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UNITED STATES DISTRICT COURT

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FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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VIRGINIA DUNCAN, ET AL,

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5

PLAINTIFFS,

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NO. 17-CV-1017

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V.

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MAY 10, 2018

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XAVIER BECERRA, ET AL.,

.

SAN DIEGO, CALIFORNIA

8

DEFENDANTS.

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08:43:20

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

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APPEARANCES:

14

FOR THE PLAINTIFFS:

MICHEL & ASSOCIATES PC

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BY: ANNA M. BARVIER AND CLINT MONFORT  
180 EAST OCEAN BOULEVARD, STE. 200  
LONG BEACH, CALIFORNIA 90802

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FOR THE DEFENDANTS:

OFFICE OF THE CALIFORNIA ATTORNEY GENERAL  
BY: JOHN DARROW ECHEVERRIA  
300 S. SPRING STREET, STE. 1702  
LOS ANGELES, CALIFORNIA 90013

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COURT REPORTER:

JULIET Y. EICHENLAUB, RPR, CSR  
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SAN DIEGO, CALIFORNIA; MAY 10, 2018; 10:06 A.M.

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

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

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

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

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

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

10:06:05

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

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

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

10:07:18 1 PLAINTIFF. YOU TELL ME: WHAT IS THE STANDARD THAT I HAVE TO  
2 LOOK TO IN ORDER TO DECIDE THIS MOTION AND WHY YOU THINK I  
3 SHOULD RULE IN YOUR FAVOR? SO THE FLOOR IS YOURS.

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

10 IN THE SECOND AMENDMENT CASE, ACCORDING TO NINTH  
11 CIRCUIT PRECEDENT, STEMMING FROM UNITED STATES VERSUS CHOVAN,  
12 THE PLAINTIFFS MUST SHOW THAT THE CONDUCT THAT THEY'RE BARRED  
13 FROM PARTICIPATING IN IS PROTECTED UNDER THE SCOPE OF THE  
14 SECOND AMENDMENT. THEN ONCE THEY'VE DONE THAT, IT BECOMES THE  
10:08:28 15 BURDEN OF THE STATE TO ESTABLISH THAT THE LAW THAT THEY HAVE  
16 PASSED AND ENFORCED AGAINST PLAINTIFFS CAN MEET THE APPROPRIATE  
17 LEVEL OF HEIGHTENED REVIEW. THAT SHOULD BE STRICT SCRUTINY --  
18 EXCUSE ME -- SHOULD BE AT LEAST INTERMEDIATE SCRUTINY.

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

10:09:07

1 THE COURT: CAN YOU DISTINGUISH FOR ME THE FYOCK  
2 CASE?

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

10:09:52

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

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

10:10:38 1 LAW-ABIDING CITIZENS' ABILITY TO OWN WHAT WE BELIEVE ARE  
2 PROTECTED MAGAZINES THAT ARE NECESSARY FOR THE PROPER FUNCTION  
3 OF THEIR FIREARMS TO BE USED IN SELF-DEFENSE, AND BY CHOOSING  
4 THAT MEANS, TAKING THEM NOT ONLY FROM CRIMINALS WHICH MAY BE  
5 ONE WAY THE STATE CAN DO IT, THEY'RE CHOOSING TO TAKE THEM FROM  
6 ALL PEOPLE, LAW-ABIDING CITIZENS, INCLUDING PEOPLE LIKE PATRICK  
7 LOVETTE WHO'S OWNED THEM FOR 20-PLUS YEARS WITHOUT INCIDENT.

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

10 MS. BARVIR: AS FAR AS PLAINTIFF IS AWARE, NO ONE  
11 EVER. MR. LOVETTE IS A TRAINED -- CERTIFIED AND TRAINED  
12 FIREARMS INSTRUCTOR. HE'S VERY CAREFUL WITH HIS FIREARMS AND  
13 HIS MAGAZINES. HE USES THOSE MAGAZINES TO TRAIN OTHER  
14 INDIVIDUALS IN THE CAREFUL AND SAFE, EFFICIENT USE OF FIREARMS  
10:11:30 15 EQUIPPED WITH DETACHABLE MAGAZINES FOR USE IN SELF-DEFENSE AND  
16 IN DEFENSE OF OTHERS. HE'S NOT KNOWN TO HAVE HARMED ANYONE  
17 WITH AIRED SHOTS OR ANYTHING LIKE THAT.

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

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

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

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

10:11:56 1 BEEN -- THE CALIFORNIA RIFLE AND PISTOL ASSOCIATION HAS NOT  
2 BEEN, HAS NOT COME FORWARD TO SAY THAT'S EVER HAPPENED. THE  
3 VAST MAJORITY OF MEMBERS AND SUPPORTERS OF CRPA ARE LAW-ABIDING  
4 CITIZENS WHO ARE SAFE WITH THEIR FIREARMS. THEY PRACTICE  
5 REGULARLY IN THE SAFE AND EFFICIENT USE OF THEIR FIREARMS FOR  
6 SELF-DEFENSE AND HUNTING AND COMPETITION. CRPA PROVIDES  
7 COMPETITIVE SHOOTING EVENTS WHERE THESE SORTS OF MAGAZINES ARE  
8 USED. NO ONE HAS EVER BEEN HARMED IN THOSE EVENTS. WHILE I  
9 DON'T KNOW THAT WE ESTABLISHED THAT IN THE EVIDENCE THAT'S  
10 BEFORE YOUR HONOR, THERE'S NOTHING TO SAY THAT -- THERE'S NO  
11 EVIDENCE OTHERWISE, EITHER.

12 THE COURT: I KEEP READING IN ALL THIS INFORMATION  
13 THAT THERE'S NO HUNTING USE FOR -- FIRST OF ALL, LET ME POINT  
14 OUT THAT A LOT OF WHAT WE'RE DEALING WITH HERE SORT OF SEEMS TO  
10:12:59 15 IN A WAY MORPH WITH DISCUSSIONS ABOUT WEAPONS LIKE THE AR-15  
16 AND SO ON AND SO FORTH. WHAT WE'RE REALLY TALKING ABOUT HERE  
17 IS WHAT IS DUBBED AS A LARGE CAPACITY MAGAZINE. WE'RE NOT  
18 REALLY TALKING ABOUT AR-15S, ET CETERA. BUT OBVIOUSLY, A LOT  
19 OF THE DISCUSSION OF ONE MERGES WITH THE OTHER. THERE'S A LOT  
20 OF DISCUSSION IN HERE IN -- AND PARTICULARLY IN THE DEFENDANT'S  
21 FILINGS, THAT THESE WEAPONS ARE NOT USED -- LARGE CAPACITY,  
22 WHAT THEY CALL LARGE CAPACITY MAGAZINES ARE NOT USED FOR  
23 HUNTING. NOW IS THAT TRUE?

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

10:14:00 1 BARRED TO NEW PEOPLE SINCE 2000, BUT IT'S NOT TRUE -- AS THE  
2 COURT WAS CALLING THEM -- AR'S AND SUCH FIREARMS THAT ARE  
3 CUSTOMIZABLE ARE USED IN SOME SORTS OF HUNTING APPLICATIONS. I  
4 KNOW THAT THERE'S PROBABLY SOME CONCERN THAT THERE'S HUNTING  
5 REGULATIONS IN CALIFORNIA WHERE CERTAIN TYPES OF BULLETS THAT  
6 MIGHT BE COMMON IN AR'S ARE NOT TO BE USED IN HUNTING BUT  
7 THAT'S --

8 THE COURT: SO SMALLER CALIBER.

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

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

13 MS. BARVIR: CORRECT.

14 THE COURT: SO IT'S NOT A CORRECT STATEMENT TO SAY  
10:14:46 15 THAT LARGE CAPACITY MAGAZINES, AS THEY ARE DEFINED, ARE IN FACT  
16 NOT USED FOR HUNTING.

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

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

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

10:15:25 1 PEOPLE WHO ARE NOT FAMILIAR WITH THE SPORT.

2 ALSO, IF YOU NOTICE IN THE DECLARATION OF MRS.

3 VIRGINIA DUNCAN, IT'S NOT PARTICULARLY HUNTING, BUT SHE DOES DO

4 PREDATION MANAGEMENT, AND SHE'S REGULARLY DOING THIS SERVICE

5 FOR RANCHERS AND FARMERS IN SOUTHERN CALIFORNIA AND SAN DIEGO

6 COUNTY TO PROTECT THEIR LIVESTOCK AND THEIR PROPERTY FROM PACK

7 HUNTING ANIMALS. IF THEY'VE SHOT ONE OR SHOOTING AT SEVERAL

8 AND MISS THEM, AND THEY'RE COMING AT THEM, IT'S A HARD TARGET.

9 A MOVING TARGET IS HARD TO ALWAYS HIT.

10 THE COURT: YOU MEAN LIKE A COYOTE?

11 MS. BARVIR: I THINK SHE SPECIFICALLY -- SHE

12 SPECIFICALLY GOES AFTER COYOTE, YES.

13 THE COURT: EVER TRY TO SHOOT ONE?

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

10:16:11 15 HONOR. BUT IF THEY MISS, IF THERE'S MULTIPLE ANIMALS COMING AT

16 THEM, IT'S DANGEROUS TO THE LIVESTOCK AS WELL AS THE RANCHERS

17 AND FARMERS IF THEY'RE AROUND AND OF COURSE MS. DUNCAN AND HER

18 HUSBAND WHO DO THIS PREDATION WORK.

19 THE COURT: BUT HUNTING, BY THE WAY, IS NOT SOMETHING

20 THAT'S PROTECTED BY HELLER. A WEAPON THAT'S USED AND POSSESSED

21 FOR HUNTING IS NOT NECESSARILY PROTECTED BY HELLER.

22 MS. BARVIR: I DON'T KNOW THAT IT'S NECESSARILY

23 PROTECTED BY HELLER. WE HAVEN'T REALLY GOTTEN TO A DECISION

24 THAT REALLY GETS THERE, BUT HELLER IS VERY CLEAR THAT IT

25 PROTECTS FIREARMS THAT -- AND NOW WE KNOW AMMUNITION AND PARTS



10:16:47 1 THAT ARE USED IN LAWFUL PURPOSES. WHILE SELF-DEFENSE IS THE  
2 CORE AS HELLER RECOGNIZES, HELLER ALSO RECOGNIZES THERE ARE  
3 OTHER LAWFUL PURPOSES, AND HUNTING IS DEFINITELY SOMETHING THAT  
4 HAS A LONG, LONG TRADITION IN THIS COUNTRY. IT'S HOW PEOPLE  
5 SURVIVED BEFORE THE SUPERMARKET WAS REGULAR. SO I DEFINITELY  
6 THINK HELLER WOULD TELL US THAT HUNTING IS A PROTECTED  
7 ACTIVITY, AND USING FIREARMS FOR HUNTING WOULD BE A PROTECTED  
8 ACTIVITY. BUT YOU'RE RIGHT, IT DOESN'T LITERALLY COME OUT AND  
9 SAY HUNTING IS AS CORE AS SELF-DEFENSE.

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

14 MS. BARVIR: IS THERE EVIDENCE THAT THEY'RE USED FOR  
10:17:43 15 SELF-DEFENSE?

16 THE COURT: THAT THEY HAVE BEEN USED.

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

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

10:18:19

1 KNOWING THERE WERE NO MORE ROUNDS IN HER WEAPON?

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

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

8 MS. BARVIR: AND IF SHE WAS LIMITED TO 10 ROUNDS BY A  
9 LAW LIKE IN CALIFORNIA, THAT WOULD DEFINITELY BE A CASE WHERE  
10 WE DON'T HAVE AN EXAMPLE OF MORE THAN 10 ROUNDS BEING FIRED,  
11 AND IT WASN'T AN EFFECTIVE USE OF SELF-DEFENSE. SO THE STORIES  
12 THAT THE STATE HAS COMPILED OR LOOKED AT AND, YOU KNOW, SOME OF  
13 THE EXAMPLES THAT WE'VE GIVEN, ARE EXAMPLES OF EFFECTIVE  
14 SELF-DEFENSE. USUALLY, IT'S FEWER ROUNDS. BUT WHEN YOU'RE  
10:19:04 15 LIMITED TO LESS THAN 10 ROUNDS, THAT'S NECESSARILY GOING TO BE  
16 THE CASE.

17 I ALSO WANT TO SAY A LITTLE BIT ABOUT THIS FOCUS ON  
18 WHETHER OR NOT THE PLAINTIFFS NEED TO ESTABLISH THAT THERE ARE,  
19 I DON'T KNOW, THERE'S SOME IMAGINARY THRESHOLD OF A NUMBER OF  
20 CASES WHERE PEOPLE HAVE NEEDED TO AND ACTUALLY FIRED MORE THAN  
21 10 ROUNDS IN SELF-DEFENSE. THAT'S NOT THE STANDARD. HELLER  
22 DOESN'T TALK ABOUT A NEED TO EXERCISE THE RIGHT. AND I DON'T  
23 KNOW OF ANY CONSTITUTIONAL RIGHT CONTEXT WHERE THAT WOULD BE  
24 APPROPRIATE IN ANY EVENT. THE LAW DEPENDS -- EXCUSE ME,  
25 THERE'S NO SUPPORT IN HELLER. THERE'S NO SUPPORT IN ANY OF THE

10:19:46 1 OTHER CASES THAT I'M AWARE OF THAT WOULD SUGGEST YOU NEED TO  
2 HAVE SOME NUMBER OF CASES WHERE 11 OR MORE ROUNDS ARE FIRED.  
3 WHAT IS THE STANDARD IS, ARE THEY TYPICALLY POSSESSED FOR THESE  
4 LAWFUL PURPOSES BY LAW-ABIDING CITIZENS? SO THE REASON THAT  
5 PEOPLE POSSESS THESE --

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

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

10 THE COURT: THANK GOODNESS.

11 MS. BARVIR: NOT THAT PEOPLE DON'T KEEP THEM FOR THAT  
12 PURPOSE; WHEREAS PLAINTIFFS HAVE SHOWN IN THE DECLARATIONS OF  
13 EACH OF THE PLAINTIFFS WHY THEY'VE CHOSEN -- WHETHER OR NOT  
14 THEY'RE RIGHT IN THEIR BELIEF THAT THEY MAY NEED THAT NUMBER OF  
10:20:28 15 ROUNDS SOMEDAY TO FIGHT OFF AN ATTACKER, THAT'S WHY THEY CHOOSE  
16 THEM.

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

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

10:21:10 1 IF YOU'RE LIMITED TO 10 ROUNDS. YOU'RE AWAKENED, STARTLED IN  
2 THE MIDDLE OF THE NIGHT, STRAGGLING FOR A FIREARM THAT IS  
3 LIMITED TO 10 ROUNDS, AND THEN YOU SHOOT OFF THREE, HIT ONE; IF  
4 THESE ASSAILANTS ARE UNDER SOME SORT OF INFLUENCE OR SOMETHING  
5 LIKE THAT, THEY MAY NOT EVEN FEEL IT. YOU HAVE TO BE A REALLY  
6 GOOD SHOT TO TAKE SOMEONE DOWN WITH ONE BULLET.

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

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

14 THE COURT: BUT THE AVERAGE HOMEOWNER IS NOT. THE  
10:22:08 15 AVERAGE HOMEOWNER IS SLEEPING, HEARS A NOISE, WAKES UP, SEES OR  
16 HEARS SOMEONE OR SOME PEOPLE, AND THEN STARTS FIRING, RIGHT,  
17 PERHAPS?

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

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

10:22:51 1 GO TO THE FIRING RANGE, YOU KNOW, THREE TIMES A YEAR OR FOUR  
2 TIMES A YEAR; WHO DOESN'T GO THROUGH THE PROGRAMS, FOR EXAMPLE,  
3 DOWNSTAIRS AT THE MARSHAL'S OFFICE WHERE THEY HAVE THE VARIOUS  
4 SCENARIOS YOU GO THROUGH AND YOU GET TO IDENTIFY "DO I SHOOT OR  
5 NOT SHOOT," RIGHT? SO LAW ENFORCEMENT NEEDS FEWER ROUNDS  
6 BECAUSE THEY HAVE MORE TRAINING THAN THE AVERAGE CIVILIAN WHO  
7 IS AT HOME AND DOESN'T HAVE THAT CONSTANT KIND OF TRAINING.  
8 DOES THAT MAKE SENSE TO YOU?

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

12 THE COURT: I UNDERSTAND, FACTUALLY. I UNDERSTAND.  
13 I HEAR YOU. I HEAR YOU. QUITE OFTEN -- BELIEVE ME, I SEE THE  
14 CASES ALL THE TIME, AND THEY DO THE BEST THEY CAN, BUT I  
10:23:53 15 OFTENTIMES WONDER, MAYBE WHAT THEY REALLY NEED IS HOWITZERS OR  
16 LPG'S OR WHATEVER IN ORDER TO HIT WHAT THEY'RE SHOOTING AT.

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

10:24:36

1

THE COURT: HOW MANY TIMES HAS THAT HAPPENED?

2

MS. BARVIR: THAT'S WHAT I WAS GOING TO SAY, YOUR

3

HONOR. THEY DON'T HAVE EVIDENCE OF THAT HAPPENING; ALTHOUGH,

4

THEY CLAIM IT MIGHT. SO I WANT TO MAKE THAT POINT VERY

5

CLEAR.

6

THE COURT: SO THE CASE OF SELF-DEFENSE, WHEN IT

7

HASN'T HAPPENED, THE STATE SAYS, "SEE, YOU DON'T NEED IT

8

BECAUSE IT HASN'T HAPPENED," AND THEN WHEN THE ISSUE COMES UP

9

ABOUT SPRAYING OF BULLETS, THAT HASN'T HAPPENED, BUT THE STATE

10

SAYS, "TAKE OUR WORD FOR IT; THIS HAS OR WILL HAPPEN."

11

MS. BARVIR: CORRECT. AND ALSO, I THINK THAT LEADS

12

US ALSO TO CRIMINAL USE WHICH IS A MAJOR CONCERN AND POINT OF

13

CONTENTION OF THE STATE IN ITS BRIEFING WHICH IS TO SUGGEST

14

THAT CRIMINALS USE THESE AT DISPROPORTIONATE RATES. I THINK

10:25:22

15

THEY SPOKE SPECIFICALLY AT SOME POINTS ON VIOLENCE AGAINST LAW

16

ENFORCEMENT OFFICERS AND OBVIOUSLY THE MASS SHOOTING EVENTS --

17

THE COURT: I NOTED THAT IN A COUPLE OF INCIDENTS THE

18

STATE MENTIONS, THE WEAPONS THAT WERE ACTUALLY USED WERE

19

MACHINE GUNS. FOR EXAMPLE, I THINK THE BIG BANK ROBBERY CASE

20

THAT ONE OF THE STATE'S EXPERTS RELIED ON, THE WEAPONS THAT

21

WERE BEING USED WERE AUTOMATIC WEAPONS WHICH I THINK HAD BEEN

22

BANNED FOR A LONG TIME.

23

MS. BARVIR: EFFECTIVELY BANNED SINCE THE '80S. AND

24

THEN, OF COURSE, WHEN YOU TALK ABOUT LAS VEGAS WHICH IS

25

DEFINITELY AN OUTLIER.

10:26:05

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

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

10:27:01

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

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

10:27:49 1 OFF THE TOP OF MY HEAD.

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

4 MS. BARVIR: I HOPE SO.

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

11 MS. BARVIR: YES.

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

14 MS. BARVIR: CORRECT.

10:28:26 15 THE COURT: SO NOW I HOPE THE STATE HAS THE  
16 STATISTICS FOR ME AS TO HOW MANY GUN VIOLENCE INSTANCES THERE  
17 HAVE BEEN IN THE LAST 10 YEARS AND HOW MANY OF THOSE HAVE BEEN  
18 COMMITTED WITH A WEAPON THAT HAD A LARGE CAPACITY MAGAZINE AND  
19 HOW MANY HAVE BEEN COMMITTED SINCE THE SALE AND TRANSFER OF  
20 LARGE CAPACITY MAGAZINES WERE BANNED EXCEPT FOR THE GRANDFATHER  
21 CLAUSE. SO --

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



10:29:09 1 FOR HERE. WHILE I DON'T HAVE RAW NUMBERS OF THE NUMBER OF  
2 INCIDENTS -- YOU KNOW, WHAT TOTAL GUN DEATHS THERE ARE, HOW  
3 MANY GUN CRIMES THERE ARE AND SPECIFICALLY HOW MANY INVOLVE  
4 MAGAZINES OVER 10 ROUNDS, BUT WHAT PROFESSOR MOODY'S WORK SHOWS  
5 IS THAT THERE HASN'T BEEN A STATISTICALLY SIGNIFICANT IMPACT ON  
6 ANY SORTS OF CRIME, GUN VIOLENCE GENERALLY, MURDERS OF LAW  
7 ENFORCEMENT, MASS SHOOTINGS, MORE SPECIFICALLY IN CALIFORNIA.  
8 SO THE FEDERAL BAN WHICH WE SPEAK ABOUT -- BOTH SIDES SPEAK  
9 ABOUT A LOT IN THE EVIDENCE AND THE BRIEFING -- THE FEDERAL BAN  
10 PAIRED WITH CALIFORNIA'S SINCE 2000 ACQUISITION BAN HAS NOT HAD  
11 A STATISTICALLY SIGNIFICANT IMPACT ON GUN VIOLENCE.

12 THE STATE OBJECTS TO A LOT OF THAT CONTENT. I'D LIKE  
13 TO SAY ONE THING ABOUT THAT. THE STATE CLAIMS IT'S NOT  
14 REBUTTAL WITNESS TESTIMONY. THE STATE CLAIMS THAT KOPER AND  
10:30:02 15 KLAREVUS AND ALLEN, THEIR EXPERTS, ARE NOT SAYING THINGS ABOUT  
16 GUN VIOLENCE IN CALIFORNIA AND MASS SHOOTINGS IN CALIFORNIA,  
17 BUT WHAT THEY ARE EXPLICITLY OPINING ON, WHAT THOSE EXPERTS ARE  
18 STATING IS THAT THEY BELIEVE THAT CAPACITY-BASED MAGAZINE  
19 RESTRICTIONS COULD HAVE SOME IMPACT, COULD HELP ALLEVIATE MASS  
20 SHOOTINGS, COULD BRING DOWN DEATH TOLLS, THINGS LIKE THAT.  
21 PROFESSOR MOODY IS PROVIDING HIS STATISTICAL ANALYSIS THAT  
22 SHOWS THAT THAT'S NOT TRUE. SO I'D LIKE THE COURT TO TAKE A  
23 LOOK AT THAT.

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

10:30:40

1

MS. BARVIR: CONCEPTUALLY, ANYTHING IS POSSIBLE.

2

THE COURT: AND I READ THESE THINGS, AND IT'S ALMOST

3

LIKE THEY CUT AND PASTE FROM EACH OTHER. IT'S LIKE -- IT'S

4

KIND OF LIKE PLAYING THE GAME WE PLAYED AS KIDS, TELEPHONE, YOU

5

KNOW, AND THEY JUST KEEP REPEATING THE SAME THING OVER AND

6

OVER. I DON'T NEED AN EXPERT TO TELL ME THAT IF A WEAPON HAS

7

30 ROUNDS THAT IT CARRIES WITH IT THE POTENTIAL OF KILLING 30

8

PEOPLE, AND IF A WEAPON HAS 10 ROUNDS IT HAS THE POTENTIAL OF

9

KILLING 10 PEOPLE. YOU DON'T HAVE TO BE A ROCKET SCIENTIST TO

10

FIGURE THAT OUT, OF COURSE. AND IF YOU HAVE A GUN THAT HOLDS

11

ONE ROUND, RIGHT, IT HAS THE POTENTIAL FOR KILLING ONE PERSON.

12

RIGHT?

13

MS. BARVIR: CORRECT. BUT WHAT COMES FROM THAT IS,

14

AS HAS BEEN SHOWN WITH MOST MASS SHOOTINGS WHERE THERE ARE

10:31:38

15

LARGER DEATH COUNTS AND MORE MEDIA ATTENTION, THESE PEOPLE THAT

16

ARE COMMITTING THESE HEINOUS ACTS ARE NOT DOING IT WITH ONE GUN

17

WITH SIX ROUNDS OR 10 ROUNDS OR 30 ROUNDS. THEY'RE DOING IT

18

WITH MULTIPLE FIREARMS AND/OR MULTIPLE MAGAZINES. SO WHAT YOU

19

HAVE TO LOOK AT IS: CAN RESTRICTING LAW-ABIDING CITIZENS TO 10

20

ROUNDS PER MAGAZINE IMPACT MASS SHOOTINGS AND VIOLENCE AGAINST

21

LAW ENFORCEMENT TO SUCH AN EXTENT BECAUSE OF HOW LONG IT TAKES

22

TO CHANGE A MAGAZINE OR JUST PICK UP A NEW FIREARM? THAT'S

23

KIND OF THE ISSUE. YES, IF YOU HAVE ONE GUN WITH 30 ROUNDS IN

24

IT, YOU COULD POTENTIALLY HIT MORE THAN ONE GUN WITH 10 ROUNDS

25

IN IT, BUT THAT'S NOT HOW THESE EVENTS WORK OUT IN THE REAL

10:32:19 1 WORLD, AND I THINK THE EVIDENCE LAYS THAT OUT.

2 THE COURT: LET ME ASK YOU ABOUT THE SAN BERNARDINO

3 SHOOTING. WHAT WEAPON WAS USED IN THAT SHOOTING? DO YOU KNOW?

4 MS. BARVIR: I DO, BUT I DON'T OFF THE TOP OF MY

5 HEAD. I'M SORRY, YOUR HONOR.

6 THE COURT: DOES THE STATE KNOW?

7 MR. ECHEVERRIA: IT'S MY UNDERSTANDING THAT THEY WERE

8 AR PLATFORM MODELS.

9 THE COURT: WHAT CAPACITY MAGAZINE?

10 MR. ECHEVERRIA: I BELIEVE THEY WERE 30 ROUND

11 MAGAZINES, YOUR HONOR.

12 THE COURT: WHERE DID THEY GET THEM?

13 MR. ECHEVERRIA: I DO NOT KNOW.

14 THE COURT: DID THEY BUY THEM HERE IN CALIFORNIA?

10:32:47 15 MR. ECHEVERRIA: UNLIKELY.

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

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

18 BUT THAT'S A FAIR ASSUMPTION.

19 THE COURT: OKAY. ALL RIGHT. GREAT. THANKS. I

20 APPRECIATE YOUR CANDIDNESS.

21 MS. BARVIR: I BELIEVE DR. KLECK TALKS ABOUT THAT

22 INSTANCE IN HIS EXPERT REPORT, YOUR HONOR.

23 THE COURT: AS I SAID, I READ ALL THIS, AND I WISH I

24 COULD REMEMBER IT ALL, BUT I CAN'T. I JUST CAN'T. SO OUR

25 RECOLLECTION IS THE SAN BERNARDINO MASS SHOOTING WHICH IS THE

10:33:15 1 ONE IN CALIFORNIA WHICH BASICALLY IS, I BELIEVE, THE LAST THAT  
2 WE HAD WAS BY SOMEONE -- AND THAT WAS A TERRORIST CASE, AS I  
3 RECALL. IT WAS THE HUSBAND AND WIFE WHO WERE --

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

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

8 MS. BARVIR: AND THEY DIDN'T HAVE THEM BEFORE THE  
9 2000 LAW WENT INTO EFFECT. SO THEY COULDN'T HAVE ACQUIRED THEM  
10 LEGALLY, YES, YOUR HONOR.

