

08:43:20

1

UNITED STATES DISTRICT COURT

2

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

3

4

VIRGINIA DUNCAN, ET AL,

.

5

PLAINTIFFS,

. NO. 17-CV-1017

6

V.

. MAY 10, 2018

7

XAVIER BECERRA, ET AL.,

. SAN DIEGO, CALIFORNIA

8

DEFENDANTS.

.

.

9

08:43:20

10

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

11

12

13

APPEARANCES:

14

FOR THE PLAINTIFFS:

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

15

16

FOR THE DEFENDANTS:

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

17

18

19

COURT REPORTER:

JULIET Y. EICHENLAUB, RPR, CSR
USDC CLERK'S OFFICE
333 WEST BROADWAY, ROOM 420
SAN DIEGO, CALIFORNIA 92101
JULIET_EICHENLAUB@CASD.USCOURTS.GOV

20

21

22

23

24

25

REPORTED BY STENOTYPE, TRANSCRIBED BY COMPUTER

08:43:20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SAN DIEGO, CALIFORNIA; MAY 10, 2018; 10:06 A.M.

-000-

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?

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

10:06:05

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.

10:08:28

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
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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

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

10:09:52

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

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

10:10:38

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
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.

10:11:30

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.

10:12:59

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
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
15 THAT LARGE CAPACITY MAGAZINES, AS THEY ARE DEFINED, ARE IN FACT
16 NOT USED FOR HUNTING.

10:14:46

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?

10:16:11

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

10:17:43

14 MS. BARVIR: IS THERE EVIDENCE THAT THEY'RE USED FOR
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
15 LIMITED TO LESS THAN 10 ROUNDS, THAT'S NECESSARILY GOING TO BE
16 THE CASE.

10:19:04

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
15 ROUNDS SOMEDAY TO FIGHT OFF AN ATTACKER, THAT'S WHY THEY CHOOSE
16 THEM.

10:20:28

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.

10:22:08

14 THE COURT: BUT THE AVERAGE HOMEOWNER IS NOT. THE
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
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.

10:23:53 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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: HOW MANY TIMES HAS THAT HAPPENED?

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

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

10:25:22

MS. BARVIR: CORRECT. AND ALSO, I THINK THAT LEADS US ALSO TO CRIMINAL USE WHICH IS A MAJOR CONCERN AND POINT OF CONTENTION OF THE STATE IN ITS BRIEFING WHICH IS TO SUGGEST THAT CRIMINALS USE THESE AT DISPROPORTIONATE RATES. I THINK THEY SPOKE SPECIFICALLY AT SOME POINTS ON VIOLENCE AGAINST LAW ENFORCEMENT OFFICERS AND OBVIOUSLY THE MASS SHOOTING EVENTS --

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

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

10:26:05

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.

10:30:02

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
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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. BARVIR: CONCEPTUALLY, ANYTHING IS POSSIBLE.

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

10:31:38

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

10:32:19

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
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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

MS. BARVIR: DO ANYTHING MORE?

THE COURT: -- YES, DO ANYTHING MORE?

MS. BARVIR: I THINK THAT'S A GOOD QUESTION. WE
COULD POTENTIALLY SEE THE -- THE COURT COULD SEE THE EXPERTS
AND WHO IS POTENTIALLY MORE AWARE. WE COULD PLAY IT OUT FOR
THE COURT. WE'VE DONE IT IN DEPOSITIONS. SO I DON'T KNOW THAT
COULD DO A WHOLE LOT MORE FOR YOU.

THE COURT: I READ THE EXCERPTS OF DEPOSITIONS THAT
WERE FILED, BY THE WAY.

