

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM WIESE, ET AL.,

Plaintiffs,

vs.

XAVIER BECERRA, ET AL.,

Defendants.

Case No. 2:17-cv-00903

Sacramento, California

February 5, 2018

1:00 p.m.

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MOTION HEARING  
BEFORE THE HONORABLE WILLIAM B. SHUBB  
UNITED STATES DISTRICT SENIOR JUDGE

APPEARANCES:

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1 THE CLERK: Item 10, 17-903, William Wiese, et al.  
2 versus Xavier Becerra, et al.

3 MS. GORDON: Good afternoon, Your Honor. Alexandra  
4 Robert Gordon for defendants.

5 MR. LEE: Good afternoon, Your Honor. George Lee  
6 appearing on behalf of the plaintiffs.

7 MR. DIGUISEPPE: Good afternoon, Your Honor. Raymond  
8 DiGuiseppe on behalf of plaintiffs as well.

9 THE COURT: Which one of you is going to be speaking  
10 primarily on behalf of the plaintiffs?

11 MR. LEE: Your Honor, I will be addressing the court  
12 as to the Second Amendment and takings claims, and, if it please  
13 the court, Mr. DiGuiseppe is prepared to discuss the  
14 overbreadth, vagueness, and the equal protection claims to the  
15 extent the Court wishes to have some colloquy on it.

16 THE COURT: Well, the discussion may not break down in  
17 that way. So if I raise a question, I hope I address it to the  
18 right one of you.

19 I'd like to start with one of you telling me what is new  
20 about the complaint that was not before the Court at the time I  
21 heard the preliminary injunction.

22 MR. LEE: Well, Your Honor, it is the same complaint,  
23 in essence, and I can't -- procedurally, I don't think anything  
24 has -- there is no difference, procedurally.

25 THE COURT: But there are new claims.

1 MR. LEE: No. If I recall, the Court considered the  
2 second amended complaint at the time of the preliminary  
3 injunction. Or am I mistaken?

4 MS. GORDON: I --

5 THE COURT: There was not an equal protection claim in  
6 the first complaint. There is now.

7 MR. LEE: Correct, Your Honor.

8 THE COURT: And there was not a claim under the  
9 California Constitution for taking under the first complaint.  
10 So that's new.

11 MR. LEE: That's correct, Your Honor.

12 THE COURT: I think I know more about the answer to my  
13 question than you do then.

14 What I was asking you is, what's new about this complaint  
15 that wasn't in the first one? I want to make sure we're on the  
16 same playing field here.

17 MR. LEE: Yes, Your Honor. Your Honor is correct.  
18 I'm familiar with the allegations of the complaint. I just  
19 wasn't sure when the Court considered -- at the time it  
20 considered the preliminary injunction motion what was before the  
21 Court.

22 THE COURT: You were here. Am I right that those  
23 claims were not presented at the time I considered the  
24 preliminary injunction motion? Because I don't remember talking  
25 about them in my order.

1 MR. LEE: Your Honor is correct.

2 THE COURT: Okay. So would you make sure that we're  
3 on the same wave length here. Tell me what's new in this  
4 complaint.

5 MR. LEE: Well, there is a claim under the California  
6 Constitution, and that is to address a specific argument that  
7 the defense made with regard to the takings argument that the  
8 magazines could be permanently altered so as to prevent their  
9 characterization of a taking.

10 Now, I will say, however, that I don't believe that that  
11 issue was raised in the defense's motion, so I don't think that  
12 there is a lot of briefing on that specific issue. But that is  
13 the reason why there is a claim under the California  
14 Constitution really to address that specific issue.

15 Because the California Constitution goes beyond what the  
16 federal constitution says about taking property and also  
17 provides for any damage to property.

18 THE COURT: Discuss that a little further. What does  
19 the California Constitution say about taking that the U.S.  
20 Constitution does not?

21 MR. LEE: That a damage to property can also  
22 constitute a taking. Not just a taking of property.

23 THE COURT: Okay. So that's important because I did  
24 address that on the federal taking claim, and I said -- I  
25 distinguished between injunctive relief and damages, right?

1 MR. LEE: Correct, Your Honor.

2 THE COURT: You're telling me now that you can get  
3 damages under the California Constitution.

4 MR. LEE: No, no, no. When I mean damage, Your Honor,  
5 damage as in damage to property. So the federal constitution --  
6 and the exact words are escaping me -- but it says that there  
7 shall be no taking for public use of private property without  
8 just compensation being paid.

9 The California Constitution goes one step beyond that and  
10 says not just taking but also damage to private property.

11 So this really was to address a very -- I wouldn't say minor  
12 -- but a very salient point that the defense has raised, which  
13 is that holders of large-capacity magazines can permanently  
14 alter them to avoid its characterization as a taking. So that's  
15 why that claim was included in there.

16 THE COURT: Lucas distinguishes between complete  
17 taking and partial taking, right?

18 MR. LEE: I think Lucas talks about whether or not the  
19 police powers of the state can be used to completely deprive an  
20 owner of all economic activity or benefit of their property.

21 THE COURT: So are you saying that California  
22 Constitution is a way around Lucas?

23 MR. LEE: In a sense in that to the extent that the  
24 state is claiming -- and I don't think they claimed this in  
25 their briefing, so I'm a little bit at a loss to recall that

1 exactly -- but to the extent that the state is claiming, well,  
2 you can always permanently alter the magazines by riveting them  
3 or epoxying them so that they can only hold 10 rounds or less,  
4 we're saying, okay, that is a taking under every theory that we  
5 have pled including the federal taking, but we'll go one beyond  
6 that and also say that it's a taking under the California  
7 Constitution because the California Constitution specifically  
8 contemplates damage to personal property or damage to private  
9 property.

10 So to the extent that the state is saying, well, you can  
11 damage your property, and it's not a taking, we beg to differ,  
12 obviously, and the California Constitution speaks to that.

13 THE COURT: Let's stop there for a minute. What's the  
14 answer to that?

15 MS. GORDON: So a few answers, Your Honor.

16 First of all, just to re-characterize or correctly  
17 characterize what the state has said, when we talked about  
18 modification -- and we raised it somewhat in our briefing --  
19 it's not a main point -- is we were saying modification is yet  
20 another way that an owner of a large-capacity magazine can  
21 realize some of its value.

22 So under Lucas it can't be that you're being deprived of all  
23 economically beneficial use because one thing you can do in  
24 addition to selling it or bolting it out of state would be to  
25 modify it.

1 THE COURT: Permanently modify it.

2 MS. GORDON: Yes. Absolutely permanently modify it.  
3 Not good enough to use chewing gum or anything that could be  
4 removed quickly.

5 So the California Constitution does not actually add  
6 anything because -- and we address this in our briefing, and I  
7 did not see any response in the opposition -- plaintiffs have  
8 not suggested that the law banning large-capacity magazines in  
9 any way damages a large-capacity magazine, first of all, at all;  
10 second of all, within the meaning of the California  
11 Constitution. So the City of Sacramento case --

12 THE COURT: I have no practical experience with the  
13 California constitutional provision on taking without just  
14 compensation.

