

No. 23-55276

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LANCE BOLAND; MARIO SANTELLAN; RENO MAY; JEROME SCHAMMEL; AND
CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED,
Plaintiffs-Appellees,

v.

ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Defendant-Appellant.

**On Appeal from the United States District Court
for the Central District of California**
No. 22-cv-1421-CJC-ADS
The Honorable Cormac J. Carney, Judge

**EXCERPTS OF RECORD
VOLUME 4 OF 7**

ROB BONTA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
P. PATTY LI
Supervising Deputy Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
ANTHONY R. HAKL
Supervising Deputy Attorney General

CHARLES J. SAROSY
Deputy Attorney General
State Bar No. 302439
300 South Spring Street, Suite 1702
Los Angeles, CA 90013-1230
Telephone: (213) 269-6356
Fax: (916) 731-2119
Email: Charles.Sarosy@doj.ca.gov
Attorneys for Defendant-Appellant

April 28, 2023

1 Dr. Saul Cornell to testify.

2 THE COURT: Very well. Rolls, do you want to --

3 THE COURTROOM DEPUTY: Mr. Cornell, please raise
4 your right hand.

5 Do you solemnly swear the testimony you shall give in the
6 cause now before this Court shall be the truth, the whole
7 truth, and nothing but truth, so help you God?

8 THE WITNESS: Yes, I do.

9 THE COURTROOM DEPUTY: Please state your name and
10 spell your last name for the record.

11 THE WITNESS: Sure. Saul Cornell, C-o-r-n-e-l-l.

12 THE COURT: Please proceed.

13 **SAUL CORNELL,**

14 **called by and on behalf of Defendant, testified as follows:**

15 **DIRECT EXAMINATION**

16 BY MR. WOODS:

17 Q. Dr. Cornell, good evening.

18 A. Good evening.

19 Q. Thank you for joining us.

20 where are you currently employed?

21 A. I'm currently employed at Fordham University where I am
22 the Paul and Diane Guenther Chair in American History and an
23 adjunct professor of law at Fordham Law School.

24 Q. Great. I am sharing the screen, and hopefully that works.

25 Is this your -- what looks like an accurate copy of your

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 CV?

2 A. Yes, it is.

3 Q. Okay. Is this a document that you prepared, sir?

4 A. Yes.

5 Q. Okay. Great. I'm going to ask some general questions
6 about your background. If you need to refer to your CV, you're
7 welcome to.

8 How long have you been employed by Fordham?

9 A. So I've been employed by Fordham since 2009. And before
10 that, I was at Ohio State University for 18 years, and the
11 College of William & Mary for two years.

12 Q. And in what context were you employed by Fordham and Ohio
13 State and William & Mary?

14 A. So William & Mary I was both an assistant professor and a
15 fellow at the Omohundro Institute of Early American History &
16 Culture, which is the leading research institute on early
17 American history.

18 And at Ohio State, I was a the professor of history.
19 Began as assistant, was promoted through associate to fellow.

20 I also had an appointment at the John Glenn School of
21 Public Policy.

22 And now I am employed at Fordham University.

23 Q. And do you -- have you received any fellowships and/or
24 grants?

25 A. Yes, a whole bunch of them. I've had fellowships from the

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suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 National Endowment for the Humanities, the American Council of
2 Learned Societies. I was a distinguished Fulbright scholar,
3 where I taught at Leiden University in the Netherlands. I have
4 received fellowship support from the Gilder Lehrman Institute
5 from the Center for the Study of Slavery at Yale University,
6 which is a distinct part of the Gilder Lehrman Institute. And
7 I have also been a visiting research scholar at Yale Law
8 School, the University of Connecticut Law School, and the
9 Floersheimer Center for Constitutional Democracy at Cardozo Law
10 School.

11 Q. All right. That's a lot. I realize this is, perhaps, a
12 big question, but do you have any particular areas of expertise
13 that you would consider yourself an expert in?

14 A. Yes. So I am an early American historian, a
15 constitutional legal historian. I have written on a variety of
16 areas of American political culture, American political
17 thought, American legal history. I've authored a popular
18 American history textbook that goes from the Paleolithic era to
19 the present. I co-authored that.

20 I also co-authored what has become standard history of
21 American constitutional development from the founding era
22 through to the Jacksonian period that was published by
23 Cambridge University Press a few years ago. And I've published
24 in almost all of the major peer reviewed history journals and
25 many of the top law reviews in the country, including Yale,

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 William & Mary, Northwestern, UCLA, and there are others, but
2 I -- that gives you a basic sense.

3 Q. Understood. Can you kind of summarize your scholarship in
4 constitutional law? I understand you mentioned constitutional
5 legal history. Is there a particular focus on constitutional
6 law that is part of that?

7 A. Sure. My first book was on the anti-federalist, the
8 original opponents of the Constitution. It's still required on
9 many graduate reading lists. I know they use it at Cambridge.
10 I know they use it at Princeton. I know it's assigned in many
11 other places.

12 I've written a book on the Second Amendment. And I've
13 also written a history -- co-authored a history on American
14 constitutional development from the founding era through the
15 Jacksonian period.

16 Q. Great. Have you ever published articles on firearms,
17 legislation in the historical period?

18 A. So I've published both in peer reviewed history journals
19 and in top law reviews. The first article I wrote on this, I
20 published in the Fordham Law Review, although I wasn't yet a
21 Fordham faculty member. And to this day, it is one of the top
22 five most cited and downloaded articles published in the
23 Fordham Law Review, which is, at last, ranking the top 15 law
24 reviews. I think it's been download almost 50,000 times.

25 Q. Great. And have you ever testified in -- or have you ever

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 provided expert testimony in a case before?

2 A. Yes. I've provided expert witness reports in something
3 like a dozen cases. My work has been cited by several dozen
4 federal and state courts. It's been cited by the Supreme Court
5 on multiple occasions, both in dissent and the majority
6 opinions.

7 Q. Great.

8 MR. WOODS: Your Honor, I would like to move Defense
9 Exhibit 23 into evidence.

10 THE COURT: Any objection?

11 MR. DALE: No objection.

12 THE COURT: Exhibit 23 will be received into
13 evidence.

14 MR. WOODS: Great.

15 (Exhibit 23 was received into evidence.)

16 BY MR. WOODS:

17 Q. Have you been retained in this case to provide an opinion?

18 A. Yes.

19 Q. And what was your task in this case?

20 A. So my task was to read the complaint and the relevant
21 documentation by provided by the A.G. Office, and to analyze,
22 with the framework provided by the recent Bruen decision in
23 mind, what the history of firearms regulation was, what the
24 context in which firearms regulations were enacted, and what
25 that might tell us about the constitutionality of current

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1 firearms law in California. In this case, you know,
2 regulations affecting the sale of firearms.

3 Q. Understood.

4 MR. WOODS: Your Honor, at this time, I would like to
5 tender this witness as an expert firearms historian under Rule
6 702.

7 THE COURT: He will be so designated.

8 BY MR. WOODS:

9 Q. So after receiving this task from the Attorney General's
10 office, did you actually form an opinion?

11 A. I did. And my opinion, I think, has to be understood in
12 the following manner. So in order to apply the Bruen
13 framework, which requires that we understand both the history
14 of regulation and what would be suitable analogies to
15 contemporary firearms legislation, we have to not only look at
16 the kind of laws that were passed but we must try and
17 understand what were the circumstances that Americans,
18 particularly in the founding area of 1400s, what were they
19 doing by enacting these laws and what were the concerns and
20 social legalities and problems that would have motivated them
21 to enact laws or would have made the enactment of laws not
22 really possible because, for technological reasons or certain
23 social ills, were not yet manifested in society? So that is
24 essentially what I was asked to do.

25 Q. And in forming your opinions, did you look at primary

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1 sources?

2 A. Yes.

3 Q. From the historical era?

4 A. Yes.

5 Q. Sorry.

6 A. I looked extensively at a variety of primary sources. I
7 think one has to -- particularly, when one is dealing with the
8 founding era, one has to recognize that early American law was
9 immersed in a common law culture inherited from England. Not
10 every aspect of England's common law was transferred but many
11 aspects of common law were absorbed into early American law.

12 So my analysis included, not just statutes but also
13 justices of the peace manuals, newspapers, a broad range of
14 sources that would give me insight into both what the
15 legislators were doing but also what the society was
16 experiencing that would lead them to enact certain kinds of
17 regulations.

18 Q. And did you also look at the text of the Second Amendment?

19 A. Yes. Yes. One of my favorite Amendments. I would say
20 after the Third, probably, my second favorite.

21 Q. Sure. Why not.

22 Did you also look at the text of any other amendments to
23 compare the text of the Second Amendment?

24 A. Yes. I think many people often draw a pretty close
25 comparison between language in the First and the Second. And,

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1 of course, what is most clear, when you look at those two
2 texts, is that they are both structured very differently and
3 the language they use is quite distinct.

4 The First Amendment, of course, talks about an abridgement
5 of a right; whereas the Second Amendment talks about
6 infringement. And in 18th century English and, in particular,
7 in the kind of legal English that was familiar to the kinds of
8 people who would be drafting the statutes and the Second
9 Amendment, that choice of language was quite significant. The
10 fact that, in one Amendment, they framed the issue in terms of
11 abridgement, and in the another, they framed it in terms of
12 infringement.

13 Q. Okay. I want to get into the difference between those two
14 words, as you understand it. I am showing you on the screen
15 what has been marked as Defendant's Exhibit 24, which is a
16 compendium of sources that I believe that you used in order to
17 form your opinions.

18 Do you have that in front of you, or can you see it?

19 A. I do.

20 Q. Great. Okay. And so the first source, what do you
21 understand the first source here to be?

22 A. So the first source is a very typical type of primary
23 source that has become particularly important in light of the
24 Supreme Court's embrace of public meaning originalism,
25 dictionaries. And this one, probably the most famous

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1 dictionary of English in the 18th century, British English, of
2 course, is Daniel Johnson's dictionary. And it's a text that's
3 widely cited by original scholars and jurists.

4 Q. Great. And so this is, as I understand it, the 1755
5 version; is that right?

6 A. That's right. This is an edition that would have been
7 fairly widely available for educated and other Americans in the
8 era of the Second Amendment.

9 Q. And here are some excerpts from the 1755 dictionary that
10 you looked at. And if you can see right here -- I realize the
11 text is a little bit small, but this is the page with abridge
12 on it?

13 A. Yes.

14 Q. And so what do you understand -- or what does this
15 dictionary tell you about the meaning of the word "abridge" in
16 1755?

17 A. So the choice of using the term "abridge" or "abridgement"
18 signified that the framers, enactors, and the educated lay
19 readers of this text would have understood that the First
20 Amendment, which, of course, in 18th century restriction on
21 Congress -- it hadn't been incorporated the way it is today --
22 would have prevented Congress from diminishing or contracting
23 the scope of the right.

24 So the clear meaning, plain meaning of this text is that
25 Congress can't pass laws that will limit and thereby abridge

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1 the freedom protected by the First Amendment. And, of course,
2 the First Amendment protects multiple freedoms, you know,
3 speech, assembly, et cetera, et cetera.

4 Q. They can't make the right smaller; is that your
5 understanding?

6 A. Yes, yes.

7 Q. I am going to move to the next page where is -- and you
8 can see it -- the entry for "infringe." Do you have that in
9 front of you?

10 A. I do.

11 Q. Okay. I am pointing to it if you can't see it. And what
12 do you understand -- or what does that definition there tell
13 you about the meaning of the word "infringe"?

14 A. Sure. So by choosing to use the word "infringe," which
15 clearly means to destroy the right, the framers of the Second
16 Amendment clearly distinguished it from the First Amendment
17 that, in the case of the Second Amendment, a different kind of
18 test was hard-wired into the language of the amendment so that
19 one, obviously, could regulate the amendment as long as one did
20 not destroy the right substantiated in the amendment.

21 And that particular reading becomes the dominant reading
22 for most of American history. And if you look, for instance,
23 at the early cases that are cited by Heller, in *District of*
24 *Columbia v. Heller*, they applied the cutting edge theory -- at
25 least it was cutting edge when John Marshall articulated it in

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 the early Republic -- of the police power.

2 And the police power analysis that Marshall and others
3 employed essentially looked to be the question of is the
4 regulation a legitimate exercise of the police power, and does
5 it infringe or, to say, destroy the right protected by -- in
6 the case of the case law would be state arms-bearing
7 provisions, not federal provisions.

8 So the notion of infringement dovetails nicely with the
9 dominant framework that early American judges used to
10 adjudicate questions about legitimate regulations of firearms.
11 And the issue was: Does the regulation infringe it or not?
12 You could say does it destroy it or not?

13 Q. Great. Okay. And then, as part of your research for this
14 case, as part your research in other cases, you looked at
15 primary sources; correct?

16 A. Correct.

17 Q. We are going to look at a couple of those primary sources.
18 So I have -- it's page 12 on Exhibit 24.

19 A. Right.

20 Q. Which is -- what do you understand this printout to be?

21 A. So this is a law from Massachusetts, from the founding
22 era, which makes it illegal to have a loaded weapon in a
23 domicile in Boston. And, of course, the concern was that
24 loaded weapons could discharge accidentally, particularly in
25 situations where, you know, if there was a fire. And so it's

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1 both a safe storage law and it's a law that is designed to
2 prevent the harm that can come from a gun accidentally
3 discharging.

4 Q. And why is that important to you?

5 A. Well, it suggests that the founding generation understood
6 that firearms and gunpowder were particularly dangerous and
7 that one had to regulate them in a robust manner. So, you
8 know, it's difficult to try and think of an analogy for a limit
9 on First Amendment freedoms that would be as intrusive as this
10 kind of regulation.

11 And, indeed, when John Marshall does write about the scope
12 of the police power, he uses gunpowder as the locus classicus
13 of what the police power is intended to do.

14 Q. But Massachusetts wasn't the only state with one such law,
15 was it?

16 A. There are a variety of different kinds of regulations
17 about gunpowder in virtually every state and every locality.
18 And in many instances, when a new municipality is created, the
19 description of what the scope of police regulation permissible
20 by that entity often uses gunpowder as the illustrative example
21 of what the police power entails.

22 Q. In fact, if you are looking at the screen here, the
23 demonstrative, which is page 16, is this an example of one such
24 law in New York?

25 A. Yes, although you've given me the title page? I would

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1 have to now see down.

2 Q. Here is the next page.

3 A. Yes. And one of the interesting things about these
4 gunpowder laws is, 18th century Americans and early 19th
5 century Americans, who were particularly mindful of the abuses
6 of British power and general warrants and things of that sort,
7 nonetheless gave government pretty broad authority to inspect
8 private dwellings for violations of Gunpowder Storage Act
9 because they believed that the threat posed by gunpowder was so
10 important to meet, to remediate that inspectors had fairly
11 broad authority to inspect private dwellings, to make sure that
12 they were in compliance with the law.

13 Q. When you say, "gunpowder regulations," you are not
14 referring to just simply storage of gunpowder but also
15 gunpowder and how it interacts with privately owned firearms;
16 correct?

17 A. Sure. I mean, what is amazing about the gunpowder
18 regulations is they cover virtually everything from the moment
19 of production to sale to transportation to storage.

20 Q. Okay. Great. I am going to shift gears a little bit.
21 And as part of your regulation -- or excuse me.

22 As part of your research, did you also find laws about
23 proofing firearms?

24 A. Yes. And, you know, this is -- this particular law -- I
25 was aware of a slightly later version of this law, but I

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1 actually only found this law about two weeks ago, which, of
2 course, is an important reminder that this field is fairly
3 young and we're still finding new things all the time and that
4 our research mission has yet to be completed, although we have
5 done a lot of research, at least, in Toulouse Society when
6 there was actually fairly little of this kind of research.

7 And so this is a law that has the preamble -- and, of
8 course, preambles were very important, in the 18th century and
9 in the early 19th century, that government has a right and an
10 obligation to inspect firearms to make sure they are safe and
11 to impose standards on firearms to ensure that they are safe.

12 Q. And so this law indicates it was enacted in 1805; is that
13 right?

14 A. Right.

15 Q. Okay. And I understand that you've read this law.

16 How do you understand this law to work, to operate?

17 A. And one thing to keep in mind, by the way, Massachusetts
18 is, perhaps, the key state in terms of producing small arms t
19 this moment.

20 So this is the equivalent of Michigan, in the late 20th
21 century, enacting a safety law pertaining to cars. So, you
22 know, the Springfield Armory, which becomes one of the most
23 important sites of the production of firearms and pioneers many
24 new techniques in creating them is, obviously, located in
25 Massachusetts as well.

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1 So the idea here is that, before firearms can be sold, it
2 must be properly inspected, and the inspector must put a stamp
3 on it so that people who purchase these arms can know that they
4 are safe.

5 Q. And that's what is meant by "proof" of firearms in this
6 law; is that right?

7 A. Yes.

8 Q. The actual --

9 A. So, essentially, these arms are going to inspected,
10 tested, and then stamped.

11 Q. Okay. And what is the purpose of that stamp?

12 A. So the stamp, in this context, is so that anyone who
13 purchases one of these firearms knows that it has been
14 subjected to the appropriate government scrutiny.

15 Q. And was it -- is it your understanding that, pursuant to
16 these laws, it was illegal or impermissible to sell firearms in
17 Massachusetts that had not been proofed?

18 A. Yes. That's correct.

19 Q. Okay. And you said that you were familiar with a later
20 version of this law. I think I'm going to show it to you. And
21 it's on page 10 of this -- oh, no. I apologize.

22 A. This one is the main version of the law.

23 Q. Yeah. That's a main version of the law?

24 A. Yeah. We are talking about the Massachusetts version.

25 But Maine, the earlier culture, legal culture of Maine, is very

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1 closely tied to Massachusetts. Maine was originally part of
2 Massachusetts and only was spun-off as a separate state in the
3 period of the 1818's.

4 Q. Let's go to -- let's see. Sorry. Is this the 18 --
5 that's the 1805 version. And this is the 1814 version.

6 A. The 1814 version, yes.

7 Q. Of the same proofing act?

8 A. Uh-huh.

9 Q. And collectively, what do you interpret these statutes to
10 mean, as they relate to the regulation of firearms at the
11 founding?

12 A. So there are a couple of broad principles that we need to
13 keep in mind when trying to understand what these laws all mean
14 when we assemble them together.

15 So government took a very active role in shaping the
16 market for firearms. And government took a very active role in
17 regulating firearms. And the idea that somehow regulation is
18 incompatible with the right to keep and bear arms is a very
19 modern and recent idea; that, in fact, in the 18th century,
20 there is no liberty without regulation.

21 And we have, you know, a variety of different commentators
22 who constantly emphasize that. And it's one of the most
23 important tasks of the historian to sort of divest yourself of
24 modern, contemporary assumptions that we bring to our reading
25 of texts, set them aside, and try and reconstruct the very

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1 different world in which these people inhabited.

2 And that is an essential part of the historian's task,
3 which if you just sort of look up old laws and read them, you
4 are likely to misinterpret them because you're not
5 reconstructing -- you're not reading them the way an
6 18th century American would have read them. You are very
7 likely reading them in the way a modern American would, and
8 this is the sort of classic anachronistic fallacy that we see
9 in so much -- particularly in this area, where people are so
10 emotionally involved in the issue and are so committed to a
11 particular policy agenda today. It is very easy to smuggle in
12 those kind of assumptions.

13 But the first thing we teach our graduate students is they
14 have to set those aside, to the extent that it's humanly
15 possible, and you have to begin to think like those in the past
16 thought.

17 Q. So these laws, these sort of gunpowder storage -- and I
18 want to focus on the gunpowder storage laws. You said that
19 they were fairly common in the colonial period, not just in
20 Massachusetts and New York?

21 A. You find them everywhere. And they are ubiquitous and
22 far-reaching in terms of the power they give the state to
23 ensure that this very dangerous product does not cause any
24 unnecessary harm to society.

25 Q. Was that consistent with the, sort of, general public and

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1 understanding at the time, that firearm regulation was a
2 function of the state?

3 A. Yes. I mean, there is simply no way to make sense of
4 early American law without understanding that regulation is not
5 antithetical to liberty. It is the absolute, necessary
6 precondition for the exercise of liberty, because the founding
7 era had a concept that has gone almost out of use in terms of
8 contemporary language. They would describe what they would
9 have called an excess of liberty as licentiousness and as a
10 threat to what they perceived to be the true goal of the
11 Constitution, which is ordered liberty.

12 Q. You said, as part of your research in this case, that you
13 read the complaint and some of the other pleadings that were
14 filed.

15 Do you have a general understanding of the unsafe handgun
16 law in California?

17 A. Yes. I'm not an expert on modern firearms policy, and I
18 wouldn't claim to be an expert on modern firearms technology.
19 But my understanding is that California is trying to make their
20 population safer, and they are trying to protect liberty in a
21 way that is consistent with constitutionally protected
22 freedoms. But that effort is obviously deeply rooted in
23 American history where we've been regulating firearms since the
24 first firearms were brought to America from England.

25 Q. Right. And in your opinion, are these historical laws

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1 that you've mentioned so far, the gunpowder storage laws, the
2 prohibition against keeping loaded firearms, and proofing
3 laws -- are these laws analogous to California's Unsafe Handgun
4 law?

5 A. Yes. I mean, the job of judging exactly how good an
6 analogy they are, from the point of view of modern
7 jurisprudence, it's, obviously, not the job of a historian.
8 But the job of the historian in this case, I believe, is to
9 understand what these laws were trying to do, what they were
10 responding to, and what understanding of power and liberty they
11 embodied, and then try and figure out, you know, how close a
12 match it is to contemporary laws, which, of course, is what we
13 have judges for.

14 Q. Would you agree that there is a long history and tradition
15 of state regulation of firearms for the purpose of making these
16 firearms safe for public ownership and use?

17 A. Absolutely. Yes. I mean, whenever -- I mean, the other
18 thing to keep in mind is that, you know, firearms technology
19 has changed. And, typically, what we see is, when firearms
20 technology changes, there is a time lag before a new technology
21 is brought to market. Then there is usually another time lag
22 before it achieves market penetration. And it's only at that
23 point that we begin to see problems. And it's at that point
24 that we see legislators trying to do what legislators have
25 traditionally done, which is protect liberty while addressing

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1 the necessity of promoting public welfare and safety.

2 Q. And you've touched on this, but I want to get, you know,
3 sort of like a focused answer, if I can, about why it was
4 important for states in the founding era, specifically states,
5 to ensure that publicly owned firearms were safe to use?

6 A. Well, firearms in early America have many, many uses, and
7 early America was unquestionably a better armed society than
8 any society in the 18th century world. And I think, where you
9 have a high level of firearms ownership, you necessarily need a
10 robust and effective regulatory regime, so that any potentially
11 harmful consequences of the widespread ownership and use of
12 firearms does not result in excessive harm to society.

13 Q. You mentioned -- you testified earlier that Massachusetts,
14 specifically, was kind of the Detroit of firearms back in the
15 day, the main manufacturer.

16 Did other states have a role in sort of encouraging the
17 manufacturer of arms during the founding period?

18 A. Yes. My own state of Connecticut, of course, becomes one
19 of the major locations of firearms manufacturing, the
20 Connecticut River Valley. You know, this is, of course, where
21 Colt and Whitney and several other iconic manufacturers of
22 firearms set up business, in a little bit later period,
23 slightly after the period in which these laws are occurring.

24 Because one thing we need to keep in mind, of course, is
25 that there are hardly any pistols in the founding era. You

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 know, over 90 percent of the firearms owned by Americans were
2 long guns. So we don't really see the problems that we
3 associate with handguns until they become cheaper, more
4 reliable, and more available. And that wouldn't really be the
5 case until, you know -- it's an upward trajectory, but it
6 really takes off, you know, so that by 1848, when Colt perfects
7 its revolver, that is sort of the golden era of handguns in
8 early America.

9 But, essentially, at the time of the Second Amendment, if
10 you are not someone like Alexander Hamilton and buying a
11 dueling pistol, you are not really going to put food on the
12 table with a pair of dueling pistols.

13 Q. Understood. But as part of encouraging the manufacturer
14 of arms, did that also include encouraging the regulation of
15 arms?

16 A. Yes. One of the things that it's important to understand
17 is that, there is this consistent problem that early Americans
18 face, early American governments face, which is that Americans
19 don't want to buy the guns that are best suited to arm the
20 militia. They want to buy guns that are more useful for
21 putting food on the table, because it is largely an agrarian
22 society, or guns that are more useful for getting rid of
23 critters that are eating your crops.

24 So really, the entire structure of early American policy
25 is to shape the nature of the market and to intervene, to

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 encourage actors to do what the government believes is in the
2 best interest of American security.

3 Q. Now, in this role of actively encouraging the manufacturer
4 and the safety of arms, did that role continue into this sort
5 of Civil War and reconstruction era?

6 A. It does. One of the amazing things about the period of
7 reconstruction is that the number of firearms regulations
8 explodes. You see efforts to regulate firearms in a number of
9 areas that were just not perceived to be that important in the
10 earlier period. For instance, you see the number of laws
11 limiting access of guns to -- limiting access of minors to guns
12 expand enormously in this period.

13 So, you know, there is this idea that somehow the
14 Fourteenth Amendment and Reconstruction was designed to prevent
15 gun regulation, but, in fact, it's very clear that what they
16 were trying to do was to prevent racially targeted
17 disarmaments, the Black codes.

18 The moment that Republicans, who were the great champions
19 of the Fourteenth Amendment -- the moment they got into office
20 they enacted sweeping gun regulations because they were dealing
21 with unprecedented levels of gun violence. And they had to
22 protect these recently freed slaves and the Republicans who had
23 come to the South to help restore order.

24 So Reconstruction is really a golden era of gun
25 regulation, a legal note from reading some of the more popular

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 discussions of this period.

2 Q. So you were on Zoom earlier when plaintiffs' expert,
3 Dr. Cramer testified.

4 Do you recall that?

5 A. Yes.

6 Q. And do you recall that he testified about sort of a
7 monolithic gun culture.

8 Do you recall that testimony?

9 A. I do. And, you know -- and one of the most interesting
10 things that we now know from research is that American gun
11 culture has never been monolithic. I mean, today, the attitude
12 towards guns that you see in Alaska is very different than the
13 attitude you see towards guns in the Bronx. And that's been
14 true, really, since the very beginning of American history.

15 Levels of gun ownership, the type of guns owned, the
16 robustness of the regulatory regimes have always varied by
17 region in America.

18 There's a wonderful article called "Firearms Localism" in
19 the law journal that explores some of these issues. And so,
20 you know, if you think about it, firearms regulation really is
21 the perfect illustration of the founders' genius because it is
22 the great illustration of how the principle of federalism
23 allows America to deal with the very different regional
24 cultures around guns.

25 Q. All right. Dr. Cornell, do you recall -- I realize you've

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 been asked or retained in several different cases. Do you
2 recall when you were specifically retained in this case?

3 A. Oh, gosh. You know, I must confess that I would have to
4 look that up, because it does seem like every week I am talking
5 to a different AG's office.

6 Q. Fair enough.

7 A. And sometimes I'm talking to your office on different
8 cases in the same week.

9 Q. Understood. Let me ask this in a different way.

10 How long have you been working on your opinions in this
11 case, if you can recall?

12 A. So this particular case, of course, came to me rather
13 late, so I've really only been working on this one, I'm
14 guessing, less than two months. Maybe a month, month and a
15 half.

16 Q. Okay. And you formed -- through some research, as you've
17 testified to, you formed some opinions about historically
18 analogous laws or laws that you think are historically analysis
19 to the Unsafe Handgun Law Act; is that correct?

20 A. That's correct.

21 Q. Now, in general, and not necessarily just for this
22 particular motion, but how long does it take -- how long would
23 it take you to do sort of full historical analysis, making sure
24 that you've crossed all the t's and dotted all the i's?

25 A. So depending on how much research I have already done on a

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 particular topic, it could take, easily, three to four months,
2 maybe six months, depending on how new the issue is. I mean,
3 one of the things that you have to do, again, if you are not
4 going to approach this in an antiquarian fashion, if you're not
5 just going to look up old laws and say, you know, "There is no
6 exact law like the one today," end of case, if you are going to
7 do what Bruen really asked us to do, which is to recognize that
8 this analogical process does not require us to find twins and
9 so the processes somehow must steer a course between, you know,
10 the blank check and the straitjacket, as Justice Thomas
11 colorfully phrases it, that means you not only have to dig for
12 these laws but you really need to dig into the social,
13 cultural, economic, military history to sort of see, wow, what
14 does it mean that there is no law? Is there no law because
15 there is a comparable problem and they choose not to pass the
16 law? Or are we really dealing with a situation where there is
17 just no comparable problem?

18 And in many cases, given how different firearms technology
19 is and given how different early American society was, in most
20 cases, I think it generally turns out that we're just dealing
21 with different problems. But in order to be sure about that,
22 you really have to do your homework and really range it widely
23 over all of this history so that you're -- you know, again, the
24 goal is always to read these law as someone in the 18th century
25 would have read them, not as someone in the, you know,

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 21st century would've done.

2 Q. Understood.

3 MR. WOODS: Your Honor, I would like to move Defense
4 Exhibit 25 into evidence. Or is it 24?

5 MR. DALE: 24.

6 MR. WOODS: Apologies. 24.

7 THE COURT: Any objection?

8 MR. DALE: No objection.

9 THE COURT: Exhibit 24 will be received in evidence.
10 (Exhibit 24 was received into evidence.)

11 MR. WOODS: All right. Dr. Cornell, I have no
12 further questions for you at this time.

13 THE WITNESS: All right. Thank you very much.

14 CROSS-EXAMINATION

15 BY MR. DALE:

16 Q. Good evening, Dr. Cornell. My name is Joshua Dale. I'm
17 an attorney for the plaintiffs in this matter. I appreciate
18 your time tonight and thank you for hanging in there with us.
19 I know it's getting late. I'll try to make this quick.

20 I am going to go ahead and put Exhibit 24 back up here,
21 really quick. Figure out how to do it.

22 MR. WOODS: You might need to get permission.

23 BY MR. DALE:

24 Q. And this was the exhibit that was just admitted. You
25 testified that there were -- let me make sure I get your words

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 here correctly -- there were so many gunpowder laws during the
2 founding and through the period of the adoption of the
3 Fourteenth Amendment, that they were ubiquitous; correct?

4 A. Correct.

5 Q. Okay. Let's look at Exhibit 24, because this was your
6 client here, the State's opportunity to present those laws.

7 Can you identify for me in Exhibit 24 how many gunpowder
8 laws are identified?

9 A. So this is an illustrative example. This isn't a
10 comprehensive table or list of all gunpowder laws.

11 Q. Why not? This was the State's chance. Why not?

12 A. Well, had we produced a formal declaration, probably we
13 would have made a decision to do one of two things. We would
14 have either produced a lengthy appendix with those laws or more
15 likely -- or I hope more likely, because it would have been
16 more economical for the Court, to simply cite to the
17 scholarship that documents them or a very lengthy footnote that
18 would have listed them.

19 So I don't know that I would necessarily conclude anything
20 from the fact that we gave you an example. It doesn't really
21 speak to the ubiquity at all.

22 Q. You are aware of scholarship that lists all of these laws
23 that support your testimony that gunpowder laws were
24 ubiquitous? Is that it?

25 A. So we have a number of -- particularly since Heller, for

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 instance, there is an excellent article by Professor Spitzer
2 that actually does count the number and types of laws. I don't
3 have it in front of me, but he clearly documents, if not
4 hundreds, then certainly dozens and dozens of these laws.

5 Q. All right. And that article was not included as part of
6 defendant's exhibit today; is that correct?

7 A. Well, had we done a report, it is an article that I cite
8 with great frequency, but for purposes of this -- I guess
9 it's -- we're in a hearing, not a deposition; right? We didn't
10 feel it was necessary to do that.

11 Q. Okay. And then you've testified about how there were
12 numerous jurisdictions that had proofing laws. And if I
13 understand that correctly, "proofing" refers to making sure
14 that the firearm is sound; that it's not going to blow up or do
15 something that might injure the user or somebody who is nearby.

16 Is that a fair representation?

17 A. So, actually, what I said is, the fact that Massachusetts
18 had one was especially significant, because Massachusetts is
19 one of the leading producers of firearms in this period. So
20 that a single law from Massachusetts would be comparable to a
21 single law from Michigan dealing with car safety in the late
22 20th century.

23 I actually haven't had time, because I've -- like I said,
24 I only just found this 1805 law about two weeks ago, so I
25 actually haven't had time to finish the research to see how

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 ubiquitous those laws were.

2 Q. Well, let me just make sure I am clear. And I am being
3 genuine about this. I count five laws listed in Exhibit 24.

4 Do I have that count right?

5 A. I suppose I could sit here and count them. But, yes,
6 these are five illustrative laws, correct.

7 Q. Understood. And you understand that part of the Bruen --
8 well, let me -- you've testified that you've read Bruen;
9 correct?

10 A. Yes.

11 Q. Yes. And you understand that part of the Bruen test
12 includes figuring out what are outlier laws and rejecting those
13 to determine if the analogues show some consensus among folks
14 from the founding to the 14th Amendment.

15 Would you agree with that characterization, or would you
16 dispute it?

17 A. So the question of what constitutes an outlier based on
18 Bruen is pretty much, I think, up for grabs in the courts
19 because the general consensus among commentators, that I've
20 read, is that it's not quite clear because the court seems to
21 change the definition of what constitutes an outlier.

22 So, for instance, in one sense, a single law from
23 Massachusetts might be read as an outlier if the relevant
24 criteria was number of laws. But if one then, you know,
25 contextualizes the Massachusetts law, recognizing that it would

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 be comparable to a law from Michigan in the 20th century about
2 cars, given that the vast majority of cars are produced in
3 Michigan, then claiming that it's an outlier solely based on,
4 you know, the numerical count would actually misrepresent the
5 historical reality.

6 would you agree?

7 Q. Well, I don't know if it's my place to agree.

8 But my question for you is, in terms of Bruen, can you
9 identify anywhere in the language where it says that certain
10 laws from certain states are to be given more weight in
11 determining whether they are historical analogue than laws from
12 other states?

