

**ORIGINAL**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE  
ROGER T. BENITEZ, DISTRICT JUDGE PRESIDING

---

VIRGINIA DUNCAN, et al.,                     ) Case No: 3:17-cv-01017-BEN-JLB  
   )  
Plaintiffs,                                     ) Motion Hearings  
   ) Department 5A  
   )  
   ) Date: 12/12/2022  
   )  
ROB BONTA, in his official                     )  
capacity as attorney general                     )  
of the State of California                     )  
   )  
Defendants.                                     )  
   )

---

KIM RHODE, et al.,                     ) Case No: 3:18-cv-00802-BEN-JLB  
   )  
Plaintiffs,                                     )  
   )  
v.   )  
   )  
ROB BONTA, in his official                     )  
capacity as attorney general                     )  
of the State of California,                     )  
   )  
Defendants.                                     )  
   )

---

JAMES MILLER, et al.,                     ) Case No: 3:19-cv-01537-BEN-JLB  
   )  
Plaintiffs,                                     )  
   )  
v.   )  
   )  
CALIFORNIA ATTORNEY GENERAL                     )  
ROB BONTA, et al.,                     )  
   )  
Defendants.                                     )  
   )

---

--- caption continued on the following page ---

1  
2 RUSSELL FOUTS, et al., ) Case No: 3:19-cv-01662-BEN-JBL  
3 Plaintiffs, )  
4 v. )  
5 ROB BONTA, in his official )  
6 capacity as attorney general )  
7 of the State of California. )  
Defendants. )

8  
9 **REPORTER'S TRANSCRIPT OF PROCEEDINGS**

10 Pages 1 through 51

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21 **--- appearances continued on the following page ---**

22  
23 REPORTED BY: Abigail R. Torres, CSR, RPR/RMR, FCRR  
24 CSR No. 13700  
25 United States District Court  
Southern District of California  
333 West Broadway, Suite 420  
San Diego, California 92101

1 APPEARANCES:

2 For the Plaintiffs: MICHEL & ASSOCIATES, PC  
 3 Duncan, et al. 180 East Ocean Boulevard, Suite 200  
 Long Beach, California 90802  
 4 By: ANNA M. BARVIR, ESQ.  
 By: SEAN A. BRADY, ESQ.  
 5 By: KONSTADINOS T. MOROS, ESQ.

6 For the Defendants: DEPARTMENT OF JUSTICE  
 7 Becerra, et al. OFFICE OF ATTORNEY GENERAL  
 GOVERNMENT LAW SECTION  
 300 South Spring Street, Suite 9012  
 8 Los Angeles, California 90013  
 By: KEVIN J. KELLY, ESQ.

9 -oOo-  
 DEPARTMENT OF JUSTICE  
 10 OFFICE OF ATTORNEY GENERAL  
 GOVERNMENT LAW SECTION  
 300 South Spring Street, Suite 1702  
 11 Los Angeles, California 90013  
 12 By: MARK R. BECKINGTON, ESQ.

13 APPEARANCES:

14 For the Plaintiffs: MICHEL & ASSOCIATES, PC  
 15 Rhode, et al. 180 East Ocean Boulevard, Suite 200  
 Long Beach, California 90802  
 16 By: ANNA M. BARVIR, ESQ.  
 By: SEAN A. BRADY, ESQ.  
 17 By: KONSTADINOS T. MOROS, ESQ.

18 For the Defendants: DEPARTMENT OF JUSTICE  
 19 Becerra, et al. OFFICE OF ATTORNEY GENERAL  
 GOVERNMENT LAW SECTION  
 1300 I Street, Suite 125  
 Sacramento, California 95814  
 20 By: ANTHONY P. O'BRIEN, ESQ.

21 -oOo-  
 DEPARTMENT OF JUSTICE  
 22 OFFICE OF ATTORNEY GENERAL  
 GOVERNMENT LAW SECTION  
 300 South Spring Street, Suite 1702  
 23 Los Angeles, California 90013  
 24 By: MARK R. BECKINGTON, ESQ.

25 --- appearances continued on the following page ---

1 APPEARANCES:

2 For the Plaintiffs: DILLON LAW GROUP, APC  
 3 Miller, et al., 2647 Gateway Road, Suite 105, No. 255  
 4 Carlsbad, California 92009  
 By: JOHN W. DILLON, ESQ.

5 For the Defendants: DEPARTMENT OF JUSTICE  
 6 Becerra, et al., OFFICE OF ATTORNEY GENERAL  
 7 GOVERNMENT LAW SECTION  
 300 South Spring Street, Suite 9012  
 Los Angeles, California 90013  
 By: KEVIN J. KELLY, ESQ.

-oOo-

8 DEPARTMENT OF JUSTICE  
 9 OFFICE OF ATTORNEY GENERAL  
 GOVERNMENT LAW SECTION  
 300 South Spring Street, Suite 1702  
 Los Angeles, California 90013  
 By: MARK R. BECKINGTON, ESQ.

11 APPEARANCES:

12 For the Plaintiffs: LAW OFFICE OF ALAN BECK  
 13 Fouts, et al., 2692 Harcourt Drive  
 14 San Diego, California 92123  
 By: ALAN A. BECK, ESQ.

-oOo-

15 STAMBOULIEH LAW, PLLC  
 PO Box 428  
 16 Olive Branch, Mississippi 38654  
 By: STEPHEN D. STAMBOULIEH, ESQ.

17 For the Defendants: DEPARTMENT OF JUSTICE  
 18 Becerra, et al. OFFICE OF ATTORNEY GENERAL  
 GOVERNMENT LAW SECTION  
 19 1300 I Street, Suite 125  
 Sacramento, California 95814  
 20 By: ANTHONY P. O'BRIEN, ESQ.

-oOo-

21 DEPARTMENT OF JUSTICE  
 22 OFFICE OF ATTORNEY GENERAL  
 GOVERNMENT LAW SECTION  
 300 South Spring Street, Suite 1702  
 23 Los Angeles, California 90013  
 By: MARK R. BECKINGTON, ESQ.

24

25

SAN DIEGO, CALIFORNIA; MONDAY, DECEMBER 12, 2022; 10:38 A.M.

-oOo-

THE COURT: Good morning.

THE CLERK: Calling 1, 2, 3, and 4 on calendar.

One, 17-cv-1017, *Duncan, et al., v. Becerra, et al.*

Two, 18-cv-0802, *Rhode, et al., v. Becerra, et al.*

Three, 19-cv-1537, *Miller, et al., v. Becerra, et al.*

Four, 19-cv-1662, *Fouts, et al., v. Becerra, et al.*

All set for status conference.

THE COURT: All right, Counsel. Thank you for being here this morning. Let's start with the Plaintiff.

If you would please identify yourself. Please speak slowly, clearly, so that my court reporter can take down your names and so that I can, hopefully, do justice to them. Okay?

MS. BARVIR: Thank you, Your Honor.

Anna Barvir, B-a-r-v-i-r, for Plaintiff Virginia Duncan, et al.

THE COURT: All right.

MR. BRADY: Good morning, Your Honor.

Sean Brady, S-e-a-n, B-r-a-d-y, on behalf of the Plaintiffs.

MR. MOROS: Good morning, Your Honor.

Konstadinos Moros on behalf of the Plaintiffs. That's K-o-n-s-t-a-d-i-n-o-s. And last name is Moros, M-o-r-o-s.

THE COURT: Okay. And for the State?

1 MR. O'BRIEN: Good morning, Your Honor.

2 Deputy Attorney General Anthony O'Brien,  
3 A-n-t-h-o-n-y; O, apostrophe, B-r-i-e-n, on behalf of the  
4 Attorney General and the Fouts and Rhode matter.

5 THE COURT: Okay.

6 MR. KELLY: Your Honor, excuse me. I'm also  
7 appearing -- I'm appearing on behalf of the State and the  
8 Attorney General in the Duncan and Miller matters.