15 When they say damage, Mr. Lee suggested it means economic  
16 damage. So, you know, you're not actually physically damaging  
17 the magazines. If you're making them less valuable, Mr. Lee  
18 suggests that is covered by the California Constitution.

19 MS. GORDON: But I think that's incorrect. In the  
20 City of Sacramento case that we cited in our brief says that,  
21 yes, the California Constitution did add the word "damage," but  
22 it wasn't intended to expand the scope of compensation. It was  
23 beyond what the federal constitution provides for.

24 THE COURT: What case is that?

25 MS. GORDON: I can get you the exact cite, but it's

1 City of Sacramento --

2 THE COURT: Is it in the brief?

3 MS. GORDON: It is in the brief twice. It's in both  
4 the reply --

5 THE COURT: City of Sacramento. Okay. I'll find it.

6 MS. GORDON: So just to say what that case holds is  
7 that damage meant something very specific. It meant that if the  
8 city is seizing property under its eminent domain power, and it  
9 literally damages it during a physical improvement project, so  
10 it's out there doing something physically to your property --

11 THE COURT: Physical damage.

12 MS. GORDON: -- physical damage, that is covered under  
13 the California Constitution explicitly.

14 THE COURT: Is that clear under case law, or is it  
15 muddier than that?

16 MS. GORDON: Everything that I could find spoke to it  
17 quite clearly and said that is what it is intended to mean.  
18 And, as I said, I did not see anything in the opposition that  
19 addressed this.

20 THE COURT: Let's stay on the subject then. Mr. Lee,  
21 what do you have to say about that?

22 MR. LEE: Your Honor, I am actually referring to  
23 physical damage to personal property. Because let us say that  
24 the state said, okay, turn in your magazines to me as an agent  
25 of the state, turn in your magazines to our bureau of firearms



1 agents. We are going to take your magazines. We are going to  
2 insert a rivet and epoxy it and permanently damage it, and here  
3 you go, you can have it back.

4 I'll point out, on the side, that the DOJ has never issued  
5 any regulations on the permanent alteration --

6 THE COURT: Alteration is different than damage.

7 MR. LEE: -- which raises a separate issue.

8 THE COURT: Alteration is different than damage.

9 MR. LEE: I don't see the difference, Your Honor.

10 THE COURT: Well, you can alter something and make it  
11 more useful and valuable. That's not damage.

12 MR. LEE: It is, Your Honor. If you have a 15-round  
13 magazine that your father picked up overseas during the war,  
14 maybe he had a Browning High Point that he brought back over  
15 from the war, brought home a 15-round magazine, and now the  
16 state is saying you have to permanently rivet that or --

17 THE COURT: Well, in your case, you're arguing that it  
18 is. But you have to be careful not to just throw around terms  
19 willy-nilly.

20 Since I just had to have one of the toilets in my house  
21 replaced, if your old toilet wears out and somebody comes in and  
22 replaces it with a brand new toilet, they have modified my house  
23 but they haven't damaged it. So there is a difference.

24 MR. LEE: If the state says, well, we have certain  
25 water-flow requirements now, turn in your toilet so that we can

1 permanently modify it so that the tank can only hold x-number of  
2 gallons of water as opposed to why, and, by the way, you're  
3 going to have to live with this in this -- I think it's been  
4 damaged.

5 THE COURT: You do.

6 MR. LEE: Here is where the distinction comes in. We  
7 all agree if the state said turn in your magazines, we, the  
8 state, are going to take your magazine, we are going to rivet  
9 it, and we are going to give it back to you in a way that you  
10 can no longer hold more than 10 rounds in it -- and, by the way,  
11 this process is simply wasted space. All it does is it puts a  
12 spacer in there.

13 THE COURT: I know.

14 MR. LEE: I think we'd all say, okay, the state is  
15 damaging your property.

16 However, what the state is saying here -- and they're not  
17 even really saying it because, again, they've issued no  
18 regulations on this -- they're saying, we leave it up to you to  
19 do it, Mr. Private Citizen.

20 I fail to see how a law that says -- that compels me at  
21 gunpoint to do something or suffer the consequences of the  
22 state, you must now damage your property, you must give up a  
23 certain portion of your property to the public good, that is  
24 damage.

25 THE COURT: I see what you're saying. That's only one

1 thing that they're suggesting you might do. The other thing  
2 they're suggesting you might do is sell it to an authorized gun  
3 dealer, which doesn't damage it, or take it to Nevada and sell  
4 it there. So there are other options besides what you're  
5 calling damage.

6 MR. LEE: There are three options on paper. But I  
7 think as we pointed out, and the argument that we make and the  
8 argument that we plan to present to the Court, is that those  
9 aren't really realistic options.

10 In the first place, we're talking about hundreds of  
11 thousands of magazines. You have to -- and I think we addressed  
12 this at the preliminary injunction hearing -- you have to  
13 literally drive to the border before you can even offer it for  
14 sale. So you can't really take it out of state unless you know  
15 somebody out of state or have some storage.

16 And I think it's a lot to say, well, you can still have your  
17 Second Amendment constitutional right to own a firearm, but  
18 we're going to make you to do it in two different states because  
19 we don't like this particular aspect of the firearm.

20 THE COURT: But you're still stuck with Lucas. And  
21 you have to take all of it. "Why not take all of me." You have  
22 to take all of it.

23 Unless you qualify under this California concept of damage  
24 -- and that's why I'm exploring that with you -- your other  
25 argument about taking it out of state and selling it to a

1 licensed dealer is impressive. Believe me. But I don't know  
2 that it rises to the level of a total taking.

3 MR. LEE: Well, I mean, if this is the way we treat  
4 takings cases, I mean, the government can always say -- I think  
5 we talked about this in the context of emissions in automobiles.

6 Let's say the state mandated that we all drive clean  
7 automobiles, and that you have to now turn in -- you have to now  
8 convert your fossil-fuel automobiles. And either drive it to  
9 Nevada and get rid of it that way or sell it. Okay. Putting  
10 aside the issue that there is no market for these things.

11 THE COURT: They might do that, you know. I wouldn't  
12 be surprised. But the only reason they don't do it is they will  
13 make so many people upset that they won't vote for them. But  
14 other than that I don't know that it constitutes a taking.

15 MR. LEE: Well, from our perspective, Your Honor, as  
16 firearms advocates, if it's a popularity contest, and it's  
17 simply a matter of everyone who is a voter will be angry, we're  
18 on the losing one of these every time.

19 What we're trying to do is establish what's right. If it's  
20 wrong for the government to say you have to now surrender your  
21 fossil-fuel automobiles --

22 THE COURT: You know, it's not what's right and what's  
23 wrong. It's what's legal and what's not legal. I may have some  
24 subjective view about what's right and wrong, and it's not worth  
25 a nickle unless it's also illegal. And so this is not a

1 question of right and wrong.

2 MR. LEE: I appreciate that, Your Honor. I mean,  
3 we're here not just -- but we're not just here out of the love  
4 of law itself but because there is an important principle at  
5 stake. And that's many people who have lawfully owned these  
6 magazines for many years, for 20 years or more, peaceably,  
7 without incident, are now being forced to turn them in,  
8 essentially.

