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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JAMES MILLER, an individual;)
PATRICK RUSS, an individual; RYAN)
PETERSON, an individual; and SAN)
DIEGO COUNTY GUN OWNERS POLITICAL)
ACTION COMMITTEE, a membership)
organization,)

Plaintiffs,)

v.)

XAVIER BECERRA, in his official)
capacity as Attorney General of)
California; and MARTIN HORAN, in)
his official capacity as Chief of)
the Department of Justice Bureau)
of Firearms,)

Defendants.)

No. 19-CV-1537-JAH-AGS

February 3, 2021

Courtroom 5A

San Diego, California

TRANSCRIPT OF PROCEEDINGS

(Court Trial - Day 1)

BEFORE THE HONORABLE ROGER T. BENITEZ, SENIOR DISTRICT JUDGE

COURT REPORTER:

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1 (Wednesday, February 3, 2021; 10:04 a.m.)

2

3 P R O C E E D I N G S

4

5 THE COURT: Well, good morning.

6 THE ATTORNEYS: Good morning, your Honor.

7 MR. CHANG: Good morning, your Honor.

8 THE CLERK: May I call the case, your Honor?

9 THE COURT: Yes.

10 THE CLERK: One on calendar, 19-CV-1537, Miller, et
11 al., versus Becerra, et al., bench trial.

12 THE COURT: All right. I guess, as a matter of
13 housekeeping, my understanding is that Mr. Becerra's no longer
14 the Attorney General and that Mr. Padilla is. And I wonder if
15 it would be appropriate for us to amend the pleadings so as to
16 reflect that Mr. Padilla is now the defendant, as opposed to
17 Mr. Becerra.

18 Does that sound like -- doesn't that sound like
19 something I ought to do?

20 MR. ECHEVERRIA: Good morning, your Honor. This is
21 John Echeverria for the defendants.

22 THE COURT: Yes.

23 MR. ECHEVERRIA: I -- Mr. Padilla was appointed to be
24 a United States senator, and that's his current position.
25 Javier Becerra is still the Attorney General, even though he --

1 THE COURT: I'm sorry. It has -- I'm sorry. So who
2 is the current Attorney General for the State of California?

3 MR. ECHEVERRIA: Javier Becerra is still --

4 THE COURT: Still is? Okay. All right. Then I -- I
5 got my players mixed up.

6 All right. Good enough.

7 All right. Counsel, please register your appearances
8 for the record.

9 And since I do have a court reporter here today,
10 please make sure you identify yourselves any time that you
11 speak. Okay? Great.

12 Starting with the plaintiff.

13 MR. LEE: Good morning, your Honor. This is George
14 Lee of the firm Seiler Epstein, LLP, appearing on behalf of the
15 plaintiffs.

16 MR. DILLON: Good morning, your Honor. This John
17 Dillon with the firm Dillon Law Group, APC, counsel for
18 plaintiffs.

19 MR. JAFFE: Good morning, your Honor. This is Erik
20 Jaffe of Schaerr Jaffe, LLP, Counsel for the plaintiff.

21 MR. LEE: And, your Honor, there's -- this is George
22 Lee. There's another attorney, but he is not attorney of
23 record for the plaintiffs: Adam Kraut. I think you heard him
24 testify in October.

25 He's currently in the Zoom waiting room, and would

1 request the ability to join by audio only, but not to
2 participate.

3 THE COURT: Any objection?

4 MR. ECHEVERRIA: Defendants don't object if Mr. Kraut
5 is just going to be observing.

6 THE COURT: Okay. Great.

7 All right. Well, Counsel, let me -- let me just
8 first of all say this is rather an -- an unorthodox proceeding
9 that we're doing here, partly as a result of this COVID issue.
10 I have you all on video. We don't have live witnesses. I
11 can't see their faces. I can't hear their tone of voice. And
12 so, frankly, it's rather -- rather odd.

13 My recollection is that you folks had agreed that
14 declarations would be accepted as if in fact there had been
15 live testimony, and that there would be depositions taken.
16 And, again, that those would be used in lieu of live testimony.
17 I have -- I wish to thank you, and I say that with my tongue
18 firmly planted in my cheek, for the filings that I received
19 yesterday; which I believe totals 13,500 pages of information.
20 To put it into perspective, *War and Peace*, and *The Gulag*
21 *Archipelago*, put together, are approximately 3200 pages.

22 So if you -- any of you expect that I have read what
23 you submitted to me yesterday by today's hearing, you're only
24 fooling yourself.

25 Now, I had expected that I would get some kind of a

1 list of what excerpts I was going to be referred to because,
2 I -- I'll tell you, I may -- I may possibly -- if you ask me to
3 look at certain excerpts of the depositions, I will do that.
4 And if I think that in order to interpret the context or -- or
5 the story behind it, I may look to -- I may look beyond the
6 excerpts, I may do so. But I have no plan whatsoever of
7 reading 13,500 pages in order to decide this case.

8 So, have -- have -- have I -- it's certainly possible
9 that I've missed something. But is there a -- has there been a
10 submission from both the plaintiff and the defense as to what
11 portions of these depositions I am to be looking to for
12 purposes of determining what I have to determine?

13 MR. LEE: Yes, your Honor. This is George Lee.

14 So we certainly appreciate that -- the -- the task
15 the Court faces in this regard.

16 The parties had met and -- and conferred several
17 times by telephone to discuss how exactly we would be
18 submitting this.

