10 ROUNDS?

MS. BARVIR: THE EVIDENCE I THINK WOULD COME FROM -- A LOT OF THE EVIDENCE OBVIOUSLY IS DEALING WITH THE UBIQUITY OF THE MAGAZINES OVER 10 ROUNDS THEMSELVES. BUT THE EVIDENCE THAT

10:49:46 GOT US TO THOSE NUMBERS I THINK WE HAVE ESTIMATES BETWEEN 100 AND 115 MILLION MAGAZINES OVER 10 ROUNDS IN THE UNITED STATES THROUGHOUT THE MARKET.

THE COURT: DO YOU HAVE ANY NUMBERS FOR CALIFORNIA?

MS. BARVIR: DON'T HAVE DIRECT NUMBERS FOR CALIFORNIA. I THINK IT'S FAIR TO CONCEDE THAT THEY'RE GOING TO BE LOWER CONSIDERING THE STATE HAS BANNED THEIR ACQUISITION AND MANUFACTURE SINCE 2010 -- I MEAN, 2000. OBVIOUSLY, THAT DOESN'T MAKE IT RIGHT. WHAT YOU'RE DOING IS SORT OF MAKING IT A CIRCULAR ARGUMENT. THEY'RE NOT IN USE IN CALIFORNIA BECAUSE WE BANNED THEM 20 YEARS AGO. THAT'S NOT THE WAY THE RIGHTS WORK. SO THE NUMBERS THAT WE'RE LOOKING AT ARE GOING TO BE THE MILLIONS THAT ARE IN THE HANDS OF PEOPLE THROUGHOUT THE COUNTRY.

10:50:34 I THINK YOU'LL SEE THAT AR'S ARE QUITE POPULAR IN CALIFORNIA THOUGH. THERE'S A LOT OF RESTRICTION ON THEIR USE. REGISTRATION IS REQUIRED FOR MANY TYPES. BUT THEY'RE STILL VERY POPULAR, AND THOSE NUMBERS, AGAIN, THEY'RE GOING TO BE COMING FROM THE NATIONWIDE LOOKING, NATIONWIDE VIEWPOINT. BUT THE WORK OF THE PLAINTIFF'S EXPERT FROM THE NATIONAL TRAINING SPORTS FOUNDATION KIND OF TALKS ABOUT THAT. THEY LOOKED AT THE NUMBERS OF HOW MANY PEOPLE HAD THE TYPES OF RIFLE PLATFORMS THAT WOULD ACCEPT LARGE CAPACITY MAGAZINES TO THEN MAKE THE ESTIMATES OF NUMBERS OF LARGE CAPACITY MAGAZINES IN THE COUNTRY. SO THAT'S THE BEST I CAN DO FOR YOU, YOUR HONOR, ON

10:51:14 NUMBERS OF AW'S IN THE STATE AND IN THE COUNTRY.

SO I THINK GOING BACK TO KOLBE, THERE'S DEFINITELY SOME CONFUSING BITS ABOUT THAT. IT'S HARD TO KIND OF SUGGEST THAT, YOU KNOW, WELL, MAYBE IT'S ONLY ONE PERCENT OF THE U.S. POPULATION, BUT IT'S THE MOST COMMON MODERN FIREARM ON THE MARKET. BUT IT'S NOT NECESSARILY CONTRADICTORY. ONE PERCENT IN THIS COUNTRY, THAT'S STILL A WHOLE LOT OF PEOPLE. AND THE FACT THAT THE PEOPLE THAT DO OWN GUNS OVERWHELMINGLY CHOOSE THOSE TYPES OF FIREARMS, AND NOW THE LARGE CAPACITY MAGAZINES THAT GO WITH THEM, THAT'S WHAT MAKES THEM IN COMMON USE. IT'S NOT RAW NUMBERS NECESSARILY. OBVIOUSLY, WE HAVE A HUNDRED MILLION OF THEM, OF MAGAZINES OVER 10 ROUNDS IN THE COUNTRY. THAT'S A RAW NUMBER. THAT'S VERY HIGH UNDER ANY MEASURE. BUT IF YOU'RE LOOKING AT AW'S AND THE KOLBE COURT IS SAYING IT'S

10:52:06 ONLY ONE PERCENT, WELL, BUT THERE'S STILL THAT ONE PERCENT IS CHOOSING THAT TYPE OF FIREARM, AND IT'S THE MOST POPULAR. I DON'T NECESSARILY THINK THEY'RE CONTRADICTORY STATEMENTS.

THE COURT: LET ME ASK YOU ABOUT ANOTHER STATEMENT IN KOLBE. I KNOW THE STATE RELIED ON KOLBE A LOT. SO I READ THE MAJORITY OPINION. THERE'S AN INTERESTING STATEMENT IN THERE THAT I THINK IS A LITTLE PUZZLING TO ME. MAYBE YOU CAN EXPLAIN IT TO ME. BUT IT SAYS: THE BANNED LARGE CAPACITY MAGAZINES ARE PARTICULARLY DESIGNED AND MOST SUITABLE FOR MILITARY AND LAW ENFORCEMENT APPLICATIONS, NOTING THAT LARGE CAPACITY MAGAZINES ARE MEANT TO PROVIDE SOLDIERS WITH A LARGE AMMUNITION

10:53:00 SUPPLY AND THE ABILITY TO RELOAD RAPIDLY.

I HAVE A BIT OF A PROBLEM WITH THAT STATEMENT BECAUSE PRIOR TO THAT IT SAYS: SIMPLY PUT, AR-15 TYPE RIFLES ARE, QUOTE, LIKE M-16 RIFLES. SO BY DEFINITION, WHEN YOU READ THAT, WHEN I READ IT, AND I UNDERSTAND I'M NOT THE BRIGHTEST LIGHT BULB IN THE BUILDING, BUT WHEN I READ THAT, IT TELLS ME THAT M-16S AND AR-15S ARE NOT THE SAME. THE M-16 IS A MILITARY WEAPON.

MS. BARVIR: THAT'S CORRECT.

THE COURT: AR-15 IS NOT A MILITARY WEAPON.

MS. BARVIR: IT'S A CIVILIAN WEAPON.

THE COURT: IT MAY HAVE -- IN FACT, THAT'S EXACTLY RIGHT. IN FACT, KOLBE SPECIFICALLY SAYS THAT. IT MAY HAVE BEEN DESIGNED AFTER A MILITARY WEAPON, BUT IT DIFFERS IN THE

10:53:55 MILITARY WEAPON IN VARIOUS REGARDS. RIGHT?

MS. BARVIR: CORRECT.

THE COURT: SO IF AN AR-15 USES A MAGAZINE THAT HOLDS MORE THAN 10 ROUNDS, BUT IT WAS NOT DESIGNED FOR MILITARY USE, IT WAS DESIGNED FOR CIVILIAN USE, IT DOESN'T REALLY HOLD. THE MAGAZINES ARE NOT MEANT TO PROVIDE SOLDIERS WITH A LARGE AMOUNT OF AMMUNITION, IT IS DESIGNED TO PROVIDE THE HOLDER OF THE WEAPON -- NOT A SOLDIER, BUT THE HOLDER OF THE WEAPON WHICH PRESUMPTIVELY IS A CIVILIAN -- WITH A LARGE AMMUNITION SUPPLY, RIGHT?

MS. BARVIR: CORRECT.

10:54:37 THE COURT: IT SEEMS SO CLEAR TO ME.

MS. BARVIR: IT IS PRETTY CLEAR, YOUR HONOR. BUT EVEN IF IT WERE A MILITARY FIREARM AND EVEN IF LARGE CAPACITY MAGAZINES WERE MADE TO GIVE SOLDIERS ACCESS TO LARGE AMOUNTS OF AMMUNITION, WHICH I DON'T THINK THE EVIDENCE BEARS OUT THAT THE STATE'S PROVIDED -- THEY REALLY JUST CITE KOLBE AND WORMAN FOR SUCH A PROPOSITION -- EVEN IF THAT WERE TRUE, THE SECOND AMENDMENT EXPLICITLY TALKS ABOUT MILITIA SERVICE SO --

THE COURT: THAT GETS US INTO A WHOLE DIFFERENT ARENA.

MS. BARVIR: THAT'S TRUE.

THE COURT: THAT GETS US INTO A WHOLE DIFFERENT ARENA WHICH IS A QUAGMIRE THAT WE'RE GOING TO, I GUESS, PERHAPS WE'RE GOING TO EXPLORE. BUT I HAVE A VERY DIFFICULT TIME. I DON'T

10:55:39 SEE ANYTHING IN HELLER THAT SAYS THAT MILITARY EQUIPMENT IS NOT PROTECTED. IT DOESN'T SAY THAT AT ALL.

MS. BARVIR: YOU'RE NOT MISSING ANYTHING. IT DOESN'T SAY THAT. IT TALKS ABOUT --

THE COURT: SO AS I SAID, I'M NOT THE BRIGHTEST LIGHT BULB IN THE BUILDING, BUT WHY IS IT THAT ALL THE OTHER COURTS, LIKE KOLBE, FOR EXAMPLE, SAY OTHERWISE? BECAUSE ALL I READ WAS THAT JUSTICE SCALIA POSED A RHETORICAL DEVICE BY WHICH HE CREATED A STRAW MAN ONLY TO BE ABLE TO KNOCK DOWN THE STRAW MAN FURTHER ON IN HIS ARGUMENT; BUT NOWHERE IN THAT ARGUMENT DOES HE SAY, FOR EXAMPLE, THAT M-16S ARE BANNED OR PROHIBITED. DO

10:56:24 YOU KNOW WHERE IN HELLER I MIGHT FIND THAT LANGUAGE?

MS. BARVIR: YOU WON'T FIND THAT LANGUAGE.

THE COURT: THEN HOW IS IT THE PEOPLE KEEP REPEATING THIS? I KEEP READING IT, AND I KEEP THINKING, YOU KNOW, THIS IS LIKE ALICE IN WONDERLAND. I DON'T UNDERSTAND. WHERE DOES THIS COME FROM?

MS. BARVIR: HAVING PRACTICED THIS TYPE OF LAW FOR A WHILE, I HAVE MY ASSUMPTIONS. BUT I THINK WHAT WE'VE SEEN HAPPEN IS THIS TAKING FROM HELLER THE DANGEROUS-AND-UNUSUAL LANGUAGE AND TURNING IT INTO UNUSUALLY-DANGEROUS LANGUAGE. ALL FIREARMS ARE GOING TO BE DANGEROUS BUT IT MEANS THEY HAVE TO BE UNUSUAL. AND THEN THEY PUT THAT TOGETHER WITH THE APPROVAL THAT HELLER GIVES TO MILLER ABOUT SAWED-OFF SHOTGUNS, THEN THEY LUMP A BUNCH OF FIREARMS IN AND SAY, WELL, NOT ALL FIREARMS ARE

10:57:15 PROTECTED. SO IT JUST KIND OF TURNED INTO THIS --

THE COURT: BUT MILLER SPECIFICALLY, MILLER SPECIFICALLY SAYS THAT WEAPONS THAT ARE USED FOR WARFARE ARE PROTECTED.

MS. BARVIR: THAT'S CORRECT.

THE COURT: RIGHT?

MS. BARVIR: RIGHT. AND THEY FOUND THAT SAWED-OFF SHOTGUNS ARE NOT PARTICULARLY USEFUL IN WARFARE SO THEY COULD BE BANNED.

THE COURT: WHICH INTERESTINGLY WOULD PROBABLY BE VERY USEFUL FOR SELF-DEFENSE; IF YOU WOKE UP IN THE MIDDLE OF

10:57:42 THE NIGHT, AND YOU HAD SOMEONE BREAK IN YOUR HOUSE, YOU WOULDN'T HAVE TO WORRY ABOUT THE BULLET GOING THROUGH THAT WALL AND THAT WALL AND GOING TO THE NEIGHBOR'S HOUSE AND HITTING SOMEONE, RIGHT? YOU WOULDN'T HAVE TO WORRY ABOUT AIM. SO PROBABLY A SAWED-OFF SHOTGUN WOULD PROBABLY BE GOOD FOR SELF-DEFENSE AT HOME, BUT YET, WE CAN'T HAVE THEM, RIGHT?

MS. BARVIR: THAT'S TRUE.

THE COURT: BUT MILLER SAID THAT WEAPONS BECAUSE -- THE WHOLE REASON FOR THE SECOND AMENDMENT WAS SO THAT IF WE WERE REQUIRED TO DEFEND OURSELVES FROM ENEMIES, FOREIGN OR DOMESTIC, IT WOULD CALL UPON THE CITIZENRY -- THE FARMERS, THE BLACKSMITHS, THE TEACHERS, THE LAWYERS, THE DOCTORS -- TO PICK UP WHATEVER THEY HAD AND TO GO OUT AND DEFEND THE FREE STATE. RIGHT?

10:58:34 MS. BARVIR: CORRECT.

THE COURT: AND MILLER SAID -- AND MILLER SAID THAT THOSE WEAPONS ARE, IN FACT, PROTECTED. NOW PRACTICALLY SPEAKING, I THINK WE ALL UNDERSTAND WHAT'S GOING ON. NONE OF US -- I SHOULDN'T SAY "NONE OF US." GENERALITIES ARE NOT GOOD. BUT I THINK WE CAN ALL AGREE THAT NONE OF US WOULD LIKE TO SEE OUR NEXT-DOOR NEIGHBOR OWN A SHOULDER-FIRED STINGER MISSILE OR BAZOOKA OR HAND-GRENADE. ALTHOUGH, UNDER THE SECOND AMENDMENT, IF YOU READ IT AND READ ITS REASON FOR ITS EXISTENCE, THAT WOULD PROBABLY BE OKAY.

SO IT SEEMS TO ME THAT THIS WHOLE IDEA THAT THESE --

10:59:20 SO THE IDEA THAT BECAUSE LARGE -- REMEMBER WE USED TO TALK ABOUT HIGH-CAPACITY MAGAZINES? NOW WE CHANGED THE TERMINOLOGY.

MS. BARVIR: THAT HAPPENS A LOT.

THE COURT: SO NOW IT'S LARGE CAPACITY MAGAZINES. SO LARGE CAPACITY MAGAZINES ARE FOR MILITARY USE. BUT THEY'RE PROHIBITED BY HELLER BECAUSE HELLER PROHIBITS WEAPONS THAT ARE USED FOR MILITARY USE. BUT I DON'T READ THAT IN HELLER. I JUST DON'T READ IT. I DON'T SEE IT. I DON'T KNOW WHERE IT IS. BUT I KEEP SEEING CASES THAT SAY THAT OVER AND OVER AND OVER AGAIN.

MS. BARVIR: LUCKILY, YOU'RE NOT GOING TO FIND THAT FROM THE NINTH CIRCUIT TELLING YOU THAT YOU NEED TO FOLLOW THAT PRECEDENT. HELLER IS GOING TO BE ON POINT HERE. THESE ARE

11:00:06 USED BY LAW-ABIDING CITIZENS FOR SELF-DEFENSE REGARDLESS OF THEIR USE IN MILITARY FUNCTIONS. IT'S NOT THE STANDARD. WE'RE LOOKING AT LAW-ABIDING CITIZENS, AND THEY USE THEM. THE EVIDENCE BEARS THAT OUT. THEY'RE PROTECTED.

THE COURT: WHAT ABOUT A HUNDRED ROUND MAGAZINE?

MS. BARVIR: THAT'S AN INTERESTING QUESTION. YOU MIGHT EVIDENCE THAT THOSE ARE UNUSUAL. THEY DON'T SHOW UP VERY OFTEN. BUT THAT'S NOT WHAT WE'RE TALKING ABOUT, RIGHT? WE'RE TALKING ABOUT 11 ROUNDS, 15 ROUNDS, 17 ROUNDS.

THE COURT: NO, WE'RE NOT. WE'RE TALKING ABOUT ANYTHING OVER 10 ROUNDS.

11:00:36 MS. BARVIR: THAT'S TRUE. BUT WHEN THE STATE HAS DECIDED TO ARBITRARILY CUT IT OFF AT 10 -- SO YES, IT'S GOING TO PULL IN THOSE 100-ROUND DRUMS, BUT IT REALLY IS GOING AFTER WHAT IS COMMON. WHAT THE EVIDENCE SHOWS IS COMMON, THE 15 TO 17, THE 24 TO 30.

THE COURT: THAT'S WHY I ASKED YOU EARLIER ABOUT WHO ACTUALLY MAKES THE DECISION AND BASED ON WHAT? HOW FAR DO WE ALLOW THE STATE TO GO IN INTERFERING WITH AN ARGUABLY CLEAR SECOND AMENDMENT BECAUSE I TAKE IT WHAT YOU'RE SAYING IS THE EVIDENCE SHOWS THAT A 100-ROUND MAGAZINE IS NOT COMMON.

MS. BARVIR: THERE'S NO EVIDENCE ABOUT 100-ROUND MAGAZINES REALLY AT ALL. THEY TALK ABOUT THEM. THEY WANT TO POINT TO THAT BOOGIE MAN, BUT THERE'S NO EVIDENCE ABOUT HOW COMMON OR UNCOMMON THEY ARE. THAT MIGHT BE A CASE FOR ANOTHER 11:01:24 DAY. IF THE STATE DECIDES TO SAY 75 TO 100 ROUNDS IS A LARGE CAPACITY MAGAZINE, THEN THE SIDES WOULD HAVE TO FIGHT IT OUT, IS THERE EVIDENCE THAT THOSE ARE IN COMMON USE AND AS SUCH PROTECTED. HERE, THERE IS NO EVIDENCE THAT THEY ARE OR NOT.

THE COURT: AND I CERTAINLY DON'T HAVE THE ABILITY, OR DO I, TO MAKE THE DECISION TO WANT AN INJUNCTION THAT WOULD RESTRAIN THE STATE FROM ENFORCING THE STATUTE WITH REGARDS TO A MAGAZINE THAT EXCEEDS OR THAT IS LESS THAN 30 ROUNDS, FOR EXAMPLE; IT'S AN ALL OR NOTHING PROPOSITION FOR ME, RIGHT?

MS. BARVIR: AT THIS POINT, YES, BECAUSE THE STATE HAS DECIDED THAT IT'S 10 ROUNDS. SO THEY HAVE TAKEN IN ALL OF

11:02:13 THE COMMONLY AND UNCOMMONLY POSSESSED MAGAZINES. SO THE COURT HAS TO STRIKE IT OR UPHOLD IT BASED ON WHAT THE THE LAW SAYS. IF THE COURT'S DECISION IS BASED ON, WELL, WE KNOW 30 ROUNDS IS COMMON AND WE KNOW 15 AND 17 ROUNDS AND 11 ROUNDS ARE COMMON, THEN THE STATE COULD OSTENSIBLY GO BACK AND PASS SOMETHING THAT SAYS, OKAY, 75 ROUNDS, 50 ROUNDS, SOMETHING LIKE THAT, AND THEN THERE COULD POTENTIALLY BE ANOTHER COURT FIGHT IN ANOTHER DAY. SO THE COURT WOULD HAVE TO SUSTAIN -- UPHOLD THE LAW OR STRIKE IT DOWN IN ITS ENTIRETY. I DON'T THINK THE COURT HAS THE ABILITY TO REWRITE THE LAW TO SAY, WELL, YOU CAN BAN MAGAZINES OVER 50 ROUNDS. EXCUSE ME, YOUR HONOR.

THE COURT: IT'S OKAY. DO YOU NEED WATER?

(PAUSE IN THE PROCEEDINGS.)

THE COURT: SO LET ME ASK YOU: NOW YOU CONCEDE, DO

11:03:40 YOU NOT, THAT ANY GUN IS DANGEROUS?

MS. BARVIR: OF COURSE. THEY'RE DESIGNED TO NEUTRALIZE THREAT, TO KILL ANIMALS; YES, A GUN IS GOING TO BE DANGEROUS.

THE COURT: YOUR ARGUMENT IS THAT THESE LARGE CAPACITY MAGAZINES ARE NOT UNUSUAL.

MS. BARVIR: THAT'S CORRECT.

THE COURT: AND UNDER HELLER, IF IT'S A -- IN ORDER FOR IT TO BE NOT PROTECTED, IT HAS TO BE DANGEROUS AND UNUSUAL AND NOT POSSESSED BY NORMAL -- THAT'S NOT QUITE THE LANGUAGE.

MS. BARVIR: LAW ABIDING.

THE COURT: I WAS GOING TO SAY NORMAL, LAW-ABIDING CITIZENS. RIGHT?

MS. BARVIR: THAT'S CORRECT. THAT'S OUR POSITION.

THE COURT: AND YOUR POSITION IS THAT LARGE CAPACITY, AT LEAST SOME LARGE CAPACITY MAGAZINES, ALTHOUGH THEY MAY BE DANGEROUS, THEY'RE NOT UNUSUAL, AND THEY ARE COMMONLY USED BY LAW-ABIDING CITIZENS.

MS. BARVIR: CORRECT. FOR LAWFUL PURPOSE, YES.

THE COURT: SO FOR THAT REASON, YOU BELIEVE I SHOULD GRANT SUMMARY JUDGMENT.

MS. BARVIR: THAT'S CORRECT.

THE COURT: OKAY. DO YOU HAVE ANYTHING ELSE YOU WANTED TO TELL ME?

MS. BARVIR: I THINK I'VE HIT EVERYTHING. THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. LET'S HEAR FROM THE STATE.

MR. ECHEVERRIA: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING.

MR. ECHEVERRIA: JOHN ECHEVERRIA FOR THE ATTORNEY GENERAL. I'D LIKE TO BEGIN BY ADDRESSING WHAT APPEARS TO BE A FUNDAMENTAL PUZZLE THAT THIS COURT IS GRAPPLING WITH. AND THAT IS, WHO MAKES THE POLICY DECISION, AND WHAT IS THE ROLE OF THE COURT IN EVALUATING THAT POLICY DECISION TO ENSURE THAT THERE'S A REASONABLE FIT BECAUSE THE COURT DOES HAVE A SIGNIFICANT ROLE TO PLAY IN THAT PROCESS. AND THE COURT REFERENCED BROWN VERSUS

11:06:07 THE BOARD OF EDUCATION, LAWRENCE VERSUS TEXAS, OBERGEFELL. THERE'S MANY OTHER DECISIONS, AS THE COURT KNOWS, IN WHICH THE JUDICIARY HAS TAKEN A FAIRLY ACTIVE ROLE IN MONITORING THE PUBLIC'S POLICY DECISIONS TO ENSURE THAT CONSTITUTIONAL LIBERTIES ARE NOT INFRINGED.

IN THE CONTEXT OF THE SECOND AMENDMENT AND IN THE CONTEXT OF THE FIRST AMENDMENT, IN THE CONTEXT OF ABORTION RIGHTS, AND THERE ARE OTHER ISSUES, STRICT SCRUTINY IS NOT ALWAYS THE STANDARD. WITH RESPECT TO SOME CONSTITUTIONAL RIGHTS, A LOWER STANDARD OF SCRUTINY IS AFFORDED, AND THE COURTS WILL NOT TAKE A DEEP DIVE IN REEVALUATING THE EVIDENCE AND WILL NOT SUBJECT THE PEOPLE'S DECISION TO A MICROSCOPIC EVALUATION, AND THAT IS THE CASE WITH RESPECT TO LARGE CAPACITY MAGAZINES UNDER THE SECOND AMENDMENT. THE REASON WHY THE KOLBE 11:07:10 COURT AND THE WORMAN COURT WITH JUDGE YOUNG SAID THAT THESE ISSUES ARE MATTERS OF PUBLIC DEBATE, AND THERE IS A VIGOROUS DEBATE HAPPENING OUTSIDE THIS COURTHOUSE, AS YOUR HONOR IS AWARE.

THE COURT: YOU'LL CONCEDE, COUNSEL, WON'T YOU, THAT A LOT OF THE DEBATE IS BEING DRIVEN BY THE FACT THAT, OF COURSE, ANY TIME ONE OF THESE SHOOTINGS OCCUR, IT'S TRAGIC. TRAGIC.

MR. ECHEVERRIA: ABSOLUTELY.

THE COURT: YOU'D LIKEWISE CONCEDE THAT UNFORTUNATELY, AND PERHAPS UNDERSTANDABLY, THERE'S A LOT OF

11:07:53 EMOTION THAT'S DRIVEN AND CREATED AS A RESULT OF THESE TRAGIC EVENTS; RIGHT?

MR. ECHEVERRIA: I WOULD CONCEDE THAT PUBLIC MASS SHOOTINGS ARE TERRIBLY TRAUMATIC NOT JUST FOR THE VICTIMS BUT FOR THE COMMUNITIES AND PEOPLE ALL OVER THE COUNTRY GIVEN THE MEDIA ATTENTION THAT THEY ENGENDER.

THE COURT: BUT STATISTICALLY, YOU'D AGREE THAT IN PROPORTION TO ALL OF THE OTHER CAUSES FOR PEOPLE DYING, RIGHT -- SO FOR EXAMPLE, PEOPLE WHO ARE KILLED AS A RESULT OF DRUNK DRIVERS --

MR. ECHEVERRIA: OR FOR JUST DRIVING.

THE COURT: WELL, JUST DRUNK DRIVING, FOR EXAMPLE, THAT THE NUMBER IS QUITE SMALL STATISTICALLY; RIGHT?

MR. ECHEVERRIA: UH-HUH.

11:08:42 THE COURT: YES.

MR. ECHEVERRIA: YES, YOUR HONOR.

THE COURT: AND IN FACT, THE SAME WOULD BE TRUE WITH REGARDS TO ALL GUN VIOLENCE, IF YOU TAKE THE PROPORTION STATISTICALLY OF THE NUMBER OF PEOPLE WHO ARE ACTUALLY KILLED OR INJURED AS A RESULT OF THESE, QUOTE, LARGE CAPACITY MAGAZINES, THEY'RE REALLY STATISTICALLY INSIGNIFICANT WITH REGARDS TO ALL THE OTHER PEOPLE WHO ARE KILLED AND INJURED AS A RESULT OF GUNS. AGREED?

MR. ECHEVERRIA: I WOULD NOT CHARACTERIZE IT AS STATISTICALLY INSIGNIFICANT. THEY ARE RELATIVELY RARE EVENTS,

11:09:16 THE PUBLIC MASS SHOOTINGS, OR GUN VIOLENCE IN GENERAL.