9 And, really, the three choices on paper that the state says,  
10 well, you can always sell it, I think we intend to show at trial  
11 there is no viable market for large-capacity magazines that are  
12 20 years and older. I mean, who is going to really buy this.  
13 If any one, pennies on the dollar.

14 THE COURT: That's true in any takings case. In a  
15 classic eminent domain case, the trier of fact, which is a jury,  
16 if somebody demands it, has to decide how much the property  
17 which the Government is taking is worth. And it could be  
18 worthless, in which case the jury will come back with an award  
19 of zero. That's always the case.

20 MR. LEE: Well, again, and we appreciate that, that  
21 there is always this problem, that's why we're here is because  
22 we're trying to get ahead of this before it becomes a problem.

23 I mean, at the end of the day, this is simply a  
24 confiscation. And what we're saying is that the government  
25 can't simply outsource its -- the government put it on others to

1 say, okay, we don't want these items anymore, fossil-fuel  
2 vehicles or high-capacity magazines, we're going to give you  
3 three options but really those are not viable options.

4 THE COURT: It sounds to me like what you're saying is  
5 you want to go to trial because you want to persuade the trier  
6 of fact that there is zero value to these magazines if the state  
7 law goes into effect. But zero is zero. Don't you have to  
8 convince me first that that is a tenable argument to make?

9 MR. LEE: What I want to do is to convince Your Honor  
10 that the state has just boldly thought they can compel everyone  
11 to turn in the magazines and not even give a thought, not even  
12 give a thought as to whether or not we have to actually pay  
13 these people, or there needs to be some process, or there needs  
14 to be some scheme or administration or process for claims, or  
15 establishing a bureau of firearms claims database.

16 They didn't give it any thought whatsoever because they  
17 assumed that they could simply do this with a snap of the  
18 fingers because police power of the state, dangerous items, mass  
19 shootings, we can do what we want.

20 And they didn't give any thought to whether or not all the  
21 law abiding people in the state who have owned these things for  
22 20 years plus without incident, that's what I'm trying to  
23 impress upon Your Honor.

24 THE COURT: You may impress me -- and you do -- but I  
25 don't know that that necessarily gives you a claim. I'm

1 thinking about this California concept of damage right now. I'm  
2 thinking about Lucas. I'm not so much thinking about what I  
3 subjectively think is fair.

4 MR. DIGUISEPPE: Might I add something, Your Honor --

5 THE COURT: Yes.

6 MR. DIGUISEPPE: -- if you don't mind, on that point  
7 about damage, and what it means, and this concept of altering  
8 LCMS, large-capacity magazines, which is how we came to the  
9 California Constitutional provision at issue.

10 Well, there are a lot of magazines, and who knows how many,  
11 where if you were to alter them or force a person to alter them  
12 to reduce capacity, they have a firearm which only accommodates  
13 that magazine in that particular formation as a large-capacity  
14 magazine.

15 And so if their magazines are altered in that regard such  
16 that the firearms are no longer even compatible with the  
17 firearm, presumably this is the reason why under SB 1446 there  
18 was a specific exception as to that version, then that is a  
19 complete taking in the sense of it's a situation like the toilet  
20 example. The toilet wouldn't work. Put a new toilet and it  
21 doesn't work. It's no good.

22 THE COURT: Are you saying that if they modify the  
23 magazine, it will not fit the weapon that they own, is that what  
24 you're saying?

25 MR. DIGUISEPPE: That the firearm is only made to

1 accommodate that size magazine assuming you can even alter in  
2 such a way that it would still accommodate that magazine.

3 THE COURT: But they can get another gun.

4 MR. DIGUISEPPE: And they have to go buy another gun.  
5 That's like saying it's okay for us to take your car because you  
6 can go buy another one.

7 THE COURT: Okay. I hear that.

8 MR. DIGUISEPPE: And then as far as --

9 THE COURT: Finish.

10 MR. DIGUISEPPE: I apologize. You know as far as the  
11 other options, which is the other two elements here, going  
12 across and selling the firearm across state lines, or storing it  
13 across state lines or selling it, the viability of a market is a  
14 problem.

15 I mean, we're talking also about the bundle of rights here.  
16 So if Lucas requires full-on taking of everything -- and we're  
17 now focusing on damage and what's the most natural construction  
18 of damage, even if it is physical damage. Nonetheless, property  
19 rights come in a bundle, a bundle of sticks. A number of those  
20 sticks include the ability to sell it in the market that you  
21 please to sell it, to get the best profit that you can, not in a  
22 forced situation with somebody who doesn't really want to buy  
23 it, nor would the property rights make any sense and you would  
24 lose clearly one or more sticks of that bundle if you were  
25 required to go store that out of state and not have access to it



1 unless you drove to Arizona, Nevada.

2 THE COURT: Ms. Gordon, you may or may not want to  
3 address this argument that Mr. Lee made. But in almost every  
4 context that I can think of, when the state or any government  
5 decides to do something like this, they usually do provide or at  
6 least think about compensating the person whose property has  
7 been either totally taken, damaged, or even de-valued.

8 I know of many things I've read about where the city or  
9 somebody will say turn in your guns and we will give you this.  
10 They almost always at least think about compensating the person  
11 who has been deprived of their property in some way. Why not  
12 here? Why not? You may not want to address that.

13 MS. GORDON: I'm happy to address it, Your Honor, of  
14 course.

15 So it is true that sometimes states will compensate, turn in  
16 your gun, but that doesn't follow that that's because otherwise  
17 it would be a compensable taking. It could equally be because  
18 it provides another incentive to come in and voluntarily turn  
19 over your gun, which is not necessarily something that many  
20 parties wish to do.

21 Here, it's not actually correct to say that the state gave  
22 no thought to compensation. You can see it in the legislative  
23 history that I believe that plaintiffs attached to their request  
24 for judicial notice. It doesn't matter, actually, if the  
25 legislature ever thought about it, but they did, and they came

1 to the conclusion that it is not a taking so there is no  
2 compensation required.

3 And nothing that is in the complaint in any way undermines  
4 that conclusion. You can make whatever complete conclusory  
5 allegations that you want that these aren't viable options, but  
6 you still can't get around the fact that we haven't taken all  
7 economic value.

8 THE COURT: Other examples I can think of even where  
9 they don't take all economic value they usually give you a  
10 grandfather clause. They'll say existing magazines are excluded  
11 and so forth. I just have a hard time thinking of many examples  
12 where there is even a partial taking in that sense that there  
13 isn't some thought given to compensation.

14 I know, for example, one of you cited seizure of contraband.  
15 There is an example where you don't compensate people for  
16 seizing contraband, but everybody knew it was contraband to  
17 start with.

18 You're shaking your head. Maybe sometimes they change the  
19 law. But it's hard to find examples where government does that  
20 kind of thing to people.