9 My name is Kevin Kelly. K-e-v-i-n. Kelly, K-e-l-l-y.  
10 Deputy Attorney General. Thank you.

11 THE COURT: I'm sorry. You're on Duncan and Miller?

12 MR. KELLY: Correct, Your Honor.

13 THE COURT: Okay. Boy, I hope I can keep all this  
14 straight. Okay.

15 MR. BECKINGTON: Good morning, Your Honor.

16 Mark Beckington, B-e-c-k-i-n-g-t-o-n. I'm joining  
17 Mr. O'Brien and Mr. Kelly on all four cases.

18 THE COURT: I'm sorry?

19 MR. BECKINGTON: I'm joining Mr. Kelly and Mr. O'Brien  
20 on all four of the cases.

21 THE COURT: On all four. I remember you from the  
22 Miller case.

23 MR. BECKINGTON: Yes, Your Honor.

24 THE COURT: Yeah. Okay. Great.

25 All right. All right. Let's see Plaintiff in the

1 Rhode case.

2 MR. BRADY: Your Honor, Sean Brady on behalf of the  
3 Plaintiffs on Rhode.

4 MS. BARVIR: Anna Barvir on behalf of the Plaintiffs  
5 and Rhode as well.

6 THE COURT: All right. And on the Fouts matter?

7 MR. STAMBOULIEH: Steven Stamboulieh,  
8 S-t-a-m-b-o-u-l-i-e-h, for Plaintiff Fouts.

9 THE COURT: I'm sorry. Just a second.

10 Can you repeat your last name again for me, please?

11 MR. STAMBOULIEH: Stamboulieh, S-t-a-m-b-o-u-l-i-e-h.

12 MR. BECK: Alan Beck on behalf of the Plaintiffs.

13 A-l-a-n. Last name B-e-c-k, sir.

14 THE COURT: Okay. Have I missed anyone?

15 MR. DILLON: Your Honor, this is John Dillon appearing  
16 on behalf of the Plaintiffs for the Millers and --

17 THE COURT: I'm sorry. For Miller?

18 MR. DILLON: Yes.

19 THE COURT: And?

20 MR. DILLON: John Dillon.

21 THE COURT: Just on the Miller case?

22 MR. DILLON: Yeah, just for Miller.

23 THE COURT: All right. Have I missed anyone?

24 Okay. Well, thank you so much for being here this  
25 morning. The reason why I called the status conference -- and

1 I called all these cases at the same time -- is because, you  
2 know, a great deal of my life over the last few years has been  
3 devoted to dealing with these Second Amendment cases.

4 As you probably know, I have four of these cases and  
5 recently inherited the fee-shifting case from two other judges.  
6 And I've spent an awful lot of time, an awful lot of time, and  
7 read an awful lot of material and heard testimony on some of  
8 these -- at least one of these cases, anyway.

9 And so I thought that, given the fact that these cases  
10 have been returned to me following the Bruen opinion, that I  
11 didn't want to duplicate effort. First of all, my time, as I'm  
12 sure your time, my law clerk's time is valuable.

13 And so I thought that perhaps there was some way that  
14 we could approach a joint methodology for dealing with all of  
15 these cases, essentially, at one time and in one -- in one way.  
16 So my understanding of -- of Heller, is that Heller has not  
17 changed. It has not been overruled. It is still good law.

18 Bruen, the Bruen opinion, I believe, discarded the  
19 intermediate scrutiny test that I also thought was not very  
20 useful; and has, instead, replaced it with a text history and  
21 tradition test. Now, the text history and tradition issue is  
22 pretty much common, I think, to all of these cases.

23 There may be some nuance as to whether, for example,  
24 in some case the -- the history and tradition may effect  
25 ammunition. In another case, it may effect the type of weapon,



1 for example, whether it's a rifle or a dirk or a dagger. But  
2 in the end, it's the same. We're basically looking at the same  
3 body of history and tradition that we're going to be looking at  
4 in all of the cases.

5 So I have an idea of how this case ought to go  
6 forward, and I'll tell you what I would like to have -- by the  
7 way, I might add, I'm not sure, Mr. O'Brien, whether you filed  
8 the supplemental brief in the Fouts case. I'm not sure who  
9 filed that.

10 MR. O'BRIEN: Yes, Your Honor, I did.

11 THE COURT: All right. Well, let me compliment you on  
12 that, because one of the things that I thought you did that I  
13 really appreciated was you filed several declarations. One of  
14 those declarations did a historical analysis of several rules,  
15 laws, regulations, and so on and so forth, all of which I have  
16 read, I might add. So --

17 You can sit down.

18 -- I found that to be very, very helpful.

19 But I would like to ask you folks to do something a  
20 little bit different; very similar. But I don't have the  
21 staff. I don't have, really, the resources to do this, at  
22 least not to do it in a timely fashion.

23 So I thought that I would ask you to do something for  
24 me, which is to, essentially, do a similar survey as,  
25 Mr. O'Brien, you did in the -- in the Fouts case.

1           And I would like that survey, if you would. I mean,  
2 I'm sure you all have access to Excel spreadsheets and so on.  
3 But I'd like to see a survey that does the following for me:  
4 First of all, on a chronological bases, starting with date, the  
5 date of any law, regulation, ordinance, restriction. And I'm  
6 going to refer to those from now on as "restrictions." Okay.  
7 Generically, okay, restriction or regulation. Okay.

8           So if you could start out chronologically, if you  
9 would give me the date, and then if you would tell me what was  
10 it that was restricted. So, for example, in many of those  
11 regulations, they regulate dirks, daggers, metal knuckles. In  
12 some cases, it might be storage of gunpowder or cartridges.  
13 Some of them, some of these, are "use" regulations. In other  
14 words, you cannot use these while committing a crime. You  
15 cannot use them while breaking and entering into somebody's  
16 property. You cannot display them in anger.

17           So what is it exactly that the law or the regulation  
18 restricted? What type of weapon? What was the weapon that was  
19 being restricted? Was it a knife? a Bowie knife? a stiletto?  
20 metal knuckles? pistols? rifles? Then I would like to know  
21 whether or not that statute was repealed and, if it was  
22 repealed, what was repealed by, and was it replaced by  
23 something else? And if so, if you would do the same analysis?  
24 Again, continuing a chronological order. Right?

25           And then, finally, whether or not that regulation or

1 restriction was reviewed by court or courts? And if so, what  
2 was the -- what was the outcome? For example, was it found to  
3 be unconstitutional, or was it found to be constitutional? And  
4 if you'll give me a citation so that I can then go and look at  
5 the cases and see what the cases say.

6 I think -- so to pose an example, I think there are  
7 one or two regulations that I have found that restricted --  
8 specifically restricted billies. Okay. So in the Fouts case, I  
9 think that would be particularly relevant. I think I found one  
10 or two that restricted rifles and shotguns. I think I found  
11 one or two that restrict certain ammunition, cartridges.  
12 Right. I think I found one that restricts a weapon that can  
13 fire more than 16 or 18 rounds. And I found one that dealt  
14 with machine guns and automatic rifles.

15 You see, that's the sort of thing that I've read  
16 through that I've captured, but I can't really capture it in a  
17 way that I think that the Supreme Court would like us to do it,  
18 which is a chronological order, so that we can determine what  
19 regulations, what tradition exists with regards to restrictions  
20 at the adoption of the Second Amendment; and then I think,  
21 secondarily, at the time that the Fourteenth Amendment was  
22 adopted.

23 I think with that body of information, I think this  
24 Court would be in a much better position to make a decision as  
25 to what to do in each one of these cases.

1           So the cases have been sent back to me, given the  
2 Bruen opinion, and I'm now going to attempt to deal with them,  
3 but I don't want to have to deal and read the same stuff over  
4 and over and over again, because I've already read some of it  
5 twice. And, frankly, there's a lot of material there. I don't  
6 know how many boxes of five-inch binders I have, but it's a  
7 lot, and I have only so much time.

8           So I would suggest both sides, if you can, please do  
9 that for me. Okay. And I think that would be very helpful.

10           Now, as far as actually setting a hearing to -- to  
11 hear your arguments on these, I don't think there's any use in  
12 taking any evidence, meaning testimony, from anyone in any of  
13 these cases.

14           I mean, the history and tradition is what it is. I  
15 don't need, you know, Mr. Spitzer or Mr. Cornell to tell me  
16 what his view of the history and tradition is. I see no point  
17 in that; nor do I think any additional discovery is necessary  
18 or additional expert work is necessary. So, anyway, that's  
19 my -- that's my initial thought on this case.