MS. BARVIR: BUT EVEN IF THE COURT DID GRAPPLE WITH
WHETHER OR NOT WE COULD HANDLE THIS AT MSJ, WHICH WE BELIEVE
YOU CAN BASED ON THE EVIDENCE THAT HAS BEEN PUT FORTH THAT
ISN'T LIKELY TO MATERIALLY AFFECT THESE TYPES OF GUN VIOLENCE,
WHAT IT COMES DOWN TO IS THERE'S NO FIT HERE. THE STATE HAS
CHOSEN THE BROADEST POSSIBLE MEANS. STRIPPING MAGAZINES
NECESSARY FOR -- USED FOR SELF-DEFENSE, OWNED FOR SELF-DEFENSE
AND OTHER LAWFUL PURPOSES BY LAW-ABIDING CITIZENS, TAKING THEM
FROM THEIR HANDS AND THEIR HOMES SO THEY CAN PREVENT CRIMINAL
MISUSE. HELLER TELLS US THAT'S INAPPROPRIATE. THE FIT IS NOT
APPROPRIATE HERE. THIS ISN'T A QUESTION OF EXPERTS FIGHTING
WHETHER OR NOT THE FIT IS APPROPRIATE, AND THE LEGISLATURE IS
ENTITLED TO NO DEFERENCE ABOUT WHETHER THE FIT IS APPROPRIATE.
THE COURT HAS THE POWER TO MAKE THAT DECISION. IT'S A LEGAL
QUESTION.

10:35:28

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
15 IN THE WORMAN DECISION.

10:37:19

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.

10:39:26

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

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

10:41:40

16 MS. BARVIR: I THINK I WANT TO GO BACK TO THAT PHRASE
17 "PREDICTIVE JUDGMENTS." STATES AND CITIES THAT ARE TRYING TO
18 DEFEND GUN CONTROL LAWS THAT ARE BEING CHALLENGED ON SECOND
19 AMENDMENT GROUNDS REGULARLY RESORT TO THIS LANGUAGE. AND THE
20 HONORABLE JUDGES WHO WROTE THE WORMAN AND KOLBE OPINIONS -- YOU
21 KNOW, THE PREDICTIVE JUDGMENT LANGUAGE COMES FROM SUPREME COURT
22 CASE LAW, BUT I THINK THEY TAKE IT TOO FAR. I THINK WHAT THE
23 CASE LAW IS REALLY CLEAR ABOUT IS, YES, THE LEGISLATURE IS
24 ENTITLED TO SOME DEFERENCE WHEN IT COMES TO, DO WE HAVE A
25 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?

10:43:15

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

10:45:22

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
15 FIREARMS EITHER IN THE DISTRICT OF COLUMBIA.

10:46:50

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
15 MANY COMPANIES.

10:48:56

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
15 MILITARY WEAPON IN VARIOUS REGARDS. RIGHT?

10:53:55

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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: IT SEEMS SO CLEAR TO ME.

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

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

MS. BARVIR: THAT'S TRUE.

THE COURT: THAT GETS US INTO A WHOLE DIFFERENT ARENA WHICH IS A QUAGMIRE THAT WE'RE GOING TO, I GUESS, PERHAPS WE'RE GOING TO EXPLORE. BUT I HAVE A VERY DIFFICULT TIME. I DON'T SEE ANYTHING IN HELLER THAT SAYS THAT MILITARY EQUIPMENT IS NOT PROTECTED. IT DOESN'T SAY THAT AT ALL.

10:55:39

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

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

10:56:24

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

10:57:15

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

1 MS. BARVIR: THAT'S TRUE. BUT WHEN THE STATE HAS
2 DECIDED TO ARBITRARILY CUT IT OFF AT 10 -- SO YES, IT'S GOING
3 TO PULL IN THOSE 100-ROUND DRUMS, BUT IT REALLY IS GOING AFTER
4 WHAT IS COMMON. WHAT THE EVIDENCE SHOWS IS COMMON, THE 15 TO
5 17, THE 24 TO 30.

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

11:01:24

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

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

24 MS. BARVIR: AT THIS POINT, YES, BECAUSE THE STATE
25 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
15 YOU NOT, THAT ANY GUN IS DANGEROUS?

11:03:40

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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?

11:05:25

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

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

MR. ECHEVERRIA: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING.

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

11:06:07

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
15 COURT AND THE WORMAN 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.