THE COURT: I'VE LOOKED AT THE EVIDENCE. I SEE A VERY, VERY SMALL NUMBER COMPARED TO THE TOTAL NUMBER OF GUN DEATHS, AS I READ AND I LOOK. HUGE. PEOPLE KILLED WITH OTHER WEAPONS, REVOLVERS, FOR EXAMPLE. SO IT'S REALLY STATISTICALLY VERY, VERY SMALL. BUT WHAT DRIVES, UNDERSTANDABLY, IS THAT WHO WANTS TO SEE CHILDREN, YOU KNOW, KILLED AND MASSACRED, RIGHT? WHO WANTS TO SEE LAW ENFORCEMENT SHOT? NOBODY DOES. RIGHT?

MR. ECHEVERRIA: ABSOLUTELY.

THE COURT: BUT THE PROBLEM IS -- BUT YOU'RE NOT REALLY SOLVING THE PROBLEM BY ENACTING THIS LEGISLATION, ARE YOU?

MR. ECHEVERRIA: IF BY "THE PROBLEM" THE COURT IS REFERRING TO GUN VIOLENCE IN GENERAL, IS THAT WHAT YOUR HONOR

11:10:20 IS REFERRING TO?

THE COURT: YES.

MR. ECHEVERRIA: THAT'S NOT THE PRIMARY OBJECTIVE OF BANNING LARGE CAPACITY --

THE COURT: FINE. LET ME GET TO THE SECONDARY OBJECTIVE. THE SECONDARY OBJECTIVE IS TO STOP MASS SHOOTINGS.

MR. ECHEVERRIA: THAT'S PART OF IT. IT'S TO ALSO MITIGATE THE LETHALITY OF PUBLIC MASS SHOOTINGS WHEN THEY DO OCCUR AND TO ALSO MITIGATE THE LETHALITY OF GUN VIOLENCE AGAINST LAW ENFORCEMENT BECAUSE OF THE PARTICULARLY DANGEROUS

11:10:51 NATURE OF LARGE CAPACITY MAGAZINES.

THE COURT: BUT I READ YOUR EXPERT'S DECLARATIONS, AND I DON'T REALLY SEE ANYTHING IN THERE THAT INDICATES THAT, YOU KNOW, POLICE DEPARTMENTS ARE UNDER CONSTANT THREATENED ATTACK BY MASS SHOOTINGS. YES, IT DOES HAPPEN. JUST LIKE LOTS OF OTHER THINGS HAPPEN. BUT I DIDN'T SEE ANYTHING IN THERE WHERE THERE'S SOME INCREDIBLE, YOU KNOW, UP-TICK IN THE NUMBER OF POLICE OFFICERS THAT ARE BEING ASSAULTED BY THESE WEAPONS. CAN YOU REFER ME TO SOMETHING IN YOUR EVIDENCE THAT SHOWS?

MR. ECHEVERRIA: ABSOLUTELY, YOUR HONOR. WHILE THE NUMBERS MAY BE RELATIVELY SMALL IN TERMS OF GUN VIOLENCE AGAINST LAW ENFORCEMENT PERSONNEL, DR. KOPER IN HIS EXPERT REPORT THAT THE ATTORNEY GENERAL HAS SUBMITTED EXPLAINS HOW 41 PERCENT OF CRIME GUNS THAT WERE USED IN MURDERS OF LAW

11:11:46 ENFORCEMENT HAD LARGE CAPACITY MAGAZINES AND THAT IS UNDISPUTED EVIDENCE. THE PLAINTIFFS DO NOT DISPUTE THE EXPERT OPINIONS OR THE EVIDENCE UNDERLYING THOSE OPINIONS THAT LARGE CAPACITY MAGAZINES ARE USED DISPROPORTIONATELY IN THE MURDER OF LAW ENFORCEMENT. AND EVEN IF --

THE COURT: SO LET ME TELL YOU WHAT I DID NOT SEE; AND THAT IS, THAT IF THE SIZE OF THE MAGAZINE WAS REDUCED FROM 17 TO 10 THE ASSAULTS ON OFFICERS BY WEAPONS THAT USE MAGAZINES WOULD BE ANY LESS.

MR. ECHEVERRIA: THE STATE DOES NOT HAVE TO PRESENT EVIDENCE THAT WOULD PROVE THAT A LARGE CAPACITY MAGAZINE BAN

11:12:50 LIKE THE ONE CALIFORNIA HAS ENACTED WOULD IN FACT REDUCE THE NUMBERS OF DEATHS OF LAW ENFORCEMENT BECAUSE INTERMEDIATE SCRUTINY IS THE APPLICABLE LEVEL OF SCRUTINY. AND THIS IS SOMETHING THAT PLAINTIFFS WOULD HAVE TO CONCEDE UNDER FYOCK AND AS EVERY SINGLE -- FOUR CIRCUIT COURTS AND NUMEROUS DISTRICT COURTS, INCLUDING THE EASTERN DISTRICT OF CALIFORNIA, THEY'VE ALL CONCLUDED THAT RESTRICTIONS OF MAGAZINE CAPACITIES ARE SUBJECT TO INTERMEDIATE SCRUTINY.

THE COURT: FINE. I'LL GRANT YOU THAT. THAT'S THE STANDARD. BUT MY QUESTION TO YOU IS -- FINE. SO WE HAVE TO FIGURE OUT THIS REASONABLE FIT, RIGHT?

MR. ECHEVERRIA: RIGHT.

THE COURT: SO TELL ME WHY IT'S A REASONABLE FIT.

MR. ECHEVERRIA: SO WHEN INTERMEDIATE SCRUTINY

11:13:37 APPLIES, THERE'S VARIOUS RULES THIS COURT HAS TO FOLLOW AND ONE OF THEM IS THE SUBSTANTIAL DEFERENCE THAT'S AFFORDED TO THE PREDICTIVE JUDGMENTS OF THE LEGISLATURE. AND WITH RESPECT TO THE POSSESSION BAN THAT WAS ENACTED IN 2016 WITH PROPOSITION 63, SUBSTANTIAL DEFERENCE TO THE PREDICTIVE JUDGMENTS OF THE PEOPLE IS ALSO DUE. SO THE COURT HAS TO LOOK AT THE EVIDENCE THAT THE ATTORNEY GENERAL HAS PRESENTED.

THE COURT: WHICH IS?

MR. ECHEVERRIA: A SUBSTANTIAL PORTION OF THE PILE OF DOCUMENTS ON YOUR HONOR'S DESK, I'M SURE.

THE COURT: BUT THEY BASICALLY ALL SAY THE SAME

THING, COUNSEL. I READ THEM OVER AND OVER AGAIN, AND THEY ALL BASICALLY SAY THE SAME THING. THEY SAY THE MORE ROUNDS THAT YOU CAN FIRE THROUGH A GUN, THE MORE LIKELY IT IS THAT PEOPLE ARE GOING TO BE INJURED AND ARE GOING TO BE KILLED. YOU DON'T HAVE TO HAVE AN EXPERT -- YOU GIVE ME 20 EXPERTS WHO SAY THE SAME THING, AND I SAY TO YOU, YOU'RE JUST NEEDLESSLY KILLING TREES TO CREATE PAPER. OF COURSE, YOU KNOW THAT. I KNOW THAT. YOU KNOW THAT. WE ALL KNOW THAT. JUST LIKE WE ALL KNOW THAT GUNS ARE DANGEROUS. YOU AGREE THAT GUNS IS A DANGEROUS THING. RIGHT?

MR. ECHEVERRIA: ABSOLUTELY.

THE COURT: BUT GUESS WHAT? LOTS OF PEOPLE OWN THEM. LOTS OF PEOPLE USE THEM. IN FACT, THEY'RE PROTECTED BY THE SECOND AMENDMENT. SO THE QUESTION BECOMES: HOW DO WE DECIDE WHAT IS A REASONABLE FIT? HOW DO WE DECIDE THAT? YOU SAY I HAVE TO GIVE SUBSTANTIAL DEFERENCE TO THE LEGISLATURE. FINE. I'LL GIVE THEM SUBSTANTIAL DEFERENCE, BUT I'M NOT GIVING THEM ALL DEFERENCE.

MR. ECHEVERRIA: ABSOLUTELY NOT. THAT WOULD BE RATIONAL BASIS, AND THIS IS NOT RATIONAL BASIS. UNDER INTERMEDIATE SCRUTINY, THE GOVERNMENT HAS THE BURDEN OF DEFENDING THE LAW. NOT THE PLAINTIFF. AND THE COURT WOULDN'T HAVE ANY ROLE IN TRYING TO HELP THE GOVERNMENT IN DEFENDING THE LAW, UNLIKE IN RATIONAL BASIS SCRUTINY.

BUT UNDER INTERMEDIATE SCRUTINY, THE COURT LOOKS TO

ENSURE THAT THERE IS SUBSTANTIAL EVIDENCE JUSTIFYING THE LAW AND THAT ON THE BASIS OF THAT SUBSTANTIAL EVIDENCE, THAT THE PEOPLE HAVE MADE RATIONAL INFERENCES FROM THAT EVIDENCE. AND THE EVIDENCE THAT WE HAVE PRESENTED TO YOUR HONOR WITH THE DECLARATION OF LUCY ALLEN, THE DECLARATION OF PROFESSOR DONOHUE, THE DECLARATION OF CHRISTOPHER KOPER, AND THE NUMEROUS EMPIRICAL STUDIES AND ARTICLES SHOWING THAT NOT ONLY DO LARGE CAPACITY MAGAZINES ENABLE SHOOTERS TO FIRE MORE ROUNDS IN A GIVEN PERIOD OF TIME, BUT THEY'RE USED -- THEY'RE PREVALENT PUBLIC MASS SHOOTINGS, AS LUCY ALLEN'S EXPERT REPORT SETS FORTH.

11:15:36

THE COURT: I LOOKED AT SOME OF THAT. SO FOR EXAMPLE -- BY THE WAY, LET ME POINT OUT THAT IN MY ORDER THAT I PREVIOUSLY ISSUED GRANTING THE PRELIMINARY INJUNCTION WAS -- I DIDN'T SEE ANYTHING IN YOUR STACK OF DOCUMENTS THAT REFUTED MY SPECIFIC FACT FINDING AS TO SOME OF THE MASS SHOOTINGS THAT HAD BEEN ALLUDED TO IN AT LEAST ONE OF THE REPORTS THAT WAS SUBMITTED. IT WOULD SEEM TO BE PRETTY CLEAR TO ME FROM THE GET-GO WAS THAT IN THESE MASS SHOOTINGS VERY OFTEN -- AND I THINK IT'S EVEN SUPPORTED BY A LOT OF THIS THAT YOU HAVE HERE -- THERE WERE WEAPONS THAT WERE USED THAT WERE NOT HIGH CAPACITY MAGAZINES. SHOTGUNS, FOR EXAMPLE. IN MANY OF THEM, THEY USE MACHINE GUNS OR FULLY AUTOMATIC WEAPONS. RIGHT?

11:16:39

MR. ECHEVERRIA: THAT'S CORRECT. AND THOSE ARE OFTEN IN CONJUNCTION WITH LARGE CAPACITY MAGAZINES WHICH MAKE THE

ASSAULT WEAPONS EVEN MORE DEADLY.

THE COURT: WELL -- SO DEFINE FOR ME AN ASSAULT WEAPON.

MR. ECHEVERRIA: THE CALIFORNIA PENAL CODE HAS MULTIPLE CATEGORIES AND DEFINITIONS.

THE COURT: I KNOW. I KNOW. BUT YOU KNOW WHAT? AS I SAID TO YOUR COLLEAGUE WHEN SHE WAS HERE, I'VE TRIED READING. I'VE TRIED READING.

MR. ECHEVERRIA: I UNDERSTAND.

THE COURT: AND I GUARANTEE YOU THAT IF I WANTED TO TRIP YOU UP TODAY, I COULD PROBABLY DO IT, EVEN THOUGH YOU'RE AN EXPERT IN THE FIELD. I GUARANTEE THAT YOU DON'T KNOW.

MR. ECHEVERRIA: I WOULDN'T SAY EXPERT, BUT YOU CAN ASK ANY QUESTION THAT YOU LIKE OF ME.

11:18:20 THE COURT: SO DEFINE FOR ME AN ASSAULT WEAPON.

MR. ECHEVERRIA: SO WITH RESPECT TO -- THE STATE OF CALIFORNIA HAS ACTED INCREMENTALLY IN PROHIBITING VERY DANGEROUS ASSAULT RIFLES.

THE COURT: WHAT IS AN ASSAULT RIFLE?

MR. ECHEVERRIA: I'M GETTING TO THAT ANSWER, YOUR HONOR.

THE COURT: I'M SORRY.

MR. ECHEVERRIA: THE STATE IS ALLOWED TO ACT INCREMENTALLY IN ADDRESSING ISSUES OF PUBLIC CONCERN. SO THE STATE FIRST HAD DIFFERENT ROSTERS OF FIREARMS BY MAKE AND MODEL

11:18:50 AND BANNED THOSE. AND WHEN GUN MANUFACTURERS STARTED MAKING COPIES OR CHANGING THEM AND MAKING MINOR TWEAKS TO THEIR DESIGNS TO GET OUT OF THE BAN, THE STATE OF CALIFORNIA ENACTED THE CATEGORY THREE BAN WHICH DEFINES AN ASSAULT WEAPON ON THE BASIS OF CERTAIN CHARACTERISTICS OR FEATURES. SO THE PREREQUISITE TO QUALIFY AS AN ASSAULT WEAPON IS FOR THE FIREARM TO HAVE THE CAPABILITY TO ACCEPT A DETACHABLE MAGAZINE AND IF IT HAS --

THE COURT: SO ANY WEAPON -- LET ME SEE IF I UNDERSTAND WHAT YOU'RE SAYING. SO SAY, FOR EXAMPLE, A MINI-14 THAT HAS A DETACHABLE MAGAZINE THAT HOLDS 7 ROUNDS. THAT'S AN ASSAULT WEAPON OR ASSAULT RIFLE?

MR. ECHEVERRIA: NOT NECESSARILY, YOUR HONOR.

THE COURT: NO. OKAY.

11:19:39 MR. ECHEVERRIA: SO THE FEATURE-BASED TEST REQUIRES THAT THE FIREARM NOT HAVE A FIXED MAGAZINE. SO IF IT CAN ACCEPT A DETACHABLE MAGAZINE, THAT'S THE FIRST STEP. THEN YOU WOULD LOOK AT A MENU OF OTHER FEATURES, AND IF THE FIREARM HAS ONE OF THOSE OTHER FEATURES IN ADDITION TO ACCEPTING A DETACHABLE MAGAZINE, THEN IT WOULD QUALIFY AS AN ASSAULT WEAPON. THOSE ADDITIONAL FEATURES WOULD BE FLASH SUPPRESSORS, TELESCOPIC STOCKS, PISTOL GRIP, TWO PISTOL GRIPS; THERE MAY BE OTHER FEATURES. I DIDN'T READ THE ASSAULT RIFLE BAN THIS MORNING.

THE COURT: FLASH SUPPRESSORS.

11:20:22 MR. ECHEVERRIA: YES.

THE COURT: GRENADE THROWERS.

MR. ECHEVERRIA: GRENADE.

THE COURT: OF COURSE, EVERYBODY -- I'M SURE THAT ALL OF THE PLAINTIFFS PROBABLY HAVE SOME WEAPON THAT POSSESSES A -- HAS A GRENADE THROWER, RIGHT?

MR. ECHEVERRIA: I WOULD MAKE NO REPRESENTATION ABOUT THAT, YOUR HONOR.

THE COURT: OF COURSE YOU WOULDN'T BECAUSE IT WOULD BE FOOLISH. NOBODY HAS THAT KIND OF A WEAPON. BUT IN ANY EVENT, GETTING BACK TO MY POINT -- I WAS TRYING TO LEAD YOU DOWN THIS --

MR. ECHEVERRIA: I'M FIGURING OUT HOW TO GET BACK TO LARGE CAPACITY MAGAZINES. BUT I'D LIKE TO NOTE, YOUR HONOR,
11:20:58 THAT THE CALIFORNIA RIFLE AND PISTOL ASSOCIATION, WHICH IS THE INSTITUTIONAL PLAINTIFF IN THIS CASE, THEY HAVE CHALLENGED CALIFORNIA'S ASSAULT WEAPONS BAN, AND THAT CASE IS RUPP, R-U-P-P, VERSUS BECERRA, AND IT'S CURRENTLY PENDING IN THE CENTRAL DISTRICT OF CALIFORNIA. AND JUST YESTERDAY, JUDGE STATON GRANTED THE ATTORNEY GENERAL'S MOTION TO DISMISS AND DENIED A MOTION FOR PRELIMINARY INJUNCTION BROUGHT BY THE CRPA, AND IT DID SO ON -- IN EVALUATING VERY SIMILAR ARGUMENTS THAT ARE BEING PRESENTED TO YOUR HONOR IN THIS CASE CHALLENGING THE LARGE CAPACITY MAGAZINES BAN.

JUDGE STATON DETERMINED THAT ASSAULT WEAPONS, EVEN

11:21:41 ASSUMING THAT THEY ARE PROTECTED BY THE SECOND AMENDMENT, THAT'S STEP ONE OF THE ANALYSIS, INTERMEDIATE SCRUTINY APPLIES AND THE EVIDENCE SUBMITTED BY THE ATTORNEY GENERAL DEMONSTRATED THAT THERE'S NO LIKELIHOOD OF SUCCESS ON THE MERITS OF THE CRPA PREVAILING ON THEIR SECOND AMENDMENT CLAIM AND JUDGE STATON ALSO DISMISSED WITH PREJUDICE THE CRPA'S TAKING CLAIM AND SUBSTANTIVE DUE PROCESS CLAIM TO THE ASSAULT WEAPONS BAN. I THINK JUDGE STATON'S WELL-REASONED ORDER PROVIDES ADDITIONAL SUPPORT FOR THE ATTORNEY GENERAL'S POSITION THAT EVEN IF THE SECOND AMENDMENT PROTECTS SOME MAGAZINE CAPACITY, IN THIS CASE --

THE COURT: WHY WOULDN'T IT? WHY WOULDN'T IT?

MR. ECHEVERRIA: WELL, IT'S NOT THE STATE'S POSITION THAT IT WOULD NOT. IT WOULD --

11:22:32 THE COURT: I'M TROUBLED BY THAT ARGUMENT. WHY WOULD IT NOT? WHY WOULD THE SECOND AMENDMENT NOT PROTECT THE MAGAZINE?

MR. ECHEVERRIA: THE STATE'S POSITION IS THAT THERE IS LIKELY SECOND AMENDMENT PROTECTION TO MAGAZINES BECAUSE THE NINTH CIRCUIT IN JACKSON MADE CLEAR THAT THERE IS SOME SECOND AMENDMENT PROTECTION TO AMMUNITION, OTHERWISE --

THE COURT: I THOUGHT THAT WAS THE CASE. SO I THOUGHT YOU JUST TOLD ME THAT JUDGE STATON FOUND THAT THERE WAS NO SECOND --

MR. ECHEVERRIA: NO. NO. JUDGE STATON ASSUMED THAT

11:23:09 THERE IS SECOND AMENDMENT PROTECTION FOR ASSAULT WEAPONS.

THE COURT: I MISUNDERSTOOD YOU. I APOLOGIZE.

MR. ECHEVERRIA: SO YOUR HONOR, IN RULING ON THIS MOTION FOR SUMMARY JUDGMENT, CAN SKIP STEP ONE AND AVOID ALL THE DEBATE ABOUT COMMON USE AND MILLER AND WHETHER SECOND AMENDMENT PROTECTION IS AFFORDED TO LARGE CAPACITY MAGAZINES, AND THE COURT CAN BYPASS THE LINE IN HELLER THAT WAS QUOTED AND RELIED UPON IN KOLBE AND IN WORMAN THAT WEAPONS THAT ARE MOST SUITABLE FOR MILITARY APPLICATION LIKE M-16S AND SIMILAR WEAPONS MAY BE BANNED. JUST REALLY QUICKLY YOUR HONOR BECAUSE YOUR HONOR ASKED THE PLAINTIFFS WHERE IN HELLER THE SUPREME COURT SAID THAT, I'D LIKE TO READ THAT PORTION INTO THE RECORD FOR YOUR HONOR.

THE COURT: WOULD YOU?

11:23:58 MR. ECHEVERRIA: IT'S ON PAGE 627 OF THE HELLER DECISION. I PRINTED OUT FOUR PAGES PER SHEET. SO I'M TRYING TO SAVE TREES. IT MIGHT BE DIFFICULT TO READ.

THE COURT: IT'S OKAY. ALL RIGHT.

MR. ECHEVERRIA: IT MAY BE OBJECTED --

THE COURT: YES, THAT'S EXACTLY WHERE I THOUGHT YOU'D GO. THAT'S A RHETORICAL DEVICE.

MR. ECHEVERRIA: CAN I READ ON?

THE COURT: NO. I READ IT. I KNOW EXACTLY WHERE YOU'RE READING FROM. THAT'S A RHETORICAL DEVICE. HE CREATED A STRAW MAN. THEN HE KNOCKED DOWN THE STRAW MAN. BUT TELL ME IN

11:24:30 THERE SOMEWHERE WHERE THE OPINION SAYS THAT MILITARY WEAPONS ARE NOT PROTECTED.

MR. ECHEVERRIA: IT'S LATER IN THAT PARAGRAPH. I DON'T VIEW THAT AS A STRAW MAN. I DON'T KNOW WHY YOU'RE READING --

THE COURT: BECAUSE BASICALLY WHAT HE WAS SAYING WAS YOU HAVE TO FIND A WAY TO CONNECT THE PREFATORY CLAUSE TO THE SUBSEQUENT CLAUSE, AND WHAT HE WAS SAYING WAS, OKAY, FINE, SO YOU OBJECT AND YOU SAY THAT THESE WEAPONS ARE OF MILITARY USE, THAT THEY HAVE TO BE OF MILITARY USE BECAUSE THE PREFATORY CLAUSE IS TALKING ABOUT A MILITIA; AND BECAUSE IT'S TALKING ABOUT A MILITIA, ONE MIGHT ARGUE THAT THE WEAPONS THAT ARE PROTECTED ARE THOSE THAT WOULD BE USED BY MILITIA AND ARE THEREFORE OF MILITARY TYPE. BUT THEN HE GOES ON TO SAY: BUT

11:25:28 IT DOESN'T MATTER, IT DOESN'T MATTER BECAUSE WHAT MATTERS IS THAT IN MILITIA, THEY'RE CALLED UPON TO BRING WHATEVER WEAPONS THEY HAD AND THAT INCLUDES WEAPONS THAT WOULD NORMALLY BE USED FOR THE DEFENSE OF THE HEARTH AND THE HOME. THAT'S WHAT HE SAID.

MR. ECHEVERRIA: BUT JUSTICE SCALIA WENT ON TO SAY THAT JUST BECAUSE A WEAPON MAY BE USEFUL IN MILITIA SERVICE OR MILITARY SERVICE, IT'S NOT NECESSARILY PROTECTED.

THE COURT: THAT'S RIGHT. THAT'S EXACTLY WHAT HE SAID. SO FOR EXAMPLE, WHAT HE WAS SAYING WAS JUST BECAUSE YOU MAY HAVE A BAZOOKA WHICH WOULD BE USEFUL FOR MILITARY PURPOSES,

11:26:13 IT DOES NOT MEAN IT'S PROTECTED. AND WHY? "A," IT'S DANGEROUS. ALL GUNS ARE DANGEROUS. AND "B," IT'S UNUSUAL, AND NOT COMMONLY POSSESSED BY LAW-ABIDING CITIZENS OR LAW-ABIDING PURPOSES. RIGHT? THAT'S WHAT HE WAS SAYING. HE WASN'T SAYING THAT BECAUSE SOMETHING WAS DESIGNED FOR MILITARY PURPOSE IT THEREFORE BECOMES UNPROTECTED. I'VE READ THAT MANY, MANY, MANY TIMES. AND YOU KNOW, AGAIN, I ACKNOWLEDGE I DIDN'T GO TO HARVARD.

MR. ECHEVERRIA: I DIDN'T EITHER, YOUR HONOR.

THE COURT: I'M NOT THE BRIGHTEST LIGHT BULB IN THE BUILDING. BUT I READ THAT, AND I UNDERSTAND WHAT IT SAYS. IT SAYS SIMPLY BECAUSE IT WAS DESIGNED FOR MILITARY USE DOESN'T MEAN THAT IT'S PROTECTED.

AGAIN, I READ KOLBE, AND I READ ALL THESE OTHER

11:27:09 CASES, BUT I THINK PERHAPS THE BEST -- SINCE WE'RE ON THE SUBJECT -- WHO BEST TO TELL ME WHAT THEY SAID IN AN OPINION THAN THE PERSON WHO WROTE THE OPINION OR THE COURT WHO WROTE THE OPINION. DON'T YOU AGREE? KOLBE IS WONDERFUL. IT'S A FOURTH CIRCUIT. BUT IT'S NOT THE SUPREME COURT.

MR. ECHEVERRIA: IT'S NOT THE SUPREME COURT, AND IT'S NOT BINDING ON YOUR HONOR, AS YOUR HONOR IS AWARE. RIGHT. IT'S PERSUASIVE AUTHORITY.

THE COURT: HELP ME WITH THIS, SINCE YOU BROUGHT UP THE SUBJECT.

MR. ECHEVERRIA: SURE.

11:27:48

THE COURT: LET'S LOOK LIKE AT CAETANO VERSUS MASSACHUSETTS. THAT'S A SUPREME COURT CASE. THE SUPREME COURT. THE SUPREME COURT SAID THE FOLLOWING. IT SAID: FINALLY, THE COURT USED A, QUOTE, A CONTEMPORARY LENS, END OF QUOTE, AND FOUND, QUOTE, NOTHING IN THE RECORD TO SUGGEST THAT, BRACKETS, STUN GUNS, END OF BRACKETS, ARE READILY ADAPTABLE TO USE IN THE MILITARY. CITATION OMITTED. BUT HELLER REJECTED THE PROPOSITION, QUOTE, THAT ONLY THOSE WEAPONS USEFUL IN WARFARE ARE PROTECTED.