20           If anyone has any suggestions on how we can go about  
21 proceeding with these cases, I would love to hear your views.  
22 I may not adopt your suggestion, but I'll certainly consider  
23 it. So if -- if anybody wants to address what I have said, or  
24 anything else on how we proceed with these cases, please feel  
25 free to speak up.

1           Maybe we'll start with Duncan, since it was the first  
2 case that I dealt with.

3           So do you have anything you want to add?

4           MS. BARVIR: Should I move here?

5           THE COURT: Yeah. Whatever. If you feel comfortable  
6 there at the table, that's fine.

7           MS. BARVIR: Again, Anna Barvir for Plaintiff Virginia  
8 Duncan.

9           Thank you, Your Honor, for your thoughtful  
10 consideration of all four matters. I'm sorry. I'm -- we've  
11 heard what -- that Your Honor is asking for from each party. I  
12 think that makes a lot of sense, though I do want to, I think,  
13 perhaps, focus the Court a little bit on what Plaintiffs' view  
14 as the kind of proper way of reviewing this case. And in our  
15 position, it doesn't really rely on -- it actually shouldn't  
16 rely, and it might be improper to rely on the sorts of -- even  
17 the laws that Your Honor is referencing in this survey and/or  
18 spreadsheet that we were talking about just now.

19           It is our position that Heller already tells -- Your  
20 Honor, tells all of us how to analyze this. The -- this is an  
21 arms banned possession case. So the Heller court then, backed  
22 up by the decision in Bruen, already handled that entire  
23 analysis. The analysis starts with --

24           THE COURT: But if that were so, why would the Ninth  
25 Circuit have kicked it back to me? I mean, I agree with you in

1 concept, but, you know, the Ninth Circuit kicked it back to me,  
2 so...

3 MS. BARVIR: Excuse me. I think that's a good  
4 question, and perhaps that's why Your Honor is, I think,  
5 intelligent, smart to ask the parties to do what we're doing.  
6 But I think that -- excuse me -- the Ninth Circuit also has a  
7 lot of these -- had a lot of these cases before it. And,  
8 obviously, all of the pro Second Amendment cases had gone up to  
9 en banc, and perhaps the Court wasn't willing to handle those  
10 at that point.

11 I'm not trying to cast aspersions, but I think we can  
12 all kind of agree that we've seen a lot of decisions that are  
13 not upholding lower-court decisions that strike California  
14 state laws, gun control laws, just overturned.

15 So perhaps they'd like to see that Your Honor do some  
16 more work on this case, but I don't think it requires --

17 THE COURT: Would you like some water?

18 MS. BARVIR: Yes.

19 I don't think that that requires us to do a new  
20 analysis of all the history that's out there. The Heller court  
21 was very -- had done a very detailed deep dive into all of the  
22 historical laws that are banning possession of arms and other  
23 types of gun control laws since the Founding and before.

24 And it found that the test is if it's -- excuse me --  
25 that the only time the State can lawfully ban a firearm or

1 other type of arm that is protected by the Second Amendment is  
2 if it's dangerous and unusual. The flip side being, typically  
3 possessed by law-abiding citizens for lawful purposes or  
4 other -- we've also heard it called the "common use" test. And  
5 so that test came out of the Court's analysis of the history  
6 and tradition.

7           So if the Court -- so the question that really is  
8 posed -- that Duncan poses this Court today, is whether or not  
9 magazines, and maybe more specifically magazines capable of  
10 holding more than ten rounds, are protected arms, bearable  
11 arms, under the Second Amendment's text.

12           And then, secondly, if there -- excuse me --  
13 otherwise, if there's a longstanding tradition, meaning are  
14 they dangerous and unusual. And this Court has already found  
15 that -- I mean, we have a really large record showing that  
16 they're not dangerous and unusual. And several courts have  
17 agreed with that finding both in the Ninth Circuit and other  
18 circuits have found it or they have been willing to accept it.  
19 And I don't think that Heller or -- I mean, I'm sorry -- I do  
20 not think Bruen changed that outcome.

21           So that's what we would like Your Honor to consider  
22 and to look at and perhaps think about when we are doing this  
23 search for more historical restrictions.

24           THE COURT: Let me ask you a question that I think has  
25 troubled me somewhat. So I think facts matter. And in

1 certain -- and in cases -- every case, there are parties that  
2 have greater access to evidence than others. Right. And at  
3 least in California, we have a presumption, for example, that  
4 when a party has the largest body of evidence but fails to  
5 present it, there's a presumption that if the evidence were to  
6 be considered by the Court, that the presumption would be that  
7 the party who has a greater body of evidence, that it would be  
8 held against him.

9 Now, one of the things that I'm concerned about, for  
10 example, is I just read someone said, "There's no evidence that  
11 a homeowner has ever fired more than ten rounds in defense."  
12 And I kind of think that that's -- I mean, I think probably the  
13 best evidence of that would be the State. The State would have  
14 the investigative reports, police reports, and so on, to  
15 explain that.

16 But I wonder if you agree with that statement, that  
17 there are no cases where a homeowner or a business owner has  
18 ever fired more than ten rounds in defense. And if so, and if  
19 that's the case, have you provided the Court with any  
20 information to support that?

21 MS. BARVIR: I don't -- I don't, standing here, know  
22 that that's true. I think that part of that is -- it's a kind  
23 of a false thing to do when you're limited to that number,  
24 anyway, but also --

25 THE COURT: I understand you. I understand -- I hear



1 you. I hear you. But I -- particularly in the Miller case, I  
2 took issue with Ms. Alan's -- Ms. Alan's analysis. And then I  
3 think I read something recently -- I can't recall which court  
4 it was -- but somebody said, "Oh, there's no evidence that a  
5 homeowner has fired more than ten rounds."

6 And defense -- and of course all that anyone has to do  
7 is go on the Internet and do a cursory search and find out that  
8 that's not true.

9 MS. BARVIR: Right.

10 THE COURT: And I wonder if you've done that.

11 MS. BARVIR: I think when we were here on MSJ -- and  
12 that's why we had this conversation several years ago.

13 THE COURT: You know, I'm sorry. But as I said, I  
14 have four of these, and if I get you all confused with one  
15 another, please forgive me. You know, I'm not as young as I  
16 used to be, so...

17 MS. BARVIR: None of us are.

18 When we were here on MSJ, I think we had this  
19 conversation as well. And a lot of times that was coming  
20 from -- you know, from Plaintiffs' side was coming from, I  
21 guess you could say, anecdotal news stories. Because we don't  
22 -- we aren't the State. We don't have access to those same  
23 sorts of records.

24 I don't think that it's true that that's never  
25 happened. That there's no evidence that it's ever happened.

1 But, again, even if it never happened, which I find  
2 extraordinarily hard to believe -- the police do it all the  
3 time -- it's not a relevant matter because the test --

4 THE COURT: Yeah, I know.

5 MS. BARVIR: -- for common use is typically  
6 possession.

7 THE COURT: I heard you. I know that. But I was just  
8 wondering if you agreed with that statement that there's no  
9 evidence that the homeowner has ever fired more than ten  
10 rounds, and just wanted to pick your brain on that.

11 Okay. I distracted you.

12 MS. BARVIR: That's okay. I have nothing more to add.

13 THE COURT: Okay. Great.

14 MS. BARVIR: So thank you for your time.

15 THE COURT: Sometimes -- sometimes less is more.

16 Okay.

17 Anyone else? No one else? Gee, I'm so glad.

18 MR. KELLY: Your Honor, could I be heard?

19 THE COURT: No. Sorry. I've heard all I need to  
20 hear.

21 No. Go ahead.

22 MR. KELLY: So the State would like to renew its  
23 request for an addition discovery period, not a lengthy  
24 discovery period in this action. Just a three-month is all we  
25 would ask for.

1 THE COURT: Tell me why.

2 MR. KELLY: Sorry, Your Honor?

3 THE COURT: Tell me why.

4 MR. KELLY: There's two reasons: First of all, this  
5 is a brand-new area of law, and it's a brand new area of  
6 historical analysis. And a three-month period would give our  
7 experts more time to actually look into this. I think we  
8 submitted a declaration from Professor Schrag, who details the  
9 types of work that is required of historians when they approach  
10 an issue like this.