11 THE COURT: SO REGARDLESS, SO HERE WE HAVE A LAW  
12 THAT'S IN EFFECT. AND THE LAW SAYS YOU CAN'T BUY, TRANSFER,  
13 POSSESS UNLESS YOU OWNED IT BEFORE A CERTAIN DATE. AND THESE  
14 PEOPLE WHO WANTED TO KILL PEOPLE, GOT THEIR HANDS ON THESE GUNS  
10:34:06 15 AND NOT WITHSTANDING THE LAW THAT WE HAD, THEY WENT AHEAD AND  
16 KILLED ALL THESE PEOPLE. RIGHT?

17 MS. BARVIR: CORRECT.

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

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

10:34:45

1

THE COURT: HOW WOULD A TRIAL -- HOW WOULD A TRIAL --

2

MS. BARVIR: DO ANYTHING MORE?

3

THE COURT: -- YES, DO ANYTHING MORE?

4

MS. BARVIR: I THINK THAT'S A GOOD QUESTION. WE

5

COULD POTENTIALLY SEE THE -- THE COURT COULD SEE THE EXPERTS

6

AND WHO IS POTENTIALLY MORE AWARE. WE COULD PLAY IT OUT FOR

7

THE COURT. WE'VE DONE IT IN DEPOSITIONS. SO I DON'T KNOW THAT

8

COULD DO A WHOLE LOT MORE FOR YOU.

9

THE COURT: I READ THE EXCERPTS OF DEPOSITIONS THAT

10

WERE FILED, BY THE WAY.

11

MS. BARVIR: BUT EVEN IF THE COURT DID GRAPPLE WITH

12

WHETHER OR NOT WE COULD HANDLE THIS AT MSJ, WHICH WE BELIEVE

13

YOU CAN BASED ON THE EVIDENCE THAT HAS BEEN PUT FORTH THAT

14

ISN'T LIKELY TO MATERIALLY AFFECT THESE TYPES OF GUN VIOLENCE,

10:35:28

15

WHAT IT COMES DOWN TO IS THERE'S NO FIT HERE. THE STATE HAS

16

CHOSEN THE BROADEST POSSIBLE MEANS. STRIPPING MAGAZINES

17

NECESSARY FOR -- USED FOR SELF-DEFENSE, OWNED FOR SELF-DEFENSE

18

AND OTHER LAWFUL PURPOSES BY LAW-ABIDING CITIZENS, TAKING THEM

19

FROM THEIR HANDS AND THEIR HOMES SO THEY CAN PREVENT CRIMINAL

20

MISUSE. HELLER TELLS US THAT'S INAPPROPRIATE. THE FIT IS NOT

21

APPROPRIATE HERE. THIS ISN'T A QUESTION OF EXPERTS FIGHTING

22

WHETHER OR NOT THE FIT IS APPROPRIATE, AND THE LEGISLATURE IS

23

ENTITLED TO NO DEFERENCE ABOUT WHETHER THE FIT IS APPROPRIATE.

24

THE COURT HAS THE POWER TO MAKE THAT DECISION. IT'S A LEGAL

25

QUESTION.

10:36:04

1

THE COURT: IT'S INTERESTING YOU SHOULD MENTION THAT

2

BECAUSE IN THE KOLBE CASE, THERE'S SOMETHING THAT REALLY

3

PUZZLED ME. AND BY THE WAY, I THINK IT WAS IN THE WORMAN

4

DECISION AS WELL WHICH, BY THE WAY, I KNOW JUDGE YOUNG

5

SOMEWHAT. I RESPECT HIM HIGHLY. HE WAS THE FELLOW WHO

6

MASTERMINDED OR MANAGED ALL THE TOBACCO CASES, IF I'M NOT

7

MISTAKEN, AND I THINK HE DID A WONDERFUL JOB IN THAT REGARD. I

8

DISAGREE WITH HIS OPINION FOR VARIOUS RESPECTS. BUT ONE OF THE

9

THINGS THAT HE TALKED ABOUT AND KOLBE TALKS ABOUT THAT YOU JUST

10

MENTIONED -- IN THE KOLBE CASE, AT PAGE 140, IT SAYS, QUOTE:

11

IT IS THE LEGISLATURE'S JOB, NOT OURS, TO WEIGH CONFLICTING

12

EVIDENCE AND MAKE POLICY JUDGMENTS, AND WE MUST ACCORD

13

SUBSTANTIAL DEFERENCE TO THE PREDICTIVE JUDGMENTS OF THE

14

LEGISLATURE. AND THAT COMES FROM KOLBE AND THEN IT'S REPEATED

10:37:19

15

IN THE WORMAN DECISION.

16

BUT AS A GOOD FRIEND OF MINE LIKES TO SAY, THAT ARROW

17

LEFT THE BOW A LONG TIME AGO. IT CAUSES ME TO THINK ABOUT SOME

18

THINGS. TELL ME WHAT YOU THINK ABOUT IT. SO BROWN VERSUS

19

BOARD OF EDUCATION, THE LEGISLATURE SAT DOWN, HEARD EVIDENCE,

20

MADE POLICY DECISIONS, AND THEY SAID SEPARATE BUT EQUAL IS

21

OKAY. THEY MADE A POLICY DECISION AFTER HEARING THE EVIDENCE,

22

AND THANK GOD ALONG COMES THE SUPREME COURT THAT SAYS, SORRY,

23

THIS IS PROTECTED BY THE BILL OF RIGHTS, YOU'RE WRONG, AND WE

24

HAD BROWN. THANK GOODNESS. RIGHT?

25

ROE VERSUS WADE, THE LEGISLATURE MADE A DECISION

10:38:22 1 CURTAILING ABORTION. THEY MADE A POLICY DECISION. ALONG COMES  
2 THE SUPREME COURT AND SAYS, WRONG. NOW IN THE ROE VERSUS WADE,  
3 THEY HAD TO FIRST FIND THERE WAS A RIGHT TO PRIVACY WHICH --  
4 I'M NOT DISAGREEING WITH THE RESULT. I'M JUST SIMPLY SAYING I  
5 READ THE CONSTITUTION. I KEEP A COPY OF IT BY MY CHAIR WHERE I  
6 LOOK AT IT EVERY NOW AND THEN WHENEVER I SEE SOMETHING IN THE  
7 NEWS. SO I LOOK AT IT QUITE OFTEN. I'VE TRIED TO FIND THE  
8 WORD "PRIVACY" IN THERE. I CAN'T FIND IT. I'VE TRIED TO FIND  
9 THE WORD "ABORTION." I CAN'T FIND IT. SO THE SUPREME COURT  
10 SAID: NOT WITHSTANDING THE FACT YOU MAY HAVE MADE CERTAIN  
11 POLICY DECISION, IT VIOLATES THE CONSTITUTION. RIGHT?

12 MS. BARVIR: CORRECT.

13 THE COURT: RECENTLY, AND PERHAPS THE STATE CAN  
14 ENLIGHTEN ME ON THIS, A CASE THAT I KNOW REASONABLY WELL,  
10:39:26 15 LAWRENCE VERSUS TEXAS, RIGHT? THE TEXAS LEGISLATURE SAID THERE  
16 WAS AN ACT PROHIBITING SODOMY. RIGHT? THEY MADE POLICY  
17 DECISIONS. SUPREME COURT SAID: NO, IT VIOLATES THE  
18 CONSTITUTION. ALONG COMES OBERGEFELL, PROPOSITION 8. NOW I'M  
19 SURE THE STATE REMEMBERS THIS QUITE WELL. THERE WAS A VOTE BY  
20 THE PEOPLE OF THE STATE OF CALIFORNIA. 54 OR 56 PERCENT VOTED  
21 AND SAID THE DEFINITION OF A MARRIAGE IS A MARRIAGE BETWEEN A  
22 MAN AND A WOMAN. RIGHT? ALONG COMES THE SUPREME COURT THAT  
23 SAYS: WRONG, THIS IS BEYOND YOUR POLICY-MAKING POWERS. THIS  
24 IS PROTECTED. IT IS PROTECTED BY SOMETHING CALLED THE BILL OF  
25 RIGHTS.

10:40:25

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10:41:40

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25

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

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



10:42:20 1 LAW COULD BE EFFECTIVE. WHAT THEY DON'T GET THIS BROAD  
2 DEFERENCE TO, WHAT THE JUDICIAL BRANCH HAS THE RESPONSIBILITY  
3 TO LOOK AT, IS WHETHER OR NOT THE FIT IS APPROPRIATE, WHETHER  
4 IT REALLY IS LIKELY TO ADVANCE THE INTERESTS THAT ARE BEING  
5 STATED OR --

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

11 MS. BARVIR: YOU KNOW, OBVIOUSLY, THE LEGISLATURE IS  
12 GOING TO MAKE ITS DECISION FIRST. BUT IT'S THE RESPONSIBILITY  
13 OF THE JUDICIARY TO MAKE SURE THAT THE DECISIONS THEY'VE MADE  
14 ARE IN LINE WITH THE CONSTITUTION. ALL THOSE CASES THAT YOUR  
10:43:15 15 HONOR JUST SPOKE OF ARE EXAMPLES OF THE JUDICIARY UPHOLDING ITS  
16 POWER AND AUTHORITY AND RESPONSIBILITY TO PROTECT THE  
17 CONSTITUTION, THE RIGHTS OF THE MINORITIES, FROM MOB RULE. I  
18 THINK IT'S DEFINITELY A HARD QUESTION, BUT IT'S SOMETHING THAT  
19 THE COURT IS GOING TO HAVE TO GRAPPLE WITH BUT --

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

10:44:14 1 CAETANO, RIGHT? BUT AS JUDGES, WE'RE EXPECTED TO EXERCISE OUR  
2 OWN INDEPENDENT THINKING.

3 MS. BARVIR: CORRECT.

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

9 MS. BARVIR: I RESPECT THAT YOUR HONOR IS  
10 CONSIDERING, LIKE, HOW FAR CAN THEY GO. THERE ARE LOTS OF  
11 CASES THAT HAVE MADE IT THROUGH THE PIPELINE AND THAT ARE  
12 KNOCKING ON THE SUPREME COURT'S DOOR ASKING HOW FAR CAN THE  
13 STATE GO. BUT WHAT WE HAVE HERE IS, AGAIN, THE BROADEST  
14 POSSIBLE MEANS. IF THE COURT FINDS THAT POSSESSION AND/OR  
10:45:22 15 ACQUISITION OF MAGAZINES OVER 10 ROUNDS IS PROTECTED BY THE  
16 CONSTITUTION, HELLER IS VERY CLEAR, YOU SIMPLY CANNOT BAN IT.

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

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

10:46:04 1 OPERATION. AS THE EVIDENCE AND THE BRIEFING FROM PLAINTIFF  
2 SHOW, DETACHABLE MAGAZINES ARE NECESSARY TO THE FUNCTION OF ALL  
3 THOSE FIREARMS THAT REQUIRE THEIR USE.

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

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

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

8 MS. BARVIR: YES.

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

12 MS. BARVIR: I THINK I HAVE A FEW RESPONSES. FIRST,  
13 JUST SAYING THAT THEY'RE NOT BANNING EVERY SINGLE MAGAZINE KIND  
14 OF TAKES US BACK TO HELLER. THEY WEREN'T BANNING ALL TYPES OF  
10:46:50 15 FIREARMS EITHER IN THE DISTRICT OF COLUMBIA.

16 THE COURT: BUT THEY WERE BANNING ALL HANDGUNS.

17 MS. BARVIR: ALL HANDGUNS, YEAH. BUT THE COURT TELLS  
18 US JUST BECAUSE THERE'S AN OPTION TO USE SOMETHING ELSE ISN'T  
19 ENOUGH TO PROTECT THE RIGHT. SINCE MAGAZINES, AT LEAST 15 TO  
20 17 ROUNDS FOR HANDGUNS AND 24 TO 30 ROUNDS FOR RIFLES, ARE  
21 COMMONLY POSSESSED BY LAWFUL PURPOSES BY LAW-ABIDING CITIZENS,  
22 THEY'RE PROTECTED. YOU CAN'T HAVE THE STATE COME BACK AND SAY,  
23 WELL, JUST BECAUSE YOU CAN USE 10 ROUNDS OR FEWER AND THEY'RE  
24 AVAILABLE, THAT'S NOT A JUDGMENT THAT THE STATE CAN MAKE WHEN  
25 THESE TYPES OF ARMS ARE PROTECTED BY THE CONSTITUTION. SO THAT

10:47:28 1 WOULD BE MY RESPONSE. AND ADDITIONALLY, EXCUSE ME --

2 THE COURT: YOU LOST YOUR TRAIN OF THOUGHT.

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

4 THE COURT: LET ME INTERRUPT YOU WITH ONE OF MY

5 QUESTIONS. IN READING KOLBE, I WAS A LITTLE CONFUSED BECAUSE

6 IN ONE PART THEY TALK ABOUT AR'S BEING POSSESSED BY ONLY ONE

7 PERCENT OF THE POPULATION. SO WHAT THEY WERE TRYING TO DO IN

8 THE KOLBE OPINION IS TO ESSENTIALLY EXPLAIN THAT THEY WERE NOT

9 IN COMMON USE. BUT THEN IN ANOTHER PART OF KOLBE THEY SAID --

10 AGAIN, KEEPING IN MIND THAT A LOT OF THIS IS SORT OF MERGING OR

11 BLENDING IN WITH THE OTHER -- IT SAYS: THE PLAINTIFF'S

12 EVIDENCE REFLECTS THAT SINCE IT WAS FIRST MARKETED TO THE

13 PUBLIC IN 1963, THE AR-15 HAS BECOME THE MOST POPULAR CIVILIAN

14 RIFLE DESIGNED IN AMERICA AND IS MADE IN MANY VARIATIONS BY

10:48:56 15 MANY COMPANIES.

16 SO I WAS A LITTLE CONFUSED WHEN I WAS READING KOLBE.

17 ON THE ONE HAND THEY SAY, WELL, THEY'RE ONLY OWNED BY ONE

18 PERCENT OF THE POPULATION. AND THEN THEY SAID, BUT IT'S BECOME

19 THE MOST POPULAR CIVILIAN RIFLE DESIGNED IN AMERICA. I WAS A

20 LITTLE CONFUSED BY THAT. DO YOU HAVE ANY NUMBERS ON HOW

21 POPULAR ARE WEAPONS IN CALIFORNIA THAT USE MAGAZINES OF MORE

22 THAN 10 ROUNDS?

23 MS. BARVIR: THE EVIDENCE I THINK WOULD COME FROM --

24 A LOT OF THE EVIDENCE OBVIOUSLY IS DEALING WITH THE UBIQUITY OF

25 THE MAGAZINES OVER 10 ROUNDS THEMSELVES. BUT THE EVIDENCE THAT

10:49:46 1 GOT US TO THOSE NUMBERS I THINK WE HAVE ESTIMATES BETWEEN 100  
2 AND 115 MILLION MAGAZINES OVER 10 ROUNDS IN THE UNITED STATES  
3 THROUGHOUT THE MARKET.

4 THE COURT: DO YOU HAVE ANY NUMBERS FOR CALIFORNIA?

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

10:50:34 15 I THINK YOU'LL SEE THAT AR'S ARE QUITE POPULAR IN  
16 CALIFORNIA THOUGH. THERE'S A LOT OF RESTRICTION ON THEIR USE.  
17 REGISTRATION IS REQUIRED FOR MANY TYPES. BUT THEY'RE STILL  
18 VERY POPULAR, AND THOSE NUMBERS, AGAIN, THEY'RE GOING TO BE  
19 COMING FROM THE NATIONWIDE LOOKING, NATIONWIDE VIEWPOINT. BUT  
20 THE WORK OF THE PLAINTIFF'S EXPERT FROM THE NATIONAL TRAINING  
21 SPORTS FOUNDATION KIND OF TALKS ABOUT THAT. THEY LOOKED AT THE  
22 NUMBERS OF HOW MANY PEOPLE HAD THE TYPES OF RIFLE PLATFORMS  
23 THAT WOULD ACCEPT LARGE CAPACITY MAGAZINES TO THEN MAKE THE  
24 ESTIMATES OF NUMBERS OF LARGE CAPACITY MAGAZINES IN THE  
25 COUNTRY. SO THAT'S THE BEST I CAN DO FOR YOU, YOUR HONOR, ON

10:51:14

1 NUMBERS OF AW'S IN THE STATE AND IN THE COUNTRY.

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

10:52:06

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

10:53:00 1 SUPPLY AND THE ABILITY TO RELOAD RAPIDLY.

2 I HAVE A BIT OF A PROBLEM WITH THAT STATEMENT BECAUSE

3 PRIOR TO THAT IT SAYS: SIMPLY PUT, AR-15 TYPE RIFLES ARE,

4 QUOTE, LIKE M-16 RIFLES. SO BY DEFINITION, WHEN YOU READ THAT,

5 WHEN I READ IT, AND I UNDERSTAND I'M NOT THE BRIGHTEST LIGHT

6 BULB IN THE BUILDING, BUT WHEN I READ THAT, IT TELLS ME THAT

7 M-16S AND AR-15S ARE NOT THE SAME. THE M-16 IS A MILITARY

8 WEAPON.

9 MS. BARVIR: THAT'S CORRECT.

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

11 MS. BARVIR: IT'S A CIVILIAN WEAPON.

12 THE COURT: IT MAY HAVE -- IN FACT, THAT'S EXACTLY

13 RIGHT. IN FACT, KOLBE SPECIFICALLY SAYS THAT. IT MAY HAVE

14 BEEN DESIGNED AFTER A MILITARY WEAPON, BUT IT DIFFERS IN THE

10:53:55 15 MILITARY WEAPON IN VARIOUS REGARDS. RIGHT?

16 MS. BARVIR: CORRECT.

17 THE COURT: SO IF AN AR-15 USES A MAGAZINE THAT HOLDS

18 MORE THAN 10 ROUNDS, BUT IT WAS NOT DESIGNED FOR MILITARY USE,

19 IT WAS DESIGNED FOR CIVILIAN USE, IT DOESN'T REALLY HOLD. THE

20 MAGAZINES ARE NOT MEANT TO PROVIDE SOLDIERS WITH A LARGE AMOUNT

21 OF AMMUNITION, IT IS DESIGNED TO PROVIDE THE HOLDER OF THE

22 WEAPON -- NOT A SOLDIER, BUT THE HOLDER OF THE WEAPON WHICH

23 PRESUMPTIVELY IS A CIVILIAN -- WITH A LARGE AMMUNITION SUPPLY,

24 RIGHT?

25 MS. BARVIR: CORRECT.

10:54:37

1

THE COURT: IT SEEMS SO CLEAR TO ME.

2

MS. BARVIR: IT IS PRETTY CLEAR, YOUR HONOR. BUT

3

EVEN IF IT WERE A MILITARY FIREARM AND EVEN IF LARGE CAPACITY

4

MAGAZINES WERE MADE TO GIVE SOLDIERS ACCESS TO LARGE AMOUNTS OF

5

AMMUNITION, WHICH I DON'T THINK THE EVIDENCE BEARS OUT THAT THE

6

STATE'S PROVIDED -- THEY REALLY JUST CITE KOLBE AND WORMAN FOR

7

SUCH A PROPOSITION -- EVEN IF THAT WERE TRUE, THE SECOND

8

AMENDMENT EXPLICITLY TALKS ABOUT MILITIA SERVICE SO --

9

THE COURT: THAT GETS US INTO A WHOLE DIFFERENT

10

ARENA.

11

MS. BARVIR: THAT'S TRUE.

12

THE COURT: THAT GETS US INTO A WHOLE DIFFERENT ARENA

13

WHICH IS A QUAGMIRE THAT WE'RE GOING TO, I GUESS, PERHAPS WE'RE

14

GOING TO EXPLORE. BUT I HAVE A VERY DIFFICULT TIME. I DON'T

10:55:39

15

SEE ANYTHING IN HELLER THAT SAYS THAT MILITARY EQUIPMENT IS NOT

16

PROTECTED. IT DOESN'T SAY THAT AT ALL.

17

MS. BARVIR: YOU'RE NOT MISSING ANYTHING. IT DOESN'T

18

SAY THAT. IT TALKS ABOUT --

19

THE COURT: SO AS I SAID, I'M NOT THE BRIGHTEST LIGHT

20

BULB IN THE BUILDING, BUT WHY IS IT THAT ALL THE OTHER COURTS,

21

LIKE KOLBE, FOR EXAMPLE, SAY OTHERWISE? BECAUSE ALL I READ WAS

22

THAT JUSTICE SCALIA POSED A RHETORICAL DEVICE BY WHICH HE

23

CREATED A STRAW MAN ONLY TO BE ABLE TO KNOCK DOWN THE STRAW MAN

24

FURTHER ON IN HIS ARGUMENT; BUT NOWHERE IN THAT ARGUMENT DOES

25

HE SAY, FOR EXAMPLE, THAT M-16S ARE BANNED OR PROHIBITED. DO



10:56:24 1 YOU KNOW WHERE IN HELLER I MIGHT FIND THAT LANGUAGE?

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

3 THE COURT: THEN HOW IS IT THE PEOPLE KEEP REPEATING

4 THIS? I KEEP READING IT, AND I KEEP THINKING, YOU KNOW, THIS

5 IS LIKE ALICE IN WONDERLAND. I DON'T UNDERSTAND. WHERE DOES

6 THIS COME FROM?

7 MS. BARVIR: HAVING PRACTICED THIS TYPE OF LAW FOR A

8 WHILE, I HAVE MY ASSUMPTIONS. BUT I THINK WHAT WE'VE SEEN

9 HAPPEN IS THIS TAKING FROM HELLER THE DANGEROUS-AND-UNUSUAL

10 LANGUAGE AND TURNING IT INTO UNUSUALLY-DANGEROUS LANGUAGE. ALL

11 FIREARMS ARE GOING TO BE DANGEROUS BUT IT MEANS THEY HAVE TO BE

12 UNUSUAL. AND THEN THEY PUT THAT TOGETHER WITH THE APPROVAL

13 THAT HELLER GIVES TO MILLER ABOUT SAWED-OFF SHOTGUNS, THEN THEY

14 LUMP A BUNCH OF FIREARMS IN AND SAY, WELL, NOT ALL FIREARMS ARE

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

16 THE COURT: BUT MILLER SPECIFICALLY, MILLER

17 SPECIFICALLY SAYS THAT WEAPONS THAT ARE USED FOR WARFARE ARE

18 PROTECTED.

19 MS. BARVIR: THAT'S CORRECT.

20 THE COURT: RIGHT?

21 MS. BARVIR: RIGHT. AND THEY FOUND THAT SAWED-OFF

22 SHOTGUNS ARE NOT PARTICULARLY USEFUL IN WARFARE SO THEY COULD

23 BE BANNED.

24 THE COURT: WHICH INTERESTINGLY WOULD PROBABLY BE

25 VERY USEFUL FOR SELF-DEFENSE; IF YOU WOKE UP IN THE MIDDLE OF

10:57:42 1 THE NIGHT, AND YOU HAD SOMEONE BREAK IN YOUR HOUSE, YOU  
2 WOULDN'T HAVE TO WORRY ABOUT THE BULLET GOING THROUGH THAT WALL  
3 AND THAT WALL AND GOING TO THE NEIGHBOR'S HOUSE AND HITTING  
4 SOMEONE, RIGHT? YOU WOULDN'T HAVE TO WORRY ABOUT AIM. SO  
5 PROBABLY A SAWED-OFF SHOTGUN WOULD PROBABLY BE GOOD FOR  
6 SELF-DEFENSE AT HOME, BUT YET, WE CAN'T HAVE THEM, RIGHT?

7 MS. BARVIR: THAT'S TRUE.

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

10:58:34 15 MS. BARVIR: CORRECT.

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

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

10:59:20 1 SO THE IDEA THAT BECAUSE LARGE -- REMEMBER WE USED TO TALK  
2 ABOUT HIGH-CAPACITY MAGAZINES? NOW WE CHANGED THE  
3 TERMINOLOGY.

4 MS. BARVIR: THAT HAPPENS A LOT.

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

12 MS. BARVIR: LUCKILY, YOU'RE NOT GOING TO FIND THAT  
13 FROM THE NINTH CIRCUIT TELLING YOU THAT YOU NEED TO FOLLOW THAT  
14 PRECEDENT. HELLER IS GOING TO BE ON POINT HERE. THESE ARE  
11:00:06 15 USED BY LAW-ABIDING CITIZENS FOR SELF-DEFENSE REGARDLESS OF  
16 THEIR USE IN MILITARY FUNCTIONS. IT'S NOT THE STANDARD. WE'RE  
17 LOOKING AT LAW-ABIDING CITIZENS, AND THEY USE THEM. THE  
18 EVIDENCE BEARS THAT OUT. THEY'RE PROTECTED.

19 THE COURT: WHAT ABOUT A HUNDRED ROUND MAGAZINE?

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

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

11:00:36

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

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

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

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

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

11:02:13 1 THE COMMONLY AND UNCOMMONLY POSSESSED MAGAZINES. SO THE COURT  
2 HAS TO STRIKE IT OR UPHOLD IT BASED ON WHAT THE THE LAW SAYS.  
3 IF THE COURT'S DECISION IS BASED ON, WELL, WE KNOW 30 ROUNDS IS  
4 COMMON AND WE KNOW 15 AND 17 ROUNDS AND 11 ROUNDS ARE COMMON,  
5 THEN THE STATE COULD OSTENSIBLY GO BACK AND PASS SOMETHING THAT  
6 SAYS, OKAY, 75 ROUNDS, 50 ROUNDS, SOMETHING LIKE THAT, AND THEN  
7 THERE COULD POTENTIALLY BE ANOTHER COURT FIGHT IN ANOTHER DAY.  
8 SO THE COURT WOULD HAVE TO SUSTAIN -- UPHOLD THE LAW OR STRIKE  
9 IT DOWN IN ITS ENTIRETY. I DON'T THINK THE COURT HAS THE  
10 ABILITY TO REWRITE THE LAW TO SAY, WELL, YOU CAN BAN MAGAZINES  
11 OVER 50 ROUNDS. EXCUSE ME, YOUR HONOR.

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

13 (PAUSE IN THE PROCEEDINGS.)

14 THE COURT: SO LET ME ASK YOU: NOW YOU CONCEDE, DO  
11:03:40 15 YOU NOT, THAT ANY GUN IS DANGEROUS?

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

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

21 MS. BARVIR: THAT'S CORRECT.

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

25 MS. BARVIR: LAW ABIDING.

11:04:37

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

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

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

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

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

MS. BARVIR: THAT'S CORRECT.

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

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

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

MR. ECHEVERRIA: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING.

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

11:05:25

11:06:07 1 THE BOARD OF EDUCATION, LAWRENCE VERSUS TEXAS, OBERGEFELL.  
2 THERE'S MANY OTHER DECISIONS, AS THE COURT KNOWS, IN WHICH THE  
3 JUDICIARY HAS TAKEN A FAIRLY ACTIVE ROLE IN MONITORING THE  
4 PUBLIC'S POLICY DECISIONS TO ENSURE THAT CONSTITUTIONAL  
5 LIBERTIES ARE NOT INFRINGED.