21 MS. GORDON: So we cited a number of examples, and the  
22 Court took notice of them both in its order on the preliminary  
23 injunction, and we cited them again in our motion to dismiss,  
24 the Akins case -- and I don't know how you say it, but it's like  
25 Fesjian case -- and these are all sort of getting rid of

1 possession of machine guns, and those are not compensable  
2 takings.

3 It's also true that in the other line of cases that we cited  
4 in the reply people did not necessarily know that something was  
5 contraband. So Mrs. Bennett, who is the half owner, legally, of  
6 an automobile in which her husband, unbeknownst to her,  
7 illegally had sex with a prostitute, and the State of Michigan  
8 says that they forfeited the car. Mrs. Bennett says but it's  
9 half my car. I have half title to it. I own it. I didn't do  
10 anything wrong. I'd like to be compensated. And the Supreme  
11 Court says no because this is not an exercise of eminent domain  
12 power.

13 THE COURT: Well, now --

14 MR. DIGUISEPPE: That's a situation where that was  
15 used in a crime.

16 THE COURT: I remember that. Yes. I remember that  
17 case. I think the facts would have been different, for example,  
18 if she had some of her own property in the car, and they seized  
19 that, and it wasn't his.

20 But when you jointly own something with somebody else, it's  
21 almost a fundamental maxim of American law that each of the  
22 joint owners is responsible for the actions of the other --

23 MS. GORDON: Perhaps.

24 THE COURT: -- with regard to that property.

25 I have a joint bank account with my wife. She wants to

1 write a check on it. She writes a check. That's what joint  
2 tenancy means. So I don't have a problem with that.

3 And I can cite isolated examples where it comes close to  
4 giving me a problem, but this seems, to me, to be rare that any  
5 government comes in and does this kind of thing to its citizens  
6 without some attempt to compensate them for it.

7 They could have done this. How many of these magazines are  
8 there? All the money the State of California has, why couldn't  
9 they have just said we will give you some compensation for this.

10 MS. GORDON: Because they legally don't have to, Your  
11 Honor, because it's not a taking.

12 THE COURT: If the State of California doesn't have to  
13 do something, they don't do it.

14 MS. GORDON: I don't know about that as a general  
15 matter. But, here, the question isn't what we all might have  
16 preferred. It's whether it's legally required. And it's not  
17 for the reasons that we've stated.

18 And, again, when the state said no more brass knuckles, no  
19 more various other things, they didn't compensate. The only  
20 reason why we're not hearing about it is because nobody sued  
21 under the takings clause. It's not a taking.

22 THE COURT: What happened when they outlawed brass  
23 knuckles? You mentioned that last time.

24 MS. GORDON: I don't actually know. I should really  
25 go back to look to see what happened.

1 THE COURT: Everybody went in and turned in their  
2 brass knuckles.

3 MS. GORDON: I've typed in every variation of like  
4 brass knuckles, grenade, blade, anything that I could think of  
5 that could be harmful in every database I can find to try to see  
6 what actually happened and pretty much nothing.

7 THE COURT: My grandson is a black belt in Taekwondo  
8 in another state, and he has nunchucks. So I tell him when he  
9 comes to California don't put the nunchucks in the car. So  
10 there is an example.

11 MS. GORDON: Right.

12 MR. LEE: Well, Your Honor, if I may just continue  
13 what Your Honor's line of thinking on this -- or continue on  
14 Ms. Gordon's argument on this.

15 I mean, just because people haven't sued up to this point on  
16 these issues where they could have and should have, perhaps, I  
17 mean --

18 THE COURT: That's why I asked her what happened.  
19 Look, I don't want to digress too much. But you raised a  
20 question. I wanted to see what her response is. And I think I  
21 have the gist of her response, which is they don't have to so  
22 they don't have to justify why they didn't do something that  
23 they don't have to do.

24 MR. LEE: But it's a self-fulfilling justification.  
25 We don't have to because we don't have to. I don't know if

1 that's a tautology or -- but we don't have to compensate you  
2 because it's the police power of the state, and we have the  
3 power to unilaterally declare your property to be contraband.

4 MS. GORDON: Well, we do, Your Honor. So we do not  
5 have to compensate because this is not a taking under any form  
6 of taking that exists. Under any case that has been cited, it  
7 is not a taking. So if I wasn't clear, that's my phrasing.

8 Also I have the cite for damage. It's Customer Company  
9 versus City of Sacramento. It's 10 Cal.4th 368. The pin site  
10 is 379. And it says, the words "or damaged" were added in  
11 actually 1879 to clarify that the government was obligated to  
12 pay just compensation for property damaged in connection with  
13 the construction of public improvements even if the government  
14 had not physically invaded the damaged property. That is what  
15 damage means.

16 THE COURT: Still, they're not defining damage very  
17 precisely.

18 MS. GORDON: That's the best definition that I could  
19 find. It just appears. It doesn't really say why.

20 THE COURT: I think we've probably discussed this as  
21 much as we can. I would like to go on to the equal protection  
22 argument now. Is that yours?

23 MR. DIGUISEPPE: Sure.

24 THE COURT: Go ahead.

25 MR. DIGUISEPPE: Well, as this is the state's motion

1 to dismiss, I think it's important to note, specifically, that  
2 what the standard we're looking at here is simply, as their own  
3 case law citations indicate, whether we've plausibly stated a  
4 claim, something that's not speculative.

5 And I would note that in their reply and their briefing they  
6 say that the plaintiffs have not alleged that there is no  
7 conceivable basis for the exception, nor have they alleged that  
8 there is no rational relationship.

9 Well, that's not true. In the second amended complaint,  
10 page -- paragraphs 111 and 113 specifically those allegations  
11 are made on the face of it.

12 And there is nothing to this notion that the claim of equal  
13 protection is subsumed in the Second Amendment claim. The cases  
14 that they cite in support of such an idea are quite different  
15 than what we have here.

16 So, for example, they were citing the cases of Kwong, out of  
17 the Second Circuit, and the Flanagan case. The Flanagan case  
18 was really the big one because that one goes through and cites  
19 all the other cases that the AG relies on here for purposes of  
20 this argument.

21 So the Kwong case, really, though, all that did, if you look  
22 at it, actually read it, it did not rule or hold that the -- a  
23 failed Second Amendment complaint led to necessarily a failed  
24 equal protection claim. They analyzed both of those separately.  
25 They found that the Second Amendment claim wasn't valid and

1 moved right on to equal protection.

2 THE COURT: So is your equal protection claim that  
3 your clients can't possess these magazines, but that police  
4 officers and some others can, is that your argument?

5 MR. DIGUISEPPE: Well, actually, it's specific to the  
6 Hollywood situation. We're dealing with that situation, which  
7 it really stands out in the briefing from the state. There is  
8 absolutely no attempt to even make up a rational argument or  
9 reason for that.

10 THE COURT: Movies, television and video, right?

11 MR. DIGUISEPPE: Essentially. And there is no effort  
12 at all. So to come to us and say you all haven't stated a claim  
13 plausibly on the face of your allegations without even bothering  
14 to provide a justification at all for this, which shows there is  
15 no such justification, it obviously falls flat on its face, such  
16 an argument.