19 We -- the parties have exchanged designations of
20 portions of the transcript. And I believe we have endeavored
21 to -- we will get you -- those designations to the Court, if
22 they have not already been lodged. But those are the relevant
23 portions that the parties have submitted in highlight form.

24 Now, the parties have also agreed to submit just the
25 entire transcript on the USB stick or the memory drive that the

1 Court has asked for.

2 So, certainly, the Court will have full copies of the
3 transcripts available if it needs to go outside of the
4 designation for context, et cetera.

5 THE COURT: I think I already have those, don't I? I
6 think that's part of the 13,000 pages, are the transcripts of
7 the depositions. Am I not correct?

8 MR. LEE: I -- plaintiffs have put the full
9 deposition transcripts on the -- on the USB memory device that
10 was delivered to your Honor's chambers. What we submitted on
11 paper were the excerpts.

12 THE COURT: Okay.

13 MR. DILLON: Your Honor, this is John Dillon. If I
14 can make a quick clarification.

15 What was submitted in actual hard copy materials were
16 the transcripts with the highlighted excerpts, but they did
17 actually have the full transcript as a part of that hard copy.

18 THE COURT: Right.

19 MR. DILLON: But the hard copies have highlighted
20 portions in them.

21 THE COURT: So then your -- your view of what I
22 should be doing is going through these depositions -- these
23 13,000 pages of -- of material -- and then looking for the
24 highlighted sections. And then -- and then -- and then take
25 notice of those? Is that -- is that what you're saying?

1 MR. LEE: Correct, your Honor.

2 THE COURT: All right.

3 MR. ECHEVERRIA: Your Honor?

4 THE COURT: Yes.

5 MR. ECHEVERRIA: This is John Echeverria for the
6 defendants.

7 THE COURT: Yes.

8 MR. ECHEVERRIA: We will be lodging with the Court
9 the designations and the counter-designations that we served on
10 the plaintiffs, to prepare the excerpts. And we apologize to
11 the Court if those designations and counter-designations were
12 not included in what we -- what we lodged with the court.

13 I would also like to note that the way in which we
14 excerpted the transcripts appears to have been different from
15 the plaintiffs.

16 THE COURT: I'm sorry. I can barely hear you,
17 Mr. Echeverria. Can you speak a little louder, please.

18 MR. ECHEVERRIA: I will, your Honor.

19 The deposition excerpts that we -- that we lodged
20 with the court, in hard copy form, are only the pages that have
21 relevant testimony on them.

22 So we did not file hard copy versions of the
23 transcripts with full copies of the transcripts, with only the
24 relevant portions highlighted. We only excerpted the relevant
25 pages. But we will be lodging with the court the designations

1 and counter-designations so your Honor can see what we've
2 excerpted from the transcripts.

3 I would also like to note that the -- the parties had
4 previously filed a joint motion to move the proposed findings
5 of fact and conclusions of law deadline until after the trial,
6 until after the Court has admitted the evidence that the Court
7 will admit and after we have argument.

8 And we would -- the defendants would like to
9 reiterate that request, so that we can incorporate -- to the
10 fullest extent possible and in a way that would be most helpful
11 for the Court -- the relevant citations to the depositions.

12 THE COURT: Makes perfectly good sense.

13 I -- I know I -- I remember seeing -- and forgive me.
14 But I seem to recall seeing proposed findings of fact from
15 someone. Maybe from both. I don't know. But I thought that
16 it was helpful in the sense that it kind of points me in a
17 direction. In a direction as to where I should be looking for
18 information that will help me determine this case.

19 But I think, Mr. Echeverria, your -- your suggestion
20 is an excellent one. I think that proposed findings of fact
21 and conclusions of law would certainly be very helpful in --
22 and obviously after the designations have been made, and so on,
23 then you can -- you can specifically refer to parts of the
24 record in the proposed findings of fact and conclusions of law.
25 And that may also very well help me focus on what I think -- by

1 the way, simply because you submit it doesn't mean that I'm
2 going to adopt it. I may adopt it in whole or in part, or I
3 may just completely disregard it if I don't believe that the
4 evidence supports what I'm being asked to find but -- or the
5 law. So -- but, yeah, that would be very, very helpful,
6 Mr. Echeverria, and I appreciate your suggestion in that
7 regard.

8 All right. So as for today, so tell me --
9 (laughing). This is such an awkward proceeding. I have to --
10 I have to tell you.

11 Tell me how -- how we should proceed today because
12 I -- this is your case, and I want to give you folks -- and
13 it's an important case. And I want to give you as much leeway
14 as I possibly can in helping me resolve the issues that are
15 before me.

16 So what -- what is your plan of how we should proceed
17 today?

18 MR. LEE: Your Honor --

19 THE COURT: Let's start out with plaintiffs' counsel.

20 MR. LEE: Thank you.

21 Your Honor, this is George Lee.

22 So I think the best way to proceed is to have the
23 parties be prepared to discuss the evidence that has been
24 submitted to your Honor, with a complete understanding that
25 your Honor has not had time to review all of the evidence that

1 has been submitted by both parties.

2 But I think this is our opportunity to discuss what
3 the evidence that has been submitted shows or will show, and to
4 discuss the law that applies to the evidence that has been
5 submitted.

6 Certainly there's a lot of evidence, as your Honor
7 knows. But I think if we can go through and highlight the
8 major portions of the evidence, I think that that would assist
9 the Court in being able to understand where to look and what
10 we're talking about.

11 THE COURT: All right. Mr. Echeverria, what's --
12 what are your thoughts?

13 MR. ECHEVERRIA: Yes, your Honor.

14 I think that, preliminarily, there's certain
15 evidentiary motions that the Court has been presented with by
16 the defendants. And the Court may want to entertain -- we
17 would ask for an opportunity to speak on those -- those
18 motions.