6 IN THE CONTEXT OF THE SECOND AMENDMENT AND IN THE  
7 CONTEXT OF THE FIRST AMENDMENT, IN THE CONTEXT OF ABORTION  
8 RIGHTS, AND THERE ARE OTHER ISSUES, STRICT SCRUTINY IS NOT  
9 ALWAYS THE STANDARD. WITH RESPECT TO SOME CONSTITUTIONAL  
10 RIGHTS, A LOWER STANDARD OF SCRUTINY IS AFFORDED, AND THE  
11 COURTS WILL NOT TAKE A DEEP DIVE IN REEVALUATING THE EVIDENCE  
12 AND WILL NOT SUBJECT THE PEOPLE'S DECISION TO A MICROSCOPIC  
13 EVALUATION, AND THAT IS THE CASE WITH RESPECT TO LARGE CAPACITY  
14 MAGAZINES UNDER THE SECOND AMENDMENT. THE REASON WHY THE KOLBE  
11:07:10 15 COURT AND THE WOMAN COURT WITH JUDGE YOUNG SAID THAT THESE  
16 ISSUES ARE MATTERS OF PUBLIC DEBATE, AND THERE IS A VIGOROUS  
17 DEBATE HAPPENING OUTSIDE THIS COURTHOUSE, AS YOUR HONOR IS  
18 AWARE.

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

23 MR. ECHEVERRIA: ABSOLUTELY.

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

11:07:53 1 EMOTION THAT'S DRIVEN AND CREATED AS A RESULT OF THESE TRAGIC  
2 EVENTS; RIGHT?

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

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

11 MR. ECHEVERRIA: OR FOR JUST DRIVING.

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

14 MR. ECHEVERRIA: UH-HUH.

11:08:42 15 THE COURT: YES.

16 MR. ECHEVERRIA: YES, YOUR HONOR.

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

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



11:09:16

1 THE PUBLIC MASS SHOOTINGS, OR GUN VIOLENCE IN GENERAL.

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

9 MR. ECHEVERRIA: ABSOLUTELY.

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

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

11:10:20

16 THE COURT: YES.

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

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

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

11:10:51

1 NATURE OF LARGE CAPACITY MAGAZINES.

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

10 MR. ECHEVERRIA: ABSOLUTELY, YOUR HONOR. WHILE THE  
11 NUMBERS MAY BE RELATIVELY SMALL IN TERMS OF GUN VIOLENCE  
12 AGAINST LAW ENFORCEMENT PERSONNEL, DR. KOPER IN HIS EXPERT  
13 REPORT THAT THE ATTORNEY GENERAL HAS SUBMITTED EXPLAINS HOW 41  
14 PERCENT OF CRIME GUNS THAT WERE USED IN MURDERS OF LAW  
15 ENFORCEMENT HAD LARGE CAPACITY MAGAZINES AND THAT IS UNDISPUTED  
16 EVIDENCE. THE PLAINTIFFS DO NOT DISPUTE THE EXPERT OPINIONS OR  
17 THE EVIDENCE UNDERLYING THOSE OPINIONS THAT LARGE CAPACITY  
18 MAGAZINES ARE USED DISPROPORTIONATELY IN THE MURDER OF LAW  
19 ENFORCEMENT. AND EVEN IF --

11:11:46

20 THE COURT: SO LET ME TELL YOU WHAT I DID NOT SEE;  
21 AND THAT IS, THAT IF THE SIZE OF THE MAGAZINE WAS REDUCED FROM  
22 17 TO 10 THE ASSAULTS ON OFFICERS BY WEAPONS THAT USE MAGAZINES  
23 WOULD BE ANY LESS.

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

11:12:50 1 LIKE THE ONE CALIFORNIA HAS ENACTED WOULD IN FACT REDUCE THE  
2 NUMBERS OF DEATHS OF LAW ENFORCEMENT BECAUSE INTERMEDIATE  
3 SCRUTINY IS THE APPLICABLE LEVEL OF SCRUTINY. AND THIS IS  
4 SOMETHING THAT PLAINTIFFS WOULD HAVE TO CONCEDE UNDER FYOCK AND  
5 AS EVERY SINGLE -- FOUR CIRCUIT COURTS AND NUMEROUS DISTRICT  
6 COURTS, INCLUDING THE EASTERN DISTRICT OF CALIFORNIA, THEY'VE  
7 ALL CONCLUDED THAT RESTRICTIONS OF MAGAZINE CAPACITIES ARE  
8 SUBJECT TO INTERMEDIATE SCRUTINY.

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

12 MR. ECHEVERRIA: RIGHT.

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

14 MR. ECHEVERRIA: SO WHEN INTERMEDIATE SCRUTINY  
11:13:37 15 APPLIES, THERE'S VARIOUS RULES THIS COURT HAS TO FOLLOW AND ONE  
16 OF THEM IS THE SUBSTANTIAL DEFERENCE THAT'S AFFORDED TO THE  
17 PREDICTIVE JUDGMENTS OF THE LEGISLATURE. AND WITH RESPECT TO  
18 THE POSSESSION BAN THAT WAS ENACTED IN 2016 WITH PROPOSITION  
19 63, SUBSTANTIAL DEFERENCE TO THE PREDICTIVE JUDGMENTS OF THE  
20 PEOPLE IS ALSO DUE. SO THE COURT HAS TO LOOK AT THE EVIDENCE  
21 THAT THE ATTORNEY GENERAL HAS PRESENTED.

22 THE COURT: WHICH IS?

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

25 THE COURT: BUT THEY BASICALLY ALL SAY THE SAME

11:14:09 1 | THING, COUNSEL. I READ THEM OVER AND OVER AGAIN, AND THEY ALL  
2 | BASICALLY SAY THE SAME THING. THEY SAY THE MORE ROUNDS THAT  
3 | YOU CAN FIRE THROUGH A GUN, THE MORE LIKELY IT IS THAT PEOPLE  
4 | ARE GOING TO BE INJURED AND ARE GOING TO BE KILLED. YOU DON'T  
5 | HAVE TO HAVE AN EXPERT -- YOU GIVE ME 20 EXPERTS WHO SAY THE  
6 | SAME THING, AND I SAY TO YOU, YOU'RE JUST NEEDLESSLY KILLING  
7 | TREES TO CREATE PAPER. OF COURSE, YOU KNOW THAT. I KNOW THAT.  
8 | YOU KNOW THAT. WE ALL KNOW THAT. JUST LIKE WE ALL KNOW THAT  
9 | GUNS ARE DANGEROUS. YOU AGREE THAT GUNS IS A DANGEROUS THING.  
10 | RIGHT?

11 | MR. ECHEVERRIA: ABSOLUTELY.

12 | THE COURT: BUT GUESS WHAT? LOTS OF PEOPLE OWN THEM.  
13 | LOTS OF PEOPLE USE THEM. IN FACT, THEY'RE PROTECTED BY THE  
14 | SECOND AMENDMENT. SO THE QUESTION BECOMES: HOW DO WE DECIDE  
11:14:59 15 | WHAT IS A REASONABLE FIT? HOW DO WE DECIDE THAT? YOU SAY I  
16 | HAVE TO GIVE SUBSTANTIAL DEFERENCE TO THE LEGISLATURE. FINE.  
17 | I'LL GIVE THEM SUBSTANTIAL DEFERENCE, BUT I'M NOT GIVING THEM  
18 | ALL DEFERENCE.

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

25 | BUT UNDER INTERMEDIATE SCRUTINY, THE COURT LOOKS TO

11:15:36 1 ENSURE THAT THERE IS SUBSTANTIAL EVIDENCE JUSTIFYING THE LAW  
2 AND THAT ON THE BASIS OF THAT SUBSTANTIAL EVIDENCE, THAT THE  
3 PEOPLE HAVE MADE RATIONAL INFERENCES FROM THAT EVIDENCE. AND  
4 THE EVIDENCE THAT WE HAVE PRESENTED TO YOUR HONOR WITH THE  
5 DECLARATION OF LUCY ALLEN, THE DECLARATION OF PROFESSOR  
6 DONOHUE, THE DECLARATION OF CHRISTOPHER KOPER, AND THE NUMEROUS  
7 EMPIRICAL STUDIES AND ARTICLES SHOWING THAT NOT ONLY DO LARGE  
8 CAPACITY MAGAZINES ENABLE SHOOTERS TO FIRE MORE ROUNDS IN A  
9 GIVEN PERIOD OF TIME, BUT THEY'RE USED -- THEY'RE PREVALENT  
10 PUBLIC MASS SHOOTINGS, AS LUCY ALLEN'S EXPERT REPORT SETS  
11 FORTH.

12 THE COURT: I LOOKED AT SOME OF THAT. SO FOR  
13 EXAMPLE -- BY THE WAY, LET ME POINT OUT THAT IN MY ORDER THAT I  
14 PREVIOUSLY ISSUED GRANTING THE PRELIMINARY INJUNCTION WAS -- I  
11:16:39 15 DIDN'T SEE ANYTHING IN YOUR STACK OF DOCUMENTS THAT REFUTED MY  
16 SPECIFIC FACT FINDING AS TO SOME OF THE MASS SHOOTINGS THAT HAD  
17 BEEN ALLUDED TO IN AT LEAST ONE OF THE REPORTS THAT WAS  
18 SUBMITTED. IT WOULD SEEM TO BE PRETTY CLEAR TO ME FROM THE  
19 GET-GO WAS THAT IN THESE MASS SHOOTINGS VERY OFTEN -- AND I  
20 THINK IT'S EVEN SUPPORTED BY A LOT OF THIS THAT YOU HAVE HERE  
21 -- THERE WERE WEAPONS THAT WERE USED THAT WERE NOT HIGH  
22 CAPACITY MAGAZINES. SHOTGUNS, FOR EXAMPLE. IN MANY OF THEM,  
23 THEY USE MACHINE GUNS OR FULLY AUTOMATIC WEAPONS. RIGHT?

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

11:17:42 1 ASSAULT WEAPONS EVEN MORE DEADLY.

2 THE COURT: WELL -- SO DEFINE FOR ME AN ASSAULT

3 WEAPON.

4 MR. ECHEVERRIA: THE CALIFORNIA PENAL CODE HAS

5 MULTIPLE CATEGORIES AND DEFINITIONS.

6 THE COURT: I KNOW. I KNOW. BUT YOU KNOW WHAT? AS

7 I SAID TO YOUR COLLEAGUE WHEN SHE WAS HERE, I'VE TRIED READING.

8 I'VE TRIED READING.

9 MR. ECHEVERRIA: I UNDERSTAND.

10 THE COURT: AND I GUARANTEE YOU THAT IF I WANTED TO

11 TRIP YOU UP TODAY, I COULD PROBABLY DO IT, EVEN THOUGH YOU'RE

12 AN EXPERT IN THE FIELD. I GUARANTEE THAT YOU DON'T KNOW.

13 MR. ECHEVERRIA: I WOULDN'T SAY EXPERT, BUT YOU CAN

14 ASK ANY QUESTION THAT YOU LIKE OF ME.

11:18:20 15 THE COURT: SO DEFINE FOR ME AN ASSAULT WEAPON.

16 MR. ECHEVERRIA: SO WITH RESPECT TO -- THE STATE OF

17 CALIFORNIA HAS ACTED INCREMENTALLY IN PROHIBITING VERY

18 DANGEROUS ASSAULT RIFLES.

19 THE COURT: WHAT IS AN ASSAULT RIFLE?

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

21 HONOR.

22 THE COURT: I'M SORRY.

23 MR. ECHEVERRIA: THE STATE IS ALLOWED TO ACT

24 INCREMENTALLY IN ADDRESSING ISSUES OF PUBLIC CONCERN. SO THE

25 STATE FIRST HAD DIFFERENT ROSTERS OF FIREARMS BY MAKE AND MODEL

11:18:50 1 AND BANNED THOSE. AND WHEN GUN MANUFACTURERS STARTED MAKING  
2 COPIES OR CHANGING THEM AND MAKING MINOR TWEAKS TO THEIR  
3 DESIGNS TO GET OUT OF THE BAN, THE STATE OF CALIFORNIA ENACTED  
4 THE CATEGORY THREE BAN WHICH DEFINES AN ASSAULT WEAPON ON THE  
5 BASIS OF CERTAIN CHARACTERISTICS OR FEATURES. SO THE  
6 PREREQUISITE TO QUALIFY AS AN ASSAULT WEAPON IS FOR THE FIREARM  
7 TO HAVE THE CAPABILITY TO ACCEPT A DETACHABLE MAGAZINE AND IF  
8 IT HAS --

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

13 MR. ECHEVERRIA: NOT NECESSARILY, YOUR HONOR.

14 THE COURT: NO. OKAY.

11:19:39 15 MR. ECHEVERRIA: SO THE FEATURE-BASED TEST REQUIRES  
16 THAT THE FIREARM NOT HAVE A FIXED MAGAZINE. SO IF IT CAN  
17 ACCEPT A DETACHABLE MAGAZINE, THAT'S THE FIRST STEP. THEN YOU  
18 WOULD LOOK AT A MENU OF OTHER FEATURES, AND IF THE FIREARM HAS  
19 ONE OF THOSE OTHER FEATURES IN ADDITION TO ACCEPTING A  
20 DETACHABLE MAGAZINE, THEN IT WOULD QUALIFY AS AN ASSAULT  
21 WEAPON. THOSE ADDITIONAL FEATURES WOULD BE FLASH SUPPRESSORS,  
22 TELESCOPIC STOCKS, PISTOL GRIP, TWO PISTOL GRIPS; THERE MAY BE  
23 OTHER FEATURES. I DIDN'T READ THE ASSAULT RIFLE BAN THIS  
24 MORNING.

25 THE COURT: FLASH SUPPRESSORS.

11:20:22

1

MR. ECHEVERRIA: YES.

2

THE COURT: GRENADE THROWERS.

3

MR. ECHEVERRIA: GRENADE.

4

THE COURT: OF COURSE, EVERYBODY -- I'M SURE THAT ALL

5

OF THE PLAINTIFFS PROBABLY HAVE SOME WEAPON THAT POSSESSES A --

6

HAS A GRENADE THROWER, RIGHT?

7

MR. ECHEVERRIA: I WOULD MAKE NO REPRESENTATION ABOUT

8

THAT, YOUR HONOR.

9

THE COURT: OF COURSE YOU WOULDN'T BECAUSE IT WOULD

10

BE FOOLISH. NOBODY HAS THAT KIND OF A WEAPON. BUT IN ANY

11

EVENT, GETTING BACK TO MY POINT -- I WAS TRYING TO LEAD YOU

12

DOWN THIS --

13

MR. ECHEVERRIA: I'M FIGURING OUT HOW TO GET BACK TO

14

LARGE CAPACITY MAGAZINES. BUT I'D LIKE TO NOTE, YOUR HONOR,

11:20:58

15

THAT THE CALIFORNIA RIFLE AND PISTOL ASSOCIATION, WHICH IS THE

16

INSTITUTIONAL PLAINTIFF IN THIS CASE, THEY HAVE CHALLENGED

17

CALIFORNIA'S ASSAULT WEAPONS BAN, AND THAT CASE IS RUPP,

18

R-U-P-P, VERSUS BECERRA, AND IT'S CURRENTLY PENDING IN THE

19

CENTRAL DISTRICT OF CALIFORNIA. AND JUST YESTERDAY, JUDGE

20

STATON GRANTED THE ATTORNEY GENERAL'S MOTION TO DISMISS AND

21

DENIED A MOTION FOR PRELIMINARY INJUNCTION BROUGHT BY THE CRPA,

22

AND IT DID SO ON -- IN EVALUATING VERY SIMILAR ARGUMENTS THAT

23

ARE BEING PRESENTED TO YOUR HONOR IN THIS CASE CHALLENGING THE

24

LARGE CAPACITY MAGAZINES BAN.

25

JUDGE STATON DETERMINED THAT ASSAULT WEAPONS, EVEN



11:21:41 1 ASSUMING THAT THEY ARE PROTECTED BY THE SECOND AMENDMENT,  
2 THAT'S STEP ONE OF THE ANALYSIS, INTERMEDIATE SCRUTINY APPLIES  
3 AND THE EVIDENCE SUBMITTED BY THE ATTORNEY GENERAL DEMONSTRATED  
4 THAT THERE'S NO LIKELIHOOD OF SUCCESS ON THE MERITS OF THE CRPA  
5 PREVAILING ON THEIR SECOND AMENDMENT CLAIM AND JUDGE STATON  
6 ALSO DISMISSED WITH PREJUDICE THE CRPA'S TAKING CLAIM AND  
7 SUBSTANTIVE DUE PROCESS CLAIM TO THE ASSAULT WEAPONS BAN. I  
8 THINK JUDGE STATON'S WELL-REASONED ORDER PROVIDES ADDITIONAL  
9 SUPPORT FOR THE ATTORNEY GENERAL'S POSITION THAT EVEN IF THE  
10 SECOND AMENDMENT PROTECTS SOME MAGAZINE CAPACITY, IN THIS  
11 CASE --

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

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

11:22:32 15 THE COURT: I'M TROUBLED BY THAT ARGUMENT. WHY WOULD  
16 IT NOT? WHY WOULD THE SECOND AMENDMENT NOT PROTECT THE  
17 MAGAZINE?

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

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

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

11:23:09 1 THERE IS SECOND AMENDMENT PROTECTION FOR ASSAULT WEAPONS.  
2 THE COURT: I MISUNDERSTOOD YOU. I APOLOGIZE.  
3 MR. ECHEVERRIA: SO YOUR HONOR, IN RULING ON THIS  
4 MOTION FOR SUMMARY JUDGMENT, CAN SKIP STEP ONE AND AVOID ALL  
5 THE DEBATE ABOUT COMMON USE AND MILLER AND WHETHER SECOND  
6 AMENDMENT PROTECTION IS AFFORDED TO LARGE CAPACITY MAGAZINES,  
7 AND THE COURT CAN BYPASS THE LINE IN HELLER THAT WAS QUOTED AND  
8 RELIED UPON IN KOLBE AND IN WORMAN THAT WEAPONS THAT ARE MOST  
9 SUITABLE FOR MILITARY APPLICATION LIKE M-16S AND SIMILAR  
10 WEAPONS MAY BE BANNED. JUST REALLY QUICKLY YOUR HONOR BECAUSE  
11 YOUR HONOR ASKED THE PLAINTIFFS WHERE IN HELLER THE SUPREME  
12 COURT SAID THAT, I'D LIKE TO READ THAT PORTION INTO THE RECORD  
13 FOR YOUR HONOR.  
14 THE COURT: WOULD YOU?  
11:23:58 15 MR. ECHEVERRIA: IT'S ON PAGE 627 OF THE HELLER  
16 DECISION. I PRINTED OUT FOUR PAGES PER SHEET. SO I'M TRYING  
17 TO SAVE TREES. IT MIGHT BE DIFFICULT TO READ.  
18 THE COURT: IT'S OKAY. ALL RIGHT.  
19 MR. ECHEVERRIA: IT MAY BE OBJECTED --  
20 THE COURT: YES, THAT'S EXACTLY WHERE I THOUGHT YOU'D  
21 GO. THAT'S A RHETORICAL DEVICE.  
22 MR. ECHEVERRIA: CAN I READ ON?  
23 THE COURT: NO. I READ IT. I KNOW EXACTLY WHERE  
24 YOU'RE READING FROM. THAT'S A RHETORICAL DEVICE. HE CREATED A  
25 STRAW MAN. THEN HE KNOCKED DOWN THE STRAW MAN. BUT TELL ME IN

11:24:30 1 THERE SOMEWHERE WHERE THE OPINION SAYS THAT MILITARY WEAPONS  
2 ARE NOT PROTECTED.

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

6 THE COURT: BECAUSE BASICALLY WHAT HE WAS SAYING WAS  
7 YOU HAVE TO FIND A WAY TO CONNECT THE PREFATORY CLAUSE TO THE  
8 SUBSEQUENT CLAUSE, AND WHAT HE WAS SAYING WAS, OKAY, FINE, SO  
9 YOU OBJECT AND YOU SAY THAT THESE WEAPONS ARE OF MILITARY USE,  
10 THAT THEY HAVE TO BE OF MILITARY USE BECAUSE THE PREFATORY  
11 CLAUSE IS TALKING ABOUT A MILITIA; AND BECAUSE IT'S TALKING  
12 ABOUT A MILITIA, ONE MIGHT ARGUE THAT THE WEAPONS THAT ARE  
13 PROTECTED ARE THOSE THAT WOULD BE USED BY MILITIA AND ARE  
14 THEREFORE OF MILITARY TYPE. BUT THEN HE GOES ON TO SAY: BUT  
11:25:28 15 IT DOESN'T MATTER, IT DOESN'T MATTER BECAUSE WHAT MATTERS IS  
16 THAT IN MILITIA, THEY'RE CALLED UPON TO BRING WHATEVER WEAPONS  
17 THEY HAD AND THAT INCLUDES WEAPONS THAT WOULD NORMALLY BE USED  
18 FOR THE DEFENSE OF THE HEARTH AND THE HOME. THAT'S WHAT HE  
19 SAID.

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

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

11:26:13 1 IT DOES NOT MEAN IT'S PROTECTED. AND WHY? "A," IT'S  
2 DANGEROUS. ALL GUNS ARE DANGEROUS. AND "B," IT'S UNUSUAL, AND  
3 NOT COMMONLY POSSESSED BY LAW-ABIDING CITIZENS OR LAW-ABIDING  
4 PURPOSES. RIGHT? THAT'S WHAT HE WAS SAYING. HE WASN'T SAYING  
5 THAT BECAUSE SOMETHING WAS DESIGNED FOR MILITARY PURPOSE IT  
6 THEREFORE BECOMES UNPROTECTED. I'VE READ THAT MANY, MANY, MANY  
7 TIMES. AND YOU KNOW, AGAIN, I ACKNOWLEDGE I DIDN'T GO TO  
8 HARVARD.

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

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

14 AGAIN, I READ KOLBE, AND I READ ALL THESE OTHER  
11:27:09 15 CASES, BUT I THINK PERHAPS THE BEST -- SINCE WE'RE ON THE  
16 SUBJECT -- WHO BEST TO TELL ME WHAT THEY SAID IN AN OPINION  
17 THAN THE PERSON WHO WROTE THE OPINION OR THE COURT WHO WROTE  
18 THE OPINION. DON'T YOU AGREE? KOLBE IS WONDERFUL. IT'S A  
19 FOURTH CIRCUIT. BUT IT'S NOT THE SUPREME COURT.

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

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

25 MR. ECHEVERRIA: SURE.

11:27:48

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

11:28:54

10 SO THE SUPREME COURT SAYS, WHAT WE SAID IN HELLER WAS  
11 THAT IT'S NOT JUST WEAPONS THAT ARE USEFUL IN WARFARE THAT ARE  
12 PROTECTED. IT INCLUDES OTHER WEAPONS INCLUDING STUN GUNS, AND  
13 THAT'S HOW CAETANO WAS DECIDED. SO I MEAN, LOOK, I LIKE  
14 READING THE LAW. I LOVE READING OPINIONS. I LIKE TRYING TO  
15 FIGURE OUT WHAT WAS IN THE PEOPLE'S MINDS WHEN THEY WROTE THE  
16 OPINIONS. BUT I JUST DON'T SEE THE ARGUMENT THAT THE SUPREME  
17 COURT SAID THAT MILITARY STYLE WEAPONS ARE FORBIDDEN, ARE NOT  
18 PROTECTED BY THE SECOND AMENDMENT. THAT'S NOT WHAT THEY SAID.  
19 WHAT THEY SAID WAS SOME WEAPONS THAT ARE USEFUL PERHAPS BY THE  
20 MILITIA ARE NOT PROTECTED. THAT'S WHAT THEY SAID. DO YOU  
21 DISAGREE WITH WHAT I JUST READ TO YOU?

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

11:29:39

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THE COURT: BECAUSE?

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

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

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

11:30:21

THE COURT: I UNDERSTAND. I GOT YOU. BUT I WAS  
TRYING -- I WAS TRYING TO FIGURE OUT WHAT THAT LANGUAGE SAYS  
WHEN IT SAYS -- BECAUSE OBVIOUSLY WHEN THEY WROTE THIS THEY  
MUST HAVE MEANT TO SAY SOMETHING, OTHERWISE THEY WEREN'T GOING  
TO WASTE THE INK AND THE PAPER. IT SAID: BUT HELLER REJECTED  
THE PROPOSITION THAT ONLY THOSE WEAPONS USEFUL IN WARFARE ARE  
PROTECTED.

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

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

11:30:57 1 THE COURT: WE AGREE. SO THE POINT IS THAT I THINK  
2 THAT HELLER DOES NOT SAY -- ANYWHERE, ANYWHERE IN HELLER DOES  
3 IT SAY THAT BECAUSE A WEAPON MAY BE DESIGNED TO BE LIKE A  
4 MILITARY-STYLE WEAPON THAT IT'S NOT PROTECTED BY THE SECOND  
5 AMENDMENT. IT DOESN'T SAY THAT ANYWHERE IN THERE.

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

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

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

11:31:42 15 THE COURT: I KNOW.

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

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

24 MR. ECHEVERRIA: PRESENT DAY MILITIA SERVICE, RIGHT?

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

11:32:14 1 WHO IS GOING TO POSSIBLY -- NO, I'M NOT GOING TO FIND THAT, AND  
2 I DON'T THINK ANY COURT WOULD AGREE. ALTHOUGH, IF YOU REALLY  
3 READ THE SECOND AMENDMENT, IT PROBABLY COULD. I SUPPOSE YOU  
4 COULD CARRY AROUND A DIRTY BOMB IN A SUITCASE IN TODAY'S DAY  
5 AND AGE, BUT NOBODY IN THEIR RIGHT MIND IS GOING TO ARGUE THAT.  
6 BUT THAT TAKES US TO THE BASIC QUESTION, THE QUESTION THAT I  
7 ASKED AT THE VERY BEGINNING, WHICH IS HOW DO WE MAKE THE  
8 DECISION, HOW DO WE DECIDE WHAT THAT REASONABLE FIT IS?

9 WE'VE AGREED THAT MACHINE GUNS, THEY'RE BANNED, AND  
10 PROBABLY THERE'S A REASONABLE FIT BETWEEN THE STATE'S INTEREST  
11 AND THE LEGISLATION. WE'VE AGREED. WE'VE AGREED THAT THE  
12 SECOND AMENDMENT DOES NOT PROTECT MY HAVING A BAZOOKA OR HAND  
13 GRENADE OR SHOULDER-FIRED MISSILE. BUT WHAT ABOUT THE REST OF  
14 THE POTENTIAL WEAPONS COVERED BY THE SECOND AMENDMENT LIKE THE  
11:33:28 15 ONES WE'RE ARGUING ABOUT HERE?

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

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



11:34:21 1 EVIDENCE INVOLVED MACHINE GUNS OR AUTOMATIC WEAPONS, BY THE  
2 WAY -- SO WE BAN MACHINE GUNS. WE'VE NOW BANNED THE SALE AND  
3 TRANSFER OF ASSAULT WEAPONS. WE BANNED THE SALE AND TRANSFER  
4 OF THESE LARGE CAPACITY MAGAZINES. BUT NOW WE COME ALONG AND  
5 WE SAY NOT ONLY HAVE WE BANNED THE SALE OR TRANSFER, WE'RE  
6 GOING TO CAUSE PEOPLE WHO ARE OTHERWISE LAW-ABIDING CITIZENS  
7 WHO POSSESS THESE FOR WHATEVER INTEREST THEY MAY POSSESS THEM,  
8 WHETHER IT BE FOR SPORTING OR FOR SELF-DEFENSE, WE'RE GOING TO  
9 CAUSE YOU TO SURRENDER THESE. EVEN THOUGH YOU'VE DONE NOTHING  
10 WRONG, WE'RE GOING TO CAUSE YOU TO SURRENDER THESE, OR YOU'RE  
11 GOING TO BECOME A CRIMINAL.