17 THE COURT: Is there any other category that you  
18 believe has been treated disparately? Police officers,  
19 Hollywood, anybody else?

20 MR. DIGUISEPPE: Well, we had noted, in other context,  
21 the fact that there had been exemptions previously -- or we  
22 still say under the co-existing SB 1446 and Prop 63 different  
23 categories of individuals who previously had exemption, and now  
24 I guess they wouldn't if we were to adopt --

25 THE COURT: But the ones that are exempt fall under



1 these categories that we mentioned.

2 MR. DIGUISEPPE: The focus really is the Hollywood  
3 situation.

4 THE COURT: So what's the test that the Court needs to  
5 apply to see whether the state can discriminate in favor of  
6 those categories?

7 MR. DIGUISEPPE: Well, our position would be that it  
8 should be strict scrutiny because of the implication of the  
9 fundamental right at issue.

10 THE COURT: Any other courts apply strict scrutiny in  
11 this context?

12 MR. DIGUISEPPE: I have not found an example in this  
13 particular context. But fundamental rights in the context of  
14 looking at it from the perspective of what's the best test or  
15 the right test, the focus is always fundamentally on the nature  
16 of the right at stake, and there is no question or dispute that  
17 the right at stake is a fundamental one.

18 THE COURT: Well, we'll see. Because that's the  
19 argument that it rides on the Second Amendment. Because if it  
20 rides on the Second Amendment, then you either have a Second  
21 Amendment argument or you don't.

22 If you do, you get strict scrutiny. If you don't, you don't  
23 get strict scrutiny. So isn't that how they are tied together?

24 MR. DIGUISEPPE: That might be one way to tie them  
25 together. But the danger here that the state is going for is

1 not that you just have that tying, but that in fact if the  
2 Second Amendment claim is no good, then there is no other claim,  
3 there is no vagueness, there is no overbreadth, there is no  
4 equal protection because it was necessarily subsumed.

5 THE COURT: Well, I'll address that with Ms. Gordon  
6 then.

7 First, tell me what the standard is. And if you think it's  
8 not strict scrutiny, tell me what it is. And then tell me what  
9 the justification is for excluding Hollywood and police officers  
10 from this law.

11 MS. GORDON: Okay. So the standard, if we're only  
12 talking about Hollywood, is rational basis. The standard again  
13 if we're -- and the courts have been very clear that if you're  
14 actually bringing a Second Amendment challenge, you bring a  
15 Second Amendment challenge, and you don't bring it through equal  
16 protection so that you can get a higher level of scrutiny. I  
17 very much contest that there is a fundamental right to possess a  
18 large-capacity magazine as opposed to --

19 THE COURT: Not unless it comes under the Second  
20 Amendment. I think that's what I was trying to make clear to  
21 Mr. DiGuiseppe. I follow you there.

22 MS. GORDON: And even if we're talking about the  
23 Second Amendment, this Court has already made the determination,  
24 as a matter of law, that intermediate scrutiny applies and has  
25 found that the law passes intermediate scrutiny. So it would

1 follow that it's also going to pass rational basis. The only  
2 basis of the equal protection clause challenge is the Hollywood  
3 exception.

4 THE COURT: Not police officers.

5 MS. GORDON: No. There are other, obviously,  
6 exemptions that Your Honor has pointed to. But if you look at  
7 the complaint, the only exception that is actually mentioned in  
8 equal protection is Hollywood.

9 It is not the state's burden at this stage, actually, to  
10 provide a justification on rational basis. It is plaintiffs'  
11 burden to show that there is no conceivable basis, which doesn't  
12 just mean stating that.

13 THE COURT: But when you get into pleading, and you  
14 start trying to apply Iqbal and Twombly to this kind of a  
15 question, it's very difficult to expect the plaintiff to tell  
16 you the details of a negative.

17 MR. GORDON: I understand that. But that is the  
18 burden.

19 But just to add to that, since we're standing here, this is  
20 a Hollywood exemption, and my understanding is that the way that  
21 it works is that someone has to go and get a permit so that they  
22 can use a large-capacity magazine that is loaded with blanks for  
23 TV, right, for video, for a movie.

24 That does not raise the same public safety concerns of mass  
25 shootings and the murder of law enforcement, right, that just

1 having a large-capacity magazine out in the world has. What I  
2 have just said under the case law is sufficient to defeat  
3 rational basis. Because if anyone in this courtroom could come  
4 up with a justification for this exemption right now under  
5 rational basis, it would pass.

6 THE COURT: So here's your argument then. Correct me  
7 if I'm wrong. It doesn't give Hollywood the right to possess  
8 these magazines anymore than it gives anyone else the right to  
9 possess them. It only gives them the right to petition the  
10 state to possess them upon the condition that they load them  
11 with blanks.

12 MS. GORDON: And as a loan. So it's not permanent.

13 THE COURT: Once they finish, they don't get to keep  
14 them.

15 MS. GORDON: No, they do not.

16 THE COURT: And it's not just Hollywood. If you  
17 wanted to do it in Pismo Beach, or Lodi, it doesn't make any  
18 difference.

19 MS. GORDON: I think we're using Hollywood as a  
20 shorthand for entertainment industry.

21 THE COURT: Do they have to be in the entertainment  
22 industry, or suppose one of these people in the courtroom just  
23 decided I want to do a You Tube video, and I want to do this,  
24 could they apply also?

25 MS. GORDON: I don't know. I know that there are very

1 specific permit requirements. Although, I was not able to  
2 actually lay my hands on them in time. If the Court is  
3 interested, I'm happy to provide what the permit requirements  
4 are.

5 THE COURT: Well, it might help your argument if you  
6 could say anybody could do this.

7 MS. GORDON: It certainly would, but it is also not  
8 alleged, for example, that any of the plaintiffs tried to get  
9 this exception because they are making a movie and they wanted  
10 to use a large-capacity magazine loaded with blanks, and for  
11 some reason that violates the equal protection clause. They  
12 couldn't get it. There is no such allegation really just  
13 looking at it on its face. Again, I am happy to give the Court  
14 supplemental authority.

15 MR. DIGUISEPPE: Your Honor, may I respond?

16 THE COURT: Yes.

17 MR. DIGUISEPPE: I don't have the statute in front of  
18 me. Maybe Ms. Gordon does. But I don't believe there is  
19 anything in there that says that the magazine has to be loaded  
20 with blanks and/or empty. There is not such a restriction. I  
21 have to go back to check the language to confirm. And I was  
22 trying to find it here in walking around. But I don't think  
23 that's there.

24 And then aside from that, there is no restriction or  
25 overseeing after these people are granted access to these

1 magazines. I mean, yeah, I guess it's for the purpose of  
2 running around on the movie set, but especially if there is no  
3 restriction or requirement that it be blanks or empty. We're  
4 just assuming that, I think.

5 THE COURT: I'll bet you that there are exceptions  
6 like that for brass knuckles and nunchucks and all these other  
7 things, too. Because you do want to make movies about things  
8 that people can't otherwise possess. And it would be a serious  
9 encroachment on probably the First Amendment if somebody  
10 couldn't do that under any conditions at all.