19 That would be the *Daubert* motion concerning the
20 testimony of John Lott, one of plaintiffs' experts. And then
21 there is a -- kind of omnibus motion in limine concerning
22 certain other evidentiary issues that defendants have with
23 plaintiffs' case and plaintiffs' evidence.

24 Beyond the procedural -- or the evidentiary issues,
25 we're happy to, you know, present to the Court and highlight to

1 the Court evidence that we have submitted.

2 We would ask the Court to admit into evidence the
3 evidence that we've lodged with the court and that we've listed
4 on our exhibit list. And -- and we're happy to entertain any
5 and all questions that the Court may have.

6 I would reiterate that the defendants --

7 THE COURT: Well, but -- but -- but a prerequisite to
8 all of that is that I have read these depositions. Right?

9 Wouldn't that be -- before I could possibly rule on
10 any of those issues you just raised, I -- I would have to have
11 read these depositions and would have to have them -- in fact,
12 would have to have them in front of me, so that I could see
13 whether or not whatever it is that's being objected to or
14 proposed, et cetera, is accurate. Right?

15 MR. ECHEVERRIA: Well, the evidentiary issues that
16 the defendants raised did not hinge on the deposition
17 testimony. We did take depositions --

18 THE COURT: All right.

19 MR. ECHEVERRIA: -- for many of the witnesses -- to
20 which we object to their testimony -- out of an abundance of
21 caution. But, for example, the *Daubert* motion regarding John
22 Lott does not depend on what he said during his deposition.

23 We did raise --

24 THE COURT: I -- I -- I read your motion, your
25 *Daubert* motion. I've also read your motions in limine. So I'm

1 reasonably familiar with those.

2 Do you want to argue those now and see if we can get
3 those out of the way?

4 MR. ECHEVERRIA: Sure. Happy to.

5 Would your Honor like to begin with the motion in
6 limine or the *Daubert* motion?

7 THE COURT: You -- whatever -- whatever makes you
8 happy.

9 MR. ECHEVERRIA: Okay. I think we can begin with the
10 *Daubert* motion, given that plaintiffs filed a declaration
11 relevant to that motion last night at 10:30. And that was a
12 declaration from David Mustard.

13 Our *Daubert* motion was focused on decades of
14 questionable conduct raised by Dr. Lott and concerns expressed
15 by many researchers in the field about Dr. Lott's credibility
16 and his research practices and methods.

17 There was one exhibit that we attached to my
18 declaration in support of our motion that referenced a survey
19 that Dr. Lott claimed to have conducted in 1997 that people
20 have significant questions about.

21 I asked him, during his deposition, about that survey
22 data and about a suggestion that he had made that certain
23 professors received that data and refused to return the data.

24 THE COURT: I'm sorry. What? I'm sorry.

25 MR. ECHEVERRIA: So these three professors -- so

1 Dr. Lott had claimed that he sent data to three professors.
2 This would be Professors Megan, Black, and Ludwig (phonetic).
3 And that each of those professors refused to return his data.
4 That --

5 THE COURT: I'm sorry. Are you saying "return" his
6 data?

7 MR. ECHEVERRIA: "Return." Yes. So these professors
8 allegedly received Dr. Lott's data and refused to give him back
9 his data after his computer allegedly crashed in 1997.

10 THE COURT: Okay.

11 MR. ECHEVERRIA: This is a claim -- this is a claim
12 that he's made off the record, and he reiterated it on the
13 record.

14 He did specify on the record during his deposition,
15 it appears that the data he gave to those three professors was
16 not the survey data that he claims to have done and lost, but
17 it related to certain regressions concerning concealed carry,
18 which was the whole point of his *More Guns, Less Crime* book.

19 And he reiterated his claim during his deposition
20 that he gave that data to Professors Megan, Black, and Ludwig,
21 and that each of them refused to return the data.

22 We have declarations that we have submitted. We
23 submitted on January 27th, from each of those professors,
24 testifying that they did not return -- refused to return any
25 data to Dr. Lott.

1 This was a highly unusual claim to make about these
2 professors. And I would note that the declaration of David
3 Mustard that was filed last night included as an exhibit an
4 excerpt from the study done by Megan and Black, in which in a
5 footnote, footnote 1, they thanked Dr. Lott for sharing the
6 concealed carry regression data with them.

7 So they publicly acknowledged that he gave them the
8 data. And it would be highly unusual for them to then refuse
9 to return that data to Dr. Lott after he -- after his computer
10 had crashed.

11 But, in any event, we don't have to show that
12 Dr. Lott provided false testimony during his deposition, even
13 though there is significant question about whether he did do
14 that.

15 THE COURT: So wait, wait, wait, wait. Just a
16 second, Mr. Echeverria.

17 So -- so Dr. Lott or Mr. Lott or Professor Lott --
18 however you want to refer to him as -- says X. He's -- he's
19 deposed. He's under oath. And then what?

20 We have declarations from people that say that what
21 he said was not true. Right?

22 MR. ECHEVERRIA: That's correct.

23 THE COURT: Okay. But -- but that doesn't go to
24 admissibility, does it? That goes to the weight of the
25 evidence. Right?

1 And so who's to say that Mr. Lott is wrong and the
2 people that filed declarations -- by the way, they weren't
3 deposed, were they?