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

14 THE COURT: WHAT DOES IT PROVIDE?

11:35:19 15 MR. ECHEVERRIA: SO WHEN THE PEOPLE OF CALIFORNIA  
16 ENACTED PROPOSITION 63 THEY CLOSED A LOOPHOLE THAT MADE  
17 ENFORCEMENT OF THE EXISTING LARGE CAPACITY MAGAZINE  
18 RESTRICTIONS THAT YOUR HONOR REFERRED TO MORE DIFFICULT TO  
19 ENFORCE BECAUSE LARGE CAPACITY MAGAZINES, UNLIKE FIREARMS,  
20 DON'T BEAR UNIQUE IDENTIFYING NUMBERS. SO WHEN LAW ENFORCEMENT  
21 COMES ACROSS A LARGE CAPACITY MAGAZINE, IT'S VERY DIFFICULT FOR  
22 THEM TO DETERMINE THAT THIS LARGE CAPACITY MAGAZINE WAS NOT  
23 GRANDFATHERED IN UNDER THE PRIOR LAW. AND THE PEOPLE CLOSED  
24 THAT LOOPHOLE NOT TO JUST ENABLE THE MORE EFFECTIVE ENFORCEMENT  
25 OF THE EXISTING RESTRICTIONS BUT BECAUSE LARGE CAPACITY

11:36:01 1 MAGAZINES CAN BE STOLEN. THE ATTORNEY GENERAL HAS PRESENTED  
2 EVIDENCE THAT --

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

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

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

14 MR. ECHEVERRIA: IN THAT CASE, IF THE LEGISLATURE OR  
11:36:55 15 THE PEOPLE WENT TOO FAR AND COMPLETELY EVISCERATED A SECOND  
16 AMENDMENT PROTECTION, THEN THE COURT WOULD STEP IN, POSSIBLY  
17 UNDER HELLER, SAY THIS WAS A POLICY CHOICE OFF THE TABLE.  
18 THAT'S NOT WHAT THE POSSESSION BAN DID.

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

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

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

11:37:38 1 WILL THE COURT MAKE THE DECISION THAT THE STATE HAS GONE TOO  
2 FAR?

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

5 THE COURT: WHAT WOULD THE SUBSTANTIAL EVIDENCE BE?

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

13 THE COURT: BUT WHAT THE COURT WAS HOLDING IN FYOCK  
14 WAS VERY DIFFERENT. I DON'T WANT TO GO THERE. I DON'T WANT TO  
11:38:22 15 GO THERE. LET ME JUST AGAIN GET BACK TO -- LET'S CUT TO THE  
16 CHASE. LET'S UNDERSTAND SOMETHING. A GUN IS A DANGEROUS  
17 THING. SO IS A KNIFE. YOU KNOW IN LONDON THEY HAVE A BAN ON  
18 KNIVES. THEY DON'T HAVE GUNS. BUT NOW THEY BANNED KNIVES. SO  
19 MAYBE NEXT WEEK THEY'LL BAN PRESSURE COOKERS. I DON'T KNOW.  
20 BUT THE FACT IS THAT A GUN IS A DANGEROUS THING. IF IT'S  
21 MISUSED, IT'S DANGEROUS. IF IT'S NOT MISUSED, IT'S A PERFECTLY  
22 VALID TOOL FOR PLEASURE AND SELF-DEFENSE.

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

11:39:08

1 QUESTIONS.

2 MR. ECHEVERRIA: HOPEFULLY.

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

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

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

11:39:56

15 MR. ECHEVERRIA: CRIMINALS WILL ALWAYS EXIST, YOUR  
16 HONOR.

17 THE COURT: EXACTLY.

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

21 THE COURT: I GOT YOU. I UNDERSTAND.

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

11:40:33 1 PEOPLE, THEY'RE PROBABLY GOING TO USE A GUN THAT HAS A MAGAZINE  
2 THAT HOLDS 10 ROUNDS. AND THE NEXT PERSON THAT COMMITS A MASS  
3 SHOOTING IS GOING TO USE A WEAPON THAT CONTAINS 10 ROUNDS. AND  
4 THE NEXT PERSON AFTER THAT IS GOING TO USE A WEAPON THAT  
5 CONTAINS A MAGAZINE THAT HOLDS 10 ROUNDS.

6 NOW ALONG IS GOING TO COME THE STATE, AND THE STATE  
7 IS GOING TO USE THE VERY SAME TYPE OF EVIDENCE THAT THE STATE  
8 HAS USED IN THIS CASE, AND THEY'RE GOING TO COME IN AND THEY'RE  
9 GOING TO SAY, LOOK, JUDGE, POLICE OFFICERS ARE BEING ASSAULTED  
10 ALL THE TIME WITH THESE WEAPONS THAT HOLD 10 ROUNDS, AND THEY  
11 WILL BECOME THE NEW LARGE CAPACITY MAGAZINE. AND THE STATE  
12 WILL SAY, JUDGE, WE HAVE TO TAKE THESE OFF THE STREETS BECAUSE  
13 LAW ENFORCEMENT OFFICERS ARE BEING ASSAULTED WITH THESE AND  
14 PEOPLE ARE BEING KILLED, AND YOU KNOW, GUESS WHAT, YOU ONLY  
11:41:39 15 NEED 2.2 ROUNDS FOR SELF-DEFENSE.

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

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

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

11:42:30 1 GOING TO HAPPEN. THEN YOU'RE GOING TO SAY -- THE STATE IS  
2 GOING TO COME IN AND SAY, YOU KNOW WHAT, WE GOT TO GET RID OF  
3 10-ROUND MAGAZINES SO WE'RE GOING TO GO TO 7. THEN JUDGE  
4 BENITEZ IS GOING TO COME ALONG AND SAY, GUESS WHAT, I'M GOING  
5 TO HAVE YOU GET RID OF THE 10-ROUND MAGAZINES; YOU CAN'T HAVE A  
6 MAGAZINE THAT'S MORE THAN 7 ROUNDS. AND THEN THE NEXT MASS  
7 SHOOTER IS GOING TO USE A WEAPON THAT KILLS WITH A 7-ROUND  
8 MAGAZINE, AND THEN THE NEXT PERSON AFTER THAT IS GOING TO USE A  
9 7-ROUND MAGAZINE, AND THE NEXT PERSON AFTER THAT IS GOING TO  
10 USE A 7-ROUND MAGAZINE.

11 THEN THE STATE IS GOING TO COME AND SAY, LOOK, JUDGE,  
12 LAW ENFORCEMENT IS BEING ASSAULTED WITH THESE 7-ROUND  
13 MAGAZINES, AND PEOPLE ARE BEING KILLED IN MASS SHOOTINGS WITH  
14 7-ROUND MAGAZINES. WE GOT TO BAN 7-ROUND MAGAZINES. YOU CAN  
11:43:26 15 SEE WHERE THIS IS GOING TO PROGRESS, AND THIS IS WHY I WAS  
16 ASKING YOU THE QUESTION BECAUSE IT'S A TOUGH QUESTION. IT'S  
17 NOT AN EASY QUESTION. IT'S NOT AN EASY QUESTION FOR ME. IT  
18 SHOULD NOT BE AN EASY QUESTION FOR ANYONE. BUT MY QUESTION IS:  
19 AT WHAT POINT IN TIME, WHERE, WHEN, BECAUSE THE EVIDENCE IS NOT  
20 GOING TO CHANGE. THERE'S GOING TO BE PEOPLE THAT ARE GOING TO  
21 BE KILLED. THERE'S GOING TO BE PEOPLE THAT ARE GOING TO BE  
22 INJURED. THERE'S GOING TO BE POLICE OFFICERS THAT ARE GOING TO  
23 BE ASSAULTED WHETHER IT BE WITH A 10-ROUND MAGAZINE OR 7-ROUND  
24 MAGAZINE OR 5-ROUND MAGAZINE. AND IF WE GET DOWN TO THE 2.2  
25 NUMBER THAT KEEPS SURFACING -- BY THE WAY, I CAN'T WAIT TO SEE

11:44:08 1 THE POINT 2. A DERRINGER WILL HOLD 2, BUT THE POINT 2, I CAN'T  
2 WAIT TO SEE WHAT THAT WEAPON IS GOING TO LOOK LIKE. BUT WHEN  
3 YOU GET DOWN TO 2.2 ROUNDS, SOMEONE IS GOING TO SAY, LOOK, FOR  
4 SELF-DEFENSE, YOU ONLY NEED ONE ROUND. THAT'S ALL YOU NEED.  
5 IF YOU'RE A GOOD SHOT, AND YOU PUT THE SHOT CENTER MASS, YOU  
6 GOT THE PERSON. THAT'S ALL YOU NEED. AND YOU'RE GOING TO COME  
7 IN AND SAY, LOOK, JUDGE, LAW ENFORCEMENT OFFICERS ARE BEING  
8 ASSAULTED WITH THESE DERRINGERS THAT USE TWO ROUNDS, AND PEOPLE  
9 ARE BEING KILLED BY PEOPLE USING DERRINGERS WITH TWO ROUNDS.  
10 THEN GUESS WHAT? AS THE EVIDENCE SHOWS, AND YOU KNOW IT, AND I  
11 KNOW IT, IN A LARGE NUMBER OF THESE MASS SHOOTINGS, THE SHOOTER  
12 HAS MORE THAN ONE WEAPON. RIGHT?

13 MR. ECHEVERRIA: THAT'S CORRECT.

14 THE COURT: THEY USUALLY COME IN WITH MANY WEAPONS.

11:45:02 15 AND SO NOW THE ARGUMENT IS GOING TO COME AND THE STATE IS GOING  
16 TO COME IN AND THE STATE IS GOING TO SAY, LOOK, JUDGE, WE NEED  
17 TO PASS A LAW, AND THE LAW IS YOU CAN'T OWN MORE THAN -- PICK A  
18 NUMBER -- 10 GUNS BECAUSE IF YOU GOT MORE THAN 10 GUNS, THE  
19 CHANCES ARE YOU'RE GOING TO KILL AND INJURE MORE PEOPLE,  
20 ASSAULT MORE LAW ENFORCEMENT OFFICERS AND SO ON. WE'RE GOING  
21 TO GET DOWN, DOING THE SAME PROGRESSION, UNTIL WE'RE AT THE  
22 POINT WHERE YOU HAVE MAYBE ONE GUN WITH ONE ROUND, AND YOU  
23 BETTER HOPE TO HECK THAT WHOEVER IS BREAKING INTO YOUR HOUSE TO  
24 RAPE YOUR WIFE OR RAPE YOUR DAUGHTER THAT YOU CAN HIT HIM OR  
25 HER WITH THAT ONE ROUND AND HIT HIM CENTER MASS. IT'S A

11:45:49 1 DIFFICULT QUESTION, BUT WHAT I'M ASKING YOU IS WHY THE 10  
2 ROUNDS, AND WHY DO I HAVE TO GIVE SUBSTANTIAL WEIGHT TO THE  
3 LEGISLATURE, AND WOULD I DO THE SAME THING IF THEY SAID 7?  
4 WOULD I DO THE SAME THING IF THEY SAID 5?

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

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

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

14 THE COURT: WHY NOT? BUT LOOK --

11:46:36 15 MR. ECHEVERRIA: BECAUSE --

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

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



11:47:19 1 CASE, THE COURT HAD CONCERNS. THE COURT FELT THAT 7 ROUNDS WAS  
2 TOO LOW. I THINK THE LOWER YOU GET -- THE CLOSER YOU GET TO  
3 THE NUMBER OF ROUNDS THAT HAVE TRADITIONALLY BEEN USED IN  
4 REVOLVERS WHICH HAVE HISTORICALLY BEEN THE QUINTESSENTIAL  
5 DEFENSE WEAPON, I THINK YOU START TO HAVE MORE CONSTITUTIONAL  
6 CONCERNS.

7 THE COURT: I'M SORRY. I UNDERSTAND YOUR POINT. BUT  
8 THAT'S REALLY SHEER SPECULATION ON YOUR PART. THAT ACTUALLY IS  
9 ASKING ME TO PREDICT. I UNDERSTAND THE 7 ROUND THING. BUT  
10 TRUST ME, 10 YEARS FROM NOW, 20 YEARS FROM NOW, THAT ALSO WILL  
11 BE DISAPPEARING. 7 ROUNDS WILL ALSO BE DISAPPEARING. THAT'S  
12 NOT THE QUESTION. THE QUESTION IS: HOW DO I MAKE THAT  
13 DECISION? WHO SAID 10 ROUNDS? WHO SAID 7 ROUNDS? WHO SAID 5  
14 ROUNDS? AND ON WHAT EVIDENCE AM I MAKING THE DECISION TO  
11:48:17 15 DECIDE WHETHER, YES, 10 ROUNDS IS AN APPROPRIATE LEVEL, 7  
16 ROUNDS, 5 ROUNDS, BECAUSE THE EVIDENCE THAT YOU HAVE PRESENTED  
17 TO ME IN THIS WHOLE STACK OF -- IF I WAS IN YOUR SHOES -- I  
18 WASN'T THE GREATEST LAWYER IN TOWN, I ASSURE YOU, BUT I COULD  
19 MAKE THE VERY SAME ARGUMENT FOR A BAN OF 10-ROUND MAGAZINES,  
20 7-ROUND MAGAZINES, 5-ROUND MAGAZINES. I COULD GET DOWN TO THE  
21 2.2. I COULD GET DOWN TO THE ONE GUN WITH ONE ROUND. NOW,  
22 DEPENDING ON HOW MANY MASS SHOOTINGS THERE HAVE BEEN WOULD  
23 DEPEND ON HOW MANY JUDGES WOULD BE INCLINED TO GO ALONG WITH ME  
24 AND FIND THAT, IN FACT, MY PROPOSED BAN WOULD PASS  
25 CONSTITUTIONAL MUSTER. I JUST --

11:49:12

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

11:50:18

THE COURT: BUT YOU KNOW WHAT, THERE ARE NINE STATES -- I KNOW JUDGE YOUNG CITED JUSTICE SCALIA IN A CASE THAT I'M PRETTY FAMILIAR. AND IN THAT CASE, AS I RECALL, THE SUPREME COURT MADE ITS DECISION BY STATISTICAL ANALYSIS. IT FOUND THAT THERE WERE MORE STATES THAT RULED ONE WAY ON AN ISSUE THAN OTHER STATES. SO ESSENTIALLY, THE SUPREME COURT FOUND THAT BECAUSE THE MAJORITY OF THE STATES WENT ONE WAY, THEY WOULD RULE THE WAY THEY DID. NOW, IN THIS CASE, THERE ARE NINE STATES, INCLUDING D.C., THAT HAVE PASSED THESE LARGE CAPACITY MAGAZINES LAWS.

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

11:51:05 1 THE COURT: THAT'S 10 OUT OF 50. AND MAY I POINT OUT  
2 TO YOU THAT SEVERAL OF THOSE STATES, AT LEAST 2, HAVE A  
3 15-ROUND LIMIT. AND ILLINOIS -- IF YOU CAN FIGURE OUT  
4 ILLINOIS, YOU'RE WAY SMARTER THAN I AM BECAUSE -- NOW ILLINOIS  
5 SEEMS TO HAVE MADE WHAT I THINK IS PERHAPS A COMMON SENSE  
6 DECISION TO ALLOW THE RURAL AREAS WHERE YOU CAN POSSESS A  
7 WEAPON WITH 35 ROUNDS BUT IN OTHER AREAS 10 ROUNDS.

8 MR. ECHEVERRIA: SURE.

9 THE COURT: SO THEY FOUND THAT IN THE RURAL AREAS YOU  
10 CAN POSSESS A WEAPON THAT HAD A MAGAZINE OF 35 ROUNDS. THAT  
11 SEEMS TO BE A LAW THAT IS NOT A BROAD BRUSH. IT DOESN'T PAINT  
12 WITH A BROAD BRUSH. IT ACTUALLY SEEMS TO HAVE MADE AN ATTEMPT  
13 TO ADDRESS REALITY AS OPPOSED TO SOME THEORETICAL ABSTRACT  
14 CONCEPT THAT SOMEONE CAME UP WITH, SOME ARBITRARY NUMBER THAT  
11:52:12 15 THEY PICKED OUT OF THE AIR. BECAUSE THERE'S NOTHING IN THIS  
16 EVIDENCE, BY THE WAY, THAT I CAN SEE THAT INDICATES THAT, YOU  
17 KNOW, IF YOU HAD A MAGAZINE OF 11 ROUNDS, ANYTHING WOULD CHANGE  
18 FROM 10 ROUNDS OR EVEN IF YOU HAD 15 ROUNDS THAT THE OUTCOME OR  
19 THE SAFETY OF THE PEOPLE WOULD BE ANY GREATER, OR 20 ROUNDS, OR  
20 30 ROUNDS.

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

11:52:59

1

THE COURT: BUT THERE'S CONFLICTING TESTIMONY --

2

MR. ECHEVERRIA: AND IF THERE'S CONFLICTING

3

TESTIMONY, THE MOTION FOR SUMMARY JUDGMENT MUST BE DENIED.

4

THE COURT: NO BECAUSE IT HAS TO BE CREDIBLE. THE

5

EVIDENCE THAT'S PRESENTED TO ME HAS TO BE CREDIBLE EVIDENCE.

6

EVIDENCE THAT'S --

7

MR. ECHEVERRIA: THE COURT CANNOT MAKE CREDIBILITY

8

DETERMINATIONS ON A MOTION FOR SUMMARY JUDGMENT.

9

THE COURT: BUT IT HAS TO BE RELIABLE. IT HAS TO BE

10

ADMISSIBLE. AND SOMEBODY'S OPINION ABOUT WHAT HAPPENED WITHOUT

11

SUBSTANTIAL JUSTIFICATION FOR IT, I DON'T HAVE TO RELY ON IT.

12

MR. ECHEVERRIA: IT'S NOT AN OPINION THAT SEVERAL

13

CHILDREN AT SANDY HOOK WERE ABLE TO ESCAPE DURING THE CRITICAL

14

PAUSES OF THAT SHOOTING.

11:53:43

15

THE COURT: WE'RE BACK TO THE SAME POINT, COUNSEL,

16

WHICH IS, AND IF YOU HAD A MAGAZINE OF 7 ROUNDS, THE PERSON

17

WOULD HAVE TO LOAD, RELOAD MORE OFTEN WHICH WOULD GIVE SOMEBODY

18

A CHANCE TO ESCAPE OR TO ATTACK HIM. AND IF YOU GOT DOWN TO 5

19

ROUNDS, THE SAME THING APPLIES.

20

MR. ECHEVERRIA: OR BANNING FIREARMS IN GENERAL, THEN

21

THERE WOULD BE NO MASS SHOOTINGS.

22

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

23

MR. ECHEVERRIA: THAT MAY BE THE COURT'S CONCERN.

24

BUT HERE, UNDER INTERMEDIATE SCRUTINY, AS THE NINTH CIRCUIT

25

REPEATEDLY EMPHASIZED, THE PEOPLE'S PREDICTIVE JUDGMENTS ARE

11:54:23 1 AFFORDED SUBSTANTIAL DEFERENCE.

2 THE COURT: BUT NOT SO LONG AS IT INTERFERES WITH A  
3 CONSTITUTIONALLY PROTECTED RIGHT, AND THE CONSTITUTIONALLY  
4 PROTECTED RIGHT AS SET FORTH IN HELLER IS THAT UNLESS IT'S A  
5 DANGEROUS AND UNUSUAL WEAPON THAT'S NOT COMMONLY POSSESSED BY  
6 LAW-ABIDING CITIZENS FOR THE PROTECTION OF THE HEARTH AND THE  
7 HOME, THAT IT IS PROTECTED. AND SO YOU CAN MAKE THE ARGUMENT  
8 THAT A GUN IS A DANGEROUS THING; YOU CAN MAKE THE ARGUMENT THAT  
9 THE MORE ROUNDS YOU FIRE FROM IT THE MORE PEOPLE ARE GOING TO  
10 BE INJURED AND THE MORE PEOPLE ARE GOING TO BE KILLED. BUT  
11 HELLER BASICALLY SAYS TO YOU IT DOESN'T MATTER BECAUSE AS LONG  
12 AS IT IS NOT A DANGEROUS AND UNUSUAL WEAPON WHICH IS BEING USED  
13 BY, IN COMMON USE BY LAW-ABIDING CITIZENS FOR THE PROTECTION OF  
14 THE HEARTH AND THE HOME, THAT'S IT. EVERYTHING ELSE IS OFF THE  
11:55:23 15 TABLE.

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

18 THE COURT: WELL --

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

11:55:52 1 THE FIRST STEP OF THE SECOND AMENDMENT INQUIRY. AND THE  
2 ATTORNEY GENERAL CAN -- WE CAN ASSUME THAT SURE, LET'S ASSUME  
3 THAT IS TRUE. BUT THEN WE HAVE TO DETERMINE -- THEN THE COURT  
4 HAS TO DETERMINE WHAT LEVEL OF SCRUTINY APPLIES, EVEN IF LARGE  
5 CAPACITY MAGAZINES ARE IN COMMON USE, EVEN IF THEY ARE  
6 PROTECTED UNDER THE SECOND AMENDMENT.

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

11:56:43 15 THE COURT: THAT'S WHAT I WAS TRYING TO GET AT, AND  
16 YOU JUST SAID SOME THINGS THAT ARE VERY DIFFICULT FOR ME WHICH  
17 WERE, NUMBER ONE, YOU USED THE WORDS "COMMON SENSE," NUMBER  
18 ONE. AND NUMBER TWO, THAT THERE'S "LEEWAY." BUT LEEWAY  
19 IMPLIES THAT JUST SIMPLY BECAUSE THE STATE SAYS THIS IS SO THAT  
20 THE COURT IN INTERPRETING WHAT IS ALLOWABLE UNDER THE SECOND  
21 AMENDMENT, THAT THE COURT MUST SIMPLY ROLL OVER AND SAY, YEAH,  
22 THE STATE DECIDED AND SO IT IS. THEY HAVE LEEWAY. BUT NOT  
23 UNFETTERED LEEWAY.

24 MR. ECHEVERRIA: THAT'S RIGHT.

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

11:57:30 1 WHY 10? WHY NOT 7? WHY NOT 5? WHY NOT 3? WHY NOT 2? DO YOU  
2 SEE WHAT I'M GETTING AT?

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

6 THE COURT: BUT IT HAS TO BE REASONABLE.

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

9 THE COURT: BUT 7, IS 7 REASONABLE?

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

14 THE COURT: WHAT IF I SAID THAT, NO, A 30-ROUND  
11:58:11 15 MAGAZINE PROHIBITION WOULD BE REASONABLE BUT NOT 10?

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

24 THE COURT: ALL 9 OF THEM, 10?

25 MR. ECHEVERRIA: SOME HAVE 15. BUT UNDER

11:58:48 1 INTERMEDIATE SCRUTINY, THE STATES ARE ALLOWED TO EXPERIMENT.

2 THE COURT: SO WHAT I'M ASKING YOU IS -- SO THERE'S  
3 10 ALTOGETHER. THREE OF THOSE 10 DON'T USE 10 AS THE BASIS,  
4 RIGHT?

5 MR. ECHEVERRIA: THE STATES CAN DISAGREE, RIGHT.

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

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

11:59:40 15 APPEARS TO AGREE WITH AND THE PLAINTIFFS DON'T DISPUTE, THAT  
16 LARGE CAPACITY MAGAZINES ENABLE SHOOTERS TO FIRE MORE ROUNDS.  
17 THE STATE ALSO PRESENTED EVIDENCE THAT THESE ARE USED IN MANY  
18 PUBLIC MASS SHOOTINGS, OVER A MAJORITY OF THEM.

19 OUT OF THE LAST 10 MOST DEADLY PUBLIC MASS SHOOTINGS,  
20 9 OUT OF 10 HAVE INVOLVED LARGE CAPACITY MAGAZINES. THE STATE  
21 HAS PRESENTED EVIDENCE THAT THE MORE INJURIES AN INDIVIDUAL  
22 SUFFERS, THE MORE LIKELY THEY WILL DIE. DR. KOPER'S EXPERT  
23 REPORT INDICATES THAT THE NUMBER IS AROUND 60 PERCENT INCREASE  
24 IN LIKELIHOOD OF FATALITY.

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



12:00:28 1 SO THE STATUTE MAKES SEVERAL EXCEPTIONS, ONE OF WHICH I KIND OF  
2 HAD FUN WITH YOUR COLLEAGUE THE LAST TIME SHE WAS HERE ABOUT  
3 THE MOVIE INDUSTRY. OF COURSE, THAT EXCEPTION IS THERE BECAUSE  
4 OF MONEY; RIGHT? THAT'S THE REASON WHY THAT EXCEPTION IS THERE  
5 BECAUSE THE MOVIE INDUSTRY IS BIG IN CALIFORNIA. A LOT OF TAX  
6 REVENUE IS GENERATED.

7 MR. ECHEVERRIA: A LOT OF JOBS.

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

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

12:01:18 16 THE COURT: I DIDN'T READ THAT IN THERE, BUT LET'S  
17 ASSUME THAT TO BE THE CASE. OF COURSE, SOMEONE WHO GOES POSTAL  
18 WHO WORKS ON A MOVIE SET WOULD KNOW THERE'S A LAW THAT SAYS I  
19 CAN'T PUT AMMO IN THIS MAGAZINE, AND THEN GO OUT AND DO A MASS  
20 SHOOTING; RIGHT?

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

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

12:01:49 1 BUT RESPECT FOR LAW ENFORCEMENT OFFICERS TO BEGIN WITH. I  
2 THINK THEY'RE GREATLY UNDER-PAID, UNDER-RESPECTED. BUT IN  
3 HERE, THEY TALK ABOUT THE FACT THAT LAW ENFORCEMENT OFFICERS  
4 SHOULD BE ALLOWED TO CONTINUE TO OWN THESE WEAPONS BECAUSE THEY  
5 HAVE GREATER TRAINING AND EXPERIENCE.

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

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

10 MR. ECHEVERRIA: KEN JAMES.

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

12:02:49 15 WITH. BUT EVEN IN LONDON WHERE GUNS ARE BANNED, PERIOD -- SO  
16 LET ME ASK YOU THIS: WHAT TRAINING DO LAW ENFORCEMENT OFFICERS  
17 GET? BEFORE I DO THAT, LET ME ASK YOU THIS: TELL ME WHAT IS A  
18 LAW ENFORCEMENT OFFICER THAT'S EXEMPTED FROM THIS LARGE  
19 CAPACITY MAGAZINE RESTRICTION. WOULD MY COURTROOM SECURITY  
20 OFFICER BE EXEMPTED?

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

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

12:03:38

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

THE COURT: BUT YOU'RE REPRESENTING THE STATE.

MR. ECHEVERRIA: I AM.

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

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

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

12:04:23

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

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

MR. ECHEVERRIA: I'M NOT SAYING THAT SECURITY

12:05:08 1 PERSONNEL GUARDING THE COURTHOUSE ARE NOT EXEMPTED FROM THE  
2 STATUTE. I'D HAVE TO DOUBLE CHECK FOR YOUR HONOR. THEY VERY  
3 WELL MAY BE EXEMPTED FROM THE STATUTE. WITH RESPECT TO YOUR  
4 HONOR AND OTHER INDIVIDUALS WHO MAY HAVE A HEIGHTENED  
5 SELF-DEFENSE NEED, AS I WOULD ACKNOWLEDGE -- LAW ENFORCEMENT  
6 PERSONNEL ARE OFTEN CALLED UPON TO SERVE WARRANTS. THEY OFTEN  
7 HAVE TO ENGAGE IN SUSTAINED GUNFIGHTS WITH CRIMINALS, LIKE IN  
8 THE SAN FRANCISCO EXAMPLE THAT YOUR HONOR MENTIONED DURING THE  
9 DISCUSSION WITH PLAINTIFF'S COUNSEL. SO LAW ENFORCEMENT HAVE  
10 PARTICULAR DUTIES AND OFTEN CERTAIN SITUATIONS THAT REQUIRE  
11 SUSTAINED FIREPOWER IN ORDER TO FULFILL THEIR DUTIES TO PUBLIC  
12 SAFETY.