13 A. Well, it seems to me Bruen very clearly says that some
14 laws from some states are not to be given weight. It seems to
15 leave open the -- you know, the logical -- it's been such a
16 long time since I've studied logic. I took a course when I was
17 an undergraduate.

18 So certainly, therefore, the question of whether or not
19 some state having a law, if its population was sufficiently
20 great, if its production of firearms was sufficiently great,
21 that it would not be an outlier, and that is certainly
22 consistent with Bruen.

23 Q. Well, no. But Bruen focused specifically on numerosity.
24 In fact, the State of New York cited to them laws in places
25 like Texas and in frontier territories. And the majority

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 opinion specifically rejected them because they were not
2 indicative of laws across the United States.

3 Isn't that a fair characterization?

4 MR. WOODS: Objection. Argumentative.

5 THE COURT: Overruled.

6 THE WITNESS: Well, of course, the problem with that
7 is, we have also the Kavanaugh Concurrence, which reaffirms
8 some of Heller's presumptively lawful laws which might not
9 square with the criteria you just laid down, which sort of
10 leaves it a little bit hard to know what to do.

11 BY MR. DALE:

12 Q. Well, you testified that, in taking on this assignment,
13 you read the Second Amendment.

14 A. I did.

15 Q. And you actually provided it, the first part of
16 Exhibit 24, an analysis of the difference between the use of
17 the word "abridgement" and "infringement" as it was understood
18 in English law prior to the founding.

19 Do you recall that testimony?

20 A. Correct. Yes.

21 Q. My question for you is: Why did you do that? I don't see
22 that in anywhere in the Bruen opinion.

23 A. Well, Bruen consistently refers that the text is the
24 ultimate arbiter of constitutional meaning.

25 Q. Correct. But it also held a specific test, and that's

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 looking at whether or not a current law impacts the core
2 exercise of the right and then, in turn, to see if there are
3 historical analogues that support that particular regulation.

4 So I guess my question is: why are you looking at a
5 definition for something like infringement and discussing
6 obliterating the right when that is not the text that was laid
7 out in Bruen?

8 MR. WOODS: Objection. Argumentative.

9 THE COURT: Overruled. You don't have to adopt any
10 characterization in the question, Professor.

11 THE WITNESS: Well, it seems to me, Bruen makes it
12 very clear that tradition does not trump texts; so, therefore,
13 getting the meaning of the text right is at the very core of
14 the enterprise.

15 BY MR. DALE:

16 Q. Okay. And then you also testified, as part of assessing
17 whether there were historical analogues, you looked at concerns
18 that society was going through during the relevant period,
19 social realities, and problems.

20 Do you recall that testimony?

21 A. Yep.

22 Q. And, again, I would ask you: where from the Bruen case is
23 there any language that says that, in looking at historical
24 analogues, you should be looking at societal problems or
25 concerns of society in assessing whether or not a historical

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 analogue exists?

2 A. Well, Bruen makes it very clear that, if you are going to
3 engage in the process of constructing an analogy, in order to
4 construct an analogy, you have to understand what you're
5 analogizing. And Bruen, also, very, very clearly states that
6 we are trying to understand what is the burden. And, also,
7 we're trying to understand whether contemporary law is
8 addressing an issue that was of a similar nature to the -- to
9 problems that the founding era experienced.

10 So if you are going to -- since Bruen says we must
11 understand whether or not, for instance, a contemporary law is
12 addressing a new social problem, that the founding era could
13 not anticipate, or whether or not they are dealing with the
14 same problem, well, that invariably means you have to
15 understand what those problems were. It seems to me that's
16 indisputable.

17 Q. So let me ask you -- you've testified that you're an early
18 American historian. You're a constitutional historian. You've
19 written a book on the Second Amendment.

20 would you call yourself an expert in the history of the
21 Second Amendment?

22 A. Sorry. Can you repeat the question?

23 Q. Yeah. I was asking if you would consider yourself an
24 expert on the history of the Second Amendment?

25 A. Well, I was asked to write the chapter on the Second

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 Amendment in the Oxford handbook of the U.S. Constitution,
2 which was edited by Sanford Levinson, Mark Tushnet and -- see,
3 I have it here somewhere on my shelf -- and Mark Graber.

4 And actually, I was recently interviewed by the head of
5 the Rothermere Institute at Oxford about the Second Amendment.
6 So I think I am generally regarded as the leading authority on
7 the history of the Second Amendment.

8 Q. Okay. But as you sit here today, if I understand your
9 testimony, you need more time in order to be able to perform
10 the tasks that was asked of you by the State to identify
11 historical analogues; is that correct?

12 A. So in order do the analysis properly, which requires not
13 simply finding laws but trying to understand what were the
14 issues that that society was dealing with that would have
15 impacted firearms, that does require a deep dive that is
16 slightly distinct from the kinds of issues that I've looked at
17 before.

18 And, indeed, almost all of the writing about the Second
19 Amendment, up until Heller, focused on a very, very narrow
20 issue. The only issue that people seemed to talk about was
21 whether it was an individual or collective right.

22 So we've actually have only had about a decade's worth of
23 serious scholarship moving beyond that question, which Heller
24 obviously solved. So it is a really young field.

25 Q. Well, you've been writing about it for more than 20 years,

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 though; correct?

2 A. Well, I've been writing about certain aspects of it, but I
3 haven't written about every aspect of it.

4 Q. Well, let me pull up one here. I want to ask you --
5 because I want to ask you about one of your writings. Let me
6 pull up Exhibit 9. I will share this.

7 Do you recall writing an article for the Northern Kentucky
8 Law Review? And I want to say the date on this was 2002,
9 called "Don't Know Much About History: The Current Crisis in
10 Second Amendment Scholarship."

11 A. Yes.

12 Q. Okay. And in that you -- well, let me ask you this sort
13 of as a preparatory question.

14 You understand what the individual right theory of the
15 Second Amendment is; correct?

16 A. I do.

17 Q. As opposed to, for example, the collective right theory?

18 A. Correct.

19 Q. Okay. And in this particular paper, you argue for a third
20 way, which is, essentially, the civic right argument; correct?

21 A. Correct.

22 Q. Okay. And, in fact -- and let me -- so that folks
23 understand this, I am going to take you page 657.

24 And you write -- I'm going to start with the second
25 sentence -- "The two dominant interpretations of the Second

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 Amendment, the individual rights --

2 (The court reporter interrupted.)

3 BY MR. DALE:

4 Q. "The two dominant interpretations of the Second Amendment,
5 the individual rights, and the collective rights models, no
6 longer seem capable of accounting for the complexity of the
7 historical evidence about the meaning of the right to bear
8 arms."

9 So this is the introduction where you then go on to talk
10 about how you believe the Second Amendment should be
11 interpreted through this civic right model that you've
12 identified; correct?

13 A. Correct.

14 Q. Okay. And for those historians who adopted a belief that
15 the individual right theory was the correct way to interpret
16 the Second Amendment, you were critical of their work, weren't
17 you?

18 A. Yes.

19 Q. And so, for example, if we go to page 661 of this
20 particular document, I believe you use a term that we heard
21 previously. So we look down at this paragraph here, and it
22 says, "Reynolds" -- and are you referring there to University
23 of Tennessee Professor Glenn Reynolds; correct?

24 A. Correct.

25 Q. Right. And you say, "Reynolds is not the only gun rights

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 advocate to approach the phrase 'right of the people' in an
2 anachronistic fashion."

3 And I think we heard you use "anachronistic" before;
4 right?

5 A. Correct.

6 Q. And Reynolds, to your understanding, is a historian who
7 argued for the individual right model, correct?

8 A. No. Reynolds has no training in history.

9 Q. Okay. So you're saying that you were citing Reynolds,
10 even though he has no training in history?

11 A. Well, he's a law professor, and he does what, I think, is
12 often described as law office history, but I don't think that
13 is considered to be a serious genre of historical writing.

14 Q. What is law office history?

15 A. So law office history is a kind of enterprise where you
16 work backwards from the present instead of working forward from
17 the past, which is the sort of standard approach amongst
18 historians. It is generally not well-researched. It is
19 generally not up-to-date in terms of the scholarship. And it's
20 generally trying to use history to advance a contemporary
21 policy agenda.

22 Q. And that's what you believe Professor Reynolds was or has
23 engaged in; correct?

24 A. Correct.

25 Q. All right. And you've also been critical of Don Cates and

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 Professor Randy Barnett; correct?

2 A. Yes.

3 Q. And they both advocate for the individual right theory of

4 the Second Amendment; correct?

5 A. Yes. They're both modern libertarians, and so, therefore,

6 they tend to read 18th century texts as if they were

7 ghost-written by Ayn Rand.

8 Q. And in assessing their interpretation, you've often used

9 the term "anachronistic"; correct?

10 A. Yes.

11 Q. Okay. And, in fact, you believe the Supreme Court engaged

12 in law office history or law office research, don't you?

13 A. Well, the term "law office history" was coined to refer to

14 the practices of the U. S. Supreme Court, originally.

15 Q. But when you've used that term with the Supreme Court, you

16 haven't used it flatteringly; correct? You've used it

17 critically?

18 A. I would say "analytically" would probably be the most

19 precise term.

20 Q. All right. Let's look at some of that analysis.

21 I am going to bring this up.

22 MR. WOODS: Counsel, which exhibit?

23 MR. DALE: We are going now to exhibit -- well, the

24 numbers have changed.

25 (A discussion was held off the record between Counsel.)

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 BY MR. DALE:

2 Q. So you wrote an article here, and if we look at the
3 date -- let me confirm.

4 This is an article that you wrote that was published
5 SCOTUSblog; correct?

6 A. Correct.

7 Q. And it was published on June 27th of last year, which
8 would be about three days after Bruen was decided?

9 A. Just about.

10 Q. And it was written in response to the Bruen decision;
11 correct?

12 A. Correct.

13 Q. And in it, you wrote -- let's look here. Make sure I have
14 the right parts. Let's take a look.

15 So the first paragraph you call "The majority opinion
16 invokes the authority of history but presents a version of the
17 past that is little more than an ideological fantasy."

18 Do you recall writing that?

19 A. We have it right here.

20 Q. Yeah. And you said, "Rather than applying the history,
21 text, and tradition, it would most accurate" -- "be more
22 accurate to characterize Justice Thomas's decision as an
23 illustration of the current Supreme Court's new interpretative
24 model -- fiction, fantasy, and mythology."

25 And then paragraph two -- let me see if I can find that.

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 You write, "It is hard to dispute Justice Breyer's negative
2 characterization of his colleagues' tendentious, error-filled,
3 and highly-selective culling of evidence to vindicate their gun
4 rights agenda."
5 You wrote that correct, too?
6 A. Correct.
7 Q. You said, "Justice Thomas quoted Dred Scott approvingly."
8 Do you recall that?
9 A. Yes.
10 Q. And then you also, down in paragraph three, you said that,
11 "To describe the Thomas version of the past as a caricature
12 understates the case in the bizarre constitutional universe
13 inhabited by Thomas. Shakespeare's England was filled with
14 pistol-packing peasants."
15 (The court reporter interrupted.)
16 BY MR. DALE:
17 Q. Do you recall writing that?
18 A. Yes.
19 Q. And then in the following paragraph, you write that, "It's
20 a license to cherry-pick evidence with reckless abandon if the
21 materials support the ideological agenda of the federalist
22 society."
23 Do you recall writing that?
24 A. Yes.
25 Q. Okay. And then -- I mean, I am going to not belabor the

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1 Court with this because there are a lot more quotes in here in
2 which you are -- I think it would be fair to characterize it
3 highly critical of the majority opinion in Bruen; correct?
4 A. That's fair.
5 Q. Okay. And I think you concluded that -- or at least in
6 paragraph 11, you referred to Justice Neil Gorsuch and Justice
7 Amy Coney Barrett as ideological warriors and political hacks.
8 Do you recall that?
9 A. You'll have to scroll down, because I haven't committed it
10 to memory.
11 Q. Sure. If I can find it for you.
12 A. Yep. Okay.
13 Q. So you were somebody who, in multiple publications,
14 championed the civic right theory of the Second Amendment, as
15 you previously testified; right?
16 A. Yes.
17 Q. And the Supreme Court rejected that and went with the
18 individual right theory in Heller, didn't it?
19 A. That's correct.
20 Q. And you don't agree with them doing that; correct?
21 A. Well, I guess -- I mean, I am flattered that you read the
22 article, but one of the first things -- you know, one of the
23 fascinating things about teaching both undergraduates, graduate
24 students, and law students is my undergrads have a very, very
25 difficult time understanding how can you criticize something

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 and then apply the law in a decision that you don't agree with.

2 But I say, "well, if you don't figure that out, you
3 probably ought not to go to law school."

4 So I am not sure what any of this has to do with my
5 ability to apply the framework that was adopted in Bruen to the
6 historical with record. I mean, if lawyers couldn't make
7 arguments about positions that they didn't agree with, they
8 wouldn't have much work, would they?

9 Q. But you are asking the Court to accept your opinion as
10 expert and not tainted by biases when you testify about things
11 like ubiquitousness of gunpowder laws, aren't you?

12 MR. WOODS: Objection. Argumentative.

13 THE COURT: Overruled.

14 THE WITNESS: well, it seems to me that -- I mean,
15 one simply has to think of the situation that any of the
16 current Supreme Court Justices, when asked during their
17 confirmation, you know -- Amy Coney Barrett, for instance, she
18 wrote law review articles.

19 And people said, well, how could we approve you as a
20 Supreme Court Justice? You wrote these law review articles
21 that are critical of Supreme Court methodology," because she
22 was a strong supporter originalist.

23 And she said, "well, you know, I was a professor, and
24 that's what professors do. As a judge, I apply the law."

25 So, again, I am not really sure that there is any real

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 logical connection between a criticism that you make when you
2 are writing in one role and applying the law in another role.
3 That is what we do every day of our life as professionals.

4 Q. Okay. As you sit here today, can you identify for the
5 Court how many jurisdictions had barrel or gun-proofing laws
6 between the founding and the adoption of the Fourteenth
7 Amendment?

8 A. Well, as I said, since I only found the gun-proofing law
9 about two weeks ago, that is kind of why I need the time to
10 actually figure that one out.

11 Q. So with regard to gun-proofing, do you have any evidence
12 at this point that it wasn't an outlier similar to the Texas
13 law that was identified in the Bruen case?

14 A. Well, as we've already discussed, it can't, by definition,
15 be an outlier, if most of the guns in America were subject to
16 it; right? Because if most of the guns in America at the time
17 were being produced in Massachusetts, subject to this law, that
18 means most of the guns in circulation would have been subject
19 to this law. So I think you are applying the wrong rule. You
20 are being overly literal in terms of reading Bruen's
21 methodology.

22 I think Justice Thomas, to his credit, said that we need
23 to be somewhat more sophisticated and nuanced when we're
24 dealing with historical complexity.

25 Q. Okay. With regard to your article criticizing the

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 Justices on the majority in the Bruen decision, --

2 A. Yes.

3 Q. -- you actually took exception with Thomas rejecting the
4 Texas laws that were cited in that decision; correct?

5 A. I did.

6 Q. And, in fact, you said that you the majority was incorrect
7 in treating it as an outlier?

8 A. That's correct.

9 Q. And is your opinion that the Supreme Court was incorrect
10 in treating it as an outlier -- did that color the way in which
11 you approached your assignment that the State asked you to do
12 in looking for historical analogues with regard to the Unsafe
13 Handgun Act?

14 A. No. It had very little to do with it. So when I
15 uncovered this law, I thought to myself, as a historian, since
16 the question of how influential, representative, significant a
17 law is, the different ways of describing the outlier
18 question -- since having read Bruen, I knew that that is now an
19 important question. That is precisely why I went out and I did
20 some research about the early history of gun manufacturing and
21 confirmed what I thought to be true but needed to confirm,
22 which is that Massachusetts was a major center of gun
23 manufacturing.

24 So quite the opposite is the case, precisely because I've
25 read Bruen very, very carefully. I take the rules laid down by

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 the courts quite seriously and have used them to inform my
2 research for this project.

3 Q. So let me ask you: In coming to the conclusion you
4 testified here about today, that Massachusetts was a major
5 gun-producing state, during what period was it a major
6 gun-producing state?

7 A. During the period that Bruen says is most significant, the
8 year of the Second Amendment.

9 Q. Bruen also says that the period around the founding -- I'm
10 sorry -- around the adoption of the Fourteenth Amendment is
11 also important; correct?

12 A. That is correct. And it would take me some more time to
13 do some more research to fill out that part of the story.

14 Q. Okay. And when you say that it was a major gun
15 manufacturer, what percentage of the gun market did
16 Massachusetts have at the founding?

17 A. I would have to pull something from the scholarly
18 authority -- I've got that -- in order to answer that question.
19 But, essentially, Massachusetts was the major provider of small
20 arms in America prior to the War of 1812.

21 Q. Well, again, you used that word "major." I am just trying
22 to figure out what you consider major, since there isn't any
23 documentation that has been provided to support your claim
24 here.

25 Can you identify what you mean by that?

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United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 A. Well, again, I would be happy, if it would help the
2 Court -- I guess I don't know -- since we're not in a
3 deposition, I don't know what the appropriate rules are. I
4 could dig up the citation to the scholarly authority that is
5 the standard account of early gun manufacturing in America that
6 makes that claim. It was in a book that was published by the
7 University of Penn -- I think it was the University of
8 Pennsylvania Press.

9 Anyway, it was a top-of-the-line academic press,
10 highly -- well-regarded, well-reviewed academic study of early
11 American gun manufacturing. It said, unambiguously, that
12 Massachusetts was the leading provider of small arms in the
13 period before the war of 1812.

14 Q. Any other sources besides this one that you've identified?

15 A. In the footnotes to that claim, there are references to
16 other authorities, but I haven't committed those to memory.

17 Q. Have you reviewed those other authorities?

18 A. Well, I looked at the footnote, and it seems quite chunky
19 and had a lot of impressive citations to it.

20 Q. So that would be a "No"?

21 A. Well, I suppose it depends on -- are you asking me did
22 I --

23 Q. Yeah. Let me withdraw. You picked up on an excellent
24 point.

25 Did you review the sources that were cited in the

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suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 footnote?

2 A. It depends. What do you mean by "reviewed"? Did I go out
3 and check them for accuracy? Did I pull them off the shelf?
4 Did I look to see whether or not they seemed like the
5 appropriate things to cite? There are sort of different
6 standards of checking, depending on what level of confidence
7 you have in the author and the press.

8 Q. Well, you previously testified about how people
9 cherry-pick quotes or pull them out without the context and the
10 importance of the context. I am trying to find out, if in
11 coming up with your opinion today that the majority or -- I'm
12 sorry. I should say a major source of arms manufacturing was
13 Massachusetts, if you relied on just the one source or if you
14 went and actually looked at the sources that were being cited
15 to to determine whether, for example, those weren't
16 cherry-picked citations, that those sources did, in fact,
17 support the one book's conclusion that Massachusetts was a
18 major source of firearms?

19 A. Well, I mean, I also -- well, actually, I also looked at
20 an unpublished dissertation on early American gun
21 manufacturing. I looked at some of the National Park Services
22 documentation about the role of the Springfield Armory in
23 western Massachusetts.

24 So, again, if this was a written report, where I would
25 have had to actually footnote, I would have done even more.

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suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 But for the purposes of this proceeding, I thought I had done
2 enough.

3 Q. So let me ask you -- you talked about the gunpowder laws,
4 and you've asked us to take your word that they were
5 ubiquitous.

6 Is there any crime investigation purpose that you're aware
7 of with the gunpowder laws that existed back at the founding?

8 A. I'm sorry. Can you repeat the question?

9 Q. Yeah. Are you aware of any crime investigation purpose
10 for gunpowder laws?

11 A. Crime investigation?

12 Q. Right.

13 A. So that is an excellent point. One of the most important,
14 recent contributions to our understanding of early American
15 firearms cultures and gun laws is recent work that makes very a
16 compelling case that there was no comparable gun violence
17 problem in the year of the Second Amendment for a variety of
18 reasons.

19 Flintlock black powder muzzleloader weapons are quite
20 time-consuming to load; therefore, they're not good for crimes
21 of passion. Because the black powder used in those guns is
22 corrosive, leaving them loaded is not good for the maintenance
23 of the firearm. And because the black powder is hygroscopic,
24 it attracts moisture, which makes it unreliable.

25 So the most recent evidence we have about patterns of

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 interpersonal violence suggests that America doesn't really
2 have a gun crime problem until the proliferation of handguns in
3 the early 19th century.

4 Q. I'm sorry. I apologize for cutting you off.

5 My question was whether or not you had an understanding
6 that those gunpowder laws had a crime investigation purpose.

7 A. So I guess what my response is: The gun crime is not a
8 significant problem here in the Second Amendment we now know.

9 Q. So that would be "No."

10 A. So, yes, that would be "No."

11 Q. And the proofing, the barrel-proofing laws, did those, to
12 your understanding, have any kind of crime investigation
13 purpose, or were those purely for public safety?

14 A. My understanding is they were primarily for public safety.

15 Q. All right. And you also talked about -- and I recall you
16 discussing this with the State's Counsel. There were early
17 laws that prevented the keeping of loaded firearms.

18 Did you testify that you were aware of those laws?

19 A. Yes.

20 Q. And is it your testimony today that a law that would not,
21 to your understanding of Bruen and the Second Amendment and the
22 history and the historical analogues, that a law that prevented
23 you from keeping a loaded firearm in your house for
24 self-defense would be considered constitutional under your
25 understanding of the Second Amendment and the historical

Suzanne M. McKennon, CSR, CRR, RMR
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1 analogues?

2 A. So sorry. Are you saying: Did the founders think it was,
3 or is contemporary Second Amendment jurisprudence likely to
4 find such a law constitutional?

5 Q. I would go with contemporary Second Amendment
6 jurisprudence.

7 MR. BRADY: Objection. Lacks foundation.

8 THE COURT: Overruled.

9 THE WITNESS: Well, I suppose the standard reading of
10 Heller would be that kind of safe storage law might not pass
11 constitutional muster. But I seem to recall that there was at
12 least one appellate case that was able to distinguish a safe
13 storage law from the kind of law in the District of Columbia,
14 so I don't know that we have a definitive answer to that
15 question yet.

16 BY MR. DALE:

17 Q. Do you have an understanding that the Supreme Court's
18 opinions are considered superior to those of lower appellate
19 courts?

20 A. Yes. But, of course, the fact pattern has to match in
21 order for the rules to apply, doesn't it?

22 Q. Yeah. So if I understand your testimony correctly, is
23 part of identifying historical analogues to the current Unsafe
24 Handgun Act, you have testified to early laws about keeping
25 loaded firearms as evidence of appropriate regulation?

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 A. Sorry. Could you restate the question?

2 Q. Yeah, yeah. So if I understand your testimony correctly,
3 in identifying the historical analogues that the State is going
4 to rely upon to try to say that the Unsafe Handgun Act is --
5 there are historical analogues to it, you've identified at
6 least one early law that didn't allow you to keep a loaded
7 firearm in the house; is that correct?

8 A. Yes.

9 Q. And that law, by the way, is not included in Exhibit 24,
10 is it?

11 A. I'd have to check Exhibit 24.

12 Q. Well, let me ask you this: By your own admission, under
13 contemporary Second Amendment jurisprudence, that sort of law
14 wouldn't be considered something that would pass muster under
15 the Second Amendment; isn't that right?

16 A. Well, of course, that question sort of forces me to come
17 to a contemporary legal conclusion, which is not something
18 that, as a historian, I could provide expert testimony on.

19 Q. Understood. Now, I want to focus you back on your article
20 that was critical of the Bruen decision, and I want you to look
21 at this paragraph here where you are talking about your
22 objection to the majority calling Texas's law an outlier.

23 Do you see that? And it's right there in the middle of
24 page.

25 A. Not on this page, but I do remember saying that.

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suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 Q. Okay. Well, let me make this simpler. You also, in this
2 article, say that another example of a law that promoted
3 regulation of firearms was Georgia's 1868 Arms Bearing
4 Provision in their Constitution.

5 Do you see that part?

6 A. Yes.

7 Q. And, in fact, you previously testified that, in your
8 expert opinion, there was a robust trend of regulation of
9 firearms that sprang from the Fourteenth Amendment; correct?

10 A. Correct.

11 Q. Okay. I am going to take you to another exhibit here.

12 THE COURT: Let me ask you a question, Counsel. It's
13 almost five to 7:00.

14 MR. DALE: Yes.

15 THE COURT: We're not going to get done by 7:00, are
16 we?

17 MR. DALE: I don't believe we are.

18 THE COURT: Okay. So I think, in fairness to the
19 court staff, we should break, then, today and come back
20 tomorrow at 9:00.

21 MR. DALE: Thank you.

22 MR. BRADY: Thank you.

23 MR. DALE: Thank you. And appreciate the
24 accommodation on this.

25 MR. SAROSY: Thank you, Your Honor.

Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

1 MR. WOODS: Thank you, Your Honor.

2 THE COURTROOM DEPUTY: All rise.

3 (Adjourned at 6:54 p.m.)

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6

7 REPORTER'S CERTIFICATE

8

9

10 I certify that the foregoing is a correct transcript of
11 proceedings in the above-entitled matter.

12

13 /s/ Suzanne M. McKennon, CSR, CRR, RMR

Date: 02/03/2023

14 United States Court Reporter

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Suzanne M. McKennon, CSR, CRR, RMR
United States Court Reporter
suzanne_mckennon@cacd.uscourts.gov (213) 894-3913

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	SACV 22-01421-CJC (ADSx)	Date	January 24, 2023
Title	Lance Boland et al v. Robert Bonta		

PRESENT: **HONORABLE CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE**

Rolls Royce Paschal

Deputy Clerk

Attorneys Present for Plaintiffs:

Alexander Frank
Joshua Dale
Konstadinos Moros
Sean Brady

Debbie Hino-Spaan

Court Reporter

Attorneys Present for Defendants:

Charles Sarosy
Sean Woods
Mark Beckington

**PROCEEDING: EVIDENTIARY HEARING ON PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION [23]**

Case called and counsel state their appearance. The evidentiary hearing is held.

Witnesses called, sworn, and testified. Exhibits identified and admitted.

For the reasons stated on the record, counsel shall file a joint stipulation of witness and admitted exhibit list. Counsel shall also file the admitted exhibits by **January 27, 2023**.

Initials of Deputy Clerk:

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION
HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

LANCE BOLAND, an individual;)	
MARIO SANTELLAN, an individual;)	
RENO MAY, an individual; JEROME)	
SCHAMMEL, an individual;)	
CALIFORNIA RIFLE & PISTOL)	
ASSOCIATION, INCORPORATED, a)	
California corporation,)	
)	
Plaintiffs,)	Certified Transcript
)	
vs.)	Case No.
)	8:22-cv-01421-CJC-ADS
ROBERT BONTA, in his official)	
capacity as Attorney General of)	
the State of California; and DOES)	
1-10,)	
Defendants.)	Day 2
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
EVIDENTIARY HEARING
REPORTED VIA ZOOM VIDEOCONFERENCE AND IN PERSON
TUESDAY, JANUARY 24, 2023
9:05 A.M.
SANTA ANA, CALIFORNIA

DEBBIE HINO-SPAAN, CSR 7953, CRR
FEDERAL OFFICIAL COURT REPORTER
411 WEST 4TH STREET, ROOM 1-053
SANTA ANA, CA 92701
dhinospaan@yahoo.com

UNITED STATES DISTRICT COURT

ER-0582

APPEARANCES OF COUNSEL:

FOR PLAINTIFFS:

MICHEL & ASSOCIATES PC
BY: ALEXANDER ASCH FRANK, ESQ.
180 East Ocean Boulevard
Suite 200
Long Beach, California 90802
562-216-4444
afrank@michellawyers.com

MICHEL & ASSOCIATES PC
BY: JOSHUA R. DALE, ESQ.
180 East Ocean Boulevard
Suite 200
Los Angeles, California 90802
562-216-4444
jdale@michellawyers.com

MICHEL & ASSOCIATES PC
BY: SEAN ANTHONY BRADY, ESQ.
180 East Ocean Boulevard
Suite 200
Long Beach, California 90802
562-216-4444
sbrady@michellawyers.com

MICHEL & ASSOCIATES P.C.
BY: KONSTADINOS T. MOROS, ESQ.
180 East Ocean Boulevard
Suite 200
Long Beach, California 90802
562-216-4444
kmoros@michellawyers.com

**APPEARANCES OF COUNSEL:
(Continued)**

FOR DEFENDANTS:

CAAG - OFFICE OF ATTORNEY GENERAL
CALIFORNIA DEPARTMENT OF JUSTICE
BY: CHARLES JOSEPH SAROSY
300 South Spring Street
Suite 1702
Los Angeles, California 90013
213-269-6356
Charles.Sarosy@doj.ca.gov

CAAG - OFFICE OF ATTORNEY GENERAL OF CALIFORNIA
CALIFORNIA DEPARTMENT OF JUSTICE
BY: SEAN CLINTON WOODS
455 Golden Gate Avenue
Suite 11000
San Francisco, California 94102-7004
415-510-3807
Clint.Woods@doj.ca.gov

CAAG - OFFICE OF ATTORNEY GENERAL
CALIFORNIA DEPARTMENT OF JUSTICE
BY: MARK R. BECKINGTON
300 South Spring Street
Suite 1702
Los Angeles, California 90013
213-269-6256
mark.beckington@doj.ca.gov

I N D E X**WITNESSES** **PAGE****SAUL CORNELL, CALLED BY THE DEFENDANT**

Cross-Examination by Mr. Dale (continued)	5
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CLAYTON CRAMER, CALLED BY THE PLAINTIFFS

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EXHIBITS

EXHIBIT		IN EVIDENCE	WITHDRAWN OR REJECTED
9	Northern Kentucky Law Review article	5	
10	SCOTUSblog article	6	
11	Law review article	24	
28	Letter, December 23, 2022	168	

1 **SANTA ANA, CALIFORNIA; TUESDAY, JANUARY 24, 2023**

2 **9:05 A.M.**

3 - - -

4
09:05AM 5 THE COURT: Okay. I think we left off on
6 cross-examination.

7 MR. DALE: Yes, sir.

8 **SAUL CORNELL, DEFENSE WITNESS,**

9 **CONTINUED VIA ZOOM VIDEOCONFERENCE**

09:05AM 10 **CROSS-EXAMINATION (Continued)**

11 BY MR. DALE:

12 Q Good morning, again, Dr. Cornell. Thank you for being
13 here. And we appreciate you staying with us so late last
14 night. I don't know that I have a lot more to ask you.

09:05AM 15 MR. DALE: Before I do, though, last night I asked
16 him questions regarding an exhibit that was a Northern Kentucky
17 Law Review article, and I showed it to him. At this time, I'd
18 like to move to add it as Exhibit 9.

19 THE COURT: Exhibit 9 will be received into
09:05AM 20 evidence.

21 **(Exhibit Number 9 received.)**

22 MR. DALE: And I also asked him questions regarding
23 an article he penned after the *Bruen* decision on the
24 SCOTUSblog. I'd like to move that as Exhibit 10.

09:06AM 25 THE COURT: Exhibit 10 will be received into

1 evidence.

2 (Exhibit Number 10 received.)

3 MR. DALE: And to set the table, I'm going to go
4 briefly back to the SCOTUSblog article.

09:06AM 5 Q BY MR. DALE: We were talking yesterday about how you
6 didn't agree with the majority in *Bruen*, that they rejected
7 Texas as an indicator of the robust regulation that was going
8 on during the Reconstruction period.

9 Do you recall that?

09:06AM 10 A Yes, I do.

11 Q Okay. And in this article where you criticized the
12 Court, you also made reference to Georgia's 1868 constitutional
13 provision regarding bearing arms. And that's right in the
14 middle here of this Exhibit 10 SCOTUSblog article.

09:07AM 15 A Correct.

16 Q Okay. My question for you is -- and I'll take this off
17 the screen now because I don't need it -- my question for you
18 is, Georgia was not a state in 1868; isn't that correct?

19 A So we're dealing with the period of Reconstruction where
09:07AM 20 the reentry and reincorporation of southern states proceeded
21 slowly, and they had to agree to the Fourteenth Amendment. I'd
22 have to check my notes to give you a precise answer because I
23 haven't memorized the date that each of the southern states
24 reentered the Union.

09:08AM 25 Q Understood.

1 So there was a period, though, after the end of the
2 Civil War where the southern states like Georgia, Texas, and
3 others weren't actually states anymore, they were considered
4 military districts; isn't that correct?

09:08AM 5 A Yes. They were -- they -- during the first -- the early
6 phase of military Reconstruction, the south was divided up into
7 military districts, and the goal was to try and reincorporate
8 the south into the Union as expeditiously as possible. And, of
9 course, there was considerable disagreement between Lincoln's
09:08AM 10 quite lenient terms and the much more demanding terms that the
11 radical Republicans wished to impose upon the defeated south.

12 Q And as rebel states -- or former states, subject to
13 military rule, the citizens of those states did not enjoy the
14 full range of constitutional rights; isn't that correct?

09:09AM 15 A During military Reconstruction, yes. But by the time you
16 have an arms-bearing provision in a constitution, by definition
17 you're under constitutional government once again.

18 Q Well, isn't it true that Georgia was not readmitted as a
19 state until 1870?

09:09AM 20 A So, again, I haven't committed all the narrative details,
21 the process by which various states reentered the Union, but
22 once Georgia accepted that constitution -- and that provision,
23 of course, was not unique. Virtually all of the new southern
24 constitutions and the new constitutions of the western states
09:09AM 25 included radically different arms-bearing provisions which may

1 express mention of a police power right of regulation that was
2 now yoked directly to the right to bear arms.

3 So I think the timeline you're sketching, again, I'd
4 have to open up a book and check a few details. But from the
09:10AM 5 point of view of original public meaning, the relevant point is
6 surely that there was a radical change in the language of state
7 constitutional arms-bearing provisions. It was not unique, it
8 was pervasive. Indeed so pervasive, that Justice Alito makes
9 quite a point of it in this *McDonald* opinion saying that
09:10AM 10 whatever the Second Amendment might have meant in 1791, the
11 evidence of the changed language in state arms-bearing
12 provisions should cause us to recognize that some things had
13 changed.