11 And, also, Professor Cornell in his declaration also  
12 said that, "This work is still ongoing, and we did our level  
13 best" --

14 THE COURT: What happens in three months when the work  
15 stops? What's the -- what's the miracle? Was the miracle  
16 pertinent? Drops down in three months and work stops?

17 MR. KELLY: Well, Your Honor, obviously, I can't  
18 represent that new evidence will be found, but that's also  
19 because I don't know what I don't know, at this point, and  
20 neither do our experts.

21 So we would, again, renew our request for an  
22 additional discovery period followed by supplemental briefing.

23 And -- excuse me -- I had another point to make on  
24 that.

25 THE COURT: Okay. Go ahead.

1           MR. KELLY: So we would also want an opportunity for  
2 our experts to examine the evidence, the new evidence that the  
3 plaintiffs included in their response to our supplemental  
4 briefing. And that would also give our experts a chance to do  
5 so, and then --

6           THE COURT: So give me an example.

7           MR. KELLY: So I will give -- one moment, Your Honor.

8           So the Plaintiffs brought or included a declaration  
9 from Ashley Hlebinsky, who claimed that "repeating rifles were  
10 not commonly owned in the nineteenth century," presumably in  
11 response to our declaration from Professor Vorenberg.

12          THE COURT: I'm sorry. They said "they were not"?

13          MR. KELLY: They were not commonly owned in the  
14 nineteenth century.

15          THE COURT: She says they were not.

16          MR. DILLON: No.

17          THE COURT: No. I think you're wrong. I think you're  
18 opposite. I think she says --

19          MR. KELLY: Opposing counsel will correct me if I'm  
20 wrong.

21          THE COURT: Yeah, I think you're wrong. I think she  
22 said the opposite.

23          MR. DILLON: I don't believe that's the case that she  
24 said they were not.

25               (Court reporter interruption.)

1           MR. DILLON: John Dillon on behalf of the Miller  
2 defendants.

3           THE COURT: Yeah. So she said they were commonly  
4 owned.

5           MR. DILLON: Yeah.

6           THE COURT: So the Model 94 Winchester --

7           MR. DILLON: She was rebutting Dr. Saul Cornell's  
8 statement that these guns were, in fact, not common. That's  
9 what his testimony was, Your Honor.

10          THE COURT: All you got to do, if you look at  
11 Professor Cornell's declarations and you look at the website  
12 that he refers to -- to Winchester -- to the Winchester  
13 company, if you look at that website, you see that, in fact,  
14 they were commonly owned.

15          So, I mean, what are you going to do? You going to --

16          MR. KELLY: Your Honor, if --

17          THE COURT: How are you going to -- I mean, if you  
18 look at Mr. Vorenberg's declaration, and you look at -- for  
19 example, as I sit here right now, I can recall one instance  
20 that he talks about where two miners were mining for borax.

21          Do you recall the incidents?

22          MR. KELLY: Sorry. Do I recall the incidents, Your  
23 Honor?

24          THE COURT: Yeah.

25          MR. KELLY: I do not, no.

1           THE COURT: Okay. So two miners were mining for  
2 borax. And I can't recall whether it was Montana or Wyoming or  
3 Nebraska, or whatever. These are just two miners, two common  
4 folks that were miners for miners -- I mean, mining for borax,  
5 and they're attacked by a band of 40 Indians. And these two  
6 miners happen to have Henry rifles, and they were able to  
7 defeat the 40 Indians that were attacking them.

8           So the point -- the point was, if you look at Mr. --  
9 Professor Cornell's -- if you look at Professor Vorenberg's  
10 materials, which I have looked at, you see that the statement  
11 that they were not commonly owned is just not true.

12           For example, there's a statement in there about how  
13 after the Civil War many of the -- of the soldiers, when they  
14 were released from duty, were, in fact, allowed to buy the  
15 repeating rifles and took the repeating rifles home.

16           And you can do the statistical analysis, by the way,  
17 which I sat down and did because maybe I have too much time on  
18 my hands. But there was an awful lot of those weapons that  
19 wound up in civilian hands.

20           So, I mean, the evidence is there. You can call, I  
21 suppose, this person for a deposition and take her deposition.  
22 But I don't think, no matter what she says, it's not going to  
23 contradict her own experts' declarations and the materials that  
24 they themselves refer to.

25           You follow what I'm saying? Okay.

1           MR. KELLY: Your Honor, I do have another example of  
2 something we would want to explore and --

3           THE COURT: Okay. Give me one more.

4           MR. KELLY: So the Plaintiffs also include a  
5 declaration from Clayton Cramer --

6           THE COURT: Okay.

7           MR. KELLY: -- presumably in response to Professor  
8 Roth's position that mass murder was not a new phenomenon or --  
9 excuse me -- mass murder, yes, correct, is a new phenomenon at  
10 this point. And we would want -- to my knowledge, Mr. Cramer  
11 was not disclosed as an expert, was not deposed in any prior  
12 proceeding in Duncan.

13           And we would first want an opportunity for Professor  
14 Roth to examine the new evidence that the Plaintiffs have  
15 brought, as well as potentially depose Mr. Cramer on that  
16 issue.

17           THE COURT: Well, before I get to that issue, let me  
18 point out something, Mr. Kelly. I don't know how long you've  
19 been in this case. But you said something about -- going back  
20 to the reason why you needed three months; that you needed --  
21 that this was a new area and so on and so forth.

22           Did I get you right?

23           MR. KELLY: That's correct, Your Honor.

24           THE COURT: Yeah. How long you have been in this  
25 case, Mr. Kelly?

1 MR. KELLY: Several weeks, Your Honor.

2 THE COURT: It's not fair to dump you into a case like  
3 this. Mr. -- Professor Cornell has gone on record and stated  
4 -- in 2017, Professor Cornell stated that he had been  
5 researching and writing on the history and tradition of Second  
6 Amendment regulations for two decades. That's 20 years,  
7 20 years before 2017. We're now in 2023. Add five years to  
8 that; that's 25 years. That's a quarter of a century that  
9 Professor Cornell has been writing, researching on the history  
10 of and tradition of the Second Amendment.

11 And I've read an awful lot of that material.  
12 Professor Cornell cites to Spitzer. Spitzer cites to  
13 Vorenberg. Vorenberg cites to Bazilli. Bazilli, I think it  
14 is, who cites to -- these folks have been working on this for a  
15 really, really long time.

16 In 2000- -- well, as you probably know in the Rhode --  
17 Rhode case, I issued an opinion where I said that the State's  
18 regulation had no historical pedigree, and I was right. The  
19 Ninth Circuit asked the State to file a supplemental brief on  
20 the issue of the historical pedigree.

21 In response to that request from the Ninth Circuit,  
22 the State at Footnote 3, page 11 of its response, cites to Saul  
23 Cornell and Nathan DeNino, "A Well Regulated Right. The Early  
24 American Origins of Gun Control," 2004, surveying firearms  
25 regulations from Founding era through the nineteenth century.



1           Mr. Kelly, with all due respect, Mr. Cornell and all  
2 these other folks have been researching and writing on this  
3 issue for 25 years. We're not here, looking -- this is not a  
4 question for the missing link. We're not looking for truffles.  
5 If it's a history and tradition, 25 years of research and  
6 writing should have disclosed it by now.

7           And as you know, probably in Bruen -- I think it was  
8 in Bruen. It might have been in Heller, as well, where the  
9 Court said, "Look, 'a lot of' doesn't show a history and  
10 tradition." Right. So I don't think -- I mean, with all due  
11 respect, I understand what you're doing, and I appreciate that.  
12 And I'm sorry that you got dumped into this just a few -- just  
13 a few weeks ago.

14           But, realistically, you don't need more time. I might  
15 give you a little more time to depose the one expert, and that  
16 might be it, but that's about it. Okay.