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

12:06:07 15 MR. ECHEVERRIA: WHEN LAW ENFORCEMENT OFFICERS ARE  
16 OFF-DUTY, THEY STILL HAVE OBLIGATIONS TO PROTECT THE PUBLIC.  
17 IN THE NINTH CIRCUIT SILVEIRA CASE, THE OFF-DUTY EXCEPTION FROM  
18 THE ASSAULT WEAPONS CONTROL ACT WAS UPHELD UNDER THE EQUAL  
19 PROTECTION CLAUSE.

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

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

24 THE COURT: YES.

25 MR. ECHEVERRIA: IT DOES, HONORABLY RETIRED PEACE

12:06:33 1 OFFICERS NOT JUST ANY RETIRED PEACE OFFICER.

2 THE COURT: SO IF YOU'RE RETIRED, YOU'RE NO LONGER

3 OFF-DUTY OR ON-DUTY, YOU CAN STILL POSSESS THESE LARGE CAPACITY

4 MAGAZINES. BUT I, ON THE OTHER HAND, AS AN ACTIVE SITTING

5 JUDGE, I'M NOT ALLOWED TO POSSESS A LARGE CAPACITY MAGAZINE.

6 IS THAT WHAT YOU'RE SAYING?

7 MR. ECHEVERRIA: THE LEGISLATURE ESTABLISHED AN

8 EXCEPTION FOR HONORABLY RETIRED PEACE OFFICERS AND THAT

9 EXCEPTION WOULD BE EVALUATED UNDER RATIONAL BASIS, AND THERE

10 ARE SEVERAL RATIONAL BASES THAT WOULD JUSTIFY AN EXCEPTION FOR

11 HONORABLY RETIRED PEACE OFFICERS.

12 THE COURT: LIKE WHAT?

13 MR. ECHEVERRIA: GENERALLY, THEIR INCREASED LEVEL OF

14 TRAINING.

12:07:16 15 THE COURT: LET'S TALK ABOUT THAT FOR JUST A

16 SECOND.

17 MR. ECHEVERRIA: SURE.

18 THE COURT: I NOTED THAT THERE'S NO EXCEPTION FOR

19 MEMBERS OF THE ARMED FORCES.

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

21 THE COURT: WHERE DO I FIND IT?

22 MR. ECHEVERRIA: IT'S IN SECTION 32400. IT'S ONE OF

23 THE EXCEPTIONS. CAN I STEP AWAY FOR A MOMENT, YOUR HONOR?

24 THE COURT: SURE. MAYBE I MISSED SOMETHING.

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

12:08:25 1 AN EXCEPTION FOR THE MANUFACTURE OF LARGE CAPACITY MAGAZINES  
2 FOR EXPORT OR FOR SALE TO GOVERNMENT AGENCIES OR THE MILITARY  
3 PURSUANT TO APPLICABLE FEDERAL REGULATIONS.

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

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

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

14 MR. ECHEVERRIA: I DO NOT KNOW IF THERE WOULD BE AN  
12:09:26 15 EXCEPTION FOR OFF-DUTY MILITARY SERVICE MEMBER.

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

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

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

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

12:10:21 1 PEOPLE WHO ARE MEMBERS OF THE ARMY, THE NAVY, THE AIR FORCE.  
2 THEY'RE TREATED AS CRIMINALS IF THEY IN FACT OWN ONE OF THESE  
3 LARGE CAPACITY MAGAZINES THAT JUST A FEW YEARS AGO WE TOLD THEM  
4 THEY COULD POSSESS. IT WAS FINE. YOU CAN POSSESS THESE  
5 THINGS. YOU JUST CAN'T BUY, SELL OR TRANSFER THEM. BUT NOW, IF  
6 THEY DON'T TURN THEM IN, YOU'RE A CRIMINAL.

7 I WAS TRYING TO FIGURE OUT -- I WAS TRYING TO MAKE  
8 SENSE OF THIS, AND I WAS ASKING MYSELF -- YOU'RE A LAW  
9 ENFORCEMENT OFFICER OUT OF THE BIG CITY. I'LL PICK A BIG CITY  
10 OUT OF THE AIR. NEEDLES, CALIFORNIA. WHAT ARE THE ODDS THAT  
11 YOU WOULD HAVE BETTER TRAINING IN THE USE OF -- AGAIN, I'LL GO  
12 TO THE AR-15. THIS IS NOT ABOUT THE AR-15. BUT WHAT ARE THE  
13 ODDS THAT YOU WOULD HAVE BETTER TRAINING ABOUT THE USE OF AN  
14 AR-15 WHEN YOU ARE A POLICE OFFICER IN THE CITY OF NEEDLES THAN  
12:11:31 15 YOU WOULD BE IF YOU WERE A SERVING MEMBER OF SEAL TEAM 6 WHILE  
16 YOU'RE AT HOME?

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

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

12:12:23 1 FOR SELF-DEFENSE. YOU'VE NEVER KILLED ANYONE, NEVER INJURED  
2 ANYONE, EXCEPT FOR PERHAPS IN THE FIELD OF BATTLE. BUT HERE  
3 YOU'RE LIMITED TO 10 ROUNDS.

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

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

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

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

14 MR. ECHEVERRIA: YES.

12:13:13 15 THE COURT: BUT IF YOU'RE A SERVING MEMBER OF ONE OF  
16 THE ARMED FORCES WHERE YOU'VE BEEN TRAINED ON HOW TO USE THESE  
17 THINGS, AND YOU'VE PROBABLY USED THEM A WHOLE LOT MORE THAN A  
18 SHERIFF DEPUTY IN PODUNK COUNTY, DOES THAT MAKE ANY SENSE TO  
19 YOU?

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



12:13:59 1 EMPLOYED IN LAW ENFORCEMENT AND THEY --

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

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

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

12 MR. ECHEVERRIA: THE PARTICULAR ARGUMENT WE WERE  
13 MAKING ABOUT POLICE OFFICERS ACTIVE DUTY OR ACTIVELY SERVING  
14 LAW ENFORCEMENT PERSONNEL IS THE TYPES OF CONFRONTATIONS THAT  
15 THEY ENTER INTO AND THE NEED FOR LARGE CAPACITY MAGAZINES.

12:14:49

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

21 MR. ECHEVERRIA: ABSOLUTELY.

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

12:15:23 1 GOING SO LONG.

2 MR. ECHEVERRIA: IT'S OKAY.

3 THE COURT: WHAT KIND OF TRAINING DOES A POLICE

4 OFFICER GET IN USING THESE WEAPONS WITH A MAGAZINE OF MORE THAN

5 10 ROUNDS? WHAT DOES THAT TRAINING CONSIST OF, DO YOU KNOW?

6 MR. ECHEVERRIA: AGAIN, THERE'S NO PARTICULAR

7 EVIDENCE IN THE RECORD. IN GENERAL, I KNOW THAT LAW

8 ENFORCEMENT PERSONNEL HAVE TO GO THROUGH THE ACADEMY.

9 THE COURT: WHAT DO THEY DO AT THE ACADEMY?

10 MR. ECHEVERRIA: SO THERE'S TRAINING REQUIREMENTS

11 THAT ARE ESTABLISHED BY THE PEACE OFFICERS' STANDARDS AND

12 TRAINING COMMISSION POST.

13 THE COURT: WITH REGARDS TO THE WEAPONS. LET'S

14 FORGET ABOUT THE LAW AND ADVISAL OF RIGHTS AND ALL THAT. LET'S

12:16:08 15 TALK ABOUT THE WEAPONS. SO WHAT KIND OF TRAINING DOES A LAW

16 ENFORCEMENT GET WITH REGARDS TO A WEAPON THAT USES A LARGE

17 CAPACITY MAGAZINE?

18 MR. ECHEVERRIA: IN GENERAL, AGAIN, I DON'T HAVE THE

19 EVIDENCE, AND THE EVIDENCE IS NOT IN THE RECORD, BUT IN

20 GENERAL, LAW ENFORCEMENT PERSONNEL NEED TO BE QUALIFIED IN THE

21 USE OF PARTICULAR FIREARMS.

22 THE COURT: WHAT DOES THAT MEAN?

23 MR. ECHEVERRIA: SO TO QUALIFY, IT'S MY UNDERSTANDING

24 THAT THEY HAVE TO DEMONSTRATE PROFICIENCY.

25 THE COURT: IN WHAT?

12:16:40

1

MR. ECHEVERRIA: IN THE USE OF THE FIREARM.

2

THE COURT: WHICH MEANS WHAT?

3

MR. ECHEVERRIA: BEING ABLE TO FIRE ACCURATELY, BEING

4

ABLE TO ASSEMBLE AND DISASSEMBLE, STUFF LIKE THAT. AND I'M

5

SURE THERE WOULD BE TRAINING ON HOW TO SAFELY STORE A FIREARM.

6

I KNOW FOR LAW ENFORCEMENT PERSONNEL LOSING A SIDEARM IS A VERY

7

BAD THING. SO THERE ARE A LOT OF SAFETY MEASURES IN PLACE TO

8

TRAIN LAW ENFORCEMENT ON HOW TO SAFELY STORE THEIR FIREARMS.

9

THE COURT: OKAY. AS YOU PROBABLY KNOW, I'M SOMEWHAT

10

FAMILIAR WITH FIREARMS. SO YOU HAVE A YOUNG BOY OR YOUNG GIRL

11

WHO WANTS TO GO HUNTING, AND THEY GO THROUGH A JUNIOR HUNTING

12

COURSE AND THEY TEACH HIM THE VERY SAME THING THAT THAT OFFICER

13

LEARNS WHEN HE OR SHE GOES TO THE POLICE ACADEMY. EVERY GUN IS

14

LOADED. MUZZLE CONTROL. HOW TO STORE IT. HOW TO TAKE CARE OF

12:17:48

15

IT. HOW TO MAINTAIN IT. HOW TO CLEAN IT. HOW NOT TO POINT IT

16

AT SOMEONE AND TO KNOW WHEREVER YOU'RE POINTING IT THERE MAY BE

17

SOMEONE THERE OR SOMETHING THAT YOU MAY INJURE. OKAY?

18

MR. ECHEVERRIA: YES.

19

THE COURT: SO IN OTHER WORDS, THE DIFFERENCE BETWEEN

20

THE TRAINING THAT A POLICE OFFICER GETS WITH A 30-ROUND

21

MAGAZINE AND AN AR-15 REALLY IS NO DIFFERENT THAN THE TRAINING

22

THAT YOU GIVE TO A JUNIOR HUNTER WHO IS LEARNING HOW TO OR IS

23

TRYING TO GET A HUNTING LICENSE, WITH THE EXCEPTION THAT THE

24

OFFICER IS GOING TO GO TO THE RANGE AND IS GOING TO SHOOT MORE

25

ROUNDS, AND AS YOU POINTED OUT EARLY ON, THEY LEARN HOW TO BE

12:18:34

1 MORE ACCURATE WITH A WEAPON. RIGHT?

2 MR. ECHEVERRIA: YES.

3 THE COURT: OKAY.

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

7 THE COURT: THERE'S NOTHING IN THE RECORD THAT  
8 INDICATES -- THERE'S JUST THIS CONCLUSION. THERE'S JUST THIS  
9 DISCUSSION THAT THEIR TRAINING IS BETTER. IT'S BETTER THAN  
10 SEAL TEAM 6 GETS. IT'S BETTER THAN THE NATIONAL GUARD GETS.  
11 IT'S BETTER THAN THE ARMY GETS. THE FACT IS THAT A WEAPON IS A  
12 WEAPON. A FIREARM IS A FIREARM, AND EVERYBODY LEARNS THE SAME  
13 THING, AND THE ONLY THING THEY LEARN WHEN THEY'RE PEACE  
14 OFFICERS IS THEY LEARN THE FOLLOWING: THEY LEARN TO GO TO  
15 SCHOOL, AND THEY LEARN TO HOPEFULLY IDENTIFY WHEN TO SHOOT AND  
16 WHEN NOT TO SHOOT, AND TO SHOOT AND TO SHOOT ACCURATELY.

12:19:27

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

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

12:20:23 1 BASICALLY THIS: WHAT IS THE DIFFERENCE IN THE TRAINING THAT  
2 LAW ENFORCEMENT OFFICERS WOULD GET, WHETHER THEY WERE USING A  
3 WEAPON THAT HAS A 30-ROUND MAGAZINE OR A 10-ROUND MAGAZINE?  
4 MR. ECHEVERRIA: I DON'T KNOW THAT THERE ARE  
5 DIFFERENT TRAINING PROTOCOLS --  
6 THE COURT: THERE ARE NOT. ABSOLUTELY NONE. SO MY  
7 QUESTION IS WHEN IN THE STACK OF EVIDENCE THAT I SEE HERE THEY  
8 SAY, WELL, OFFICERS SHOULD BE ALLOWED TO HAVE THESE BECAUSE  
9 THEY HAVE GREATER TRAINING, I ASK MYSELF: GREATER TRAINING  
10 THEN, ARE YOU KIDDING ME, THAN A MEMBER OF THE SEAL TEAM 6  
11 GROUP? ARE YOU KIDDING ME? GREATER TRAINING THAN A MEMBER OF  
12 THE NATIONAL GUARD? ARE YOU KIDDING ME? ARE YOU TELLING ME  
13 THAT A RETIRED POLICE OFFICER HAS BETTER SKILLS, BETTER  
14 TRAINING THAN A RETIRED SEAL TEAM SIX MEMBER? ARE YOU TELLING  
12:21:35 15 ME THAT BECAUSE OF THIS SOMEHOW OR ANOTHER ALL OF THESE OTHER  
16 PEOPLE THAT HAVE HONORABLY SERVED THIS COUNTRY AND PUT THEIR  
17 LIVES ON THE LINE -- MANY OF THEM HAVE LOST LEGS, ARMS, SO ON  
18 -- BUT YOU CAN'T POSSESS A MAGAZINE THAT HAS MORE THAN 10  
19 ROUNDS.  
20 BUT WE'RE GOING TO MAKE THIS EXCEPTION. THE  
21 EXCEPTION IS THAT IF YOU WORK FOR THE MOVIE INDUSTRY, YOU CAN  
22 HAVE IT. IF YOU'RE A RETIRED POLICE OFFICER, YOU CAN HAVE IT.  
23 AND WHAT I'M TRYING TO DO IS I'M TRYING TO FIGURE OUT -- YOU  
24 USED THE WORD COMMON SENSE EARLIER ON, AND I'M TRYING TO FIGURE  
25 OUT WHERE IS THE COMMON SENSE IN THAT ONE. I KNOW JUDGE

12:22:17 1 REINHARDT ONCE MADE A SIMILAR ARGUMENT IN ANOTHER CASE, AND I  
2 AGREE WITH HIM.

3 MR. ECHEVERRIA: WOULD THAT BE SILVEIRA?

4 THE COURT: I BELIEVE IT IS. MY QUESTION IS: IF  
5 YOU'RE TRYING TO PROTECT THE PUBLIC, IF THIS IS REALLY WHAT  
6 YOU'RE TRYING TO DO, DON'T YOU PROTECT THE PUBLIC JUST AS WELL  
7 BY HAVING A MEMBER OF SEAL TEAM 6 WHO HAS, FOR EXAMPLE, A GLOCK  
8 17 THAT HE'S WALKING AROUND WITH IN THE EVENT THERE HAPPENS TO  
9 BE -- FOR EXAMPLE, WHO IS THE CONGRESSMAN THAT WAS SHOT BY THE  
10 FELLOW --

11 MR. ECHEVERRIA: CONGRESSMAN SCALISE.

12 THE COURT: YEAH, SCALISE; YOU HAPPEN TO HAVE A  
13 MEMBER OF THE SEAL TEAM SIX WHO HAS A GLOCK 17 IN HIS POCKET,  
14 HE MIGHT BE ABLE TO STOP THAT KIND OF SHOOTING, RIGHT?

12:23:12 15 MR. ECHEVERRIA: THAT'S A POLICY CHOICE FOR THE  
16 PEOPLE TO DIVIDE THROUGH DEMOCRACY. THERE ARE IMPORTANT  
17 SEPARATION OF POWERS, PRINCIPLES, THAT ARE VINDICATED BY THE  
18 APPLICATION OF INTERMEDIATE SCRUTINY TO THIS KIND OF GUN  
19 CONTROL LEGISLATION. IT --

20 THE COURT: CAN YOU THINK OF AN EXAMPLE WHERE THE  
21 STATE HAS EVER SAID IN CONNECTION WITH TRYING TO DEFEND  
22 LEGISLATION THAT WAS PASSED THAT WOULD GIVE THE GOVERNMENT  
23 POWER WHERE THE STATE COMES IN AND SAID, YOU KNOW, WE DON'T  
24 HAVE THE POWER TO DO THIS; WE DON'T HAVE THE AUTHORITY TO DO  
25 THIS; WE DON'T HAVE THE DISCRETION TO DO THIS.

12:23:51

1

MR. ECHEVERRIA: AGAIN, THIS IS NOT IN THE RECORD AND

2

THIS IS FAR OUTSIDE THE BOUNDS OF THIS LITIGATION, BUT -- AND

3

I'M ON TOTALLY FAMILIAR WITH THE DETAILS -- BUT IT'S MY

4

UNDERSTANDING THAT WITH THE ENACTMENT OF PROPOSITION 8, THE

5

GOVERNMENT DECIDED IT WASN'T GOING TO BE DEFENDING PROPOSITION

6

8 --

7

THE COURT: THAT'S ABSOLUTELY TRUE.

8

MR. ECHEVERRIA: SO THAT WAS A SITUATION WHERE THE

9

GOVERNMENT DISAGREED WITH THE ENACTMENT OF THE PEOPLE BECAUSE

10

OF ITS PERCEPTION, RIGHTFULLY SO, THAT IT VIOLATED THE

11

CONSTITUTION. SO THAT WOULD BE AN EXAMPLE.

12

THE COURT: OKAY. GOT YOU.

13

MR. ECHEVERRIA: I'D ALSO LIKE TO CLARIFY: I KNOW

14

THAT YOUR HONOR CHARACTERIZED CALIFORNIA'S POSSESSION BAN AS

12:24:32

15

DISARMAMENT AND AS A POLICY CHOICE THAT WAS OFF THE TABLE AND

16

WAS CONSTITUTIONALLY SUSPECT. AND I WOULD LIKE TO JUST CLARIFY

17

THAT CALIFORNIA'S POSSESSION BAN DOES NOT DISARM ANYBODY.

18

INDIVIDUALS ARE STILL PERMITTED TO POSSESS AS MANY MAGAZINES

19

THAT ARE CALIFORNIA COMPLIANT AS THEY WISH AND CAN, AT LEAST

20

WITH RESPECT TO THE LARGE CAPACITY MAGAZINE BAN, CAN HAVE AS

21

MANY WEAPONS AS THEY CAN LAWFULLY POSSESS TO EXERCISE THEIR

22

SELF-DEFENSE RIGHTS.

23

THERE ARE NUMEROUS OPTIONS FOR COMPLYING WITH

24

CALIFORNIA'S POSSESSION BAN. IF YOUR HONOR HAD NOT ENJOINED

25

THE STATUTE ON JULY 1ST, IT WOULDN'T HAVE AUTOMATICALLY

12:25:21 1 RENDERED ALL INDIVIDUALS WHO OWNED GRANDFATHERED LCM'S  
2 CRIMINALS. THERE WERE DISPOSAL OPTIONS THAT THE OWNERS COULD  
3 COMPLY WITH INCLUDING STORING THEM OUT OF STATE, SELLING THEM  
4 TO AN FFL, FEDERALLY FIREARMS LICENSE DEALER. ONE OF THE  
5 EXCEPTIONS THAT SEEMS TO BE LOST IN THE DISCUSSION ABOUT THE  
6 POSSESSION BAN IS THE DEFINITION OF A LARGE CAPACITY MAGAZINE  
7 IN PENAL CODE SECTION 16740 WHICH IN SUBDIVISION A TAKES OUT  
8 FROM THE DEFINITION OF LARGE CAPACITY MAGAZINES, LARGE CAPACITY  
9 MAGAZINES THAT HAVE BEEN PERMANENTLY MODIFIED.

10 SO WITH THE PERMANENT MODIFICATION OPTION, SOMEONE  
11 WHO OWNS A GRANDFATHERED LCM CAN TAKE IT TO A GUNSMITH, AND A  
12 GUNSMITH HAS AN EXCEPTION IN THE POSSESSION BAN, TO MODIFY A  
13 LARGE CAPACITY MAGAZINE SO THAT IT CAN HOLD NO MORE THAN 10  
14 ROUNDS OF AMMUNITION. IN THAT CASE, THE OWNER KEEPS POSSESSION  
12:26:23 15 AND KEEPS TITLE OF THEIR MAGAZINE, AND THEY CAN STILL USE THAT  
16 MAGAZINE IN SELF-DEFENSE OR FOR ANY OTHER LAWFUL PURPOSE THAT  
17 THEY MAY DESIRE.

18 THE COURT: IF YOU WERE A WOMAN AND YOU WERE AT HOME  
19 -- I'M USING A WOMAN BECAUSE THERE WAS A CASE THAT I CAN'T  
20 REMEMBER THE --

21 MR. ECHEVERRIA: SUSAN GONZALEZ.

22 THE COURT: YEAH. AND YOU'RE AT HOME AND YOU'RE BY  
23 YOURSELF AND SOME PEOPLE BREAK IN YOUR HOUSE, OR YOU HAVE YOUR  
24 DAUGHTER OR CHILD WITH YOU AND SOME PEOPLE BREAK INTO YOUR  
25 HOUSE, AND YOU KNOW THEY'RE NOT GOING TO DO YOU ANY GOOD.



12:27:14 1 THEY'RE EITHER GOING TO RAPE OR KILL YOU OR BOTH.

2 MR. ECHEVERRIA: OR TRY.

3 THE COURT: OR TRY. AND YOU HAVE YOUR GLOCK 17 WITH

4 A PERMANENTLY MODIFIED MAGAZINE THAT ONLY HOLDS 10 ROUNDS, AND

5 YOU FIRED ALL 10 ROUNDS BECAUSE YOU'RE SCARED. YOU HAVEN'T

6 BEEN TRAINED TO HIT WHAT YOU'RE SHOOTING AT, BUT YOU'RE TRYING

7 TO PROTECT YOURSELF OR YOUR DAUGHTER, AND YOU FIRE ALL 10

8 ROUNDS, AND THOSE PEOPLE ARE STILL COMING AT YOU. ARE YOU OR

9 ARE YOU NOT DISARMED AT THAT POINT IN TIME?

10 MR. ECHEVERRIA: YOU CAN HAVE ANY NUMBER OF MAGAZINES

11 ON YOUR POSSESSION.

12 THE COURT: WHAT IS SHE GOING TO DO, COUNSEL,

13 REALISTICALLY? REALISTICALLY. LET'S BE REAL.

14 MR. ECHEVERRIA: THIS IS SPECULATION, YOUR HONOR.

12:28:30 15 THE COURT: THIS IS NOT SPECULATION. THIS IS NO MORE

16 SPECULATION THAN TO SAY THAT BECAUSE IF YOU HAVE A LOT OF

17 MAGAZINES OUT THERE THERE'S GOING TO BE A LOT OF PEOPLE THAT

18 ARE KILLED. YES, THERE ARE GOING TO BE PEOPLE THAT ARE

19 PROBABLY GOING TO BE INJURED AND KILLED BECAUSE OF THE FACT

20 THAT THERE ARE GUNS. BUT IF YOU HAVE SOMEONE WHO HAS FIRED ALL

21 10 ROUNDS, AND THEY GET TO THE 11TH ROUND, AND THEY PULL THE

22 TRIGGER AND ALL THAT HAPPENS IS "CLICK," THEY ARE EFFECTIVELY

23 DISARMED. YES, IT IS TRUE THAT IF THEY HAPPEN TO CARRY AROUND

24 WITH THEM 20 10-ROUND MAGAZINES WITH THEM, ASSUMING THAT THEY

25 HAVE THE TIME, AND OF COURSE AS THE EVIDENCE SHOWS, PEOPLE ARE

12:29:10 1 NERVOUS, RIGHT, AND PERHAPS THEY JUST WOKE UP, AND THEY'RE NOT  
2 GOING TO BE AS LIKELY TO BE ABLE TO CHANGE THE MAGAZINE AS  
3 QUICKLY AS THEY WOULD IF THEY HAD THAT GLOCK 17 WITH 17 ROUNDS  
4 IN THE MAGAZINE. SO WHEN YOU GET TO THAT 11TH ROUND, YOU'RE  
5 ESSENTIALLY DISARMED.

6 MR. ECHEVERRIA: I WOULD DISAGREE WITH THAT  
7 CHARACTERIZATION, YOUR HONOR. IT IS NOT DISARMAMENT. THEY HAD  
8 A FIREARM IN THEIR POSSESSION. THEY WERE ABLE TO USE A  
9 MAGAZINE THAT HELD LIVE AMMUNITION UP TO 10 ROUNDS. THEY COULD  
10 HAVE AS MANY MAGAZINES ON THEIR PERSON. TO ME, THAT IS ARMED.  
11 THE PLAINTIFFS HAVE PRESENTED NO EVIDENCE TO SUBSTANTIATE THIS  
12 TYPE OF SPECULATION IN THE STATE OF CALIFORNIA. THEY PRESENTED  
13 NO CASES IN WHICH ANYONE IN THE STATE OF CALIFORNIA HAS BEEN  
14 PREVENTED FROM EFFECTIVELY DEFENDING THEMSELVES NOT  
15 WITHSTANDING THE EXISTING LARGE CAPACITY MAGAZINE BAN AND THE  
16 MODIFICATION OPTION.

17 THE COURT: DOES THE STATE KEEP THOSE KIND OF  
18 STATISTICS?

19 MR. ECHEVERRIA: I DON'T KNOW THAT THE STATE HAS THAT  
20 INFORMATION --

21 THE COURT: YOU DON'T. YOU DON'T. BECAUSE THE  
22 EVIDENCE, IN FACT, AS I READ IT IS THAT THE STATE DOESN'T KEEP  
23 THAT KIND OF INFORMATION. SO WE DON'T KNOW WHETHER IT HAS  
24 HAPPENED OR HASN'T HAPPENED.

25 MR. ECHEVERRIA: WHAT WE DO KNOW --

12:30:31 1 THE COURT: AND THE ENTITY THAT HAS THE BEST ABILITY  
2 TO TELL US WHETHER OR NOT THAT HAS HAPPENED OR HAS NOT HAPPENED  
3 WOULD BE THE STATE. BUT YOU DON'T HAVE ANY RECORDS TO THAT  
4 EFFECT.

5 MR. ECHEVERRIA: THE ATTORNEY GENERAL HAS PRESENTED  
6 EVIDENCE, AS YOUR HONOR KNOWS, THAT SHOWS THAT ON AVERAGE FAR  
7 LESS THAN 10 ROUNDS OF AMMUNITION ARE USED IN SELF-DEFENSE.