4 MR. ECHEVERRIA: They were not deposed.

5 THE COURT: Okay. So there's been no opportunity to
6 cross-examine those folks. So who -- who's to say that what
7 Mr. Lott said is false? Just because these people say it is
8 doesn't make it so, does it?

9 MR. ECHEVERRIA: Well, I -- so for the *Daubert*
10 motion, we want to emphasize that we don't have to show that
11 Dr. Lott provided false testimony --

12 THE COURT: I -- I agree. I understand. But what do
13 you have to show?

14 MR. ECHEVERRIA: So we have to show that Dr. Lott
15 failed to reliably apply reliable methods in the field. We
16 have other arguments on that point that I hope that I can
17 address.

18 But the fact that there's -- there are three
19 declarations, one under penalty of perjury from these
20 professors --

21 THE COURT: Just a second. Just a minute. Excuse
22 me. I -- I

23 (Telephone ringing.)

24 THE COURT: (Laughing.) My phone's going off, and
25 I'm trying to find it. It's here somewhere.

1 (Pause, referring.)

2 THE COURT: I think it stopped.

3 Okay. Go ahead.

4 MR. ECHEVERRIA: So -- so I was just saying that we
5 have three -- three sworn declarations from these professors
6 that they did not refuse to return data to Dr. Lott, which is
7 very strong evidence that Dr. Lott may have not provided
8 truthful testimony during his deposition.

9 THE COURT: So you're saying that these declarations
10 are evidence, and that those declarations should control my
11 finding that somehow or another Dr. Lott -- what? His
12 methodology is not -- is not reliable? Is that -- is that your
13 point?

14 MR. ECHEVERRIA: It's -- Dr. Lott's veracity and his
15 ability or willingness to tell the truth under oath during his
16 deposition and including in his declaration, they go -- they
17 don't just go to his credibility. They go to his admissibility
18 and the admissibility of his testimony here. And they raise
19 serious questions about whether --

20 THE COURT: So just to make sure I understand -- I --
21 I hate to interrupt you. But, you know, I --

22 MR. ECHEVERRIA: That's fine.

23 THE COURT: -- I like to address things as they come
24 up.

25 So you're saying that these declarations by these

1 people are evidence, and that that evidence can be used to
2 somehow diminish the admissibility of Dr. Lott's testimony?
3 Right?

4 MR. ECHEVERRIA: Yes. That is correct, your Honor.

5 THE COURT: But -- but you do acknowledge, of course,
6 that those -- those declarations of those folks, that they have
7 not been deposed or cross-examined. Correct?

8 MR. ECHEVERRIA: We acknowledge that that is correct.

9 THE COURT: Okay. Good. All right.

10 MR. ECHEVERRIA: We also -- we also did request, in
11 one of our related filings -- either our ex parte application
12 to strike Dr. Lott's *Daubert* declaration or our opposition to
13 the plaintiffs' ex parte application to allow his declaration
14 to be filed out of time, we did request a *Daubert* hearing.

15 We -- if the Court feels the need to decide who is
16 telling the truth -- either Dr. Lott or each of the -- all of
17 the three professors -- we -- we're open -- open to having that
18 opportunity and to presenting that opportunity to the Court,
19 including possibly even having live testimony from Dr. Lott.

20 THE COURT: Well, there -- therein lies the problem,
21 Mr. Echeverria.

22 Look, if we're going to start doing this with live
23 witnesses, if we're going to start -- if we're going to do
24 this, then let us just do this. Let's just have a real trial
25 where we actually call live witnesses and bring people in. I

1 mean, last time that we were here, you noticed -- I mean, I --
2 I -- I am the trier of fact. I'm the one who's going to be
3 making a decision in this case. And if I have questions, I
4 want those questions answered.

5 And one of the ways that I normally answer
6 questions -- at least in my 20-some-odd years as a judge, is I
7 put witnesses up on the stand, under oath. I get to watch
8 their -- their facial expressions, their demeanor, listen to
9 their voice and their inflections, and so on.

10 So I don't know why -- why we would want to have a
11 live trial, if you will, as to Dr. Lott but not do that as to
12 everyone else. You see what I'm saying? Either we're going to
13 do this or we're not going to do this. One or the other.
14 Right?

15 MR. ECHEVERRIA: Frankly, your Honor, I don't know
16 that that has to be the case -- you know, the -- the defendants
17 and the plaintiffs, as well, are struggling with the fact that
18 we are in the midst of a highly unusual once-in-a-century
19 global pandemic.

20 Would it be my preference to be in the courtroom with
21 you right now with the witnesses? Absolutely.

22 THE COURT: Okay. Well, I -- I agree. I mean, I
23 wholeheartedly agree with you. I'm doing this -- I mean, I'm
24 doing this more as an accommodation than anything else.

25 Okay. So, fine. Let's get back to the original

1 issue. The original issue is -- so you say that Dr. -- or --
2 Dr. Lott's testimony should not be allowed in because he hasn't
3 told the truth in connection with this survey having to do with
4 the -- I think you said a concealed carry. Was that --

5 MR. ECHEVERRIA: So the -- so there are questions
6 about whether he has told the truth about conducting a
7 survey --

8 THE COURT: Okay.

9 MR. ECHEVERRIA: -- about the (indiscernible).

10 There's a separate issue about whether he is telling
11 the truth in this action that Professors Megan, Black, and
12 Ludwig refused to return data -- survey data to Lott.