14 Q All right. So if I understand your testimony correctly,
09:10AM 15 you're saying that virtually all of the western states, when
16 they came into the Union, had these -- what you're calling
17 these police power arms-bearing provisions; is that correct?

18 A Yes. I think I once tallied it up, and there were a total
19 of 16 newly drafted or drafted from first time, as they moved
09:11AM 20 from territories to states, constitutions implying a radically
21 different formulation of the right to bear arms, one that no
22 longer mentioned the militia or the threat of standing armies,
23 but that stress the power of the state to regulate arms.

24 Q All right. But, again, none of those constitutional
09:11AM 25 provisions were submitted as part of Exhibit 24 in support of

1 the State's case; correct?

2 A So --

3 Q Is that correct?

4 A I have written about them, and they're mentioned in --

09:12AM 5 some of them are mentioned in *McDonald*. But, again, this was a
6 hearing and not a full proceeding where we produced a
7 declaration. If I had more time to write up a report, I could
8 certainly produce all of those texts for your edification.

9 Q So -- and I would certainly appreciate that.

09:12AM 10 So, again, to clarify, you need more time in order
11 for the state to be able to show that these historical
12 analogues exist. You can't do it today; correct?

13 A Well, we didn't prepare a declaration for today, no. My
14 understanding is this was a hearing in which we would flesh out
09:12AM 15 some of these issues in a preliminary fashion. And if it was
16 necessary to produce full declaration, that would require us to
17 proceed in a different manner.

18 So, no. So my instructions were not to produce a
19 detailed declaration or a long report, but to simply canvass
09:13AM 20 the relevant history as directed by *Bruen* and offering opinion
21 on what that initial canvassing revealed.

22 Q All right. Are you aware that the State produced
23 declarations in opposition to plaintiff's motion for
24 preliminary injunction?

09:13AM 25 A The State certainly sent me a bunch of documents. But

1 given that I'm a historian and not a member of the State's
2 litigation team, I didn't dwell particularly long on what
3 motions they were making, since my focus was really on the
4 history.

09:13AM 5 Q So you weren't asked to prepare a declaration as one of
6 the ones to be submitted in opposition to plaintiff's motion;
7 that's correct?

8 A So for today -- for today's hearing, I was not asked to
9 prepare a declaration, that's correct.

09:14AM 10 Q Okay. Yesterday we talked a little about Exhibit 9.
11 That was the 2002 article you wrote for the Northern Kentucky
12 Law Review where you talked about your historical belief that
13 the civic right theory of the Second Amendment was the correct
14 one.

09:14AM 15 Do you recall that testimony?

16 A I do.

17 Q And that was not the -- certainly the only time that you
18 gave the opinion that the civic right theory of the Second
19 Amendment was the correct one?

09:14AM 20 A Yes. Although I think it is worth noting that there has
21 been an awful lot of scholarships since I published that. And,
22 in particular, there's a quite important article by
23 Jud Campbell, who's a leading originalist scholar, who was, I
24 think, recently appointed as professor at Stanford.

09:15AM 25 And he has a kind of paradigm-shifting analysis

1 which suggests that the entire debate over the Second
2 Amendment, as it's been proceeding, has missed important
3 aspects of 18th Century constitutional and legal thought,
4 particularly the way rights were understood.

09:15AM 5 So I would have to say I haven't completely recast
6 my thinking, but his really quite brilliant analysis, some of
7 which appears in the law journal -- I think he's had three
8 articles in the law journal, which may be a record, recasting
9 the First Amendment, has caused me to rethink some of my
09:15AM 10 framing of this issue. But I have not yet had a chance to
11 explicate that in a scholarly venue.

12 Q And do you recall in 2004 publishing an article in the
13 Fordham Law Review in which you further talked about your
14 historical understanding of the Second Amendment as a civic
09:16AM 15 right and not an individual or collective right?

16 A Right. So, again, it is important when we use these terms
17 which are scholarly analytical framework, that when I -- you
18 know, at the time that I was trying to understand the Second
19 Amendment, when I called it a civic right, the purpose of
09:16AM 20 calling it a civic right was to call attention that we
21 understand the right in its 18th Century sense, and that 18th
22 Century rights in general don't easily fit into our modern
23 simple dichotomy between individual and collective rights.

24 And that's one of the reasons why I find Jud
09:16AM 25 Campbell's work so exciting and powerful because he's the first

1 scholar to really flesh out a different vocabulary and a
2 different understanding of how we should talk about rights so
3 that we don't keep falling back into these anachronistic modern
4 framing of the rights. And I assume that's why he got the job
09:17AM 5 at Stanford, which is quite a coup for a young scholar of his
6 stature.

7 Q You co-authored amicus briefs that were presented to the
8 Supreme Court in their consideration of the *Heller* case; isn't
9 that correct?

09:17AM 10 A Yes.

11 Q And in those amicus briefs you, again, argued for the
12 civic right theory of the Second Amendment; isn't that correct?

13 A Well, not exactly. The *Heller* briefs was spearheaded by
14 Jack Rakove at Stanford, who's, I think, generally regarded as
09:17AM 15 the leading constitutional historian of this generation.

16 And Rakove was the lead author. And I would say
17 that most people would characterize the brief as making a
18 slightly different type of originalist argument about the
19 nature of the Second Amendment. So no, that brief was not
09:18AM 20 really modeled on a civic rights argument.

21 Q Well, the brief that you co-authored, that was not the
22 view that the Supreme Court adopted in the majority opinion in
23 *Heller*; isn't that correct?

24 A I think that's a fair statement, if it's somewhat, you
09:18AM 25 know, slightly reductionist. There were certainly aspects of

1 that brief that are consistent with *Heller*; other aspects of
2 that brief that aren't.

3 Q Well, let me make it easier because I don't want to hit
4 you with any ambiguities.

09:18AM 5 Your amicus brief was not cited favorably in the
6 majority opinion in *Heller*; correct?

7 A That's right. We got our best "ink" in the dissenting
8 opinions.

9 Q Understood.

09:19AM 10 So I'm going to now show you a law review article
11 that you wrote recently, actually. If I can just figure out
12 where I put it. Apparently, I didn't have it. My apologies.

13 All right. Doctor, if you take a look on your
14 screen, you're going to see a symposium essay.

09:19AM 15 Do you recall writing this essay?

16 A Yes.

17 Q And you wrote this in 2021; correct?

18 A Correct.

19 Q And so this would have been about a year before the *Bruen*
09:19AM 20 decision came out?

21 A Literally this article came out two days before the
22 deadline for filing amicus briefs in *Bruen*. I think it was
23 something like this article published on Friday, and the amicus
24 briefs were due on Monday. I'd have to check the specific
09:20AM 25 dates.

1 Q Well, that's -- yeah, that must have certainly been fun.

2 In this article, you -- again, like you talked about
3 in the SCOTUSblog article critical of the Supreme Court, you,
4 again, argue that Reconstruction era America had a very rich
09:20AM 5 history of applying the Second Amendment in a way which
6 permitted regulation during the Reconstruction period.

7 Is that a fair characterization?

8 A That is a fair characterization.

9 Q Okay. And you not only argued that it was -- that --
09:20AM 10 well, withdrawn.

11 You made the claim there that radical Republicans
12 that were driving the Reconstruction Movement in Congress and
13 nationally, they were as equally fervent about this regulatory
14 turn towards firearms as were the southern Democrats who were
09:21AM 15 supposedly doing it for racist reasons.

16 Is that a correct characterization?

17 A That's not really a correct characterization. So the gun
18 regulations being pushed by neo-Confederate southerners were
19 racially targeted laws designed to disarm recently freed
09:21AM 20 persons.

21 The regulations that the Republicans were racially
22 neutral and were driven by the desire not to -- you know, not
23 to weaken the ability of African Americans to defend
24 themselves, they were designed to address the rampant violence
09:22AM 25 of the period and were primarily targeted at groups like the

1 Klan which were terrorizing Republicans and African Americans.

2 So they each were efforts of regulation, but the
3 nature of the regulations and the driving impulse behind them
4 were almost diametrically opposed.

09:22AM 5 Q All right. Can you read the sentence I've highlighted
6 from page 71 of your 2021 article there?

7 A "Republicans were committed to a vision of government
8 that would protect the rights of recently freed
9 slaves and promote the ideal of a well-regulated.
09:22AM 10 society."

11 Q And, again, this is in comport with your opinion that
12 you've given, that there was this robust regulation going on
13 during the Reconstruction period that would be consistent with
14 some of the laws being challenged, including the Unsafe Handgun
09:23AM 15 Act; is that fair?

16 A So I would actually say it's not so much an opinion, it's
17 a statement of fact. There are, unquestionably, many, many gun
18 regulations enacted during this period. And subsequent to the
19 publication of this essay, we have some quite remarkable
09:23AM 20 scholarship showing that these blogs were actually enforced,
21 and enforced in a racially neutral manner until Jim Crow and,
22 at that point, the sort of Reconstruction project of building a
23 multicultural racially inclusive society collapsed, and pretty
24 much every law in the south was turned towards the goal of
09:23AM 25 perpetuating a "white supremacist Jim Crowe vision" of the

1 south.

2 Q But, again, that robust scholarship and those citations,
3 they're not anywhere within State's Exhibit 24; correct?

4 A Well, again, since my charge was not to assemble a report
09:24AM 5 where, of course, I would cite them, no. I mean, they're not
6 cited because there's no report. It would be hard to cite them
7 without actually having written a report.

8 Q Right. But they're not -- none of those laws that
9 support the testimony you're giving today about this robust
09:24AM 10 regulation, none of those laws have been attached to
11 Exhibit 24; isn't that correct?

12 A Yes. But you have examples of the law in the documents
13 before you.

14 Q But those were laws back during the Founding period;
09:24AM 15 isn't that correct?

16 A No. No. This article is entirely about the period of
17 Reconstruction.

18 Q No, this article. I meant specifically the laws that the
19 State presented on your direct examination regarding gunpowder
09:25AM 20 storage, regarding barrel proofing. You haven't provided any
21 laws from the Reconstruction period for gunpowder storage, for
22 barrel proofing, or anything else that you contend is part of
23 the historical analogues that support the Unsafe Handgun Act;
24 isn't that correct?

09:25AM 25 A Yes. The focus of the documents that were provided were

1 on Founding era laws which are -- makes quite a bit of sense
2 given the importance of the Founding era. But it was not
3 intended to be an exhaustive or comprehensive election of laws,
4 it was merely a sampling which the AG's office produced for the
09:25AM 5 Court's benefit.

6 Q But you also contend that this -- what you claim as a
7 robust history of regulation during the Reconstruction era is
8 also important for the Court to consider. In fact, *Bruen*
9 requires the Court to require Reconstruction era laws; correct?

09:26AM 10 A Well, it is fascinating. There's a lot of debate about
11 the relevance of 1791 and 1868. I'm actually quite delighted
12 to hear that you believe that 1868 is really important because
13 there are many people on the gun rights side who said we should
14 not pay any attention to 1868. So I am very pleased to hear
09:26AM 15 that you believe that 1868 is important and we are to dig more
16 deeply into it. I think that's a very positive development in
17 this inquiry.

18 Q But more importantly, as part of providing your opinions,
19 you believe that period is important for the Court in
09:26AM 20 determining whether this law that's being challenged is, you
21 know, something that is permissible or impermissible after
22 *Bruen*; isn't that right?

23 A Yes. So if this was -- if I was asked to write a
24 comprehensive report and produce a declaration, I would
09:27AM 25 certainly include extensive discussion of that. That, of

1 course, was not my charge in this particular proceeding,
2 because it is not a -- it was sort of a preliminary hearing on
3 a preliminary injunction, if I'm not mistaken. Here, I'm
4 betraying my historian's training in my absence of legal
09:27AM 5 training.

6 Q Understood. And if the state didn't ask you to do that,
7 the state didn't ask you to do that.

8 Let me -- I want to delve a little further into your
9 article and highlight another part that I would like you to
09:27AM 10 read. And if I understand correctly, this is -- in this
11 article where you're arguing about this -- excuse me.
12 Withdrawn.

13 In this article where you are writing about this
14 robust era of regulation of firearms rights during the
09:28AM 15 Reconstruction period, you then go on to give an example. Can
16 you go ahead and read that for me.

17 A Which part? You want me to read the whole paragraph or
18 just the General Order Number 1?

19 Q The part that I've highlighted in blue, please.

09:28AM 20 A Okay.

21 "Nothing better illustrates the linkage
22 between gun regulation, the right to bear arms and
23 the protection of free persons than General Daniel
24 Sickles's general orders. In General Order
09:28AM 25 Number 1, Sickles declared 'The constitutional

1 rights of all loyal and well-disposed inhabitants to
2 bear arms will not be infringed. Nevertheless, this
3 shall not be construed to sanction the unlawful
4 practice of carrying concealed weapons, nor to
09:28AM 5 authorize any person to enter with arms on the
6 premises of another's against his consent."

7 Q And, again, you're giving this as a illustration of the
8 bipartisan, robust gun regulation that was occurring during the
9 Reconstruction era; correct?

09:29AM 10 A Well, no, it's not bipartisan. General Sickles is a
11 representative of the Reconstruction republican government.
12 He, obviously, would not have been very well liked by
13 neo-Confederates who opposed Reconstruction. But it is a great
14 source for understanding what was the thinking of the
09:29AM 15 Reconstruction era governments regarding both the right to bear
16 arms, the importance of racially neutral and robust regulation
17 of firearms and, most fascinating of all, particularly in light
18 of developments in New York and New Jersey, stating clearly
19 that the default assumption is no guns on private property
09:30AM 20 without permission as opposed to the view that people can carry
21 guns wherever they want unless you have a "no firearms" posted.

22 So this is really quite a remarkable statement of
23 what the Republicans view to be the scope of the -- and the
24 robust regulation permissible of the right to bear arms.

09:30AM 25 Q Well, you say this is an example of the Republicans of

1 that time. General Sickles was a military officer; correct?

2 A Yes. General Sickles was a military officer, correct.

3 Q And he was a commander of one of these military districts
4 that had been set up post the Civil War to basically maintain
09:30AM 5 marshal law within the South until the states were readmitted;
6 correct?

7 A Correct.

8 Q And, in fact, these general orders, they weren't
9 legislated. Congress didn't pass them down. These were orders
09:31AM 10 that he wrote up himself in his role as a military commander of
11 a military district; isn't that correct?

12 A Yes. But, you know, the point is that if you look at sort
13 of much of the scholarship that you mentioned, people like, you
14 know, Glenn Harlan Reynolds and Randy Barnett and many people
09:31AM 15 who have adopted the robust libertarian view of the Second
16 Amendment, almost all of them quote this as dispositive of the
17 meaning of the Second Amendment in the era of the Fourteenth.
18 But, of course, they quoted selectively. They just quote the
19 part about up to the semicolon and ignore the part that comes
09:31AM 20 after the semicolon.

21 So, you know, it is certainly true that we certainly
22 need to understand the difference between military
23 Reconstruction and civilian Reconstruction. But this
24 particular text has bloomed large in modern Second Amendment
09:32AM 25 scholarship, particularly, Second Amendment scholarship

1 forwarding a libertarian expansive view of the right to bear
2 arms.

3 So it does seem odd to me that you would disparage
4 the significance of this because it would tend to undercut much
09:32AM 5 of the scholarship that you yourself have suggested is
6 important to understanding *Heller* in the Second Amendment.

7 Q You do understand that with regard to this general order,
8 the people that were subject to it were not given the full
9 range of constitutional rights that other Americans were given
09:32AM 10 during this time period?

11 A Well, what General Sickles is, in fact, saying, and the
12 plain text underscores this, is that we need to protect those
13 rights in a racially neutral manner. So I'm not sure that I
14 would agree with the way you've spun the text in this context.

09:33AM 15 Q Well --

16 A It is certainly true that the larger context -- we're
17 talking about multi-Reconstruction -- where we're not living
18 under a normal civilian constitutional order, but this
19 particular text clearly is asserting the need to protect rights
09:33AM 20 in a racially neutral manner.

21 Q So are you aware of the case of *in re McCardle* from the
22 Reconstruction era?

23 A Sorry, which case?

24 Q *In re McCardle*.

09:33AM 25 A Oh, *McCardle* case?

1 Q Yes.

2 A Yes.

3 Q And that was a case where a newspaper publisher in
4 Vicksburg, Mississippi published an article that was not -- let
09:33AM 5 me phrase it this way -- it was critical of Reconstruction
6 legislation.

7 Would that be a fair characterization?

8 A I must confess, it's been a while since I read that
9 decision. That rings true. But before I'd opine on it, I'd
09:34AM 10 need to reread it. Because I know it is -- it's a landmark
11 decision from the Reconstruction era, but, again, I haven't
12 committed every major decision or maritime institutional law to
13 memory. So I would need to reread it.

14 Q Okay. And I apologize. I actually misquoted. It's
09:34AM 15 *Ex parte McCardle*. And the cite on that is -- if I can find it
16 again -- 74 U.S. 506.

17 And so you don't have any regulation in that case
18 of -- in that instance the newspaper publisher seeking habeas
19 corpus relief from the Supreme Court and being denied because
09:34AM 20 he wasn't entitled to it as a citizen of a military district?

21 A Like I said, you know, the habeas cases from that period
22 are important. And I have read them. And when I'm teaching
23 Civil War Reconstruction, I refresh my memory about them. But
24 I -- without having read them in about a year, my memory isn't
09:35AM 25 good enough to give you an informed scholarly opinion. But

1 your account sounds entirely plausible to me.

2 Q All right. Well, I won't ask you more questions on that.

3 I'm just -- I'm trying to determine how the Court
4 can have evidence of this robust history of regulating firearms
09:35AM 5 during Reconstruction when you're citing in this instance to a
6 military order over essentially militarily occupied people --
7 actually I'm going to withdraw that.

8 Were there concerns for the military at that time
9 about Southern sympathizers shooting at the military and
09:36AM 10 shooting at black people?

11 A Well, there was a tremendous amount of violence in this
12 period, and that's one of the reasons why many laws are passed.

13 Q I mean the South in particular.

14 A The vast majority of that article that you cite actually
09:36AM 15 lists dozens of racially neutral laws that were passed and,
16 indeed, actually focuses quite heavily on California and the
17 rise of permitting schemes during this period. So I wouldn't
18 think it's a fair characterization to say that I'm relying
19 heavily or even primarily on the general orders.

09:36AM 20 Actually, the article's mostly about laws passed by
21 the California legislature and other legislatures and shows
22 that half of California's population was living under
23 regulations at least as burdensome as the law at issue in
24 *Bruen*; and that the ten largest cities in America all have laws
09:37AM 25 at least as onerous as *Bruen*. And this is during the era of

1 the Fourteenth Amendment. That's really what the article is
2 about.

3 Q I see. So your article essentially is citing to these
4 other laws and regulations for support for the idea that the
09:37AM 5 law in New York that was overturned in *Bruen* was actually a
6 valid law?

7 A Well, the -- the best way to characterize it was the law
8 in *Bruen* was itself part of a larger movement to regulate
9 firearms that extended back into the 1870s.

09:37AM 10 MR. DALE: All right. I'd like to move this law
11 review article into evidence as Exhibit 11.

12 THE COURT: Any objection?

13 MR. WOODS: No objection.

14 THE COURT: Exhibit 11 will be received into
09:38AM 15 evidence.

16 **(Exhibit Number 11 received.)**

17 Q BY MR. DALE: I'm going to wrap up here.

18 Are there any assurances you can give to the Court
19 that your personal beliefs about gun regulation have not seeped
09:38AM 20 into the opinion that you've provided here today and you
21 provided yesterday?

22 A Well, my job as a scholar is not to take my personal views
23 and make them the foundation for my scholarly analysis. My
24 job, as a scholar, is to use the standard rules that govern
09:38AM 25 scholarly inquiry and apply them to the materials.

1 So, you know, none of my -- I mean, one of the
2 things that people find quite surprising is my involvement in
3 the whole gun debate is really not -- has very little to do
4 with the gun debate. It's all about the use of history and
09:39AM 5 constitutional law.

6 And, indeed, I often remind people of the famous
7 episode of "Seinfeld" in which Jerry's dentist decides to
8 convert so they won't be the subject of so many jokes. And at
9 the end of the episode, Jerry complains. And somebody says,
09:39AM 10 "Does this offend you because he's converted to Judaism."

11 He says, "No, no, no. It doesn't offend me for that
12 reason. It offends me because I'm a comedian."

13 So my interest in this has always been about the
14 history, not about the guns. I just want to make sure that
09:39AM 15 courts have the best possible history available to them. And
16 so my personal views about guns have very little to do with
17 what I do. It's all about defending Clio's honor, if you will.
18 Clio being the muse of history.

19 Q And I apologize if I wasn't clear. I wasn't talking
09:40AM 20 about your personal views on gun control per se. I meant your
21 views on gun control history. And I'm just wondering what
22 assurances you can give to the Court in light of the fact that
23 your views were rejected by the Court in *Heller*; they were
24 rejected, again, in *Bruen*. And you wrote a very -- you know,
09:40AM 25 not just an article critical of the Supreme Court after that,

1 but personally attacking them. You called them "hacks." You
2 called them "ideologues." You called them, essentially,
3 "agents of the federal society." And that seems to me at least
4 to go beyond, you know, preserving history.

09:40AM 5 So I'm wondering what you can tell the Court that
6 would assure it that you are not -- you don't have some animus
7 towards the Court and the *Bruen* decision for having rejected
8 your views of history in *Heller* and *Bruen*.

9 MR. WOODS: Objection. Argumentative.

09:41AM 10 THE COURT: Overruled.

11 If you want to respond to it, sir.

12 THE WITNESS: Well, as we discussed yesterday, I
13 think what any scholar does, when they act in their scholarly
14 capacity, is employ what are the orthodox and accepted rules
09:41AM 15 for that discipline. And given that *Bruen* is the law of the
16 land, any expert report or any opinion I would offer in the
17 context of a proceeding would be governed by what the law of
18 the land is. And so whatever I might write in a law review
19 article or op-ed about the Court is somewhat different than
09:41AM 20 what I would do in this capacity, because the rules governing
21 this particular enterprise are very, very different.

22 You know, I think anyone who spent their life
23 participating in academic debate recognizes that you need to
24 wear more than one hat if you're going to be a scholar,
09:42AM 25 particularly one who operates as a public intellectual. And so

1 it seems to me it's really just sort of standard operating
2 procedure.

3 You know, when SCOTUSblog calls you -- and that's
4 worth pointing out, they don't call a lot of people. Getting
09:42AM 5 published in a SCOTUSblog is a bit of a coup -- they want
6 something that will engage their audience, and they're asking
7 for a certain kind of writing. And when, you know -- when the
8 AG's office calls and says, "We need an expert witness report,"
9 they're asking for a very different kind of piece of writing
09:42AM 10 and piece of analysis. And I think any scholar worth their
11 weight can move between those two roles effortlessly. That's
12 the very definition of an accomplished scholar.

13 Q BY MR. DALE: I appreciate you reiterating that *Bruen* is
14 the law of the land.

09:43AM 15 As you sit here today, do you still believe that the
16 Texas laws that were rejected as outliers in the *Bruen*
17 decisions are outliers? I'm sorry. I'm going to withdraw
18 that.

19 Do you still believe that the Texas laws that were
09:43AM 20 rejected as outliers in the *Bruen* decision are still not
21 outliers?

22 A So I think that I share the view of many people that the
23 criteria by which a law is characterized as an outlier in *Bruen*
24 is insufficiently clear, and that if looking at the first round
09:43AM 25 of judicial decisions applying *Bruen*, we're already seeing that

1 courts are construing the outlier concept in very different
2 ways. So I think the best answer I can give is we need more
3 guidance.

4 And I assume it will probably come at the appellate
09:44AM 5 level or, perhaps, at the district level about what exactly an
6 outlier is and what is the metrics to determine it because
7 *Bruen* pronounces that certain things are outliers, but it
8 doesn't really provide a very detailed set of metrics to
9 determine that. And I remain puzzled as do many, many, many
09:44AM 10 constitutional scholars and theorists and even judges.

11 Q But, specifically, do you believe that Texas is an
12 outlier?

13 A Well, in *Bruen*, the Court says Texas is an outlier.

14 Q Do you believe it?

09:44AM 15 A For purposes of a declaration, it would not make much
16 sense to hinge an argument on Texas because the Court has
17 pronounced it an outlier.

18 Now, what we take to be the guiding principle that
19 made Texas an outlier, and whether or not a law in Louisiana
09:45AM 20 would fall under a similar criteria, we really don't know, do
21 we?

22 Q Well, if I understand correctly, you're professing to not
23 know at this point; isn't that right?

24 A Well, I'm professing to share the view of, I think, the
09:45AM 25 vast majority of people who have weighed in on what *Bruen*

1 means, that it's not exactly clear how to apply *Bruen's* outlier
2 principle on a consistent and neutral fashion.

3 Q Understood. Thank you again for your time this
4 afternoon, and I appreciate it. Thank you, Doctor.

09:46AM 5 THE COURT: Redirect?

6 MR. WOODS: Yes. Thank you.

7 **REDIRECT EXAMINATION**

8 BY MR. WOODS:

9 Q Good morning, Dr. Cornell -- or good afternoon where you
09:46AM 10 are. Thank you again for joining us. I just have a few
11 questions for redirect. And you covered this, but I wanted
12 to -- you covered this a little bit.

13 Counsel asked you a lot of questions about the
14 SCOTUSblog article, about *Bruen*, and I just want to make clear,
09:46AM 15 were you acting as an expert witness on history in writing that
16 article?

17 A No. I was asked to give my quick first reactions to *Bruen*
18 as a scholar and interested citizen, what I thought -- what I
19 thought of the decision.

09:46AM 20 Q Okay. And then counsel asked you some questions about
21 the 1868 Georgia Constitution and the provision in there.

22 Do you recall that?

23 A Right.

24 Q Does it matter to your analysis around police powers
09:47AM 25 whether that statement in the 1868 Georgia Constitution was

1 pre- or post-readmittance for Georgia?

2 A No, I don't think it does. If it was isolated, if it was
3 an outlier, it would, but, of course, it's typical. And there
4 are over a dozen similar provisions. So I could have just as
09:47AM 5 easily chosen anything from Utah to you name it, because that
6 was -- that was a profound change in the language of state
7 constitutional arms-bearing provisions.

8 Q And counsel asked a question about historical analogues
9 and whether or not you can point to historical analogues for
09:47AM 10 the unfair competition law. But you can point to historical
11 analogues, can you not?

12 A Sorry. I couldn't hear the last question.

13 Q You can point to historical analogues for the unsafe
14 handgun law; correct?

09:48AM 15 A Yes.

16 Q Okay. And what are those historical analogues?

17 A So could you just point me to the specific year so I can
18 know whether I'm going forward or backward in time for
19 analogues?

09:48AM 20 Q Well, do you want me to pull up Exhibit 24 again?

21 A Yeah. That would be helpful.

22 Q Great. I can do that. Let me see. Hang on.

23 A I'm sorry about that. I kind of got lost in the
24 chronology where I am.

09:48AM 25 Q No problem.

1 A Since we've been weaving back and forth between "Founding"
2 and "Reconstruction."

3 Q Okay. This is Exhibit 24, and that's the dictionary
4 pages, and here's the 1805 law that we talked about yesterday.

09:49AM 5 A Right. So as I said, I found this law about two weeks
6 ago. I was aware of a subsequent law from the 18-teens, and
7 another law from Maine from the 1820s. And after I found this
8 law, I noticed that Massachusetts continued this process
9 through the Reconstruction period, but I have not yet had the
09:49AM 10 time to expand the scope of my research beyond Massachusetts
11 and Maine.

12 Q Okay. And I believe your testimony yesterday was also
13 that gunpowder laws around storage and loading guns were also
14 historical analogues to the unsafe handgun law; is that
09:50AM 15 correct?

16 A Yes. I've been working on gunpowder storage laws for a
17 very long time. These gun-proving laws really didn't figure in
18 my analysis because they were not relevant to the kinds of
19 questions I was asking at the time. It's only in the context
09:50AM 20 of this latest round of litigation where things like the
21 microstamping act make laws like this so relevant. Really most
22 of the litigation-driving research was about public carry.

23 So the vast majority of my energy was devoted to
24 digging out that particular history. So, yes, I have a good
09:50AM 25 sense of this for Massachusetts, which, as we've established,

1 is a very important center of gun manufacturing, but I have not
2 had the time to expand beyond that.

3 Q And your opinions in this case are not limited to the
4 sampling of laws that are cited in Exhibit 24; correct?

09:51AM 5 A No. I mean, you know, I've been writing about this for a
6 long time, and I published widely about this. So my opinions
7 reflect that body of scholarship. And amazing as it may seem,
8 we are still finding new things. This 1805 law being a good
9 example.

09:51AM 10 Q All right. And counsel asked you some questions about a
11 Kentucky Law Review article that was published in about 2002.

12 Do you recall those questions?

13 A Yes. One of the earliest things I published.

14 Q Right. And that was before *D.C. v. Heller*; correct?

09:51AM 15 A Correct.

16 Q And counsel asked you some questions regarding some
17 characterizations of your law review articles, specifically the
18 article in the Davis Law Review that was recently published.

19 Do you recall that?

09:52AM 20 A Yep.

21 Q Would you say that the fairest characterization would be
22 to read the article in the entirety to understand what you were
23 saying?

24 A Oh, absolutely. I mean, the article is primarily about
09:52AM 25 gun regulations enacted during the period of Reconstruction

1 when Republicans were in charge, not the period when military
2 rule was the norm in the reconstructed South.

3 Q All right. Thank you, Dr. Cornell.

4 MR. WOODS: I have no further questions at this
09:52AM 5 time.

6 THE COURT: All right. Any further questions?

7 MR. DALE: No.

8 THE COURT: Thank you, sir.

9 THE WITNESS: Thank you very much. And thank you
09:52AM 10 for allowing us to do this on Zoom given the COVID spike. I
11 appreciate that.

12 THE COURT: Any more witnesses from the defense?

13 MR. WOODS: No, Your Honor.

14 MR. DALE: I would like to recall Mr. Cramer.

09:52AM 15 THE COURT: Very well.

16 MR. WOODS: Your Honor, I think Mr. -- or
17 Dr. Cornell mistakenly dropped off. I was going to ask him --

18 THE COURTROOM DEPUTY: He's coming back.

19 MR. DALE: Mr. Cramer, we're going to wait until
09:53AM 20 Dr. Cornell comes back on line before I start asking questions.

21 THE WITNESS: Okay.

22 **(Pause in proceedings.)**

23 THE COURT: He's still trying to get connected.

24 MR. WOODS: I apologize and beg the Court's
09:55AM 25 forgiveness for this and indulgence. I've texted him. I'm

1 going to jump outside very quickly.

2 THE COURT: Okay.

3 **(Pause in proceedings.)**

4 MR. WOODS: I believe he's back on.

09:56AM 5 **CLAYTON CRAMER, PLAINTIFF WITNESS,**
6 **RECALLED AND TESTIFIED VIA ZOOM VIDEOCONFERENCE**

7 **DIRECT EXAMINATION**

8 BY MR. DALE:

9 Q Thank you, Mr. Cramer. Thank you for being with us
09:56AM 10 yesterday for the entire day, and thank you again for being
11 with us again this morning.

12 Did you have an opportunity to listen to
13 Dr. Cornell's testimony, Mr. Cramer?

14 A Yes, I did.

09:57AM 15 Q Let me ask you, have you ever previously been aware of
16 Dr. Cornell giving expert testimony in cases regarding firearms
17 laws?

18 A Yes. In a case which I was also giving expert testimony
19 two years ago --

09:57AM 20 Q *Baird v. Bonta.*

21 A Right.

22 Q And was he testifying on behalf of the State in that
23 case, or was he testifying on behalf of the plaintiff
24 challenging the law?

09:57AM 25 A State's.

1 Q Okay. And you heard his prior testimony where he talked
2 about how he has multiple cases that he's providing expert
3 testimony for the State.

4 Did you hear that?

09:57AM 5 A Yes.

6 Q Do you have any understanding as to whether he ever
7 testifies in favor of the constitutionality of a gun control
8 law?

9 A I'm not aware that he's ever done so. That does not mean
09:58AM 10 that -- that does not necessarily mean that he's consistently
11 against. He has a rather nuanced view of the meaning of the
12 Second Amendment. And it is possible to read what he says in a
13 way that will be in opposition to some sort of gun control
14 laws.

09:58AM 15 Q But you're not aware of him ever testifying on behalf of
16 a plaintiff challenging the law?

17 A No. No, I'm not.

18 Q Okay. And, you know, you heard the testimony about the
19 civic right theory of the Second Amendment?

09:58AM 20 A Uh-huh.

21 Q Is it your understanding that the Supreme Court accepted
22 or rejected that theory subsequent to it being proposed?

23 A I think they pretty thoroughly rejected it. I mean,
24 *D.C. vs. Heller*, it definitely took an individual's rights.

09:58AM 25 But the idea that Mr. Heller's right to possess a firearm is

1 somewhat dependent on his willingness to participate in the
2 collective activities of this society was not in any way
3 required.

4 Q And did you hear his testimony last night where he said
09:59AM 5 that pistols were rare in the early part of the Founding of
6 America up through Reconstruction?

7 A Yes, I did. In fact, I think he was specifically saying
8 before Colt's began -- started manufacturing in 1848 -- and, in
9 fact, I think pistols were quite readily from throughout the
09:59AM 10 period before 1848, not just dueling pistols --

11 Q Sorry. Keep going. My apologies.

12 A The Henry gunsmithing family, which was several
13 generations of Pennsylvania, made guns (inaudible) the Interior
14 Department to provide the Indians and, also, for personal use.
10:00AM 15 Quite a number of them are actually pocket pistols that they're
16 making. So they're not dual pistols at all.