8 THE COURT: BUT AVERAGE IS 2.2.

9 MR. ECHEVERRIA: AND OFTEN ZERO. OFTEN THE MERE  
10 BRANDISHING OF THE FIREARM --

11 THE COURT: SURE. AND IF YOU THROW THE GUN AT  
12 SOMEONE, THAT MIGHT VERY WELL WORK.

13 MR. ECHEVERRIA: I DON'T KNOW THAT WOULD WORK BECAUSE  
14 YOU'D BE DISARMING YOURSELF --

12:31:03 15 THE COURT: I WOULDN'T WANT MY WIFE OR DAUGHTER TO  
16 HAVE TO DEPEND ON A WEAPON THAT SHOOTS 2.2 BULLETS. SO THE  
17 POINT I'M MAKING TO YOU IS, LOOK, RIGHT NOW IT IS PERFECTLY  
18 LEGAL FOR SOMEONE TO POSSESS A GLOCK 17 WITH A 17-ROUND  
19 MAGAZINE AND USE IT FOR SELF-DEFENSE IN THEIR HOME IF THEY HAVE  
20 TO. HOPEFULLY, THEY NEVER WOULD HAVE TO, BUT THEY CAN. BUT  
21 ONCE YOU TAKE AWAY THAT 7 ROUNDS, AND NOW YOU'RE DOWN TO 10  
22 ROUNDS, YOU BETTER HOPE AND PRAY THAT YOU HIT WHATEVER IT IS  
23 YOU'RE SHOOTING WITH THOSE 10 ROUNDS.

24 NOW WHY SHOULD THE GOVERNMENT BE SO ARROGANT AS TO  
25 TELL A LAW-ABIDING CITIZEN, SOMEONE WHO HAS NOT VIOLATED THE

12:31:50 1 LAW IN ANY WAY, HAS NOT SHOT ANYONE, HAS NOT INJURED ANYONE,  
2 WHY SHOULD THE GOVERNMENT BE SO ARROGANT AS TO TELL THAT WOMAN:  
3 YOU KNOW WHAT, TOO BAD, SO SAD. IF YOU HAD 17 ROUNDS, YOU  
4 MIGHT HAVE BEEN ABLE TO STOP THE ASSAILANT, BUT YOU ONLY HAD  
5 10. AND NOW YOU'VE BEEN RAPED, AND NOW YOU'RE DEAD, AND WE'RE  
6 SO SORRY. BUT YOU KNOW, THAT'S JUST THE WAY LIFE GOES.

7 ISN'T THAT REALLY WHERE YOU ARE?

8 MR. ECHEVERRIA: THE DECLARATION OF LUCY ALLEN  
9 DEMONSTRATES THAT ON AVERAGE 71 PERCENT OF PUBLIC MASS  
10 SHOOTINGS INVOLVE INDIVIDUALS WHO LAWFULLY ACQUIRED THEIR  
11 FIREARMS AND MAGAZINE ACCESSORIES. THE STATE IS NOT SAYING  
12 THAT ANY PARTICULAR INDIVIDUALS ARE DANGEROUS. THE STATE IS  
13 SAYING THAT LARGE CAPACITY MAGAZINES ARE DANGEROUS AND PEOPLE  
14 CAN --

12:32:45 15 THE COURT: BUT NOT IF THEY'RE POSSESSED BY RETIRED  
16 LAW ENFORCEMENT POLICE OFFICERS, 80-YEAR-OLD POLICE OFFICERS  
17 WHO MAY BE SUFFERING FROM MACULAR DEGENERATION AND WHO --

18 MR. ECHEVERRIA: I COMPLETELY UNDERSTAND YOUR HONOR  
19 DISAGREES WITH THE LINES THAT HAVE BEEN DRAWN BY THE PEOPLE. I  
20 COMPLETELY UNDERSTAND. OR AT LEAST THAT'S WHAT IT SEEMS TO BE  
21 THE CASE TODAY. BUT UNDER INTERMEDIATE SCRUTINY, IT'S NOT YOUR  
22 HONOR'S ROLE TO REDRAW THOSE LINES OR INVALIDATE A STATUTE  
23 COMPLETELY BECAUSE YOU DON'T THINK THE LINES ARE PERFECT.  
24 THAT'S FOR THE DEMOCRATIC PROCESS.

25 THE COURT: SO IF THE DEMOCRATIC PROCESS RESULTED IN

12:33:24 1 A DECISION THAT YOU COULD NOT HOLD A MAGAZINE THAT HELD MORE  
2 THAN 7 ROUNDS?

3 MR. ECHEVERRIA: THEN THE STATE STARTS GETTING INTO  
4 PROBLEMATIC TERRITORY FROM A CONSTITUTIONAL PERSPECTIVE. THE  
5 NEW YORK -- THE SECOND CIRCUIT INVALIDATED THE 7-ROUND LOAD  
6 LIMIT. ONE OF THE REASONS WHY IS THERE JUST AREN'T MANY  
7 7-ROUND MAGAZINES THAT ARE READILY AVAILABLE. THE REASON WHY  
8 THE STATE OF NEW YORK ENACTED A 10-ROUND MAGAZINE CAPACITY  
9 RESTRICTION IS THAT THOSE CAPACITY SIZES ARE READILY AVAILABLE  
10 AND SOLD THROUGHOUT THE COUNTRY, BUT THERE AREN'T MANY 7-ROUND  
11 MAGAZINES.

12 I'D ALSO LIKE TO NOTE THAT IN THE CASE OF SUSAN  
13 GONZALEZ -- THAT WAS A CASE IN FLORIDA NOT IN THE STATE OF  
14 CALIFORNIA -- EVEN AFTER SUSAN GONZALEZ HAD HER INCIDENT, SHE  
12:34:07 15 WENT OUT AND BOUGHT A FIREARM. IT WAS A 5-ROUND REVOLVER. SHE  
16 DID NOT GO OUT AND GET A LARGE CAPACITY MAGAZINE EVEN THOUGH  
17 THOSE ARE AVAILABLE IN THE STATE OF FLORIDA. SO WHAT WE HAVE  
18 HERE IS THE COURT HAS LEGITIMATE CONCERNS ABOUT INDIVIDUALS  
19 BEING ABLE TO PROTECT THEMSELVES, BUT IT'S BASED ON  
20 SPECULATION. IT'S BASED ON "WHAT IF" SCENARIOS. BUT THE  
21 PEOPLE OF CALIFORNIA WERE CONFRONTED WITH DATA, DATA SHOWING  
22 THAT IN A MAJORITY OF PUBLIC MASS SHOOTINGS, LARGE CAPACITY  
23 MAGAZINES ARE USED; AND WHEN THEY'RE USED, THE FATALITY AND  
24 INJURY RATES ARE MUCH LARGER THAN WHEN 10 ROUNDS OR LESS ARE  
25 USED IN THOSE PUBLIC MASS SHOOTINGS. THAT WAS ALSO SET FORTH

12:34:50

1 IN THE DECLARATION OF LUCY ALLEN.

2 THE NINTH CIRCUIT IN FYOCK VERSUS SUNNYVALE SAID THAT  
3 THE DECLARATION OF LUCY ALLEN, THE DECLARATION OF PROFESSOR  
4 DONOHUE, THE EMPIRICAL EVIDENCE THAT THE STATE HAS PROVIDED,  
5 INCLUDING THE MAYORS AGAINST ILLEGAL GUNS STUDY, THAT THAT IS  
6 THE, QUOTE, UNQUOTE, PRECISE TYPE OF EVIDENCE THAT THE STATE  
7 CAN RELY ON TO SUBSTANTIATE ITS INTEREST AND TO SHOW A  
8 REASONABLE FIT.

9 THE COURT: BUT WASN'T THAT THE STUDY THAT I --

10 MR. ECHEVERRIA: IT WAS.

11 THE COURT: -- ESSENTIALLY DISSECTED, AND I'VE YET TO  
12 HEAR ANYBODY -- I'VE YET TO HEAR ANYONE TELL ME WHY I WAS WRONG  
13 IN MY DISSECTING THAT STUDY.

14 MR. ECHEVERRIA: WELL, THE NUMBERS THAT YOUR HONOR  
15 IDENTIFIED IN YOUR 12-PAGE DISSECTION OF THE MAYORS AGAINST  
16 ILLEGAL GUNS STUDY WERE NOT NECESSARILY ERRONEOUS. I DO THINK  
17 SOME OF THE ASSUMPTIONS WERE WRONG.

18 THE COURT: WELL, THEY'RE ALL ACCURATE. EVERYTHING I  
19 SAID IN THERE WAS ACCURATE.

20 MR. ECHEVERRIA: SO IF THERE WAS A MASS SHOOTING THAT  
21 DOESN'T HAVE THE CAPACITY NUMBER, IT'S NOT ACCURATE TO ASSUME  
22 THAT A LARGE CAPACITY MAGAZINE WAS NOT USED IN THAT SHOOTING.

23 THE COURT: IS IT ACCURATE TO ASSUME THAT IT WAS?

24 MR. ECHEVERRIA: THE EVERYTOWN AMICUS BRIEF THAT WAS  
25 FILED IN OPPOSITION TO PLAINTIFFS MOTION, AND EVERYTOWN IS THE

12:36:13 1 SUCCESSOR ORGANIZATION TO THE MAYORS AGAINST ILLEGAL GUNS, THEY  
2 SET FORTH WHY SOME OF THE FACTUAL ASSUMPTIONS YOUR HONOR MADE  
3 WERE INCORRECT. BUT STILL, UNDER INTERMEDIATE SCRUTINY, IT'S  
4 NOT THE COURT'S ROLE TO DISSECT THIS TYPE OF EVIDENCE. THE  
5 COURT DISMISSED MANY MASS SHOOTINGS THAT OCCURRED OUTSIDE THE  
6 STATE OF CALIFORNIA, AND UNDER INTERMEDIATE SCRUTINY, THE  
7 PEOPLE AND THE LEGISLATURE ARE ENTITLED TO LOOK AT ANY EVIDENCE  
8 REASONABLY BELIEVED TO BE RELEVANT TO THE ISSUE AT HAND AND  
9 LOOKING AT OTHER JURISDICTIONS TO SEE WHAT THEIR EXPERIENCES  
10 ARE AND HOW EFFECTIVE THEIR GUN SAFETY LEGISLATION HAS BEEN.

11 THIS IS THE KIND OF SYSTEM THAT OUR CONSTITUTIONAL  
12 DEMOCRACY WAS ESTABLISHED TO BRING FORTH TO ALLOW STATES TO  
13 EXPERIMENT WITH PUBLIC SAFETY LEGISLATION TO TACKLE THESE  
14 ISSUES OF PUBLIC CONCERN. I CAN THINK OF FEW OTHER ISSUES  
12:37:12 15 OTHER THAN PUBLIC MASS SHOOTINGS AND THE MURDER OF LAW  
16 ENFORCEMENT PERSONNEL THAT ARE MORE COMPELLING FOR THE PEOPLE  
17 OF CALIFORNIA TO BE CONCERNED WITH. SO EVEN IF PUBLIC MASS  
18 SHOOTINGS AND MURDERS OF LAW ENFORCEMENT ARE RELATIVELY RARE  
19 EVENTS --

20 THE COURT: I CAN NAME A FEW. ABOUT THE SAME TIME WE  
21 PASSED THIS LAW, WE ALSO PASSED A RECREATIONAL MARIJUANA USE  
22 LAW WHICH NOT ONLY VIOLATES FEDERAL LAW, I MIGHT POINT OUT, BUT  
23 I'M WILLING TO BET YOU DOLLARS TO DOUGHNUTS, AND I DON'T THINK  
24 YOU'D DISAGREE, SIR, THAT THERE ARE PEOPLE WHO HAVE ALREADY  
25 BEEN KILLED, MAIMED, INJURED AS A RESULT OF SOMEONE SITTING IN

12:37:51 1 THEIR LIVING ROOM SMOKING A JOINT, AND THEN GOT IN THEIR CAR  
2 AND DROVE THEIR CAR AND KILLED, MAIMED OR INJURED PEOPLE.

3 MR. ECHEVERRIA: I'LL MAKE NO REPRESENTATIONS ABOUT  
4 THAT. I DON'T KNOW ANYTHING ABOUT THAT.

5 THE COURT: WELL, YOU CAN USE YOUR COMMON SENSE THAT  
6 YOU REFERRED TO EARLIER. AND YOU KNOW, FOR EXAMPLE, ALCOHOL,  
7 WE CAN BAN ALCOHOL. THERE'S NO CONSTITUTIONAL PROTECTION TO  
8 THE CONSUMPTION OF ALCOHOL. AND WE KNOW FOR A FACT, WE KNOW  
9 FOR A FACT, WE DON'T HAVE TO GUESS, THAT EVERY YEAR THERE'S  
10 MANY, MANY MORE PEOPLE KILLED AND INJURED AS A RESULT OF PEOPLE  
11 DRIVING AFTER HAVING CONSUMED ALCOHOL. WE DON'T BAN ALCOHOL,  
12 BUT IT'S NOT PROTECTED.

13 MR. ECHEVERRIA: YOUR HONOR MAY THINK THERE'S MORE  
14 PRESSING CONCERNS, BUT THE PEOPLE CAN DECIDE THAT.

12:38:42 15 THE COURT: WHEN YOU TELL ME THAT THE STATE HAS NO  
16 GREATER INTEREST --

17 MR. ECHEVERRIA: I DIDN'T SAY THAT, YOUR HONOR.

18 THE COURT: I THOUGHT THAT'S WHAT YOU SAID. MAYBE I  
19 MISUNDERSTOOD.

20 MR. ECHEVERRIA: I SAID FEW OTHER ISSUES. SO I'M NOT  
21 RULING OUT THAT THERE ARE OTHER ISSUES THAT ARE IMPORTANT. THE  
22 PEOPLE OF CALIFORNIA AND THE LEGISLATURE CAN WALK AND CHEW GUM.  
23 THEY CAN TACKLE MULTIPLE ISSUES IN DIFFERENT WAYS. THAT'S HOW  
24 DEMOCRACY WORKS. BUT UNDER INTERMEDIATE SCRUTINY, THIS COURT'S  
25 ROLE IS TO MERELY DETERMINE WHETHER THERE'S SUBSTANTIAL



12:39:09 1 EVIDENCE, AND THAT'S A SUBSTANTIAL PILE OF PAPER, THAT INVOLVES  
2 RELEVANT EVIDENCE CONCERNING THE USE OF LARGE CAPACITY  
3 MAGAZINES IN PUBLIC MASS SHOOTINGS AND VIOLENCE AGAINST LAW  
4 ENFORCEMENT WHICH DEPRIVE INNOCENT CITIZENS AND LAW ENFORCEMENT  
5 OF THE CRITICAL PAUSES TO INTERVENE. THERE'S EVIDENCE THAT THE  
6 POSSESSION BAN WAS NEEDED TO CLOSE THE POSSESSION LOOPHOLE.

7 IN THE EXPERT REPORT OF DR. KOPER, HE RECOUNTED THE  
8 EXPERIENCE WITH THE FEDERAL ASSAULT WEAPONS BAN WHICH WAS IN  
9 PLACE IN 1994 TO 2004, AND HE SHOWED THAT THAT BAN LED TO A  
10 REDUCTION IN THE USE OF LARGE CAPACITY MAGAZINES AND GUN CRIME  
11 AND --

12 THE COURT: I READ HIS REPORT AND ACTUALLY EVERYTHING  
13 THAT I READ THAT HE SAYS IS BASICALLY INCONCLUSIVE. WHAT HE  
14 SAYS IS ALL INCONCLUSIVE. IN FACT, IF I'M NOT MISTAKEN --  
12:40:00 15 LOOK, I DON'T WANT TO ARGUE WITH YOU, BUT MY UNDERSTANDING IS  
16 THAT HE SAYS -- I CAN PROBABLY FIND IT HERE.

17 MR. ECHEVERRIA: THE 2004 STUDY? HE WAS ONE OF THE  
18 AUTHORS OF THE FEDERALLY COMMISSIONED STUDY OF THE FEDERAL  
19 ASSAULT WEAPONS BAN.

20 THE COURT: HE SAID IT MAY HAVE HAD AN IMPACT, AND I  
21 THINK HE SAID THAT PERHAPS IF WE ALLOWED MORE TIME WE MIGHT  
22 HAVE SEEN A REDUCTION; BUT AS IT STANDS RIGHT NOW, EVERYTHING  
23 THAT HE SAYS IS INCONCLUSIVE. HE SAYS WE DON'T KNOW. WE DON'T  
24 KNOW WHAT THE EFFECT WAS.

25 MR. ECHEVERRIA: THAT WOULD BE THE EFFECT ON GUN

12:40:36 1 CRIME GENERALLY. BUT WHAT WE DID SEE AND WHAT DR. KOPER  
2 TESTIFIES TO IN HIS EXPERT REPORT IS THAT THE USE OF LARGE  
3 CAPACITY MAGAZINES DECREASED BASED ON THE WASHINGTON POST STUDY  
4 OF THE STATE OF VIRGINIA. AND THEN AFTER THE LAPSING OF THE  
5 FEDERAL ASSAULT WEAPONS BAN UNTIL 2010, THE NUMBERS OF LARGE  
6 CAPACITY MAGAZINE EQUIPPED FIREARMS USED IN GUN CRIME DOUBLED  
7 TO 20 PERCENT. SO THAT SHOWS THAT LARGE CAPACITY MAGAZINE  
8 RESTRICTIONS, WHEN THEY'RE IN PLACE, WORK. IN REMOVING LARGE  
9 CAPACITY MAGAZINES FROM CIRCULATION AND IN THE USE OF VIOLENCE  
10 AGAINST LAW ENFORCEMENT AND IN PUBLIC MASS SHOOTINGS, AND IN  
11 GENERAL, GUN CRIME.

12 AND THE POSSESSION BAN IS EVEN MORE EFFECTIVE IN THE  
13 STATE OF CALIFORNIA BECAUSE THE FEDERAL BAN HAD A SIMILAR  
14 GRANDFATHER PROVISION, RIGHT, THAT INDIVIDUALS WHO OWNED LARGE  
12:41:32 15 CAPACITY MAGAZINES BEFORE 1994 WERE ALLOWED TO CONTINUE THEIR  
16 POSSESSION OF THOSE MAGAZINES. BUT UNDER THE FEDERAL LAW, THEY  
17 WERE ALSO ALLOWED TO TRANSFER THEM. THAT'S SOMETHING THAT  
18 SP-23 DID NOT ALLOW. SO LARGE CAPACITY MAGAZINES WERE BEING  
19 CIRCULATED THROUGHOUT THE COUNTRY. ADDITIONALLY, I THINK IT  
20 WAS 25 TO 50 MILLION LARGE CAPACITY MAGAZINES WERE  
21 GRANDFATHERED IN UNDER THE FEDERAL ASSAULT WEAPONS BAN, AND  
22 MANY MORE GRANDFATHERED LCM'S WERE IMPORTED INTO THE COUNTRY  
23 DURING THE FEDERAL ASSAULT WEAPONS BAN.

24 SO CALIFORNIA LOOKED AT WHAT HAPPENED WITH THE  
25 FEDERAL BAN AND IMPROVED IT, AND THEY CONTINUED TO IMPROVE IT

12:42:11 1 IN 2016 BY CLOSING THE POSSESSION LOOPHOLE. WE HAVE EVIDENCE  
2 IN THE RECORD WITH THE DECLARATION OF BLAKE GRAHAM THAT SHOWS  
3 THAT THE POSSESSION BAN IS NECESSARY TO EFFECTIVELY ENFORCE  
4 CALIFORNIA'S EXISTING LARGE CAPACITY MAGAZINES RESTRICTION.

5 THE COURT: I SAW IN ONE OF THE DECLARATIONS WHERE  
6 THE NUMBER, THE NUMBER OF -- LET ME SEE IF I CAN FIND IT. JUST  
7 A SECOND. I HOPE I CAN FIND IT. I WON'T BE ABLE TO PUT MY  
8 FINGER ON IT. BUT I SAW A SIGNIFICANT REDUCTION. I THINK THE  
9 NUMBER I REMEMBER IS 264 OF THE NUMBER OF -- WELL, I BETTER NOT  
10 SAY BECAUSE I'M NOT ABSOLUTELY CERTAIN. I'D HAVE TO LOOK AT IT  
11 BEFORE I ISSUE MY DECISION.

12 ANYWAY, LISTEN, MY STAFF HAS BEEN GOING NONSTOP NOW  
13 FOR A LITTLE OVER TWO HOURS. WE'RE GOING TO TALK A BREAK.  
14 WE'LL COME BACK. TAKE A LITTLE BREAK AND COME BACK AT 1:00.

12:43:57 15 AND THEN I'M GOING TO GIVE YOU 10 MORE MINUTES IF YOU NEED IT  
16 TO TELL ME WHATEVER ELSE YOU WANT ME TO HEAR, AND THEN I'M  
17 GOING TO GIVE THE PLAINTIFF AN OPPORTUNITY TO CLOSE. AND THEN  
18 WE'RE GOING TO CALL IT. WE'RE GOING TO BE DONE BY 2:00. SO  
19 ALL RIGHT. WE'LL BE IN RECESS UNTIL 1:00. THANK YOU.

20 ALL COUNSEL: THANK YOU, YOUR HONOR.

21 (RECESS.)

22 THE COURT: ALL RIGHT. MR. ECHEVERRIA, AS I TOLD  
23 YOU, I'D GIVE YOU 10 MINUTES IF THERE WAS ANYTHING ELSE YOU  
24 WANTED TO ADDRESS. I KNOW I PEPPERED YOU WITH QUESTIONS, AND  
25 YOU SO FAR HELD YOUR OWN.

13:01:18

1

MR. ECHEVERRIA: THERE'S STILL TIME, YOUR HONOR.

2

THE COURT: STILL TIME FOR IT?

3

MR. ECHEVERRIA: YEAH, I'LL TRY NOT TO TAKE TOO MUCH

4

OF THE COURT'S TIME.

5

THE COURT: IT'S ALL RIGHT. IT'S AN IMPORTANT ISSUE.

6

I TOOK THE TIME AND ASKED QUESTIONS BECAUSE I BELIEVE IT'S AN

7

IMPORTANT ISSUE.

8

MR. ECHEVERRIA: THE ATTORNEY GENERAL APPRECIATES

9

THAT. I'D LIKE TO NOTE SOME POINTS ABOUT THE SECOND AMENDMENT

10

CLAIM. I'D LIKE TO NOTE FOR THE COURT THAT THE FYOCK CASE

11

INVOLVING THE SUNNYVALE ORDINANCE WAS A POSSESSION BAN THAT WAS

12

VERY SIMILAR TO WHAT CALIFORNIA DID ON A STATEWIDE BASIS IN

13

ENACTING PROPOSITION 63.

14

THE COURT: CAN I ASK YOU A QUESTION WITH REGARDS TO

13:01:57

15

THE FYOCK CASE?

16

MR. ECHEVERRIA: SURE.

17

THE COURT: DO YOU THINK IT MAKES ANY DIFFERENCE THAT

18

THE FYOCK CASE INVOLVED A CITY, A HIGHLY-POPULATED CITY, WHERE

19

LAW ENFORCEMENT, FOR EXAMPLE, WOULD BE ABLE TO RESPOND PERHAPS

20

ON SHORT NOTICE? I KNOW THERE'S LACK OF EVIDENCE IN THE RECORD

21

AS TO HOW MANY RAPES, ASSAULTS, ATTEMPTED MURDERS OR MURDERS

22

THE STATE HAS BEEN ABLE TO PREVENT OVER THE YEARS. I DIDN'T

23

SEE ANY STATISTICS ON THAT. SO WHAT WE REALLY DO KNOW -- WHAT

24

WE KNOW IS THAT GENERALLY LAW ENFORCEMENT IS REACTIVE. THAT

25

LAW ENFORCEMENT WILL SHOW UP ONCE A PROBLEM HAS BEGAN.

13:02:46

1           NOW IN THE SUNNYVALE CASE, THAT'S A CITY WHERE LAW  
2 ENFORCEMENT, AT LEAST IN THEORY, SHOULD BE ABLE TO RESPOND  
3 RATHER QUICKLY TO AN INCIDENT. SOMEONE BREAKS INTO A WOMAN'S  
4 HOUSE, THE WOMAN PICKS UP THE PHONE, CALLS 9-1-1, HOPEFULLY LAW  
5 ENFORCEMENT WOULD BE THERE QUICKLY. THAT'S TO BE CONTRASTED,  
6 FOR EXAMPLE, FROM SOME OF THE MORE RURAL AREAS WHERE SOMETIMES  
7 IT TAKES 15 MINUTES OR MORE FOR LAW ENFORCEMENT TO ARRIVE. DO  
8 YOU THINK THAT MAKES A DIFFERENCE?

9           MR. ECHEVERRIA: WELL, THE NINTH CIRCUIT DIDN'T  
10 DISCUSS THAT POINT IN ITS DECISION.

11          THE COURT: DO YOU THINK THAT MAKES A DIFFERENCE?

12          MR. ECHEVERRIA: DO I, PERSONALLY?

13          THE COURT: YEAH, DO YOU?

14          MR. ECHEVERRIA: NOT GIVEN THE CONTEXT OF THE LARGE

13:03:34

15 CAPACITY MAGAZINE BAN BECAUSE SOMEONE WHO LIVES IN A RURAL  
16 COMMUNITY CAN HAVE ACCESS TO AS MANY MAGAZINES AS THEY FEEL  
17 THEY NEED.

18          THE COURT: YOU RAISE THAT, AND SO THAT'S AN  
19 INTERESTING POINT THAT YOU RAISE BECAUSE YOU SAID THAT BY  
20 REDUCING THE NUMBER OF ROUNDS A MAGAZINE CAN HOLD TO 10, THE  
21 EVIDENCE IN THE RECORD SHOWS THAT THAT WOULD GIVE SOMEONE AN  
22 OPPORTUNITY EITHER TO ESCAPE OR TO TAKE DOWN THE ASSAILANT.

23          MR. ECHEVERRIA: OR HIDE.

24          THE COURT: OR HIDE. NOW IF YOU'RE THE WOMAN WHO IS  
25 HIDING IN THE CLOSET, AND THERE'S THREE ASSAILANTS WHO HAVE

13:04:33 1 BROKEN INTO THE HOUSE, AND YOU FIRED ALL 10 SHOTS, YOU MAY HAVE  
2 20 OR 30 MAGAZINES THAT HOLD 10 ROUNDS WITH YOU, BUT NOW THAT  
3 INDIVIDUAL HAS TO TAKE THE TIME, AGAIN ASSUMING THAT HE OR SHE  
4 IS NOT SO NERVOUS AND SHAKING AND STRESSED OUT, AND THAT  
5 INDIVIDUAL HAS TO TAKE THE TIME TO CHANGE THE MAGAZINE. DOES  
6 THAT NOT RENDER THAT PERSON MORE VULNERABLE TO THOSE ASSAILANTS  
7 THAT HAVE BROKEN INTO HER HOUSE? IN OTHER WORDS, NOW SHE HAS  
8 TO TAKE THE SAME AMOUNT OF TIME THAT IT TAKES WHEN THE  
9 ASSAILANT WITH A 10-ROUND MAGAZINE NEEDS TO REMOVE THE MAGAZINE  
10 AND PUT A NEW MAGAZINE IN, THAT GIVES PEOPLE A CHANCE TO RUN,  
11 HIDE OR TO BE TAKEN DOWN.

12 MR. ECHEVERRIA: I SEE WHAT YOU'RE SAYING, YOUR  
13 HONOR.

14 THE COURT: THAT SAME TIME INTERVAL WORKS TO THE  
13:05:28 15 DETRIMENT TO THE WOMAN NOW FACING THESE THREE ASSAILANTS,  
16 RIGHT? DO YOU AGREE WITH THAT?