17           MR. KELLY: Thank you, Your Honor.

18           THE COURT: All right. Is there anything else you  
19 wanted to add?

20           MR. KELLY: Actually, a point of clarification, Your  
21 Honor.

22           THE COURT: Sure. Go ahead.

23           MR. KELLY: Would Your Honor like us to submit one set  
24 of briefing for all four matters, or one for each matter?

25           THE COURT: I'm open to suggestions. I don't want to

1 have to be rereading the same stuff over and over and over  
2 again. So what do you think?

3 MR. KELLY: Your Honor, I think they should be heard  
4 separately. I think as Your Honor said, you know, there is  
5 some overlap here in terms of the historical analysis,  
6 et cetera. But there's also enough nuance among the cases  
7 that, I think, both, as a matter of fairness, and to make your  
8 burden easier, they should be heard separately.

9 For example, I think the textual analyses is different  
10 in these case; the first prong under Bruen as to whether the  
11 regulated items constitute arms under the Second Amendment.  
12 And our position is a different analysis in each case.

13 THE COURT: Okay. Well, what you say makes sense.  
14 All right. So how about if what we do is we have a joint  
15 historical analysis? In other words, what I suggested at the  
16 very beginning of this hearing? How about if we have that as  
17 one?

18 And, yes, I can understand how you might want to  
19 argue, for example, that in the Fouts case, looking at the  
20 historical analysis, there's, you know, history and tradition.  
21 And that you might want to brief that separately.

22 Yeah, I can understand what you're saying. I'll hear  
23 from the Plaintiffs in just a second, see if they have a  
24 different idea. But that makes sense. I can go along with it.

25 MR. KELLY: Thank you, Your Honor.

1           THE COURT: All right. Thank you.

2           Anyone else?

3           All right. Let's go back to the Plaintiffs. Anyone  
4 have anything you want to comment in response?

5           MR. BRADY: Sure, Your Honor. Sean Brady on behalf of  
6 the Plaintiffs.

7           I agree. I think that makes sense. But to address  
8 the nuance, there are some things that are going to sort of be  
9 boilerplate with respect to this compendium of Excel  
10 spreadsheet of the laws. If the State prepares that, they're  
11 going to have to prepare that for all the cases. Right. So it  
12 wouldn't be an additional burden on them.

13          THE COURT: I want you to look at it, and see if you  
14 agree or disagree because I want to know, you know, if there's  
15 disagreement. Right.

16          MR. BRADY: If Your Honor would like us to meet and  
17 confer, you know -- I guess our position is that it's the  
18 State's burden to research and present these laws, and they've  
19 had adequate time for that. We don't need to get into --

20          THE COURT: I think I agree. But I think it's always  
21 really a good idea to meet and confer. So if you could do  
22 that, that would be wonderful.

23          MR. BRADY: Absolutely. And if Your Honor wants us to  
24 do that prior to -- instead of dressing it in our opposition  
25 and meeting and conferring beforehand, we're more than happy to

1 do that.

2 THE COURT: Why don't you do that. And then if  
3 there's any disagreement, if there's any disagreement, then we  
4 can deal with that later. Right.

5 So here's something that I do with jury instructions.  
6 I ask the parties to meet and confer and come up with an  
7 agreed-upon body of jury instructions. Okay. And then if  
8 there are any jury instructions that they disagree with, then  
9 they can file a brief to tell me what instructions they  
10 disagree with and what other instructions they want me to give.

11 Perhaps this is a good policy for us to apply here.  
12 If you meet and confer and agree on the historical analysis,  
13 then that's great. You can submit that. And if there are any  
14 disagreements, then you can submit that separately.

15 How's that? That work?

16 MR. BRADY: I think that works, Your Honor.

17 THE COURT: Mr. Kelly?

18 MR. KELLY: Yeah, that works for us, Your Honor.

19 THE COURT: Great.

20 MR. BRADY: This meet-and-confer process, though, is  
21 there going to be another status conference or -- that's my  
22 only concern. Or are we just going to address it in our  
23 briefing?

24 THE COURT: No. I don't think we need another  
25 meet-and-confer conference after this. I think -- look, I

1 don't want to slow-walk these cases. These are important cases  
2 both to the State and to the Plaintiffs and the people that  
3 insist that they have these rights, and I think we need to move  
4 these cases along.

5 So a meet-and-confer. Give me an agreed-upon  
6 historical analysis, and then what I will do is I will give you  
7 a time period for that to be filed. I'll give you a time  
8 period for additional briefs to be filed, and then we're going  
9 to have hearings, and we're going to put these cases to bed.

10 MR. MOROS: Your Honor, one question.

11 Is the State to be limited in the presentation of its  
12 laws to laws before the year 1900? Because I know in their  
13 supplemental briefing, they went into twentieth century laws,  
14 and our position is those aren't relevant. But if you want a  
15 comprehensive view, just to get everything.

16 THE COURT: You know, frankly, I don't see much point  
17 in those because I think that there would be so many laws. I  
18 mean, let's face it, after -- there came a point when -- when  
19 they began to grow exponentially.

20 I think in the Bruen opinion it talks about -- the way  
21 I see it, it places greater emphasis on those laws that were,  
22 essentially, in effect at the time the Second Amendment was  
23 adopted, and then with a secondary emphasis at the time that  
24 the Fourteenth Amendment incorporated the Second Amendment by  
25 reference. I think that's the time period.

1           In fact, I think the one -- if I'm not mistaken, the  
2 one statute that regulates -- that was submitted in the Fouts  
3 case, it talks about machine guns and automatic rifles, is a  
4 1927 statute, if I'm not mistaken; which, frankly, I thought  
5 was irrelevant, anyway.

6           So why don't we limit it to -- how about this? How  
7 about, let's say, 20 years -- how about an arbitrary and  
8 capricious number that I'm going to give you? Twenty years  
9 after the Second Amendment was incorporated by the Fourteenth  
10 Amendment -- or the Fourteenth Amendment was adopted. How's  
11 that?

12           MR. MOROS: So, 1888. Okay.

13           THE COURT: All right. Twenty years after the  
14 Fourteenth Amendment was adopted.

15           MR. KELLY: Your Honor, we would object to that.

16           THE COURT: Why?

17           MR. KELLY: In Bruen, it specifically says that  
18 statutes after the Fourteenth Amendment's ratification can be  
19 used as evidence so long as they do not conflict with the  
20 restrictions that were in place prior to then around the  
21 Founding and the Reconstruction period.

22           So we would want to reserve our right to introduce  
23 those laws if -- if we do, in fact, do that.

24           THE COURT: Can you cite me to the page in Bruen?

25           MR. KELLY: Yes, Your Honor.

1           THE COURT: And if that were the case, why would --  
2 why would the Supreme Court have overturned the New York  
3 statute on concealed carry? Since there were -- I would  
4 imagine there's probably 100, if not 200, statutes that have  
5 prohibited the methodology for obtaining concealed carry  
6 permits.

7           MR. KELLY: So, Your Honor, the page we're referring  
8 to is at 142, Supreme Court page 2153, Note 28.

9           THE COURT: Can you read it for me? Because I -- I  
10 don't have a photographic memory.

11          MR. KELLY: Sure, Your Honor. Just give us one  
12 moment.

13          Your Honor, the footnote says: "We will not address  
14 any of the twentieth century historical evidence brought to  
15 bear by respondent or their amici. As with their  
16 late-nineteenth-century evidence, the twentieth century  
17 evidence presented by Respondent's in the amici --"

18          (Court reporter interruption.)

19          MR. KELLY: "-- the twentieth century evidence  
20 presented by Respondents and their amici does not provide  
21 insight into the meaning of the Second Amendment when it  
22 contradicts earlier evidence."

23          And we would argue that that footnote would allow us  
24 to introduce statutes and regulations post-Reconstruction so  
25 long as they do not contradict earlier restrictions.

1           THE COURT: The problem with that, though, as I  
2 said -- how many -- how many laws have been enacted? I mean,  
3 just look at California. Let's just take, for example, the  
4 Miller case, right, the AR-15-type regulations.