17 Q So do you agree with his testimony that pistols were rare
18 prior to the Civil War?

19 A Yes. They were rarer than muskets and rifles, but they
10:00AM 20 were sold to quite a number of them. They advertised quite
21 readily in newspapers. One case I found, one said, "2,000
22 pairs of pistols available."

23 Q And did you hear his testimony yesterday that
24 Massachusetts was a major producer of arms during -- following
10:00AM 25 the Founding?

1 A Yes, I did. I found that a little bit surprising.
2 Because other than Springfield Armory, I was not aware of any
3 gun manufacturers in Massachusetts in that period. What it is,
4 the U.S. Government, along with the population census every ten
10:00AM 5 years at that point, also is doing censuses of manufacturing.
6 They were trying to find out who was manufacturing what and
7 what states. The 1810 manufactured census showed absolutely no
8 manufacturing of guns in Massachusetts. It showed quite a bit
9 in Pennsylvania, however, and some of the other states like
10:01AM 10 Tennessee.

11 Q So do you agree or disagree with his testimony that
12 Massachusetts was a major manufacturing or firearms following
13 the Founding?

14 A It was not. The 1820 census, manufacturing, which was
10:01AM 15 quite a bit more complete than the 1810, it's not as well
16 organized to be able to find a total by state. I went through
17 all the entries for all the counties of Massachusetts, and I
18 found only one county that showed any sort of firearms
19 manufacturing, and that specifically was making 2,000 muskets a
10:01AM 20 year for the U.S. Government. So that was the Springfield
21 arsenal. So not a prior firm at all.

22 And interesting enough, that proofing law does not
23 apply to any barrels being made for the U.S. Government. So
24 the proofing law would appear to have had little or no impact
10:02AM 25 on who was actually making guns in Massachusetts.

1 Q And you had an opportunity to hear his testimony about
2 the Massachusetts laws that were identified in Exhibit 24, did
3 you?

4 A Yes.

10:02AM 5 Q And do you agree with his opinion that Massachusetts
6 laws, like the one cited in Exhibit 24, should be given more
7 weight than laws in other colonies or states around the period
8 of the Founding?

9 A I would say it has more weight than some law that might
10:02AM 10 have been passed in a remote community out on the frontier
11 somewhere than a territory. I would agree on that.
12 Massachusetts is not -- it's not the most important state in
13 the Union, but it's not a critical one either.

14 Q So if 12 of the 13 states of the Founding didn't have
10:02AM 15 laws requiring proofing, but Massachusetts did, in terms of the
16 opinions that you've provided to the Court, would that have any
17 impact on how much weight you would give the Massachusetts law
18 in comparison to the other 12 states?

19 A I would say that it's obviously not as important. I mean,
10:03AM 20 you always find an outlier of some sort. It's just not as
21 dramatic of an outlier as the one that *Bruen* pointed to where
22 you're talking about frontier communities in territories with
23 laws that often do not survive more than a few years, usually
24 because states cause the revisions.

10:03AM 25 Q And did you hear the testimony about Dr. Cornell's

1 reliance on General Sickles' order as an example of the robust
2 regulation that was going on during Reconstruction?

3 A Well, I would say that the banning of the concealed carry
4 of weapons is something that by the time that the Civil War is
10:04AM 5 over, it was pretty generally accepted as something that was
6 within the realm of the State's authority to do. But it also
7 shows that it was still your right to carry your arms. And
8 this right was individual in nature. It was not a collective
9 right.

10:04AM 10 Q And it wasn't a civic right; correct?

11 A Right. In fact, in some ways it's quite the opposite.
12 The post war period, some of the neo-Confederates, basically,
13 they have state militias formed specifically to enforce the
14 power over the KKK and the right to possess your arms as a way
10:04AM 15 to push back on the KKK. It was definitely an individual right
16 fighting against this sort of strange civic right idea that
17 he's got.

18 One of the things I also found very interesting in
19 looking at Exhibit 24 is I believe that the --
10:05AM 20 Professor Cornell described this --

21 Q Hold on. Hold on, Mr. Cramer. Did you want to look at
22 Exhibit 24?

23 A Yes, please.

24 Q Let me go ahead and put it up on the screen so everyone
10:05AM 25 has it and we know what you're looking at.

1 What page would you like to look at?

2 A Page 17.

3 Now, this and the next page is supposed to be a
4 gunpowder storage law. I do not see anything in here that

10:06AM 5 describes the general organization of the city government of
6 New York City.

7 Q So explain to me the significance of that.

8 A Well, he was referencing a gunpowder storage law. It's
9 actually not a gunpowder storage law at all.

10:06AM 10 Q Well, what kind of law was it?

11 A Well, it's basically directing the -- for the mayor and
12 recorder. It was the law --

13 **(Reporter requests clarification**
14 **for the record.)**

10:06AM 15 Q BY MR. DALE: Hold on. Hold on. Mr. Cramer, could you
16 slow down a little bit for the court reporter and repeat what
17 you just said.

18 A Okay. It is a law that is providing some sort of
19 provision for the organizing of city government. It is not
10:07AM 20 anything to do with gunpowder storage at all. So I know how we
21 made this mistake because I'm very familiar with the gunpowder
22 storage laws of that period. I'm aware of a number of them.
23 But this particular one, he has the wrong volume number. He
24 went to Volume I. The pages he wants are actually in
10:07AM 25 Volume II.

1 Q I see. So --

2 A I'm a little --

3 Q So?

4 A It's actually a law.

10:07AM 5 Q All right. But it's not reflected in the document that
6 was submitted as part of Exhibit 24.

7 Is that what you're saying?

8 A Yes. I'd say it's a little bit on the sloppy side to
9 submit something like this without apparently having read the
10:07AM 10 actual law you're submitting.

11 Q Okay. So to clarify, this page 17 and page 18, which you
12 understand was submitted as evidence of a gunpowder storage
13 law, it's actually the incorrect volume?

14 A Right.

10:08AM 15 Q Okay. Now, you talked about how banning concealed carry
16 was something that was recognized during Reconstruction?

17 A Yes, it was generally accepted by that point that states
18 had that authority.

19 Q Do you consider that sort of authority to ban concealed
10:08AM 20 carry a historical analogue to the provisions of the Unsafe
21 Handgun Act?

22 A Not in the least.

23 Q Okay.

24 A However, I would say that one of the things
10:08AM 25 Professor Cornell mentioned was that the post-bellum, it's the

1 constitutional -- constitutions have a lot more police power
2 written into them. From my reading of the case law associated
3 with those post-bellum constitutions, it appears that there
4 were two different motivations for those to increase police
10:09AM 5 powers be added to it, the "right to arms" provisions.

6 One was a -- of course there had been some cases
7 that have challenged totalitarian laws in the antebellum period
8 as contrary to the State constitutional guarantee. And because
9 in some cases, State's recourse did actually strike down such
10:09AM 10 laws, making sure that the constitutional provision provided an
11 opportunity for the State legislature to regulate it somewhat,
12 the carrying of concealed weapons certainly makes some sense.

13 I would also point out that a lot of the southern
14 states that increased police power, there was an increased
10:09AM 15 opportunity to go ahead and find some way to disarm the
16 freedmen, because it's really hard to keep freedmen terrified
17 of the Klan if you start putting holes in their robes and
18 hoods.

19 Q So let me ask you, were there any other opinions that you
10:10AM 20 heard Dr. Cornell testify to that you disagreed with?

21 A Yes. At one point, he made a reference to a recent --
22 saying that the loading of black powder firearms in the
23 constitutional period was sufficiently difficult. And the need
24 was to keep them unloaded -- keeping them loaded with damaged
10:10AM 25 guns. That is a very logical assumption that you would do

1 that.

2 But I found when I looked through
3 Governor Winthrop's journal of Massachusetts Colony, at least
4 four separate accidents with bad results were because someone
10:10AM 5 had left a loaded musket accessible, in one case, to a child.
6 In others there were people on a militia muster who were -- not
7 an actual discharged gun, but a -- supposedly an unloaded
8 weapon. So pretty clearly, people in this period did often
9 keep loaded black-powdered weapons in their homes or in their
10:11AM 10 possession. They were not widely used.

11 And I would also point out that Professor Cornell
12 pointed to a 1783 law that provided that Boston residents could
13 not keep loaded artillery pieces or firearms in their homes.
14 And it seems if it was really a bad idea to have a loaded
10:11AM 15 black-powder weapon because the risk would have created damage
16 in the weapon, seems all you have to tell people is "Do not do
17 this as a fire safety measure" if it was already considered a
18 bad idea. Pretty obviously a lot of people were keeping loaded
19 black-powder firearms in their homes. It appears loaded
10:11AM 20 cannons and hand grenade ordinance was mentioned in there as
21 well.

22 And, also, when he talked about how personal views
23 would not influence a scholar worked, I think it's fair to say
24 that any scholar who is not influenced, to some degree, in what
10:12AM 25 area he researches, what he's looking at is going to

1 necessarily be very difficult to not be influenced by the
2 things -- also the things you research that you think about
3 what public policy should be.

4 Q Were there any other opinions of Dr. Cornell you heard
10:12AM 5 and disagreed with?

6 A I guess the -- at one point, the microstamping was made to
7 the proofing laws. That's a poor analogy because the proofing
8 laws were intended as a public safety measure to prevent all --
9 to be directly injured by the exploding gun.

10:13AM 10 Microstamping is a -- an ill-fated attempt to track
11 down who the unlawfully used firearm belongs to. Most of the
12 time unlawful-use firearms are not registered to the -- are not
13 owned by the person who actually used weapons if it was stolen.

14 It seems like microstamping is sort of a -- not an
10:13AM 15 analogy, it's an attempt to make it appear as though you're
16 trying to find people who were responsible for these crimes
17 when, realistically, a lot of the guns that are misused are
18 stolen in burglaries and robberies.

19 Q Of all the laws that you saw cited in Exhibit 24, do you
10:13AM 20 have an opinion as to whether any of those laws have the same
21 or similar crime investigation purpose that microstamping has
22 under the UHA?

23 A No. The proofing laws are -- those are purely safety
24 issues and have nothing to do with pursuit of criminals.

10:14AM 25 Q All right. Thank you again for being back with us this

1 morning.

2 MR. DALE: At this time, I'd submit Mr. Cramer as an
3 expert under 302.

4 THE COURT: So designated.

10:14AM 5 MR. DALE: And I'll tender the witness. Thank you.

6 **CROSS-EXAMINATION**

7 BY MR. WOODS:

8 Q Mr. Cramer, thank you for joining us this morning. My
9 name is Clinton Woods. I am a Deputy Attorney General for the
10:14AM 10 State of California representing the defendant in this case. I
11 want to follow up on just a few questions that counsel asked
12 you just now.

13 Would you say that your personal views influence
14 what you read and think about history?

10:15AM 15 A Absolutely. It's certainly an influence why I decided to
16 research. And I think it would be illogical to think that a
17 person would not be influenced to highly read the significance
18 of the law.

19 Q Have you ever testified on behalf of the State or any
10:15AM 20 state defending gun law as constitutional?

21 A No. Although some of my law review articles have been
22 cited by government -- U.S. Government, in fact, in cases where
23 they were trying to demonstrate, for example, misdemeanor
24 aggressive violence convictions are, in fact, a valid firearms
10:15AM 25 disqualifier.

1 Q Have you ever published in a peer review journal?

2 A Yes.

3 Q Okay.

4 A *Journal of Mass Media Ethics*.

10:15AM 5 Q And what was the topic of your publication?

6 A The topic was that the way that news media covered mass
7 murders is very unbalanced. It gives -- they give far more
8 space to mass murders involving guns than they do mass murders
9 involving other sorts of weapons.

10:16AM 10 There was a period there where the biggest mass
11 murders in American history were done entirely with explosives
12 and arson, and most people do not have any awareness of those,
13 because news magazines, like, "Time" and "Newsweek" pretty much
14 ignored those and gave enormous coverage to the mass murderers
10:16AM 15 with guns.

16 And, of course, the copycat -- one of the things
17 that I'm working on right now is the history of mass murders in
18 the United States. And one of the things I've noticed in an
19 awful lot of these crimes are copycats. There's one where a
10:16AM 20 woman came in and -- her husband read her a -- she read a
21 horrific account of a person who murdered their family with a
22 rat poison. She read it three times and then she went and
23 bought the rat poison and killed herself and her child.

24 So people are definitely influenced by -- the more
10:16AM 25 the news media report on something, the more likely they are to

1 encourage or influence someone to say, "Well, if I'm doing
2 something horrible, that's what we'd use to do it with."

3 Q Understood. But you don't dispute that mass murders
4 involving guns do happen; correct?

10:17AM 5 A Oh, they certainly do happen. And from the 1920s on,
6 they've become more common.

7 Q Right.

8 Have you ever heard received any fellowships at any
9 educational institutions?

10:17AM 10 A No. I have -- most of my career was spent as a software
11 engineer. I went back to school and got my bachelor's degree
12 and -- my bachelor's degree while I was working for some
13 startups in California until I had a stroke in 2014, which you
14 may be able to tell from the swallowing issues that I'm having.

10:17AM 15 Until 2014, that's what I did for a living. I did teach a
16 little bit at the Boise State University out of the community
17 college. But mostly I was a software engineer.

18 Q Understood. And no fellowships; correct?

19 A Right.

10:18AM 20 Q Thank you.

21 Counsel asked you some questions about a page on
22 Exhibit 24 that you pointed out were New York's organizing
23 laws.

24 Do you recall that testimony?

10:18AM 25 A Yes, I do.

1 Q Would you agree that organizing laws include the power to
2 regulate gunpowder?

3 A No, because the gunpowder storage law is actually very
4 specific and refers to gunpowder. And there's a limit to the
10:18AM 5 amount you can have in your home.

6 Q But you don't dispute that there was such a gunpowder
7 regulation in New York at that time; correct?

8 A Yes. It's in Volume II of *Laws of New York*.

9 Q Understood.
10:18AM 10 And you don't dispute that there are gunpowder
11 regulations in virtually all the colonies at that point; is
12 that correct?

13 A I'm not sure I'd say all of them. I know of one in
14 Pennsylvania in 1782, and I know of one in South Carolina in
10:19AM 15 1770. And there's one in Brunswick, New Jersey by 1821.

16 Q So that sounds like a pretty good sampling.

17 A Those are the ones I found.

18 At some point someone was crazy enough to ask me --
19 we do every -- every published year in effect our succession
10:19AM 20 log of the revolutionary period which, believe me, was a lot of
21 work. And so along the way, I was looking at gun-related
22 laws -- anything -- hunting laws, carrying laws, licensing
23 laws, gun storage laws, things like that. And that's why I was
24 able to find these. There probably are others, but I would not
10:19AM 25 claim that I found every one of them.

1 Q Does it take a long time to do a full historical
2 analysis?

3 A It does take a very long time. The one thing that has
4 really changed since I was working on my master's degree was --
10:20AM 5 when I was working on my master's degree, I went to University
6 of California Hastings law school library.

7 Q That's where I went to law school.

8 A Well, that library has this enormous collection of books
9 gathering dust. And that was a very slow process to go through
10:20AM 10 and find all the case law associated with all those state
11 constitutional provisions. And it's a lot faster now. But
12 even now, looking through old statutes online is a slow and
13 laborious process.

14 Q Do you agree that the 1868 timeline is relevant to the
10:20AM 15 constitutional inquiry for these cases?

16 A I would say it's relevant with one little caveat, and that
17 is, 1965, 1868, you have an awful lot of these states passing
18 laws that are very clearly aimed at disarming freedmen. And
19 the Fourteenth Amendment, to a large extent, was an attempt to
10:21AM 20 overturn the black codes and, specifically, the firearms
21 related ones.

22 And so you have to look at those laws with that in
23 mind that what you may be seeing is one of the laws that the
24 reason the Fourteenth Amendment was adopted. So the fact that
10:21AM 25 there's a law to that purpose may not necessarily mean very

1 much. Needless to say, this is the one they were trying to
2 stomp out, as an example.

3 Another case that I read recently, another case that
4 I was working with the lawyers on, there was an 1867 Alabama
10:21AM 5 law that had a provision that basically said -- that prohibited
6 the possession of a Bowie knife without some sort of \$2 fee,
7 and a handgun was, like, \$3. And it really struck me that
8 those are the laws that could have been -- even though they
9 were racially neutral in the text, it would be very easy to
10:22AM 10 have either enforced a racially unneutral way or the cost of
11 the licenses to possess a Bowie knife or a pistol might well
12 have had a disproportionate impact on the freedmen.

13 Q Okay. But it seems like you agree that the time frame is
14 relevant to the constitutional inquiry; correct?

10:22AM 15 A The time frame is relevant, yes.

16 Q Thank you. Did you submit a declaration in this case?

17 A I did not.

18 Q Is that because you weren't asked to submit a
19 declaration?

10:22AM 20 A No one asked me to. I would have had absolutely no
21 problem doing so. I've spent -- basically starting 1989,
22 pretty much every waking hour that was not involved with
23 raising a family or working for a software company -- has been
24 spent that was searching this topic.

10:22AM 25 Q And you testified yesterday about laws concerning honor

1 culture around the Founding.

2 Do you recall that testimony?

3 A Not so much on the Founding, but they are an issue during
4 the Founding period.

10:23AM 5 Q Understood.

6 A Dueling is an issue associated with military throughout
7 the most part of Europe. A lot of military officers came over
8 to America either on the British side or fighting on the
9 American side, and they brought this notion of the honor
10:23AM 10 culture with them. It's something that was already present in
11 some of the southern states, but this sort of was aggravated in
12 the north.

13 And dueling became very unpopular because of the
14 Alexander Hamilton death, and the south had persisted for quite
10:23AM 15 a bit longer. And to some extent it's a reflection of the fact
16 that an awful lot of Scotch-Irish immigrants had brought this
17 honor culture with them from the very violent and largely
18 without law parts of the border counties between Scotland and
19 Ireland -- Scotland and England.

10:24AM 20 Q And is it your testimony that the colony -- or excuse
21 me -- the states, at that time, enacted laws in response to
22 this sort of honor culture?

23 A Yes. As I said yesterday, the very indirect sort of
24 relationship. We want to stop dueling, but the only way to
10:24AM 25 stop dueling is for people to not challenge someone to duel.

1 The only way to make sure they don't do that is you see someone
2 that's armed openly, they don't have to go over and attack
3 them. But if they're carrying a concealed, who knows, maybe
4 they'll draw a weapon on me and kill me. So maybe I'm not
10:24AM 5 going to go in and insult them.

6 Q But you didn't submit any primary sources of these laws
7 that were passed as a result of the honor culture as part of
8 your testimony either yesterday or today, did you?

9 A No. But if anyone wants, I can provide them -- boy, do I
10:25AM 10 have a collection.

11 Q And you didn't submit, for example, the 1810 census, the
12 primary source, as part of your testimony today, did you?

13 A No, I did not. I found that last night after -- I had
14 been through the documents previous from a book I had written
10:25AM 15 some years ago.

16 But when Professor Cornell made that claim, I went
17 ahead and found the documents that were supplied to -- the
18 documents to Mr. Dale.

19 Q Right. But the fact that you didn't submit those primary
10:25AM 20 sources doesn't mean that those primary sources don't exist;
21 correct?

22 A Right. They do exist. But if anyone wants them, I can
23 provide them.

24 Q Thank you.

10:25AM 25 MR. WOODS: No further questions.

1 THE COURT: Anything further?

2 MR. DALE: No.

3 THE COURT: All right, sir. You're excused. Thank
4 you.

10:25AM 5 THE WITNESS: Thank you. Glad to be of help.

6 THE COURT: Any more evidence?

7 MR. DALE: Not from plaintiffs, Your Honor.

8 THE COURT: Okay. Anything further from the
9 defense?

10:26AM 10 MR. WOODS: No, Your Honor.

11 THE COURT: Okay. Why don't we take a break. And
12 then when we get back from the break, I have some questions. I
13 kind of wanted to think out loud with both sides and then we
14 can talk about submitting closing supplemental briefs. I think
10:26AM 15 that would be helpful and appropriate in this case. So take
16 about ten minutes. About ten minutes.

17 THE COURTROOM DEPUTY: All rise.

18 **(Recess from 10:26 a.m. to 10:40 a.m.)**

19 THE COURT: All right. I have a few questions, some
10:40AM 20 issues I wanted to brainstorm with both sides. And why don't I
21 start with the plaintiffs first. I don't know who wants to
22 answer my questions, and maybe go to the lectern. And then
23 there may be some other issues you want me to think about. I'd
24 encourage you to let me know what those are, and then we can
10:40AM 25 talk about closing briefs.

1 So I want to give a disclaimer. I want this to be a
2 very open and free discussion. Don't read into any of the
3 issues that I identify that that's where I'm coming out. This
4 is just the way I think and I try to analyze the issues. And I
10:41AM 5 would want you to answer my question, but if you think any
6 question -- the answer isn't really relevant or probative,
7 please feel free to tell me that. I want you to tell me that,
8 which it's kind of ironic.

9 Usually the rule is if the judge asks the question,
10:41AM 10 you got to answer it and it's important. But I find the *Bruen*
11 decision a little confusing, quite frankly, as a district judge
12 on how to apply it. And that's going to be my first question
13 is, as I read *Bruen*, there's a -- I guess two-element -- or
14 two-step test.

10:42AM 15 The first is does the plain text of the Second
16 Amendment cover an individual's conduct? And taken literally,
17 it seems to be pretty understandable and clear, but I don't
18 think it's completely literal. In other words, do I look at
19 that narrowly or do I look at it broadly? And more specific --
10:42AM 20 I just jotted down -- is the step: Are plaintiffs' rights to
21 acquire a new state-of-the-art handgun protected by the Second
22 Amendment right to keep and bear handguns? Is that the
23 question that I ask myself? Or is it: Does the UHA's
24 requirements interfere with plaintiffs' rights to keep and bear
10:43AM 25 handguns?

1 The step, as worded, focuses on the plaintiffs'
2 conduct. And I think in the briefs, which I understand, it was
3 does the requirements of the UHA, does that implicate the plain
4 text of the Second Amendment? Maybe it's the same thing, but
10:43AM 5 what's the starting point?

6 I gave you two examples. Is there any other
7 question -- precise question that I -- that I should be asking
8 at this first step?

9 The problem that I also see, and then I'll be quiet
10:43AM 10 and let you answer that, is if I read this very broadly, this
11 first step, then it's not really a step at all. I mean, if you
12 satisfy it by just mentioning a firearm -- refers to or
13 mentions a firearm or a handgun, then the plain text is
14 covered, that seems too easy.

10:44AM 15 Personally, and I could be wrong on this, I would
16 say that a serial number on a weapon shouldn't be implicating
17 the right to bear -- keep and bear firearms because that
18 doesn't impact the ergonomics, the structural integrity of the
19 weapon. It's not hard to do. It's not costly. And that
10:44AM 20 shouldn't interfere with your right to keep and bear firearms.

21 And then if I -- so I don't feel it should be too
22 broad, would be too easy to satisfy, but I don't think it
23 should be the other extreme is we can require gun manufacturers
24 just to sell squirt guns. You know, that -- that -- you know,
10:45AM 25 that's not right either.

1 So I think the plaintiffs, in their brief, they used
2 a -- described -- or does this implicate. "Implicate" is
3 better than "cover." But isn't there -- doesn't this have to
4 really interfere with your right to keep and bear firearms?

10:45AM 5 Now, maybe what standard applies in this case,
6 plaintiffs are going to say, "We'll be able to satisfy it," and
7 so be it. And defense may say, "No, you can't satisfy it."
8 But I really want to know what is that first question in this
9 first step that I need to be asking myself?

10:46AM 10 MR. FRANK: Thank you, Your Honor. I think I can
11 absolutely help the Court understand how to apply the *Bruen*
12 test.

13 So the test does have two parts. It's a little
14 unclear, but perhaps upon a first reading of *Bruen*, whether
10:46AM 15 it's a two-part test or whether it's not. And I think the
16 Court does understand the ambiguity quite well.

17 When the Court says -- when -- as Justice Thomas
18 wrote regarding the first step:

19 "We hold that when the Second Amendment plain
10:46AM 20 text covers an individual's conduct, the
21 Constitution presumptively protects that conduct."

22 Now, what the State is trying to do is advance an
23 extremely narrow understanding of this first step. They are
24 trying to advance an argument that unless a gun law effects a
10:47AM 25 complete destruction of an individual's Second Amendment right

1 to possess an operable firearm for self-defense, then it's
2 whatever the law in question that we're analyzing is
3 constitutional, that it's okay. It's a presumptively lawful
4 exercise of the State's police power or perhaps falls under the
10:47AM 5 language from *Heller* about a presumptively lawful commercial
6 regulation.

7 But that's a misreading of *Heller*, and it's a
8 misreading of *Bruen* and other authorities like *Caetano v.*
9 *Massachusetts*. And those cases establish that of course a
10:47AM 10 complete destruction of the right is going to violate the
11 Second Amendment. That's a granted. However, that doesn't
12 mean that anything that falls short is not a violation. So the
13 proper interpretation of this language from *Bruen* that
14 establishes the first part of this test is a broad
10:47AM 15 interpretation of it.

16 Now, that doesn't mean that there may not be
17 circumstances where it's a stretch to see whether or not the
18 Second Amendment right is implicated, but in virtually all
19 cases, and definitely here, it is correct to look at the law
10:48AM 20 that effectively picks an arbitrary point in time and says that
21 if you -- if a manufacturer cannot include a hypothetical
22 technology that's never really been proven to be commercially
23 adaptable, that's just too bad, and you have to choose from
24 everything that's aging into obsolescence that was on the
10:48AM 25 market prior.

1 In the *Pena v. Lindley* case, which litigated this
2 same question that's before the Court here prior to *Bruen*,
3 there's an excellent dissent by Judge Bybee where he explains,
4 "Well, what does the Supreme Court mean when they talk about
10:48AM 5 presumptively lawful commercial regulatory measures? How do we
6 square that with this broad individual rights holding?" And
7 what he basically said, which is very helpful, is that there
8 are certain types of commercial regulations that apply to all
9 kinds of things in society, and other constitutional context do
10:49AM 10 not present ambiguous questions.

11 So the example that he raised was in the free
12 exercise domain of the First Amendment, is imposing a tax that
13 a church would have to pay the same as a car dealership or any
14 other type of commercial actor, is that an insult to the free
10:49AM 15 exercise of religion? And the answer is no, because it applies
16 everywhere.

17 But if we're to go beyond that to a more dramatic
18 extreme of regulation, you can clearly see how something that's
19 a commercial regulation would actually be a serious insult to
10:49AM 20 the right.

21 And I think the example that Judge Bybee used was
22 imagine if a commercial regulation was passed that said that a
23 gun store can only be open from 11 at night until midnight or
24 that there's a \$1 million bond that someone who wants to buy a
10:49AM 25 gun would have to post in order to acquire a gun. Sure, that

1 would really be a commercial regulation. But would that really
2 be squarable with the broad, strong, individual rights notions
3 that *Heller* established?

4 So I think this is long-winded way, Your Honor, of
10:50AM 5 saying that it should be interpreted broadly. It's a
6 borderline rhetorical question. And as Judge Bybee said
7 that -- it seems pretty clear that if you draw an arbitrary
8 line on the sand and say, "You can't have any new guns in
9 California that were introduced past this point" -- or maybe
10:50AM 10 not any new guns, but new semiautomatic handguns, the
11 quintessential self-defense choice under *Heller*, that clearly
12 intrudes into the Second Amendment right. That intrudes into
13 the most widespread common practice of what the Second
14 Amendment right in the United States means today, which is
10:50AM 15 acquiring handguns.

16 THE COURT: Can I interrupt you because --

17 MR. FRANK: Of course.

18 THE COURT: -- you said -- you used a word there
19 that I get, but I want to seize on it. You used the word
10:50AM 20 "intrude." And I saw in some of the documents one of the
21 definitions of infringement, apparently at the time of the
22 Founding of the Constitution, was "hinder."

23 So is that the word -- or what I'm trying to
24 understand, does it intrude, hinder, interfere? I understand
10:51AM 25 what you're saying. It's not complete destruction. That's too

1 high of a burden. And you could have something that's far less
2 drastic, but it substantially impairs your ability to keep and
3 bear firearms.

4 So I interrupted you. Is that the answer to my
10:51AM 5 question, is it's got to impede, interfere, intrude, as opposed
6 to just refer, mention firearm.

7 MR. FRANK: I think it's actually a question that
8 this Court doesn't have to answer. There have been no --
9 inside of 15 years, there have been four Supreme Court
10:52AM 10 decisions that I think answer the question clearly, which is
11 that if we're touching upon someone's ability to exercise the
12 right, then we're within the meaning of the plain text, and we
13 can proceed to step two.

14 Does that answer the Court's question?

10:52AM 15 THE COURT: Maybe -- I don't think so. I guess I've
16 written a lot of orders and opinions, and at least, in my own
17 mind, I need to understand what I'm saying. That refers to my
18 comment I said. The standard is really important to me to
19 apply the correct standard.

10:52AM 20 MR. FRANK: Uh-huh.

21 THE COURT: And I get it. You're going to be saying
22 there may be a couple ways to look at this reasonably, but we
23 satisfy it no matter what. The purist in me still, I want to
24 know what is the best interpretation of this first step? I
10:53AM 25 want to know that. And I -- I assume you're going to say we

1 can easily satisfy it. I still want to know.

2 MR. FRANK: Understood, Your Honor.

3 *Caetano v. Massachusetts*, this is one of the early
4 post-*Heller* cases, and the issue before the Court there was
10:53AM 5 whether or not Tasers are a protected category of arms. And
6 what the *Caetano* court said was, "Yes, they are." And Tasers
7 are a less -- are a sublethal type of arm. And so if the
8 Supreme Court has held that the -- and in that case the Supreme
9 Court said that the Second Amendment presumptively extends to
10:53AM 10 all bearable instruments that can basically be weapons.

11 So if Tasers -- if Bay Staters, who were seeking to
12 protect their rights, require Tasers under the Second Amendment
13 were successful, then Californians seeking to protect their
14 right to acquire their choice of what the semiautomatic handgun
10:54AM 15 market nationwide has to offer, I think they should similarly
16 be able to pass the bar. We're talking about the
17 quintessential handgun.

18 Q And so, again, you can disagree with me, but I still --
19 it's dancing around my issue because the limitations in this
10:54AM 20 case are -- it's not a complete ban of Tasers. There's
21 limitations on the features.

22 MR. FRANK: Uh-huh.

23 THE COURT: I got a bunch of questions about that
24 when we get to the second step. But this first step, do you
10:54AM 25 agree that it's got to be something more than just mentioning a

1 firearm? Do you agree with that?

2 MR. FRANK: I think so. I think that's probably
3 true. I can't think of an example where just mentioning would
4 be outside of it. It's possible.

10:55AM 5 THE COURT: Well, but the example, you might
6 disagree, you got to put a serial number on the firearm. I'm
7 not talking about microstamping. Let's get no confusion. I
8 said it doesn't make sense to me why that would, using your
9 word, implicate or intrude on the right to keep and bear
10 firearms. Because, again, it doesn't affect the ergonomics of
11 the weapon. It's relatively inexpensive to do. You can easily
12 do it. So I wouldn't think that that implicates it.

13 MR. FRANK: I think you make a persuasive argument,
14 Your Honor. I think it might not.

10:55AM 15 THE COURT: Okay.

16 MR. FRANK: But if you look at it at a general
17 level, this law prevents Californians from buying handguns, the
18 quintessential self-defense weapon, against *Heller*. I think
19 that's all you really need to know in order to decide the --
10:56AM 20 regardless of how you want to construct the first part of the
21 test, whether you want to go very broadly or very narrowly, if
22 you look at it at that level, the fact that there's still guns
23 on the roster that people can acquire doesn't really matter
24 because we're still looking at what the question is.

10:56AM 25 The UHA restricts Californians from accessing a

1 significant number of modern semiautomatic handguns and,
2 therefore, restricts the supply. And under authorities
3 nationwide, here in the Ninth Circuit and throughout the
4 nation, courts recognize that there's a concomitant right to
10:56AM 5 commerce in arms, to acquire arms necessary to exercise the
6 right to self-defense that's protected under the Second
7 Amendment.

8 So the weight of the authority here would clearly
9 indicate that we don't need to decide on how broadly or
10:56AM 10 narrowly to interpret the language that establishes the first
11 step under *Bruen* if we look at it like that. There's a right
12 to acquire arms, and there's really little room to doubt that
13 there's an intrusion into someone's ability or attempt to
14 exercise.

10:57AM 15 Now, I know I used that word "intrusion" again, and
16 the Court maybe is a little unsure. But in any event, the
17 Supreme Court has said that infringement -- the Supreme Court
18 did not adapt the 1950's dictionary definition that the State's
19 trying to advance. The State is trying to advance an argument
10:57AM 20 that the Supreme Court has already settled. The right to bear
21 arms under *Heller* and other authorities is not likely to be
22 reversed anytime soon. And infringement doesn't mean what the
23 State would like it to mean.

24 THE COURT: Well, one of the definitions of
10:57AM 25 "infringement" at the time is "hinder." Another is "destroy."

1 And they're taking the view "destroy," but I get that. But I
2 take from your papers and from what I heard today, you're
3 basically saying these requirements are preventing a citizen,
4 law-abiding citizen from acquiring a new state-of-the-art
10:58AM 5 semiautomatic handgun.

6 MR. FRANK: Correct.

7 THE COURT: So you're left with the old models. You
8 know, that has my attention. That seems significant.

9 One of the issues that's not clear to me, have there
10:58AM 10 been any new handguns registered since 2013 when the
11 microstamping thing came in? If you understand my question.
12 When I mean new handguns, did they have to go through a firing
13 reliability test and safe dropping? Because I understood I
14 think Agent Gonzalez saying that, you know, if it's pretty much
10:59AM 15 identical the way it -- the mechanical features, it's just you
16 have a different color or maybe a different material on a grip
17 or something, that you can register it, but it just is another
18 fee. But you don't have to go through the drop test or the
19 firing liability. I'm not talking about those.

10:59AM 20 I'm saying is there any new handgun that has been
21 registered, that meets, I guess, all these -- these three
22 requirements: The chamber load indicator, the magazine
23 disconnect mechanism, and the microstamping?