11 MR. DIGUISEPPE: Well, what I'm saying is that if  
12 we're making a comparison or looking at the classification  
13 distinction here and using the justification that she provided,  
14 is that the nature of what has to be in the magazine and then  
15 also what happens with it after it's given to these Hollywood  
16 folks, there is nothing in the statute, at least, especially  
17 with no regulations, that require some kind of oversight.

18 THE COURT: Why don't you tell me what the statute  
19 says instead of both of you speculating on it. This is your  
20 burden. Tell me exactly what the statute says on this  
21 exception.

22 MR. DIGUISEPPE: I'm looking that up. Hang on.

23 So this is what it says. It says section 32310 -- and the  
24 statutory section at issue is 32450.

25 It says, 32310 does not apply to the purchase or possession

1 of a large-capacity magazine by the holder of a special weapons  
2 permit issued pursuant to various statutory provisions for any  
3 of the following purposes: Subdivision A, for use solely as a  
4 prop for a motion picture, television or video production.

5 That's it. Nothing in there that says it has to be an empty  
6 magazine, blanks, or otherwise rendered non-harmful.

7 THE COURT: But they do have to get a special weapons  
8 permit?

9 MR. DIGUISEPPE: That's true.

10 THE COURT: And there is nothing stopping your  
11 clients, or you, or anybody else from applying for a special  
12 weapons permit if you want to do that, right?

13 MR. DIGUISEPPE: Well, the difference here, though, is  
14 that while it is granted to a person with a special weapons  
15 permit, that person in the real world would be a Hollywood  
16 producer, movie maker, and that person is just going to hand it  
17 to whomever is happening use it in that scene. It's not that  
18 Matt Damon and these guys actually have these permits  
19 themselves. They get to run around, do what they want with  
20 them, and who knows whether they can bring them home. There is  
21 nothing in there that says that they have to keep it on set.  
22 They could bring it home. They could show it off at a gun  
23 range. I don't know. There is nothing that limits the use  
24 from --

25 THE COURT: But if I'm applying intermediate scrutiny,

1 they don't have to dot all the Is and cross all the Ts, make it  
2 impossible for Matt Damon to go home and use it.

3 MR. DIGUISEPPE: All I'm doing is responding to her  
4 claim that there is a rational basis at least for this. And  
5 based upon what she said, there is no such viable point.

6 THE COURT: What else did you have to say?

7 MS. GORDON: Solely as a prop is a limitation, Your  
8 Honor.

9 THE COURT: A prop could be loaded.

10 MR. DIGUISEPPE: That just means --

11 MS. GORDON: If you look in our reply brief at  
12 page 16, I went through, and I went through some of the  
13 regulations. And if you look at Cal Stats. It's 2010. It's  
14 Chapter 711 and then Section 6. That's where it talks about  
15 blank cartridges specifically.

16 I really tried to get as much as I possibly could on this  
17 exception to help the Court. Again, there really is no credible  
18 allegation that the Matt Damons of this world are responsible  
19 for gun violence with large-capacity magazines. That's not the  
20 problem that the state is trying to target with its  
21 large-capacity magazine ban.

22 THE COURT: Unless there is something pressing on this  
23 issue, did you want to talk about the vagueness claim or any of  
24 the other claims?

25 MS. GORDON: Your Honor, I think --



1 THE COURT: Overbreadth.

2 MS. GORDON: I think we're sort of repeating  
3 ourselves. So I'm happy to talk about the vagueness claims, but  
4 I think Your Honor has already ruled, and there is nothing new.  
5 That it fails because the basis of it is that there are two  
6 different chapterings, and Your Honor has already held, well,  
7 the later-enacted one controls. And even if it didn't, that's  
8 not vagueness. That's a statutory construction or  
9 interpretation question.

10 Overbreadth. There is no Second Amendment overbreadth, nor  
11 have plaintiffs cited to any cases suggesting that there is  
12 Second Amendment overbreadth. Again, if there were, it is  
13 duplicative, right, because it has to actually subsume a  
14 substantial amount of protected conduct, and this law does not.

15 THE COURT: All right. I don't know of any other  
16 questions that I wanted you to address. Is there anything that  
17 we haven't talked about yet that you wanted to address?

18 MR. LEE: Your Honor --

19 MR. DIGUISEPPE: Just on the vagueness issues there.  
20 If we could, quickly. Just to point out, as we had said in the  
21 reply, which the Attorney General did not respond to at all,  
22 what Bustamonte was really applying, going back to cases where  
23 it's pointed out that there is actually a presumption against a  
24 repeal of a later statute -- of an earlier statute by a later  
25 statute, and we've already cited the evidence regarding that.

1           And also, we've got an example of what was dealt with by the  
2 legislature specifically with respect to Prop 63 with AB 103,  
3 where you had the legislature taking an express affirmative  
4 action to repeal a provision that was earlier in time in order  
5 to make it clear that there was not going to be a -- that both  
6 statutes were not to survive.

7           Also, too, I think the existence of the clearly reasonable  
8 exemptions that nobody can refute that are in SB 1446 regarding  
9 all those categories, the AG has never claimed, and I don't  
10 think she could claim, that these should apply.

11           THE COURT: What are you taking about?

12           MR. DIGUISEPPE: Well, for example, people who happen  
13 to find a large-capacity magazine and surrender it to the  
14 police, the museum curators, and the forensic lab techs, all  
15 those were specifically crafted as exemptions to this  
16 prohibition under SB 1446.

17           The reasonableness of those really undercuts the notion that  
18 the legislature intended to just completely get rid of them for  
19 purposes of Prop 63. Because there could be no reason not to  
20 exempt them.

21           So that is further evidence of an intent to at least have  
22 them be concurrent in so far as we can read them together or  
23 have SB 1446 be the one that applies.

24           THE COURT: Let me give Ms. Gordon a chance to respond  
25 to that. That's a good point. All these other exemptions, is

1 it your position they no longer apply?

2 MS. GORDON: Correct.

3 THE COURT: Why not?

4 MS. GORDON: Because it is the later-enacted statute  
5 that controls.

6 THE COURT: And I've already said that.

7 MS. GORDON: Correct. And even if it didn't, it  
8 wouldn't be vagueness. It would be a different problem.

9 THE COURT: Is it your interpretation that those  
10 exemptions no longer apply, curators of museums and all these  
11 people?

12 MS. GORDON: If they were not explicitly mentioned in  
13 Prop 63 --

14 THE COURT: Well, they are not.

15 MS. GORDON: -- then, no, they do not apply. Is that  
16 a good idea? I don't know. But the test isn't are those  
17 reasonable exemptions. The test is could anybody really be  
18 confused, right, as to whether they still are there. And as  
19 Your Honor has said, no.

20 And I'm not exactly certain what's being addressed by  
21 counsel in terms of pre-amendment. But I think that the cite --  
22 and I think we have had this discussion -- is to a different  
23 portion of Prop 63. Because Prop 63 did many things. And I  
24 believe the pre-amendment was for Section 1235, which is  
25 ammunition sales. So I think what that shows is if the

1 legislature wants to pre-amend something, it knows perfectly  
2 well how to do it. It did not do so here.