5           How many of those laws have been enacted since 1927?  
6 Lots and lots and lots and lots. But how does that help me  
7 decide the history and tradition of regulation of rifles --

8           MR. KELLY: I think, Your Honor --

9           THE COURT: -- at the time the Second Amendment was  
10 adopted, or at the time the Fourteenth Amendment was adopted?  
11 All that tells me is -- has happened after the Civil War when  
12 states found out that, yes, they could restrict certain  
13 firearms. Right. That all of a sudden there was an explosion  
14 of restrictions because the states found out, "Hey, guess what?  
15 We can do this." So then they did it.

16           But how does that help me determine the history and  
17 tradition of these laws at the time the Second Amendment was  
18 adopted or at the time that the Nineteenth -- I mean the  
19 Fourteenth Amendment was adopted?

20           MR. KELLY: Your Honor, I'm only speculating that  
21 these laws are out there. I personally do not know. I think  
22 we would just want to reserve our right and not be barred from  
23 doing so should it come to that.

24           THE COURT: I'll tell you what I'll do. I'll let you  
25 file a separate one. You can file -- you can file a separate



1 survey, and we'll call it "Post 20 years after" -- "20 Years  
2 After the Ratification of the Fourteenth Amendment."

3 How's that?

4 MR. KELLY: That sounds good, Your Honor.

5 THE COURT: And include as many as you want. In fact,  
6 the more the merrier.

7 MR. DILLON: Your Honor, if I may?

8 THE COURT: Yes, go ahead.

9 MR. DILLON: I just wanted to clarify on the parameter  
10 of exactly what you're requesting. As I heard you, you're  
11 looking for a single spreadsheet-style chronological order of  
12 all the statutes, ordinances, restrictions that the State can  
13 come up with that identify what was restricted, what act was  
14 restricted, whether it was a law that was repealed or not  
15 repealed, and whether or not it was ever brought before a  
16 court.

17 And then they'll present -- they'll draft that  
18 document with no argument, no expert witness testimony.

19 THE COURT: Correct.

20 MR. DILLON: It will just be a straight list of the  
21 laws. We will have a chance to review it as Plaintiffs. And  
22 like a summary judgment, if we have a contested issue of the  
23 summary of the law that they present, we can note that contest  
24 in the -- you know, a joint document? Is that what you're --

25 THE COURT: Sounds reasonable. Sounds reasonable to

1 me.

2 MR. DILLON: No problem. Thank you, Your Honor.

3 MR. KELLY: Your Honor, I think we would object to  
4 that as well. I think we would want, if we need to, to  
5 introduce experts to interpret some of the laws and the  
6 standards --

7 THE COURT: No.

8 MR. KELLY: -- in the language --

9 THE COURT: No.

10 MR. KELLY: -- and the statute --

11 THE COURT: No. Look -- no, no.

12 Mr. Kelly, with all due respect, I don't need -- every  
13 one of these experts that you've put forth, I have read, just  
14 like experts that they have put forth, like Mr. Copill, for  
15 example. Your experts -- these are people that have, you know,  
16 biased points of view. I mean, Mr. Bosey, for example -- I  
17 hope I'm pronouncing his name. The fellow who worked for --

18 MR. MOROS: Kimber, Your Honor.

19 THE COURT: Kimber. Yeah. Who at some point in time  
20 had an epiphany and realized that all the work that he'd been  
21 doing for all these years, selling these weapons to the public  
22 was not good. And now he works -- he's a consultant for  
23 Everytown -- I'm trying to remember.

24 Anyway, look. These people's opinions of what these  
25 statutes say, right, means nothing. It means nothing. It's

1    like, I remember -- I think it was Justice Brier in -- I think  
2    it was Bruen, who talked about, "Well, we need to have this  
3    factual record," and this and that, what have you.

4               No. 702 says that the admission of expert testimony  
5    is help -- is possible if, because of the expert's knowledge,  
6    skill, or experience, it will assist the trier of fact. Okay.

7               But there's nothing. I mean, I've read these  
8    declarations. Every one of these folks come in here with a  
9    biased -- it's not like they're really neutral experts, okay,  
10   or they're not experts who've come up on these opinions as a  
11   result of these cases, okay, doing research for these cases.

12              These are all people that already come with  
13   preconceived ideas and opinions, but their opinion is not worth  
14   any more than your opinion or her opinion. They're going to  
15   tell me, "Well, in my opinion, if you look at this statute,  
16   this statute means that -- you know, that the State of Wyoming  
17   regulated concealed carry of brass knuckles," and so I can read  
18   that. I can figure that out by myself.

19              MR. KELLY: Well, Your Honor, I think the issue that  
20   we might have with simply creating a spreadsheet and submitting  
21   it to the Court doesn't take into account that restrictions  
22   were found in places other than statutes. In our supplemental  
23   briefing, we -- Professor Vorenberg testified as to how, for  
24   example, in the Reconstruction period, the U.S. Army acted to  
25   restrict firearms with magazines or carrying more than ten

1 rounds.

2 THE COURT: When was the Reconstruction period? It  
3 was after the Civil War.

4 MR. KELLY: Correct, Your Honor.

5 THE COURT: Yeah. It was after the Fourteenth  
6 Amendment?

7 MR. KELLY: It was during the same period, Your Honor;  
8 during the same time period.

9 THE COURT: And why would I want to give -- in fact, I  
10 think there was some discussion about this. I thought maybe it  
11 was in Bruen.

12 Why would I want to give any credit to -- to what the  
13 U.S. Army was doing in their territories? In fact, I think,  
14 wasn't it Bruen that somewhat criticizes applying laws that  
15 were regulations that were used in territories that --

16 MR. KELLY: Your Honor, it goes to the history and  
17 tradition of firearm regulations. That may not be a statute.

18 THE COURT: But, look. If it's the State's position  
19 that there's a long history and tradition to regulating  
20 firearms, if that's your position, you don't need to present  
21 any evidence. I'll buy that. I understand that.

22 Any time the State can get their -- the ability to  
23 regulate something, they'll do it, and they've been regulating  
24 firearms for a long time. Right. But that doesn't mean that  
25 it's an analog to the particular statute that's at issue in the

1 cases that I have before me.

2 So the fact that, for example, in the territories in  
3 the Reconstruction period, the Army may not have wanted to have  
4 people to have this, that or whatever, that doesn't help me.  
5 It's not an analog.

6 Yes, we know. We know. We know. We don't have -- I  
7 don't need to take testimony of the fact that there's a history  
8 and tradition in the United States in regulating firearms.  
9 Right. But if that were the test, if that were the test,  
10 Heller would not have been decided the way it was, and neither  
11 would McDonald, and neither would Bruen, and neither would  
12 Caetano.

13 That's not the test. But the test is, is there a  
14 reasonable analog? It doesn't have a twin. It doesn't have to  
15 be a twin. But is there a reasonable analog in the history and  
16 tradition of firearm regulation or arms regulation? Because in  
17 the Fouts case, we're dealing with billy clubs.

18 Is there an analog in the history and tradition of  
19 regulating this type of weapon, this type of conduct, this type  
20 of behavior? That's what we're looking at.

21 So, anyway, all right. Anyone else?

22 Yes.

23 MR. O'BRIEN: Your Honor, just wanted to check.

24 With respect to Fouts and Rhode, what the Court's  
25 requesting here, what effect does it have on kind of the

1 existing posture of those cases?

2           With respect to Fouts, the Plaintiffs have an  
3 opposition brief due on the 22nd, currently. And Rhode, there  
4 hasn't been any order with respect to briefing. So I'm just  
5 trying to check and see what's the -- what is kind of the  
6 process going forward.

7           THE COURT: Thank you. I appreciate your mentioning  
8 that.

9           So here's what I'd like for you to do. As I said,  
10 Professor Cornell, Spitzer, and some of these other folks, they  
11 have been working on this for a really long time. So it really  
12 shouldn't take them really long to be able to come up with  
13 this -- with a survey that I've requested. So I'm going to ask  
14 that that be done within 30 days. Okay.

15           I will then -- given that, I will then give each side  
16 an opportunity to file a brief, and the reason why I use the  
17 word "brief," it's because I want it to be brief. Okay. I'm  
18 not going to -- I'm not going to require a 25-page maximum, but  
19 I don't think it needs to be 25 pages for you to tell me what  
20 the analogs are that I should apply in your case. And I'll  
21 give you 30 days to do that. Then I'll give you 10 days to  
22 each side to file a response.