17 MR. ECHEVERRIA: WELL, THE CRITICAL PAUSE THAT THE  
18 STATE EMPHASIZES IN JUSTIFYING THE LARGE CAPACITY MAGAZINE BAN,  
19 WHAT YOUR HONOR IS SAYING, AS FAR AS I UNDERSTAND, IS THAT  
20 THERE WOULD ALSO BE A PAUSE IF SOMEONE IS CONFINED TO HAVING A  
21 10-ROUND MAGAZINE TO RELOAD THEIR MAGAZINE; IS THAT WHAT YOU'RE  
22 YOU'RE ASKING?

23 THE COURT: THAT'S EXACTLY WHAT I WAS ASKING.

24 MR. ECHEVERRIA: SO THE INFERENCE CAN CUT BOTH WAYS.  
25 PROFESSOR EUGENE VOLOKH AT UCLA LAW SCHOOL WROTE A BLOG POST

13:05:56 1 ABOUT THIS ON THE WASHINGTON POST ABOUT HOW THE INFERENCES CAN  
2 CUT BOTH WAYS.

3 THE COURT: WHAT DO YOU MEAN?

4 MR. ECHEVERRIA: SO WHERE THE STATE SAYS THAT LARGE  
5 CAPACITY MAGAZINES ARE SO DANGEROUS BECAUSE THEY CAN BE USED TO  
6 KILL MANY PEOPLE IN A SHORT PERIOD OF TIME, THAT SAME ARGUMENT  
7 COULD BE USED TO JUSTIFY A LARGE CAPACITY MAGAZINE BECAUSE  
8 SOMEONE COULD SHOOT MORE ROUNDS AND DEFEND THEMSELVES MORE  
9 EFFECTIVELY.

10 THE COURT: RIGHT.

11 MR. ECHEVERRIA: ALTHOUGH, I WOULD NOTE, AS NOTED IN  
12 HELLER TOO AND NOTED IN FYOCK, THAT SPRAYING ROUNDS IN  
13 SELF-DEFENSE CAN INJURE INNOCENT BYSTANDERS ESPECIALLY WHERE,  
14 AS YOUR COURT SUGGESTED, THEY MAY HAVE LESS TRAINING AND BE  
13:06:36 15 LESS ACCURATE. AND THE EXPERT REPORT OF STEPHEN HELSLEY  
16 INDICATES THAT WITH MOST SHOOTINGS, MOST SHOOTINGS INVOLVE A  
17 LOT OF MISSING, AND THOSE MISSED SHOTS CAN INJURE PEOPLE,  
18 INNOCENT PEOPLE.

19 BUT WHERE THE INFERENCE CUTS BOTH WAYS, THE STATE HAS  
20 EVIDENCE THAT LARGE CAPACITY MAGAZINES UNDERMINE THE CRITICAL  
21 PAUSES FOR INNOCENT VICTIMS TO SEEK COVER, ESCAPE OR INTERVENE  
22 AND THERE'S SPECULATION ON THE OTHER HAND THAT SOME  
23 HYPOTHETICAL PERSON MAY NEED AN 11TH ROUND AT THAT VERY MOMENT  
24 TO PROTECT THEMSELVES. AND WHERE THERE ARE THESE COMPETING  
25 INFERENCES, IT'S NOT THE PROVINCE OF THE JUDICIARY TO REWEIGH

13:07:19 1 THOSE INFERENCES AND REWEIGH THE EVIDENCE UNDER INTERMEDIATE  
2 SCRUTINY. UNDER STRICT SCRUTINY, SURE; THEN THE JUDICIAL ROLE  
3 IS MUCH MORE ACTIVE AND MUCH MORE SCRUTINIZING. IF THE BAN IS  
4 A CATEGORICAL BAN SIMILAR TO HELLER OF A QUINTESSENTIAL  
5 SELF-DEFENSE FIREARM, THEN THAT WOULD BE INVALID UNDER ANY  
6 LEVEL OF SCRUTINY. IT WOULD BE CATEGORICALLY INVALID UNDER  
7 HELLER.

8 BUT HERE WE HAVE COMPETING INFERENCES, AND WE HAVE  
9 SUBSTANTIAL EVIDENCE ON THE STATE SIDE, AND IT WAS WITHIN THE  
10 POWER OF THE PEOPLE OF CALIFORNIA TO CLOSE THE POSSESSION  
11 LOOPHOLE AND ENACT PROPOSITION 63, AND THERE'S NOTHING  
12 UNCONSTITUTIONAL ABOUT THAT. IN THE SECOND CIRCUIT, THE NYSRPA  
13 CASE, WHICH INVOLVED THE NEW YORK LARGE CAPACITY MAGAZINE BAN  
14 AND THE SAFE ACT, THE PREVIOUS RESTRICTIONS GRANDFATHERED IN  
13:08:16 15 LARGE CAPACITY MAGAZINES THAT WERE OWNED BEFORE THE YEAR 1994.  
16 AND THE LAW THAT WAS BEING CHALLENGED IN THE SECOND CIRCUIT  
17 CASE DID AWAY WITH THAT GRANDFATHERING. SO IT'S VERY SIMILAR  
18 TO THE TYPE OF POSSESSION RESTRICTIONS THAT WERE ENACTED IN  
19 PROPOSITION 63.

20 THE COURT: TO BE CONTRASTED WITH KOLBE. KOLBE, FOR  
21 EXAMPLE, DEALT WITH LEGISLATION THAT PRESERVED, THAT DID  
22 INCLUDE A GRANDFATHER CLAUSE.

23 MR. ECHEVERRIA: SIMILAR TO WHAT CALIFORNIA DID WITH  
24 SP-23 IN 2000.

25 THE COURT: RIGHT.



13:08:45

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MR. ECHEVERRIA: AGAIN, STATES CAN APPROACH THIS COMPELLING ISSUE IN DIFFERENT WAYS AND LEARN FROM EACH OTHER IN TRYING TO ENACT PUBLIC SAFETY LEGISLATION. I'D ALSO LIKE TO NOTE WITH RESPECT TO WEIGHING OF THE EVIDENCE AND HOW THE PEOPLE HAVE THE POWER TO WEIGH THE EVIDENCE AND NOT THE COURT WHEN INTERMEDIATE SCRUTINY APPLIES WHICH IS THE CASE HERE. I'D LIKE TO POINT THE COURT TO THE JACKSON CASE.

13:09:42

IN JACKSON, THE NINTH CIRCUIT WAS EVALUATING A MUNICIPAL RESTRICTION ON HOLLOW POINT AMMUNITION WHICH THE CITY AND COUNTY OF SAN FRANCISCO DETERMINED TO BE MORE DANGEROUS THAN STANDARD AMMUNITION. AND THE NINTH CIRCUIT WAS LOOKING AT THE EVIDENCE THAT WAS BEFORE THE DISTRICT COURT AND CONCLUDED THAT THE PLAINTIFF'S COUNTER-EVIDENCE MERELY SUGGESTED THAT THE CITY'S EVIDENCE WAS QUOTE, UNQUOTE, BAD SCIENCE AND AT MOST THERE'S AN OPEN QUESTION ABOUT WHETHER HOLLOW POINT AMMUNITION IS MORE DANGEROUS.

BUT WHEN THERE'S AN OPEN QUESTION, WHEN THERE'S EVIDENCE ON BOTH SIDES, WHEN THERE ARE COMPETING INFERENCES, THE LEGISLATURE AND THE PEOPLE HAVE THE POWER TO DRAW THE LINES AND TO EXPERIMENT. AND THE INTERMEDIATE SCRUTINY STANDARD PRESERVES IMPORTANT SEPARATION OF POWER PRINCIPALS THAT I WOULD IMPLORE THE COURT TO BE MINDFUL OF.

THE COURT: SINCE I KNOW YOU'RE REALLY KNOWLEDGEABLE ABOUT THIS, BUT CAN YOU NAME FOR ME A FEW CASES OTHER THAN HELLER WHERE THE COURTS HAVE EVER FOUND IN FAVOR OF NOT

13:10:31

1 RESTRICTING THE SECOND AMENDMENT RIGHTS OF PEOPLE?

2 MR. ECHEVERRIA: I CAN, BUT THEY WERE REVERSED.

3 THE COURT: SO TO MAKE A LONG STORY SHORT, IT WOULD  
4 SEEM THAT SHORT OF HELLER, THERE'S A JUDICIAL ANTIPATHY TOWARDS  
5 PROTECTION OF THE SECOND AMENDMENT. SO ANY TIME THAT COURTS  
6 RULE AGAINST A STATE, IN CONNECTION WITH FIREARM LAWS OR  
7 REGULATIONS, THE STATE WINS.

8 MR. ECHEVERRIA: I WOULDN'T SAY IT'S ANTIPATHY. I'D  
9 SAY IT'S AN APPLICATION OF INTERMEDIATE SCRUTINY AS  
10 INTERMEDIATE SCRUTINY IS UNDERSTOOD UNDER TURNER BROADCASTING  
11 AND OTHER SUPREME COURT PRECEDENTS. IT'S JUST HOW INTERMEDIATE  
12 SCRUTINY WORKS. I UNDERSTAND THAT THERE ARE MANY PEOPLE IN THE  
13 STATE OF CALIFORNIA WHO DON'T THINK LARGE CAPACITY MAGAZINE  
14 RESTRICTIONS ARE EFFECTIVE AND WHO THINK THEY ACTUALLY DO NEED  
15 LARGE CAPACITY MAGAZINES. I'M SURE THERE'S MANY MEMBERS OF THE  
16 JUDICIARY WHO HAVE DIFFERENCES OF OPINION ABOUT THE WISDOM OF  
17 THIS GUN CONTROL MEASURE OR THAT GUN CONTROL MEASURE.

13:11:45

18 BUT UNDER INTERMEDIATE SCRUTINY, SUBSTANTIAL  
19 DEFERENCE IS AFFORDED TO THE PREDICTIVE JUDGMENTS OF THE  
20 LEGISLATURE AND THE PEOPLE. SO IT SHOULD NOT BE SURPRISING  
21 THAT THE JUDICIAL OUTCOME OF, AT LEAST SO FAR, CONSTITUTIONAL  
22 CHALLENGES TO GUN SAFETY LEGISLATION HAVE NOT BEEN SUCCESSFUL  
23 FOR THE PLAINTIFFS. I THINK THAT ONLY SUPPORTS THE ATTORNEY  
24 GENERAL'S POSITION THAT INTERMEDIATE SCRUTINY APPLYING HERE  
25 SUPPORTS A FINDING THAT THE SECOND AMENDMENT IS NOT VIOLATED BY

13:12:23 1 THE LARGE CAPACITY MAGAZINE BAN.

2 UNLESS YOUR HONOR HAS ANY FURTHER QUESTIONS ABOUT THE  
3 SECOND AMENDMENT, I'D LIKE TO TOUCH ON THE OTHER TWO CLAIMS  
4 THAT ARE AT ISSUE VERY BRIEFLY. THEY HAVE BEEN BRIEFED.  
5 REGARDING THE TAKINGS CLAIM, THE SUPREME COURT IN HORNE MADE A  
6 DISTINCTION BETWEEN REAL ESTATE AND PERSONAL PROPERTY. IT'S A  
7 DISTINCTION THAT WAS OBSERVED IN THE LUCAS CASE. AND WHAT THE  
8 COURT IN HORNE HELD IS THAT WHEN IT COMES TO A PHYSICAL  
9 OCCUPATION OF PRIVATE POSSESSIONS, THERE'S A TAKING REQUIRING  
10 JUST COMPENSATION.

11 THE LARGE CAPACITY MAGAZINE BAN HERE IS NOT A  
12 PHYSICAL OCCUPATION OF ANY OF THE PLAINTIFFS' OR ANYONE ELSE'S  
13 LARGE CAPACITY MAGAZINES BECAUSE THEY CAN DISPOSE OF THEM IN  
14 MANY WAYS AND MODIFY THEIR MAGAZINES AND RETAIN TITLE, AND THE  
13:13:19 15 COURT IN HORNE MADE CLEAR THAT WITH RESPECT TO REGULATORY  
16 TAKINGS, PRIVATE PROPERTY AND -- PRIVATE REAL PROPERTY AND  
17 OTHER POSSESSIONS OR CHATTELS ARE TREATED DIFFERENTLY IN A  
18 REGULATORY TAKINGS CONTEXT. AND THIS IS NEITHER A PHYSICAL  
19 TAKING NOR A REGULATORY TAKING, AND IT'S NOT A REGULATORY  
20 TAKING BECAUSE THE VALUE OF THE LARGE CAPACITY MAGAZINES THAT  
21 WERE GRANDFATHERED IS STILL RETAINED. THEY CAN SELL THEM.  
22 THEY CAN KEEP THEM AND MOVE THEM OUT OF STATE.

23 THE COURT: BUT IF THERE'S NO MARKET FOR THEM.

24 MR. ECHEVERRIA: THERE IS A MARKET FOR LARGE CAPACITY  
25 MAGAZINES OUTSIDE OF THE STATE OF CALIFORNIA.

13:14:01

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THE COURT: CAN YOU SHIP AND SELL A LARGE CAPACITY  
MAGAZINE OUT OF THE STATE OF CALIFORNIA?

MR. ECHEVERRIA: I DON'T KNOW WHAT THE MECHANISM  
WOULD BE FOR INTERSTATE SALES OF LARGE CAPACITY MAGAZINES.

THE COURT: IF I WAS LOOKING TO BUY A CAR AND I KNEW  
YOU HAD TO SELL THE CAR, WHAT ARE THE ODDS THAT I WOULD PAY YOU  
FAIR MARKET VALUE FOR THAT CAR IF I KNEW YOU HAD TO SELL THE  
CAR.

MR. ECHEVERRIA: YOU MIGHT SELL IT FOR LESS.

THE COURT: NO, YOU WOULD SELL IT FOR LESS, A LOT  
LESS.

MR. ECHEVERRIA: BUT THAT IS STILL NOT A REGULATORY  
TAKING, YOUR HONOR. THE REGULATORY TAKING'S JURISPRUDENCE  
INDICATES THAT THE REDUCTION IN VALUE HAS TO BE BASICALLY  
COMPLETE.

THE COURT: YOU MEAN NO VALUE. IS THERE ANY EVIDENCE  
THERE WOULD BE ANY VALUE TO THESE MAGAZINES IF THEY --

MR. ECHEVERRIA: WELL, THE PLAINTIFFS BEAR THE BURDEN  
ON THEIR TAKINGS CLAIM AND THEIR DUE PROCESS CLAIM ON A MOTION  
FOR SUMMARY JUDGMENT, AND THEY'VE PRESENTED NO EVIDENCE. AND  
THEIR BRIEFING DIDN'T REALLY ADDRESS THE REGULATORY TAKINGS  
ARGUMENT MUCH. I THINK THERE WAS A FOOTNOTE THAT MENTIONED A  
REGULATORY TAKING.

AND AGAIN, I REITERATE THAT THE EASTERN DISTRICT OF  
CALIFORNIA WIESE VERSUS BECERRA, JUDGE SHUBB GRANTED A MOTION

13:15:15 1 TO DISMISS AND DENIED A MOTION FOR PRELIMINARY INJUNCTION ON A  
2 VERY SIMILAR TAKINGS THEORY TO CALIFORNIA'S POSSESSION BAN.  
3 AND JUST YESTERDAY IN RUPP VERSUS BECERRA, JUDGE STATON IN THE  
4 CENTRAL DISTRICT GRANTED A MOTION TO DISMISS A VERY SIMILAR  
5 TAKINGS THEORY WITH RESPECT TO ASSAULT WEAPONS THAT WERE UNABLE  
6 TO BE REGISTERED UNDER THE NEW ASSAULT WEAPONS RESTRICTIONS.

7 SO JUST TO CONCLUDE ON THE TAKINGS, SECTION 32310  
8 SUBDIVISION C AND D, DO NOT AFFECT THE TAKING. THEY WERE  
9 LEGITIMATE EXERCISE OF THE STATE'S POLICE POWER IN BANNING  
10 DANGEROUS FIREARMS THAT HAD BEEN DECLARED, AS YOUR HONOR  
11 OBSERVED IN YOUR ORDER ON THE PRELIMINARY INJUNCTION, HAD BEEN  
12 DECLARED A PUBLIC NUISANCE SUBJECT TO SEIZURE AND CONFISCATION  
13 BY LAW ENFORCEMENT.

14 AND FINALLY, WITH RESPECT TO THE SUBSTANTIVE DUE  
13:16:08 15 PROCESS CLAIM, THERE IS NO MERIT TO THE CLAIM THAT THE  
16 POSSESSION BAN VIOLATES ANY SUBSTANTIVE DUE PROCESS RIGHTS AS  
17 THE ATTORNEY GENERAL HAS LAID OUT IN ITS BRIEFING. A RATIONAL  
18 BASIS SCRUTINY EFFECTIVELY APPLIES TO A SUBSTANTIVE DUE PROCESS  
19 ANALYSIS, AND HERE, THE STATE HAS PRESENTED A SIGNIFICANT AND  
20 SUBSTANTIAL AND IMPORTANT GOVERNMENT INTEREST, WE'D SAY A  
21 COMPELLING GOVERNMENT INTEREST -- IN THE PREVENTION AND  
22 MITIGATION OF PUBLIC MASS SHOOTINGS AND VIOLENCE AGAINST LAW  
23 ENFORCEMENT, AND CLOSING THE POSSESSION LOOPHOLE IS RATIONALLY  
24 RELATED TO THAT INTEREST BECAUSE IT HELPS LAW ENFORCEMENT  
25 ENFORCE EXISTING LARGE CAPACITY MAGAZINE RESTRICTIONS. AND

13:16:49

1 THAT WAS SET FORTH IN BLAKE GRAHAM'S DECLARATION.

2 ADDITIONALLY, THE POSSESSION BAN ON LARGE CAPACITY  
3 MAGAZINE BANS IS NOT RETROACTIVE. I KNOW THE PLAINTIFF IS  
4 TRYING TO CHARACTERIZE THIS IS A RETROACTIVE STATUTE. BUT IT  
5 IS NOT RETROACTIVE. IT PROSPECTIVELY CRIMINALIZES CONDUCT  
6 WHERE INDIVIDUALS DECIDE NOT TO DISPOSE OF THEIR LARGE CAPACITY  
7 MAGAZINES OR MODIFY THEM. ONLY THEN WILL ANY OF THE  
8 INDIVIDUALS WHO OWN GRANDFATHERED LARGE CAPACITY MAGAZINES BE  
9 SUBJECT TO CRIMINAL PENALTIES. SO THERE'S NO RETROACTIVE  
10 EFFECT IMPOSED ON THEM UNDER THE POSSESSION BAN.

11 THE COURT: WHEN THE ORIGINAL BAN WAS PASSED, WHEN  
12 WAS THAT? IN 2000?

13 MR. ECHEVERRIA: 2000.

13:17:49

14 THE COURT: IN 2000. IF THE CITIZENS OF THE STATE IN  
15 2000 HAD BEEN TOLD THAT THIS LAW IS GOING TO BECOME EFFECTIVE,  
16 IT'S NOT GOING TO HAVE A GRANDFATHER CLAUSE, WE'RE NOT GOING TO  
17 ALLOW YOU TO KEEP THAT WHICH YOU ALREADY HAVE, WE'RE GOING TO  
18 MAKE YOU DISPOSSESS YOURSELF OF IT --

19 MR. ECHEVERRIA: OR MODIFY IT.

20 THE COURT: -- OR MODIFY IT, DO YOU THINK THAT THE  
21 REACTION TO THE LAW MIGHT HAVE BEEN DIFFERENT?

22 MR. ECHEVERRIA: I DON'T KNOW. I CAN'T PREDICT --

23 THE COURT: WHY DO YOU THINK THEY PUT THE GRANDFATHER  
24 CLAUSE IN, IN THE FIRST PLACE?

25 MR. ECHEVERRIA: IT WAS LIKELY A POLITICAL

13:18:45 1 COMPROMISE. THAT'S WHAT HAPPENS WITH --

2 THE COURT: WHAT'S A POLITICAL COMPROMISE? WHAT'S  
3 THE POINT OF THE POLITICAL COMPROMISE? TO GARNER SUPPORT?

4 MR. ECHEVERRIA: YEAH, TO HELP PASS THE LAW, TO BUILD  
5 COALITIONS.

6 THE COURT: SO IN ESSENCE, WHAT HAPPENED WAS IN 2000  
7 PEOPLE WERE ESSENTIALLY MISLEAD INTO SUPPORTING A LAW THAT  
8 LATER ON, A FEW YEARS LATER, THE STATE WOULD SAY, WELL, NOW WE  
9 GOT THIS PASSED, THIS IS GREAT, BUT NOW WE'RE GOING TO TAKE  
10 AWAY THE GRANDFATHER CLAUSE.

11 MR. ECHEVERRIA: I WOULD DEFINITELY NOT AGREE WITH  
12 YOUR HONOR'S CHARACTERIZATION THAT ANY PARTICULAR LEGISLATORS  
13 WHO WERE MISLEAD IN THE ENACTMENT OF SP-23. BACK IN THE YEAR  
14 2000, THERE WERE PUBLIC MASS SHOOTINGS THAT LED TO THE PUBLIC  
13:19:39 15 OUTCRY, THAT LED TO THE FEDERAL ASSAULT WEAPONS BAN AND LED TO  
16 CALIFORNIA'S ENACTMENT OF SP-23; BUT OVER THE PAST 15 TO 16  
17 YEARS, THERE'S BEEN EVEN MORE PUBLIC MASS SHOOTINGS INVOLVING  
18 LARGE CAPACITY MAGAZINES. SO EVEN IF THE COMPROMISE WOULD HAVE  
19 NOT BEEN POSSIBLE BACK IN 2000, THE FACTS HAVE CHANGED AND  
20 CIRCUMSTANCES HAVE CHANGED AND OVER 60 PERCENT OF THE  
21 CALIFORNIA ELECTORATE VOTED FOR PROPOSITION 63. THAT'S HOW  
22 DEMOCRACY WORKS. THAT'S HOW INCREMENTAL LEGISLATION HAPPENS.

23 THE COURT: OKAY.

24 MR. ECHEVERRIA: SO THE ATTORNEY GENERAL WOULD URGE  
25 YOUR HONOR TO DENY THE MOTION FOR SUMMARY JUDGMENT AND THE

13:20:23 1 MOTION FOR PARTIAL SUMMARY JUDGMENT. THE LARGE CAPACITY  
2 MAGAZINE BAN AND THE POSSESSION BAN IS CONSTITUTIONAL. THEY'RE  
3 NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW, AND AT A MINIMUM,  
4 THEY'RE ISSUES FOR TRIAL, AND THIS COURT MUST DENY THE MOTION  
5 FOR SUMMARY JUDGMENT AT THIS STAGE.

6 THE COURT: NOW IT'S KIND OF INTERESTING. I NOTED  
7 THAT THE GOVERNMENT -- THE GOVERNMENT, I'M SORRY -- THE STATE  
8 DID NOT FILE A MOTION FOR SUMMARY JUDGMENT.

9 MR. ECHEVERRIA: THAT'S CORRECT, YOUR HONOR.

10 THE COURT: OKAY.

11 MR. ECHEVERRIA: THE ATTORNEY GENERAL --

12 THE COURT: SO I ASSUME THAT YOU WOULD CONCEDE THEN,  
13 THAT BASED ON THE STATE OF THE EVIDENCE, THAT GIVEN THAT THE  
14 STATE HAS NOT FILED A MOTION FOR SUMMARY JUDGMENT IN ITS FAVOR,  
13:21:17 15 THAT IF I WERE TO DENY THE MOTION FOR SUMMARY JUDGMENT THAT'S  
16 PRESENTLY BEING GRANTED, MY PRELIMINARY INJUNCTION ORDER WOULD  
17 CONTINUE TO REMAIN IN EFFECT, AND WE WOULD NEXT MOVE FORWARD TO  
18 SOME SORT OF TRIAL OR EVIDENTIARY HEARING; CORRECT?

19 MR. ECHEVERRIA: THAT'S MY UNDERSTANDING OF WHAT  
20 WOULD HAPPEN, YOUR HONOR. THE STATE DID NOT MOVE TO SUMMARY  
21 JUDGMENT. SO IF THE COURT DENIES THE MOTION FOR SUMMARY  
22 JUDGMENT, THE CASE WOULD PROCEED, AND THE PRELIMINARY  
23 INJUNCTION WOULD REMAIN IN EFFECT ABSENT SOME OTHER ACTION FROM  
24 A HIGHER COURT.

25 THE COURT: ABSENT THE COURT OF APPEALS TELLING ME



13:21:52 1 THAT I'M ALL WET. I GOT IT. THEY WOULD USE MUCH BETTER  
2 LANGUAGE THAN THAT. I THINK THEIR LANGUAGE WOULD BE A LITTLE  
3 DIFFERENT.

4 MR. ECHEVERRIA: ABSOLUTELY.

5 THE COURT: ALL RIGHT. THANK YOU.

6 MR. ECHEVERRIA: THANK YOU, YOUR HONOR.

7 THE COURT: ALL RIGHT. SO I'VE PEPPERED  
8 MR. ECHEVERRIA ENOUGH. LET'S SEE IF MAYBE I CAN GIVE YOU EQUAL  
9 OPPORTUNITY.

10 MS. BARVIR: JUST PLEASE REMEMBER I'M WEARING HEELS.  
11 SO IT'S A LITTLE HARDER FOR ME TO STAND HERE QUITE AS LONG AS  
12 MY OPPOSING COUNSEL. ANYWAY, I JUST WANT TO SAY A FEW THINGS  
13 AND KIND OF IN RESPONSE TO THE DISCUSSION THAT WE JUST HEARD  
14 AND TO CLOSE UP FOR A LITTLE BIT.

13:22:30 15 I THINK THE FIRST THING I WANT TO MENTION IS THAT I  
16 THINK IT WAS REALLY CLEAR THAT THE STATE IS CLAIMING OVER AND  
17 OVER AGAIN -- IT'S ASKING THIS COURT TO APPLY INTERMEDIATE  
18 SCRUTINY, THAT, YOU KNOW, IT'S NOT RATIONAL BASIS REVIEW, WE'RE  
19 LOOKING AT INTERMEDIATE SCRUTINY HERE.

20 BUT SITTING HERE TODAY, IT SOUNDS MORE LIKE THEY'RE  
21 SEEKING A TOOTHLESS FORM OF INTERMEDIATE SCRUTINY, MORE AKIN TO  
22 RATIONAL BASIS REVIEW, ONE WHERE IT'S ASKING THIS COURT TO  
23 AFFORD SUBSTANTIAL DEFERENCE TO THESE PREDICTIVE JUDGMENTS,  
24 THESE POLICY JUDGMENTS THAT THE LEGISLATURE AND THE PEOPLE MADE  
25 IN PROP 63 AND THE TWIN BILLS THAT WENT THROUGH THE LEGISLATURE

13:23:09 1 AND SEEMINGLY ASKING THE COURT TO VIEW ITS EVIDENCE WITH AN  
2 UNCRITICAL EYE. BUT THIS IS A REALLY IMPORTANT CASE, YOUR  
3 HONOR. THIS IS --

4 THE COURT: THAT DOESN'T CHANGE HOW I VIEW THE  
5 EVIDENCE.

6 MS. BARVIR: I THINK THAT'S RIGHT. I THINK THE STATE  
7 IS ASKING YOU TO KIND OF ACCEPT WHAT IT'S PUT FORWARD AND WHAT  
8 IT'S SAYING HERE TODAY. BUT WHEN YOU REALLY LOOK WITH A  
9 CRITICAL EYE AT THE EVIDENCE THAT'S PRESENTED BY THE STATE, IT  
10 DOES NOT BEAR OUT THE FAIR RELATIONSHIP THAT IS REQUIRED UNDER  
11 INTERMEDIATE SCRUTINY FOR THE LAW TO BE DEEMED  
12 CONSTITUTIONAL.