13 THE COURT: Okay. I got it. All right. So what
14 else? What else do you want me to know?

15 MR. ECHEVERRIA: Yeah. And so there are other issues
16 with John Lott's testimony. Particularly whether he's -- he's
17 reliably applied reliable methods in the field. And one of the
18 methods that he is proposing in this case -- it was present in
19 his preliminary injunction declaration, which has been marked
20 as Plaintiff's Exhibit 10. It was referenced repeatedly during
21 his deposition and it was referenced again in his *Daubert*
22 opposition. He was kind of reiterating this -- this idea he
23 has about why the federal assault weapons ban was purportedly
24 ineffective.

25 And this idea is that the share of mass public

1 shootings involving assault weapons went down during the
2 ten-year period that the federal ban was in effect, and
3 continued to go down after the ban was lifted. And this idea
4 is something that is not seen anywhere in the literature. It
5 hasn't been discussed in any of the cases. This is something
6 that John Lott has just come up with in this case.

7 THE COURT: But can't you -- can't you -- can't you
8 basically say that about every expert witness declaration or
9 testimony that has been put forth before me so far,
10 Mr. Echeverria?

11 I mean, if -- if -- say Lucy Allen, for example.
12 Lucy Allen conducts a study in a way that I can't say I've ever
13 seen or heard another study done the way she did her study.
14 Right? Professor Donahue, some of the information that he puts
15 forward is also stuff that -- that there's really no support
16 for other than Professor Donahue's expression of his opinion,
17 based on the data as he examines it, and he arrives at a
18 certain conclusion. But isn't that what experts always do?

19 I mean -- you know, this is why (laughing) there are
20 so many people that are so skeptical about expert witness
21 testimony. Because, you know, you can express an opinion on
22 anything. The question is, does it eventually carry the day in
23 the trier of fact's mind? Right?

24 So --

25 MR. ECHEVERRIA: We --

1 THE COURT: So I don't know that you've so far said
2 anything that leads me to conclude that -- that Dr. Lott's
3 testimony is inadmissible. It may not carry the day. I'm not
4 saying that it will or it won't. It may not carry the day, but
5 I don't -- I don't know that I see that it's -- that it's
6 inadmissible.

7 Anyway, go ahead.

8 MR. ECHEVERRIA: So the Court, under -- under *Daubert*
9 and its progeny, serves as a gatekeeping function. The -- the
10 Court is -- is absolutely correct that, you know, in some cases
11 experts may come up with novel ideas or novel theories or novel
12 ways of analyzing data or analyzing the facts of a case.

13 But the Court, when -- when -- when the issue is
14 properly raised by a party, the Court does have an obligation
15 to assess whether the methodology used by the expert is a
16 reliable methodology.

17 The methodologies used by defendants' experts in this
18 case, the methodology is -- is a reliable one. It's been a
19 methodology used in other cases. It's been published. Many
20 cases in peer review journals. So there really isn't a
21 question about what Lucy Allen or John Donahue has done.

22 There was some question about, frankly, what -- what
23 Dr. Klarevas had done in looking at gun massacres involving six
24 or more mortalities.

25 But as I drew out of Dr. Lott during his

1 deposition -- and it's just readily apparent on the face of his
2 declaration -- that there are other studies that have looked at
3 six or more fatalities. So it's not like Dr. Klarevas just
4 came up with that on his own. Even so, setting a fatality
5 threshold at six is not an unreliable method.

6 But here we have Dr. Lott coming up with this share
7 test that hasn't been anywhere in the literature, anywhere in
8 the case law. And there are just logical fallacies that
9 underlie this approach that are readily apparent.

10 He doesn't account for substitution effects or
11 spillover effects, which he even discussed in his *Daubert*
12 declaration. He acknowledged that there could be a
13 substitution effect during the federal assault weapons ban,
14 where people would use other weapons instead of assault weapons
15 to try to carry out mass shootings.

16 And during his deposition Dr. Lott acknowledged that
17 the substitution may be of a less effective or less lethal
18 firearm that would make it more difficult for an individual to
19 kill the requisite number of people. So therefore --

20 THE COURT: You kind of lost me on that. So -- so --
21 so are you saying --

22 MR. ECHEVERRIA: Sorry, your Honor.

23 THE COURT: Do me a favor. Just restate that for me
24 one more time.

25 MR. ECHEVERRIA: Sure.

1 So Dr. Lott's share (phonetic) test has several
2 logical problems with it, and one of them is the substitution
3 effect. He fails to account for the fact that during the
4 federal assault weapons ban, when it was more difficult for
5 would-be shooters to acquire assault weapons, they may
6 substitute different weapons. And according to John Lott --

7 THE COURT: But isn't that important?

8 I mean, doesn't -- doesn't -- doesn't that actually
9 work in plaintiffs' favor?

10 MR. ECHEVERRIA: Absolutely not.

11 THE COURT: Why -- why not?

12 MR. ECHEVERRIA: Because by forcing prospective
13 shooters to use different weapons than assault weapons, where
14 our evidence shows that when assault weapons are used more
15 people -- significantly more people are injured, they may use
16 weapons that are less effective at murdering people. And,
17 therefore, it may be more difficult for those shooters to
18 murder the requisite number of people to qualify as a mass
19 shooting. So it's not --

20 THE COURT: But they -- but -- but if I heard you
21 correctly, they did. Right? So during the -- the federal
22 assault weapons ban, the -- by the way, this is -- this is a
23 problematic issue for me that maybe we'll discuss later. But
24 right now I'm going to use a very broad, generic definition of
25 assault weapon.

1 But if what you're saying is true, during the federal
2 assault weapon ban, we still had mass shootings, but the people
3 that are doing the mass shootings were using different weapons.
4 Right?