23           Now, Mr. Kelly, you said you wanted to take somebody's  
24 deposition, and I'm more than happy to give you a chance to  
25 depose someone. See what happens.

1           So who did you want to depose?

2           MR. KELLY: Mr. Cramer, Your Honor.

3           THE COURT: Mr. Cramer. Whose witness is Mr. Cramer?

4           MS. BARVIR: Clayton Cramer is the Duncan Plaintiffs'  
5 declarant. He was responding, I think, to Professor Roth.

6           I would think that if Your Honor is going to give the  
7 State some time to depose our witness, we should also get the  
8 chance to depose Mr. Roth. He was also not disclosed at any  
9 point prior to filing that.

10          THE COURT: You each have 20 days to work out an  
11 agreement to -- one, to depose Mr. Cramer, to depose Mr. Roth.  
12 Okay.

13          MR. STAMBOULIEH: Yes, Your Honor. I'm with --  
14 Stephen Stamboulieh for the Fouts Plaintiffs.

15          Plaintiff Cramer is also going to be our expert even  
16 though we're outside the discovery deadline. He has,  
17 obviously, not been disclosed to them as an expert, just like  
18 their witnesses were not disclosed to us as an expert.

19          I'm not really sure that he needs to be deposed since  
20 he's just going to be responding to Mr. Spitzer's declaration  
21 of what the -- what he's found the historical analogs to be.  
22 So I'm not really sure, other than wasting money and time, what  
23 a deposition would bring to them.

24          I did have one question, and I -- the page length for  
25 the supplemental briefs, my understanding of the local rules is

1 that we were limited to 25 pages. We have not filed motions to  
2 strike. We have not tried to burden the docket with anything.  
3 I figured I would just ask the Court.

4 Do we have the same page limit that the Defendants do,  
5 which I believe was 36 pages? We're not going to burden --

6 THE COURT: I don't think we need 36 pages, especially  
7 if we're breaking it up. Okay. So we've got -- so we have  
8 the -- so we have the historical survey. Right. I don't know  
9 why you would need 36 pages. So why would you need 36 pages to  
10 tell me that the history and tradition of arm regulations --  
11 I'm going to use the Fouts case -- for billies is consistent  
12 with the history and tradition of that which has been provided  
13 to me by way of that survey? You don't need 36 pages;  
14 25 pages, max, for any opening brief, and 10 pages for any  
15 reply.

16 MR. STAMBOULIEH: Let me go back one step, Your Honor.  
17 They filed the supplemental brief that this Court  
18 ordered. I'm not sure the actual date; October 17th, I  
19 believe. And they took 36 pages. Ours is coming up. The  
20 response is due on the 22nd.

21 So my question to the Court, and perhaps the Court  
22 just answered me when you limited it to 25 pages. The reason  
23 that we might need to go a little bit beyond that page limit,  
24 Your Honor, is they've raised this issue and said that there's  
25 really been no historical analysis of the "dangerous" -- and



1 they corrected it to be "or unusual" instead of "dangerous and  
2 unusual" language.

3 THE COURT: Yeah. I noted that. I noted that. I  
4 found that to be rather distressing, even though in the -- in  
5 the past, they have referred to some instances as "dangerous or  
6 unusual." But as Justice Alito pointed out in his concurring  
7 opinion in Caetano, anyone with a ninth-grade education can  
8 read the Heller opinion and determine that, in fact, it is  
9 "dangerous and unusual," i.e., the conjunctive, not a  
10 disjunctive.

11 So I don't know why that keeps popping up. I mean, I  
12 heard some supposedly distinguished legal scholar make that  
13 same error, and I don't know whether that's intentional or not.  
14 I hope that's not intentional.

15 MR. STAMBOULIEH: Well, the Supreme Court said  
16 "dangerous and unusual," Your Honor, so we're going to go with  
17 what the Supreme Court --

18 THE COURT: That's a good thing to do.

19 MR. STAMBOULIEH: Right.

20 THE COURT: That's a really good thing to do.

21 MR. STAMBOULIEH: So my question, Your Honor -- and  
22 I'm sorry for taking so long on this.

23 THE COURT: It's okay.

24 MR. STAMBOULIEH: We have briefed "dangerous and  
25 unusual." It takes us beyond 35 pages. It's about 35 pages.

1 We've briefed it. So to the extent the Court wants to see  
2 it -- if the Court limits us to 25, we'll cut the "dangerous  
3 and unusual" and just cite back "see Supreme Court. See  
4 Justice Alito" who references Caetano --

5 THE COURT: Are you saying -- are you talking about  
6 whether or not the weapon is dangerous and unusual, or are you  
7 talking about the fact that the test that some folks referred  
8 to it as "dangerous or unusual"? You follow what I'm saying?  
9 Are you talking about the weapon? Because, certainly, I can  
10 understand, particularly in your case, talking about whether or  
11 not the weapon is or is not dangerous and unusual.

12 But I don't want to talk about whether or not the test  
13 is "dangerous and unusual" or "dangerous or unusual." That has  
14 been decided by somebody who's way above my pay grade. Okay.

15 MR. BECK: Alan Beck for the Plaintiffs Fouts, Your  
16 Honor.

17 Our briefing also indicates that the phrase "dangerous  
18 and unusual" doesn't actually refer to any sort of intrinsic  
19 property of an arm. Historically, in Heller, the Court  
20 references the tradition of prohibiting carrying "dangerous and  
21 unusual" weapons.

22 And after we took a look at what that actually was,  
23 that -- that typically refers to prohibitions on carrying in  
24 certain manners, that were actually what terrified people.

25 So our position is that the possession of any weapon

1 cannot be justified simply through this historical tradition of  
2 carrying dangerous and unusual weapons, because it doesn't  
3 refer to types of weapons; it refers to certain types of  
4 conduct with weapons.

5 And in light of the fact that the State's brief was  
6 36 pages, we're just hoping to have an equal-length brief as  
7 the brief they filed so we can demonstrate that to the Court,  
8 Your Honor.

9 THE COURT: And you've already prepared this, you're  
10 telling me?

11 MR. BECK: Yes, Your Honor.

12 THE COURT: Okay. File it.

13 MR. BECK: Thank you.

14 THE COURT: File it. Thank you for making my life  
15 that much more difficult, but whatever. Okay. File it. I'm  
16 done.

17 Okay. So -- so --

18 MR. O'BRIEN: Your Honor --

19 THE COURT: You have 30 days to file the survey. You  
20 have 30 days after that to file any brief that you wish to  
21 file. And this goes for both sides. Having looked at the  
22 survey, having made your decisions, et cetera, you've got  
23 30 days after that to file your brief. You've got 10 days  
24 after that to file any opposition that you want to in that  
25 brief. You have 20 days to depose Mr. Cramer and Mr. Roth.

1           Anything else?

2           MR. O'BRIEN: Your Honor, if I may. With respect to  
3 the survey due in 30 days --

4           THE COURT: Yes.

5           MR. O'BRIEN: -- we would request, if possible, to  
6 extend that to 60 days.

7           THE COURT: I could probably do it -- if I had the  
8 time and the resources, I think I could probably do that in  
9 probably less than two weeks. The State has unlimited  
10 resources. You can do this. Trust me, you can do it. I've  
11 looked at it. And if I had the resources and the time to do  
12 it, I could do it in probably -- I could probably do it in a  
13 week.

14          MR. O'BRIEN: Well, you know, I understand where the  
15 Court is coming from.

16          I think that there's a couple of issues. One, we do  
17 have a holiday period, and I think that our resources will be  
18 limited at least, you know --

19          THE COURT: Yeah. I hear you. I feel your pain.

20          MR. O'BRIEN: -- to the last week, so I think to  
21 expand beyond that, that takes away one week.

22          Also, as we note, even in Fouts, even, you know, in a  
23 case where, you know, we provided a lot of that historical, you  
24 know, information, it's still, I think with respect to what the  
25 Court's asking for, is going to, you know, require, you know,

1 some additional time, especially in researching each of those  
2 laws and determining whether or not they were challenged, and  
3 what the -- what the disposition was in those cases.