SO THE SUPREME COURT SAYS, WHAT WE SAID IN HELLER WAS THAT IT'S NOT JUST WEAPONS THAT ARE USEFUL IN WARFARE THAT ARE PROTECTED. IT INCLUDES OTHER WEAPONS INCLUDING STUN GUNS, AND THAT'S HOW CAETANO WAS DECIDED. SO I MEAN, LOOK, I LIKE READING THE LAW. I LOVE READING OPINIONS. I LIKE TRYING TO

11:28:54

FIGURE OUT WHAT WAS IN THE PEOPLE'S MINDS WHEN THEY WROTE THE OPINIONS. BUT I JUST DON'T SEE THE ARGUMENT THAT THE SUPREME COURT SAID THAT MILITARY STYLE WEAPONS ARE FORBIDDEN, ARE NOT PROTECTED BY THE SECOND AMENDMENT. THAT'S NOT WHAT THEY SAID. WHAT THEY SAID WAS SOME WEAPONS THAT ARE USEFUL PERHAPS BY THE MILITIA ARE NOT PROTECTED. THAT'S WHAT THEY SAID. DO YOU DISAGREE WITH WHAT I JUST READ TO YOU?

MR. ECHEVERRIA: MY READING OF CAETANO IS THAT THE MASSACHUSETTS HIGH COURT COMMITTED LEGAL ERROR BY CONCLUDING THAT STUN GUNS -- PARDON ME -- ARE NOT PROTECTED BY THE SECOND AMENDMENT.

11:29:39 THE COURT: BECAUSE?

MR. ECHEVERRIA: BECAUSE THEY WERE NOT IN EXISTENCE AT THE TIME OF RATIFICATION, AND THE SUPREME COURT CLARIFIED THAT COMMON USE AT THE TIME IS NOT REFERRING TO IN COMMON USE IN 1789 OR --

THE COURT: THAT'S ONE OF THE ISSUES THEY TALKED ABOUT.

MR. ECHEVERRIA: SURE. BUT THE MAIN REASON WHY STUN GUNS ARE PROTECTED BY THE SECOND AMENDMENT AND WHY THE MASSACHUSETTS HIGH COURT COMMITTED ERROR IS BECAUSE THEY'RE IN COMMON USE FOR SELF-DEFENSE.

THE COURT: I UNDERSTAND. I GOT YOU. BUT I WAS TRYING -- I WAS TRYING TO FIGURE OUT WHAT THAT LANGUAGE SAYS WHEN IT SAYS -- BECAUSE OBVIOUSLY WHEN THEY WROTE THIS THEY

11:30:21 MUST HAVE MEANT TO SAY SOMETHING, OTHERWISE THEY WEREN'T GOING TO WASTE THE INK AND THE PAPER. IT SAID: BUT HELLER REJECTED THE PROPOSITION THAT ONLY THOSE WEAPONS USEFUL IN WARFARE ARE PROTECTED.

NOW CORRECT ME IF I'M WRONG, BUT THE WAY I READ THAT IS IT'S SAYING THAT NOT ONLY ARE WEAPONS USEFUL IN WARFARE PROTECTED, BUT THERE ARE OTHER WEAPONS LIKEWISE PROTECTED SUCH AS STUN GUNS.

MR. ECHEVERRIA: RIGHT. THERE ARE OTHER WEAPONS THAT MAY NOT RELATE TO THE PREFATORY CLAUSE OF MILITIA SERVICE; RIGHT, YOUR HONOR?

11:30:57 THE COURT: WE AGREE. SO THE POINT IS THAT I THINK THAT HELLER DOES NOT SAY -- ANYWHERE, ANYWHERE IN HELLER DOES IT SAY THAT BECAUSE A WEAPON MAY BE DESIGNED TO BE LIKE A MILITARY-STYLE WEAPON THAT IT'S NOT PROTECTED BY THE SECOND AMENDMENT. IT DOESN'T SAY THAT ANYWHERE IN THERE.

MR. ECHEVERRIA: SO IN CAETANO, THE COURT MADE CLEAR THAT THE OPERATIVE CLAUSE OF THE SECOND AMENDMENT EXTENDS TO OTHER WEAPONS THAT MAY NOT HAVE HAD A RELATION TO MILITIA SERVICE. BUT IT DOESN'T NECESSARILY MEAN THAT ALL WEAPONS THAT ARE USEFUL IN MILITIA SERVICE ARE ALSO --

THE COURT: I'LL GRANT YOU THAT. I'LL GRANT YOU THAT. BUT MILLER SAYS SOMETHING DIFFERENT.

MR. ECHEVERRIA: WELL, MILLER'S HOLDING IS ACTUALLY COUCHED IN NEGATIVE LANGUAGE.

11:31:42 THE COURT: I KNOW.

MR. ECHEVERRIA: WHERE THE SUPREME COURT SAID THAT WEAPONS NOT SUITABLE FOR MILITIA SERVICE ARE NOT PROTECTED. BUT THE COROLLARY ARE NOT NECESSARILY THE CASE, THAT ALL WEAPONS THAT ARE USEFUL ARE PROTECTED.

THE COURT: I UNDERSTAND. LOOK, THERE'S NOBODY HERE THAT'S GOING TO ARGUE, INCLUDING ME, THAT POSSESSION OF A BAZOOKA OR A SHOULDER-FIRED MISSILE WHICH WOULD BE USEFUL IN THE MILITIA --

MR. ECHEVERRIA: PRESENT DAY MILITIA SERVICE, RIGHT?

THE COURT: YES. IT COULD BE USEFUL, BUT YOU KNOW,

11:32:14 WHO IS GOING TO POSSIBLY -- NO, I'M NOT GOING TO FIND THAT, AND I DON'T THINK ANY COURT WOULD AGREE. ALTHOUGH, IF YOU REALLY READ THE SECOND AMENDMENT, IT PROBABLY COULD. I SUPPOSE YOU COULD CARRY AROUND A DIRTY BOMB IN A SUITCASE IN TODAY'S DAY AND AGE, BUT NOBODY IN THEIR RIGHT MIND IS GOING TO ARGUE THAT. BUT THAT TAKES US TO THE BASIC QUESTION, THE QUESTION THAT I ASKED AT THE VERY BEGINNING, WHICH IS HOW DO WE MAKE THE DECISION, HOW DO WE DECIDE WHAT THAT REASONABLE FIT IS?

WE'VE AGREED THAT MACHINE GUNS, THEY'RE BANNED, AND PROBABLY THERE'S A REASONABLE FIT BETWEEN THE STATE'S INTEREST AND THE LEGISLATION. WE'VE AGREED. WE'VE AGREED THAT THE SECOND AMENDMENT DOES NOT PROTECT MY HAVING A BAZOOKA OR HAND GRENADE OR SHOULDER-FIRED MISSILE. BUT WHAT ABOUT THE REST OF THE POTENTIAL WEAPONS COVERED BY THE SECOND AMENDMENT LIKE THE

11:33:28 ONES WE'RE ARGUING ABOUT HERE?

MR. ECHEVERRIA: 100 ROUND DRUM MAGAZINES, FOR EXAMPLE.

THE COURT: WELL, EXACTLY. SO ONE COULD ARGUE THAT IF I HAD THE POWER THAT I COULD SAY, OKAY, ANYTHING OVER 30 ROUNDS, BANNED. ANYTHING LESS THAN 30 ROUNDS, NOT BANNED. BUT NOBODY DIED AND MADE ME GOD -- KING YET. SO I CAN'T DO THAT. SO THE QUESTION IS -- AND I ASKED YOUR COLLEAGUE WHEN SHE WAS HERE AND I HOPE YOU'LL BE ABLE TO ASK THE QUESTION FOR ME. I THINK IT CUTS TO THE CHASE. SO WE BAN MACHINE GUNS -- BY THE WAY, MANY OF THE INCIDENTS THAT ARE REPORTED IN YOUR EXPERT'S

11:34:21 EVIDENCE INVOLVED MACHINE GUNS OR AUTOMATIC WEAPONS, BY THE WAY -- SO WE BAN MACHINE GUNS. WE'VE NOW BANNED THE SALE AND TRANSFER OF ASSAULT WEAPONS. WE BANNED THE SALE AND TRANSFER OF THESE LARGE CAPACITY MAGAZINES. BUT NOW WE COME ALONG AND WE SAY NOT ONLY HAVE WE BANNED THE SALE OR TRANSFER, WE'RE GOING TO CAUSE PEOPLE WHO ARE OTHERWISE LAW-ABIDING CITIZENS WHO POSSESS THESE FOR WHATEVER INTEREST THEY MAY POSSESS THEM, WHETHER IT BE FOR SPORTING OR FOR SELF-DEFENSE, WE'RE GOING TO CAUSE YOU TO SURRENDER THESE. EVEN THOUGH YOU'VE DONE NOTHING WRONG, WE'RE GOING TO CAUSE YOU TO SURRENDER THESE, OR YOU'RE GOING TO BECOME A CRIMINAL.

MR. ECHEVERRIA: THAT'S NOT WHAT THE LAW PROVIDES, YOUR HONOR.

THE COURT: WHAT DOES IT PROVIDE?

11:35:19 MR. ECHEVERRIA: SO WHEN THE PEOPLE OF CALIFORNIA ENACTED PROPOSITION 63 THEY CLOSED A LOOPHOLE THAT MADE ENFORCEMENT OF THE EXISTING LARGE CAPACITY MAGAZINE RESTRICTIONS THAT YOUR HONOR REFERRED TO MORE DIFFICULT TO ENFORCE BECAUSE LARGE CAPACITY MAGAZINES, UNLIKE FIREARMS, DON'T BEAR UNIQUE IDENTIFYING NUMBERS. SO WHEN LAW ENFORCEMENT COMES ACROSS A LARGE CAPACITY MAGAZINE, IT'S VERY DIFFICULT FOR THEM TO DETERMINE THAT THIS LARGE CAPACITY MAGAZINE WAS NOT GRANDFATHERED IN UNDER THE PRIOR LAW. AND THE PEOPLE CLOSED THAT LOOPHOLE NOT TO JUST ENABLE THE MORE EFFECTIVE ENFORCEMENT OF THE EXISTING RESTRICTIONS BUT BECAUSE LARGE CAPACITY

11:36:01 MAGAZINES CAN BE STOLEN. THE ATTORNEY GENERAL HAS PRESENTED EVIDENCE THAT --

THE COURT: DID THEY THINK OF THAT -- DIDN'T THE LEGISLATURE THINK ABOUT THAT WHEN THEY ORIGINALLY PASSED LEGISLATION BANNING THE SALE, TRANSFER, OR WHAT? DID THEY FALL ASLEEP AT THE SWITCH OR --

MR. ECHEVERRIA: PRESUMABLY, BUT THE LEGISLATURE WASN'T REQUIRED IN 2000 TO ENACT A PERFECTLY COMPREHENSIVE LAW. THE LEGISLATURE IS ENTITLED TO ACT INCREMENTALLY AND TO EXPERIMENT. AND EXPERIMENTATION --

THE COURT: INCREMENTALLY CAN ALSO DRIVE YOU TO THE POINT WHERE YOU COMPLETELY EXTINGUISHED OR DESTROYED THE SECOND AMENDMENT.

MR. ECHEVERRIA: IN THAT CASE, IF THE LEGISLATURE OR
11:36:55 THE PEOPLE WENT TOO FAR AND COMPLETELY EVISCERATED A SECOND AMENDMENT PROTECTION, THEN THE COURT WOULD STEP IN, POSSIBLY UNDER HELLER, SAY THIS WAS A POLICY CHOICE OFF THE TABLE. THAT'S NOT WHAT THE POSSESSION BAN DID.

THE COURT: DO YOU SEE -- WHEN I SAID I WANTED TO CUT TO THE CHASE, THAT'S WHERE WE ARE. THAT'S WHERE WE ARE. SO WHAT WOULD JUSTIFY THE COURT SAYING: YOU'VE GONE TOO FAR?

MR. ECHEVERRIA: THE COURT SHOULD NOT SAY THAT WITH RESPECT TO A LARGE CAPACITY MAGAZINE BAN. NO COURT HAS.

THE COURT: I HEAR YOU. I HEAR YOU. BUT YOU'RE NOT ANSWERING MY QUESTION BECAUSE MY QUESTION IS: WHEN AND HOW

11:37:38 WILL THE COURT MAKE THE DECISION THAT THE STATE HAS GONE TOO FAR?

MR. ECHEVERRIA: WHEN THE STATE FAILS TO PRESENT SUBSTANTIAL EVIDENCE.

THE COURT: WHAT WOULD THE SUBSTANTIAL EVIDENCE BE?

MR. ECHEVERRIA: EXACTLY WHAT THE ATTORNEY GENERAL HAS PRESENTED TO YOUR HONOR IN THIS CASE. I UNDERSTAND THAT IN ORDERING THE PRELIMINARY INJUNCTION THE COURT DISTINGUISHED THE RECORD IN FYOCK VERSUS SUNNYVALE FROM THE RECORD THAT THE ATTORNEY GENERAL PRESENTED IN OPPOSITION TO THE MOTION FOR PRELIMINARY INJUNCTION. BUT THAT WAS JUST NOT ACCURATE. THE RECORDS WERE SUBSTANTIALLY SIMILAR.

THE COURT: BUT WHAT THE COURT WAS HOLDING IN FYOCK WAS VERY DIFFERENT. I DON'T WANT TO GO THERE. I DON'T WANT TO

11:38:22 GO THERE. LET ME JUST AGAIN GET BACK TO -- LET'S CUT TO THE CHASE. LET'S UNDERSTAND SOMETHING. A GUN IS A DANGEROUS THING. SO IS A KNIFE. YOU KNOW IN LONDON THEY HAVE A BAN ON KNIVES. THEY DON'T HAVE GUNS. BUT NOW THEY BANNED KNIVES. SO MAYBE NEXT WEEK THEY'LL BAN PRESSURE COOKERS. I DON'T KNOW. BUT THE FACT IS THAT A GUN IS A DANGEROUS THING. IF IT'S MISUSED, IT'S DANGEROUS. IF IT'S NOT MISUSED, IT'S A PERFECTLY VALID TOOL FOR PLEASURE AND SELF-DEFENSE.

NOW, I ASKED YOUR COLLEAGUE THIS QUESTION LAST TIME SHE WAS HERE. HOPEFULLY, YOU'LL BE ABLE TO ANSWER IT BECAUSE I SUSPECT YOU READ THE TRANSCRIPT AND HAVE ANSWERS TO ALL MY

11:39:08 QUESTIONS.

MR. ECHEVERRIA: HOPEFULLY.

THE COURT: SO WHAT'S GOING ON IS THAT SOME MASS SHOOTINGS THAT OCCUR THERE ARE PEOPLE THAT ARE USING MAGAZINES THAT ARE LABELED AS LARGE CAPACITY MAGAZINES, ANYTHING OVER 10 ROUNDS.

MR. ECHEVERRIA: OVER A MAJORITY OF PUBLIC MASS SHOOTINGS. NOT JUST SOME.

THE COURT: NOW TOMORROW I'M GOING TO ISSUE A DECREE. THE DECREE IS THAT ANYONE WHO HAS A MAGAZINE OF MORE THAN 10 ROUNDS HAS TO GET RID OF THEM. TURN THEM IN. "A," IT'S NOT GOING TO STOP PEOPLE LIKE THE SAN BERNARDINO SHOOTERS FROM ENGAGING IN MASS SHOOTINGS. YOU KNOW THAT, AND I KNOW THAT. RIGHT?

11:39:56 MR. ECHEVERRIA: CRIMINALS WILL ALWAYS EXIST, YOUR HONOR.

THE COURT: EXACTLY.

MR. ECHEVERRIA: THAT DOESN'T MEAN THE STATE IS FORBIDDEN FROM TRYING TO MAKE IT MORE DIFFICULT FOR INDIVIDUALS TO OBTAIN THOSE DANGEROUS MAGAZINES.

THE COURT: I GOT YOU. I UNDERSTAND.

THE COURT: THEN WE'RE GOING TO GET TO -- I WAVE MY MAGIC WAND. I MAKE ALL THE MAGAZINES WITH MORE THAN 10 ROUNDS GO AWAY. THEY WENT AWAY. THEN THE NEXT PERSON WHO IS DERANGED OR DECIDES THAT HE OR SHE WANTS TO FOR WHATEVER REASON KILL

PEOPLE, THEY'RE PROBABLY GOING TO USE A GUN THAT HAS A MAGAZINE THAT HOLDS 10 ROUNDS. AND THE NEXT PERSON THAT COMMITS A MASS SHOOTING IS GOING TO USE A WEAPON THAT CONTAINS 10 ROUNDS. AND THE NEXT PERSON AFTER THAT IS GOING TO USE A WEAPON THAT CONTAINS A MAGAZINE THAT HOLDS 10 ROUNDS.

NOW ALONG IS GOING TO COME THE STATE, AND THE STATE IS GOING TO USE THE VERY SAME TYPE OF EVIDENCE THAT THE STATE HAS USED IN THIS CASE, AND THEY'RE GOING TO COME IN AND THEY'RE GOING TO SAY, LOOK, JUDGE, POLICE OFFICERS ARE BEING ASSAULTED ALL THE TIME WITH THESE WEAPONS THAT HOLD 10 ROUNDS, AND THEY WILL BECOME THE NEW LARGE CAPACITY MAGAZINE. AND THE STATE WILL SAY, JUDGE, WE HAVE TO TAKE THESE OFF THE STREETS BECAUSE LAW ENFORCEMENT OFFICERS ARE BEING ASSAULTED WITH THESE AND PEOPLE ARE BEING KILLED, AND YOU KNOW, GUESS WHAT, YOU ONLY NEED 2.2 ROUNDS FOR SELF-DEFENSE.

OKAY. NOW WHAT? I HAVE ESSENTIALLY THE SAME SITUATION I HAVE TODAY ONLY YOU WILL BE ARGUING THAT SOMETHING WHICH IS 10 ROUNDS IS A LARGE CAPACITY MAGAZINE THAT OUGHT TO BE BANNED, AND THE LEGISLATURE HAS MADE ITS POLICY DECISION AND I SHOULD DEFER TO IT, AND SECOND AMENDMENT BE DAMNED. RIGHT?

MR. ECHEVERRIA: I'M NOT GOING TO PREDICT WHAT THE LEGISLATURE --

THE COURT: WELL, I AM BECAUSE WHEN YOU LOOK AT THE INCREMENTAL WAY THAT WE HAVE BEEN ADDRESSING THE SECOND AMENDMENT, LOGIC AND REASON TELLS US THAT THAT'S EXACTLY WHAT'S

GOING TO HAPPEN. THEN YOU'RE GOING TO SAY -- THE STATE IS GOING TO COME IN AND SAY, YOU KNOW WHAT, WE GOT TO GET RID OF 10-ROUND MAGAZINES SO WE'RE GOING TO GO TO 7. THEN JUDGE BENITEZ IS GOING TO COME ALONG AND SAY, GUESS WHAT, I'M GOING TO HAVE YOU GET RID OF THE 10-ROUND MAGAZINES; YOU CAN'T HAVE A MAGAZINE THAT'S MORE THAN 7 ROUNDS. AND THEN THE NEXT MASS SHOOTER IS GOING TO USE A WEAPON THAT KILLS WITH A 7-ROUND MAGAZINE, AND THEN THE NEXT PERSON AFTER THAT IS GOING TO USE A 7-ROUND MAGAZINE, AND THE NEXT PERSON AFTER THAT IS GOING TO USE A 7-ROUND MAGAZINE.

THEN THE STATE IS GOING TO COME AND SAY, LOOK, JUDGE, LAW ENFORCEMENT IS BEING ASSAULTED WITH THESE 7-ROUND MAGAZINES, AND PEOPLE ARE BEING KILLED IN MASS SHOOTINGS WITH 7-ROUND MAGAZINES. WE GOT TO BAN 7-ROUND MAGAZINES. YOU CAN SEE WHERE THIS IS GOING TO PROGRESS, AND THIS IS WHY I WAS ASKING YOU THE QUESTION BECAUSE IT'S A TOUGH QUESTION. IT'S NOT AN EASY QUESTION. IT'S NOT AN EASY QUESTION FOR ME. IT SHOULD NOT BE AN EASY QUESTION FOR ANYONE. BUT MY QUESTION IS: AT WHAT POINT IN TIME, WHERE, WHEN, BECAUSE THE EVIDENCE IS NOT GOING TO CHANGE. THERE'S GOING TO BE PEOPLE THAT ARE GOING TO BE KILLED. THERE'S GOING TO BE PEOPLE THAT ARE GOING TO BE INJURED. THERE'S GOING TO BE POLICE OFFICERS THAT ARE GOING TO BE ASSAULTED WHETHER IT BE WITH A 10-ROUND MAGAZINE OR 7-ROUND MAGAZINE OR 5-ROUND MAGAZINE. AND IF WE GET DOWN TO THE 2.2 NUMBER THAT KEEPS SURFACING -- BY THE WAY, I CAN'T WAIT TO SEE

11:44:08 THE POINT 2. A DERRINGER WILL HOLD 2, BUT THE POINT 2, I CAN'T WAIT TO SEE WHAT THAT WEAPON IS GOING TO LOOK LIKE. BUT WHEN YOU GET DOWN TO 2.2 ROUNDS, SOMEONE IS GOING TO SAY, LOOK, FOR SELF-DEFENSE, YOU ONLY NEED ONE ROUND. THAT'S ALL YOU NEED. IF YOU'RE A GOOD SHOT, AND YOU PUT THE SHOT CENTER MASS, YOU GOT THE PERSON. THAT'S ALL YOU NEED. AND YOU'RE GOING TO COME IN AND SAY, LOOK, JUDGE, LAW ENFORCEMENT OFFICERS ARE BEING ASSAULTED WITH THESE DERRINGERS THAT USE TWO ROUNDS, AND PEOPLE ARE BEING KILLED BY PEOPLE USING DERRINGERS WITH TWO ROUNDS. THEN GUESS WHAT? AS THE EVIDENCE SHOWS, AND YOU KNOW IT, AND I KNOW IT, IN A LARGE NUMBER OF THESE MASS SHOOTINGS, THE SHOOTER HAS MORE THAN ONE WEAPON. RIGHT?

MR. ECHEVERRIA: THAT'S CORRECT.

THE COURT: THEY USUALLY COME IN WITH MANY WEAPONS.

11:45:02 AND SO NOW THE ARGUMENT IS GOING TO COME AND THE STATE IS GOING TO COME IN AND THE STATE IS GOING TO SAY, LOOK, JUDGE, WE NEED TO PASS A LAW, AND THE LAW IS YOU CAN'T OWN MORE THAN -- PICK A NUMBER -- 10 GUNS BECAUSE IF YOU GOT MORE THAN 10 GUNS, THE CHANCES ARE YOU'RE GOING TO KILL AND INJURE MORE PEOPLE, ASSAULT MORE LAW ENFORCEMENT OFFICERS AND SO ON. WE'RE GOING TO GET DOWN, DOING THE SAME PROGRESSION, UNTIL WE'RE AT THE POINT WHERE YOU HAVE MAYBE ONE GUN WITH ONE ROUND, AND YOU BETTER HOPE TO HECK THAT WHOEVER IS BREAKING INTO YOUR HOUSE TO RAPE YOUR WIFE OR RAPE YOUR DAUGHTER THAT YOU CAN HIT HIM OR HER WITH THAT ONE ROUND AND HIT HIM CENTER MASS. IT'S A

DIFFICULT QUESTION, BUT WHAT I'M ASKING YOU IS WHY THE 10 ROUNDS, AND WHY DO I HAVE TO GIVE SUBSTANTIAL WEIGHT TO THE LEGISLATURE, AND WOULD I DO THE SAME THING IF THEY SAID 7? WOULD I DO THE SAME THING IF THEY SAID 5?

MR. ECHEVERRIA: SURE. THE QUESTION THE COURT IS ASKING IS HOW LOW CAN THE STATE GO, AND THE COURT IS CONCERNED ABOUT RULING ON A SLIPPERY SLOPE AND POTENTIALLY PAVING THE WAY TO MORE REGULATION OF MAGAZINES OR A REGULATION OF --

THE COURT: WE'RE ALREADY THERE. IT'S JUST A QUESTION OF: DO WE STOP THE SLIDE, AND IF SO, WHEN DO WE STOP THE SLIDE?

MR. ECHEVERRIA: THIS IS NOT THE CASE TO STOP THE SLIDE.

THE COURT: WHY NOT? BUT LOOK --

MR. ECHEVERRIA: BECAUSE --

THE COURT: -- APPOINTED TO BE INDEPENDENT THINKERS, NOT TO FOLLOW THE CROWD OR THE HERD. SO MY QUESTION IS WHY? WHY WOULD I NOT UPHOLD THE 10-ROUND BAN? WHY WOULD I NOT UPHOLD A 7-ROUND BAN? WHY WOULD I NOT UPHOLD A 5-ROUND BAN? WHY WOULD I NOT UPHOLD A MORE THAN 10 GUNS BAN?

MR. ECHEVERRIA: IN THE SECOND CIRCUIT'S, THE NEW YORK CASE INVOLVING NEW YORK'S LARGE CAPACITY MAGAZINE BAN, THE SECOND CIRCUIT AT THE SAME TIME UPHELD THE BAN ON LARGE CAPACITY MAGAZINES DEFINED AS MORE THAN 10 ROUNDS WHILE ON THE SAME RECORD STRIKING DOWN THE 7-ROUND LOAD LIMIT. SO IN THAT

11:47:19 CASE, THE COURT HAD CONCERNS. THE COURT FELT THAT 7 ROUNDS WAS TOO LOW. I THINK THE LOWER YOU GET -- THE CLOSER YOU GET TO THE NUMBER OF ROUNDS THAT HAVE TRADITIONALLY BEEN USED IN REVOLVERS WHICH HAVE HISTORICALLY BEEN THE QUINTESSENTIAL DEFENSE WEAPON, I THINK YOU START TO HAVE MORE CONSTITUTIONAL CONCERNS.