11:07:10

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 FLYNN 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.

11:13:37

14 MR. ECHEVERRIA: SO WHEN INTERMEDIATE SCRUTINY
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.

11:16:39

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
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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. ECHEVERRIA: YES.

THE COURT: GRENADE THROWERS.

MR. ECHEVERRIA: GRENADE.

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

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

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

11:20:58

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

JUDGE STATON DETERMINED THAT ASSAULT WEAPONS, EVEN

11:21:41

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.

11:27:09

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: BECAUSE?

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

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

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

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

11:30:21

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
15 ONES WE'RE ARGUING ABOUT HERE?

11:33:28

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.

11:36:55

14 MR. ECHEVERRIA: IN THAT CASE, IF THE LEGISLATURE OR
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
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.

11:38:22

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
15 NEED 2.2 ROUNDS FOR SELF-DEFENSE.

11:41:39

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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.

11:52:12

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
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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: BUT THERE'S CONFLICTING TESTIMONY --

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

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

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

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

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

11:53:43

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

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

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

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

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
15 TABLE.

11:55:23

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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?

12:09:26

14 MR. ECHEVERRIA: I DO NOT KNOW IF THERE WOULD BE AN
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
15 YOU WOULD BE IF YOU WERE A SERVING MEMBER OF SEAL TEAM 6 WHILE
16 YOU'RE AT HOME?

12:11:31

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
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?

12:16:08

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
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.

12:21:35

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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. ECHEVERRIA: AGAIN, THIS IS NOT IN THE RECORD AND THIS IS FAR OUTSIDE THE BOUNDS OF THIS LITIGATION, BUT -- AND I'M ON TOTALLY FAMILIAR WITH THE DETAILS -- BUT IT'S MY UNDERSTANDING THAT WITH THE ENACTMENT OF PROPOSITION 8, THE GOVERNMENT DECIDED IT WASN'T GOING TO BE DEFENDING PROPOSITION 8 --

THE COURT: THAT'S ABSOLUTELY TRUE.

MR. ECHEVERRIA: SO THAT WAS A SITUATION WHERE THE GOVERNMENT DISAGREED WITH THE ENACTMENT OF THE PEOPLE BECAUSE OF ITS PERCEPTION, RIGHTFULLY SO, THAT IT VIOLATED THE CONSTITUTION. SO THAT WOULD BE AN EXAMPLE.

THE COURT: OKAY. GOT YOU.

12:24:32

MR. ECHEVERRIA: I'D ALSO LIKE TO CLARIFY: I KNOW THAT YOUR HONOR CHARACTERIZED CALIFORNIA'S POSSESSION BAN AS DISARMAMENT AND AS A POLICY CHOICE THAT WAS OFF THE TABLE AND WAS CONSTITUTIONALLY SUSPECT. AND I WOULD LIKE TO JUST CLARIFY THAT CALIFORNIA'S POSSESSION BAN DOES NOT DISARM ANYBODY. INDIVIDUALS ARE STILL PERMITTED TO POSSESS AS MANY MAGAZINES THAT ARE CALIFORNIA COMPLIANT AS THEY WISH AND CAN, AT LEAST WITH RESPECT TO THE LARGE CAPACITY MAGAZINE BAN, CAN HAVE AS MANY WEAPONS AS THEY CAN LAWFULLY POSSESS TO EXERCISE THEIR SELF-DEFENSE RIGHTS.

THERE ARE NUMEROUS OPTIONS FOR COMPLYING WITH CALIFORNIA'S POSSESSION BAN. IF YOUR HONOR HAD NOT ENJOINED THE STATUTE ON JULY 1ST, IT WOULDN'T HAVE AUTOMATICALLY

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
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.

12:26:23

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.

12:30:06

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.

12:34:07

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
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.

12:35:37

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 --
15 12:40:00 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.

12:41:32

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
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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

THE COURT: STILL TIME FOR IT?

MR. ECHEVERRIA: YEAH, I'LL TRY NOT TO TAKE TOO MUCH OF THE COURT'S TIME.