5 MR. ECHEVERRIA: We're not denying -- we're not
6 disputing that mass shootings continued to happen under the
7 federal assault weapons ban, and that some of those shootings
8 involved other weapons.

9 The point is that the number of mass shootings, in
10 total, went down during the federal assault weapons ban. So
11 the denominator --

12 THE COURT: So let me ask you -- because this has
13 been troubling me quite a bit. So you -- you argue that, look,
14 the -- the legislature has done a -- one -- one bang-up job of
15 considering evidence, which does not have to be like the
16 evidence that you present in court. But evidence. But they've
17 done all of this work, and they came up with this idea that we
18 have to ban these -- these weapons.

19 But -- but -- but the federal government, which has
20 even more resources than the state government does, did the
21 same thing. And they -- and they -- they decided that the
22 assault weapons ban wasn't effective, and so they allowed it to
23 lapse. And that was -- what? 2004. So my math is not very
24 good, but I'm going to say that was at least -- what? 17 years
25 ago? And in 17 years, the federal government has not elected

1 to reinstitute an assault weapons ban. I'm not saying they may
2 not now, in light of recent elections, and so on. But -- but
3 they didn't reinstitute the federal assault weapons ban.

4 So if you can say -- so why -- if the federal
5 government has greater resources than the state and has a much
6 broader ability to compile evidence in support of something, if
7 they concluded that in 2004 that they would allow the -- the
8 ban to lapse, why -- why doesn't -- why is that not something
9 that I should consider as evidence that supports Dr. Lott's
10 conclusion?

11 Because one would expect -- one would expect, would
12 they not, that if in fact the evidence -- the study that
13 Dr. Lott conducted was erroneous or inaccurate or that he
14 reached the wrong conclusion, that the federal government would
15 not have allowed the weapons ban to lapse. Or that certainly
16 in the last 17 years since it lapsed -- I think I've got the
17 date right. Right? Wasn't it in 2004 that it lapsed?

18 MR. ECHEVERRIA: September 2004.

19 THE COURT: Right. So, you know, they would have
20 reenacted it. But they -- they haven't. So leads me to
21 conclude that perhaps Dr. Lott's assessment may not be so
22 wrong.

23 In any event, can I say this, Mr. Echeverria, in
24 order to -- in the interest of time?

25 Look, *Daubert* motions and the Court's function as a

1 gatekeeper are much more important when -- when we have juries,
2 laypeople -- right? -- hearing evidence because they may be
3 confused or misled.

4 But when we have a bench trial, which is what we have
5 here, I'm the one who's -- I don't know how many cases I've
6 tried over the years but it's -- it's more than a handful. And
7 I think I have a pretty good idea of being able to sort through
8 evidence and be able to, you know, separate the wheat from the
9 chaff.

10 So I wonder if we really effectively are using up our
11 time by arguing about this.

12 So far everything that you've said to me -- and by
13 the way, Mr. Echeverria, I -- I -- I love listening to you. I
14 think you do a wonderful job on behalf of your client, and I
15 appreciate your -- your advocacy. But I just think that
16 nothing that you've said to me so far would -- would work to --
17 to make Dr. Lott's evidence inadmissible. Okay?

18 Now, if you want to keep arguing about it, I'll keep
19 listening to you because, you know what, I've got the time.
20 But I'm just telling you where I am right now. Okay?

21 MR. ECHEVERRIA: Your Honor, I do appreciate that --
22 that insight, your Honor.

23 I would note that, you know, we understand and we
24 acknowledged in our *Daubert* motion that this is a bench trial.
25 And the interests in excluding unreliable expert testimony is

1 diminished at a bench trial.

2 But a *Daubert* inquiry is still appropriate even in a
3 bench trial, so we wanted to make that motion, to give the
4 Court an opportunity to examine and probe the reliability of
5 the methods that Dr. Lott used.

6 But, in any event, the evidence that we presented and
7 the arguments that we presented about Dr. Lott's credibility
8 issues and the logical problems with his share test for
9 assessing the federal assault weapons ban relate to the merits
10 of the case, irrespective of whether the Court grants or denies
11 our motion to conclude --

12 THE COURT: Yeah, I gather that. I gather that to be
13 the case.

14 MR. ECHEVERRIA: And I would also like to note that
15 even if the Court -- well, I -- I would want to push back on
16 something that the Court did say earlier, and that is the --
17 that the federal government allowed the federal assault weapons
18 ban to lapse in 2004 because it was ineffective. This is a
19 claim made in many of the cases that I've been litigating,
20 defending California's gun safety laws. And it is just not
21 what Koper's 2004 report says.

22 That report is clear that a final assessment of the
23 efficacy of the federal assault weapons ban was premature and
24 that more time was needed to allow, basically, the medicine to
25 work through the system.

1 THE COURT: But don't you think -- don't you think,
2 Mr. Echeverria -- I mean, are you -- you're certainly not
3 saying to me that our representatives in Congress are any less
4 responsible or -- or more negligent than -- than our
5 representatives in the state legislature. And certainly if
6 they thought that -- that -- that the assault weapons ban was
7 effective -- I mean, common sense tells me that they would not
8 have allowed it to lapse. What they might have done, it seems
9 to me, is they might have extended it and continued with their
10 evidence -- evidentiary search until in fact they were able to
11 come up with a finite conclusion one way or the other: Is this
12 effective or not effective?