THE COURT: I'M SORRY. I UNDERSTAND YOUR POINT. BUT THAT'S REALLY SHEER SPECULATION ON YOUR PART. THAT ACTUALLY IS ASKING ME TO PREDICT. I UNDERSTAND THE 7 ROUND THING. BUT TRUST ME, 10 YEARS FROM NOW, 20 YEARS FROM NOW, THAT ALSO WILL BE DISAPPEARING. 7 ROUNDS WILL ALSO BE DISAPPEARING. THAT'S NOT THE QUESTION. THE QUESTION IS: HOW DO I MAKE THAT DECISION? WHO SAID 10 ROUNDS? WHO SAID 7 ROUNDS? WHO SAID 5 ROUNDS? AND ON WHAT EVIDENCE AM I MAKING THE DECISION TO

11:48:17 DECIDE WHETHER, YES, 10 ROUNDS IS AN APPROPRIATE LEVEL, 7 ROUNDS, 5 ROUNDS, BECAUSE THE EVIDENCE THAT YOU HAVE PRESENTED TO ME IN THIS WHOLE STACK OF -- IF I WAS IN YOUR SHOES -- I WASN'T THE GREATEST LAWYER IN TOWN, I ASSURE YOU, BUT I COULD MAKE THE VERY SAME ARGUMENT FOR A BAN OF 10-ROUND MAGAZINES, 7-ROUND MAGAZINES, 5-ROUND MAGAZINES. I COULD GET DOWN TO THE 2.2. I COULD GET DOWN TO THE ONE GUN WITH ONE ROUND. NOW, DEPENDING ON HOW MANY MASS SHOOTINGS THERE HAVE BEEN WOULD DEPEND ON HOW MANY JUDGES WOULD BE INCLINED TO GO ALONG WITH ME AND FIND THAT, IN FACT, MY PROPOSED BAN WOULD PASS CONSTITUTIONAL MUSTER. I JUST --

11:49:12 MR. ECHEVERRIA: THE ATTORNEY GENERAL'S ANSWER IS THAT THE COURT CANNOT UNDER INTERMEDIATE SCRUTINY INVALIDATE THE CURRENT LARGE CAPACITY MAGAZINE BAN BECAUSE OF THE COURT'S PREDICTION OF HOW THE LEGISLATURE OR THE PEOPLE WILL ACT IN THE FUTURE. INTERMEDIATE SCRUTINY ACCORDS THE STATES SIGNIFICANT LEVERAGE IN EXPERIMENTING WITH DIFFERENT BANS. THE STATE OF COLORADO, FOR EXAMPLE, HAVE A 15-ROUND BAN. THEY HAVE A DIFFERENT ONE. THE FEDERAL ASSAULT WEAPONS BAN WAS A 10-ROUND BAN. THE NUMBER THAT SEEMS TO BE INVOLVED IN MOST STATE AND MUNICIPAL LARGE CAPACITY MAGAZINE BANS IS MORE THAN 10 ROUNDS OF AMMUNITION --

THE COURT: BUT YOU KNOW WHAT, THERE ARE NINE STATES -- I KNOW JUDGE YOUNG CITED JUSTICE SCALIA IN A CASE THAT I'M PRETTY FAMILIAR. AND IN THAT CASE, AS I RECALL, THE SUPREME

11:50:18 COURT MADE ITS DECISION BY STATISTICAL ANALYSIS. IT FOUND THAT THERE WERE MORE STATES THAT RULED ONE WAY ON AN ISSUE THAN OTHER STATES. SO ESSENTIALLY, THE SUPREME COURT FOUND THAT BECAUSE THE MAJORITY OF THE STATES WENT ONE WAY, THEY WOULD RULE THE WAY THEY DID. NOW, IN THIS CASE, THERE ARE NINE STATES, INCLUDING D.C., THAT HAVE PASSED THESE LARGE CAPACITY MAGAZINES LAWS.

MR. ECHEVERRIA: I BELIEVE THE NUMBER IS NOW 10. THE STATE OF VERMONT ON APRIL 11TH ENACTED ITS OWN LARGE CAPACITY MAGAZINE, AND THAT'S HARDLY A GUN CONTROL STATE, AS YOUR HONOR IS AWARE.

11:51:05 THE COURT: THAT'S 10 OUT OF 50. AND MAY I POINT OUT TO YOU THAT SEVERAL OF THOSE STATES, AT LEAST 2, HAVE A 15-ROUND LIMIT. AND ILLINOIS -- IF YOU CAN FIGURE OUT ILLINOIS, YOU'RE WAY SMARTER THAN I AM BECAUSE -- NOW ILLINOIS SEEMS TO HAVE MADE WHAT I THINK IS PERHAPS A COMMON SENSE DECISION TO ALLOW THE RURAL AREAS WHERE YOU CAN POSSESS A WEAPON WITH 35 ROUNDS BUT IN OTHER AREAS 10 ROUNDS.

MR. ECHEVERRIA: SURE.

THE COURT: SO THEY FOUND THAT IN THE RURAL AREAS YOU CAN POSSESS A WEAPON THAT HAD A MAGAZINE OF 35 ROUNDS. THAT SEEMS TO BE A LAW THAT IS NOT A BROAD BRUSH. IT DOESN'T PAINT WITH A BROAD BRUSH. IT ACTUALLY SEEMS TO HAVE MADE AN ATTEMPT TO ADDRESS REALITY AS OPPOSED TO SOME THEORETICAL ABSTRACT CONCEPT THAT SOMEONE CAME UP WITH, SOME ARBITRARY NUMBER THAT

11:52:12 THEY PICKED OUT OF THE AIR. BECAUSE THERE'S NOTHING IN THIS EVIDENCE, BY THE WAY, THAT I CAN SEE THAT INDICATES THAT, YOU KNOW, IF YOU HAD A MAGAZINE OF 11 ROUNDS, ANYTHING WOULD CHANGE FROM 10 ROUNDS OR EVEN IF YOU HAD 15 ROUNDS THAT THE OUTCOME OR THE SAFETY OF THE PEOPLE WOULD BE ANY GREATER, OR 20 ROUNDS, OR 30 ROUNDS.

MR. ECHEVERRIA: THE STATE HAS PRESENTED EVIDENCE THAT BANS ON CAPACITY SIZE, WHETHER IT BE A BAN ON MAGAZINES OVER 20 ROUNDS, 15 ROUNDS, THEY INCREASE THE FREQUENCY OF THESE PAUSES IN PUBLIC MASS SHOOTINGS. AND EVEN IF IT'S JUST A MATTER OF SECONDS, THOSE SECONDS TRANSLATE INTO LIVES.

11:52:59 THE COURT: BUT THERE'S CONFLICTING TESTIMONY --

MR. ECHEVERRIA: AND IF THERE'S CONFLICTING TESTIMONY, THE MOTION FOR SUMMARY JUDGMENT MUST BE DENIED.

THE COURT: NO BECAUSE IT HAS TO BE CREDIBLE. THE EVIDENCE THAT'S PRESENTED TO ME HAS TO BE CREDIBLE EVIDENCE. EVIDENCE THAT'S --

MR. ECHEVERRIA: THE COURT CANNOT MAKE CREDIBILITY DETERMINATIONS ON A MOTION FOR SUMMARY JUDGMENT.

THE COURT: BUT IT HAS TO BE RELIABLE. IT HAS TO BE ADMISSIBLE. AND SOMEBODY'S OPINION ABOUT WHAT HAPPENED WITHOUT SUBSTANTIAL JUSTIFICATION FOR IT, I DON'T HAVE TO RELY ON IT.

MR. ECHEVERRIA: IT'S NOT AN OPINION THAT SEVERAL CHILDREN AT SANDY HOOK WERE ABLE TO ESCAPE DURING THE CRITICAL PAUSES OF THAT SHOOTING.

11:53:43 THE COURT: WE'RE BACK TO THE SAME POINT, COUNSEL, WHICH IS, AND IF YOU HAD A MAGAZINE OF 7 ROUNDS, THE PERSON WOULD HAVE TO LOAD, RELOAD MORE OFTEN WHICH WOULD GIVE SOMEBODY A CHANCE TO ESCAPE OR TO ATTACK HIM. AND IF YOU GOT DOWN TO 5 ROUNDS, THE SAME THING APPLIES.

MR. ECHEVERRIA: OR BANNING FIREARMS IN GENERAL, THEN THERE WOULD BE NO MASS SHOOTINGS.

THE COURT: I THINK THAT'S THE ULTIMATE --

MR. ECHEVERRIA: THAT MAY BE THE COURT'S CONCERN. BUT HERE, UNDER INTERMEDIATE SCRUTINY, AS THE NINTH CIRCUIT REPEATEDLY EMPHASIZED, THE PEOPLE'S PREDICTIVE JUDGMENTS ARE

AFFORDED SUBSTANTIAL DEFERENCE.

THE COURT: BUT NOT SO LONG AS IT INTERFERES WITH A CONSTITUTIONALLY PROTECTED RIGHT, AND THE CONSTITUTIONALLY PROTECTED RIGHT AS SET FORTH IN HELLER IS THAT UNLESS IT'S A DANGEROUS AND UNUSUAL WEAPON THAT'S NOT COMMONLY POSSESSED BY LAW-ABIDING CITIZENS FOR THE PROTECTION OF THE HEARTH AND THE HOME, THAT IT IS PROTECTED. AND SO YOU CAN MAKE THE ARGUMENT THAT A GUN IS A DANGEROUS THING; YOU CAN MAKE THE ARGUMENT THAT THE MORE ROUNDS YOU FIRE FROM IT THE MORE PEOPLE ARE GOING TO BE INJURED AND THE MORE PEOPLE ARE GOING TO BE KILLED. BUT HELLER BASICALLY SAYS TO YOU IT DOESN'T MATTER BECAUSE AS LONG AS IT IS NOT A DANGEROUS AND UNUSUAL WEAPON WHICH IS BEING USED BY, IN COMMON USE BY LAW-ABIDING CITIZENS FOR THE PROTECTION OF THE HEARTH AND THE HOME, THAT'S IT. EVERYTHING ELSE IS OFF THE TABLE.

MR. ECHEVERRIA: THAT'S NOT WHAT HELLER SAID, YOUR HONOR.

THE COURT: WELL --

MR. ECHEVERRIA: AND THE NINTH CIRCUIT IN CHOVAN, IN JACKSON, SYLVESTER, REPEATEDLY, THE NINTH CIRCUIT HAS STATED THAT THAT'S NOT THE SOLE INQUIRY. THE TWO QUESTIONS THAT THE COURT PRESENTED ON ITS ORDER ON THE PRELIMINARY INJUNCTION MOTION DEALT EXCLUSIVELY WITH WHETHER LARGE CAPACITY MAGAZINES ARE IN COMMON USE FOR LAWFUL PURPOSES AND WHETHER THEY'RE USEFUL FOR MILITIA SERVICE. BUT THOSE QUESTIONS ONLY FOCUS ON

11:55:52 THE FIRST STEP OF THE SECOND AMENDMENT INQUIRY. AND THE ATTORNEY GENERAL CAN -- WE CAN ASSUME THAT SURE, LET'S ASSUME THAT IS TRUE. BUT THEN WE HAVE TO DETERMINE -- THEN THE COURT HAS TO DETERMINE WHAT LEVEL OF SCRUTINY APPLIES, EVEN IF LARGE CAPACITY MAGAZINES ARE IN COMMON USE, EVEN IF THEY ARE PROTECTED UNDER THE SECOND AMENDMENT.

THERE'S A RIGHT TO AN ABORTION, BUT THAT DOESN'T MEAN THAT THE STATES ARE PROHIBITED FROM IMPOSING ANY RESTRICTIONS ON ABORTIONS. IT'S AN UNDUE BURDEN STANDARD. IN THE FIRST AMENDMENT CONTEXT, IF IT'S NOT CONTENT-BASED PURE POLITICAL SPEECH, IF IT'S COMMERCIAL SPEECH, THEN SOME LOWER STANDARD OF SCRUTINY APPLIES. SO EVEN IF THERE IS FIRST AMENDMENT PROTECTION, THERE'S STILL SOME LEEWAY FOR THE STATES TO EXPERIMENT IN TRYING TO ENACT COMMON SENSE REGULATIONS.

11:56:43 THE COURT: THAT'S WHAT I WAS TRYING TO GET AT, AND YOU JUST SAID SOME THINGS THAT ARE VERY DIFFICULT FOR ME WHICH WERE, NUMBER ONE, YOU USED THE WORDS "COMMON SENSE," NUMBER ONE. AND NUMBER TWO, THAT THERE'S "LEEWAY." BUT LEEWAY IMPLIES THAT JUST SIMPLY BECAUSE THE STATE SAYS THIS IS SO THAT THE COURT IN INTERPRETING WHAT IS ALLOWABLE UNDER THE SECOND AMENDMENT, THAT THE COURT MUST SIMPLY ROLL OVER AND SAY, YEAH, THE STATE DECIDED AND SO IT IS. THEY HAVE LEEWAY. BUT NOT UNFETTERED LEEWAY.

MR. ECHEVERRIA: THAT'S RIGHT.

THE COURT: SO WHAT NOBODY HAS YET ANSWERED FOR ME IS

11:57:30 WHY 10? WHY NOT 7? WHY NOT 5? WHY NOT 3? WHY NOT 2? DO YOU SEE WHAT I'M GETTING AT?

MR. ECHEVERRIA: I'LL TELL YOU WHY, YOUR HONOR, BECAUSE UNDER INTERMEDIATE SCRUTINY, THE FIT DOESN'T HAVE TO BE PERFECT.

THE COURT: BUT IT HAS TO BE REASONABLE.

MR. ECHEVERRIA: EXACTLY. THAT'S WHERE COMMON SENSE COMES INTO PLAY.

THE COURT: BUT 7, IS 7 REASONABLE?

MR. ECHEVERRIA: WELL, THAT'S NOT THE DECISION THAT THE PEOPLE OF CALIFORNIA AND THE LEGISLATURE BEFORE IT DECIDED TO ENACT. THAT'S JUST NOT THE ISSUE BEFORE THE COURT. THE PEOPLE DREW A LINE AROUND 10.

THE COURT: WHAT IF I SAID THAT, NO, A 30-ROUND

11:58:11 MAGAZINE PROHIBITION WOULD BE REASONABLE BUT NOT 10?

MR. ECHEVERRIA: THE COURT IS -- CAN'T SAY THAT UNDER INTERMEDIATE SCRUTINY BASED ON THE EVIDENCE WE PRESENTED, BASED UPON WHAT APPEARS TO BE THE COURT'S AGREEMENT THAT THE MORE ROUNDS YOU HAVE THE MORE SHOTS YOU CAN FIRE WITHOUT RELOADING, AND THE PEOPLE HAVE DRAWN THE LINE, THE SAME LINE THAT CONGRESS DREW WHEN IT ENACTED THE FEDERAL ASSAULT WEAPONS BAN, THE SAME LINE THAT MOST STATES THAT HAVE ENACTED LARGE CAPACITY MAGAZINE RESTRICTIONS HAVE DRAWN.

THE COURT: ALL 9 OF THEM, 10?

MR. ECHEVERRIA: SOME HAVE 15. BUT UNDER

11:58:48 INTERMEDIATE SCRUTINY, THE STATES ARE ALLOWED TO EXPERIMENT.

THE COURT: SO WHAT I'M ASKING YOU IS -- SO THERE'S 10 ALTOGETHER. THREE OF THOSE 10 DON'T USE 10 AS THE BASIS, RIGHT?

MR. ECHEVERRIA: THE STATES CAN DISAGREE, RIGHT.

THE COURT: OKAY. BUT THAT GETS US BACK TO WHERE WE ARE WHICH IS, SO IF THE STATE SAYS SEVEN, DO I HAVE TO JUST BITE MY LIP AND SAY, OKAY, THE STATE SAID SEVEN, SO I MUST FIND THAT'S A REASONABLE FIT?

MR. ECHEVERRIA: WE'RE NOT ASKING THE COURT TO BITE ITS LIP. WE'RE NOT ASKING THE COURT TO JUST SIT BACK AND LET THE PEOPLE AND THE LEGISLATURE ENACT WHATEVER FIREARM RESTRICTIONS THEY WANT TO WILLY-NILLY. THAT'S NOT OUR POSITION. THE STATE HAS PRESENTED EVIDENCE THAT THE COURT

11:59:40 APPEARS TO AGREE WITH AND THE PLAINTIFFS DON'T DISPUTE, THAT LARGE CAPACITY MAGAZINES ENABLE SHOOTERS TO FIRE MORE ROUNDS. THE STATE ALSO PRESENTED EVIDENCE THAT THESE ARE USED IN MANY PUBLIC MASS SHOOTINGS, OVER A MAJORITY OF THEM.

OUT OF THE LAST 10 MOST DEADLY PUBLIC MASS SHOOTINGS, 9 OUT OF 10 HAVE INVOLVED LARGE CAPACITY MAGAZINES. THE STATE HAS PRESENTED EVIDENCE THAT THE MORE INJURIES AN INDIVIDUAL SUFFERS, THE MORE LIKELY THEY WILL DIE. DR. KOPER'S EXPERT REPORT INDICATES THAT THE NUMBER IS AROUND 60 PERCENT INCREASE IN LIKELIHOOD OF FATALITY.

THE COURT: LET ME SHIFT THE FOCUS TO SOMETHING ELSE.

12:00:28 SO THE STATUTE MAKES SEVERAL EXCEPTIONS, ONE OF WHICH I KIND OF HAD FUN WITH YOUR COLLEAGUE THE LAST TIME SHE WAS HERE ABOUT THE MOVIE INDUSTRY. OF COURSE, THAT EXCEPTION IS THERE BECAUSE OF MONEY; RIGHT? THAT'S THE REASON WHY THAT EXCEPTION IS THERE BECAUSE THE MOVIE INDUSTRY IS BIG IN CALIFORNIA. A LOT OF TAX REVENUE IS GENERATED.

MR. ECHEVERRIA: A LOT OF JOBS.

THE COURT: YES, A LOT OF JOBS. SO WE'RE GOING TO EXEMPT MOVIE PEOPLE AND SAY YOU CAN POSSESS THESE MAGAZINES; IT'S OKAY. I'M HAVING A HARD TIME --

MR. ECHEVERRIA: THEY CAN ONLY USE THOSE MAGAZINES IF THEY'RE USED AS PROPS. THEY WOULD NOT BE LOADED LARGE CAPACITY MAGAZINES. IT'S NOT AN EXCEPTION THAT ALLOWS ACTORS TO WALK AROUND WITH LARGE CAPACITY MAGAZINES, YOUR HONOR. THAT'S JUST

12:01:18 NOT WHAT THAT EXCEPTION PROVIDES.

THE COURT: I DIDN'T READ THAT IN THERE, BUT LET'S ASSUME THAT TO BE THE CASE. OF COURSE, SOMEONE WHO GOES POSTAL WHO WORKS ON A MOVIE SET WOULD KNOW THERE'S A LAW THAT SAYS I CAN'T PUT AMMO IN THIS MAGAZINE, AND THEN GO OUT AND DO A MASS SHOOTING; RIGHT?

MR. ECHEVERRIA: IT'S POSSIBLE, BUT THE FIT DOESN'T HAVE TO BE PERFECT.

THE COURT: OF COURSE IT DOESN'T HAVE TO BE PERFECT. SO IN YOUR EVIDENCE YOU TALKED ABOUT THERE'S AN EXCEPTION. THE EXCEPTION IS FOR LAW ENFORCEMENT OFFICERS, AND I HAVE NOTHING

12:01:49 BUT RESPECT FOR LAW ENFORCEMENT OFFICERS TO BEGIN WITH. I THINK THEY'RE GREATLY UNDER-PAID, UNDER-RESPECTED. BUT IN HERE, THEY TALK ABOUT THE FACT THAT LAW ENFORCEMENT OFFICERS SHOULD BE ALLOWED TO CONTINUE TO OWN THESE WEAPONS BECAUSE THEY HAVE GREATER TRAINING AND EXPERIENCE.

MR. ECHEVERRIA: THAT WOULDN'T BE THE ONLY REASON.

THE COURT: WELL, THAT'S ONE OF THE REASONS. IT'S SAID OVER AND OVER AND OVER AGAIN BY YOUR EXPERTS INCLUDING I THINK IT WAS THE L.A. SHERIFF HIMSELF.

MR. ECHEVERRIA: KEN JAMES.

THE COURT: WAS IT HIM WHO TALKED ABOUT IN A PEACEFUL SOCIETY THERE'S NO NEED FOR -- YEAH. OF COURSE, AS WE WERE DISCUSSING THIS IN CHAMBERS, WE THOUGHT, WELL, IF WE HAD A PEACEFUL SOCIETY, WE WOULDN'T NEED LAW ENFORCEMENT TO BEGIN

12:02:49 WITH. BUT EVEN IN LONDON WHERE GUNS ARE BANNED, PERIOD -- SO LET ME ASK YOU THIS: WHAT TRAINING DO LAW ENFORCEMENT OFFICERS GET? BEFORE I DO THAT, LET ME ASK YOU THIS: TELL ME WHAT IS A LAW ENFORCEMENT OFFICER THAT'S EXEMPTED FROM THIS LARGE CAPACITY MAGAZINE RESTRICTION. WOULD MY COURTROOM SECURITY OFFICER BE EXEMPTED?

MR. ECHEVERRIA: I DON'T KNOW IF YOUR SECURITY OFFICER WOULD BE EXEMPTED.

THE COURT: THE FELLOW FROM THE FEDERAL PROTECTIVE SERVICES AT THE GATE COMING INTO OUR PARKING AREA, WOULD HE OR SHE BE PROTECTED?

12:03:38 MR. ECHEVERRIA: IT'S POSSIBLE. I HAVEN'T LOOKED AT THE STATUTE CLOSELY.

THE COURT: BUT YOU'RE REPRESENTING THE STATE.

MR. ECHEVERRIA: I AM.

THE COURT: SO YOU DON'T KNOW? YOU CAN'T TELL ME?

MR. ECHEVERRIA: I CAN REFER TO SECTION 830 OF THE PENAL CODE THAT DEFINES THE DIFFERENT CATEGORIES OF SWORN PEACE OFFICERS WHO WOULD BE EXEMPT FROM THE LARGE CAPACITY MAGAZINE BAN. I'D BE HAPPY TO. I DON'T HAVE THAT PARTICULAR SECTION HANDY WITH ME AT THE HEARING TODAY.

THE COURT: WOULD I BE EXEMPTED? IF I FELT THAT I NEEDED TO HAVE, FOR EXAMPLE, A GLOCK 17, WHICH I DON'T HAVE ONE, BUT IF I FELT I NEEDED TO HAVE ONE IN ORDER TO PROTECT MYSELF FROM -- AS YOU KNOW, THERE'S VARIOUS PEOPLE WHO VERY

12:04:23 OFTEN DISAGREE WITH OPINIONS AND DECISIONS THAT I MAKE. IF I FELT I NEEDED TO HAVE A GLOCK 17 TO PROTECT MYSELF, WOULD I BE EXEMPTED UNDER THAT SECTION?

MR. ECHEVERRIA: I DON'T BELIEVE THAT FEDERAL JUDGES ARE PEACE OFFICERS, YOUR HONOR, AND I DON'T THINK THERE'S AN -- THERE'S NOT AN EXCEPTION IN THE STATUTE FOR JUDGES, NO.

THE COURT: SO WHAT'S THE RATIONALE, IF YOU WILL, FOR NOT EXEMPTING ME OR MY COURTROOM SECURITY OFFICER OR THE PERSON WHO IS OUT IN THE STREET PROTECTING THE GATE, BUT PROTECTING OTHER LAW ENFORCEMENT OFFICERS? WHAT'S THE RATIONALE FOR THAT?

MR. ECHEVERRIA: I'M NOT SAYING THAT SECURITY

PERSONNEL GUARDING THE COURTHOUSE ARE NOT EXEMPTED FROM THE STATUTE. I'D HAVE TO DOUBLE CHECK FOR YOUR HONOR. THEY VERY WELL MAY BE EXEMPTED FROM THE STATUTE. WITH RESPECT TO YOUR HONOR AND OTHER INDIVIDUALS WHO MAY HAVE A HEIGHTENED SELF-DEFENSE NEED, AS I WOULD ACKNOWLEDGE -- LAW ENFORCEMENT PERSONNEL ARE OFTEN CALLED UPON TO SERVE WARRANTS. THEY OFTEN HAVE TO ENGAGE IN SUSTAINED GUNFIGHTS WITH CRIMINALS, LIKE IN THE SAN FRANCISCO EXAMPLE THAT YOUR HONOR MENTIONED DURING THE DISCUSSION WITH PLAINTIFF'S COUNSEL. SO LAW ENFORCEMENT HAVE PARTICULAR DUTIES AND OFTEN CERTAIN SITUATIONS THAT REQUIRE SUSTAINED FIREPOWER IN ORDER TO FULFILL THEIR DUTIES TO PUBLIC SAFETY.

THE COURT: I BELIEVE THE EXEMPTION COVERS THEM, FOR EXAMPLE, IF I AM NOT MISTAKEN, WHEN THEY'RE OFF-DUTY.

12:06:07 MR. ECHEVERRIA: WHEN LAW ENFORCEMENT OFFICERS ARE OFF-DUTY, THEY STILL HAVE OBLIGATIONS TO PROTECT THE PUBLIC. IN THE NINTH CIRCUIT SILVEIRA CASE, THE OFF-DUTY EXCEPTION FROM THE ASSAULT WEAPONS CONTROL ACT WAS UPHELD UNDER THE EQUAL PROTECTION CLAUSE.

THE COURT: I THINK IT COVERS THEM WHEN THEY'RE RETIRED.

MR. ECHEVERRIA: THE CALIFORNIA'S LARGE CAPACITY MAGAZINE BAN?

THE COURT: YES.

MR. ECHEVERRIA: IT DOES, HONORABLY RETIRED PEACE

12:06:33 OFFICERS NOT JUST ANY RETIRED PEACE OFFICER.

THE COURT: SO IF YOU'RE RETIRED, YOU'RE NO LONGER OFF-DUTY OR ON-DUTY, YOU CAN STILL POSSESS THESE LARGE CAPACITY MAGAZINES. BUT I, ON THE OTHER HAND, AS AN ACTIVE SITTING JUDGE, I'M NOT ALLOWED TO POSSESS A LARGE CAPACITY MAGAZINE. IS THAT WHAT YOU'RE SAYING?

MR. ECHEVERRIA: THE LEGISLATURE ESTABLISHED AN EXCEPTION FOR HONORABLY RETIRED PEACE OFFICERS AND THAT EXCEPTION WOULD BE EVALUATED UNDER RATIONAL BASIS, AND THERE ARE SEVERAL RATIONAL BASES THAT WOULD JUSTIFY AN EXCEPTION FOR HONORABLY RETIRED PEACE OFFICERS.

THE COURT: LIKE WHAT?

MR. ECHEVERRIA: GENERALLY, THEIR INCREASED LEVEL OF TRAINING.

12:07:16 THE COURT: LET'S TALK ABOUT THAT FOR JUST A SECOND.

MR. ECHEVERRIA: SURE.

THE COURT: I NOTED THAT THERE'S NO EXCEPTION FOR MEMBERS OF THE ARMED FORCES.

MR. ECHEVERRIA: THAT'S NOT TRUE, YOUR HONOR.

THE COURT: WHERE DO I FIND IT?