THE COURT: IT'S ALL RIGHT. IT'S AN IMPORTANT ISSUE. I TOOK THE TIME AND ASKED QUESTIONS BECAUSE I BELIEVE IT'S AN IMPORTANT ISSUE.

MR. ECHEVERRIA: THE ATTORNEY GENERAL APPRECIATES THAT. I'D LIKE TO NOTE SOME POINTS ABOUT THE SECOND AMENDMENT CLAIM. I'D LIKE TO NOTE FOR THE COURT THAT THE FYOCK CASE INVOLVING THE SUNNYVALE ORDINANCE WAS A POSSESSION BAN THAT WAS VERY SIMILAR TO WHAT CALIFORNIA DID ON A STATEWIDE BASIS IN ENACTING PROPOSITION 63.

13:01:57

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

MR. ECHEVERRIA: SURE.

THE COURT: DO YOU THINK IT MAKES ANY DIFFERENCE THAT THE FYOCK CASE INVOLVED A CITY, A HIGHLY-POPULATED CITY, WHERE LAW ENFORCEMENT, FOR EXAMPLE, WOULD BE ABLE TO RESPOND PERHAPS ON SHORT NOTICE? I KNOW THERE'S LACK OF EVIDENCE IN THE RECORD AS TO HOW MANY RAPES, ASSAULTS, ATTEMPTED MURDERS OR MURDERS THE STATE HAS BEEN ABLE TO PREVENT OVER THE YEARS. I DIDN'T SEE ANY STATISTICS ON THAT. SO WHAT WE REALLY DO KNOW -- WHAT WE KNOW IS THAT GENERALLY LAW ENFORCEMENT IS REACTIVE. THAT LAW ENFORCEMENT WILL SHOW UP ONCE A PROBLEM HAS BEGAN.

13:02:46

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.

13:05:28

14 THE COURT: THAT SAME TIME INTERVAL WORKS TO THE
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
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.

13:06:36

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
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.

13:08:16

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

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

13:09:42

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.

13:13:19

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
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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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.

13:14:41

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.

13:16:08

14 AND FINALLY, WITH RESPECT TO THE SUBSTANTIVE DUE
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.

13:19:39

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
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,
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?

13:21:17

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.

13:23:58

13 THE COURT: LOOK, ALMOST EVERY COURT -- NOT ALMOST --
14 EVERY COURT THAT HAS LOOKED AT THIS ISSUE HAVE ALL BASICALLY
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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. BARVIR: IN THE NINTH?

THE COURT: YES.

MS. BARVIR: IT DEPENDS ON THE PANEL I GUESS. I DON'T KNOW. WE'LL SEE. I HOPE THE ANSWER WOULD BE DIFFERENT BECAUSE I THINK A JUDGE WHO'S LOOKING AT THIS INDEPENDENTLY CAN REVIEW THE EVIDENCE AND REALLY SEE THAT NONE OF THOSE CASES HAVE SHOWN ANYTHING THAT'S DIFFERENT HERE. THEY'VE JUST COME TO A POTENTIALLY POLITICAL DECISION. ULTIMATELY, WE HAVE HERE, COMING FROM HELLER, IS THAT WHEN WE'RE TALKING ABOUT FIREARMS THAT ARE COMMONLY PROTECTED BY LAW-ABIDING CITIZENS -- THAT IS, THAT THEY ARE WITHIN THE SCOPE OF THE SECOND AMENDMENT -- THERE ARE THINGS THAT THE STATE CAN DO. BUT FLATLY BANNING THE ACQUISITION AND POSSESSION OF THEM IS A POLICY JUDGMENT THAT'S OFF THE TABLE. THAT COMES FROM HELLER.

13:25:26

THE COURT: WE'RE ALREADY PAST THE ACQUISITION. THAT'S BEING CHALLENGED SOMEWHERE ELSE APPARENTLY. WE'RE NOW TALKING ABOUT POSSESSION.