24 MR. FRANK: No, Your Honor.

11:00AM 25 THE COURT: So there's nothing new that's been added

1 since 2012?

2 MR. FRANK: There's no new semiautomatic centerfire
3 handgun that has all three features. I believe the State
4 introduced some evidence of a -- kind of a jerry-rigged version
11:00AM 5 of a gun that's like a single-shot exemption kind of a thing,
6 but that is a totally different animal.

7 There have been no new semiautomatic centerfire
8 firearms introduced to the broader national market post-May of
9 2013 that have been admitted to the roster because they've been
11:00AM 10 able to satisfy all three. There are no guns anywhere in the
11 world that have microstamping, let alone here in California.

12 As we learned from plaintiffs' expert Mr. Beddow,
13 this technology was invented and tested in a laboratory. And
14 the laboratory test was proven that after a very minimal amount
11:00AM 15 of rounds, it's borderline useless. It's not fully -- it's not
16 imprinting a legible or complete stamp on primers.

17 So we know in the laboratory it can work. But in
18 the real world implementation, by the world's biggest and even
19 some of the smallest manufacturers, it's not implemental. It's
11:01AM 20 a theoretical technology that works in the laboratory, but it's
21 not commercially adaptable. That's what plaintiffs' expert
22 testified to.

23 And the State has not made any efforts to
24 collaborate with arms manufacturers. And I think the fact that
11:01AM 25 ten years on, after the -- after the theoretical experiment

1 that this would fall into technological revolution and
2 firearms, here we are, and there's not a single one anywhere.

3 And we're not even talking about a small industry
4 that's incapable of bearing R & D costs. These are global arms
11:01AM 5 manufacturers, many of which has U.S. government defense
6 contracts like FN. These companies could afford to do this if
7 there were a consumer demand and feasibility to actually make
8 this technology work.

9 But it doesn't work because it's an unnecessary
11:01AM 10 complication to an already fairly delicate type of technology.
11 Firearms are held together with pins and springs. And the
12 shooting of the firearm injects thousands of pounds or hundreds
13 of pounds of explosive pressure. So little parts that aren't
14 well designed can break very easily.

11:02AM 15 And after all, this is a mechanical industry we're
16 talking about here, and it just hasn't worked. And that's why
17 no gun has been admitted in the last ten years as the currently
18 available options agent to obsolescence.

19 THE COURT: I feel I do understand your argument.

11:02AM 20 Let me ask you a few questions about some of the
21 requirements other than microstamping, because I think I know
22 where you're going with that. But give it to me simply. What
23 is the problem with the chamber load indicator as far as using
24 the firearm?

11:02AM 25 MR. FRANK: As far as using it from a user's end

1 view of it?

2 THE COURT: Yeah. Why -- I assume I can look at
3 each of these requirements individually, and I feel I'm on top
4 of the microstamping issues, but some of the evidence, from
11:03AM 5 what I was listening to, I don't want to say it's inconsistent,
6 it's not conflicting, but it's just not clear.

7 Does the chamber load indicator cause a problem,
8 "yes" or "no," for the user?

9 MR. FRANK: Yes.

11:03AM 10 THE COURT: What is that problem?

11 MR. FRANK: The problem with the chamber load
12 indicator is that, as Mr. Boland testified, and even, as I
13 believe, Mr. Gonzalez testified, is that a chamber load
14 indicator is a technological solution to a problem -- to a
11:03AM 15 human problem that is a mismatch.

16 It is a -- the idea behind it is that somebody who
17 is in the process of negligently using a firearm, which
18 violates all the rules of gun safety, is going to have a sliver
19 of a chance at seeing that there's a thing on the gun that
11:04AM 20 looks weird, inspect it for what it is, read it, and say, "Oh,
21 this gun's loaded." That's the theory behind it.

22 But in practicality, we know that this piece of
23 technology has a failure rate and it proposes something of a
24 logical conundrum, which is that if someone is being negligent
11:04AM 25 with a firearm, can we really expect a small little pop-up on

1 the top or the side of the slide of the pistol to really do
2 much? It's unsubstantiated whether this technology really even
3 can do what it purports to do.

4 In the process, it can actually obscure the sights
11:04AM 5 on a pistol, which is a terrible thing to happen to you if you
6 need to use a firearm in a defensive situation. Acquiring a
7 clear-sight picture through your sights is hard enough when
8 your adrenaline is pumping or you're in a dangerous situation.

9 So to point your sights above the weapon and not
11:04AM 10 have a clear-sight picture is a terrible thing tactically to
11 happen to you. And it can also, unfortunately, cause the kind
12 of problems that it's designed to prevent from happening in the
13 first place.

14 THE COURT: Because of distraction and it obstructs
11:05AM 15 the user's vision.

16 MR. FRANK: Right. And as Agent Gonzalez said, it
17 could potentially malfunction and tell you that your gun is
18 loaded when it's not.

19 So a law enforcement officer maybe who is using a
11:05AM 20 weapon -- equipped with one that's a duty weapon -- might look
21 at the gun and say, "Okay. I have a round in the chamber. I
22 can go on duty now," and then there might be an altercation
23 where they need to use deadly force, draw their weapon and
24 present their weapon and pull the trigger and not get the bang
11:05AM 25 they were expecting. So it's a technology that tries to solve

1 one thing but in the process creates other problems.

2 And, as we've learned, it's not -- you should always
3 be following the rules of gun safety no matter what. Wherever
4 you go in this nation, perhaps the world, the four rules of gun
11:05AM 5 safety, or some variation thereof, are taught everywhere.

6 I've been shooting firearms my entire life. I've
7 heard them at every single shooting competition I've ever been
8 to, at every range, every class I've taken. These are
9 something of a gospel of how to be a responsible and safe owner
11:06AM 10 and user and operator of a firearm.

11 And to delegate that to a piece of technology that
12 has a failure rate and comes at the cost potentially of
13 obstructing the sights on your gun -- not all guns, but some
14 models -- is too high of a price to pay. There's only one way
11:06AM 15 to guarantee gun safety, and that's to inculcate responsibility
16 of how to safely use guns into people.

17 There may be an off chance that somebody could
18 use -- could pick up a gun with a loaded chamber indicator on
19 it and see that it's -- and say, "Oh, what's that?" and learn
11:06AM 20 that the gun is unloaded, but is that the type of person who's
21 likely to cause an accident with a gun in the first place?

22 Negligent uses of a firearm happens very quickly.
23 I've seen adults pick up firearms -- smart adults pick up
24 firearms and pull the trigger without even inspecting the gun
11:06AM 25 at all. And, of course, if an adult can do that, then a child

1 can do it.

2 So this is a huge intrusion into the manufacturing
3 of modern firearms that hasn't proven that it actually can do
4 anything. And common sense and wisdom from everyone
11:07AM 5 experienced with a gun say, "Don't rely on that. Pretend it's
6 not there."

7 THE COURT: I have many thoughts about what you're
8 saying. What you're saying makes sense to me. But question --
9 I have several questions.

11:07AM 10 One question is post-*Bruen*, does this matter? From
11 a judge having to decide this, it matters to me. I want to --
12 at least it's helpful context, but I don't know whether it
13 matters so much.

14 Another thought I have is, okay, your argument is --
11:07AM 15 makes sense to me, but don't I have to give deference to the
16 legislatures if they think it's a good idea? And I think --
17 actually, I believe it was yesterday there was a document I
18 didn't have a chance to review closely, but that was
19 introduced, that they said accidental discharges are -- I think
11:08AM 20 even accidental deaths could have been reduced with this
21 chamber load indicator. If you give me just a moment, I'll
22 tell you the document. Again, I haven't read it quickly. I
23 just remember when some of the questions were being asked.

24 Accidental injuries and deaths from firearms. It's
11:08AM 25 Defendants' Exhibit 12 where it was done by the GAO,

1 United States General Accounting Office. Many deaths and
2 injuries caused by firearms could be prevented. It was done in
3 1991, March 1991. But this suggests that deaths could have
4 been avoided, prevented with this safety feature.

11:09AM 5 MR. FRANK: Sure. Your Honor, I believe the Court
6 used the word "deference." And the most important thing for
7 applying *Bruen* is to understand that the interest balancing
8 test that proliferated after *Heller* prior to *Bruen*, which is
9 basically a strange adoption of Justice Breyer's dissent in
11:09AM 10 *Heller*, is those days are over. We don't interest-balance
11 anymore. We ask the simple, straightforward borderline
12 rhetorical question of whether or not the conduct at issue
13 implicates the plain meaning, and then we proceed to the
14 historical analysis.

11:09AM 15 So the bulk of the testimony that the Court heard
16 here about whether or not this technology works, which it
17 doesn't, is important, like you said, to the Court's
18 understanding of what are we really looking at here. And
19 that's important. But the legal question has been simplified
11:10AM 20 thanks to *Bruen*.

21 And we have to look at whether the State has met its
22 burden to show the -- has marshalled the evidence of the
23 well-subscribed, historical regulatory tradition that's
24 sufficiently analogous to the modern regulation. And what
11:10AM 25 we've seen here through the State's expert witnesses and in

1 their briefing are a handful of citations to laws that they
2 can't conclusively say are outliers or not.

3 THE COURT: Can I stop you because I have a bunch of
4 questions on the second step. Now you're getting to the second
11:10AM 5 step, but I'd like to finish the first step because then it's
6 going to rain on my parade and I'm going to go back there. I
7 want to be comfortable on the first step before I get to the
8 second step. So please hold your thoughts and try not to
9 forget them, if you want to make a note or whatever, because I
11:10AM 10 do want to hear that.

11 So the chamber load indicator, you told me about the
12 potential problems for the law-abiding citizen who uses it. It
13 distracts, obstructs his vision. How about the magazine
14 disconnect mechanism? What problems arise from that?

11:11AM 15 MR. FRANK: So the magazine safety -- magazine
16 disconnect mechanism is meant to ensure that if the
17 semiautomatic firearm does not have the magazine that feeds the
18 ammunition in it, if you eject the magazine, then the trigger
19 goes dead. So even if there's a live round of ammunition in
11:11AM 20 the chamber of the gun, the gun won't fire.

21 And the idea here is that there's some evidence --
22 some anecdotal evidence that too many people have accidentally
23 shot people, shot themselves, or caused accidents, negligent
24 discharges, because they didn't understand how semiautomatic
11:12AM 25 handguns work. And they ejected the magazine, and they thought

1 the gun was unloaded, but it wasn't, and something terrible
2 happens. So the idea is that if we -- if the mechanical
3 ability to prevent the gun from firing would help.

4 But as we saw through plaintiffs' witnesses, this is
11:12AM 5 a delicate piece of technology that will fail and has failed
6 which creates the problem that it's meant to prevent. And I'm
7 aware of at least one incident where someone mistakenly
8 believed that a gun had an MDM and went to demonstrate that to
9 someone and accidentally committed suicide. It's actually
11:12AM 10 depicted in the pandemic era documentary "Tiger King." It's
11 all caught on film.

12 And it's a remarkably tragic illustration of how the
13 public misperception about a firearm having an MDM actually
14 caused the problem that the MDM was supposed to prevent in the
11:12AM 15 first place. And, again, it goes back to the rules of gun
16 safety is that you cannot rely on unproven mechanical safety
17 features on a gun to ensure that a gun is safe. You have to
18 abide by the rules of gun safety. It is not a substitute for
19 the failure to inculcate rules of gun safety into people who
11:13AM 20 live in a society where guns are ubiquitous.

21 THE COURT: Was there -- I hear you, and I remember
22 that testimony. But was there also an additional ground that
23 if you're in a firefight and you need more rounds, that this is
24 going to cost you time? Am I recalling that argument
11:13AM 25 correctly? Or is it a viable point?

1 MR. FRANK: I believe the argument you're recalling
2 is testimony, I believe, from Agent Gonzalez about how a law
3 enforcement officer in an altercation could theoretically eject
4 the magazine while holstered. And, therefore, if a suspect was
11:14AM 5 successfully able to get the gun from the officer, he wouldn't
6 be able to use the firearm against the officer in a defensive
7 scenario.

8 And that sounds good enough, but it's strange that
9 law enforcement officers are exempt from the UHA. And as
11:14AM 10 Special Agent Gonzalez even testified, he had the Gen4 Glock
11 that's not equipped with an MDM.

12 I've met tons of law enforcement officers. None of
13 them carry guns that are equipped with MDMs, despite the fact
14 that they would probably be the ones who could benefit from it
11:14AM 15 the most. Because I don't walk around with weapon retention
16 issues in society. Most civilians don't. Even civilians with
17 CCWs. So it could help law enforcement the most, yet
18 ironically they're exempt.

19 THE COURT: I understand that. It's ironic. My
11:14AM 20 question probably wasn't a good one. I didn't tee it up
21 because it clearly shows I didn't understand.

22 What you were saying, I was expecting the
23 Attorney General to argue that, you know, this is a real
24 safety -- if a police officer loses his weapon.

11:15AM 25 I was asking you -- I thought there was another

1 downside to -- particularly to law enforcement when they're in
2 a fight that it's not in all the way, but they need that round
3 and they can't fire their gun, and so then they lose time,
4 whatever they have to do to take that out or put it back in or
11:15AM 5 get more rounds in.

6 MR. FRANK: I understand now, Your Honor, and you're
7 correct about that.

8 THE COURT: Would you explain it better than I did?

9 MR. FRANK: I think the Court understands it, but
11:15AM 10 I'm happy to paraphrase the Court's understanding.

11 Yes. So I've done a lot of shooting with firearms.
12 And sometimes you think you fully seeded a magazine into the
13 firearm, but you haven't. And it's hanging on in there through
14 friction and through the fact on -- although most firearms,
11:15AM 15 especially polymer frame, which is a species of plastic that's
16 very commonly used to construct modern handguns, all Glocks are
17 that, the pressure from your own hand can actually keep the
18 magazine and the gun, despite the fact that the magazine isn't
19 fully seeded and, therefore, can't deliver ammunition, can't
11:16AM 20 reliably feed ammunition.

21 So it's entirely possible that a firearm equipped
22 with an MDM, you can have that problem and present the firearm
23 and not -- the gun will not go "bang" when you pull the
24 trigger. And then you have to do what's called a tap rack or
11:16AM 25 bang drill, which is -- basically means that you tap the

1 magazine to try to seed it, and then you rack the slide to
2 eliminate the possibility that the malfunction was caused by an
3 ammunition and not something else. And it's what people were
4 taught to do to quickly cycle and clear malfunctions in a
11:16AM 5 tactical scenario. And an MDM would absolutely prevent that.

6 Because if your magazine weren't fully seeded and
7 there was a live round of ammunition in that gun, then the gun
8 would go "bang." But it wouldn't if you had an MDM. And that
9 could cost you precious seconds in a self-defense scenario as
11:16AM 10 Mr. Boland testified to.

11 THE COURT: Okay. Could you -- and maybe it's not
12 possible because there's so many different variations, but
13 given the evidence that you've highlighted that no new
14 semiautomatic handguns have been added to the register since
11:17AM 15 2013, that there's no firearm on the register that has these
16 three requirements.

17 What are the advantages of the new state-of-the-art
18 handguns? I have a feeling you're going to say from a legal
19 analysis under *Bruen*, it really doesn't matter. But I want to
11:17AM 20 understand, you know, how bad is this law hurting you?

21 MR. FRANK: I can absolutely explain that,
22 Your Honor.

23 So firearms evolve incrementally like most other
24 products. And the current landscape for semiautomatic
11:18AM 25 handguns, which are the quintessential, most popular choice for

1 defense, looks very different than what the roster of available
2 guns offer in terms of, I'd say, primarily ergonomics. I think
3 ergonomics are really the big thing.

4 If you look at modern offerings from, say, the
11:18AM 5 world's most popular manufactures, the manufactures that are
6 most popular with military, law enforcement, and civilians, the
7 guns that are offered today are configurability. One common
8 feature to these modern guns is what Agent Gonzalez testified
9 to yesterday when he talked about interchangeable backstraps on
11:18AM 10 the back of a gun.

11 So if you imagine you're holding a firearm, the part
12 that's towards the rear of the hand, that piece can be taken
13 out. And then with the gun in the box, you have different size
14 backstraps. So if you have small hands, you use a small one,
11:19AM 15 medium, large, and so on.

16 Gripping a firearm confidently is critical to using
17 it safely. So this is an important ergonomic feature of a lot
18 of popular, very affordable guns, that no gun on the roster
19 currently offers to California.

11:19AM 20 So if you -- and if you're, say, a smaller person,
21 you have smaller hands and you want the benefit of maximizing
22 the amount of ammunition in your gun, you might learn that "I
23 only feel comfortable gripping a small-frame pistol." And the
24 person at the gun store is going to tell you, "Yeah, that's
11:19AM 25 okay. You'll have the good grip, but you'll lose that on the

1 ammunition capacity of a larger gun with a larger handle."

2 There's also been another really important
3 development in the firearm space in the last ten years, which
4 is as the American -- as American society has embraced

11:19AM 5 concealed carry exponentially -- I mean, half the states in the
6 country don't even require a permit for it anymore --
7 manufacturers have responded by introducing smaller-frame guns
8 that are easy to grip, but at the same time don't have the
9 capacity limitation.

11:20AM 10 So ten years ago -- actually, less than ten years
11 ago, if you wanted a gun optimized for concealed carry, there
12 are only a few reliable recommended good choices nationwide,
13 even fewer on the roster, and they all came with disadvantages.
14 They're still kind of big for carry guns and had capacity
11:20AM 15 limitations.

16 But today there are incredibly reliable, excellent
17 firearm choices for that specific purpose that offer
18 significantly greater ammunition capacities, and these are
19 offered by the major names that we've heard so far in this
11:20AM 20 proceeding like Glock, SIG Sauer, Heckler & Koch, CZ, Smith &
21 Wesson. They all offer guns that are optimized for concealed
22 carry that are very ergonomic, very flat, and have high
23 capacity. There's no more tradeoffs anymore in that world.
24 All of those guns are off roster.

11:20AM 25 I believe Mr. Boland and Mr. -- Mr. Boland testified

1 to buying a Glock 43. At the time it was the most popular gun
2 in America. Glock has since released models that are
3 variations of that that offer almost twice the capacity and are
4 the same price effectively making the 43 obsolete.

11:21AM 5 So the reality is that the ergonomic options, yes,
6 side by side if you shot them at a range and you weren't that
7 familiar with the guns, you might not understand it. But after
8 actually using them, after shooting them, you'd realize that
9 the modern Glock Gen5, even though on paper it looks like a
11:21AM 10 Glock Gen3, there's some critical things about it that are just
11 better. It's just a better gun. It's a better piece of
12 technology. It has a better barrel in it. It has a better
13 trigger with a smoother and lighter trigger pull, which is
14 directly translatable into how accurate the gun is, and the
11:21AM 15 backstrap.

16 So you have a one-size-fits-all version of a gun, of
17 America's most popular gun versus a configurable one that's
18 more accurate and has a better trigger and can cost the same
19 money and has better sights on it.

11:21AM 20 THE COURT: Let's bring into the discussion
21 left-handers. Is the problem with left-handers only if you
22 have these limitations on the gun of the chamber load
23 indicator, the magazine disconnect mechanism? I assume
24 microstamping isn't involved there. Is that the problem with
11:22AM 25 left-handers? Or is it the older versions of guns are not

1 really suited for left-handers and the newer ones are or some
2 combination of that? Or am I missing the boat?

3 MR. FRANK: I can explain.

4 So because of firearm -- a semiautomatic centerfire
11:22AM 5 handgun must have the CLI, the MDM, and microstamping, and no
6 guns can do that, all these modern options, some of which I
7 just described, are unavailable. And so it's not the CLI and
8 the MDM, per se, it's -- the reality is that, of the guns on
9 the roster, these designs are predominantly from the 1970s and
11:23AM 10 1980s and, at least in one particular case, are variants of a
11 firearm that was invented in the year 1911. It's called the
12 1911.

13 And there are variants of that gun on the roster,
14 depending on barrel length, primarily caliber, but they're all
11:23AM 15 basically the same gun. And a significant percentage of the
16 semiautomatic guns on the roster are a variant of the 1911.

17 When it was designed, ambidextrous features were
18 rare. Over the years they incorporated some. But the reality
19 is that all of these popular weapons that -- choices that
11:23AM 20 are -- that predominate the roster were designed for
21 right-handed shooters.

22 And maybe some options allow you to configure one of
23 the three main controls on a semiautomatic firearm for a
24 left-handed shooter. But virtually everything that's off
11:23AM 25 roster that's very popular today allows you to configure all

1 three of the core controls.

2 So there's the trigger, of course. Every gun has a
3 trigger. But on a semiautomatic pistol, you have the magazine
4 release, you have the slide release, and then sometimes you
11:24AM 5 have an external safety, but not all. Glocks don't have an
6 external safety. Most striker-fired pistols don't have an
7 external safety; hammer-fired ones do.

8 So the ability to manipulate, to safely and
9 accurately and quickly use a semiautomatic firearm, you have to
11:24AM 10 be able to actuate the magazine release and the slide release.
11 It's very important. It's very important to actuate the gun to
12 clear malfunctions.

13 And those -- firearm manufacturers have only
14 recently, in the last ten or so years, designed guns to
11:24AM 15 configure all of these controls for a left-handed shooter.
16 That's a new development. And I have seen left-handed shooters
17 struggle, myself, with figuring out how to do the
18 manipulations.

19 As Mr. Boland testified, the best thing to do
11:24AM 20 probably is to transfer the weapon from your strong hand -- if
21 you're a left-handed shooter, that's your left hand -- to your
22 weak hand, and then use the gun as it's intended for a
23 right-handed shooter, but that slows you down. And it's a
24 delicate and precise mobile thing to do under stress.

11:25AM 25 So, I mean, just transferring a gun enough without

1 stress can be a little tricky and takes all the focus that you
2 have, because you don't want to accidentally pull the trigger,
3 you want to do it safely. And if not, then you have to do
4 strange manipulations that enhance danger to yourself, if
11:25AM 5 you're trying to move quickly. You could muzzle yourself. You
6 could sweep -- which means basically that in the process of
7 trying to reach around the gun to activate it, you could
8 potentially put your hand in front of the gun which violates
9 the rules of gun safety.

11:25AM 10 So the left-handed shooter is at a big disadvantage
11 because why wouldn't you buy a gun that's optimizable fully,
12 all controls? And it's not much of a consolation that maybe
13 you could buy one gun that allows you to reverse the position
14 of the magazine release but not the slide release.

11:25AM 15 THE COURT: Got it. I think I'm ready to go now to
16 the second step. I know you're anxious too. No, I misspoke.
17 Couple more questions relevant to the first step.

18 I know in *Bruen*, in Justice Alito's concurrence, he
19 talked about anecdotal evidence of defensive firearm use. Do
11:26AM 20 you have any of that evidence, access to that evidence?

21 Again, I'm not so sure it matters under the *Bruen*
22 analysis. So if that's what you're thinking, so be it. But
23 it's important to me to -- you know, to have that Second
24 Amendment, to have real meaning and why it's important that it
11:26AM 25 matters. And I don't know if you have at your fingertips or

1 access to anecdotal evidence where good thing that the victim
2 or someone helping the victim had a firearm.

3 MR. FRANK: Your Honor, the question of statistics
4 on defensive gun use has a few complexities to it. So you may
11:27AM 5 have seen recently in the media there was an article that the
6 Centers For Disease Control at one time posted information
7 about defensive gun uses and then took it off -- took it out of
8 the public's purview. And the issue is that it's hard to --
9 well, first, the term "defensive gun use" can mean lots of
11:27AM 10 things. It can mean defensive brandishing. It can mean
11 actually discharging the firearm. It can mean discharging the
12 firearm and shooting someone. It could mean discharging the
13 firearm and killing someone.

14 So there's some reliable data out there that tracks
11:28AM 15 actual defensive, justifiable homicide incidents, and some of
16 the data is in the FBI's Uniform Crime Report. And what it
17 shows is year after year, several hundred people will commit
18 justifiable homicide. So we can definitely measure that and do
19 so with handguns.

11:28AM 20 But there are estimates that range into the range of
21 2.5 million defensive gun uses a year. Now, that, obviously,
22 doesn't mean homicides because there are only 12- to 14,000
23 homicides a year in the whole United States; so we're not
24 talking about that. But we're talking more along the lines of
11:28AM 25 people being able to brandish, or people -- well, that's the

1 thing. It's such a broad definition that it's hard to get good
2 data about it.

3 THE COURT: But there is data on defensive --
4 legitimate defensive use?

11:28AM 5 MR. FRANK: There is. There is data on defensive --
6 on justifiable homicide, I believe, in the FBI's Uniform Crime
7 Report. Probably elsewhere.

8 THE COURT: And do you -- it is a question. Do you
9 think it would be helpful for me to see that or no?

11:29AM 10 MR. FRANK: Only inasmuch as it would ratify what
11 the Supreme Court already said, which is that the
12 quintessential choice for self-defense in the United States is
13 the handgun. And that's, you know, been determined, as a
14 matter of law, in *Heller*. So I don't know if it would be all
11:29AM 15 that useful for the Court to peruse it. It might. It might
16 help paint a more concrete picture of how many instances there
17 are.

18 But the question of self-defense is broader than
19 what people are actually doing. It's more -- it's broader than
11:29AM 20 that. It goes into what arms do people prefer to own for the,
21 you know, unfortunate contingency that they're going to need to
22 use their weapon in self-defense. Because you have to be
23 trained with the firearm. You have to be comfortable with it.

24 So say the data showed that everyone that was
11:30AM 25 involved in a defensive gun use last year used a gun that's on

1 the roster. It wouldn't necessarily mean anything for really
2 the resolution of this case. I mean, they might have just used
3 guns on the roster because California is a state with
4 40 million people, and that's what the statistics are going to
11:30AM 5 draw from because there's just so many people here. You know,
6 so it's -- I don't know if it will be that useful to the Court
7 here.

8 THE COURT: I appreciate that. I guess it's similar
9 with respect to statistics.

11:30AM 10 Is there any statistics that are still being
11 maintained on how many accidental discharges of handguns that
12 we have?

13 MR. FRANK: There are. In fact, I recently was on
14 the CDC's website. They have an interactive portal where you
11:30AM 15 can customize your search query fairly -- with some
16 complexities.

17 So you can go to the State of, say, Idaho. You can
18 say, "I want to know how many children were, unfortunately,
19 lost to a negligent use of a firearm." You can look that up.
11:31AM 20 The states furnish the data to the CDC. Not all states have
21 the same best practices. So there are even some big states
22 like even Arizona. There are some years that the CDC just
23 couldn't present data for.

24 So there's holes here and there, and there may be
11:31AM 25 differences state to state on what they classify as a negligent

1 use. But, yes, the CDC does furnish a portal online that
2 anyone can access and investigate that data to some degree.

3 THE COURT: And in California, do you know, have the
4 rates increased or decreased or stayed the same since 2013?

11:31AM 5 MR. FRANK: Since 2013, I couldn't definitively say.

6 THE COURT: Do you have any -- over the past couple
7 years have the rates increased, decreased, or stayed the same?

8 MR. FRANK: Specifically in California?

9 THE COURT: Yes.

11:31AM 10 MR. FRANK: I couldn't definitively say. I'm not
11 sure.

12 THE COURT: Do you know nationally?

13 MR. FRANK: Nationally, I don't.

14 THE COURT: Okay. Do you think that matters?

11:32AM 15 MR. FRANK: It matters -- well, if the State could
16 produce -- well, I don't think it matters legally. I think
17 that -- first of all, the State, I think, would have to prove
18 that.

19 Well, let's assume that there is a decrease, a
11:32AM 20 dramatic enough decrease that it warrants investigating,
21 because a small one can be attributable to any number of other
22 variables that we can't control for. But even if the State
23 could produce fairly clear evidence that the -- that the UHA
24 has actually made guns safer and, therefore, fewer people have
11:32AM 25 been injured in negligent firearm situations, I'm not sure it

1 would change the legal question because we're not interest
2 balancing.

3 Because of *Bruen*, we're no longer interest balancing
4 the people's interest in their exercise of their Second
11:33AM 5 Amendment rights with the public safety. And I can see why
6 people are uncomfortable with that, but it's one step too many,
7 as Justice Thomas wrote.

8 THE COURT: Now, I guess some of this has relevance
9 to this point, and I'm not trying to interject political
11:33AM 10 passion into this. But, you know, I've heard the argument that
11 UHA and maybe other laws, it's really driven by those of the
12 belief that -- especially in urban environments, we shouldn't
13 have handguns. So the UHA is an indirect "We're trying to take
14 away people's guns in the urban areas."

11:33AM 15 Do you feel that is what's happening here? Or do
16 you agree that the motives of the California legislature were
17 genuine, that they were just trying to reduce the number of
18 accidental discharges?

19 MR. FRANK: That's a good question, Your Honor. I
11:34AM 20 think they -- some of the legislatures probably were. I think
21 there are some legislatures that have made it clear of the
22 areas that they'd go to any means to destroy the Second
23 Amendment and take guns out of society, and they may have had
24 more cynical purposes.

11:34AM 25 You know, as somebody that is familiar with

1 firearms, from a perspective of how to make guns safe, I think
2 there's probably some theoretical -- theoretical legitimacy to
3 experimenting with these technologies. I think there are
4 stronger reasons why there are bad attempts to do that.

11:34AM 5 But as far as the UHA being, you know, a backdoor
6 way to banning guns, I'm not so sure that has merit. Because
7 the irony of the UHA is that because of the grandfathering that
8 it allows, it doesn't actually do anything but ensure the
9 proliferation of guns that are allegedly unsafe.

11:35AM 10 Because you can walk into any gun store in
11 California and buy a grandfathered Glock 19 that doesn't have
12 an LCI or an MDM, and it truly doesn't have microstamping, and
13 you can do this forever, and that's what's happening, is that
14 we're just seeing fictitiously designated unsafe guns
11:35AM 15 proliferate *ad infinitum*, and that's the strange thing about
16 the UHA.

17 THE COURT: And, again, I don't know how relevant
18 this is, but that's what I'm confused about the UHA. I'm --
19 I'm not sure this is the best way or the sensible way to try to
11:35AM 20 limit accidental discharges because of -- you have all those
21 guns on the roster that don't have these mechanisms. So, like
22 you said, you're promoting outdated versions of weapons.

23 But then I don't know whether it should or not. It
24 bothers me that law enforcement have the state of the art to
11:36AM 25 protect themselves, to protect others, but law-abiding citizens

1 don't. But law enforcement can make money on it selling
2 secondhand things.

3 I'm not trying to say "Shame on you." I'm just
4 trying to from a -- trying to understand this law that is --
11:36AM 5 has pretty broad exceptions to it. And I -- it's encouraging
6 the law enforcement to sell their weapons and get new ones and
7 make money. I don't know if that's a good thing.

8 MR. FRANK: I think it's a bad thing, and it's
9 actually illegal. That's the irony. Under federal law, you
11:37AM 10 have to have an FFL, federal firearms license, to be a dealer
11 in handguns. And every few years a law enforcement officer
12 who's not familiar with the nuances of federal firearms
13 regulation will get in trouble because he'll start a little
14 side business acquiring off-roster firearms and selling them
11:37AM 15 for significant markups. And he does this too many times or
16 she does this too many times, and the ATF makes an arrest, and
17 there's a prosecution and it makes headlines.

18 And people say they're special law enforcement
19 officers. Well, what do you mean? You're telling me I can
11:37AM 20 legally buy this off-roster gun, and I can legally go to a
21 firearms dealer, and I can process it through a lawful private
22 party transfer, that's legal; but if I do it too many times in
23 too short of a period, then it's illegal. And that's right.
24 That's a correct interpretation of the law.

11:37AM 25 So it does create perverse incentives for law

1 enforcement. And the reality is that there are far more law
2 enforcement officers in California than there are people moving
3 into California with desirable off-roster guns who want to sell
4 them.

11:38AM 5 So the market is predominantly -- basically
6 facilitated by law enforcement, either intentionally or
7 unintentionally, exploiting a loophole. So if these guns are
8 so unsafe, why is it that anyone is allowed to acquire them in
9 the secondary market? But why does the law facilitate you
11:38AM 10 paying a significant price premium for your unsafe gun? If the
11 gun is unsafe, you shouldn't be able to own it either way. It
12 it's another strange aspect of the UHA.

13 THE COURT: Well, I think we've talked more than
14 enough about step one. And you've defined step one broadly.
11:38AM 15 And I really don't want to shortchange the discussion on
16 step two because it's important. But, candidly, I'm confused
17 on step two, especially having both sides' experts hasn't
18 helped me.

19 What are the metrics that I'm supposed to use to
11:39AM 20 determine whether there's a comparable analogue? What am I
21 supposed to look for in this case? And it's not disconcerting.
22 I mean, I've seen that. But it's the experts, they're not even
23 in the same parking lot of the same stadium. They seem to be
24 very diverse. And I don't know if one's wrong or if they're
11:39AM 25 both a little wrong or both right.

1 What I want to do is what I think is the right
2 thing. I don't see how any of the analogues that -- and this
3 is probably a better question for the defense, the Attorney
4 General, than for you. But the microstamping, I wasn't
11:40AM 5 following how any of the analogues that were cited, the
6 proofing, the gunpowder, that dealt with microstamping.

7 So I'm babbling. What are the metrics that I use to
8 find this comparable analogue or that there's no comparable
9 analogue?

11:40AM 10 MR. FRANK: Absolutely, Your Honor. And before I
11 proceed to answer that question, my colleague just looked up
12 the information that the CDC has on unintentional firearms
13 deaths in California. For the year 2013, it was 35. For the
14 year 2020, it was 39.

11:40AM 15 THE COURT: Okay.

16 MR. FRANK: So the analogical inquiry under *Bruen* is
17 fairly straightforward. And *Bruen* itself builds upon language
18 from *Heller* that established the text history and tradition
19 approach to the Second Amendment. And basically the test is we
11:41AM 20 look back to history. We look back to the time of the Founding
21 and perhaps the time of ratification of the Fourteenth
22 Amendment. And we look to see if the majority of the state
23 legislatures pass laws that regulated a right that's
24 sufficiently analogous to the one in question.