MR. ECHEVERRIA: IT'S IN SECTION 32400. IT'S ONE OF THE EXCEPTIONS. CAN I STEP AWAY FOR A MOMENT, YOUR HONOR?

THE COURT: SURE. MAYBE I MISSED SOMETHING.

MR. ECHEVERRIA: IN PENAL CODE SECTION 32440, THERE'S

AN EXCEPTION FOR THE MANUFACTURE OF LARGE CAPACITY MAGAZINES FOR EXPORT OR FOR SALE TO GOVERNMENT AGENCIES OR THE MILITARY PURSUANT TO APPLICABLE FEDERAL REGULATIONS.

THE COURT: I UNDERSTAND THAT. THAT'S NOT WHAT I WAS GETTING AT. WHAT I WAS GETTING AT IS, YOU GOT A MEMBER OF SEAL TEAM 6; THE MEMBER OF SEAL TEAM 6 IS AT HOME. IS THERE AN EXCEPTION THAT ALLOWS THAT MEMBER OF SEAL TEAM 6 TO HAVE AN AR-15 WITH A MORE THAN 10-ROUND MAGAZINE?

MR. ECHEVERRIA: I DON'T KNOW IF THERE'S AN EXCEPTION TO THE ASSAULT WEAPONS BAN FOR OFF-DUTY MILITARY PERSONNEL.

THE COURT: HOW ABOUT THE MAGAZINES? IS THERE AN EXCEPTION FOR THAT SEAL TEAM 6 MEMBER HAVING A HIGH CAPACITY MAGAZINE?

MR. ECHEVERRIA: I DO NOT KNOW IF THERE WOULD BE AN EXCEPTION FOR OFF-DUTY MILITARY SERVICE MEMBER.

THE COURT: WHAT ABOUT A NATIONAL GUARD MEMBER, WHEN THEY GO HOME AT NIGHT? IS THERE AN EXCEPTION THAT COVERS THEM?

MR. ECHEVERRIA: I DON'T KNOW, YOUR HONOR.

THE COURT: THE ANSWER IS NO. THERE IS NONE.

THE COURT: SO MY QUESTION -- WHICH I THINK IS A PRETTY OBVIOUS QUESTION -- SO YOU HAVE A RETIRED POLICE OFFICER. BY THE WAY, I'M NOT SAYING THEY SHOULD NOT. I'M JUST TRYING TO MAKE SENSE OF THIS LEGISLATION, THE SAFETY FOR ALL ACT. SO YOU GOT PEOPLE WHO ARE MEMBERS OF THE NATIONAL GUARD, MEMBERS WHO ARE -- PEOPLE WHO ARE MEMBERS OF THE MARINE CORPS,

12:10:21 PEOPLE WHO ARE MEMBERS OF THE ARMY, THE NAVY, THE AIR FORCE. THEY'RE TREATED AS CRIMINALS IF THEY IN FACT OWN ONE OF THESE LARGE CAPACITY MAGAZINES THAT JUST A FEW YEARS AGO WE TOLD THEM THEY COULD POSSESS. IT WAS FINE. YOU CAN POSSESS THESE THINGS. YOU JUST CAN'T BUY, SELL OR TRANSFER THEM. BUT NOW, IF THEY DON'T TURN THEM IN, YOU'RE A CRIMINAL.

I WAS TRYING TO FIGURE OUT -- I WAS TRYING TO MAKE SENSE OF THIS, AND I WAS ASKING MYSELF -- YOU'RE A LAW ENFORCEMENT OFFICER OUT OF THE BIG CITY. I'LL PICK A BIG CITY OUT OF THE AIR. NEEDLES, CALIFORNIA. WHAT ARE THE ODDS THAT YOU WOULD HAVE BETTER TRAINING IN THE USE OF -- AGAIN, I'LL GO TO THE AR-15. THIS IS NOT ABOUT THE AR-15. BUT WHAT ARE THE ODDS THAT YOU WOULD HAVE BETTER TRAINING ABOUT THE USE OF AN AR-15 WHEN YOU ARE A POLICE OFFICER IN THE CITY OF NEEDLES THAN

12:11:31 YOU WOULD BE IF YOU WERE A SERVING MEMBER OF SEAL TEAM 6 WHILE YOU'RE AT HOME?

MR. ECHEVERRIA: YOUR HONOR MAY THINK THAT THERE'S NO EVIDENCE IN THE RECORD ABOUT THIS, BUT YOUR HONOR MAY THINK, AND REASONABLY SO, THAT SERVICEMEN AND WOMEN HAVE SIGNIFICANT TRAINING IN THE USE AND OPERATION AND SAFE STORAGE OF FIREARMS INCLUDING ASSAULT WEAPONS, BUT UNDER RATIONAL BASIS --

THE COURT: BUT THIS LEGISLATION, JUST WITH A BROAD BRUSH, BASICALLY SAYS, TOO BAD, SO SAD. SO YOU'RE HONORABLY SERVING OUR COUNTRY, BUT YOUR WIFE, YOUR DAUGHTER, YOURSELF AT HOME, YOU CAN'T POSSESS ONE OF THESE LARGE CAPACITY MAGAZINES

12:12:23 FOR SELF-DEFENSE. YOU'VE NEVER KILLED ANYONE, NEVER INJURED ANYONE, EXCEPT FOR PERHAPS IN THE FIELD OF BATTLE. BUT HERE YOU'RE LIMITED TO 10 ROUNDS.

MR. ECHEVERRIA: YOU CAN HAVE ANY NUMBER OF 10-ROUND MAGAZINES AT YOUR DISPOSAL FOR SELF-DEFENSE PURPOSES, YES.

THE COURT: BUT IF YOU'RE IN THE MOVIE INDUSTRY, YOU CAN HAVE A 15-ROUND, 30-ROUND, 100-ROUND MAGAZINE.

MR. ECHEVERRIA: TO USE AS A PROP IN FILMING.

THE COURT: I GOT YOU. IF YOU'RE A RETIRED POLICE OFFICER, YOU'RE 80 YEARS OLD, YOU CAN HAVE ONE OF THESE MAGAZINES, AND IT'S NOT FOR A PROP. YOU CAN ACTUALLY HAVE ONE OF THESE MAGAZINES, AND YOU CAN HAVE IT LOADED WITH AMMUNITION. RIGHT?

MR. ECHEVERRIA: YES.

12:13:13 THE COURT: BUT IF YOU'RE A SERVING MEMBER OF ONE OF THE ARMED FORCES WHERE YOU'VE BEEN TRAINED ON HOW TO USE THESE THINGS, AND YOU'VE PROBABLY USED THEM A WHOLE LOT MORE THAN A SHERIFF DEPUTY IN PODUNK COUNTY, DOES THAT MAKE ANY SENSE TO YOU?

MR. ECHEVERRIA: UNDER RATIONAL BASIS, THE FIT DOESN'T HAVE TO BE PERFECT. IT CAN BE OVERINCLUSIVE, UNDERINCLUSIVE, AND THE PEOPLE OF CALIFORNIA AND THE LEGISLATURE COULD HAVE CONCLUDED THAT HONORABLY RETIRED PEACE OFFICERS GENERALLY HAVE MORE TRAINING. THEY HAVE TO COMPLY WITH THE POST STANDARDS. THEY HAVE CONTINUOUS TRAINING WHILE

12:13:59 EMPLOYED IN LAW ENFORCEMENT AND THEY --

THE COURT: LET ME ASK YOU ABOUT THAT FOR JUST A SECOND. SO TELL ME ABOUT THE TRAINING THAT LAW ENFORCEMENT GET IN USING A WEAPON THAT HOLDS MORE THAN 10 ROUNDS. WHAT KIND OF TRAINING DO THEY GET BECAUSE I WAS LOOKING AT THIS AND I WAS TRYING TO FIGURE IT OUT?

MR. ECHEVERRIA: THERE'S NO EVIDENCE IN THE RECORD ABOUT THE TRAINING OF HONORABLY RETIRED PEACE OFFICERS.

THE COURT: NO, ANY -- THEY TALK ABOUT POLICE OFFICERS. THEY TALK ABOUT HOW POLICE OFFICERS ARE TRAINED TO USE THESE WEAPONS, AND I READ ABOUT THAT.

MR. ECHEVERRIA: THE PARTICULAR ARGUMENT WE WERE MAKING ABOUT POLICE OFFICERS ACTIVE DUTY OR ACTIVELY SERVING LAW ENFORCEMENT PERSONNEL IS THE TYPES OF CONFRONTATIONS THAT

12:14:49 THEY ENTER INTO AND THE NEED FOR LARGE CAPACITY MAGAZINES.

THE COURT: I'M SORRY. I DISAGREE WITH YOU. THERE'S A LOT OF MENTION IN HERE, AND I'M NOT GOING TO TAKE THE TIME NOW TO FIND IT, BUT THERE'S A LOT OF MENTION IN HERE AND A LOT OF YOUR EXPERTS THAT TALK ABOUT THE FACT THAT THEY HAVE TRAINING.

MR. ECHEVERRIA: ABSOLUTELY.

THE COURT: OKAY. SO YOU CONCEDE THAT. ALL RIGHT. NOW SO LET ME ASK YOU ABOUT THIS BECAUSE THAT'S -- YOU RAISE IT, AND SINCE YOU RAISE IT, I'M QUESTIONING YOU ON IT. OKAY. BY THE WAY, LET ME KNOW IF YOU NEED A BREAK. I APOLOGIZE FOR

GOING SO LONG.

MR. ECHEVERRIA: IT'S OKAY.

THE COURT: WHAT KIND OF TRAINING DOES A POLICE OFFICER GET IN USING THESE WEAPONS WITH A MAGAZINE OF MORE THAN 10 ROUNDS? WHAT DOES THAT TRAINING CONSIST OF, DO YOU KNOW?

MR. ECHEVERRIA: AGAIN, THERE'S NO PARTICULAR EVIDENCE IN THE RECORD. IN GENERAL, I KNOW THAT LAW ENFORCEMENT PERSONNEL HAVE TO GO THROUGH THE ACADEMY.

THE COURT: WHAT DO THEY DO AT THE ACADEMY?

MR. ECHEVERRIA: SO THERE'S TRAINING REQUIREMENTS THAT ARE ESTABLISHED BY THE PEACE OFFICERS' STANDARDS AND TRAINING COMMISSION POST.

THE COURT: WITH REGARDS TO THE WEAPONS. LET'S FORGET ABOUT THE LAW AND ADVISAL OF RIGHTS AND ALL THAT. LET'S TALK ABOUT THE WEAPONS. SO WHAT KIND OF TRAINING DOES A LAW ENFORCEMENT GET WITH REGARDS TO A WEAPON THAT USES A LARGE CAPACITY MAGAZINE?

MR. ECHEVERRIA: IN GENERAL, AGAIN, I DON'T HAVE THE EVIDENCE, AND THE EVIDENCE IS NOT IN THE RECORD, BUT IN GENERAL, LAW ENFORCEMENT PERSONNEL NEED TO BE QUALIFIED IN THE USE OF PARTICULAR FIREARMS.

THE COURT: WHAT DOES THAT MEAN?

MR. ECHEVERRIA: SO TO QUALIFY, IT'S MY UNDERSTANDING THAT THEY HAVE TO DEMONSTRATE PROFICIENCY.

THE COURT: IN WHAT?

MR. ECHEVERRIA: IN THE USE OF THE FIREARM.

THE COURT: WHICH MEANS WHAT?

MR. ECHEVERRIA: BEING ABLE TO FIRE ACCURATELY, BEING ABLE TO ASSEMBLE AND DISASSEMBLE, STUFF LIKE THAT. AND I'M SURE THERE WOULD BE TRAINING ON HOW TO SAFELY STORE A FIREARM. I KNOW FOR LAW ENFORCEMENT PERSONNEL LOSING A SIDEARM IS A VERY BAD THING. SO THERE ARE A LOT OF SAFETY MEASURES IN PLACE TO TRAIN LAW ENFORCEMENT ON HOW TO SAFELY STORE THEIR FIREARMS.

THE COURT: OKAY. AS YOU PROBABLY KNOW, I'M SOMEWHAT FAMILIAR WITH FIREARMS. SO YOU HAVE A YOUNG BOY OR YOUNG GIRL WHO WANTS TO GO HUNTING, AND THEY GO THROUGH A JUNIOR HUNTING COURSE AND THEY TEACH HIM THE VERY SAME THING THAT THAT OFFICER LEARNS WHEN HE OR SHE GOES TO THE POLICE ACADEMY. EVERY GUN IS LOADED. MUZZLE CONTROL. HOW TO STORE IT. HOW TO TAKE CARE OF IT. HOW TO MAINTAIN IT. HOW TO CLEAN IT. HOW NOT TO POINT IT AT SOMEONE AND TO KNOW WHEREVER YOU'RE POINTING IT THERE MAY BE SOMEONE THERE OR SOMETHING THAT YOU MAY INJURE. OKAY?

MR. ECHEVERRIA: YES.

THE COURT: SO IN OTHER WORDS, THE DIFFERENCE BETWEEN THE TRAINING THAT A POLICE OFFICER GETS WITH A 30-ROUND MAGAZINE AND AN AR-15 REALLY IS NO DIFFERENT THAN THE TRAINING THAT YOU GIVE TO A JUNIOR HUNTER WHO IS LEARNING HOW TO OR IS TRYING TO GET A HUNTING LICENSE, WITH THE EXCEPTION THAT THE OFFICER IS GOING TO GO TO THE RANGE AND IS GOING TO SHOOT MORE ROUNDS, AND AS YOU POINTED OUT EARLY ON, THEY LEARN HOW TO BE

12:18:34 MORE ACCURATE WITH A WEAPON. RIGHT?

MR. ECHEVERRIA: YES.

THE COURT: OKAY.

MR. ECHEVERRIA: ALTHOUGH, I WOULD NOT CONCEDE THAT THEIR TRAINING WOULD BE THE SAME. I WOULDN'T GO THAT FAR, YOUR HONOR.

THE COURT: THERE'S NOTHING IN THE RECORD THAT INDICATES -- THERE'S JUST THIS CONCLUSION. THERE'S JUST THIS DISCUSSION THAT THEIR TRAINING IS BETTER. IT'S BETTER THAN SEAL TEAM 6 GETS. IT'S BETTER THAN THE NATIONAL GUARD GETS. IT'S BETTER THAN THE ARMY GETS. THE FACT IS THAT A WEAPON IS A WEAPON. A FIREARM IS A FIREARM, AND EVERYBODY LEARNS THE SAME THING, AND THE ONLY THING THEY LEARN WHEN THEY'RE PEACE OFFICERS IS THEY LEARN THE FOLLOWING: THEY LEARN TO GO TO

12:19:27 SCHOOL, AND THEY LEARN TO HOPEFULLY IDENTIFY WHEN TO SHOOT AND WHEN NOT TO SHOOT, AND TO SHOOT AND TO SHOOT ACCURATELY.

MR. ECHEVERRIA: I KNOW THAT LAW ENFORCEMENT ARE TRAINED IN SHOOT-DON'T-SHOOT SCENARIOS. I DON'T KNOW THAT HYPOTHETICAL INDIVIDUAL WHO IS TRAINED IN THE USE OF A FIREARM WOULD ALSO HAVE SIMILAR NO-SHOOT TRAINING.

THE COURT: I WILL CONCEDE THAT. BUT CERTAINLY PEOPLE IN THE ARMED FORCES GET THAT SAME TRAINING BECAUSE YOU KNOW FULL WELL AS I DO THAT A MEMBER OF THE ARMED FORCES WHO SHOOTS A CIVILIAN FACES SOME PRETTY TOUGH CONSEQUENCES. SO THEY LEARN AS WELL, SHOOT-DON'T-SHOOT. BUT MY BASIC POINT WAS

12:20:23 BASICALLY THIS: WHAT IS THE DIFFERENCE IN THE TRAINING THAT LAW ENFORCEMENT OFFICERS WOULD GET, WHETHER THEY WERE USING A WEAPON THAT HAS A 30-ROUND MAGAZINE OR A 10-ROUND MAGAZINE?

MR. ECHEVERRIA: I DON'T KNOW THAT THERE ARE DIFFERENT TRAINING PROTOCOLS --

THE COURT: THERE ARE NOT. ABSOLUTELY NONE. SO MY QUESTION IS WHEN IN THE STACK OF EVIDENCE THAT I SEE HERE THEY SAY, WELL, OFFICERS SHOULD BE ALLOWED TO HAVE THESE BECAUSE THEY HAVE GREATER TRAINING, I ASK MYSELF: GREATER TRAINING THEN, ARE YOU KIDDING ME, THAN A MEMBER OF THE SEAL TEAM 6 GROUP? ARE YOU KIDDING ME? GREATER TRAINING THAN A MEMBER OF THE NATIONAL GUARD? ARE YOU KIDDING ME? ARE YOU TELLING ME THAT A RETIRED POLICE OFFICER HAS BETTER SKILLS, BETTER TRAINING THAN A RETIRED SEAL TEAM SIX MEMBER? ARE YOU TELLING

12:21:35 ME THAT BECAUSE OF THIS SOMEHOW OR ANOTHER ALL OF THESE OTHER PEOPLE THAT HAVE HONORABLY SERVED THIS COUNTRY AND PUT THEIR LIVES ON THE LINE -- MANY OF THEM HAVE LOST LEGS, ARMS, SO ON -- BUT YOU CAN'T POSSESS A MAGAZINE THAT HAS MORE THAN 10 ROUNDS.

BUT WE'RE GOING TO MAKE THIS EXCEPTION. THE EXCEPTION IS THAT IF YOU WORK FOR THE MOVIE INDUSTRY, YOU CAN HAVE IT. IF YOU'RE A RETIRED POLICE OFFICER, YOU CAN HAVE IT. AND WHAT I'M TRYING TO DO IS I'M TRYING TO FIGURE OUT -- YOU USED THE WORD COMMON SENSE EARLIER ON, AND I'M TRYING TO FIGURE OUT WHERE IS THE COMMON SENSE IN THAT ONE. I KNOW JUDGE

12:22:17 REINHARDT ONCE MADE A SIMILAR ARGUMENT IN ANOTHER CASE, AND I AGREE WITH HIM.

MR. ECHEVERRIA: WOULD THAT BE SILVEIRA?

THE COURT: I BELIEVE IT IS. MY QUESTION IS: IF YOU'RE TRYING TO PROTECT THE PUBLIC, IF THIS IS REALLY WHAT YOU'RE TRYING TO DO, DON'T YOU PROTECT THE PUBLIC JUST AS WELL BY HAVING A MEMBER OF SEAL TEAM 6 WHO HAS, FOR EXAMPLE, A GLOCK 17 THAT HE'S WALKING AROUND WITH IN THE EVENT THERE HAPPENS TO BE -- FOR EXAMPLE, WHO IS THE CONGRESSMAN THAT WAS SHOT BY THE FELLOW --

MR. ECHEVERRIA: CONGRESSMAN SCALISE.

THE COURT: YEAH, SCALISE; YOU HAPPEN TO HAVE A MEMBER OF THE SEAL TEAM SIX WHO HAS A GLOCK 17 IN HIS POCKET, HE MIGHT BE ABLE TO STOP THAT KIND OF SHOOTING, RIGHT?

12:23:12 MR. ECHEVERRIA: THAT'S A POLICY CHOICE FOR THE PEOPLE TO DIVIDE THROUGH DEMOCRACY. THERE ARE IMPORTANT SEPARATION OF POWERS, PRINCIPLES, THAT ARE VINDICATED BY THE APPLICATION OF INTERMEDIATE SCRUTINY TO THIS KIND OF GUN CONTROL LEGISLATION. IT --

THE COURT: CAN YOU THINK OF AN EXAMPLE WHERE THE STATE HAS EVER SAID IN CONNECTION WITH TRYING TO DEFEND LEGISLATION THAT WAS PASSED THAT WOULD GIVE THE GOVERNMENT POWER WHERE THE STATE COMES IN AND SAID, YOU KNOW, WE DON'T HAVE THE POWER TO DO THIS; WE DON'T HAVE THE AUTHORITY TO DO THIS; WE DON'T HAVE THE DISCRETION TO DO THIS.

12:23:51 MR. ECHEVERRIA: AGAIN, THIS IS NOT IN THE RECORD AND THIS IS FAR OUTSIDE THE BOUNDS OF THIS LITIGATION, BUT -- AND I'M ON TOTALLY FAMILIAR WITH THE DETAILS -- BUT IT'S MY UNDERSTANDING THAT WITH THE ENACTMENT OF PROPOSITION 8, THE GOVERNMENT DECIDED IT WASN'T GOING TO BE DEFENDING PROPOSITION 8 --

THE COURT: THAT'S ABSOLUTELY TRUE.

MR. ECHEVERRIA: SO THAT WAS A SITUATION WHERE THE GOVERNMENT DISAGREED WITH THE ENACTMENT OF THE PEOPLE BECAUSE OF ITS PERCEPTION, RIGHTFULLY SO, THAT IT VIOLATED THE CONSTITUTION. SO THAT WOULD BE AN EXAMPLE.

THE COURT: OKAY. GOT YOU.

MR. ECHEVERRIA: I'D ALSO LIKE TO CLARIFY: I KNOW THAT YOUR HONOR CHARACTERIZED CALIFORNIA'S POSSESSION BAN AS

12:24:32 DISARMAMENT AND AS A POLICY CHOICE THAT WAS OFF THE TABLE AND WAS CONSTITUTIONALLY SUSPECT. AND I WOULD LIKE TO JUST CLARIFY THAT CALIFORNIA'S POSSESSION BAN DOES NOT DISARM ANYBODY. INDIVIDUALS ARE STILL PERMITTED TO POSSESS AS MANY MAGAZINES THAT ARE CALIFORNIA COMPLIANT AS THEY WISH AND CAN, AT LEAST WITH RESPECT TO THE LARGE CAPACITY MAGAZINE BAN, CAN HAVE AS MANY WEAPONS AS THEY CAN LAWFULLY POSSESS TO EXERCISE THEIR SELF-DEFENSE RIGHTS.

THERE ARE NUMEROUS OPTIONS FOR COMPLYING WITH CALIFORNIA'S POSSESSION BAN. IF YOUR HONOR HAD NOT ENJOINED THE STATUTE ON JULY 1ST, IT WOULDN'T HAVE AUTOMATICALLY

RENDERED ALL INDIVIDUALS WHO OWNED GRANDFATHERED LCM'S CRIMINALS. THERE WERE DISPOSAL OPTIONS THAT THE OWNERS COULD COMPLY WITH INCLUDING STORING THEM OUT OF STATE, SELLING THEM TO AN FFL, FEDERALLY FIREARMS LICENSE DEALER. ONE OF THE EXCEPTIONS THAT SEEMS TO BE LOST IN THE DISCUSSION ABOUT THE POSSESSION BAN IS THE DEFINITION OF A LARGE CAPACITY MAGAZINE IN PENAL CODE SECTION 16740 WHICH IN SUBDIVISION A TAKES OUT FROM THE DEFINITION OF LARGE CAPACITY MAGAZINES, LARGE CAPACITY MAGAZINES THAT HAVE BEEN PERMANENTLY MODIFIED.

SO WITH THE PERMANENT MODIFICATION OPTION, SOMEONE WHO OWNS A GRANDFATHERED LCM CAN TAKE IT TO A GUNSMITH, AND A GUNSMITH HAS AN EXCEPTION IN THE POSSESSION BAN, TO MODIFY A LARGE CAPACITY MAGAZINE SO THAT IT CAN HOLD NO MORE THAN 10 ROUNDS OF AMMUNITION. IN THAT CASE, THE OWNER KEEPS POSSESSION AND KEEPS TITLE OF THEIR MAGAZINE, AND THEY CAN STILL USE THAT MAGAZINE IN SELF-DEFENSE OR FOR ANY OTHER LAWFUL PURPOSE THAT THEY MAY DESIRE.

THE COURT: IF YOU WERE A WOMAN AND YOU WERE AT HOME -- I'M USING A WOMAN BECAUSE THERE WAS A CASE THAT I CAN'T REMEMBER THE --

MR. ECHEVERRIA: SUSAN GONZALEZ.

THE COURT: YEAH. AND YOU'RE AT HOME AND YOU'RE BY YOURSELF AND SOME PEOPLE BREAK IN YOUR HOUSE, OR YOU HAVE YOUR DAUGHTER OR CHILD WITH YOU AND SOME PEOPLE BREAK INTO YOUR HOUSE, AND YOU KNOW THEY'RE NOT GOING TO DO YOU ANY GOOD.

12:27:14 THEY'RE EITHER GOING TO RAPE OR KILL YOU OR BOTH.

MR. ECHEVERRIA: OR TRY.

THE COURT: OR TRY. AND YOU HAVE YOUR GLOCK 17 WITH A PERMANENTLY MODIFIED MAGAZINE THAT ONLY HOLDS 10 ROUNDS, AND YOU FIRED ALL 10 ROUNDS BECAUSE YOU'RE SCARED. YOU HAVEN'T BEEN TRAINED TO HIT WHAT YOU'RE SHOOTING AT, BUT YOU'RE TRYING TO PROTECT YOURSELF OR YOUR DAUGHTER, AND YOU FIRE ALL 10 ROUNDS, AND THOSE PEOPLE ARE STILL COMING AT YOU. ARE YOU OR ARE YOU NOT DISARMED AT THAT POINT IN TIME?

MR. ECHEVERRIA: YOU CAN HAVE ANY NUMBER OF MAGAZINES ON YOUR POSSESSION.

THE COURT: WHAT IS SHE GOING TO DO, COUNSEL, REALISTICALLY? REALISTICALLY. LET'S BE REAL.

MR. ECHEVERRIA: THIS IS SPECULATION, YOUR HONOR.

12:28:30 THE COURT: THIS IS NOT SPECULATION. THIS IS NO MORE SPECULATION THAN TO SAY THAT BECAUSE IF YOU HAVE A LOT OF MAGAZINES OUT THERE THERE'S GOING TO BE A LOT OF PEOPLE THAT ARE KILLED. YES, THERE ARE GOING TO BE PEOPLE THAT ARE PROBABLY GOING TO BE INJURED AND KILLED BECAUSE OF THE FACT THAT THERE ARE GUNS. BUT IF YOU HAVE SOMEONE WHO HAS FIRED ALL 10 ROUNDS, AND THEY GET TO THE 11TH ROUND, AND THEY PULL THE TRIGGER AND ALL THAT HAPPENS IS "CLICK," THEY ARE EFFECTIVELY DISARMED. YES, IT IS TRUE THAT IF THEY HAPPEN TO CARRY AROUND WITH THEM 20 10-ROUND MAGAZINES WITH THEM, ASSUMING THAT THEY HAVE THE TIME, AND OF COURSE AS THE EVIDENCE SHOWS, PEOPLE ARE

12:29:10 NERVOUS, RIGHT, AND PERHAPS THEY JUST WOKE UP, AND THEY'RE NOT GOING TO BE AS LIKELY TO BE ABLE TO CHANGE THE MAGAZINE AS QUICKLY AS THEY WOULD IF THEY HAD THAT GLOCK 17 WITH 17 ROUNDS IN THE MAGAZINE. SO WHEN YOU GET TO THAT 11TH ROUND, YOU'RE ESSENTIALLY DISARMED.