3 MR. DIGUISEPPE: But aside from that, under bedrock,  
4 bedrock statutory construction principles, this Court cannot  
5 construe the law to reach absurd results.

6 THE COURT: That's not absurd. If they don't want  
7 curators to have these magazines --

8 MR. DIGUISEPPE: There could be no reasonable  
9 explanation for that nor --

10 THE COURT: Maybe some curator somewhere went out and  
11 did a mass murder. I don't know.

12 MR. DIGUISEPPE: Right.

13 THE COURT: Curators can do anything. Hollywood  
14 people, they're different.

15 MR. DIGUISEPPE: Well, I would like to mention one  
16 more thing on that point just by way of how the AG replied to  
17 our opposition here.

18 Regarding those individuals we talked about before,  
19 magazines that are capable of accepting more than 10 rounds, but  
20 the firearm itself is actually calibrated or chambered --

21 THE COURT: You mentioned that, right.

22 MR. DIGUISEPPE: Well, the Attorney General came back  
23 saying, well, it doesn't really matter because the statute says  
24 the caliber is irrelevant.

25 So basically she's admitting that, in fact, this is an

1 across-the-board application so that plaintiffs like ours, and  
2 those similarly situated, if they have a firearm that is only  
3 chambered to accept ammunition of the type that can be with a  
4 lesser number of bullets, then they no longer have use of that  
5 firearm or that magazine. Simply because if they re-calibrated  
6 their firearm for another type of ammunition, that magazine  
7 could accommodate more than 10 rounds of that ammunition. She  
8 completely, I think, misunderstood our point here.

9 But the point is that -- or missed the point in basically  
10 saying that it makes no difference. That of course it's clear  
11 that person would have to surrender that or fall under NAPHS  
12 (phonetic) prohibition because it doesn't matter what caliber it  
13 could accept or what the ammunition is.

14 That really is a significant point to keep in mind about the  
15 impact of the statute, and how the state doesn't have an  
16 explanation. In fact, its own construction of the statute shows  
17 that they are not only taking it outside of what's  
18 constitutional in the vagueness context but in the Second  
19 Amendment.

20 THE COURT: All right. Anything else?

21 MS. GORDON: Just quickly, Your Honor. Our point was  
22 that that doesn't go to vagueness.

23 In terms of the Second Amendment --

24 THE COURT: He's not arguing for vagueness.

25 MS. GORDON: There is really no allegation that

1 there's so many people out there who have a firearm that can't  
2 actually accept a California compliant magazine, despite the  
3 fact that most people have had to do this since 1994, that we've  
4 effectively destroyed the right of individuals for self-defense  
5 in the home. There are many other magazines. There are many  
6 other firearms. There is nothing in the complaint that suggests  
7 otherwise.

8 Plaintiffs even go so far as to talk about the substitution.  
9 Again, at the end of day, perhaps everyone in this courtroom  
10 would have written this law differently. That's not the  
11 question. The question is whether it violates the Constitution,  
12 and this Court has already held that it does not. And nothing  
13 in this complaint changes that.

14 THE COURT: Well, my previous order does not control  
15 everything before the Court now, and there are claims in the  
16 complaint that were not before me.

17 And don't forget even on the taking claim I talked about the  
18 difference between an injunction and the difference between  
19 requiring compensation. There are different issues before the  
20 Court now that I will address in this order.

21 MS. GORDON: There absolutely are. And just to say on  
22 the takings part, we're not pressing the part about it not being  
23 available at the preliminary injunction stage. We're going with  
24 the other part of Your Honor's order that there is no cited  
25 case, basically, that it's a taking simply because the state

1 exercises its police power to eliminate something dangerous.

2 And I will be quiet now.

3 MR. LEE: Your Honor, there is one more point that I  
4 would like to bring to the Court's attention, and that is -- it  
5 has to do with the Second Amendment claim.

6 And it's a nuance that could get lost if we didn't bring  
7 this up, so I think it's prudent to talk about it. This Court  
8 found in its preliminary injunction order that Proposition 63  
9 was the version that controlled, and that SB 1446 was not on the  
10 books because of the later-chaptered version.

11 Now, if the Court adheres to that viewpoint, then when it's  
12 evaluating the Second Amendment claim, and it does so --  
13 presumably this court will apply intermediate scrutiny -- we  
14 don't think that that issue can be decided on a motion to  
15 dismiss. Because intermediate scrutiny in other contexts such  
16 as the First Amendment requires a two-part examination: whether  
17 the problem that is perceived is real or actual; and whether or  
18 not the law, the regulation will alleviate that harm in a  
19 meaningful way.

20 Now, so if the Court feels that Proposition 63 is the only  
21 version out there, then the total universe of what -- it's not  
22 even the legislature -- it's the people -- what the people  
23 intend is contained within paragraphs 11 and 12 of Proposition  
24 63 of their legislative history. Those are the only two  
25 paragraphs that pertain to large-capacity magazines whatsoever

1 in terms of any type of legislative intent.

2 So if the Court feels that Proposition 63 is the version  
3 that controls, then nothing that the state says about our  
4 legislature considered this, our legislature considered that,  
5 none of that is really relevant. The only relevant portions  
6 that the Court has to evaluate in trying to set up an  
7 examination of the perceived harm and applying the remedy is  
8 contained within those two paragraphs of Proposition 63. So I  
9 think that it's prudent for us to recognize that as we go  
10 forward.

11 THE COURT: Well, that's a good point. But would that  
12 apply to every initiative that we could only look to the face of  
13 the initiative to determine the constitutionality of it?

14 MR. LEE: Well, in this case, the initiative had an  
15 express number of paragraphs that sets forth its legislative  
16 findings, for lack of a better word -- it's not a legislature,  
17 but Your Honor understands the point -- and it sets forth 14  
18 paragraphs of findings. And this is Exhibit E to our request  
19 for judicial notice in which we set forth the entirety of  
20 Proposition 63.

21 And of those 14 paragraphs of legislative intent, or  
22 propositional intent, only paragraphs 11 and 12 constitute the  
23 whole universe of why they are seeking to justify a retroactive  
24 prohibition on the possession of large-capacity magazines.

25 So I think that to the extent that the Court may be tempted



1 to delve deeply into the state's reasoning and analysis, really  
2 it comes down to this, paragraphs 11 and 12.

3 If the Court finds that Proposition 63 is the only game in  
4 town, is the only thing that matters at this point, then I think  
5 that we're limited to these two findings, and I think that the  
6 rest of the case should proceed in accordance with following  
7 what Your Honor will direct us to do simply as to whether or not  
8 there is a remedy to those two issues.

9 THE COURT: Well, then I will hear from Ms. Gordon on  
10 this point, then. Because if the Court is going to apply  
11 intermediate scrutiny, as I had previously indicated, I have to  
12 determine the government's stated objective and whether it's  
13 significant, substantial or important.