4 THE COURT: I would imagine, Mr. O'Brien, with all due  
5 respect, that whoever came up with that -- I don't know,  
6 whatever it is, 40 pages, 30 pages of statutes or whatever,  
7 already has, pretty much, that information. And if they  
8 submitted it to the Court for purposes of persuading the Court,  
9 they should also have the information to determine, for  
10 example, whether or not that statute has been previously held  
11 unconstitutional or constitutional, and should be able to  
12 provide me with a citation.

13 I don't think 30 days is unreasonable. I understand,  
14 but my order remains. All right.

15 Is there anything else? I'm sorry. I don't --

16 Yeah, go ahead.

17 MR. O'BRIEN: One more, Your Honor.

18 You know, we would just also request with respect  
19 to -- as you're allowing for -- I believe, in the Miller or the  
20 Duncan cases, for deposing Professor Cramer. I don't know what  
21 Professor Cramer or Mr. Cramer will testify to with respect to  
22 Fouts. I would -- if we need to depose him, and I don't know  
23 if they're -- you know, we want to have that opportunity to do  
24 so if we need.

25 THE COURT: Well, if you don't know what you want from

1     them in Fouts, what's the point of deposing him?

2             MR. O'BRIEN: Well, we need to have an opportunity to  
3     review his -- his declaration and --

4             THE COURT: Was the declaration already filed or not?

5             MR. STAMBOULIEH: The declaration is not filed yet,  
6     Your Honor. The declaration, I would think, is probably  
7     substantially complete. It's a rebuttal of Mr. Spitzer's  
8     expert report.

9             THE COURT: Tell you what we'll do. Let's leave that  
10    up in the air. You take a look at it. When you get the  
11    opposition -- opposition, you get the declaration.

12            I've read Mr. Spitzer's declaration. I'd say it's  
13    probably one of the better ones I think that I've read. If  
14    after you read -- and, hopefully, you'll read it pretty  
15    quickly. But it isn't Mr. Cramer -- or is it Professor or  
16    Mr. Cramer? I hate to insult people. But whatever it is he  
17    says, if you think you need to depose him, let me know and let  
18    me know quickly.

19            And if I decide that, in fact, that deposition is  
20    necessary, I'll probably order that deposition to be taken on  
21    very short notice, in which case I will allow you to take the  
22    deposition of Mr. Spitzer. And we'll take it from there.

23            We're going to get all this done, folks, in the time  
24    period that I have set.

25            As I said, these are important cases to the State and

1 to the Plaintiffs and to the -- to the People of the State of  
2 California. So I want to move it along. And that's that.  
3 Okay. I really appreciate you all being here.

4 MR. BRADY: Regretfully, Your Honor, I have to raise  
5 one issue --

6 THE COURT: What's that?

7 MR. BRADY: -- about the Rhode case that may,  
8 unfortunately, complicate things.

9 And that is, the Rhode case, the analysis is a little  
10 bit different than these other cases which have to do with  
11 whether these specific items, right, are protected. Here we're  
12 talking about -- I don't think that there's any dispute that  
13 ammunition is protected, and sale of it. But what I suspect  
14 the State, and what we've seen in the Ninth Circuit briefing,  
15 their position is going to be that background checks on any  
16 arm, regardless, are going to be covered historically, because  
17 Bruen suggested that background checks on carry license are  
18 going to be protected.

19 Our position is, obviously, going to be ammunition is  
20 different, right, because the State admits that this is the  
21 very first time that ammunition background check has ever been  
22 put in place. So our position is going to be that's treated  
23 differently.

24 But I think that we need, potentially, a backup  
25 argument to make in case the State's argument carries the day

1 that background checks are generally okay or outside the scope  
2 of the Second Amendment, and that is to point out that even if  
3 background checks on ammunition are outside of the scope of the  
4 Second Amendment, at some point the burden on them becomes so  
5 great that --

6 THE COURT: Well, I already decided that. Didn't I  
7 already decide in the ammunition case --

8 MR. BRADY: Yes.

9 THE COURT: -- that I thought that requiring people to  
10 pay \$19 every time they buy ammunition is unreasonable?

11 MR. BRADY: Correct.

12 THE COURT: I thought I decided that.

13 MR. BRADY: You did, Your Honor.

14 THE COURT: So we don't need to rehash stuff that  
15 we've already gone through.

16 I think the question -- I think the question is: Is  
17 there any history or tradition that supports these background  
18 checks?

19 Now, with that, Counsel, let me just say this. The  
20 Bruen case did say that background checks were okay, right,  
21 with regard to the concealed carry. Now, they also said,  
22 however, that you can't impose unreasonable restrictions  
23 because, you know, you can regulate the Second Amendment out of  
24 existence by imposing regulations on something. Right.

25 MR. BRADY: Correct. And that's what I was getting



1 at, Your Honor. If you're saying that your previous findings  
2 are the law of the case and the findings up to this point --

3 THE COURT: I'm not changing my mind.

4 MR. BRADY: Okay. Then I -- so no --

5 THE COURT: You know, but I do want to raise  
6 something, by the way. You know, I'm glad you mentioned that.  
7 I'm going to take a wild guess that your position is that any  
8 background check for buying ammunition is not reasonable. I'm  
9 putting words in your mouth. Okay.

10 Now, I said that this regulation -- which is not what  
11 the legislature had originally enacted; right?

12 MR. BRADY: Correct.

13 THE COURT: This -- the way the bureaucracy has now  
14 regulated purchases of ammunition is unreasonable. But I guess  
15 what I'm offering to you folks to talk about is whether or  
16 not -- and I don't expect that this will be fruitful, but I  
17 have to offer it because I think it's possible that if there  
18 was a consent decree that said that the regulation of  
19 purchasing ammunition as set forth by the legislature in the  
20 legislative enactment would be what would be required, my  
21 analysis might be very different.

22 And so I'm thinking that that perhaps might be a way  
23 to compromise a resolution of that case. I just offer that as  
24 an idea, folks, but you can do with it whatever you wish.

25 I've spent about as much time on this case as I'm

1 going to. So I need to go, unless there's something really,  
2 really, really important you need to address.

3 MR. BECKINGTON: Your Honor, I apologize for testing  
4 your patience. I'll be very brief.

5 THE COURT: Okay.

6 MR. BECKINGTON: Just for the clarification of the  
7 record, we did have a motion for reconsideration. We did have  
8 requests, I think, both in the Miller and in Fouts and Rhode  
9 for the additional time to do discovery, to submit evidence,  
10 et cetera.

11 Is the Court making a formal rule on those matters --

12 THE COURT: Nothing -- nothing is -- the only thing  
13 that has changed -- the only thing that has changed since I  
14 issued my rulings on the cases that I've issued rulings is what  
15 Bruen -- the Bruen opinion says, which is that we consider the  
16 history and tradition of the firearm regulation or the arm  
17 regulation. Okay. That's the only thing that has changed.

18 All right. Thank you. Thank you very much.

19 MR. O'BRIEN: Just one other thing, Your Honor.  
20 Apologize. Is the Court going to be issuing a written order?  
21 We did the best we can to kind of keep track of what you were  
22 looking for with respect to the survey, but I just wanted to  
23 clarify that as well.

24 THE COURT: Well, you couldn't write that fast?

25 MR. O'BRIEN: I tried, Your Honor.

1 MR. DILLON: We have to summarize, Your Honor.

2 MR. O'BRIEN: Yeah.

3 THE COURT: We'll do our best. I'll issue a written  
4 order. Thank you very much. And I appreciate you all being  
5 here.

6 (The proceedings were adjourned at 11:50 a.m.)

7 -oOo-

8 **C E R T I F I C A T E**

9 I, Abigail R. Torres, certify that I am a duly  
10 qualified and acting Official Court Reporter for the United  
11 States District Court; that the foregoing is a true and  
12 accurate transcript of the proceedings as taken by me in the  
above-entitled matter on December 12, 2022, and that the format  
used complies with the rules and requirements of the United  
States Judicial Conference.

13 DATED: December 20, 2022, San Diego.  
14 S/ABIGAIL R. TORRES

15 Abigail R. Torres, CSR No. 13700  
U.S. Official Court Reporter

16

17

18

19

20

21

22

23

24

25