13 But I would think that -- that if in fact it was an
14 issue and if -- and if in fact they thought that it was an
15 important legislative accomplishment on their part, that --
16 that they would have not allowed it to lapse. They would have
17 just conducted -- continued to conduct studies until they --
18 until they had a finite answer, or at least an answer that
19 satisfied them. Instead, they said, "Uh, we're going to let
20 this thing lapse."

21 Now, what -- you know, whether they did that because
22 they didn't think that it was effective, I don't know. But it
23 certainly -- it seems to me common sense tells me they wouldn't
24 have allowed it to lapse if they thought it was being
25 effective.

1 Anyway -- but that's arguing the merits, I think,
2 more than anything else. And I think that gets us beyond this
3 *Daubert* motion, I think.

4 MR. ECHEVERRIA: Well, I would just say that the fact
5 that the federal assault weapons ban was allowed to lapse, it
6 doesn't bolster the reliability of John Lott's share test that
7 he's been promoting --

8 THE COURT: Why not? Why not?

9 MR. ECHEVERRIA: Well, because the fact that the
10 federal assault weapons ban lapsed is a political judgment.
11 And as your Honor acknowledges, we can't really say for certain
12 why the legislature allowed the sunset clause to go into
13 effect.

14 I mean, as your Honor --

15 THE COURT: You can say that about any legislative --
16 in fact, you could say it about the legislative enactment that
17 we have before us right now, that it's a political act. Right?

18 MR. ECHEVERRIA: Well, it's a political judgment to
19 enact gun safety laws. But, in this case, it was a political
20 judgment based on facts. Facts --

21 THE COURT: Are you saying that the federal
22 government -- let me make sure I understand, Mr. Echeverria.
23 Are you saying --

24 MR. ECHEVERRIA: Sure.

25 THE COURT: -- that when the federal government

1 allowed the assault weapons ban to lapse, they were not
2 exercising legislative judgment? That they were just being
3 lazy, and they didn't have anything else to do, or -- or -- or
4 had other things to pay attention to and they just said, uh, we
5 don't care about this. Let it lapse.

6 MR. ECHEVERRIA: Well, I am definitely not saying
7 that, your Honor.

8 I'm saying that when the federal assault weapons ban
9 expired there was no statement of legislative intent. There
10 wasn't a declaration that the ban was ineffective, or anything
11 like that.

12 But there was a substantial amount of legislative
13 evidence explaining why Congress enacted the federal assault
14 weapons ban. About the use of assault weapons in mass
15 shootings and gun violence against police and gang violence.

16 THE COURT: Okay.

17 MR. ECHEVERRIA: So I don't think the Court can
18 ascribe a particular motivation to the legislature in allowing
19 the federal assault weapons ban to lapse.

20 THE COURT: Okay.

21 MR. ECHEVERRIA: That's all I'm saying.

22 THE COURT: Listen, can I ask you a question?
23 Because you -- you -- you just -- you -- you kind of caused me
24 to think about something.

25 Was the definition of an assault weapon in the

1 federal assault weapons ban identical to the definition to the
2 assault weapon ban that the State of California is using?

3 MR. ECHEVERRIA: No, they are different, and I'm
4 happy to explain the difference.

5 THE COURT: Tell me the differences.

6 MR. ECHEVERRIA: So the federal assault weapons ban
7 applied to -- was not limited to centerfire rifles like
8 California's Assault Weapons Control Act. So even rimfire
9 rifles that fire .22 caliber ammunition could qualify as an
10 assault weapon under the federal statute.

11 Another -- probably the bigger difference -- the
12 centerfire distinction is kind of underappreciated in the
13 literature. But the big distinction is that the federal ban
14 required a prohibited assault weapon to have two qualifying
15 features. And that -- the federal ban was enacted in 1994.
16 And then, in 2000, California adopted its own features-based
17 test.

18 THE COURT: What were the features in the -- in the
19 federal assault weapons ban?

20 MR. ECHEVERRIA: So I don't have the statute in front
21 of me. It is an exhibit, however, that we submitted. But it's
22 many of the same features that we have identified in --

23 THE COURT: Wait. You said there were two features,
24 and so it can't be many.

25 MR. ECHEVERRIA: So --

1 THE COURT: What were the two features?

2 MR. ECHEVERRIA: No, it -- a weapon would have to
3 have two or more qualifying features. Like a pistol grip, a
4 telescoping stock, folding stock, flash suppressor. It would
5 also have to have a detachable magazine -- capable of accepting
6 a detachable magazine.

7 So if a firearm has two or more features listed in
8 the federal assault weapons ban, it would qualify as an assault
9 weapon under federal law.

10 In California, taking --

11 THE COURT: Was -- was -- was the hand grenade or
12 flare thrower one of the features?

13 MR. ECHEVERRIA: I would have to double-check, your
14 Honor, but I believe it was. I will double-check on that.

15 The flame launcher and grenade launcher feature is
16 not really hotly disputed by the parties in this case, but I
17 will double-check.

18 THE COURT: (Laughing.) Is that right?

19 Okay. I'm laughing because, frankly, I'm sitting
20 here. And I'm -- from the time this case started, I kept
21 asking myself, well, how -- how many -- how many grenade
22 launchers are there out there? And how many people commonly
23 own guns that have grenade launchers? And what do they use
24 them for? I mean, do I go quail hunting and you launch a
25 grenade and you get the whole covey of quail at one time? I

1 don't know. I don't mean to make light of it, but I just
2 thought this is one of the really funny issues. And now you're
3 telling me that it's not hotly debated, and I'm trying to
4 figure out --

5 Is that right, Mr. Lee? Is -- and I'm not -- I'm not
6 trying to steer your argument one way or the other. But is
7 that right? Is it -- is it really true that it's not a big
8 issue?