11:41AM 25 So we're basically looking at the statutes, and

1 we're seeing what they say, and we're seeing if the analogies
2 hold up. That's the broad level to look at it. And the State
3 here --

4 THE COURT: What are the metrics for an analogy,
11:41AM 5 though? That's the problem I'm having. Do I look for
6 regulations which put restrictions on the mechanical features
7 of a weapon? It doesn't seem to me -- and I don't think
8 there's any dispute here, I shouldn't be looking -- okay,
9 the -- there is restrictions on you can't have machine guns, or
11:42AM 10 you can't have weapons at a hospital, or you can't have weapons
11 at a school. I don't think I -- those issues are in this case.
12 And I don't think any analogues -- trying to find comparable
13 analogues for that is relevant.

14 I know there was discussion by the experts on
11:42AM 15 qualifications restrictions on the sale of firearms. And I
16 think I heard Justice Kavanaugh said something "They're still
17 in place."

18 Well, what are we talking about? Are we talking
19 about mechanical features or what? What was he referring to?

11:43AM 20 MR. FRANK: Well, firearms regulations largely fall
21 into one of a few buckets. There's "who" questions, you know,
22 who can possess a firearm? There's "where" questions, you
23 know, sensitive places. And then there's "hardware" questions.
24 So things like assault weapons and magazine capacity.

11:43AM 25 And we're in that hardware question, well, what type

1 of hardware can the State regulate? And at most here, right,
2 the *Heller* and *Bruen* stated that we're not looking at -- you
3 asked -- the Court asked about metrics. And the Court said one
4 of those important metrics is that we don't -- we don't do the
11:43AM 5 analogical analysis at a high level of generality, right? So
6 we need to do the opposite. We need to look specifically at
7 what do these laws actually do? And then go on for analogies
8 that do something -- see if there are any -- there's
9 well-subscribed judicial laws that do similar thing.

11:44AM 10 So we are looking at -- we probably want to look at
11 hardware laws. But I think I can probably help the Court
12 better understand the contours of it by looking at the
13 categories of laws that the State has pointed to. They point
14 to gunpowder storage law, which were purportedly
11:44AM 15 well-subscribed throughout the nation at, you know, roughly the
16 time of the ratification and thereafter. These gunpowder laws
17 prevented people from storing large quantities of gunpowders at
18 their homes.

19 Now, I don't know much about gunpowder, but I do
11:44AM 20 know that it's an inherently combustible substance and that you
21 don't have to do anything other than store it for potential
22 issues, especially in the types of structures that were, you
23 know, erected at the time in the late 1790s, they're built much
24 differently than the ones now.

11:44AM 25 So it seems reasonable to me that that was an

1 interest in preventing fire safety, and that's what scrutiny of
2 those laws seems to show, which is that these were concerns
3 about starting fires, and that's why we have these laws.

4 Now, for a gunpowder law to -- although it's very
11:45AM 5 different in that respect, there's no evidence of any gunpowder
6 laws that say that people can own a specific type of gunpowder,
7 but they can't own another type of gunpowder because it's
8 allegedly unsafe, because it doesn't have technology that
9 doesn't exist.

11:45AM 10 The State hasn't presented any evidence of any type
11 of gunpowder regulation that work like that. And that might be
12 analogous, but it doesn't exist because there were no laws like
13 that. And the State had plenty of time to marshal evidence of
14 such laws, but it didn't. So citing broadly to gunpowder laws
11:45AM 15 and saying these are similar to a gun law because both promote
16 public safety is analogizing at that high level of generality
17 which *Heller* and *Bruen* said we're not supposed to do. So
18 that's an insufficient analogue.

19 The next category are trap guns. This was mentioned
11:45AM 20 in the State's briefing. So a trap gun is a gun that can be --
21 that's optimized to be remotely triggered. So you set it up
22 maybe inside the hallway of a private residence, and someone
23 opens the door and there's a string or some other mechanism,
24 and the gun shoots without any human involvement other than the
11:46AM 25 human that jerry-rigged the trap in the first place.

1 I haven't seen any testimony or any evidence that
2 all Forster firearms are at all analogous to trap guns.
3 There's nothing about an -- there's nothing about the Gen4
4 Glock that Agent Gonzalez carries every day that is any more or
11:46AM 5 less configurable than a Gen3 Glock that you can buy on the
6 roster. So the contours there simply show that that's not a
7 valid analogy.

8 And then the third category that was mentioned in
9 the State's briefing was laws that prevented keeping of loaded
11:46AM 10 firearms around the house. *Heller* addressed that as a matter
11 of law. The issue in the *Heller* case was that the District of
12 Columbia ordinance said you can't have your gun assembled
13 loaded so you can use it for self-defense, and the Supreme
14 Court said that's ridiculous.

11:46AM 15 The purpose of owning a firearm is to have it around
16 for self-defense. And you can't take and disassemble a gun
17 apart, put it together, load it in the time that you would need
18 to -- in order to defend yourself. It's impractical. They
19 said that's a destruction of the right. So, as a matter of
11:47AM 20 law, that third category can't be a sufficient analogue.

21 And at the -- at most, the laws of the State has
22 produced evidence of making quality checks on firearms for
23 commercial manufacturers. Now, that might arguably support --
24 that might arguably be analogous to the drop safety test thing
11:47AM 25 and the firing test that are pre-conditions to roster

1 admission, which plaintiffs here are not challenging.

2 THE COURT: And they're part of the UHA; right?

3 MR. FRANK: They are. And so even if the CLI and
4 MDM and microstamping are preliminarily enjoined, there would
11:47AM 5 still be requirements to roster admission which would be the
6 drop testing and the firing safety. And for all I know, there
7 are legitimate analogues to those. But in any event, we're not
8 challenging them, and manufacturers would have to go and submit
9 to the laboratories for testing where those guns are going to
11:48AM 10 pass the test. It's not an engineering feat to ensure a gun
11 doesn't fire when it falls.

12 THE COURT: Okay.

13 MR. FRANK: So the analogical inquiry here, the
14 State simply just hasn't met its burden. And the State has
11:48AM 15 also strangely argued that if it had more time, it would have.

16 But the State's been litigating this matter for a
17 while. It's been litigating another matter in the Southern
18 District which presents the same questions. It's a
19 constitutional challenge to the roster under *Bruen*.

11:48AM 20 So there's been many, many months here for the State
21 to do its due diligence and marshal the evidence of the proper
22 historical tradition that's analogous, and it hasn't been able
23 to. If it wasn't able to do so by now, it's not going to be
24 able to do so in one or two or three or six months or a year
11:48AM 25 from now.

1 This is dispositive. The State needed to marshal
2 its evidence for this hearing and it didn't. That's a
3 dispositive failure because the State has the burden under
4 *Bruen*. The burden shifts to the State to prove the analogy.
11:49AM 5 It's not plaintiffs' obligation; it's the State's. And they
6 basically admitted -- their expert admitted "Well, sorry. I
7 can't conclusively say whether or not this particular category
8 of laws is a -- was well-subscribed or not. I can't say
9 whether it's an outlier or not. It may be, it may not be. I'm
11:49AM 10 not sure." Well, that sounds a lot like not meeting the burden
11 that the State was obligated to meet.

12 THE COURT: Now, I guess I'm asking you for a
13 fallback position. You may say, "Is this an all-or-nothing
14 thing?" Or is there any legitimate in-between, such as the
11:49AM 15 microstamping is unconstitutional, but the -- you pick one or
16 both of the other requirements.

17 MR. FRANK: Well, I would say that the State's
18 failure to marshal any evidence of a historical regulatory
19 tradition to support microstamping is obvious. I'd say that
11:50AM 20 that's very clear.

21 I would say that the State has also failed to
22 demonstrate that there's a sufficient historical regulatory
23 tradition to uphold the chamber load indicator with the
24 microstamping. The only plausible way they could do that is
11:50AM 25 under the interest balancing test, which is no longer the law

1 of the land. So I believe that it's fairly clear that it is an
2 all-or-nothing thing.

3 But in any event, it's so objectively clear that
4 microstamping fails. Microstamping isn't even a gun safety
11:50AM 5 measure. It's a law enforcement investigatory measure which
6 has never proven to be implementable. So the failure there is
7 abject. It's undeniable.

8 And like I said a few moments ago, the most that the
9 State has produced any purported analogue -- I'm not conceding
11:50AM 10 that they have. I do not believe they have shown that it's
11 well-represented. But that would speak to the drop testing and
12 the firing requirement, which they don't challenge. So the
13 Court could find that those are -- that the evidence that the
14 State has presented would support upholding those requirements.
11:51AM 15 But in any event, it doesn't matter because we're not
16 challenging them.

17 But I also haven't seen anything here. I haven't
18 seen any evidence -- any sufficient evidence of a regulatory
19 tradition to support chamber load indicators and magazine
11:51AM 20 disconnect mechanisms. I mean, only at the highest level of
21 generality. I mean, the theoretical idea that these
22 technological features could promote gun safety.

23 Yeah, maybe they could, but we're not interest
24 balancing, and the State has not shown that that -- there were
11:51AM 25 any states that said that firearms have to have particular

1 features that the market doesn't really want, that no
2 manufacturers are building in the name of gun safety or any
3 other interest. There's no evidence of that in the record. No
4 sufficient evidence of that on the record. None to meet the
11:51AM 5 burden under *Bruen*.

6 So the Court could bifurcate them if it wanted to.
7 It could preliminarily enjoin the microstamping and preserve
8 CLI if it wanted to. But, in my opinion, there's sufficient
9 evidence for the Court to declare all three preliminarily
11:52AM 10 enjoined.

11 THE COURT: I appreciate your views. Thank you.

12 MR. FRANK: Thank you, Your Honor.

13 THE COURT: It's 10 to 12:00. I in no way want to
14 limit your argument. So tell me how long do you think -- I
11:52AM 15 don't have any other new questions. So all the questions that
16 I discussed with the plaintiffs, feel free to address and
17 anything else you want. I'm just trying to plan this.

18 How long do you think you're going to want?

19 MR. SAROSY: I think plaintiffs' counsel was up
11:52AM 20 there for an hour.

21 THE COURT: Yes.

22 MR. SAROSY: So over an hour to respond to all the
23 points that were just made. And to sufficiently answer
24 Your Honor's questions, I would say at least an hour as well.

11:53AM 25 THE COURT: Okay. Then why don't we go ahead and

1 take our lunch break so you're not split up and then we're not
2 all hungry. I want to be paying attention.

3 I do have a thing to do. Would it be too much --
4 just be honest with me -- if we came back at 1:30? Or is that
11:53AM 5 just not going to work for your schedules?

6 MR. DALE: That's fine on my schedule.

7 THE COURT: You're trying to catch a plane?

8 MR. WOODS: At 4:00. But I think I'll be able to
9 catch it one way or the other.

11:53AM 10 THE COURT: Okay. But you start promptly at 1:30.

11 MR. SAROSY: Thank you, Your Honor.

12 THE COURTROOM DEPUTY: All rise. This Court is in
13 recess.

14 **(Lunch recess from 11:53 a.m. to 1:27 p.m.)**

01:26PM 15 THE COURT: All right. Let's hear from the AG.

16 MR. SAROSY: I apologize in advance, Your Honor. I
17 have notes kind of in multiple places.

18 THE COURT: No apologies necessary. Let's take our
19 time. But if you wouldn't mind, can we start with the first
01:27PM 20 step of the analysis. And you heard my questions to
21 plaintiffs' counsel. I'm trying to understand how I interpret
22 and apply that first step. Tell me what you think.

23 MR. SAROSY: Sure, Your Honor. Happy to start with
24 that. I would also like to, at some point, get to talking
01:27PM 25 about the standard of a preliminary injunction motion and what

1 must be shown. But I'll start with your question first.

2 I think throughout the evidence that we've seen over
3 the last day and a half or so and throughout plaintiffs'
4 argument, there is kind of a blending of handgun and
01:28PM 5 semiautomatic pistol. And I want to at least first distinguish
6 that there are multiple types of handguns.

7 The semiautomatic pistol is a type of handgun. It
8 is not the only handgun. And that was, in part, the purpose of
9 Special Agent Supervisor Gonzalez's testimony yesterday,
01:28PM 10 showing the different types of handguns that are on the roster
11 that there are revolvers, single-shot pistols, and
12 semiautomatic pistols, and that the chamber load indicator,
13 magazine disconnect and microstamping requirement only applies
14 to one of those types of handguns.

01:28PM 15 And so I know plaintiff keeps saying that the
16 quintessential self-defense weapon is a handgun, as *Heller*
17 said, but they keep saying that the quintessential self-defense
18 weapon is a semiautomatic pistol, or at least they're implying
19 that. And that's not what *Heller* said.

01:28PM 20 But to actually -- so I just wanted to frame that
21 because I think that is relevant to the first question. And
22 your first question is how to do the plain text analysis. And
23 what *Bruen* said at page 2134, when they were looking at the
24 first step and applying it in that case, was:

01:29PM 25 "We, therefore, turn to whether the plain

1 text of the Second Amendment protects, cautions,
2 and matches proposed course of conduct-carrying
3 handguns publicly for self-defense."

4 So the Court was looking at whether the plain text
01:29PM 5 covers a specific conduct that the plaintiffs are carrying --
6 or claiming is violated by the regulation at issue. And this
7 wasn't really a big issue in *Bruen* itself because both sides
8 appear to agree that the plain text covered that conduct. And
9 that is not the case here. We do not agree that the plain text
01:29PM 10 here covers plaintiffs' proposed course of conduct.

11 And the proposed course of conduct here is to be
12 able to purchase on the primary market off-roster semiautomatic
13 pistols that are available in other states. That is a proposed
14 course of conduct. The UHA, or the Unsafe Handgun Act, does
01:30PM 15 not prohibit possession. It does not take away the guns they
16 currently own.

17 We saw from testimony by Mr. Boland and Mr. May that
18 they, in fact, do currently possess multiple semiautomatic
19 pistols including off-roster semiautomatic pistols. And so
01:30PM 20 we're not actually talking about the keeping and bearing of
21 arms here. We're not talking about a regulation that restricts
22 or regulates how a gun is supposed to be kept in the home.
23 We're not talking about a regulation that restricts or
24 regulates how a gun is to be carried in public.

01:30PM 25 So we're not talking about really the keeping and

1 bearing of arms because plaintiffs are, in fact, keeping and
2 bearing arms, as they testified, that they have multiple
3 handguns, including semiautomatic pistols at home, that are all
4 operable and can fire. They each have CCWs that they're able
01:31PM 5 to carry those handguns in public.

6 And I think plaintiffs' counsel said that this first
7 step is a borderline rhetorical question. And I felt like
8 there was a lot of shifting in what plaintiffs' position was on
9 what the first step meant. And I think at the core of it,
01:31PM 10 where they ultimately landed was that the first step is a very
11 easy hurdle to overcome for plaintiffs, that pretty much
12 anytime you challenged a firearm regulation, that you meet the
13 first step.

14 And the danger in that is that you then get to cases
01:31PM 15 like the federal case -- I believe out of West Virginia --
16 where the court -- it was about serial numbers, the federal law
17 requiring serial numbers for firearms. And that court found
18 that the plain text covered that, and that there was no
19 historical analogues to support serial numbers. And, thus,
01:32PM 20 invalidated the federal law requiring serial numbers on guns.
21 And I think I'm slightly oversimplifying that, but --

22 THE COURT: I don't think you are. I think in my
23 questions I said I don't think this satisfies the first step, a
24 serial number, because it doesn't impact, you know, the
01:32PM 25 functioning of the gun, the dynamics, the cost. I don't see

1 how that impacts it. So that -- that's why -- I mean, I agree
2 with you, it's got to have some meaning. The question is what
3 meaning?

4 MR. SAROSY: I think it's clear that it doesn't have
01:32PM 5 the meaning that plaintiffs want it to have because -- and I
6 think that --

7 THE COURT: Well, they are being -- I mean, the
8 evidence, I think, is pretty undisputed. It's very
9 difficult -- very difficult for them to get their hands on new
01:33PM 10 semiautomatic handguns.

11 MR. SAROSY: So I think, yeah, the question is
12 whether -- and that is their proposed course of conduct; right?
13 They want to get --

14 THE COURT: That is the most popular handgun, as I
01:33PM 15 understand it, in the record. And, you know, it's important.
16 I don't think it's a trivial right. But go ahead, you tell me
17 why you think it's not covered.

18 MR. SAROSY: So I think there is a disconnect
19 between what plaintiffs want to look at for history and what
01:33PM 20 they want to talk about what the plain text covers. They want
21 to say the plain text of the Second Amendment covers what is
22 the most popular handgun available today. Well -- but then for
23 history they want to talk about, well, what was the -- what
24 laws were in effect around the time of the Founding?

01:34PM 25 Well, we need to look at -- if you're going to look

1 at the plain text, there were no semiautomatic pistols at the
2 time of the Founding. And as far as I know -- I'm not a
3 firearms historian, but as far as I know, I don't think there
4 were semiautomatic pistols at the time of Reconstruction
01:34PM 5 either. There were handguns such as revolvers -- I actually
6 don't know if there were revolvers, but there were handguns at
7 the time of the Founding, just not semiautomatic pistols
8 specifically.

9 And to get to your question of how to apply this
01:34PM 10 first step, there is a case called *Defense Distributed v. Bonta*
11 from the Central District. And the cite for that is 2022
12 Westlaw 15524977. And that case applied this proposed course
13 of conduct method that I think *Bruen* outlines.

14 And what is also helpful is the Ninth Circuit
01:34PM 15 decision in *Pena v. Lindley*. And I know plaintiffs will say
16 it's not relevant because it involves interest balancing.

17 THE COURT: But on that Central District, who is the
18 judge?

19 MR. WOODS: Judge Wu.

01:35PM 20 THE COURT: Judge Wu.

21 MR. SAROSY: Mr. Woods handled that case. That's
22 why he knows it offhand and I don't.

23 *Pena* actually said that there is -- they rejected
24 the claim that there's a Second Amendment right to purchase a
01:35PM 25 particular handgun, which is a very proposed course of conduct

1 here. Plaintiffs want to be able to purchase a specific type
2 of semiautomatic pistol. And they're not saying they can't,
3 they're not able to. They're not saying that -- and they've
4 actually been able to. I understand that they claim it's
01:35PM 5 difficult to do so, but they have done so.

6 And, again, it's not the State's position -- or not
7 again, but I'll make clear it's not the State's position that
8 there needs to be a destruction of the right for the plain text
9 to cover. That is not what the State is saying. But this is
01:36PM 10 just in terms of between the goalpost of what the Second
11 Amendment covers and what the Second Amendment doesn't cover.
12 This is on the side of the Second Amendment -- the plain text
13 of the Second Amendment does not cover this.

14 We've heard a lot of arguments about whether the
01:36PM 15 Unsafe Handgun Act is effective. And I think that is pretty
16 much the majority of the day and a half of the evidence that
17 we've had. But that's not the right question of whether the
18 plain text covers the proposed course of conduct here. The
19 Second Amendment is not defined about what firearm
01:36PM 20 manufacturers think is popular or what they think is, you
21 know -- will be commercially popular.

22 And that is kind of a running theme in the evidence
23 that, well, chamber load indicators are not commercially
24 popular. Microstamping is not commercially adaptable, and
01:37PM 25 magazine disconnects are not commercially popular. But just

1 because the firearm industry claims it's not popular, that
2 doesn't mean that it is, therefore, conduct covered by the
3 Second Amendment to have a pistol that doesn't have these
4 features.

01:37PM 5 And the question about the efficacy of these
6 features has already been debated in the legislature. And we
7 keep talking about 2013. The Unsafe Handgun Act has been
8 around since 2001, and it has been added to over the years. It
9 started in 2001. The SB 15 was the first bill that established
01:37PM 10 the roster. It's passed in 1999, took effect in 2001.

11 SB 489 in 2003 became law in 2003 but didn't take
12 effect -- at least what it did was it added the chamber load
13 indicator and the magazine disconnect requirements in 2006 and
14 2007. So the firearm industry had three years to try to
01:38PM 15 innovate guns with chamber load indicators and magazine
16 disconnects.

17 And AB 1471 in 2007 comes along, and that's
18 microstamping. But that didn't take effect until 2010, but it
19 said DOJ has to certify that there are no patents restricting
01:38PM 20 microstamping. So microstamping didn't actually become a
21 requirement until 2013. So you had six years there where the
22 firearms industry could have innovated and come up with
23 technology to try to comply with the requirements of the
24 roster, and they didn't. And --

01:38PM 25 THE COURT: Is there any state, other than

1 California, that has those first two requirements, not the
2 microstamping?

3 MR. SAROSY: The chamber load indicator and the
4 magazine disconnect, off the top of my head, I don't -- I can't
01:39PM 5 think of any. I can't know for sure.

6 THE COURT: And I assume no state has the
7 microstamping?

8 MR. SAROSY: So New York and New Jersey recently
9 adopted microstamping laws. But to be clear, they have to -- I
01:39PM 10 think the AG office in those respective states has to
11 certify -- I don't know if whether it's feasible or exactly
12 what they need to certify, but they need to do some kind of
13 certification about microstamping before it becomes a
14 requirement.

01:39PM 15 THE COURT: Wasn't that in California too?

16 MR. SAROSY: So California, the certification -- and
17 I know if I misstate this, plaintiffs will correct me. I think
18 the certification was that there -- because microstamping was
19 developed by one company, DOJ had to certify that there were no
01:39PM 20 patent issues that the -- you know, there wasn't a patent
21 restriction to microstamping, meaning that the technology --
22 like every manufacturer didn't have to get a license from one
23 company, right? So that is what DOJ certified in 2013, that
24 there were no patent restrictions. The 2013 certification
01:40PM 25 wasn't about feasibility.

1 THE COURT: Got you.

2 MR. SAROSY: But if we're talking about feasibility
3 of microstamping -- and I want to be sure I -- I know I'm
4 jumping. So --

01:40PM 5 THE COURT: No, you're not. We were talking.

6 MR. SAROSY: So microstamping feasibility, I heard
7 over the last day and a half, and I heard during plaintiffs'
8 argument different iterations of whether microstamping is
9 feasible or whether it's commercially available. And I think I
01:40PM 10 heard them say that it was not feasible.

11 THE COURT: I heard that and it's not commercially
12 available.

13 MR. SAROSY: So their own witnesses admitted
14 otherwise. And it's interesting that they bring up
01:40PM 15 Mr. Beddow's testimony, because what I recall from Mr. Beddow's
16 testimony, in my cross-examination of Mr. Beddow, is that he
17 admitted in 2008, based on his study, that microstamping with
18 alphanumeric characters was not only feasible but was the
19 best -- was the best way to commercially adapt microstamping.
01:41PM 20 And the use of alphanumeric characters is exactly the method of
21 microstamping that is contemplated in the California
22 regulations related to microstamping.

23 And I believe we went through his study, which,
24 interestingly, plaintiffs offered Mr. Beddow but didn't offer
01:41PM 25 to admit his study. And we went through his study to -- and to

1 go over the various handguns that he tested and to talk about
2 how, of all the handguns he tested, the microstamp on the
3 firing pin, for the most part, was still legible after either
4 hundreds or sometimes thousands of rounds of firing, and that
01:41PM 5 the transfer rate of the microstamp onto the cartridge cases
6 range was at least 76 percent, I believe, for almost all of the
7 handguns that he tested except for a rimfire gun, which already
8 had a -- a poor microstamp on the firearm and the firing pin to
9 begin with.

01:42PM 10 THE COURT: But if it's so feasible, why isn't any
11 gun manufacturer doing it?

12 MR. SAROSY: That's a fantastic question,
13 Your Honor. And I would direct that to plaintiffs because I
14 don't know. And that's the same question that the
01:42PM 15 Ninth Circuit had in *Pena vs. Lindley* where they raised the
16 same argument.

17 And, again, I would -- I do want to point out that
18 the firearm manufacturers are not a party here. To the extent
19 they claim there's any burden by these laws, they're not a
01:42PM 20 party here. So that's irrelevant to them.

21 So *Pena* said -- sorry, I have it. You know, it said
22 at page 983:

23 "We thus find it odd, indeed, that the
24 manufacturers indirectly assert a right to sell new
01:42PM 25 models of modern semiautomatic handguns but refuse

1 to modernize their firearms by installing
2 microstamping features."

3 And then in Footnote 11, also on page 983, it makes
4 an analogy to airbags and how the car industry refused to
01:43PM 5 implement airbags because they said it was either not feasible,
6 it was too costly, wouldn't actually enhance public safety.
7 And the Court and the Ninth Circuit said as with that debate,
8 the airbag debate, "It may be that protest about technical
9 ability to comply reflects a reluctance to comply."

01:43PM 10 So I'm not going to stand here and accuse the
11 firearms manufacturers of anything. I'm just reading what the
12 Ninth Circuit said in *Pena*. And I understand there is
13 Judge Bybee's dissent.

14 But plaintiffs' counsel stood here and said that
01:43PM 15 firearms manufacturers are willing to pay and have the -- well,
16 not willing -- I think he said they have the funding for the
17 R and D to do microstamping.

18 And they've talked about all the innovations that
19 have been made to the ergonomic design of handguns, to the
01:44PM 20 ambidextrous ability of handguns, and how that has improved
21 over the last 10 to 15 years. Well, where is the R and D, and
22 where are the innovations and microstamping? It hasn't
23 happened. And I -- I can't personally speak to why.

24 But Mr. Beddow did say that in his study, that DOJ
01:44PM 25 and the firearms manufacturers should work collaboratively.

1 And I think I heard plaintiffs' counsel say, well, DOJ hasn't
2 worked collaborative with firearms manufacturers. And we can
3 point fingers at each other all day, but I asked Mr. Beddow,
4 "Did any firearms manufacturer come to you and talk to you
01:44PM 5 about your study?"

6 And he said "No."

7 And in terms of the DOJ offering to work with
8 firearms manufacturers, on December 23rd, the DOJ actually
9 issued a release -- a letter for preliminary -- it was an
01:44PM 10 invitation for preliminary rulemaking comments. So basically
11 it was inviting the firearms industry, firearms manufacturers
12 to comment on a revision to microstamping regulations. And
13 that is still an active letter; so I don't know if anybody has
14 responded. But it's at least an indication of the DOJ offering
01:45PM 15 to work with firearm manufacturers.

16 And if the Court would like, I do have a copy of
17 that letter.

18 THE COURT: No, let's make it part of the record.

19 I'm still having a little bit of a disconnect,
01:45PM 20 though, with the microstamping. And it certainly is not
21 directly related to safety.

22 And I guess we're all a creature of our own
23 experiences, but I have a lot of gun cases and violence and
24 felon in possession -- I can go on and on -- drug cases.
01:45PM 25 Most -- not all, but most of the weapons are stolen. And many

1 cases there's sentencing enhancements for an altered or
2 obliterated serial number on the weapon.

3 So I'm having a hard time trying to figure out why
4 the legislatures thought this was going to be a great
01:46PM 5 investigative tool. I mean, I just don't see it as being a
6 great investigative tool in the cases that I have.

7 Whereas, I know the plaintiffs dispute you showed me
8 evidence about how deaths could have been avoided if they had
9 the chamber load indicator or the magazine disconnect in a
01:46PM 10 study. So that -- the microstamping doesn't really deal with
11 the safety of the firearm. It deals with gun violence, I
12 think, in general, and will this be an effective tool to
13 prosecute them in.

14 I -- because, obviously, it must have some costs,
01:47PM 15 the argument that even Mr. Beddow says, you know, you can't
16 have a universal application about this. So a gun manufacturer
17 would have to create a certain microstamp, as I understand it,
18 for every model of every weapon it manufactures, and then all
19 the gun manufacturers would do that. That's kind of
01:47PM 20 complicated.

21 And then I also heard evidence that, you know, it's
22 going to lose its printing -- imprinting power over time in the
23 fires. What all, I guess, I'm getting to is I'm curious why
24 they are pushing so hard -- California's pushing so hard for
01:48PM 25 the microstamping. I don't see the -- I know I have to give

1 deference and, you know, that's their call, but --

2 MR. SAROSY: So I can't speak for the legislature,
3 but I would point the Court to the legislative findings in
4 AB 2847, which is the most recent microstamping bill, and that
01:48PM 5 is the one that reduced microstamping from two places -- the
6 requirement of microstamping from two places to one, and did
7 the three-for-one provision that we've been talking about where
8 for every new semiautomatic pistol added to the roster, three
9 would come off.

01:48PM 10 So I would encourage the Court to look at the
11 legislative findings for that where they talk about
12 microstamping. And I would also say that I agree --

13 THE COURT: I will look at that. I know judges,
14 particularly in the Supreme Court, say you can't really put
01:48PM 15 much faith or trust or reliance in legislative findings and
16 discussions. But, in any event, it just, on its face, sounds a
17 little suspicious, "Okay, if you microstamp, then we can take
18 three guns off and we'll add one," it just sounds to me that
19 California is trying to limit the number of handguns.

01:49PM 20 MR. SAROSY: So to get back to one of your earlier
21 points, and then I will answer that question, I agree that
22 microstamping does not enhance the safety of the gun itself --
23 right? -- like chamber load indicators or magazine disconnect,
24 but it does mean it has nothing to do with public safety,
01:49PM 25 right? Being an investigative tool is part of public safety.

1 That falls within the umbrella of public safety.

2 Because as Special Agent Supervisor Gonzalez
3 testified, microstamping can help law enforcement more -- at
4 least provide a lead and hopefully help more quickly identify a
01:50PM 5 shooter, and which is especially helpful in a serial killer
6 situation. And we've heard -- I know plaintiffs have put
7 forward all these opinions about how it's not useful, but you
8 can make the same arguments about serial numbers not being
9 useful when serial numbers on firearms became -- first came
01:50PM 10 out. You could easily remove a serial number from a gun. It
11 is very -- it is burdensome for manufacturers to add serial
12 numbers to firearms.

13 THE COURT: I wouldn't think it would be that
14 burdensome, certainly not as burdensome from a technological
01:50PM 15 standpoint, at least today, with it in microprint.

16 MR. SAROSY: But Your Honor was talking about how
17 you have to assign a unique microstamp to each firearm. You
18 have to assign a unique serial -- so that's what I'm speaking
19 of. You have to assign a unique serial number to every
01:51PM 20 firearm. And you can easily scratch off a serial number, but
21 there are criminal penalties for doing so. And just because
22 somebody can get around the law doesn't mean the law is
23 unconstitutional. And that is ultimately the question here.
24 Plaintiffs are not --

01:51PM 25 THE COURT: But -- no, I appreciate your argument.

1 I'm not trying to beat you up. I'm just trying to challenge
2 what you're saying.

3 There's a lot of things that we could do to help law
4 enforcement. We could get rid of the Fourth Amendment. You
01:51PM 5 see what I'm saying? And I see that all the time.

6 This Supreme Court -- and I disagree with them on
7 this one -- they're saying the pings you can get from a
8 cell phone -- you know, person has a cell phone and you could
9 see where they are if they're located next to the crime, that
01:51PM 10 that information requires a warrant to get off. Justice Alito
11 disagreed with that. But Justice Roberts, I think he wrote the
12 opinion that in this modern day and age, cell phones have this
13 special protection. But, you know, you could do monitoring and
14 surveillance of a person, see where they go, but that would be
01:52PM 15 cost prohibitive.

16 The point I'm trying to make is there's a lot of
17 things we could do to aid law enforcement. But if the
18 Constitution says there's privacy or there's the right to bear
19 arms, you can't -- can't use the police power regulation to
01:52PM 20 trump the constitutional right.

21 MR. SAROSY: So I --

22 THE COURT: You're saying in this case there isn't a
23 constitutional right. That's your first argument because they
24 fail on the first step.

01:53PM 25 MR. SAROSY: Well, what I'm saying is that the

1 argument made by plaintiffs is about effectiveness of
2 microstamping. They are not -- they are not saying that it
3 burdens the right to keep and bear arms. And plaintiffs' claim
4 that it's not feasible.

01:53PM 5 But we have evidence from two of their witnesses,
6 from Mr. Beddow who studied it, and said in 2008 -- so almost
7 15 years ago -- that it actually is feasible. The alphanumeric
8 version of microstamping is feasible.

9 THE COURT: I heard him to say it was not
01:53PM 10 technologically feasible for commercial purposes because that
11 was only one specific weapon that you had to do with it. And I
12 think it was in response to my questions, you couldn't do it in
13 a uniform way that would be helpful and not burdensome to the
14 industry.

01:54PM 15 MR. SAROSY: He did test it across, I think, four
16 different manufacturer type of firearms. He tested it across a
17 Smith & Wesson and I think a Seecamp and AMK [sic]. I honestly
18 forget the exact manufacturers, but it's not as if he tested it
19 only for one manufacturer. He tested multiple semiautomatic
01:54PM 20 pistols from different manufacturers.

21 And the theme across almost all of them was that the
22 microstamp on the firing pin remained legible after thousands
23 or hundreds of rounds of firing, and that the microstamp was
24 legible at least -- there was an average transfer rate of at
01:54PM 25 least 76 percent.

1 And then you have Mr. Fatohi from the Trade
2 Association for firearm manufacturers who admitted that his
3 employer, NSSF -- I forget the exact name for the acronym --
4 that the NSSF admitted that microstamping on one place is
01:55PM 5 feasible, and they admitted that in 2017.

6 So this whole argument about it not being feasible,
7 I think plaintiffs have actually conceded the opposite, that it
8 is feasible. And the Ninth Circuit has already rejected the
9 argument made by -- they rejected a similar argument about
01:55PM 10 microstamping not being feasible, saying that just because fire
11 manufacturers have refused to do it doesn't mean it's
12 unfeasible.

13 You know, the -- you can't -- you know, I think
14 overall in consumer product safety -- and at the end of the
01:55PM 15 day, firearms are a consumer product. And I'm not a consumer
16 product expert, but just from my personal -- seeing how
17 consumer product safety works when it comes to airbags or baby
18 products or cars, that there is a phaseout period where, as
19 technology develops, you phase out the older products that are
01:56PM 20 less safe. And I think that is the intended purpose of the
21 three-for-one provision, it's to phase out those older
22 products.