14 MS. GORDON: And this Court has done so.

15 THE COURT: Yes. But his point is, I can only look to  
16 the language of the initiative itself because it supersedes the  
17 legislative enactment.

18 MS. GORDON: There is no case law suggesting that a  
19 court is limited to only what is written in the enactment that  
20 controls. And, in fact, quite the contrary. So it's the Turner  
21 cases, for example, before the Supreme Court where law is being  
22 considered under the First Amendment. It's sent back, actually,  
23 because there is not enough evidence in the record, and the  
24 court wants more studies, and they are told to flesh out their  
25 record, and then the Supreme Court considers all of that. So

1 this Court is absolutely not limited.

2 THE COURT: But what am I supposed to consider besides  
3 the initiative? The initiative came from a vote of the  
4 populous.

5 MS. GORDON: Correct.

6 THE COURT: It didn't come from the legislature. So  
7 of what value is anything that the legislature considered?

8 MS. GORDON: I think that it's actually a tremendous  
9 value because I think they are done at around the same time, and  
10 the Court is allowed to look at the --

11 THE COURT: I don't know. That's his point.

12 MS. GORDON: I understand. But his point doesn't have  
13 legal support, and if I could just point the Court to a few  
14 places.

15 THE COURT: This might be answered, and I don't want  
16 to have to do the research myself if you've got it. We've had  
17 umpteen propositions in the State of California.

18 MS. GORDON: Yes.

19 THE COURT: We've had almost umpteen challenges to  
20 those propositions.

21 Where do the courts look if they apply intermediate scrutiny  
22 in order to determine the government's stated objective?

23 MS. GORDON: The stated objective?

24 THE COURT: Yes. Because that's intermediate  
25 scrutiny. We look to the government's stated objective, and we

1 see whether the act is a reasonable fit. That's intermediate  
2 scrutiny.

3 MS. GORDON: Correct.

4 THE COURT: So where do we look to determine the  
5 government's stated objective? There may be some case law on  
6 this.

7 MS. GORDON: Perhaps stated objective. I actually  
8 understood the discussion to be more about what can the Court  
9 look at in figuring out whether or not this substantially  
10 advances the government's stated objective.

11 THE COURT: Both.

12 MS. GORDON: Both.

13 So to point the Court to a few places. I think the stated  
14 objectives are still, even if one looks at Prop 63, but I think  
15 you can also rely upon the stated objections that the government  
16 has come in and put forth to Your Honor. Your Honor can  
17 certainly take judicial notice of the record in this case. Your  
18 Honor can take judicial notice, of course, of Your Honor's  
19 previous findings.

20 THE COURT: I can. But I just want to make sure that  
21 there is justification to do that. He has made a point here.

22 MS. GORDON: Let me be a little more helpful.

23 THE COURT: How do I know that the voters even knew  
24 about what went on in the legislature when they voted for this  
25 proposition?

1 MS. GORDON: Well, the voters may or may not have.  
2 The legislature certainly knew what was going on with Prop 63,  
3 and the legislation followed.

4 THE COURT: The other thing you may look to is the  
5 drafters of Prop 63.

6 MS. GORDON: Correct.

7 THE COURT: What was their intent?

8 MS. GORDON: That is correct.

9 THE COURT: Where can we look to get that?

10 MS. GORDON: Well, I think, again, even if you just  
11 looked at those two paragraphs, the stated intent is there. But  
12 the question, too, is, is the Court able on intermediate  
13 scrutiny and on the pleading stage to figure out whether or not  
14 there is a sufficient or reasonable fit between the stated  
15 objectives. And there are a few cases that we've cited that  
16 speak to that.

17 So the *Fyock versus Sunnyvale* case at page 1,000 says, well,  
18 when reviewing under intermediate scrutiny, a court can -- I  
19 don't think this is exhaustive but here is the beginning --  
20 consider legislative history, studies in the record or cited in  
21 pertinent case law.

22 So the Court is also able to look at other cases that have  
23 decided the issue of large-capacity magazines and use sort of  
24 the findings there to figure out whether or not there is a  
25 reasonable fit.

1 In the cases that we've cited, Mahoney, Wilson and Garcia,  
2 you see exactly what the court is relying on, and I think it's  
3 in Wilson they are relying, for example --

4 THE COURT: None of those were initiatives, though.  
5 They were all ordinances.

6 MS. GORDON: True. But I'm not sure why initiatives  
7 should be different than a law when you're looking at the  
8 purposes that something is trying --

9 THE COURT: They're different. And here is how they  
10 are different. Start at the bottom.

11 MS. GORDON: Okay.

12 THE COURT: A city ordinance.

13 MS. GORDON: Right.

14 THE COURT: You've got the discussions of the city  
15 council. You can look at what they discussed. You've got the  
16 individuals who appeared before the council and expressed their  
17 views that were taken into account by the council in enacting  
18 the ordinance. Take it up to the county board of supervisors.  
19 Same thing. Take it to the legislature. There's all kinds of  
20 legislative history that you're allowed to assume was taken into  
21 account by the legislature.

22 But when you get to an initiative, it's just a mass of  
23 people, each one with their own individual points of view, each  
24 one with their own purposes. There is no stated objective  
25 anywhere.

1 MS. GORDON: Well, I think there are stated the  
2 objectives even in 11 and 12. They're talking about the use of  
3 large-capacity magazines in mass shooting and talking about the  
4 loophole. And then the people vote on it.

5 THE COURT: If that's your answer --

6 MS. GORDON: As well as I would say in addition to --  
7 I don't think the Court is limited to that -- but if the Court  
8 were, it's right there. And then there's also sort of the  
9 ballot initiative materials that go out where there is also a  
10 description of why we're doing this. The Court can certainly  
11 take from there.

12 THE COURT: Is that before the Court?

13 MS. GORDON: It is.

14 THE COURT: I can look to that then.

15 MS. GORDON: There's been no objections made to  
16 requests for judicial notice. It's up to Your Honor. But these  
17 are all judicially noticed.

18 THE COURT: That helps.

19 MS. GORDON: So for the stated interest, the Court can  
20 look there. In terms of the reasonable fit, the Court can look  
21 many places.

22 THE COURT: That helps. Because he raised the  
23 question. I needed to know your position. I have it now. Are  
24 we finished?

25 MR. LEE: I believe so, Your Honor.

1 THE COURT: Thank you. I put this on at the end  
2 because the arguments in this case are always very productive,  
3 and they always help me. Those other things that you heard  
4 earlier may or may not assist the Court, but I was helped by the  
5 arguments. Thank you.

6 MR. LEE: Thank you, Your Honor.

7 MS. GORDON: Thank you, Your Honor.

8 MR. DIGUISEPPE: Thank you for your time, Your Honor.

9 (Court adjourned. 3:32 p.m.)

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11

CERTIFICATION

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13 I, Diane J. Shepard, certify that the foregoing is a correct  
14 transcript from the record of proceedings in the above-entitled  
15 matter.

16

/s/ DIANE J. SHEPARD  
DIANE J. SHEPARD, CSR #6331, RPR  
Official Court Reporter  
United States District Court

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