MR. ECHEVERRIA: I WOULD DISAGREE WITH THAT CHARACTERIZATION, YOUR HONOR. IT IS NOT DISARMAMENT. THEY HAD A FIREARM IN THEIR POSSESSION. THEY WERE ABLE TO USE A MAGAZINE THAT HELD LIVE AMMUNITION UP TO 10 ROUNDS. THEY COULD HAVE AS MANY MAGAZINES ON THEIR PERSON. TO ME, THAT IS ARMED. THE PLAINTIFFS HAVE PRESENTED NO EVIDENCE TO SUBSTANTIATE THIS TYPE OF SPECULATION IN THE STATE OF CALIFORNIA. THEY PRESENTED NO CASES IN WHICH ANYONE IN THE STATE OF CALIFORNIA HAS BEEN PREVENTED FROM EFFECTIVELY DEFENDING THEMSELVES NOT

12:30:06 WITHSTANDING THE EXISTING LARGE CAPACITY MAGAZINE BAN AND THE MODIFICATION OPTION.

THE COURT: DOES THE STATE KEEP THOSE KIND OF STATISTICS?

MR. ECHEVERRIA: I DON'T KNOW THAT THE STATE HAS THAT INFORMATION --

THE COURT: YOU DON'T. YOU DON'T. BECAUSE THE EVIDENCE, IN FACT, AS I READ IT IS THAT THE STATE DOESN'T KEEP THAT KIND OF INFORMATION. SO WE DON'T KNOW WHETHER IT HAS HAPPENED OR HASN'T HAPPENED.

MR. ECHEVERRIA: WHAT WE DO KNOW --

12:30:31 THE COURT: AND THE ENTITY THAT HAS THE BEST ABILITY TO TELL US WHETHER OR NOT THAT HAS HAPPENED OR HAS NOT HAPPENED WOULD BE THE STATE. BUT YOU DON'T HAVE ANY RECORDS TO THAT EFFECT.

MR. ECHEVERRIA: THE ATTORNEY GENERAL HAS PRESENTED EVIDENCE, AS YOUR HONOR KNOWS, THAT SHOWS THAT ON AVERAGE FAR LESS THAN 10 ROUNDS OF AMMUNITION ARE USED IN SELF-DEFENSE.

THE COURT: BUT AVERAGE IS 2.2.

MR. ECHEVERRIA: AND OFTEN ZERO. OFTEN THE MERE BRANDISHING OF THE FIREARM --

THE COURT: SURE. AND IF YOU THROW THE GUN AT SOMEONE, THAT MIGHT VERY WELL WORK.

MR. ECHEVERRIA: I DON'T KNOW THAT WOULD WORK BECAUSE YOU'D BE DISARMING YOURSELF --

12:31:03 THE COURT: I WOULDN'T WANT MY WIFE OR DAUGHTER TO HAVE TO DEPEND ON A WEAPON THAT SHOOTS 2.2 BULLETS. SO THE POINT I'M MAKING TO YOU IS, LOOK, RIGHT NOW IT IS PERFECTLY LEGAL FOR SOMEONE TO POSSESS A GLOCK 17 WITH A 17-ROUND MAGAZINE AND USE IT FOR SELF-DEFENSE IN THEIR HOME IF THEY HAVE TO. HOPEFULLY, THEY NEVER WOULD HAVE TO, BUT THEY CAN. BUT ONCE YOU TAKE AWAY THAT 7 ROUNDS, AND NOW YOU'RE DOWN TO 10 ROUNDS, YOU BETTER HOPE AND PRAY THAT YOU HIT WHATEVER IT IS YOU'RE SHOOTING WITH THOSE 10 ROUNDS.

NOW WHY SHOULD THE GOVERNMENT BE SO ARROGANT AS TO TELL A LAW-ABIDING CITIZEN, SOMEONE WHO HAS NOT VIOLATED THE

LAW IN ANY WAY, HAS NOT SHOT ANYONE, HAS NOT INJURED ANYONE, WHY SHOULD THE GOVERNMENT BE SO ARROGANT AS TO TELL THAT WOMAN: YOU KNOW WHAT, TOO BAD, SO SAD. IF YOU HAD 17 ROUNDS, YOU MIGHT HAVE BEEN ABLE TO STOP THE ASSAILANT, BUT YOU ONLY HAD 10. AND NOW YOU'VE BEEN RAPED, AND NOW YOU'RE DEAD, AND WE'RE SO SORRY. BUT YOU KNOW, THAT'S JUST THE WAY LIFE GOES.

ISN'T THAT REALLY WHERE YOU ARE?

MR. ECHEVERRIA: THE DECLARATION OF LUCY ALLEN DEMONSTRATES THAT ON AVERAGE 71 PERCENT OF PUBLIC MASS SHOOTINGS INVOLVE INDIVIDUALS WHO LAWFULLY ACQUIRED THEIR FIREARMS AND MAGAZINE ACCESSORIES. THE STATE IS NOT SAYING THAT ANY PARTICULAR INDIVIDUALS ARE DANGEROUS. THE STATE IS SAYING THAT LARGE CAPACITY MAGAZINES ARE DANGEROUS AND PEOPLE CAN --

12:32:45 THE COURT: BUT NOT IF THEY'RE POSSESSED BY RETIRED LAW ENFORCEMENT POLICE OFFICERS, 80-YEAR-OLD POLICE OFFICERS WHO MAY BE SUFFERING FROM MACULAR DEGENERATION AND WHO --

MR. ECHEVERRIA: I COMPLETELY UNDERSTAND YOUR HONOR DISAGREES WITH THE LINES THAT HAVE BEEN DRAWN BY THE PEOPLE. I COMPLETELY UNDERSTAND. OR AT LEAST THAT'S WHAT IT SEEMS TO BE THE CASE TODAY. BUT UNDER INTERMEDIATE SCRUTINY, IT'S NOT YOUR HONOR'S ROLE TO REDRAW THOSE LINES OR INVALIDATE A STATUTE COMPLETELY BECAUSE YOU DON'T THINK THE LINES ARE PERFECT. THAT'S FOR THE DEMOCRATIC PROCESS.

THE COURT: SO IF THE DEMOCRATIC PROCESS RESULTED IN

12:33:24 A DECISION THAT YOU COULD NOT HOLD A MAGAZINE THAT HELD MORE THAN 7 ROUNDS?

MR. ECHEVERRIA: THEN THE STATE STARTS GETTING INTO PROBLEMATIC TERRITORY FROM A CONSTITUTIONAL PERSPECTIVE. THE NEW YORK -- THE SECOND CIRCUIT INVALIDATED THE 7-ROUND LOAD LIMIT. ONE OF THE REASONS WHY IS THERE JUST AREN'T MANY 7-ROUND MAGAZINES THAT ARE READILY AVAILABLE. THE REASON WHY THE STATE OF NEW YORK ENACTED A 10-ROUND MAGAZINE CAPACITY RESTRICTION IS THAT THOSE CAPACITY SIZES ARE READILY AVAILABLE AND SOLD THROUGHOUT THE COUNTRY, BUT THERE AREN'T MANY 7-ROUND MAGAZINES.

I'D ALSO LIKE TO NOTE THAT IN THE CASE OF SUSAN GONZALEZ -- THAT WAS A CASE IN FLORIDA NOT IN THE STATE OF CALIFORNIA -- EVEN AFTER SUSAN GONZALEZ HAD HER INCIDENT, SHE 12:34:07 WENT OUT AND BOUGHT A FIREARM. IT WAS A 5-ROUND REVOLVER. SHE DID NOT GO OUT AND GET A LARGE CAPACITY MAGAZINE EVEN THOUGH THOSE ARE AVAILABLE IN THE STATE OF FLORIDA. SO WHAT WE HAVE HERE IS THE COURT HAS LEGITIMATE CONCERNS ABOUT INDIVIDUALS BEING ABLE TO PROTECT THEMSELVES, BUT IT'S BASED ON SPECULATION. IT'S BASED ON "WHAT IF" SCENARIOS. BUT THE PEOPLE OF CALIFORNIA WERE CONFRONTED WITH DATA, DATA SHOWING THAT IN A MAJORITY OF PUBLIC MASS SHOOTINGS, LARGE CAPACITY MAGAZINES ARE USED; AND WHEN THEY'RE USED, THE FATALITY AND INJURY RATES ARE MUCH LARGER THAN WHEN 10 ROUNDS OR LESS ARE USED IN THOSE PUBLIC MASS SHOOTINGS. THAT WAS ALSO SET FORTH

IN THE DECLARATION OF LUCY ALLEN.

THE NINTH CIRCUIT IN FYOCK VERSUS SUNNYVALE SAID THAT THE DECLARATION OF LUCY ALLEN, THE DECLARATION OF PROFESSOR DONOHUE, THE EMPIRICAL EVIDENCE THAT THE STATE HAS PROVIDED, INCLUDING THE MAYORS AGAINST ILLEGAL GUNS STUDY, THAT THAT IS THE, QUOTE, UNQUOTE, PRECISE TYPE OF EVIDENCE THAT THE STATE CAN RELY ON TO SUBSTANTIATE ITS INTEREST AND TO SHOW A REASONABLE FIT.

THE COURT: BUT WASN'T THAT THE STUDY THAT I --

MR. ECHEVERRIA: IT WAS.

THE COURT: -- ESSENTIALLY DISSECTED, AND I'VE YET TO HEAR ANYBODY -- I'VE YET TO HEAR ANYONE TELL ME WHY I WAS WRONG IN MY DISSECTING THAT STUDY.

MR. ECHEVERRIA: WELL, THE NUMBERS THAT YOUR HONOR IDENTIFIED IN YOUR 12-PAGE DISSECTION OF THE MAYORS AGAINST ILLEGAL GUNS STUDY WERE NOT NECESSARILY ERRONEOUS. I DO THINK SOME OF THE ASSUMPTIONS WERE WRONG.

THE COURT: WELL, THEY'RE ALL ACCURATE. EVERYTHING I SAID IN THERE WAS ACCURATE.

MR. ECHEVERRIA: SO IF THERE WAS A MASS SHOOTING THAT DOESN'T HAVE THE CAPACITY NUMBER, IT'S NOT ACCURATE TO ASSUME THAT A LARGE CAPACITY MAGAZINE WAS NOT USED IN THAT SHOOTING.

THE COURT: IS IT ACCURATE TO ASSUME THAT IT WAS?

MR. ECHEVERRIA: THE EVERYTOWN AMICUS BRIEF THAT WAS FILED IN OPPOSITION TO PLAINTIFFS MOTION, AND EVERYTOWN IS THE

SUCCESSOR ORGANIZATION TO THE MAYORS AGAINST ILLEGAL GUNS, THEY SET FORTH WHY SOME OF THE FACTUAL ASSUMPTIONS YOUR HONOR MADE WERE INCORRECT. BUT STILL, UNDER INTERMEDIATE SCRUTINY, IT'S NOT THE COURT'S ROLE TO DISSECT THIS TYPE OF EVIDENCE. THE COURT DISMISSED MANY MASS SHOOTINGS THAT OCCURRED OUTSIDE THE STATE OF CALIFORNIA, AND UNDER INTERMEDIATE SCRUTINY, THE PEOPLE AND THE LEGISLATURE ARE ENTITLED TO LOOK AT ANY EVIDENCE REASONABLY BELIEVED TO BE RELEVANT TO THE ISSUE AT HAND AND LOOKING AT OTHER JURISDICTIONS TO SEE WHAT THEIR EXPERIENCES ARE AND HOW EFFECTIVE THEIR GUN SAFETY LEGISLATION HAS BEEN.

THIS IS THE KIND OF SYSTEM THAT OUR CONSTITUTIONAL DEMOCRACY WAS ESTABLISHED TO BRING FORTH TO ALLOW STATES TO EXPERIMENT WITH PUBLIC SAFETY LEGISLATION TO TACKLE THESE ISSUES OF PUBLIC CONCERN. I CAN THINK OF FEW OTHER ISSUES OTHER THAN PUBLIC MASS SHOOTINGS AND THE MURDER OF LAW ENFORCEMENT PERSONNEL THAT ARE MORE COMPELLING FOR THE PEOPLE OF CALIFORNIA TO BE CONCERNED WITH. SO EVEN IF PUBLIC MASS SHOOTINGS AND MURDERS OF LAW ENFORCEMENT ARE RELATIVELY RARE EVENTS --

THE COURT: I CAN NAME A FEW. ABOUT THE SAME TIME WE PASSED THIS LAW, WE ALSO PASSED A RECREATIONAL MARIJUANA USE LAW WHICH NOT ONLY VIOLATES FEDERAL LAW, I MIGHT POINT OUT, BUT I'M WILLING TO BET YOU DOLLARS TO DOUGHNUTS, AND I DON'T THINK YOU'D DISAGREE, SIR, THAT THERE ARE PEOPLE WHO HAVE ALREADY BEEN KILLED, MAIMED, INJURED AS A RESULT OF SOMEONE SITTING IN

12:37:51 THEIR LIVING ROOM SMOKING A JOINT, AND THEN GOT IN THEIR CAR AND DROVE THEIR CAR AND KILLED, MAIMED OR INJURED PEOPLE.

MR. ECHEVERRIA: I'LL MAKE NO REPRESENTATIONS ABOUT THAT. I DON'T KNOW ANYTHING ABOUT THAT.

THE COURT: WELL, YOU CAN USE YOUR COMMON SENSE THAT YOU REFERRED TO EARLIER. AND YOU KNOW, FOR EXAMPLE, ALCOHOL, WE CAN BAN ALCOHOL. THERE'S NO CONSTITUTIONAL PROTECTION TO THE CONSUMPTION OF ALCOHOL. AND WE KNOW FOR A FACT, WE KNOW FOR A FACT, WE DON'T HAVE TO GUESS, THAT EVERY YEAR THERE'S MANY, MANY MORE PEOPLE KILLED AND INJURED AS A RESULT OF PEOPLE DRIVING AFTER HAVING CONSUMED ALCOHOL. WE DON'T BAN ALCOHOL, BUT IT'S NOT PROTECTED.

MR. ECHEVERRIA: YOUR HONOR MAY THINK THERE'S MORE PRESSING CONCERNS, BUT THE PEOPLE CAN DECIDE THAT.

12:38:42 THE COURT: WHEN YOU TELL ME THAT THE STATE HAS NO GREATER INTEREST --

MR. ECHEVERRIA: I DIDN'T SAY THAT, YOUR HONOR.

THE COURT: I THOUGHT THAT'S WHAT YOU SAID. MAYBE I MISUNDERSTOOD.

MR. ECHEVERRIA: I SAID FEW OTHER ISSUES. SO I'M NOT RULING OUT THAT THERE ARE OTHER ISSUES THAT ARE IMPORTANT. THE PEOPLE OF CALIFORNIA AND THE LEGISLATURE CAN WALK AND CHEW GUM. THEY CAN TACKLE MULTIPLE ISSUES IN DIFFERENT WAYS. THAT'S HOW DEMOCRACY WORKS. BUT UNDER INTERMEDIATE SCRUTINY, THIS COURT'S ROLE IS TO MERELY DETERMINE WHETHER THERE'S SUBSTANTIAL

12:39:09 EVIDENCE, AND THAT'S A SUBSTANTIAL PILE OF PAPER, THAT INVOLVES RELEVANT EVIDENCE CONCERNING THE USE OF LARGE CAPACITY MAGAZINES IN PUBLIC MASS SHOOTINGS AND VIOLENCE AGAINST LAW ENFORCEMENT WHICH DEPRIVE INNOCENT CITIZENS AND LAW ENFORCEMENT OF THE CRITICAL PAUSES TO INTERVENE. THERE'S EVIDENCE THAT THE POSSESSION BAN WAS NEEDED TO CLOSE THE POSSESSION LOOPHOLE.

IN THE EXPERT REPORT OF DR. KOPER, HE RECOUNTED THE EXPERIENCE WITH THE FEDERAL ASSAULT WEAPONS BAN WHICH WAS IN PLACE IN 1994 TO 2004, AND HE SHOWED THAT THAT BAN LED TO A REDUCTION IN THE USE OF LARGE CAPACITY MAGAZINES AND GUN CRIME AND --

THE COURT: I READ HIS REPORT AND ACTUALLY EVERYTHING THAT I READ THAT HE SAYS IS BASICALLY INCONCLUSIVE. WHAT HE SAYS IS ALL INCONCLUSIVE. IN FACT, IF I'M NOT MISTAKEN --

12:40:00 LOOK, I DON'T WANT TO ARGUE WITH YOU, BUT MY UNDERSTANDING IS THAT HE SAYS -- I CAN PROBABLY FIND IT HERE.

MR. ECHEVERRIA: THE 2004 STUDY? HE WAS ONE OF THE AUTHORS OF THE FEDERALLY COMMISSIONED STUDY OF THE FEDERAL ASSAULT WEAPONS BAN.

THE COURT: HE SAID IT MAY HAVE HAD AN IMPACT, AND I THINK HE SAID THAT PERHAPS IF WE ALLOWED MORE TIME WE MIGHT HAVE SEEN A REDUCTION; BUT AS IT STANDS RIGHT NOW, EVERYTHING THAT HE SAYS IS INCONCLUSIVE. HE SAYS WE DON'T KNOW. WE DON'T KNOW WHAT THE EFFECT WAS.

MR. ECHEVERRIA: THAT WOULD BE THE EFFECT ON GUN

12:40:36 CRIME GENERALLY. BUT WHAT WE DID SEE AND WHAT DR. KOPER TESTIFIES TO IN HIS EXPERT REPORT IS THAT THE USE OF LARGE CAPACITY MAGAZINES DECREASED BASED ON THE WASHINGTON POST STUDY OF THE STATE OF VIRGINIA. AND THEN AFTER THE LAPSING OF THE FEDERAL ASSAULT WEAPONS BAN UNTIL 2010, THE NUMBERS OF LARGE CAPACITY MAGAZINE EQUIPPED FIREARMS USED IN GUN CRIME DOUBLED TO 20 PERCENT. SO THAT SHOWS THAT LARGE CAPACITY MAGAZINE RESTRICTIONS, WHEN THEY'RE IN PLACE, WORK. IN REMOVING LARGE CAPACITY MAGAZINES FROM CIRCULATION AND IN THE USE OF VIOLENCE AGAINST LAW ENFORCEMENT AND IN PUBLIC MASS SHOOTINGS, AND IN GENERAL, GUN CRIME.

AND THE POSSESSION BAN IS EVEN MORE EFFECTIVE IN THE STATE OF CALIFORNIA BECAUSE THE FEDERAL BAN HAD A SIMILAR GRANDFATHER PROVISION, RIGHT, THAT INDIVIDUALS WHO OWNED LARGE

12:41:32 CAPACITY MAGAZINES BEFORE 1994 WERE ALLOWED TO CONTINUE THEIR POSSESSION OF THOSE MAGAZINES. BUT UNDER THE FEDERAL LAW, THEY WERE ALSO ALLOWED TO TRANSFER THEM. THAT'S SOMETHING THAT SP-23 DID NOT ALLOW. SO LARGE CAPACITY MAGAZINES WERE BEING CIRCULATED THROUGHOUT THE COUNTRY. ADDITIONALLY, I THINK IT WAS 25 TO 50 MILLION LARGE CAPACITY MAGAZINES WERE GRANDFATHERED IN UNDER THE FEDERAL ASSAULT WEAPONS BAN, AND MANY MORE GRANDFATHERED LCM'S WERE IMPORTED INTO THE COUNTRY DURING THE FEDERAL ASSAULT WEAPONS BAN.

SO CALIFORNIA LOOKED AT WHAT HAPPENED WITH THE FEDERAL BAN AND IMPROVED IT, AND THEY CONTINUED TO IMPROVE IT

12:42:11 IN 2016 BY CLOSING THE POSSESSION LOOPHOLE. WE HAVE EVIDENCE IN THE RECORD WITH THE DECLARATION OF BLAKE GRAHAM THAT SHOWS THAT THE POSSESSION BAN IS NECESSARY TO EFFECTIVELY ENFORCE CALIFORNIA'S EXISTING LARGE CAPACITY MAGAZINES RESTRICTION.

THE COURT: I SAW IN ONE OF THE DECLARATIONS WHERE THE NUMBER, THE NUMBER OF -- LET ME SEE IF I CAN FIND IT. JUST A SECOND. I HOPE I CAN FIND IT. I WON'T BE ABLE TO PUT MY FINGER ON IT. BUT I SAW A SIGNIFICANT REDUCTION. I THINK THE NUMBER I REMEMBER IS 264 OF THE NUMBER OF -- WELL, I BETTER NOT SAY BECAUSE I'M NOT ABSOLUTELY CERTAIN. I'D HAVE TO LOOK AT IT BEFORE I ISSUE MY DECISION.

ANYWAY, LISTEN, MY STAFF HAS BEEN GOING NONSTOP NOW FOR A LITTLE OVER TWO HOURS. WE'RE GOING TO TALK A BREAK. WE'LL COME BACK. TAKE A LITTLE BREAK AND COME BACK AT 1:00.

12:43:57 AND THEN I'M GOING TO GIVE YOU 10 MORE MINUTES IF YOU NEED IT TO TELL ME WHATEVER ELSE YOU WANT ME TO HEAR, AND THEN I'M GOING TO GIVE THE PLAINTIFF AN OPPORTUNITY TO CLOSE. AND THEN WE'RE GOING TO CALL IT. WE'RE GOING TO BE DONE BY 2:00. SO ALL RIGHT. WE'LL BE IN RECESS UNTIL 1:00. THANK YOU.

ALL COUNSEL: THANK YOU, YOUR HONOR.

(RECESS.)

THE COURT: ALL RIGHT. MR. ECHEVERRIA, AS I TOLD YOU, I'D GIVE YOU 10 MINUTES IF THERE WAS ANYTHING ELSE YOU WANTED TO ADDRESS. I KNOW I PEPPERED YOU WITH QUESTIONS, AND YOU SO FAR HELD YOUR OWN.

13:01:18 MR. ECHEVERRIA: THERE'S STILL TIME, YOUR HONOR.

THE COURT: STILL TIME FOR IT?

MR. ECHEVERRIA: YEAH, I'LL TRY NOT TO TAKE TOO MUCH OF THE COURT'S TIME.

THE COURT: IT'S ALL RIGHT. IT'S AN IMPORTANT ISSUE. I TOOK THE TIME AND ASKED QUESTIONS BECAUSE I BELIEVE IT'S AN IMPORTANT ISSUE.

MR. ECHEVERRIA: THE ATTORNEY GENERAL APPRECIATES THAT. I'D LIKE TO NOTE SOME POINTS ABOUT THE SECOND AMENDMENT CLAIM. I'D LIKE TO NOTE FOR THE COURT THAT THE FYOCK CASE INVOLVING THE SUNNYVALE ORDINANCE WAS A POSSESSION BAN THAT WAS VERY SIMILAR TO WHAT CALIFORNIA DID ON A STATEWIDE BASIS IN ENACTING PROPOSITION 63.

THE COURT: CAN I ASK YOU A QUESTION WITH REGARDS TO

13:01:57 THE FYOCK CASE?

MR. ECHEVERRIA: SURE.

THE COURT: DO YOU THINK IT MAKES ANY DIFFERENCE THAT THE FYOCK CASE INVOLVED A CITY, A HIGHLY-POPULATED CITY, WHERE LAW ENFORCEMENT, FOR EXAMPLE, WOULD BE ABLE TO RESPOND PERHAPS ON SHORT NOTICE? I KNOW THERE'S LACK OF EVIDENCE IN THE RECORD AS TO HOW MANY RAPES, ASSAULTS, ATTEMPTED MURDERS OR MURDERS THE STATE HAS BEEN ABLE TO PREVENT OVER THE YEARS. I DIDN'T SEE ANY STATISTICS ON THAT. SO WHAT WE REALLY DO KNOW -- WHAT WE KNOW IS THAT GENERALLY LAW ENFORCEMENT IS REACTIVE. THAT LAW ENFORCEMENT WILL SHOW UP ONCE A PROBLEM HAS BEGAN.

13:02:46 NOW IN THE SUNNYVALE CASE, THAT'S A CITY WHERE LAW ENFORCEMENT, AT LEAST IN THEORY, SHOULD BE ABLE TO RESPOND RATHER QUICKLY TO AN INCIDENT. SOMEONE BREAKS INTO A WOMAN'S HOUSE, THE WOMAN PICKS UP THE PHONE, CALLS 9-1-1, HOPEFULLY LAW ENFORCEMENT WOULD BE THERE QUICKLY. THAT'S TO BE CONTRASTED, FOR EXAMPLE, FROM SOME OF THE MORE RURAL AREAS WHERE SOMETIMES IT TAKES 15 MINUTES OR MORE FOR LAW ENFORCEMENT TO ARRIVE. DO YOU THINK THAT MAKES A DIFFERENCE?

MR. ECHEVERRIA: WELL, THE NINTH CIRCUIT DIDN'T DISCUSS THAT POINT IN ITS DECISION.

THE COURT: DO YOU THINK THAT MAKES A DIFFERENCE?

MR. ECHEVERRIA: DO I, PERSONALLY?

THE COURT: YEAH, DO YOU?

MR. ECHEVERRIA: NOT GIVEN THE CONTEXT OF THE LARGE

13:03:34 CAPACITY MAGAZINE BAN BECAUSE SOMEONE WHO LIVES IN A RURAL COMMUNITY CAN HAVE ACCESS TO AS MANY MAGAZINES AS THEY FEEL THEY NEED.

THE COURT: YOU RAISE THAT, AND SO THAT'S AN INTERESTING POINT THAT YOU RAISE BECAUSE YOU SAID THAT BY REDUCING THE NUMBER OF ROUNDS A MAGAZINE CAN HOLD TO 10, THE EVIDENCE IN THE RECORD SHOWS THAT THAT WOULD GIVE SOMEONE AN OPPORTUNITY EITHER TO ESCAPE OR TO TAKE DOWN THE ASSAILANT.