MS. BARVIR: THAT'S BEING CHALLENGED HERE AS WELL, YOUR HONOR. REMEMBER, AT THE MPI STAGE, THE PLAINTIFFS ONLY CHALLENGED THE POSSESSION BAN BECAUSE IT WAS THE ONE THAT WAS ABOUT TO GO INTO EFFECT. THERE WAS THE IRREPARABLE HARM --

THE COURT: OKAY. OKAY. GOT IT.

MS. BARVIR: SO YES, THE ACQUISITION IS PART OF THIS DISCUSSION. IT'S COMPLETELY FLATLY BANNING THE USE OF THESE PROTECTED ITEMS BY THE HAND -- IN THE HANDS AND HOMES OF

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
15 MAGAZINES OVER 10 ROUNDS.

13:26:36

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.

13:27:59

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
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
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.

13:29:28

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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. BARVIR: SO AND IN ALL EVENTS, PLAINTIFF LOVETTE WHO IS THE REMAINING PLAINTIFF WHO CURRENTLY OWNS LARGE CAPACITY MAGAZINES AND UNTOLD NUMBERS OF MEMBERS OF THE CALIFORNIA RIFLE AND PISTOL ASSOCIATION ARE ENTITLED TO JUST COMPENSATION FOR THEIR DISPOSSESSION OF THESE PARTICULAR PROTECTED ARMS. THE AG DOES NOT DISPUTE THAT THE GOVERNMENT MUST PAY IF THERE'S A PHYSICAL TAKING. 32310 DOES NOT PROVIDE FOR ANYTHING, LET ALONE ON JUST COMPENSATION; AND AGAIN, THE ABILITY TO SELL TO A THIRD PARTY WHEN THE MARKET HAS BEEN ARTIFICIALLY DESTROYED IS NOT SUFFICIENT TO ENSURE JUST COMPENSATION IN OR EVEN OUTSIDE OF THE STATE.

13:30:51

AND ALSO, ASIDE FROM OUTSIDE OF THE STATE, EVEN IF IT'S AN AVAILABLE AVENUE TO SELL OUTSIDE OF THE STATE, IT'S NOT APPROPRIATE TO SAY THAT THE STATE SHOULD BE ABLE TO RELY ON THE PERMISSIVE LAWS OF OTHER JURISDICTIONS, NEARBY JURISDICTIONS IN OTHER STATES, TO JUSTIFY ITS OWN PHYSICAL TAKING WITHOUT COMPENSATION.

WITH THAT SAID, I WOULD LIKE TO ASK THE COURT IF IT HAS ANY OTHER QUESTIONS. I'M HAPPY TO ANSWER THEM. IF NOT, I WOULD ASK THIS COURT TO REVIEW THE EVIDENCE ONCE MORE, GRANT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AT LEAST IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT ON THE DUE PROCESS AND TAKINGS CLAIMS.

THE COURT: OKAY. LET ME -- THANK YOU. I THANK YOU BOTH. BY THE WAY, I THINK YOU BOTH HAVE DONE A WONDERFUL JOB.

13:31:31

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.

13:32:42

14 MY CONCERN, MY CONCERN IS THIS: THE BILL OF RIGHTS
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.

13:34:41

13 AND SO WHEN THEY WERE DRAFTING THE BILL OF RIGHTS,
14 THESE PEOPLE WHO HAD JUST LIVED THROUGH THIS EXPERIENCE -- THIS
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
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.

13:36:31

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 WHITTLING
10 AWAY AT THE SECOND AMENDMENT, KEEP WHITTLING AWAY, WHITTLING
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
15 GUESS THAT'S WHAT THEY PAY ME THE BIG BUCKS FOR. RIGHT? SO
16 I'LL DO MY BEST AND THEN OF COURSE --

13:40:57

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.

22
23
24
25
/S/ JULIET Y. EICHENLAUB
JULIET Y. EICHENLAUB, RPR, CSR
OFFICIAL COURT REPORTER
CERTIFIED SHORTHAND REPORTER NO. 12084