23 And I know plaintiffs also, you know, say the
24 grandfathering in of the old products is problematic. But if
01:56PM 25 you didn't grandfather in those products, then the list -- the

1 roster would be substantially low. Because if you didn't
2 grandfather those in and then the firearms manufacturers didn't
3 innovate, as they have not with microstamping, then there would
4 not be -- there wouldn't be that many guns on the roster.

01:56PM 5 THE COURT: Then you have a constitutional problem.

6 MR. SAROSY: And then you have a constitutional
7 problem. So you can't have it both ways. And --

8 THE COURT: Or you could say, "No good deed goes
9 unpunished."

01:57PM 10 MR. SAROSY: Yeah. Yeah.

11 THE COURT: But that explains the grandfathering.
12 But I'm struggling. Help me on the law enforcement exception
13 because we're not talking about, you know, sometimes law
14 enforcement, depending on the assignment, they need almost
01:57PM 15 paramilitary-type weapons to deal with the threats that they
16 have to deal with. But now we're just talking about handguns.
17 Why should law enforcement have the best handguns and not a
18 law-abiding citizen?

19 MR. SAROSY: So I want to clarify the law
01:57PM 20 enforcement exceptions because I don't think they've been
21 really clarified by plaintiffs.

22 THE COURT: Okay.

23 MR. SAROSY: So the exceptions are at Penal
24 Code 32000, and there are three groups -- subdivision (b)(4),
01:58PM 25 (b)(6), and (b)(7) -- and the groups are treated differently.

1 (b) (4) has, I would say, the most flexibility. And those are
2 listed agencies, including DOJ, police departments, sheriffs,
3 marshals, Highway Patrol. And that group, the (b) (4) group,
4 can purchase off-roster firearms and then can resell them in a
01:58PM 5 private party transaction. So for whatever reason, that's what
6 the legislature decided for those groups, that that's how it
7 would work.

8 And then what plaintiffs failed to clarify is that
9 there's a (b) (6) and (b) (7) group that actually has further
01:58PM 10 restrictions, and those are other law enforcement agencies --
11 or there are other agencies that have law enforcement officers.
12 So like Department of Parks and Recreation, Department of Fish
13 and Wildlife.

14 And those -- the restrictions there are that, one,
01:59PM 15 they can't resell them in private party transactions; two, they
16 actually have stricter training requirements for officers from
17 those entities. And I believe in the (b) (7) group for sure --
18 I forget off the top of my head whether the (b) (6) group --
19 individual officers cannot purchase them. It's the entity --
01:59PM 20 only the entities that can purchase them.

21 THE COURT: So am I to assume the exception for
22 police officers is because legislature believe they will be
23 more trained on firearms?

24 MR. SAROSY: I think so. And I think that it's not
01:59PM 25 only -- I think that's a correct assumption in terms of the

1 average -- I think the average police officer. And the average
2 law enforcement official in the agency listed in (b) (4) have
3 more firearms training than the average civilian, the average
4 law-abiding citizen.

02:00PM 5 Mr. Boland, I believe, talked about the amount of
6 training that he had or his students had, but, you know, there
7 was -- I think those are folks that are getting CCWs or
8 concealed carry permits. And to get a concealed carry permit,
9 you do have to have more training. But there is no evidence
02:00PM 10 presented by plaintiffs that the amount of training that one
11 does for a CCW or an average civilian gets is more or equal to
12 the officials listed in (b) (4).

13 And, also, the whole, you know, discussion about,
14 you know, the exceptions -- law enforcement exceptions is, I
02:00PM 15 think, actually not really relevant to the Second Amendment
16 claim that plaintiffs make. In *Pena*, they actually raise an
17 equal protection claim saying that, well, all these law
18 enforcement officers have these exceptions and are able to
19 purchase, you know, these off-roster firearms. And that's
02:01PM 20 unfair because we, as average law-abiding citizens, cannot do
21 so. And *Pena* not only -- they rejected that claim. And
22 plaintiffs also don't bring an equal protection claim here.

23 So I think -- I'm happy to help the Court understand
24 those exceptions, but I really don't think that the -- those
02:01PM 25 exceptions are really relevant to this discussion.

1 And, you know, we did have testimony from
2 Mr. Gonzalez about the amount of training that he had before
3 becoming -- before joining the DOJ or becoming a special agent
4 and special agent supervisor at the Bureau of Firearms. That's
02:01PM 5 the only evidence we have about the amount of training that law
6 enforcement officers get before using off-roster firearms.

7 THE COURT: I appreciate that.

8 Let me take you back just a bit. And I'm not trying
9 to be smug. I'm taking arguments to the extreme to test it.

02:02PM 10 Instead of the three requirements that are at issue
11 in this case, how about if California said you can only sell
12 squirt guns? Would that satisfy the first step?

13 MR. SAROSY: I guess it would depend if a squirt gun
14 is considered an arm. And there are cases challenging --

02:02PM 15 THE COURT: You can only sell BB guns. And assume
16 the grandfather clauses -- so you have all of the old weapons
17 still on the register, and you have the law enforcement
18 exception, for whatever reason that applies. In my
19 hypothetical, would the first step be satisfied that this is
02:02PM 20 protected by the plain text of the Second Amendment?

21 MR. SAROSY: In your hypothetical, is that going
22 forward that anybody can only buy a BB gun?

23 THE COURT: You can only sell BB guns.

24 MR. SAROSY: Can only sell BB guns. So I think with
02:03PM 25 the -- you know, *Heller* saying that the handgun is a

1 quintessential self-defense weapon, then I would say, yes, the
2 plain text would cover that and you would move --

3 THE COURT: To step two.

4 MR. SAROSY: -- to step two.

02:03PM 5 THE COURT: So why is, in that hypothetical,
6 step one satisfied, but in this case, these three are not?

7 MR. SAROSY: Because there are other handguns that
8 are new. There are new revolvers being added to the roster
9 because the roster does not -- there are no chamber load
02:03PM 10 indicator or magazine disconnect, microstamping requirements
11 for revolvers, one, or for single-shot pistols. And there is
12 also, you know -- and your hypothetical said you cannot sell at
13 all anything other than a BB gun.

14 And there are exceptions to the Unsafe Handgun Act
02:04PM 15 for the new semiautomatic pistols, and the plaintiffs have
16 taken advantage of those exceptions. So not only are there
17 more variety of guns available, there are also guns that are
18 actually being added to the roster that are new, in addition to
19 the similar handguns that we've talked about, and there are
02:04PM 20 exceptions in the hypothetical that you posed that there were
21 no exceptions.

22 And, you know, again, it goes back to types of
23 handguns. Semiautomatic pistols is not the only type of
24 handgun. It may be plaintiffs -- you know, what they prefer to
02:04PM 25 use as a handgun, the most modern semiautomatic pistol, what

1 they prefer to use as a handgun. But that is not what -- the
2 Supreme Court did not say that the most modern semiautomatic
3 pistol is the quintessential self-defense weapon. They said
4 the handgun is the most quintessential self-defense weapon.
02:05PM 5 And we showed the Court examples of different types of handguns
6 that are on the roster.

7 And, again, we have to ask why have no new handguns
8 been added to the roster? And Your Honor mentioned 2013. And
9 it's not because the legislature said you cannot add more guns
02:05PM 10 to the roster. That's not what it said. It said you need to
11 have microstamping to have a gun added to the roster. And
12 firearm manufacturers have refused to do so.

13 I've heard nothing from plaintiffs about attempts by
14 manufacturers to do microstamping and it failing. There's been
02:05PM 15 no evidence of that whatsoever. Everything saying -- them
16 saying, "It's not commercially popular" or "It's not
17 commercially feasible," "We haven't done R and D." There's
18 been no evidence that they've even tried. And that is the very
19 contradiction that I think the Ninth Circuit recognized in
02:06PM 20 *Pena*.

21 This is not a law that is saying you can't add more
22 guns to the roster. It's saying in order to add a gun to the
23 roster, you need microstamping in addition to these other two
24 requirements. And there were guns added to the roster after
02:06PM 25 chamber load indicator and magazine disconnect became

1 requirements.

2 Before microstamping, there were guns that were
3 added to the roster, and manufacturers did do chamber load
4 indicator and magazine disconnect. There was that innovation
02:06PM 5 and that space. But it was -- that innovation ended with
6 microstamping. And that's not because the legislature said you
7 can't add any more; it's because manufacturers didn't comply or
8 didn't try to innovate.

9 And that's -- you can't -- an example of the
02:07PM 10 short-circuiting and consumer protection law, if carmakers
11 said, "We're not going to do airbags," but every new car sold
12 needs to have airbags, well, then, there would just be no new
13 cars sold whatsoever because manufacturers refused to implement
14 airbags.

02:07PM 15 THE COURT: Let me -- because it seems to be an
16 important point. I just want to clarify.

17 You're saying the evidence in the record shows that
18 gun manufacturers were producing firearms, handguns with the
19 chamber load indicator and the magazine disconnect mechanism.
02:07PM 20 It wasn't until 2013 with the microstamping that they stopped?

21 MR. SAROSY: Correct.

22 THE COURT: Is that what I heard?

23 MR. SAROSY: I believe Mr. Gonzalez testified that
24 there were about 32 handguns on the roster that have magazine
02:07PM 25 disconnect mechanism and chamber load indicator. And to talk

1 about the benefits of the, you know, most modern semiautomatic
2 pistols that the plaintiffs want to buy, I believe plaintiffs'
3 counsel describes them as mostly ergonomic. They do not
4 improve the structural integrity of the gun. They do not
02:08PM 5 improve -- you know, there are marketing claims that it
6 improves the accuracy of the firearm, but it's still a firearm
7 at the end of the day. Or the new ones shoot just like the
8 older generation ones.

9 And I think Mr. Gonzalez, on cross-examination,
02:08PM 10 talked about it being an iPhone 10 versus iPhone 14. And the
11 changes are either ergonomic or cosmetic. And if the industry
12 can innovate in that way to create those kind of changes, as
13 the Ninth Circuit again said in *Pena*, it makes you wonder why
14 they have not innovated -- or tried to innovate in the
02:08PM 15 microstamping space.

16 And to take a step back, also, the conversation that
17 we're having right now, and I think pretty much the entire
18 plaintiffs' argument, we're only talking about the first
19 factor, the first of the *Winter* factors. We're talking about
02:09PM 20 likelihood of success in the merits.

21 Plaintiff said multiple times that, "We don't do
22 interest balancing anymore because of *Bruen*." Maybe on final
23 judgment you don't do interest balancing. That's right.
24 That's the *Bruen* test. But we are in a preliminary injunction,
02:09PM 25 and it is the plaintiffs' burden to show all four *Winter*

1 factors.

2 And *Bruen* did not overrule *Winter*. *Bruen* was not a
3 preliminary injunction case. And it is plaintiffs' burden to
4 show that they meet those factors and have provided evidence of
02:09PM 5 those factors. And over one and a half days of testimony, the
6 only evidence that they presented has gone to that first
7 factor.

8 And not only -- I mean, the preliminary injunction
9 is already an extraordinary remedy that is a high burden to
02:10PM 10 meet, requiring a clear showing by plaintiffs. And they are
11 seeking to enjoin the entire Unsafe Handgun Act. That is what
12 is in their Amended Complaint. That is what is in their
13 motion. I know plaintiffs' counsel stood here and said, "We're
14 only seeking to enjoin chamber load indicator, microstamping,
02:10PM 15 and magazine disconnect." I -- we can't take their word on
16 that.

17 THE COURT: Well, I'm not going to declare
18 unconstitutional the dropping test nor the firing reliability
19 test.

02:10PM 20 MR. SAROSY: Okay. I appreciate you saying that,
21 Your Honor, because the scope of the preliminary injunction
22 that they are seeking, at least from my perspective, keeps
23 changing. And that is also what plaintiffs did in *Pena* as
24 well.

02:11PM 25 So even if they are not seeking to enjoin the drop

1 safety or the firing test and the lab testing that is done, the
2 requirements they are seeking to enjoin have been around since
3 at least 2006. And because they are seeking to change the
4 status quo, that is something that is akin to a mandatory
02:11PM 5 injunction, which is, as the Ninth Circuit has said,
6 disfavored, and also requires a -- is subject to a higher level
7 of scrutiny. And they must show that the law, in fact, clearly
8 favor their position.

9 And I think Your Honor said that the evidence
02:11PM 10 presented is -- I don't think you said "in conflict," but I
11 think maybe you said "inconsistent" or it's at least debated.
12 So I don't think plaintiffs have made that clear showing in
13 that they have not met that higher burden.

14 And moreover, they're not only seeking to change the
02:12PM 15 status quo of something that's been around since 2006, they're
16 seeking to overturn a law that the Ninth Circuit has already
17 upheld granted before *Bruen*. I understand that. But, also,
18 the relief they seek is identical to the relief that they are
19 trying to get from ultimate judgment.

02:12PM 20 And we have not done discovery. We are at very
21 early stages. And it's just -- a preliminary injunction is not
22 the right vehicle or the appropriate vehicle for the kind of
23 relief that they are seeking here. And they're not only
24 seeking to enjoin enforcement of the law, it would also -- if
02:12PM 25 those three requirements were to be enjoined, it would prevent

1 the DOJ from continuing to regulate the market of handguns.
2 And then you would have handguns -- or at least -- you know, I
3 understand there are handguns grandfathered in, but it would at
4 least expand the number of handguns that could be sold without
02:13PM 5 those safety requirements.

6 And because Penal Code 32000 does not prohibit
7 possession. It's not like the DOJ can go out and if the
8 injunction was lifted, go back and say, "Well, you can't
9 possess these anymore." The DOJ couldn't do that. And so you
02:13PM 10 can't unring the bell, in other words, of enjoining those
11 provisions.

12 And I have, you know, some case cites about how --
13 if you're seeking -- if plaintiffs are seeking to upset the
14 status quo, that there is a higher burden.

02:13PM 15 I'm happy to continue to talk about the likelihood
16 of success, but I didn't hear anything about irreparable harm
17 or the balancing of equities and public safety. I especially
18 didn't hear about irreparable harm. The only irreparable harm
19 identified in the briefing by plaintiffs is that there was a
02:14PM 20 Second Amendment violation.

21 One, we disagree that there's a Second Amendment
22 violation. Two, the plaintiffs testified, again, that they
23 have handguns, multiple handguns, and are able to defend
24 themselves in their home and in public. So at least from the
02:14PM 25 time from now until judgment, there's no chance -- there's no

1 testimony that they were unable to defend themselves in that
2 time. And that is the -- that's what the Second Amendment is
3 about. It's about arms self-defense.

4 And they testified that they are able to defend
02:14PM 5 themselves. Well, I don't know if they said they were exactly
6 able to defend themselves, but the fact that they have handguns
7 and long guns also, they are able to defend themselves. And it
8 would actually be the DOJ that -- well, let me step back for a
9 second.

02:14PM 10 The timing of the preliminary injunction, when it
11 was sought, also demonstrates the lack of irreparable harm.
12 This case was filed August 1st of last year. The motion was
13 not filed until November 15th. That's three and a half months
14 later. Well, if there was really irreparable harm, why was a
02:15PM 15 PI motion not filed soon after the case was filed?

16 And I think we've actually established through
17 defense -- through Mr. Gonzalez that the DOJ would be harmed,
18 and because being unable to enforce the law is a form of
19 irreparable harm. That's something that the Supreme Court said
02:15PM 20 in *Maryland v. King*. The DOJ would lose fees if the entire
21 Unsafe Handgun Act were to be enjoined, but Your Honor said
22 you're not inclined to do that. So I don't need to talk about
23 that.

24 Then I mentioned about the unregulated -- or
02:15PM 25 uncontrolled sale -- increasing sale of handguns without

1 chamber load indicators and magazine disconnects. So you can't
2 unring that bell, like I said. And --

3 THE COURT: You're very good on your part to remind
4 us all that there are the *Winter* factors that I've got to
02:16PM 5 address. But given I see those *Winter* factors and apply them
6 so much, I feel comfortable I know what they are. I think I
7 understand all the arguments that you made just now but also in
8 your brief.

9 So I know my questions have really focused on the
02:16PM 10 likelihood of success on the merits, but that's where I feel I
11 need the most guidance from both sides. And now, after
12 listening to you, reading your briefs, hearing the evidence, I
13 think I understand your position on step one. But I'd
14 appreciate your input and views on step two.

02:17PM 15 MR. SAROSY: Okay.

16 THE COURT: And I still -- I'm not sure I got it.

17 What are the metrics that I'm supposed to follow
18 when I'm looking for analogues? It doesn't seem to me -- maybe
19 it's a terrible analogy, but in the area of civil rights, we
02:17PM 20 have what we call qualified immunities.

21 So, hypothetically, in an excessive force case, and
22 maybe even tragically there's a death or serious bodily injury,
23 first you have to determine whether there's a constitutional
24 violation of an excessive force, but then there's qualified
02:17PM 25 immunity under federal law if the right was not clearly

1 established.

2 And I'm not saying that that's the same analysis I
3 have to do here, but I have to determine whether there is a
4 similar historical analogue that was established. How do I go
02:18PM 5 about -- what am I thinking about? I know the plaintiffs made
6 the argument you can't just say "public safety." That's too
7 broad.

8 Just like in the area of civil rights, it's how you
9 define what law is clearly established. The more specific you
02:18PM 10 get, nothing will be clearly established. The more general you
11 get, everything's clearly established. In this case, is there
12 a historical similar analogue? And what am I -- what am I
13 looking for to find that?

14 MR. SAROSY: Just as a flag for myself and for you,
02:18PM 15 I would like to talk about the interest balancing --

16 THE COURT: Sure.

17 MR. SAROSY: -- related to *Bruen*. But I would talk
18 about that after answering your question, because plaintiffs'
19 claim that interest balancing is completely irrelevant, and it
02:19PM 20 is for preliminary injunction.

21 THE COURT: Okay.

22 MR. SAROSY: But to get to your question about the
23 step two, the historical analysis, so our position is that at a
24 preliminary injunction stage, the burden for the historical
02:19PM 25 tradition is actually on plaintiffs and not on defendant. And

1 it is true that typically in -- that the burdens of a
2 preliminary injunction tracks those at trial, and that is in
3 the First Amendment context.

4 But that case law, again, has to do with the First
02:19PM 5 Amendment and has to do with the Government having to show that
6 there is a compelling interest for the restriction. And the
7 compelling interest analysis is something that is completely
8 different from the kind of historical analysis that *Bruen*
9 requires.

02:19PM 10 Both Dr. Cornell and Mr. Cramer talked about how
11 difficult -- and I think Mr. Cramer said it is a laborious
12 process, it is a slow process, and that it would take a very
13 long time to do the kind of historical analysis that *Bruen*
14 requires. And Dr. Cornell said something along those same
02:20PM 15 lines. And I think he said it would require three to six
16 months for a full historical analysis.

17 And so if you were to take plaintiffs' view on how
18 step one is going to work -- would work, and then you would
19 take plaintiffs' view that the burden is on the defendant to
02:20PM 20 show the historical tradition, then that sets it up so that
21 every firearm regulation challenge in the Second Amendment in a
22 preliminary injunction could fail, because it is so easy to get
23 past step one.

24 And then in a PI, the timelines are so condensed
02:20PM 25 that that kind of historical -- the full historical analysis

1 that *Bruen* requires cannot be done.

2 THE COURT: But the problem with that is the
3 plaintiffs say there are no historical analogues that are
4 similar.

02:20PM 5 So the way you're suggesting, they're supposed to
6 give me the analogue that would say it's okay what the
7 Government did?

8 MR. SAROSY: In a way, I guess it seems like they
9 have to try to prove the negative. But --

02:21PM 10 THE COURT: See how conceptually that --

11 MR. SAROSY: No, I understand. But --

12 THE COURT: Because they'll come back and say,
13 "There are none."

14 And I'll say, "Well, convince me how there are
02:21PM 15 none."

16 MR. SAROSY: And that's what they're -- I mean, that
17 is immediately what they are doing here. But their expert also
18 did identify, you know, potential historical analogues and
19 said, you know, they're not analogous.

02:21PM 20 THE COURT: That's because you identified them.

21 MR. SAROSY: I think -- well, I don't recall off the
22 top of my head if Mr. Cramer -- I thought Mr. Cramer did
23 identify something. But regardless, you know, just stating
24 that that's -- that is the position about the burden.

02:22PM 25 THE COURT: So just so I understand, it's the burden

1 on them to prove the negative?

2 MR. SAROSY: It's the burden on them to prove that
3 there is no historical analogues.

4 THE COURT: Okay.

02:22PM 5 MR. SAROSY: And plaintiffs could potentially point
6 to *Baird v. Bonta* which disagreed with that position, and so
7 I'm just going to point the Court to it. It's at 2022 Westlaw
8 17542432, and that was Judge Mueller in the Eastern District.

9 THE COURT: Okay. The --

02:22PM 10 MR. SAROSY: So putting the burden -- you know, "who
11 has the burden" issue aside, assuming defendant has the burden,
12 I think we met that burden. And how the analysis is supposed
13 to be done, at least for a law like on the Unsafe Handgun Act
14 which involves -- it is regulating revolvers in addition to
02:23PM 15 semiautomatic pistols. But what plaintiffs are challenging are
16 the semiautomatic pistols. So that is a new technology.

17 And *Bruen* talks about how -- that the more nuance
18 approach is required for unprecedented societal concerns or
19 dramatic technological changes. And Dr. Cornell and Mr. Cramer
02:23PM 20 both agreed that handguns in general or pistols were not as
21 common as long guns at the time of the Founding. They
22 disagreed on, you know, how much -- like they both agreed that
23 they were not as common.

24 And so I think the safety of semiautomatic pistols
02:23PM 25 and the consumer safety that needs to be protected from them

1 falls into the category of unprecedented societal concerns or
2 dramatic technological changes. And so in that category, you
3 don't need historical twins, as the Supreme Court says, you
4 need analogues.

02:24PM 5 And how you figure out or do that analogical
6 reasoning is at page 2133 in *Bruen*, they talk about how and why
7 the regulations burden the right to arm self-defense. So you
8 have to look at the comparable burden between the historical
9 analogues and the current regulation and the -- and the
02:24PM 10 comparable justification of those regulations. Those are the
11 metrics, at least to the extent that they are clear. I don't
12 think they are. But those are the metrics outlined in *Bruen*.

13 And applying them here, you have the gunpowder laws
14 where I believe those laws restricted possessing gunpowder in
02:24PM 15 your home or how it was maintained in your home. And so in
16 terms of the burden, that is a far more severe burden than what
17 the Unsafe Handgun Act imposes with the three requirements
18 we've been discussing for gunpowder to talk about what you do
19 in your home, which was the very issue in *Heller* about how you
02:25PM 20 exercise your Second Amendment right at home.

21 For the proofing law or the stamping law, my
22 understanding of that law is that for every gun sold to a
23 member of the public, it had to be stamped by the Government.
24 The Unsafe Handgun Act does not require the DOJ to give a stamp
02:25PM 25 of approval to every single gun sold to a member of the public.

1 What it requires is three tested models be sent to a lab and
2 tested, and then one of those samples be sent to the DOJ.

3 The DOJ is not going and stamping every
4 semiautomatic pistol that is sold in the State of California.

02:25PM 5 And so that is the comparable burden. I would say the burden
6 of the historical analogues is greater than -- than the Unsafe
7 Handgun Act.

8 In terms of justification, they all had to do with
9 public safety of a consumer product and ensuring that the ammo,
02:26PM 10 at least for the gunpowder, and the gun itself did not present
11 unnecessary or more dangers to those who possessed the guns and
12 the people around those who did possess those guns.

13 THE COURT: I understand your argument with respect
14 to the first two requirements, but I still have a problem with
02:26PM 15 the justification on the microstamping.

16 MR. SAROSY: So, again, I think -- sorry.

17 THE COURT: Because, again, that's investigative --
18 criminal investigative purposes. It's not for safety. So I
19 can understand gunpowder explosion, fire, that's a real danger.
02:27PM 20 And I assume the chamber load indicator and the magazine
21 disconnect mechanism, that's for -- to try to reduce or
22 mitigate accidental discharges. Again, that's pretty
23 important. And I think now the record is that there were 39
24 accidental deaths with firearms.

02:27PM 25 So that's -- that has to get your attention. But

1 aiding law enforcement with the casings left at a scene, if
2 they're left at the scene for a firearm that was most likely
3 stolen, I'm not getting sick to my stomach thinking about death
4 or injury.

02:27PM 5 MR. SAROSY: So I think this -- the serial killer
6 example is an example that would fall into public safety where
7 microstamping could help in that situation. Because my
8 understanding, at least from the testimony of Agent Gonzalez of
9 how you try to identify a shooter currently without

02:28PM 10 microstamping, is that you look at the striations on the
11 casings or the bullet -- and I'm sorry if I'm getting the
12 technology wrong or which part you look at -- but you look
13 through a microscope and compare the striations, and then you
14 have to get the gun itself that was used in the shooting to
02:28PM 15 match up the striations to ensure that those bullets or
16 cartridges came from that specific gun. So you need the gun.
17 You need to find the gun itself -- right? -- to figure out --
18 or to confirm that that gun was used in the shooting. And --

19 THE COURT: Counsel has to catch an airplane.

02:28PM 20 MR. WOODS: I apologize, Your Honor.

21 **(Mr. Woods leaves the courtroom.)**

22 THE COURT: No apologies.

23 I'm just not moved by the comparison to a serial
24 killer. Maybe it's because the death penalty habeas cases I've
02:29PM 25 had or the murder cases I've had. It's -- usually what catches

1 those is the DNA; it's not a serial number on the weapon. A
2 lot of the serial killers, unfortunately, use knives and
3 torture.

4 MR. SAROSY: I mean, the recent Stockton serial
02:29PM 5 killer was using a firearm. And I'm sure there are other
6 examples as well. There's also no evidence put forth by
7 plaintiffs. I know there were a lot of arguments by plaintiffs
8 that guns used in shootings are usually stolen guns, but there
9 is no evidence about that.

02:29PM 10 So I -- yeah, I -- I'm not sure if I can add much
11 more. I just --

12 THE COURT: I think you would have to agree that the
13 purposes behind the chamber load indicator and the magazine
14 disconnect mechanism, the public safety to avoid or limit
02:30PM 15 accidental discharges is more apparent, at least easier for me
16 to understand than the benefits to public safety aiding law
17 enforcement in investigation.

18 MR. SAROSY: I agree. It's easier to see the public
19 safety benefit of something that improves the safety of the
02:30PM 20 product itself. But I think the position is still that
21 microstamping falls within the umbrella of enhancing public
22 safety.

23 THE COURT: And through what analogue? Just so I
24 know that. Assuming they've met their burden of saying there's
02:30PM 25 none, what analogue would you point to for the microstamping

1 for me?

2 MR. SAROSY: I would say the proofing or the
3 stamping laws that Dr. Cornell talked about. Moreover, again,
4 we are at the preliminary injunction stage. As Dr. Cornell
02:31PM 5 said, I think repeatedly, because plaintiffs pushed back on him
6 not providing every single law that he's looked at. He has not
7 done the full historical analysis yet. And so I understand
8 we're being pushed on, well, which historical analogues are
9 there. And Dr. Cornell did not provide a full compendium of
02:31PM 10 every potential historical analogue.

11 Well, you know, we've had five weeks since the Court
12 issued the order to present this evidence, and we did present
13 Dr. Cornell as a witness, and we presented some laws. And as
14 he said, the laws that you find are continuing -- you continue
02:31PM 15 to find new laws.

16 So I can't guarantee that there are going to be
17 better analogues to microstamping, but that is why a PI -- or,
18 sorry -- preliminary injunction is inappropriate here because
19 that historical analysis -- the full exhaustive historical
02:32PM 20 analysis needs to be done --

21 THE COURT: I understand that.

22 MR. SAROSY: -- to find those analogues.

23 THE COURT: I'm not trying to pick on you, but let's
24 go back to proofing and stamping. Was that combined? In other
02:32PM 25 words, proof -- did they look at the barrel and then they

1 deemed it was safe and then they stamped it? Or is it
2 something separate?

3 Maybe a better question is can you explain to me
4 what the proofing requirement was all about and what the
02:32PM 5 stamping requirement was all about?

6 MR. SAROSY: My understanding is, unfortunately,
7 what I already said. So I don't -- unfortunately, we can
8 explain it better in supplemental briefing --

9 THE COURT: Okay.

02:32PM 10 MR. SAROSY: -- to be honest. Because of the
11 division of labor, that was Mr. Woods. So I don't want to make
12 up something.

13 THE COURT: Okay. Appreciate that. I won't hold
14 you to it.

02:33PM 15 MR. SAROSY: So that's something we would certainly
16 address.

17 THE COURT: Do you have any understanding? Because
18 I don't.

19 MR. SAROSY: My understanding is that a handgun that
02:33PM 20 was going to be sold to a private individual as opposed to one
21 sold to a militia or the military, that it needed to be
22 inspected by a government official, and then it would be
23 stamped in some way.

24 THE COURT: Inspected just like this looks --

02:33PM 25 MR. SAROSY: I think so, Your Honor. I don't,

1 again, want to inaccurately describe the law.

2 THE COURT: All right.

3 MR. SAROSY: But that is something we can certainly
4 explain further on in supplemental briefing.

02:33PM 5 THE COURT: Right. It would seem to me, for
6 whatever it's worth, that not fully understanding the proofing
7 and the stamping, that that would be an appropriate analogue
8 for the drop safety and the firing reliability test. But I'm
9 still -- I don't see the direct correlation or comparison with
02:34PM 10 chamber load indicator and the magazine disconnect mechanism.
11 But just off the top of my head.

12 MR. SAROSY: Well, I don't -- I think the problem of
13 safe storage of handguns or safe storage of guns and access to
14 firearms was different at the time of the Founding than it is
02:34PM 15 today. And the proliferation of -- there are more firearms in
16 the United States of America than there are people.

17 And I think Agent Gonzalez testified that of the
18 many searches and investigations that he's done, that many
19 firearms are not safely stored. And I know plaintiffs
02:34PM 20 emphasize about firearms training. And sure, that -- I'm sure
21 there are several firearm owners who are properly trained and
22 properly store their firearms like Mr. Boland and Mr. May. But
23 just because some do it, does not mean everyone does it.

24 And in the studies that we talked about during
02:35PM 25 Mr. Gonzalez's testimony, especially the General Accounting

1 Office that he -- where it talked about three different
2 examples where a child or a teenager had access to a gun,
3 didn't think it was loaded, fired it, and killed their sibling,
4 their spouse, or something like that, you know, I don't know of
02:35PM 5 a similar problem around the time of the Founding.

6 And so I think that is where the more nuance
7 approach that *Bruen* describes about, you know, having
8 historical analogues but not historical twins. So there can
9 be -- you can have a wider scope of what falls into the -- into
02:35PM 10 the category of the historical analogue.

11 THE COURT: Understood.

12 MR. SAROSY: And I think Your Honor asked plaintiff
13 about data showing how the chamber load indicator, magazine
14 disconnect mechanism, whether those -- if there's any data
02:36PM 15 showing that those reduced accidental deaths. So in the
16 legislative findings for AB 2847, which is the recent
17 microstamping law, Subdivision (b) -- I can read it for
18 Your Honor -- says that:

19 "Data from the CDC fatal injury reports" --
02:36PM 20 which I think is what plaintiffs had talked about
21 briefly -- "indicate that California's rate of
22 unintentional shooting deaths has fallen
23 substantially since the Unsafe Handgun Act's
24 initial provisions went into effect in 2001.

02:36PM 25 "In the preceding five years between 1996 to

1 2000, nearly 400 Californians died as a result of
2 unintentional shooting injuries.

3 "By 2014 to 2018, the most recent five years
4 of data available from the CDC, the rate of
02:36PM 5 unintentional shooting deaths in California had
6 fallen by two thirds."

7 So that -- I mean, obviously, I don't have the CDC
8 data myself, but that is what the legislature found, right?
9 And so there is the legislative finding that chamber load
02:37PM 10 indicators, magazine disconnect mechanisms actually do and have
11 helped prevent accidental discharges in the State of
12 California, which is consistent with the Government or the
13 General Accounting Office study that Agent Gonzalez talked
14 about. It's consistent with the other two studies that he read
02:37PM 15 statements from where it's something along the lines of
16 anywhere from one third to a fourth of the accidental death --
17 accidental shootings that were studied could have been
18 prevented by a chamber load indicator or magazine disconnect
19 mechanism.

02:37PM 20 Because in each of the -- in each of those studies,
21 what the researchers did was they looked at the case files of
22 the shootings or the deaths and categorized them based on
23 whether somebody said in the police report or the case file
24 that they thought the weapon was unloaded during the shooting.

02:38PM 25 And they -- I think the General Accounting Office

1 looked at multiple metropolitan areas. I think the ISMACH
2 study, I-S-M-A-C-H study looked at death or shootings around
3 the metropolitan Atlanta area, and the Vernick, V-e-r-n-i-c-k,
4 2003 study looked at deaths in Maryland and Wisconsin. So
02:38PM 5 those three studies combined look at different parts of the
6 country to see how these devices could help prevent accidental
7 shootings.

8 And you combine that with this finding in AB 2847, I
9 think that is more than sufficient to show that these devices
02:38PM 10 can help prevent deaths. It may not, as Agent Gonzalez said,
11 prevent every death. That's not the point of any safety
12 measure is to prevent every death. Maybe that is the dream,
13 the optimistic goal, but any public safety measure is not going
14 to prevent every death.

02:39PM 15 In terms of the burden on the Second Amendment from
16 a chamber load indicator, there are multiple ways to design a
17 chamber load indicator, and you can design it in a way that
18 meets the regulatory requirements that does not affect the
19 cite. And I think the evidence that it does affect the sight
02:39PM 20 was weak.

21 And the Ninth Circuit actually talked about this in
22 *Pena* where it said that the chance -- we were talking about a
23 magazine disconnect preventing firing when there's one
24 cartridge in the chamber and you can't fire it if the magazine
02:39PM 25 is out -- the Ninth Circuit did recognize that in *Pena* but

1 characterized it as a rare occurrence.