MR. ECHEVERRIA: OR HIDE.

THE COURT: OR HIDE. NOW IF YOU'RE THE WOMAN WHO IS HIDING IN THE CLOSET, AND THERE'S THREE ASSAILANTS WHO HAVE

13:04:33 BROKEN INTO THE HOUSE, AND YOU FIRED ALL 10 SHOTS, YOU MAY HAVE 20 OR 30 MAGAZINES THAT HOLD 10 ROUNDS WITH YOU, BUT NOW THAT INDIVIDUAL HAS TO TAKE THE TIME, AGAIN ASSUMING THAT HE OR SHE IS NOT SO NERVOUS AND SHAKING AND STRESSED OUT, AND THAT INDIVIDUAL HAS TO TAKE THE TIME TO CHANGE THE MAGAZINE. DOES THAT NOT RENDER THAT PERSON MORE VULNERABLE TO THOSE ASSAILANTS THAT HAVE BROKEN INTO HER HOUSE? IN OTHER WORDS, NOW SHE HAS TO TAKE THE SAME AMOUNT OF TIME THAT IT TAKES WHEN THE ASSAILANT WITH A 10-ROUND MAGAZINE NEEDS TO REMOVE THE MAGAZINE AND PUT A NEW MAGAZINE IN, THAT GIVES PEOPLE A CHANCE TO RUN, HIDE OR TO BE TAKEN DOWN.

MR. ECHEVERRIA: I SEE WHAT YOU'RE SAYING, YOUR HONOR.

THE COURT: THAT SAME TIME INTERVAL WORKS TO THE

13:05:28 DETRIMENT TO THE WOMAN NOW FACING THESE THREE ASSAILANTS, RIGHT? DO YOU AGREE WITH THAT?

MR. ECHEVERRIA: WELL, THE CRITICAL PAUSE THAT THE STATE EMPHASIZES IN JUSTIFYING THE LARGE CAPACITY MAGAZINE BAN, WHAT YOUR HONOR IS SAYING, AS FAR AS I UNDERSTAND, IS THAT THERE WOULD ALSO BE A PAUSE IF SOMEONE IS CONFINED TO HAVING A 10-ROUND MAGAZINE TO RELOAD THEIR MAGAZINE; IS THAT WHAT YOU'RE YOU'RE ASKING?

THE COURT: THAT'S EXACTLY WHAT I WAS ASKING.

MR. ECHEVERRIA: SO THE INFERENCE CAN CUT BOTH WAYS. PROFESSOR EUGENE VOLOKH AT UCLA LAW SCHOOL WROTE A BLOG POST

13:05:56 ABOUT THIS ON THE WASHINGTON POST ABOUT HOW THE INFERENCES CAN CUT BOTH WAYS.

THE COURT: WHAT DO YOU MEAN?

MR. ECHEVERRIA: SO WHERE THE STATE SAYS THAT LARGE CAPACITY MAGAZINES ARE SO DANGEROUS BECAUSE THEY CAN BE USED TO KILL MANY PEOPLE IN A SHORT PERIOD OF TIME, THAT SAME ARGUMENT COULD BE USED TO JUSTIFY A LARGE CAPACITY MAGAZINE BECAUSE SOMEONE COULD SHOOT MORE ROUNDS AND DEFEND THEMSELVES MORE EFFECTIVELY.

THE COURT: RIGHT.

MR. ECHEVERRIA: ALTHOUGH, I WOULD NOTE, AS NOTED IN HELLER TOO AND NOTED IN FYOCK, THAT SPRAYING ROUNDS IN SELF-DEFENSE CAN INJURE INNOCENT BYSTANDERS ESPECIALLY WHERE, AS YOUR COURT SUGGESTED, THEY MAY HAVE LESS TRAINING AND BE
13:06:36 LESS ACCURATE. AND THE EXPERT REPORT OF STEPHEN HELSLEY INDICATES THAT WITH MOST SHOOTINGS, MOST SHOOTINGS INVOLVE A LOT OF MISSING, AND THOSE MISSED SHOTS CAN INJURE PEOPLE, INNOCENT PEOPLE.

BUT WHERE THE INFERENCE CUTS BOTH WAYS, THE STATE HAS EVIDENCE THAT LARGE CAPACITY MAGAZINES UNDERMINE THE CRITICAL PAUSES FOR INNOCENT VICTIMS TO SEEK COVER, ESCAPE OR INTERVENE AND THERE'S SPECULATION ON THE OTHER HAND THAT SOME HYPOTHETICAL PERSON MAY NEED AN 11TH ROUND AT THAT VERY MOMENT TO PROTECT THEMSELVES. AND WHERE THERE ARE THESE COMPETING INFERENCES, IT'S NOT THE PROVINCE OF THE JUDICIARY TO REWEIGH

13:07:19 THOSE INFERENCES AND REWEIGH THE EVIDENCE UNDER INTERMEDIATE SCRUTINY. UNDER STRICT SCRUTINY, SURE; THEN THE JUDICIAL ROLE IS MUCH MORE ACTIVE AND MUCH MORE SCRUTINIZING. IF THE BAN IS A CATEGORICAL BAN SIMILAR TO HELLER OF A QUINTESSENTIAL SELF-DEFENSE FIREARM, THEN THAT WOULD BE INVALID UNDER ANY LEVEL OF SCRUTINY. IT WOULD BE CATEGORICALLY INVALID UNDER HELLER.

BUT HERE WE HAVE COMPETING INFERENCES, AND WE HAVE SUBSTANTIAL EVIDENCE ON THE STATE SIDE, AND IT WAS WITHIN THE POWER OF THE PEOPLE OF CALIFORNIA TO CLOSE THE POSSESSION LOOPHOLE AND ENACT PROPOSITION 63, AND THERE'S NOTHING UNCONSTITUTIONAL ABOUT THAT. IN THE SECOND CIRCUIT, THE NYSRPA CASE, WHICH INVOLVED THE NEW YORK LARGE CAPACITY MAGAZINE BAN AND THE SAFE ACT, THE PREVIOUS RESTRICTIONS GRANDFATHERED IN 13:08:16 LARGE CAPACITY MAGAZINES THAT WERE OWNED BEFORE THE YEAR 1994. AND THE LAW THAT WAS BEING CHALLENGED IN THE SECOND CIRCUIT CASE DID AWAY WITH THAT GRANDFATHERING. SO IT'S VERY SIMILAR TO THE TYPE OF POSSESSION RESTRICTIONS THAT WERE ENACTED IN PROPOSITION 63.

THE COURT: TO BE CONTRASTED WITH KOLBE. KOLBE, FOR EXAMPLE, DEALT WITH LEGISLATION THAT PRESERVED, THAT DID INCLUDE A GRANDFATHER CLAUSE.

MR. ECHEVERRIA: SIMILAR TO WHAT CALIFORNIA DID WITH SP-23 IN 2000.

THE COURT: RIGHT.

13:08:45 MR. ECHEVERRIA: AGAIN, STATES CAN APPROACH THIS COMPELLING ISSUE IN DIFFERENT WAYS AND LEARN FROM EACH OTHER IN TRYING TO ENACT PUBLIC SAFETY LEGISLATION. I'D ALSO LIKE TO NOTE WITH RESPECT TO WEIGHING OF THE EVIDENCE AND HOW THE PEOPLE HAVE THE POWER TO WEIGH THE EVIDENCE AND NOT THE COURT WHEN INTERMEDIATE SCRUTINY APPLIES WHICH IS THE CASE HERE. I'D LIKE TO POINT THE COURT TO THE JACKSON CASE.

IN JACKSON, THE NINTH CIRCUIT WAS EVALUATING A MUNICIPAL RESTRICTION ON HOLLOW POINT AMMUNITION WHICH THE CITY AND COUNTY OF SAN FRANCISCO DETERMINED TO BE MORE DANGEROUS THAN STANDARD AMMUNITION. AND THE NINTH CIRCUIT WAS LOOKING AT THE EVIDENCE THAT WAS BEFORE THE DISTRICT COURT AND CONCLUDED THAT THE PLAINTIFF'S COUNTER-EVIDENCE MERELY SUGGESTED THAT THE CITY'S EVIDENCE WAS QUOTE, UNQUOTE, BAD SCIENCE AND AT MOST

13:09:42 THERE'S AN OPEN QUESTION ABOUT WHETHER HOLLOW POINT AMMUNITION IS MORE DANGEROUS.

BUT WHEN THERE'S AN OPEN QUESTION, WHEN THERE'S EVIDENCE ON BOTH SIDES, WHEN THERE ARE COMPETING INFERENCES, THE LEGISLATURE AND THE PEOPLE HAVE THE POWER TO DRAW THE LINES AND TO EXPERIMENT. AND THE INTERMEDIATE SCRUTINY STANDARD PRESERVES IMPORTANT SEPARATION OF POWER PRINCIPALS THAT I WOULD IMPLORE THE COURT TO BE MINDFUL OF.

THE COURT: SINCE I KNOW YOU'RE REALLY KNOWLEDGEABLE ABOUT THIS, BUT CAN YOU NAME FOR ME A FEW CASES OTHER THAN HELLER WHERE THE COURTS HAVE EVER FOUND IN FAVOR OF NOT

RESTRICTING THE SECOND AMENDMENT RIGHTS OF PEOPLE?

MR. ECHEVERRIA: I CAN, BUT THEY WERE REVERSED.

THE COURT: SO TO MAKE A LONG STORY SHORT, IT WOULD SEEM THAT SHORT OF HELLER, THERE'S A JUDICIAL ANTIPATHY TOWARDS PROTECTION OF THE SECOND AMENDMENT. SO ANY TIME THAT COURTS RULE AGAINST A STATE, IN CONNECTION WITH FIREARM LAWS OR REGULATIONS, THE STATE WINS.

MR. ECHEVERRIA: I WOULDN'T SAY IT'S ANTIPATHY. I'D SAY IT'S AN APPLICATION OF INTERMEDIATE SCRUTINY AS INTERMEDIATE SCRUTINY IS UNDERSTOOD UNDER TURNER BROADCASTING AND OTHER SUPREME COURT PRECEDENTS. IT'S JUST HOW INTERMEDIATE SCRUTINY WORKS. I UNDERSTAND THAT THERE ARE MANY PEOPLE IN THE STATE OF CALIFORNIA WHO DON'T THINK LARGE CAPACITY MAGAZINE RESTRICTIONS ARE EFFECTIVE AND WHO THINK THEY ACTUALLY DO NEED LARGE CAPACITY MAGAZINES. I'M SURE THERE'S MANY MEMBERS OF THE JUDICIARY WHO HAVE DIFFERENCES OF OPINION ABOUT THE WISDOM OF THIS GUN CONTROL MEASURE OR THAT GUN CONTROL MEASURE.

BUT UNDER INTERMEDIATE SCRUTINY, SUBSTANTIAL DEFERENCE IS AFFORDED TO THE PREDICTIVE JUDGMENTS OF THE LEGISLATURE AND THE PEOPLE. SO IT SHOULD NOT BE SURPRISING THAT THE JUDICIAL OUTCOME OF, AT LEAST SO FAR, CONSTITUTIONAL CHALLENGES TO GUN SAFETY LEGISLATION HAVE NOT BEEN SUCCESSFUL FOR THE PLAINTIFFS. I THINK THAT ONLY SUPPORTS THE ATTORNEY GENERAL'S POSITION THAT INTERMEDIATE SCRUTINY APPLYING HERE SUPPORTS A FINDING THAT THE SECOND AMENDMENT IS NOT VIOLATED BY

13:12:23 THE LARGE CAPACITY MAGAZINE BAN.

UNLESS YOUR HONOR HAS ANY FURTHER QUESTIONS ABOUT THE SECOND AMENDMENT, I'D LIKE TO TOUCH ON THE OTHER TWO CLAIMS THAT ARE AT ISSUE VERY BRIEFLY. THEY HAVE BEEN BRIEFED. REGARDING THE TAKINGS CLAIM, THE SUPREME COURT IN HORNE MADE A DISTINCTION BETWEEN REAL ESTATE AND PERSONAL PROPERTY. IT'S A DISTINCTION THAT WAS OBSERVED IN THE LUCAS CASE. AND WHAT THE COURT IN HORNE HELD IS THAT WHEN IT COMES TO A PHYSICAL OCCUPATION OF PRIVATE POSSESSIONS, THERE'S A TAKING REQUIRING JUST COMPENSATION.

THE LARGE CAPACITY MAGAZINE BAN HERE IS NOT A PHYSICAL OCCUPATION OF ANY OF THE PLAINTIFFS' OR ANYONE ELSE'S LARGE CAPACITY MAGAZINES BECAUSE THEY CAN DISPOSE OF THEM IN MANY WAYS AND MODIFY THEIR MAGAZINES AND RETAIN TITLE, AND THE
13:13:19 COURT IN HORNE MADE CLEAR THAT WITH RESPECT TO REGULATORY TAKINGS, PRIVATE PROPERTY AND -- PRIVATE REAL PROPERTY AND OTHER POSSESSIONS OR CHATTELS ARE TREATED DIFFERENTLY IN A REGULATORY TAKINGS CONTEXT. AND THIS IS NEITHER A PHYSICAL TAKING NOR A REGULATORY TAKING, AND IT'S NOT A REGULATORY TAKING BECAUSE THE VALUE OF THE LARGE CAPACITY MAGAZINES THAT WERE GRANDFATHERED IS STILL RETAINED. THEY CAN SELL THEM. THEY CAN KEEP THEM AND MOVE THEM OUT OF STATE.

THE COURT: BUT IF THERE'S NO MARKET FOR THEM.

MR. ECHEVERRIA: THERE IS A MARKET FOR LARGE CAPACITY MAGAZINES OUTSIDE OF THE STATE OF CALIFORNIA.

13:14:01 THE COURT: CAN YOU SHIP AND SELL A LARGE CAPACITY MAGAZINE OUT OF THE STATE OF CALIFORNIA?

MR. ECHEVERRIA: I DON'T KNOW WHAT THE MECHANISM WOULD BE FOR INTERSTATE SALES OF LARGE CAPACITY MAGAZINES.

THE COURT: IF I WAS LOOKING TO BUY A CAR AND I KNEW YOU HAD TO SELL THE CAR, WHAT ARE THE ODDS THAT I WOULD PAY YOU FAIR MARKET VALUE FOR THAT CAR IF I KNEW YOU HAD TO SELL THE CAR.

MR. ECHEVERRIA: YOU MIGHT SELL IT FOR LESS.

THE COURT: NO, YOU WOULD SELL IT FOR LESS, A LOT LESS.

MR. ECHEVERRIA: BUT THAT IS STILL NOT A REGULATORY TAKING, YOUR HONOR. THE REGULATORY TAKING'S JURISPRUDENCE INDICATES THAT THE REDUCTION IN VALUE HAS TO BE BASICALLY

13:14:41 COMPLETE.

THE COURT: YOU MEAN NO VALUE. IS THERE ANY EVIDENCE THERE WOULD BE ANY VALUE TO THESE MAGAZINES IF THEY --

MR. ECHEVERRIA: WELL, THE PLAINTIFFS BEAR THE BURDEN ON THEIR TAKINGS CLAIM AND THEIR DUE PROCESS CLAIM ON A MOTION FOR SUMMARY JUDGMENT, AND THEY'VE PRESENTED NO EVIDENCE. AND THEIR BRIEFING DIDN'T REALLY ADDRESS THE REGULATORY TAKINGS ARGUMENT MUCH. I THINK THERE WAS A FOOTNOTE THAT MENTIONED A REGULATORY TAKING.

AND AGAIN, I REITERATE THAT THE EASTERN DISTRICT OF CALIFORNIA WIESE VERSUS BECERRA, JUDGE SHUBB GRANTED A MOTION

13:15:15 TO DISMISS AND DENIED A MOTION FOR PRELIMINARY INJUNCTION ON A VERY SIMILAR TAKINGS THEORY TO CALIFORNIA'S POSSESSION BAN. AND JUST YESTERDAY IN RUPP VERSUS BECERRA, JUDGE STATON IN THE CENTRAL DISTRICT GRANTED A MOTION TO DISMISS A VERY SIMILAR TAKINGS THEORY WITH RESPECT TO ASSAULT WEAPONS THAT WERE UNABLE TO BE REGISTERED UNDER THE NEW ASSAULT WEAPONS RESTRICTIONS.

SO JUST TO CONCLUDE ON THE TAKINGS, SECTION 32310 SUBDIVISION C AND D, DO NOT AFFECT THE TAKING. THEY WERE LEGITIMATE EXERCISE OF THE STATE'S POLICE POWER IN BANNING DANGEROUS FIREARMS THAT HAD BEEN DECLARED, AS YOUR HONOR OBSERVED IN YOUR ORDER ON THE PRELIMINARY INJUNCTION, HAD BEEN DECLARED A PUBLIC NUISANCE SUBJECT TO SEIZURE AND CONFISCATION BY LAW ENFORCEMENT.

AND FINALLY, WITH RESPECT TO THE SUBSTANTIVE DUE
13:16:08 PROCESS CLAIM, THERE IS NO MERIT TO THE CLAIM THAT THE POSSESSION BAN VIOLATES ANY SUBSTANTIVE DUE PROCESS RIGHTS AS THE ATTORNEY GENERAL HAS LAID OUT IN ITS BRIEFING. A RATIONAL BASIS SCRUTINY EFFECTIVELY APPLIES TO A SUBSTANTIVE DUE PROCESS ANALYSIS, AND HERE, THE STATE HAS PRESENTED A SIGNIFICANT AND SUBSTANTIAL AND IMPORTANT GOVERNMENT INTEREST, WE'D SAY A COMPELLING GOVERNMENT INTEREST -- IN THE PREVENTION AND MITIGATION OF PUBLIC MASS SHOOTINGS AND VIOLENCE AGAINST LAW ENFORCEMENT, AND CLOSING THE POSSESSION LOOPHOLE IS RATIONALLY RELATED TO THAT INTEREST BECAUSE IT HELPS LAW ENFORCEMENT ENFORCE EXISTING LARGE CAPACITY MAGAZINE RESTRICTIONS. AND

13:16:49 THAT WAS SET FORTH IN BLAKE GRAHAM'S DECLARATION.

ADDITIONALLY, THE POSSESSION BAN ON LARGE CAPACITY MAGAZINE BANS IS NOT RETROACTIVE. I KNOW THE PLAINTIFF IS TRYING TO CHARACTERIZE THIS IS A RETROACTIVE STATUTE. BUT IT IS NOT RETROACTIVE. IT PROSPECTIVELY CRIMINALIZES CONDUCT WHERE INDIVIDUALS DECIDE NOT TO DISPOSE OF THEIR LARGE CAPACITY MAGAZINES OR MODIFY THEM. ONLY THEN WILL ANY OF THE INDIVIDUALS WHO OWN GRANDFATHERED LARGE CAPACITY MAGAZINES BE SUBJECT TO CRIMINAL PENALTIES. SO THERE'S NO RETROACTIVE EFFECT IMPOSED ON THEM UNDER THE POSSESSION BAN.

THE COURT: WHEN THE ORIGINAL BAN WAS PASSED, WHEN WAS THAT? IN 2000?

MR. ECHEVERRIA: 2000.

THE COURT: IN 2000. IF THE CITIZENS OF THE STATE IN 13:17:49 2000 HAD BEEN TOLD THAT THIS LAW IS GOING TO BECOME EFFECTIVE, IT'S NOT GOING TO HAVE A GRANDFATHER CLAUSE, WE'RE NOT GOING TO ALLOW YOU TO KEEP THAT WHICH YOU ALREADY HAVE, WE'RE GOING TO MAKE YOU DISPOSSESS YOURSELF OF IT --

MR. ECHEVERRIA: OR MODIFY IT.

THE COURT: -- OR MODIFY IT, DO YOU THINK THAT THE REACTION TO THE LAW MIGHT HAVE BEEN DIFFERENT?

MR. ECHEVERRIA: I DON'T KNOW. I CAN'T PREDICT --

THE COURT: WHY DO YOU THINK THEY PUT THE GRANDFATHER CLAUSE IN, IN THE FIRST PLACE?

MR. ECHEVERRIA: IT WAS LIKELY A POLITICAL

COMPROMISE. THAT'S WHAT HAPPENS WITH --

THE COURT: WHAT'S A POLITICAL COMPROMISE? WHAT'S THE POINT OF THE POLITICAL COMPROMISE? TO GARNER SUPPORT?

MR. ECHEVERRIA: YEAH, TO HELP PASS THE LAW, TO BUILD COALITIONS.

THE COURT: SO IN ESSENCE, WHAT HAPPENED WAS IN 2000 PEOPLE WERE ESSENTIALLY MISLEAD INTO SUPPORTING A LAW THAT LATER ON, A FEW YEARS LATER, THE STATE WOULD SAY, WELL, NOW WE GOT THIS PASSED, THIS IS GREAT, BUT NOW WE'RE GOING TO TAKE AWAY THE GRANDFATHER CLAUSE.

MR. ECHEVERRIA: I WOULD DEFINITELY NOT AGREE WITH YOUR HONOR'S CHARACTERIZATION THAT ANY PARTICULAR LEGISLATORS WHO WERE MISLEAD IN THE ENACTMENT OF SP-23. BACK IN THE YEAR 2000, THERE WERE PUBLIC MASS SHOOTINGS THAT LED TO THE PUBLIC OUTCRY, THAT LED TO THE FEDERAL ASSAULT WEAPONS BAN AND LED TO CALIFORNIA'S ENACTMENT OF SP-23; BUT OVER THE PAST 15 TO 16 YEARS, THERE'S BEEN EVEN MORE PUBLIC MASS SHOOTINGS INVOLVING LARGE CAPACITY MAGAZINES. SO EVEN IF THE COMPROMISE WOULD HAVE NOT BEEN POSSIBLE BACK IN 2000, THE FACTS HAVE CHANGED AND CIRCUMSTANCES HAVE CHANGED AND OVER 60 PERCENT OF THE CALIFORNIA ELECTORATE VOTED FOR PROPOSITION 63. THAT'S HOW DEMOCRACY WORKS. THAT'S HOW INCREMENTAL LEGISLATION HAPPENS.

THE COURT: OKAY.

MR. ECHEVERRIA: SO THE ATTORNEY GENERAL WOULD URGE YOUR HONOR TO DENY THE MOTION FOR SUMMARY JUDGMENT AND THE

MOTION FOR PARTIAL SUMMARY JUDGMENT. THE LARGE CAPACITY MAGAZINE BAN AND THE POSSESSION BAN IS CONSTITUTIONAL. THEY'RE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW, AND AT A MINIMUM, THEY'RE ISSUES FOR TRIAL, AND THIS COURT MUST DENY THE MOTION FOR SUMMARY JUDGMENT AT THIS STAGE.

THE COURT: NOW IT'S KIND OF INTERESTING. I NOTED THAT THE GOVERNMENT -- THE GOVERNMENT, I'M SORRY -- THE STATE DID NOT FILE A MOTION FOR SUMMARY JUDGMENT.

MR. ECHEVERRIA: THAT'S CORRECT, YOUR HONOR.

THE COURT: OKAY.

MR. ECHEVERRIA: THE ATTORNEY GENERAL --

THE COURT: SO I ASSUME THAT YOU WOULD CONCEDE THEN, THAT BASED ON THE STATE OF THE EVIDENCE, THAT GIVEN THAT THE STATE HAS NOT FILED A MOTION FOR SUMMARY JUDGMENT IN ITS FAVOR, THAT IF I WERE TO DENY THE MOTION FOR SUMMARY JUDGMENT THAT'S PRESENTLY BEING GRANTED, MY PRELIMINARY INJUNCTION ORDER WOULD CONTINUE TO REMAIN IN EFFECT, AND WE WOULD NEXT MOVE FORWARD TO SOME SORT OF TRIAL OR EVIDENTIARY HEARING; CORRECT?

MR. ECHEVERRIA: THAT'S MY UNDERSTANDING OF WHAT WOULD HAPPEN, YOUR HONOR. THE STATE DID NOT MOVE TO SUMMARY JUDGMENT. SO IF THE COURT DENIES THE MOTION FOR SUMMARY JUDGMENT, THE CASE WOULD PROCEED, AND THE PRELIMINARY INJUNCTION WOULD REMAIN IN EFFECT ABSENT SOME OTHER ACTION FROM A HIGHER COURT.

THE COURT: ABSENT THE COURT OF APPEALS TELLING ME

13:21:52 THAT I'M ALL WET. I GOT IT. THEY WOULD USE MUCH BETTER LANGUAGE THAN THAT. I THINK THEIR LANGUAGE WOULD BE A LITTLE DIFFERENT.

MR. ECHEVERRIA: ABSOLUTELY.

THE COURT: ALL RIGHT. THANK YOU.

MR. ECHEVERRIA: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. SO I'VE PEPPERED MR. ECHEVERRIA ENOUGH. LET'S SEE IF MAYBE I CAN GIVE YOU EQUAL OPPORTUNITY.

MS. BARVIR: JUST PLEASE REMEMBER I'M WEARING HEELS. SO IT'S A LITTLE HARDER FOR ME TO STAND HERE QUITE AS LONG AS MY OPPOSING COUNSEL. ANYWAY, I JUST WANT TO SAY A FEW THINGS AND KIND OF IN RESPONSE TO THE DISCUSSION THAT WE JUST HEARD AND TO CLOSE UP FOR A LITTLE BIT.

13:22:30 I THINK THE FIRST THING I WANT TO MENTION IS THAT I THINK IT WAS REALLY CLEAR THAT THE STATE IS CLAIMING OVER AND OVER AGAIN -- IT'S ASKING THIS COURT TO APPLY INTERMEDIATE SCRUTINY, THAT, YOU KNOW, IT'S NOT RATIONAL BASIS REVIEW, WE'RE LOOKING AT INTERMEDIATE SCRUTINY HERE.

BUT SITTING HERE TODAY, IT SOUNDS MORE LIKE THEY'RE SEEKING A TOOTHLESS FORM OF INTERMEDIATE SCRUTINY, MORE AKIN TO RATIONAL BASIS REVIEW, ONE WHERE IT'S ASKING THIS COURT TO AFFORD SUBSTANTIAL DEFERENCE TO THESE PREDICTIVE JUDGMENTS, THESE POLICY JUDGMENTS THAT THE LEGISLATURE AND THE PEOPLE MADE IN PROP 63 AND THE TWIN BILLS THAT WENT THROUGH THE LEGISLATURE

13:23:09 AND SEEMINGLY ASKING THE COURT TO VIEW ITS EVIDENCE WITH AN UNCRITICAL EYE. BUT THIS IS A REALLY IMPORTANT CASE, YOUR HONOR. THIS IS --

THE COURT: THAT DOESN'T CHANGE HOW I VIEW THE EVIDENCE.