13 THE COURT: LOOK, ALMOST EVERY COURT -- NOT ALMOST --  
14 EVERY COURT THAT HAS LOOKED AT THIS ISSUE HAVE ALL BASICALLY  
13:23:58 15 SAID IT'S CONSTITUTIONAL. IT PASSES SCRUTINY, THE INTERMEDIATE  
16 SCRUTINY TEST. WHAT MAKES THIS ANY DIFFERENT? WHY SHOULD I  
17 SWIM UP AGAINST -- RUN AGAINST THE HEARD, IF YOU WILL? WHAT IS  
18 IT ABOUT THIS CASE AND THE STATE OF THE EVIDENCE IN THIS CASE  
19 THAT MAKES IT ANY DIFFERENT THAN OTHER CASES?

20 MS. BARVIR: WELL, I THINK FIRST AND FOREMOST, IN  
21 THIS CIRCUIT WE DON'T HAVE A FINAL JUDGMENT FROM A COURT OF  
22 APPEALS FROM THE NINTH CIRCUIT THAT'S BASED ON MSJ THAT'S BASED  
23 ON ALL THE EVIDENCE --

24 THE COURT: DO YOU THINK THE OUTCOME IS GOING TO BE  
25 ANY DIFFERENT?

13:24:48

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MS. BARVIR: IN THE NINTH?

2

THE COURT: YES.

3

MS. BARVIR: IT DEPENDS ON THE PANEL I GUESS. I

4

DON'T KNOW. WE'LL SEE. I HOPE THE ANSWER WOULD BE DIFFERENT

5

BECAUSE I THINK A JUDGE WHO'S LOOKING AT THIS INDEPENDENTLY CAN

6

REVIEW THE EVIDENCE AND REALLY SEE THAT NONE OF THOSE CASES

7

HAVE SHOWN ANYTHING THAT'S DIFFERENT HERE. THEY'VE JUST COME

8

TO A POTENTIALLY POLITICAL DECISION. ULTIMATELY, WE HAVE HERE,

9

COMING FROM HELLER, IS THAT WHEN WE'RE TALKING ABOUT FIREARMS

10

THAT ARE COMMONLY PROTECTED BY LAW-ABIDING CITIZENS -- THAT IS,

11

THAT THEY ARE WITHIN THE SCOPE OF THE SECOND AMENDMENT -- THERE

12

ARE THINGS THAT THE STATE CAN DO. BUT FLATLY BANNING THE

13

ACQUISITION AND POSSESSION OF THEM IS A POLICY JUDGMENT THAT'S

14

OFF THE TABLE. THAT COMES FROM HELLER.

13:25:26

15

THE COURT: WE'RE ALREADY PAST THE ACQUISITION.

16

THAT'S BEING CHALLENGED SOMEWHERE ELSE APPARENTLY. WE'RE NOW

17

TALKING ABOUT POSSESSION.

18

MS. BARVIR: THAT'S BEING CHALLENGED HERE AS WELL,

19

YOUR HONOR. REMEMBER, AT THE MPI STAGE, THE PLAINTIFFS ONLY

20

CHALLENGED THE POSSESSION BAN BECAUSE IT WAS THE ONE THAT WAS

21

ABOUT TO GO INTO EFFECT. THERE WAS THE IRREPARABLE HARM --

22

THE COURT: OKAY. OKAY. GOT IT.

23

MS. BARVIR: SO YES, THE ACQUISITION IS PART OF THIS

24

DISCUSSION. IT'S COMPLETELY FLATLY BANNING THE USE OF THESE

25

PROTECTED ITEMS BY THE HAND -- IN THE HANDS AND HOMES OF

13:25:58 1 LAW-ABIDING CITIZENS. THAT IS A POLICY JUDGMENT THAT IS NOT  
2 ENTITLED TO THE SUBSTANTIAL DEFERENCE THAT THE STATE IS ASKING  
3 FOR HERE.

4 THE COURT: AND WHY NOT?

5 MS. BARVIR: WHAT'S THAT?

6 THE COURT: AND WHY NOT?

7 MS. BARVIR: BECAUSE IT'S NOT LIKE -- THE STATE HAD  
8 MENTIONED A CASE LIKE CHOVAN WHERE WE WERE TALKING ABOUT  
9 WHETHER OR NOT A -- I THINK IT WAS A MISDEMEANANT, DOMESTIC  
10 VIOLENT MISDEMEANANT COULD GET HIS FIREARMS RIGHTS BACK. THOSE  
11 KINDS OF THINGS, THESE REGULATIONS, THESE RESTRICTIONS ON  
12 CERTAIN TYPES OF PEOPLE, NOT LAW-ABIDING CITIZENS AND OTHER  
13 CASES LIKE THAT. BUT WHAT WE'RE TALKING ABOUT HERE IS A CASE  
14 OF A FLAT BAN ON WHAT PLAINTIFFS ARGUE IS PROTECTED ARMS, THESE  
13:26:36 15 MAGAZINES OVER 10 ROUNDS.

16 AND JUST LIKE THE COURT IN HELLER DID, BY FINDING  
17 THAT IT WAS A POLICY JUDGMENT TAKEN OFF THE TABLE FOR THE  
18 DISTRICT OF COLUMBIA TO BAR HANDGUNS EVEN THOUGH THEY'RE MORE  
19 THAN 80 PERCENT OF THE TIME USED BY CRIMINALS WHEN THEY'RE  
20 COMMITTING THEIR CRIMES, THAT IS NOT A DECISION -- THAT DOESN'T  
21 COME INTO PLAY. WHAT MATTERS IS THAT THEY'RE USED  
22 OVERWHELMINGLY BY THE LAW ABIDING. YOU JUST CAN'T BAN THEM.  
23 THE STATE DOESN'T HAVE THE POWER TO SAY, WELL, THERE'S THIS  
24 OTHER THING OVER HERE YOU CAN USE THAT MIGHT BE APPROPRIATE IN  
25 SELF-DEFENSE OR MIGHT BE ENOUGH IN SELF-DEFENSE; SO WE CAN

13:27:13 1 PREVENT YOU FROM USING SOMETHING YOU'VE CHOSEN AND IS WIDELY  
2 CHOSEN BY PEOPLE IN THIS COUNTRY FOR SELF-DEFENSE.

3 I CAN'T EXPLAIN WHY COURTS ARE FINDING SOMETHING  
4 COMPLETELY CONTRARY TO THAT BECAUSE HELLER IS CRYSTAL CLEAR ON  
5 THIS POINT. UNLESS YOUR HONOR HAS ANY MORE QUESTIONS ABOUT THE  
6 SECOND AMENDMENT, I'D LIKE TO TALK BRIEFLY ABOUT THE TAKINGS  
7 CLAIM AND WHAT HAPPENED IN RUPP YESTERDAY, AND OF COURSE,  
8 WIESE. MAY I?

9 THE COURT: YEAH, GO AHEAD. I GOT SOMETHING I WANT  
10 TO ASK YOU ABOUT THE SECOND AMENDMENT, BUT RIGHT NOW IT JUST  
11 SUDDENLY SLIPPED MY MIND.

12 MS. BARVIR: WE CAN GO BACK, OF COURSE. IT'S UP TO  
13 YOU. YOU HEARD COUNSEL TALKING ABOUT THE DECISION THAT CAME  
14 DOWN IN RUPP YESTERDAY. OF COURSE, THAT DEALT WITH ASSAULT  
13:27:59 15 WEAPONS REGISTRATION AND THE STATE'S NEXT GENERATION OF ASSAULT  
16 WEAPONS REGULATIONS. I THINK IT'S REALLY IMPORTANT AGAIN TO  
17 RECOGNIZE THAT THE SECOND AMENDMENT CLAIM WAS ONLY ON A MOTION  
18 FOR PRELIMINARY INJUNCTION. SO ON THE RECORD AS IT STOOD, IT  
19 WASN'T CLEAR THAT PLAINTIFFS HAD MET THEIR BURDEN, BUT THAT'S  
20 NOT BEEN DECIDED FINALLY AT THIS POINT.

21 WHEN IT COMES TO THE MOTION TO DISMISS ON THE TAKINGS  
22 CLAIM, WHICH HAD TO DO WITH THE -- THE DOJ'S REQUIREMENT THAT  
23 PEOPLE BE ABLE TO ESTABLISH I THINK IT WAS THE DATE AND SOURCE  
24 OF WHEN THEY ACQUIRED THE FIREARM AND WHERE THEY ACQUIRED IT  
25 FROM -- THE ASSAULT WEAPON -- THE COURT FOUND IT WAS NOT A

13:28:43 1 TAKING. BUT THE ANALYSIS THAT THE COURT PRESENTED IN RUPP JUST  
2 LIKE IN WEIS WHICH WAS HANDED DOWN JUST A LITTLE BIT BEFORE  
3 THIS COURT ISSUED ITS OPINION ON OUR MOTION FOR PRELIMINARY  
4 INJUNCTION IN JUNE 2017 IS THE EXACT OPPOSITE LEGAL CONCLUSION  
5 THAT THIS COURT MADE IN 2017 AS TO THE TAKINGS CLAIM IN THIS  
6 CASE.

7 THERE'S BEEN NO NEW LEGAL DISCUSSION THAT THE STATE  
8 HAS PUT FORWARD AND NO NEW FACTUAL EVIDENCE THAT EITHER SIDE  
9 HAS PUT FORWARD THAT SHOULD CHANGE WHAT THIS COURT FOUND ALMOST  
10 A YEAR AGO. I THINK THE TAKINGS CLAIM IS A CLEAR FLAT LEGAL  
11 QUESTION. IT'S VERY CLEAR THAT THIS IS THE QUINTESSENTIAL  
12 PHYSICAL TAKING. THE NINTH CIRCUIT IN RICHMOND ELKS HALL TELLS  
13 US THAT A PHYSICAL TAKING CAN IN FACT OCCUR WHEN THE GOVERNMENT  
14 ITSELF DOES NOT TAKE PHYSICAL POSSESSION OR TITLE OR EVEN USE  
13:29:28 15 OF THE PROPERTY. WHAT WE'RE TALKING ABOUT IS WHETHER OR NOT  
16 IT'S BEING -- IF THE TAKING OF THE PROPERTY IS FURTHERING A  
17 PUBLIC PURPOSE, AND THAT'S FROM THE U.S. SUPREME COURT CASE  
18 HAWAII HOUSING AUTHORITY.

19 AS TO THIS IDEA THAT BECAUSE IT'S AN EXERCISE OF THE  
20 POLICE POWER THE STATE IS ABLE TO EFFECT A TAKING WITHOUT  
21 COMPENSATION, THAT'S DEMONSTRATIVELY WRONG. THE SUPREME COURT  
22 CASES, LAREDO AND LUCAS TELL US OTHERWISE.

23 THE COURT: I'M SORRY. WHAT WAS THAT CASE?

24 MS. BARVIR: LAREDO AND LUCAS, I BELIEVE.

25 THE COURT: YEAH. ALL RIGHT.

13:30:03

1

MS. BARVIR: SO AND IN ALL EVENTS, PLAINTIFF LOVETTE

2

WHO IS THE REMAINING PLAINTIFF WHO CURRENTLY OWNS LARGE

3

CAPACITY MAGAZINES AND UNTOLD NUMBERS OF MEMBERS OF THE

4

CALIFORNIA RIFLE AND PISTOL ASSOCIATION ARE ENTITLED TO JUST

5

COMPENSATION FOR THEIR DISPOSSESSION OF THESE PARTICULAR

6

PROTECTED ARMS. THE AG DOES NOT DISPUTE THAT THE GOVERNMENT

7

MUST PAY IF THERE'S A PHYSICAL TAKING. 32310 DOES NOT PROVIDE

8

FOR ANYTHING, LET ALONE ON JUST COMPENSATION; AND AGAIN, THE

9

ABILITY TO SELL TO A THIRD PARTY WHEN THE MARKET HAS BEEN

10

ARTIFICIALLY DESTROYED IS NOT SUFFICIENT TO ENSURE JUST

11

COMPENSATION IN OR EVEN OUTSIDE OF THE STATE.

12

AND ALSO, ASIDE FROM OUTSIDE OF THE STATE, EVEN IF

13

IT'S AN AVAILABLE AVENUE TO SELL OUTSIDE OF THE STATE, IT'S NOT

14

APPROPRIATE TO SAY THAT THE STATE SHOULD BE ABLE TO RELY ON THE

13:30:51

15

PERMISSIVE LAWS OF OTHER JURISDICTIONS, NEARBY JURISDICTIONS IN

16

OTHER STATES, TO JUSTIFY ITS OWN PHYSICAL TAKING WITHOUT

17

COMPENSATION.

18

WITH THAT SAID, I WOULD LIKE TO ASK THE COURT IF IT

19

HAS ANY OTHER QUESTIONS. I'M HAPPY TO ANSWER THEM. IF NOT, I

20

WOULD ASK THIS COURT TO REVIEW THE EVIDENCE ONCE MORE, GRANT

21

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AT LEAST IN THE

22

ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT ON THE DUE PROCESS AND

23

TAKINGS CLAIMS.

24

THE COURT: OKAY. LET ME -- THANK YOU. I THANK YOU

25

BOTH. BY THE WAY, I THINK YOU BOTH HAVE DONE A WONDERFUL JOB.

13:31:31 1 MR. ECHEVERRIA, YOU STOOD UP TO MY WHIP-SAWING YOU FOR A LONG  
2 PERIOD OF TIME THIS MORNING, AND I REALLY, REALLY APPRECIATE  
3 IT. IT'S A SERIOUS CASE, SOME SERIOUS ISSUES. I THINK I CAN  
4 ANSWER THE QUESTION OF WHY IT IS THAT JUDGES ALMOST ALWAYS  
5 UPHOLD THE STATE'S RESTRICTIONS. WHO WANTS TO BE THE JUDGE  
6 WHO -- BY THE WAY, I CAN TELL YOU THAT I RECEIVE MAIL REGULARLY  
7 -- WELL, NOT SO MUCH ANYMORE -- PEOPLE TELLING ME THE BLOOD OF  
8 THESE CHILDREN WILL BE ON YOUR HANDS AND COMMENTS LIKE THAT.  
9 WHO WANTS TO BE THE JUDGE WHO ALLOWS PEOPLE TO CONTINUE TO OWN  
10 LARGE CAPACITY MAGAZINES OR ASSAULT WEAPONS OR MACHINE GUNS OR  
11 WHATEVER WHO WAKES UP IN THE MORNING AND FINDS OUT THAT SOME  
12 OTHER DERANGED PERSON OR SOME TERRORIST HAS KILLED A BUNCH OF  
13 YOUNG KIDS OR INNOCENT CHILDREN.

14 MY CONCERN, MY CONCERN IS THIS: THE BILL OF RIGHTS  
13:32:42 15 WASN'T ADOPTED BECAUSE THERE WAS SOME PEOPLE SITTING IN SOME  
16 THEORETICAL ROOM SOMEWHERE STROKING THEIR CHIN AND GOING:  
17 WELL, I'M GOING TO THINK BIG THOUGHTS TODAY. AND YEAH, I GOT  
18 AN IDEA. HEY, I TELL YOU WHAT. LET'S DO THIS. LET'S PASS AN  
19 AMENDMENT THAT SAYS THAT THE GOVERNMENT WILL NOT DISARM THE  
20 POPULATION. YEAH, THAT'S A GOOD IDEA.

21 THAT'S NOT WHY IT HAPPENED AT ALL. IT HAPPENED  
22 BECAUSE THESE PEOPLE HAD JUST LIVED, THEY HAD JUST LIVED  
23 THROUGH AN EXPERIENCE WHERE THE GOVERNMENT, THE VERY GOVERNMENT  
24 -- MR. ECHEVERRIA, YOU'RE HERE REPRESENTING THE STATE -- THE  
25 VERY GOVERNMENT THAT WAS SUPPOSED TO PROTECT ITS CITIZENS WAS



13:33:39 1 IN FACT ABUSING ITS CITIZENS, AND IT WAS DOING IT ALL UNDER THE  
2 PRETENSE OF LAW.

3 TAKE, FOR EXAMPLE, THE FOURTH AMENDMENT. THE FOURTH  
4 AMENDMENT, THEY WERE USING SOMETHING CALLED THE WRIT OF  
5 ASSISTANCE IN ORDER TO COME INTO PEOPLE'S HOUSE WITHOUT  
6 PROBABLE CAUSE AND TO SEARCH AND ARREST AND HAUL PEOPLE AWAY.  
7 PEOPLE VERY OFTEN FORGET THAT THE FIRST BATTLE OF THE  
8 REVOLUTIONARY WAR WAS FOUGHT ON APRIL -- I BELIEVE IT WAS APRIL  
9 19TH, 1775. AND IT WAS FOUGHT, WHY? BECAUSE THE GOVERNMENT  
10 DECIDED IT WAS GOING TO DISARM, IN THE INTEREST OF THE PUBLIC,  
11 IT WAS GOING TO DISARM THE PUBLIC, THE COLONISTS. AND THEY  
12 MARCHED UPON LEXINGTON AND CONCORD TO DISARM THE POPULATION.

13 AND SO WHEN THEY WERE DRAFTING THE BILL OF RIGHTS,  
14 THESE PEOPLE WHO HAD JUST LIVED THROUGH THIS EXPERIENCE -- THIS  
13:34:41 15 WASN'T THEORETICAL. IT WASN'T HYPOTHETICAL. IT WASN'T SOME  
16 BIG THINK TANK MOVEMENT. THEY LIVED THROUGH THIS, AND THEY  
17 DECIDED, YOU KNOW, THERE'S CERTAIN THINGS THAT WE WANT TO TELL  
18 THE GOVERNMENT THAT THEY CANNOT DO. YOU CAN DO A LOT OF  
19 THINGS. YOU CAN TELL PEOPLE YOU CAN'T DRIVE CARS WITH TINTED  
20 WINDOWS. YOU CAN TELL PEOPLE THAT YOU HAVE TO HAVE A GFCI IN  
21 YOUR BATHROOM AND EVERY OTHER 20 FEET. YOU CAN TELL ME YOU  
22 MUST WEAR A SEATBELT. NONE OF THOSE THINGS ARE PROTECTED BY  
23 THE BILL OF RIGHTS.

24 BUT THE PEOPLE WHO FOUNDED THIS COUNTRY -- WHO IN MY  
25 OPINION WERE SOME OF THE SMARTEST PEOPLE EVER ON THE FACE OF

13:35:33 1 THE PLANET -- CAME UP WITH THIS IDEA, CAME UP WITH THIS  
2 EXPERIMENT, AND THEY WERE VERY MUCH AFRAID, VERY MUCH AFRAID  
3 THAT THEY MIGHT PERHAPS BE FACING IN THE FUTURE THE VERY SAME  
4 THING THEY JUST LIVED THROUGH, AND THEY DIDN'T WANT THAT TO  
5 HAPPEN. THEY DID NOT WANT TO THE GOVERNMENT TO TELL THEM WHAT  
6 THEY COULD DO AND WHAT THEY COULD NOT DO WITH REGARDS TO  
7 CERTAIN THINGS.

8 NOW WE UNDERSTAND, REALLY, WE UNDERSTAND, OF COURSE,  
9 THAT IN THE REAL WORLD, YOU CAN'T HAVE A FIRST AMENDMENT  
10 WITHOUT RESTRICTIONS, AND YOU CAN'T HAVE A FOURTH AMENDMENT  
11 WITHOUT RESTRICTIONS. BUT JUST THINK ABOUT HOW MANY LIVES  
12 COULD BE SAVED IF WE SIMPLY SAID: FOURTH AMENDMENT, THAT'S A  
13 NICE THOUGHT, BUT YOU KNOW WHAT, WE'RE JUST NOT GOING TO.  
14 THERE'S A GREATER PUBLIC INTEREST IN ALLOWING LAW ENFORCEMENT  
13:36:31 15 TO BARGE INTO PEOPLE'S HOUSE AND SEARCH THEIR HOUSES WITHOUT  
16 PROBABLE CAUSE. FIFTH AMENDMENT. THINK OF HOW MANY MORE  
17 CRIMES COULD BE SOLVED, HOW MANY PEOPLE COULD BE SAVED IF WE  
18 COULD COERCE CONFESSIONS FROM PEOPLE. YEAH, FIFTH AMENDMENT,  
19 YOU KNOW, IT'S A GREAT IDEA, BUT THE PUBLIC INTEREST OUTWEIGHS  
20 PEOPLE HAVING THE RIGHT TO NOT INCRIMINATE THEMSELVES.

21 SO I THINK THIS IS VERY, VERY DIFFICULT BECAUSE WHO  
22 WANTS TO SEE CHILDREN BEING SHOT AND KILLED OR OTHER PEOPLE  
23 BEING SHOT OR LAW ENFORCEMENT BEING SHOT. BUT SIMPLY BECAUSE  
24 WE DON'T WANT THAT TO HAPPEN DOESN'T MEAN THAT THE STATE GETS  
25 TO HAVE ITS WAY HOWEVER IT WANTS, WHENEVER IT WANTS, UNDER SOME

13:37:26 1 RUBRIC THAT, WELL, YOU KNOW, IT'S A REASONABLE FIT. BECAUSE,  
2 AS I ASKED MR. ECHEVERRIA OVER AND OVER AND OVER AGAIN, WHEN IS  
3 IT NOT A REASONABLE FIT? HOW DO WE MAKE THAT DECISION?

4 AND MY QUESTION IS: ARE WE NOT THERE? LOOK AT ALL OF  
5 THE LAWS, ALL OF THE REGULATIONS. I'VE LOOKED AT ALL THIS  
6 EVIDENCE, AND FRANKLY, WITH ALL OF THE GUN LAWS THAT WE HAVE,  
7 AND WE HAVE MANY, MANY, MANY, MANY, HAVE WE REALLY DONE  
8 ANYTHING AT ALL TO SOLVE THE GUN VIOLENCE PROBLEM IN THE UNITED  
9 STATES? AND THE ANSWER IS NO. NO. WE JUST KEEP WHITTILING  
10 AWAY AT THE SECOND AMENDMENT, KEEP WHITTILING AWAY, WHITTILING  
11 AWAY UNTIL EVENTUALLY WE'LL GET TO THE POINT WHERE WE'LL BE  
12 WHERE PEOPLE ARE ALLOWED TO OWN ONE GUN WITH ONE ROUND OF  
13 AMMUNITION BECAUSE ANYTHING ELSE BEYOND THAT WILL BE A  
14 REASONABLE FIT.

13:38:35 15 THOSE ARE MY PRELIMINARY THOUGHTS. BUT I'M NOT FIXED  
16 ON THAT. WHAT I'D LIKE FOR YOU TO DO -- AND AGAIN, I THINK YOU  
17 BOTH HAVE DONE A WONDERFUL JOB REPRESENTING YOUR RESPECTIVE  
18 POSITIONS AND ANSWERING MY QUESTIONS. BUT WHAT I'D LIKE FOR  
19 YOU TO DO IS I'D LIKE FOR YOU TO FILE -- YOU SORT OF HEARD MY  
20 CONCERNS. AND YOU HEARD -- YOU OBVIOUSLY KNOW THE THINGS THAT  
21 TROUBLE ME. YOU KNOW THE THINGS THAT MR. ECHEVERRIA HAS NOW  
22 ARGUED TO ME AND THE EVIDENCE THEY'VE ARGUED. MR. ECHEVERRIA  
23 KNOWS YOUR POSITION.

24 I'D LIKE FOR YOU TO, WITHIN THE NEXT 30 DAYS, TO FILE  
25 A BRIEF BRIEF. I DON'T WANT TO DECIMATE ANY MORE SMALL

13:39:36 1 FORESTS. OKAY? IF YOU CAN KEEP IT DOWN TO 25 PAGES OR LESS,  
2 SUMMARIZE YOUR POSITION, TRY TO ANSWER SOME OF MY QUESTIONS IF  
3 YOU CAN, CITATIONS TO CASES AND SPECIFIC CITATIONS TOO. SO  
4 DON'T JUST TELL ME, DX 29. TELL ME, DX 29, LINE 5 THROUGH 17  
5 OR WHATEVER SO I CAN GO BACK AND LOOK AT IT AND TRY AND SEE  
6 WHETHER OR NOT IT ACTUALLY SUPPORTS WHAT IT IS THAT YOU'RE  
7 SAYING.

8 IF YOU CAN DO THAT WITHIN THE NEXT 30 DAYS, AND THEN  
9 I'LL GIVE YOU 10 DAYS TO FILE A RESPONSE TO EACH OTHER'S.  
10 OKAY. AND THEN I'M GOING TO TAKE THE MATTER UNDER SUBMISSION,  
11 AND THEN I'LL DECIDE ONE WAY OR THE OTHER. UNLESS EITHER ONE  
12 OF YOU HAVE ANYTHING ELSE YOU WISH TO OFFER, I THANK YOU BOTH  
13 FOR PRESENTING YOUR CASES AS WELL AS YOU HAVE. AND AGAIN, I  
14 UNDERSTAND IT'S A DIFFICULT, IT'S A DIFFICULT CHOICE. BUT I  
13:40:57 15 GUESS THAT'S WHAT THEY PAY ME THE BIG BUCKS FOR. RIGHT? SO  
16 I'LL DO MY BEST AND THEN OF COURSE --

17 MR. ECHEVERRIA: ONE CLARIFYING QUESTION, YOUR  
18 HONOR.

19 THE COURT: SURE.

20 MR. ECHEVERRIA: FOR THE SUPPLEMENTAL BRIEFING, IS  
21 THIS GOING TO BE FOCUSED EXCLUSIVELY ON THE SECOND AMENDMENT  
22 CLAIM? I GOT THE IMPRESSION THAT IS THE CASE.

23 THE COURT: I THINK SO. I THINK IT'S A DIFFICULT --  
24 THE OTHER ISSUE, AS EVIDENCED BY THE AMOUNT OF TIME THAT YOU  
25 BOTH SPENT ON THE OTHER ISSUE, I THINK THE SECOND AMENDMENT

13:41:26 1 ISSUE IS THE MOST DIFFICULT ISSUE. SO I WOULD PREFER THAT YOU  
2 DO THAT.

3 MR. ECHEVERRIA: ABSOLUTELY.

4 THE COURT: ALL RIGHT. IS THERE ANYTHING ELSE?

5 MS. BARVIR: I DON'T HAVE ANYTHING.

6 THE COURT: ANY QUESTIONS?

7 MR. ECHEVERRIA: NO, YOUR HONOR.

8 THE COURT: IF NOT, THANK YOU VERY MUCH. YOU ALL  
9 TAKE CARE. THIS HEARING IS CONCLUDED.

10 (MATTER CONCLUDED.)

11 C-E-R-T-I-F-I-C-A-T-I-O-N

12  
13 I HEREBY CERTIFY THAT I AM A DULY APPOINTED, QUALIFIED  
14 AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED STATES  
15 DISTRICT COURT; THAT THE FOREGOING IS A TRUE AND CORRECT  
16 TRANSCRIPT OF THE PROCEEDINGS HAD IN THE AFOREMENTIONED CAUSE;  
17 THAT SAID TRANSCRIPT IS A TRUE AND CORRECT TRANSCRIPTION OF MY  
18 STENOGRAPHIC NOTES; AND THAT THE FORMAT USED HEREIN COMPLIES  
19 WITH THE RULES AND REQUIREMENTS OF THE UNITED STATES JUDICIAL  
20 CONFERENCE.

21 DATED: MAY 16, 2018, AT SAN DIEGO, CALIFORNIA.

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/S/ JULIET Y. EICHENLAUB  
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