2 And so -- and, you know, I think the scenario that
3 we talked about was -- it's called a tactical reload is what is
4 described. It seems like something that is a situation
02:40PM 5 typically used by law enforcement rather than an average
6 civilian who's defending themselves where they use all the
7 rounds in the magazine. And then they need to -- you know,
8 they can't fire that one round in the magazine after that. I
9 mean, typically you would fire -- you know, if you have ten
02:40PM 10 rounds in a magazine, you would have fired nine already. And
11 then you get another magazine and reload.

12 So I think the burdens are none, and there are
13 demonstrated safety benefits from them.

14 THE COURT: I appreciate the points you made. And I
02:40PM 15 would just ask you to repeat them again in your briefing.

16 MR. SAROSY: Sure.

17 I can talk about left-handed shooters.

18 THE COURT: I'd like you to, but I have a -- I'm not
19 worried about the time if you're not. This is important to me.
02:41PM 20 I want to -- I'm not going to shut you down. But I have a
21 question that I neglected to ask your colleagues on the other
22 side. And I was going to give you a short, short rebuttal, and
23 then you'll have the last word, if you want it.

24 The question I have is Justice Kavanaugh's wording
02:41PM 25 in *Bruen* said:

1 "In particular, Justice Kavanaugh
2 emphasized" -- this is your brief -- "that
3 'presumptively lawful measures that *Heller*
4 identified, including laws imposing conditions and
02:41PM 5 qualifications on the commercial sale of arms
6 remain constitutional.'"

7 Do you have any idea what conditions and
8 qualifications on the commercial sale of arms he's talking
9 about?

02:42PM 10 MR. SAROSY: I think that question is one that I
11 think was debated a lot among courts before *Bruen* about what
12 qualifies or falls into that category because it can be
13 construed broadly. I would say the Unsafe Handgun Act does
14 fall within that category. And I think that is what *Pena*
02:42PM 15 actually said, you know --

16 THE COURT: Well, I'm a little bit clueless on this,
17 I'll confess. So I'm not holding it against you. And I know
18 you're going to say that this falls within that. But can you
19 give me the absolute easy case that this is talking about,
02:42PM 20 whether it was in *Pena* or any other -- I really don't know what
21 conditions and qualifications.

22 MR. SAROSY: So I know *Pena* said that the Unsafe
23 Handgun Act, quote, "regulates commercial sales, not
24 possession." And that was at page 973.

02:43PM 25 THE COURT: How about -- let me put aside the -- put

1 aside *Pena* and put aside the UHA.

2 My question is, what, historically, are the
3 legitimate conditions and qualifications that had been placed
4 on the commercial sale of arms? Do you understand the question
02:43PM 5 I'm asking? It's a very basic one. I don't -- I'm not
6 familiar with any condition or qualification on the commercial
7 sale of arms specifically.

8 MR. SAROSY: Sure. I think in *Teixeira vs. Alameda*
9 *County*, 2017, Ninth Circuit case -- and *Teixeira* is spelled
02:43PM 10 T-e-i-x-i-e-r-a [sic], I think -- which involved, I believe,
11 possession for sale of guns on county fairgrounds. So I would
12 say where guns can be sold.

13 THE COURT: Could be who? Like felons? Is that --

14 MR. SAROSY: No, I think it was a restriction on
02:44PM 15 guns being sold on a county fairground. So I guess like the
16 placement of where guns can be sold could potentially fall
17 under that. You know, I think felons is a separate category
18 that --

19 THE COURT: That's not what he's talking about.

02:44PM 20 MR. SAROSY: I think there are categories of
21 where -- I think, like, background checks falls under the
22 conditions for commercial sale.

23 THE COURT: Okay. That's what I'm asking.

24 MR. SAROSY: You have to get a background check --
02:44PM 25 right? -- before you can purchase a firearm. Those are

1 conditions and qualifications.

2 THE COURT: Got you.

3 MR. SAROSY: That is the easy one. I think that's,
4 by far, the easiest is background checks.

02:45PM 5 Arguably serial numbers could fall, I guess, into
6 that because you can't purchase an unserialized firearm. And
7 that goes through the whole ghost gun issue where you make your
8 own and serialize. But I think serial numbers fall within that
9 as well.

02:45PM 10 THE COURT: Okay. Thanks.

11 MR. SAROSY: I can move to left-handed shooters if
12 that's okay, Your Honor.

13 THE COURT: Sure.

14 MR. SAROSY: I didn't hear any testimony that
02:45PM 15 left-handed shooters are impacted by the chamber load indicator
16 or the magazine disconnect itself. I think the argument is
17 that there are not options on the roster for left-handed
18 shooters. But we didn't establish with Agent Gonzalez that
19 there are options for left-handed shooters.

02:45PM 20 There are semiautomatic pistols on the roster with
21 an ambidextrous magazine release and an ambidextrous external
22 safety. And plaintiff said for Glocks, which have an internal
23 safety, that that's not an issue for left-handers because it's
24 internal, so you don't have to use your hand to turn the safety
02:46PM 25 on or off.

1 And so I -- and we also heard testimony from
2 Mr. Gonzalez that left-handers are not -- they train themselves
3 to use guns that are designed for right-handers. And
4 presumably that's what they've done up until the last ten years
02:46PM 5 that -- when the ambidextrous options became more widely
6 available.

7 And the left-handed shooter argument was also
8 something -- and I'm sorry. I sound like a broken record
9 coming back to *Pena*. It's because a lot of these were
02:46PM 10 addressed in *Pena*. Including this left-handed argument where
11 one of the plaintiffs actually did not have a right arm and
12 wanted to be able to buy a gun that was better designed for
13 left-handed shooters, but in Footnote 8, page 978, the Court
14 said that that was little evidence that the handguns
02:47PM 15 unavailable for purchase in California are materially more
16 effective for self-defense than handguns currently for sale in
17 the state.

18 And the left-handed shooter argument they called it
19 slim evidence, I believe. So, again, not my words. I'm just
02:47PM 20 reading what *Pena* says. So I don't think the left-handed
21 shooter argument is enough to carry the day here.

22 So I think I've answered all the questions that the
23 Court asked plaintiff. But if I did miss something --

24 THE COURT: No, you didn't. That's all that I have
02:47PM 25 for you.

1 MR. SAROSY: I've been up here for a while. I did
2 want to say one more thing about interest balancing and then
3 I'll step down, if that's okay.

4 THE COURT: All right.

02:48PM 5 MR. SAROSY: Plaintiffs said multiple times that
6 interest balancing is irrelevant here because of *Bruen*. But
7 the plaintiffs chose the remedy of preliminary injunction. And
8 as the Court knows, the *Winter* factors require a balancing of
9 equities, including a consideration of public safety. And so
02:48PM 10 those public safety interests were all highlighted in *Pena*.
11 And I'm not going to repeat them for the Court because I've
12 already, like I said, sound like a broken record.

13 So the public safety and the interest balancing is
14 relevant because plaintiffs chose the remedy of a preliminary
02:48PM 15 injunction. So it's incorrect to just say that interest
16 balancing is irrelevant. It's not. It's irrelevant for the
17 purpose of a preliminary injunction even if it's not relevant
18 for the, you know, the Second Amendment analysis that you would
19 do in final judgment.

02:48PM 20 And -- yeah. So I just want to correct that because
21 I -- there were multiple times where plaintiff said that -- and
22 they said in their briefs that interest balancing is
23 irrelevant. And it is here for the purpose of a PI.

24 I do want to say, before I forget, if the Court were
02:49PM 25 inclined to grant the preliminary injunction, we would ask that

1 the Court stay that -- the effectiveness of that injunction
2 until we have time to seek an appeal. Because there have been
3 instances where a law was enjoined without a stay, and then
4 there was a large flow of the items that were restricted into
02:49PM 5 the State in the interim. So I do want to just flag that for
6 the Court.

7 THE COURT: I appreciate that. Thank you.

8 I need to give the court reporter a short break and
9 then we'll have a short rebuttal if you want to take advantage
02:49PM 10 of it.

11 I assume you want to take a short advantage of it?

12 MR. FRANK: I would.

13 **(Recess from 2:49 p.m. to 3:10 p.m.)**

14 THE COURT: Please be seated.

03:01PM 15 Let's hear the rebuttals.

16 MR. FRANK: Thank you, Your Honor.

17 So my dream would be to present a very clear
18 narrative from my notes, but the reality may be a little more
19 bumpy than that.

03:01PM 20 So there were several points that the Deputy
21 Attorney General raised that were a response from plaintiffs.
22 The first point was -- well, actually, just to frame the tone
23 of my rebuttal. I mentioned earlier that in the *pre-Bruen*,
24 Pena litigation, Judge Bybee wrote a long dissent addressing
03:02PM 25 issues that we've addressed here today, which are how do we

1 look at this first step question? You know, are we dealing
2 with a law that really does implicate Second Amendment rights
3 or not?

4 And what did Justice Kavanaugh mean when he said --
03:02PM 5 or I think language appears in *Bruen* and *Heller* -- what did he
6 mean when he said there are presumptively lawful commercial
7 regulations? So most of my comments are going to fit in under
8 those two umbrella statements here hopefully.

9 So, first, it's true that there were no
03:02PM 10 semiautomatic firearms available at the time of the
11 ratification of the Second Amendment. But that doesn't mean
12 we're now in this strange carve out from *Bruen* where we get to
13 bypass the analogical analysis. There were commonly circulated
14 weapons that people back then preferred and were widely owned
03:03PM 15 for self-defense purposes. So laws that regulate those would
16 be the logical place to start. It doesn't make the historical
17 research impossible.

18 Next there's a difference between the chamber load
19 indicator, the magazine disconnect mechanism, and microstamping
03:03PM 20 that relates to public safety that's important. So the CLI and
21 MDM are end user safety. They are meant to prevent people
22 handling guns from causing harm to themselves or others.
23 That's distinct and different from the microstamping, which is
24 nothing more really than a theoretical law enforcement
03:03PM 25 investigatory tool. I think that's an important difference

1 that the Deputy Attorney General got near, but I don't think
2 was perfectly clear. So I wanted to highlight the difference
3 for the Court.

4 Now, as far as the feasibility issue, Mr. Beddow
03:04PM 5 testified in -- not testified in 2008, but wrote in 2008 that
6 it was feasible. But he clarified that it's not feasible to be
7 implemented throughout the entire industry for hundreds of
8 different firearm manufacturers across hundreds of different
9 designs. And that's an important difference.

03:04PM 10 But, yes, in a laboratory where he looked at four
11 different manufacturers' particular models, that's hardly
12 representative of the hundreds, if not thousands, of different
13 models that would have to adapt this. And to that end, the
14 State of California, only -- only after the *Bruen* decision came
03:04PM 15 down, and only after two lawsuits were filed, invited the
16 public to -- or the firearms community to try to figure out how
17 to implement microstamping.

18 So until microstamping was in the crosshairs that
19 were -- that *Bruen* provided, then it got serious about trying
03:04PM 20 to reach out to the firearms manufacturing world to see what we
21 could do to make microstamping leap from the laboratory into
22 actual implementation. So it's not exactly a good faith
23 position.

24 So, next, the *Winter* factors and the constitutional
03:05PM 25 fundamental rights context are different than any other normal

1 civil litigation context. It's well-established that
2 constitutional rights are deemed irreparable if they're
3 violated even for moments. And in some sense, if the Court
4 meets us at the first factor and finds that we have proven that
03:05PM 5 there's a likelihood that we are going to prevail on the Second
6 Amendment claim, that's essentially dispositive of whether or
7 not we're entitled to relief.

8 And, moreover, enjoining microstamping, if the Court
9 were just to enjoin microstamping, that would actually, in some
03:05PM 10 sense, facilitate what the UHA was intended to do, because
11 manufacturers would still have to comply with the CLI and the
12 MDM requirements. So nothing would change as far as disrupting
13 the status quo, even if that were really an important factor
14 under *Winter*, which it's really not in this unique fundamental
03:05PM 15 rights context.

16 So the State's argument that we failed to meet the
17 rest of the high bar factors that you need to meet to get
18 preliminary injunctive relief don't apply in this context right
19 here.

03:06PM 20 And, third -- or fourth, perhaps, I lost count --
21 California passed a law, Assembly Bill 1327, and it was just
22 preliminarily enjoined in the Southern District. And what that
23 law intended to do was make the stakes of plaintiffs seeking to
24 enforce Second Amendment rights in courts virtually impossible.
03:06PM 25 It imposed a feeship provision.

1 So if any gun rights, plaintiffs were to prevail on
2 anything less than the entirety of their case, if they were to
3 lose anything, they would be liable to pay the State's
4 Attorney's fees. It's patent and constitutional -- blatantly
03:06PM 5 unconstitutional, which is why Attorney General Bonta refused
6 to defend it and necessitated Governor Newsom to step in. But
7 that was the reason for the delay in bringing this motion for
8 preliminary injunction, because we had to tell people that
9 wanted to be plaintiffs to vindicate their Second Amendment
03:06PM 10 constitutional rights.

11 There's a serious looming financial noose over your
12 head, my head too, as counsel. The feeship provision would
13 have applied equally to plaintiffs and counsel. So it was
14 designed really in the wake of *Bruen* to prevent an onslaught of
03:07PM 15 Second Amendment litigation of people seeking to vindicate
16 their constitutional rights. Patently unconstitutional. So
17 that explains the delay.

18 THE REPORTER: Counsel, please slow down.

19 MR. FRANK: I can. I apologize.

03:07PM 20 I also heard argument that it's not the State's
21 burden here to marshal events of historically analogous loss.
22 That is not true. That contradicts the plain language of
23 *Bruen*.

24 *Bruen*, at 2135, said that:

03:07PM 25 "The burden falls on respondents to show that

1 New York's proper cause requirement is consistent
2 with its nation's historical tradition of firearm
3 regulation."

4 And I can't discern any language in *Bruen* that would
03:07PM 5 dispense that requirement in the motion for preliminary
6 injunction context.

7 Only a few more points here.

8 So proofing and stamping laws are not microstamping
9 analogues. They are, arguably, as I believe the Court noted --
03:08PM 10 they're analogous to the fire testing and drop safety
11 requirements. The analogue here for microstamping testing
12 seems to be focused on the sorts of laws that were
13 technology-driven investigatory aids. That would be because
14 that's what microstamping does, that's the law we have to look
03:08PM 15 to find. And I see nothing in the record that supports the
16 existence of such laws back then.

17 So Justice Kavanaugh's *Bruen* language relates to a
18 point in Bybee's dissent where he says that "presumptively
19 lawful" does not mean "conclusively lawful." And this
03:08PM 20 dovetails perfectly with the core of what we get from *Bruen*,
21 which is that a law might presumptively be a constitutional,
22 you know, intrusion or regulation, however you like to look at
23 it, of the Second Amendment right, but a plaintiff can
24 basically force the State to prove that historically we have
03:09PM 25 laws that did the same thing and, therefore, it would be a

1 constitutional regulation. Presumptively means presumptively.
2 It doesn't mean conclusively.

3 And there's some other language from the dissent
4 that's important here. As Judge Bybee said, if there were
03:09PM 5 somehow a categorical exception for these restrictions, meaning
6 commercial restrictions, it would follow that there would be no
7 constitutional defect in prohibiting the commercial sale of
8 firearms. So there is a slippery slope here.

9 There's that slippery slope argument that really
03:09PM 10 does apply here where if the Second Amendment doesn't protect
11 your right to own any given gun, well, then now it's okay the
12 State would be able to get away with the UHA. But then in five
13 or ten years they would say, "You know what? We don't like
14 striker-fired guns because they're used disproportionately by
03:09PM 15 criminals. They're easy for people with 3-D printers to make.
16 So we're going to get rid of striker-fired guns." So there go
17 all your blocks.

18 And then they say, ten years down the road, "Oh, we
19 don't like hammer-fired guns because hammer-fired guns can be
03:10PM 20 manipulated by criminals as well," and there goes hammer-fired
21 guns. Why couldn't we do that? That really does create a
22 slippery slope.

23 The Second Amendment must protect a robust
24 marketplace in the types of firearms that people have access
03:10PM 25 to. Because if it doesn't, then we begin our dissension down

1 the slippery slope of the State being able to say the
2 constitution says -- or rather the Supreme Court has
3 interpreted the constitution to say that you have a right to
4 own an operable handgun in your self-defense. There's one
03:10PM 5 store downtown that's open three hours a day that sells the one
6 gun that you could have. There you go. There's your right to
7 self-defense.

8 What would stop that? A faithful reading of the
9 language from *Heller*, language from *Bruen* and a close
03:10PM 10 inspection of Bybee's dissent. Bybee's dissent explains how
11 the commercial regulations of the sort that would apply to any
12 other type or thing are presumptively lawful. So if you don't
13 want a gun stored in your school, that's probably a
14 presumptively and unlikely conclusively lawful commercial
03:11PM 15 regulation.

16 It's not hard to imagine if there are similar ones.
17 Like you'd want to have perhaps gun stores display signs that
18 say "Guns are dangerous and you should acquire firearms
19 training prior to owning a gun." Not that the law would
03:11PM 20 require you to, but maybe you should if you want to be a
21 responsible gun owner.

22 That's the kind of commercial regulation that
23 doesn't -- that doesn't reach into the bundle of Second
24 Amendment rights at its core and create real problems for
03:11PM 25 ordinary people.

1 And, furthermore, the evidence that these CLIs and
2 MDMs actually promote, we can attribute the decline in
3 accidents in California to those features is questionable
4 because the decline here in California largely mirrors the
03:11PM 5 nationwide decline. And there's really not enough evidence in
6 the record whether or not these things are effective because
7 ultimately they're not relevant to the constitutional analysis.

8 I believe that's all I have for Your Honor. And I
9 would request that if the Court has made up its mind about
03:12PM 10 microstamping today, to enter a preliminary injunction
11 enjoining the microstamping feature of the UHA today or in due
12 course if it's -- if it wants to review supplemental briefing
13 about the other features, I would understand it would be more
14 complex for the Court, that's understandable, but plaintiffs
03:12PM 15 would respectfully request that enjoining microstamping be
16 enjoined immediately. Thank you.

17 THE COURT: One question. The chamber load
18 indicator, magazine disconnect mechanism, I heard argument that
19 gun manufacturers actually produced handguns with those. And
03:12PM 20 it wasn't until the microstamping that everything came to a
21 halt. So it's obviously technologically feasible. I know
22 you're saying those are problematic. We went over the reasons
23 why you felt they're problematic. But from a legal standpoint
24 on a preliminary injunction, would you at least agree it's --
03:13PM 25 from your standpoint, it's not as powerful as the

1 microstamping? Your case.

2 MR. FRANK: Powerful in what sense?

3 THE COURT: Persuasive. That those should be
4 enjoined.

03:13PM 5 MR. FRANK: Well, I don't -- I believe that --

6 THE COURT: Because you were able to do it; right?
7 With microstamping, your position has been and you argue, the
8 evidence indicates it's not technologically feasible and it's
9 not commercially viable --

03:13PM 10 MR. FRANK: Right.

11 THE COURT: -- at this point.

12 MR. FRANK: Uh-huh.

13 THE COURT: But it's technologically feasible, the
14 other two requirements, and it's obviously commercially viable
03:13PM 15 because you did it for -- what? How many years did you do
16 that? You meaning the gun manufacturers.

17 MR. FRANK: Yeah, I appreciate the credit for that,
18 Your Honor, but I can't accept it.

19 THE COURT: And I'm not trying to give you a loaded
03:14PM 20 question. I've always been inspired by the creativity of
21 American business, that they can get things done, if it makes
22 sense. And even with microstamping, if a gun manufacturer --
23 all it takes is one thought, you know, this is something
24 viable, they can make it, they'd do it. With the other two
03:14PM 25 restrictions -- chamber load indicator, magazine disconnect

1 mechanism -- they did it. Might not have been happy about it,
2 but they were able to do it.

3 MR. FRANK: I think that the State has failed to
4 satisfy its burden under *Bruen* for all three. And I think on
03:14PM 5 that basis, the Court can enjoin all three.

6 Now, I know for a fact that MDMs and CLIs exist. I
7 believe the State -- Mr. -- or Agent Gonzalez testified that
8 there are 32 SKUs on the roster of roughly 100 firearms that
9 have them. I'm not sure if that 32 figure represents
03:15PM 10 individual distinct models. I'm almost positive it doesn't.
11 There's probably a handful of distinct models and what accounts
12 for the 32-figure -- the fact that there's one in stainless
13 steel, one in stainless steel in blue finish, et cetera,
14 et cetera.

03:15PM 15 The technical legal conclusion about all three is
16 that I haven't seen the State marshal evidence of the
17 sufficiently well-subscribed historical tradition to support
18 any of them. And the wider marketplace does not want these
19 features because they're redundant to the proper exercise of
03:15PM 20 the four rules against safety which are fundamental everywhere.

21 So consumers don't want them. They make guns hard
22 to use. They make guns more finicky. They make them more
23 likely to malfunction. The only people who can benefit from
24 MDMs are law enforcement. And no law enforcement agency seems
03:16PM 25 to take notice of that because they're not using these guns.

1 So who do these features really serve? There's
2 these practical reasons that I think the firearm makers can
3 absolutely equip guns with these, probably. I mean, maybe not
4 all of them, but the big ones probably would. I can't speak
03:16PM 5 for them. I don't know. But I think ultimately the proper
6 legal conclusion for all three of them -- I mean, especially in
7 microstamping, and I think the Court understands that -- is
8 that there are no sufficient analogues to justify the
9 monitoring existence of these features under the UHA.

03:16PM 10 Now, the CLI and MDM, I think manufacturers can live
11 with that for the time being, but ultimately, the legal correct
12 resolution would be to declare it unconstitutional for -- to
13 require them.

14 Now, there may be manufacturers that still offer
03:16PM 15 guns with them. That's kind of another thing we had not
16 discussed, is that I'm sure there would be some people out
17 there that might want guns with these features. As an
18 experienced shooter myself, I don't. I wouldn't recommend it
19 to anybody, but there may be people out there that are
03:17PM 20 first-time consumers and want extra, you know, nannies, so to
21 speak, the way that you might want a lane departure warning in
22 a car or a radar cruise control.

23 Experienced drivers maybe don't see the need. And,
24 actually, that's a good analogy of all the analogies that have
03:17PM 25 been offered, which is that you still need to be a safe driver.

1 Delegating your safety, your responsibility to be a safe driver
2 to technology on your car is a bad idea. It inculcates bad
3 habits. Technology can fail. You're better off paying
4 attention to using a dangerous instrumentality.

03:17PM 5 I understand why the legislature wants to buffer
6 that, however it can, but it still can only buffer it within
7 the contours of what the Constitution will tolerate. And here,
8 the Constitution won't tolerate that. There's a clear test
9 that establishes what the Constitution will tolerate in the
03:17PM 10 states. And the states basically shrug their shoulders and
11 say, "Yeah, it takes longer to get the evidence we might need
12 that might prove it, but we don't have it yet, even though
13 we've been litigating these cases for months and months."

14 The State failed to meet its burden. So the proper
03:18PM 15 legal resolution is to declare all three unconstitutional. But
16 if the Court wants to take a look at its own briefing, I
17 understand that as well.

18 THE COURT: Well, I get your historical analogue
19 argument. I understand it. So don't get frustrated with me,
03:18PM 20 but there is evidence in the record that it might be an
21 outdated study. The General Administrative Office have
22 indicated that the chamber load indicator actually saved lives.
23 I mean, it's not a legislative finding. So I find it a little
24 bit more reliable. You know, maybe there's a lot of holes that
03:18PM 25 you could poke through, but I do have that study that that may

1 make a difference.

2 MR. FRANK: That study is irrelevant if the Court
3 believes that the UHA doesn't get the plain text of the Second
4 Amendment. I just said many words about the analogues, but I
03:19PM 5 think that issue is inextricable from the analogical inquiry.
6 Because if the Court looks at the UHA and says, "Yeah, this
7 implicates people keeping and bearing arms," well, then it has
8 to proceed to the analogical inquiry.

9 And that evidence that it could save lives is one
03:19PM 10 step too many. We don't interest balance away Second Amendment
11 rights in the name of public safety experiments anymore and
12 Second Amendment litigation. That's not part of the inquiry
13 into the what the scope of the Second Amendment is anymore.

14 THE COURT: Didn't the Supreme Court say the burden
03:19PM 15 is a factor I can consider in the historical analogue analysis?
16 And so it's kind of the other side of the coin, you know, how
17 much of a burden it is on you, especially when you can be
18 achieving some benefits. And then, of course, this is an
19 injunction, and I do have the balance of interest.

03:20PM 20 I understand the constitutional right. I understand
21 your argument, but --

22 MR. FRANK: The Court said to look to how a law
23 impacts the exercise of the core right and if the Court is
24 having trouble doing the analogical analysis. It's a
03:20PM 25 subcontour, I guess, of it. That was my reading of what the

1 majority opinion said, which is that it may be difficult in
2 some cases to figure out what analogues are.

3 I believe the State mentioned that there are maybe
4 unprecedented societal concerns or strange technological issues
03:20PM 5 that arise that make analogical reasons difficult. And if
6 we're in that sort of difficult space, well, then, a guidepost
7 of the analysis would be, well, how does -- how does this law
8 impact the core right to exercise self-defense? Just a useful
9 question to ask along the way. Those are my interpretations of
03:21PM 10 it.

11 THE COURT: Thank you.

12 MR. FRANK: Thank you, Your Honor.

13 MR. SAROSY: Couple points, Your Honor.

14 Sorry, Your Honor, I lost something in the pages of
03:21PM 15 notes I have.

16 I think I heard that the higher standard for
17 preliminary injunctions -- I think it was insinuated that it
18 does not apply in the Second Amendment context. And there are
19 two cases where it did apply in the Second Amendment context,
03:21PM 20 including the recent *Baird vs. Bonta* case that I mentioned
21 earlier. The Court did apply and describe that higher burden
22 for PI involving the Second Amendment challenge.

23 And there's also a case -- and I was trying to find
24 the citation for it -- *Tracy Rifle and Pistol Association* --
03:22PM 25 probably -- *v. California* or versus the Attorney General at the

1 time. So there are the higher PI burden where it did apply.

2 And then on the point of evidence about chamber load
3 indicators and magazine disconnects being -- I think the word
4 was "finicky," other than maybe one or two anecdotes from

03:22PM 5 Mr. Boland, there's been no evidence submitted by plaintiffs
6 that chamber load indicators and magazine disconnects do not
7 work compared to the evidence that we submitted and the GAO
8 study that you mentioned and the other two studies regarding
9 the benefit of how chamber load indicators and magazine

03:23PM 10 disconnect mechanisms could save lives.

11 And then there actually were four manufacturers that
12 produced semiautomatic pistols with chamber load indicators and
13 magazine disconnects in that time before microstamping became
14 effective. I don't know exactly how many unique models, you
03:23PM 15 know, of the 32. There are some that are similar, but there
16 were four manufacturers that did do so.

17 And then I think there was a point that the DOJ just
18 conveniently now, post-*Bruen*, is trying to engage its
19 manufacturers about microstamping. With the microstamping
03:23PM 20 regulations that are currently in effect for any regulations,
21 there's always a public comment period. And I don't know if
22 the firearms industry submitted comments in response to that,
23 but there was at least that opportunity for engagement whenever
24 those microstamping regulations were adopted. And those were
03:24PM 25 adopted years ago. But there was at least that opportunity.

1 I do have that letter that I mentioned about the
2 preliminary invitation for a comment.

3 THE COURT: Make it part of the record. Make it an
4 exhibit. What number would it be?

03:24PM 5 MR. DALE: 28.

6 THE COURT: Defense Exhibit 28 will be received into
7 evidence.

8 **(Exhibit Number 28 received.)**

9 MR. SAROSY: I think I only have one copy.

03:24PM 10 MR. DALE: That's fine. We can deal with it when we
11 get to the list.

12 MR. SAROSY: Oh, I also will say that *Bruen* itself
13 involved the motion to dismiss, not a preliminary injunction,
14 for whatever that's worth. But that's all I have unless the
03:24PM 15 Court has any further questions.

16 THE COURT: No. I found the arguments on both sides
17 very engaging, and I appreciate it from both sides.

18 MR. SAROSY: We're happy to address issues further
19 in supplemental briefing.

03:24PM 20 THE COURT: That's what I wanted to address next.

21 Not to frustrate everybody, but I feel this is an important

22 decision. I would appreciate supplemental briefing. In my

23 mind, the sooner the better, but I don't want to rush it. I

24 don't know if -- you know, if I were sitting in your position,

03:25PM 25 I would want the transcripts of the hearings and then make your

1 points. You might be duping and revising your briefs, but I
2 think the hearing and then the arguments today, hopefully you
3 have kind of honed in on the issues that I'm thinking about,
4 and you can address that.

03:25PM 5 You know, I really think brevity is key, especially
6 when it comes to persuasion. The shorter the better. But at
7 the same time, I don't want to pressure either side if they got
8 something to say. So with that, I'll start with the
9 plaintiffs, then I'll go to the defense.

03:26PM 10 How many pages and how much time do you need before
11 you can submit the supplemental brief?

12 MR. DALE: I would suggest ten pages. I think we
13 can cover what we need to cover in ten.

14 MR. FRANK: Sure.

03:26PM 15 MR. DALE: My suggestion would be probably no later
16 than Friday of next week.

17 THE COURT: Okay. That's your suggestion. Tell me
18 what the State would like.

19 MR. SAROSY: Your Honor, I think in terms of pages,
03:26PM 20 given that we've been at it for almost two days, I think 25 is
21 at least -- a limit of 25 is needed. And in terms of days, I
22 mean -- when the clock starts, I would say 30 days at least
23 from when we get the transcript. We do -- you know, the DOJ
24 has a large organization that has multiple levels of review.
03:27PM 25 And as you said, these are important issues and we want to be

1 assured that we address the Court's questions.

2 THE COURT: All right. Let me just go off the
3 record with the court reporter, see how long she thinks
4 today -- and if she knows how long yesterday. She might not
03:27PM 5 know because it was a different court reporter.

6 **(Discussion held off the record.)**

7 THE COURT: I think out of an abundance of caution,
8 I don't think you'll have the transcripts until the earliest
9 the end of next week. And then I'm inclined -- and I think
03:29PM 10 what I'll do is simultaneous briefing, no rebuttals. You all
11 know now what the other side's arguments are. And I'll give
12 you up to 25 pages.

13 Yes, sir?

14 MR. MOROS: Your Honor, if the State presents new
03:29PM 15 analogues that have not been discussed today, do we get a
16 chance to rebut those? That's my only concern about the
17 simultaneous briefing.

18 THE COURT: That's a good point. That's a good
19 point. Does the State anticipate doing that?

03:30PM 20 MR. SAROSY: I can't say for sure one way or
21 another. And it would require us discussing with Dr. Cornell.
22 Given -- I can't say -- it's certainly possible given that most
23 of the arguments about this historical analogue, we didn't
24 provide enough.

03:30PM 25 THE COURT: Okay. So I think the point's well

1 taken. So what I would do is from the time you get the
2 transcript, you have 20 days. Submit your initial briefs. And
3 you have 20 pages in your initial briefs. And then your
4 rebuttal briefs, we'll do that two weeks or one week after?

03:31PM 5 MR. SAROSY: I would say two weeks, Your Honor.

6 MR. DALE: And we were going to say one week, so.

7 THE COURT: Let's just do two weeks. No one's going
8 to say we weren't given due process. All right. Two weeks
9 and ten pages length.

03:31PM 10 So I think that will be enough because we're only
11 really talking about *Bruen* here; right? And you've said a lot
12 already. And that's still part of the record. So this is just
13 to kind of hone in onto the issues, the step analysis, what it
14 is, why it is, and then the rest of the *Winter* factors.

03:32PM 15 So unless someone can convince me, and I know the
16 plaintiffs won't disagree because that's more than you said you
17 needed, is 20 pages enough for initial and 10 pages for
18 rebuttal enough? You feel comfortable with that?

19 MR. SAROSY: Yes, Your Honor.

03:32PM 20 THE COURT: Okay. So, again, I guess we do things
21 in seven days in court. So 21 days after receiving the
22 transcripts. I'm wondering if we just should set it 21 days
23 after next Friday because we should have the transcripts by
24 then, I would think.

03:32PM 25 All right. So let me --

1 Rolls, 21 days from next Friday is when?

2 THE COURTROOM DEPUTY: February 17, Your Honor.

3 THE COURT: Okay. And then the rebuttal is two

4 weeks after that?

03:33PM 5 MR. SAROSY: I'm sorry, Your Honor, February 17, is

6 that a --

7 THE COURTROOM DEPUTY: It's a Friday.

8 MR. SAROSY: I know President's Day is in that area.

9 THE COURTROOM DEPUTY: That's the 20th.

03:33PM 10 MR. SAROSY: Thank you. Sorry.

11 THE COURT: So it would be 14 days later, Rolls?

12 THE COURTROOM DEPUTY: 14 days -- so 14 days after

13 February 17, which is a Friday, is going to be March 3rd,

14 Your Honor.

03:33PM 15 THE COURT: March 3rd. And that will be 10 pages.

16 The initial is 20 pages.

17 And you'll electronically file all the exhibits that

18 we received.

19 Is there anything else we need to discuss this

03:34PM 20 afternoon from the plaintiffs?

21 MR. DALE: Not on plaintiffs' side.

22 THE COURT: Okay.

23 MR. SAROSY: Is the Court going to outline those

24 dates in an order?

03:34PM 25 THE COURT: I wasn't going to.

1 MR. SAROSY: Okay.

2 THE COURT: Would you like it? We can issue a
3 minute order.

4 MR. SAROSY: I think that could be helpful just for
03:34PM 5 the record.

6 THE COURT: We'll issue a very short minute order
7 just with the briefing dates. And, obviously, no hearing.
8 Okay? All right. Thank you.

9 THE COURTROOM DEPUTY: All rise. This Court is in
03:34PM 10 recess.

11 (Proceedings concluded at 3:34 p.m.)

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Date: January 30, 2023

/S/ *DEBBIE HINO-SPAAN*

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UNITED STATES DISTRICT COURT

ER-0755