MS. BARVIR: I THINK THAT'S RIGHT. I THINK THE STATE IS ASKING YOU TO KIND OF ACCEPT WHAT IT'S PUT FORWARD AND WHAT IT'S SAYING HERE TODAY. BUT WHEN YOU REALLY LOOK WITH A CRITICAL EYE AT THE EVIDENCE THAT'S PRESENTED BY THE STATE, IT DOES NOT BEAR OUT THE FAIR RELATIONSHIP THAT IS REQUIRED UNDER INTERMEDIATE SCRUTINY FOR THE LAW TO BE DEEMED CONSTITUTIONAL.

THE COURT: LOOK, ALMOST EVERY COURT -- NOT ALMOST -- EVERY COURT THAT HAS LOOKED AT THIS ISSUE HAVE ALL BASICALLY

13:23:58 SAID IT'S CONSTITUTIONAL. IT PASSES SCRUTINY, THE INTERMEDIATE SCRUTINY TEST. WHAT MAKES THIS ANY DIFFERENT? WHY SHOULD I SWIM UP AGAINST -- RUN AGAINST THE HEARD, IF YOU WILL? WHAT IS IT ABOUT THIS CASE AND THE STATE OF THE EVIDENCE IN THIS CASE THAT MAKES IT ANY DIFFERENT THAN OTHER CASES?

MS. BARVIR: WELL, I THINK FIRST AND FOREMOST, IN THIS CIRCUIT WE DON'T HAVE A FINAL JUDGMENT FROM A COURT OF APPEALS FROM THE NINTH CIRCUIT THAT'S BASED ON MSJ THAT'S BASED ON ALL THE EVIDENCE --

THE COURT: DO YOU THINK THE OUTCOME IS GOING TO BE ANY DIFFERENT?

13:24:48 MS. BARVIR: IN THE NINTH?

THE COURT: YES.

MS. BARVIR: IT DEPENDS ON THE PANEL I GUESS. I DON'T KNOW. WE'LL SEE. I HOPE THE ANSWER WOULD BE DIFFERENT BECAUSE I THINK A JUDGE WHO'S LOOKING AT THIS INDEPENDENTLY CAN REVIEW THE EVIDENCE AND REALLY SEE THAT NONE OF THOSE CASES HAVE SHOWN ANYTHING THAT'S DIFFERENT HERE. THEY'VE JUST COME TO A POTENTIALLY POLITICAL DECISION. ULTIMATELY, WE HAVE HERE, COMING FROM HELLER, IS THAT WHEN WE'RE TALKING ABOUT FIREARMS THAT ARE COMMONLY PROTECTED BY LAW-ABIDING CITIZENS -- THAT IS, THAT THEY ARE WITHIN THE SCOPE OF THE SECOND AMENDMENT -- THERE ARE THINGS THAT THE STATE CAN DO. BUT FLATLY BANNING THE ACQUISITION AND POSSESSION OF THEM IS A POLICY JUDGMENT THAT'S OFF THE TABLE. THAT COMES FROM HELLER.

13:25:26 THE COURT: WE'RE ALREADY PAST THE ACQUISITION. THAT'S BEING CHALLENGED SOMEWHERE ELSE APPARENTLY. WE'RE NOW TALKING ABOUT POSSESSION.

MS. BARVIR: THAT'S BEING CHALLENGED HERE AS WELL, YOUR HONOR. REMEMBER, AT THE MPI STAGE, THE PLAINTIFFS ONLY CHALLENGED THE POSSESSION BAN BECAUSE IT WAS THE ONE THAT WAS ABOUT TO GO INTO EFFECT. THERE WAS THE IRREPARABLE HARM --

THE COURT: OKAY. OKAY. GOT IT.

MS. BARVIR: SO YES, THE ACQUISITION IS PART OF THIS DISCUSSION. IT'S COMPLETELY FLATLY BANNING THE USE OF THESE PROTECTED ITEMS BY THE HAND -- IN THE HANDS AND HOMES OF

LAW-ABIDING CITIZENS. THAT IS A POLICY JUDGMENT THAT IS NOT ENTITLED TO THE SUBSTANTIAL DEFERENCE THAT THE STATE IS ASKING FOR HERE.

THE COURT: AND WHY NOT?

MS. BARVIR: WHAT'S THAT?

THE COURT: AND WHY NOT?

MS. BARVIR: BECAUSE IT'S NOT LIKE -- THE STATE HAD MENTIONED A CASE LIKE CHOVAN WHERE WE WERE TALKING ABOUT WHETHER OR NOT A -- I THINK IT WAS A MISDEMEANANT, DOMESTIC VIOLENT MISDEMEANANT COULD GET HIS FIREARMS RIGHTS BACK. THOSE KINDS OF THINGS, THESE REGULATIONS, THESE RESTRICTIONS ON CERTAIN TYPES OF PEOPLE, NOT LAW-ABIDING CITIZENS AND OTHER CASES LIKE THAT. BUT WHAT WE'RE TALKING ABOUT HERE IS A CASE OF A FLAT BAN ON WHAT PLAINTIFFS ARGUE IS PROTECTED ARMS, THESE MAGAZINES OVER 10 ROUNDS.

AND JUST LIKE THE COURT IN HELLER DID, BY FINDING THAT IT WAS A POLICY JUDGMENT TAKEN OFF THE TABLE FOR THE DISTRICT OF COLUMBIA TO BAR HANDGUNS EVEN THOUGH THEY'RE MORE THAN 80 PERCENT OF THE TIME USED BY CRIMINALS WHEN THEY'RE COMMITTING THEIR CRIMES, THAT IS NOT A DECISION -- THAT DOESN'T COME INTO PLAY. WHAT MATTERS IS THAT THEY'RE USED OVERWHELMINGLY BY THE LAW ABIDING. YOU JUST CAN'T BAN THEM. THE STATE DOESN'T HAVE THE POWER TO SAY, WELL, THERE'S THIS OTHER THING OVER HERE YOU CAN USE THAT MIGHT BE APPROPRIATE IN SELF-DEFENSE OR MIGHT BE ENOUGH IN SELF-DEFENSE; SO WE CAN

13:27:13 PREVENT YOU FROM USING SOMETHING YOU'VE CHOSEN AND IS WIDELY CHOSEN BY PEOPLE IN THIS COUNTRY FOR SELF-DEFENSE.

I CAN'T EXPLAIN WHY COURTS ARE FINDING SOMETHING COMPLETELY CONTRARY TO THAT BECAUSE HELLER IS CRYSTAL CLEAR ON THIS POINT. UNLESS YOUR HONOR HAS ANY MORE QUESTIONS ABOUT THE SECOND AMENDMENT, I'D LIKE TO TALK BRIEFLY ABOUT THE TAKINGS CLAIM AND WHAT HAPPENED IN RUPP YESTERDAY, AND OF COURSE, WIESE. MAY I?

THE COURT: YEAH, GO AHEAD. I GOT SOMETHING I WANT TO ASK YOU ABOUT THE SECOND AMENDMENT, BUT RIGHT NOW IT JUST SUDDENLY SLIPPED MY MIND.

MS. BARVIR: WE CAN GO BACK, OF COURSE. IT'S UP TO YOU. YOU HEARD COUNSEL TALKING ABOUT THE DECISION THAT CAME DOWN IN RUPP YESTERDAY. OF COURSE, THAT DEALT WITH ASSAULT
13:27:59 WEAPONS REGISTRATION AND THE STATE'S NEXT GENERATION OF ASSAULT WEAPONS REGULATIONS. I THINK IT'S REALLY IMPORTANT AGAIN TO RECOGNIZE THAT THE SECOND AMENDMENT CLAIM WAS ONLY ON A MOTION FOR PRELIMINARY INJUNCTION. SO ON THE RECORD AS IT STOOD, IT WASN'T CLEAR THAT PLAINTIFFS HAD MET THEIR BURDEN, BUT THAT'S NOT BEEN DECIDED FINALLY AT THIS POINT.

WHEN IT COMES TO THE MOTION TO DISMISS ON THE TAKINGS CLAIM, WHICH HAD TO DO WITH THE -- THE DOJ'S REQUIREMENT THAT PEOPLE BE ABLE TO ESTABLISH I THINK IT WAS THE DATE AND SOURCE OF WHEN THEY ACQUIRED THE FIREARM AND WHERE THEY ACQUIRED IT FROM -- THE ASSAULT WEAPON -- THE COURT FOUND IT WAS NOT A

13:28:43 TAKING. BUT THE ANALYSIS THAT THE COURT PRESENTED IN RUPP JUST LIKE IN WEIS WHICH WAS HANDED DOWN JUST A LITTLE BIT BEFORE THIS COURT ISSUED ITS OPINION ON OUR MOTION FOR PRELIMINARY INJUNCTION IN JUNE 2017 IS THE EXACT OPPOSITE LEGAL CONCLUSION THAT THIS COURT MADE IN 2017 AS TO THE TAKINGS CLAIM IN THIS CASE.

THERE'S BEEN NO NEW LEGAL DISCUSSION THAT THE STATE HAS PUT FORWARD AND NO NEW FACTUAL EVIDENCE THAT EITHER SIDE HAS PUT FORWARD THAT SHOULD CHANGE WHAT THIS COURT FOUND ALMOST A YEAR AGO. I THINK THE TAKINGS CLAIM IS A CLEAR FLAT LEGAL QUESTION. IT'S VERY CLEAR THAT THIS IS THE QUINTESSENTIAL PHYSICAL TAKING. THE NINTH CIRCUIT IN RICHMOND ELKS HALL TELLS US THAT A PHYSICAL TAKING CAN IN FACT OCCUR WHEN THE GOVERNMENT ITSELF DOES NOT TAKE PHYSICAL POSSESSION OR TITLE OR EVEN USE

13:29:28 OF THE PROPERTY. WHAT WE'RE TALKING ABOUT IS WHETHER OR NOT IT'S BEING -- IF THE TAKING OF THE PROPERTY IS FURTHERING A PUBLIC PURPOSE, AND THAT'S FROM THE U.S. SUPREME COURT CASE HAWAII HOUSING AUTHORITY.

AS TO THIS IDEA THAT BECAUSE IT'S AN EXERCISE OF THE POLICE POWER THE STATE IS ABLE TO EFFECT A TAKING WITHOUT COMPENSATION, THAT'S DEMONSTRATIVELY WRONG. THE SUPREME COURT CASES, LAREDO AND LUCAS TELL US OTHERWISE.

THE COURT: I'M SORRY. WHAT WAS THAT CASE?

MS. BARVIR: LAREDO AND LUCAS, I BELIEVE.

THE COURT: YEAH. ALL RIGHT.

13:30:03 MS. BARVIR: SO AND IN ALL EVENTS, PLAINTIFF LOVETTE WHO IS THE REMAINING PLAINTIFF WHO CURRENTLY OWNS LARGE CAPACITY MAGAZINES AND UNTOLD NUMBERS OF MEMBERS OF THE CALIFORNIA RIFLE AND PISTOL ASSOCIATION ARE ENTITLED TO JUST COMPENSATION FOR THEIR DISPOSSESSION OF THESE PARTICULAR PROTECTED ARMS. THE AG DOES NOT DISPUTE THAT THE GOVERNMENT MUST PAY IF THERE'S A PHYSICAL TAKING. 32310 DOES NOT PROVIDE FOR ANYTHING, LET ALONE ON JUST COMPENSATION; AND AGAIN, THE ABILITY TO SELL TO A THIRD PARTY WHEN THE MARKET HAS BEEN ARTIFICIALLY DESTROYED IS NOT SUFFICIENT TO ENSURE JUST COMPENSATION IN OR EVEN OUTSIDE OF THE STATE.

AND ALSO, ASIDE FROM OUTSIDE OF THE STATE, EVEN IF IT'S AN AVAILABLE AVENUE TO SELL OUTSIDE OF THE STATE, IT'S NOT APPROPRIATE TO SAY THAT THE STATE SHOULD BE ABLE TO RELY ON THE 13:30:51 PERMISSIVE LAWS OF OTHER JURISDICTIONS, NEARBY JURISDICTIONS IN OTHER STATES, TO JUSTIFY ITS OWN PHYSICAL TAKING WITHOUT COMPENSATION.

WITH THAT SAID, I WOULD LIKE TO ASK THE COURT IF IT HAS ANY OTHER QUESTIONS. I'M HAPPY TO ANSWER THEM. IF NOT, I WOULD ASK THIS COURT TO REVIEW THE EVIDENCE ONCE MORE, GRANT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AT LEAST IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT ON THE DUE PROCESS AND TAKINGS CLAIMS.

THE COURT: OKAY. LET ME -- THANK YOU. I THANK YOU BOTH. BY THE WAY, I THINK YOU BOTH HAVE DONE A WONDERFUL JOB.

13:31:31 MR. ECHEVERRIA, YOU STOOD UP TO MY WHIP-SAWING YOU FOR A LONG PERIOD OF TIME THIS MORNING, AND I REALLY, REALLY APPRECIATE IT. IT'S A SERIOUS CASE, SOME SERIOUS ISSUES. I THINK I CAN ANSWER THE QUESTION OF WHY IT IS THAT JUDGES ALMOST ALWAYS UPHOLD THE STATE'S RESTRICTIONS. WHO WANTS TO BE THE JUDGE WHO -- BY THE WAY, I CAN TELL YOU THAT I RECEIVE MAIL REGULARLY -- WELL, NOT SO MUCH ANYMORE -- PEOPLE TELLING ME THE BLOOD OF THESE CHILDREN WILL BE ON YOUR HANDS AND COMMENTS LIKE THAT. WHO WANTS TO BE THE JUDGE WHO ALLOWS PEOPLE TO CONTINUE TO OWN LARGE CAPACITY MAGAZINES OR ASSAULT WEAPONS OR MACHINE GUNS OR WHATEVER WHO WAKES UP IN THE MORNING AND FINDS OUT THAT SOME OTHER DERANGED PERSON OR SOME TERRORIST HAS KILLED A BUNCH OF YOUNG KIDS OR INNOCENT CHILDREN.

MY CONCERN, MY CONCERN IS THIS: THE BILL OF RIGHTS

13:32:42 WASN'T ADOPTED BECAUSE THERE WAS SOME PEOPLE SITTING IN SOME THEORETICAL ROOM SOMEWHERE STROKING THEIR CHIN AND GOING: WELL, I'M GOING TO THINK BIG THOUGHTS TODAY. AND YEAH, I GOT AN IDEA. HEY, I TELL YOU WHAT. LET'S DO THIS. LET'S PASS AN AMENDMENT THAT SAYS THAT THE GOVERNMENT WILL NOT DISARM THE POPULATION. YEAH, THAT'S A GOOD IDEA.

THAT'S NOT WHY IT HAPPENED AT ALL. IT HAPPENED BECAUSE THESE PEOPLE HAD JUST LIVED, THEY HAD JUST LIVED THROUGH AN EXPERIENCE WHERE THE GOVERNMENT, THE VERY GOVERNMENT -- MR. ECHEVERRIA, YOU'RE HERE REPRESENTING THE STATE -- THE VERY GOVERNMENT THAT WAS SUPPOSED TO PROTECT ITS CITIZENS WAS

13:33:39 IN FACT ABUSING ITS CITIZENS, AND IT WAS DOING IT ALL UNDER THE PRETENSE OF LAW.

TAKE, FOR EXAMPLE, THE FOURTH AMENDMENT. THE FOURTH AMENDMENT, THEY WERE USING SOMETHING CALLED THE WRIT OF ASSISTANCE IN ORDER TO COME INTO PEOPLE'S HOUSE WITHOUT PROBABLE CAUSE AND TO SEARCH AND ARREST AND HAUL PEOPLE AWAY. PEOPLE VERY OFTEN FORGET THAT THE FIRST BATTLE OF THE REVOLUTIONARY WAR WAS FOUGHT ON APRIL -- I BELIEVE IT WAS APRIL 19TH, 1775. AND IT WAS FOUGHT, WHY? BECAUSE THE GOVERNMENT DECIDED IT WAS GOING TO DISARM, IN THE INTEREST OF THE PUBLIC, IT WAS GOING TO DISARM THE PUBLIC, THE COLONISTS. AND THEY MARCHED UPON LEXINGTON AND CONCORD TO DISARM THE POPULATION.

AND SO WHEN THEY WERE DRAFTING THE BILL OF RIGHTS, THESE PEOPLE WHO HAD JUST LIVED THROUGH THIS EXPERIENCE -- THIS
13:34:41 WASN'T THEORETICAL. IT WASN'T HYPOTHETICAL. IT WASN'T SOME BIG THINK TANK MOVEMENT. THEY LIVED THROUGH THIS, AND THEY DECIDED, YOU KNOW, THERE'S CERTAIN THINGS THAT WE WANT TO TELL THE GOVERNMENT THAT THEY CANNOT DO. YOU CAN DO A LOT OF THINGS. YOU CAN TELL PEOPLE YOU CAN'T DRIVE CARS WITH TINTED WINDOWS. YOU CAN TELL PEOPLE THAT YOU HAVE TO HAVE A GFCI IN YOUR BATHROOM AND EVERY OTHER 20 FEET. YOU CAN TELL ME YOU MUST WEAR A SEATBELT. NONE OF THOSE THINGS ARE PROTECTED BY THE BILL OF RIGHTS.

BUT THE PEOPLE WHO FOUNDED THIS COUNTRY -- WHO IN MY OPINION WERE SOME OF THE SMARTEST PEOPLE EVER ON THE FACE OF

13:35:33 THE PLANET -- CAME UP WITH THIS IDEA, CAME UP WITH THIS EXPERIMENT, AND THEY WERE VERY MUCH AFRAID, VERY MUCH AFRAID THAT THEY MIGHT PERHAPS BE FACING IN THE FUTURE THE VERY SAME THING THEY JUST LIVED THROUGH, AND THEY DIDN'T WANT THAT TO HAPPEN. THEY DID NOT WANT TO THE GOVERNMENT TO TELL THEM WHAT THEY COULD DO AND WHAT THEY COULD NOT DO WITH REGARDS TO CERTAIN THINGS.

NOW WE UNDERSTAND, REALLY, WE UNDERSTAND, OF COURSE, THAT IN THE REAL WORLD, YOU CAN'T HAVE A FIRST AMENDMENT WITHOUT RESTRICTIONS, AND YOU CAN'T HAVE A FOURTH AMENDMENT WITHOUT RESTRICTIONS. BUT JUST THINK ABOUT HOW MANY LIVES COULD BE SAVED IF WE SIMPLY SAID: FOURTH AMENDMENT, THAT'S A NICE THOUGHT, BUT YOU KNOW WHAT, WE'RE JUST NOT GOING TO. THERE'S A GREATER PUBLIC INTEREST IN ALLOWING LAW ENFORCEMENT

13:36:31 TO BARGE INTO PEOPLE'S HOUSE AND SEARCH THEIR HOUSES WITHOUT PROBABLE CAUSE. FIFTH AMENDMENT. THINK OF HOW MANY MORE CRIMES COULD BE SOLVED, HOW MANY PEOPLE COULD BE SAVED IF WE COULD COERCE CONFESSIONS FROM PEOPLE. YEAH, FIFTH AMENDMENT, YOU KNOW, IT'S A GREAT IDEA, BUT THE PUBLIC INTEREST OUTWEIGHS PEOPLE HAVING THE RIGHT TO NOT INCRIMINATE THEMSELVES.

SO I THINK THIS IS VERY, VERY DIFFICULT BECAUSE WHO WANTS TO SEE CHILDREN BEING SHOT AND KILLED OR OTHER PEOPLE BEING SHOT OR LAW ENFORCEMENT BEING SHOT. BUT SIMPLY BECAUSE WE DON'T WANT THAT TO HAPPEN DOESN'T MEAN THAT THE STATE GETS TO HAVE ITS WAY HOWEVER IT WANTS, WHENEVER IT WANTS, UNDER SOME

13:37:26 RUBRIC THAT, WELL, YOU KNOW, IT'S A REASONABLE FIT. BECAUSE, AS I ASKED MR. ECHEVERRIA OVER AND OVER AND OVER AGAIN, WHEN IS IT NOT A REASONABLE FIT? HOW DO WE MAKE THAT DECISION?

AND MY QUESTION IS: ARE WE NOT THERE? LOOK AT ALL OF THE LAWS, ALL OF THE REGULATIONS. I'VE LOOKED AT ALL THIS EVIDENCE, AND FRANKLY, WITH ALL OF THE GUN LAWS THAT WE HAVE, AND WE HAVE MANY, MANY, MANY, MANY, HAVE WE REALLY DONE ANYTHING AT ALL TO SOLVE THE GUN VIOLENCE PROBLEM IN THE UNITED STATES? AND THE ANSWER IS NO. NO. WE JUST KEEP WHITTLING AWAY AT THE SECOND AMENDMENT, KEEP WHITTLING AWAY, WHITTLING AWAY UNTIL EVENTUALLY WE'LL GET TO THE POINT WHERE WE'LL BE WHERE PEOPLE ARE ALLOWED TO OWN ONE GUN WITH ONE ROUND OF AMMUNITION BECAUSE ANYTHING ELSE BEYOND THAT WILL BE A REASONABLE FIT.

13:38:35 THOSE ARE MY PRELIMINARY THOUGHTS. BUT I'M NOT FIXED ON THAT. WHAT I'D LIKE FOR YOU TO DO -- AND AGAIN, I THINK YOU BOTH HAVE DONE A WONDERFUL JOB REPRESENTING YOUR RESPECTIVE POSITIONS AND ANSWERING MY QUESTIONS. BUT WHAT I'D LIKE FOR YOU TO DO IS I'D LIKE FOR YOU TO FILE -- YOU SORT OF HEARD MY CONCERNS. AND YOU HEARD -- YOU OBVIOUSLY KNOW THE THINGS THAT TROUBLE ME. YOU KNOW THE THINGS THAT MR. ECHEVERRIA HAS NOW ARGUED TO ME AND THE EVIDENCE THEY'VE ARGUED. MR. ECHEVERRIA KNOWS YOUR POSITION.

I'D LIKE FOR YOU TO, WITHIN THE NEXT 30 DAYS, TO FILE A BRIEF BRIEF. I DON'T WANT TO DECIMATE ANY MORE SMALL

13:39:36 FORESTS. OKAY? IF YOU CAN KEEP IT DOWN TO 25 PAGES OR LESS, SUMMARIZE YOUR POSITION, TRY TO ANSWER SOME OF MY QUESTIONS IF YOU CAN, CITATIONS TO CASES AND SPECIFIC CITATIONS TOO. SO DON'T JUST TELL ME, DX 29. TELL ME, DX 29, LINE 5 THROUGH 17 OR WHATEVER SO I CAN GO BACK AND LOOK AT IT AND TRY AND SEE WHETHER OR NOT IT ACTUALLY SUPPORTS WHAT IT IS THAT YOU'RE SAYING.

IF YOU CAN DO THAT WITHIN THE NEXT 30 DAYS, AND THEN I'LL GIVE YOU 10 DAYS TO FILE A RESPONSE TO EACH OTHER'S. OKAY. AND THEN I'M GOING TO TAKE THE MATTER UNDER SUBMISSION, AND THEN I'LL DECIDE ONE WAY OR THE OTHER. UNLESS EITHER ONE OF YOU HAVE ANYTHING ELSE YOU WISH TO OFFER, I THANK YOU BOTH FOR PRESENTING YOUR CASES AS WELL AS YOU HAVE. AND AGAIN, I UNDERSTAND IT'S A DIFFICULT, IT'S A DIFFICULT CHOICE. BUT I

13:40:57 GUESS THAT'S WHAT THEY PAY ME THE BIG BUCKS FOR. RIGHT? SO I'LL DO MY BEST AND THEN OF COURSE --

MR. ECHEVERRIA: ONE CLARIFYING QUESTION, YOUR HONOR.

THE COURT: SURE.

MR. ECHEVERRIA: FOR THE SUPPLEMENTAL BRIEFING, IS THIS GOING TO BE FOCUSED EXCLUSIVELY ON THE SECOND AMENDMENT CLAIM? I GOT THE IMPRESSION THAT IS THE CASE.

THE COURT: I THINK SO. I THINK IT'S A DIFFICULT -- THE OTHER ISSUE, AS EVIDENCED BY THE AMOUNT OF TIME THAT YOU BOTH SPENT ON THE OTHER ISSUE, I THINK THE SECOND AMENDMENT

13:41:26 ISSUE IS THE MOST DIFFICULT ISSUE. SO I WOULD PREFER THAT YOU DO THAT.

MR. ECHEVERRIA: ABSOLUTELY.

THE COURT: ALL RIGHT. IS THERE ANYTHING ELSE?

MS. BARVIR: I DON'T HAVE ANYTHING.

THE COURT: ANY QUESTIONS?

MR. ECHEVERRIA: NO, YOUR HONOR.

THE COURT: IF NOT, THANK YOU VERY MUCH. YOU ALL TAKE CARE. THIS HEARING IS CONCLUDED.

(MATTER CONCLUDED.)

C-E-R-T-I-F-I-C-A-T-I-O-N

I HEREBY CERTIFY THAT I AM A DULY APPOINTED, QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT; THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HAD IN THE AFOREMENTIONED CAUSE; THAT SAID TRANSCRIPT IS A TRUE AND CORRECT TRANSCRIPTION OF MY STENOGRAPHIC NOTES; AND THAT THE FORMAT USED HEREIN COMPLIES WITH THE RULES AND REQUIREMENTS OF THE UNITED STATES JUDICIAL CONFERENCE.

DATED: MAY 16, 2018, AT SAN DIEGO, CALIFORNIA.

/S/ JULIET Y. EICHENLAUB
JULIET Y. EICHENLAUB, RPR, CSR
OFFICIAL COURT REPORTER
CERTIFIED SHORTHAND REPORTER NO. 12084

CERTIFICATE OF SERVICE

Case Name: **Duncan, Virginia et al v. Xavier Becerra** No. **19-55376**

I hereby certify that on July 15, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLANT'S EXCERPTS OF RECORD VOLUME ONE

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 15, 2019, at Los Angeles, California.

Beth L. Gratz	*s/ Beth L. Gratz*
Declarant	Signature

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