9 MR. LEE: I wouldn't say it's not hotly debated. It
10 certainly hasn't been the center of the parties' arguments.
11 But everything's at issue in this case.

12 THE COURT: Okay.

13 MR. ECHEVERRIA: If I may, your Honor, the -- the
14 plaintiffs' concede that grenade launchers are legal under
15 federal law. They claim that the grenade launcher feature is
16 superfluous; not that individuals need a grenade launcher for
17 self-defense.

18 General Youngman testified in this case. He has seen
19 grenade launchers affixed to rifles -- typically the M16 -- in
20 his military service. It's a military feature of
21 military-issued weapons. I mean, that's why California has
22 included that feature as -- as an assault weapon feature.

23 THE COURT: Okay.

24 MR. DILLON: Your Honor, if I may make a quick
25 clarification.

1 Grenade launchers, under federal law, are not in fact
2 illegal. They are regulated under the National Firearms Act.
3 So there's nothing illegal about them. Merely, they require
4 additional paperwork in order to, you know, own and possess it.

5 Plaintiffs have also -- Mr. Echeverria has
6 identified -- we've made the claim that the grenade launcher is
7 listed as a destructive device under California law, and so it
8 is already prohibited.

9 The fact that it is included as one of the prohibited
10 features in the California Assault Weapons Act is, you know,
11 unnecessary. And if it were removed, it would change nothing
12 with regard to, you know, California's access to grenade
13 launchers in that respect.

14 THE COURT: Can I ask a question? It's the problem
15 with this case, is that every -- everything raises a question.

16 So let me ask this. Are machine guns -- is it
17 illegal to own a machine gun in the state of California?

18 MR. DILLON: Technically speaking, you can get a
19 Class 3 weapons permit and get lawful possession of a machine
20 gun, although there are additional requirements and standards
21 that you would have to meet before you could ever use one.

22 THE COURT: All right. So it's like the federal --
23 like the federal law --

24 MR. LEE: Well --

25 THE COURT: -- which allows you to own one, but you

1 have to go through some regulatory steps in order to be able to
2 own one. Right?

3 MR. LEE: And -- correct, your Honor. And I do think
4 there is a specific penal code statute pertaining to possession
5 of machine guns. That's a separate statute.

6 THE COURT: Yeah, I understand that. But I was just
7 trying to -- so -- so -- so the reason why I asked the question
8 was because -- all right. So grenade launchers -- as I was
9 joking, I was saying, look, I don't really know how many people
10 would own a grenade launcher. I don't know. I honestly don't
11 know. I have no idea. Maybe they're very popular. Who knows.

12 But -- but it struck me, based on what Mr. Dillon
13 said, that apparently you can own a grenade launcher in
14 California if you go through some regulatory process; just like
15 you can own a machine gun if you go through some regulatory
16 process. Licensing or whatever. Right?

17 I mean, you get a special permit or a special
18 license, or whatever. Right?

19 So -- okay. All right. Anyway. But what I was --
20 the reason why I asked about the federal ban and the definition
21 of an assault weapon is because, you know, this case has been
22 fraught with mixing apples and oranges, and it's been kind of
23 difficult for me in reading some of the things that I've read.
24 Because an assault weapon is not an assault weapon. Just like
25 a mass shooting is not a mass shooting. Right?

1 An assault weapon, for some definitions, may be --
2 may be something. In other definitions, it may be something
3 completely different. Or maybe not completely different but
4 something in addition to.

5 The same thing with mass shootings. We know that
6 some people say three. Others say four. Others say five.
7 Others say six. Some include the shooters. Some do not.

8 So whenever I read all of this material that I have
9 read so far, I find it very confusing because I say to myself,
10 Wait a minute, wait a minute, wait a minute. What kind of
11 assault weapon are they talking about? What is it that we're
12 talking about? What kind of a mass shooting are we talking
13 about? Were we talking about a three, four, five, six? Does
14 it include the shooter?

15 The same thing goes for the commonality issue. And
16 the same thing goes for the number of mass shootings.
17 Sometimes we talk about, well, the mass shootings nationwide.
18 But then we talk about guns only in the state of California.

19 So when we look at some of these studies and some of
20 these -- these statistics that have been provided to me so far,
21 it's kind of confusing because -- well, if -- if you want to
22 talk -- if you -- if you want to compare apples to apples, so
23 then we can do this. And we can say, okay, how many mass
24 shootings have there been in the state of California? And then
25 we look to see how many of these weapons are owned in the state

1 of California.

2 Or if we're going to look nationally, we're going to
3 say, okay, how many mass shootings have there been nationally?
4 And then let's look at the number of weapons that are owned
5 nationally. You see?

6 But it seems like all of these folks -- you know,
7 they seem to pick and choose what seems to support their
8 opinion. Do you follow what I'm saying? And so the assault
9 weapon definition for me is very confusing.

10 So, for example, one of the issues that has recently
11 come up is this new definition about -- what is this? Is this
12 the armory rifle? Or what -- what is the -- the -- the one
13 that -- that -- I don't have it in front of me. But it's not a
14 rifle. It's not a shotgun. And it's not a pistol. But,
15 nevertheless, it's an assault weapon.

16 Do you understand what I'm saying?

17 MR. ECHEVERRIA: I do, your Honor. It -- I do know
18 what you're talking about.

19 This -- your Honor actually raises another important
20 preliminary issue that we should address before getting into
21 the merits of the trial. The plaintiffs are claiming to be
22 challenging newly added provisions to the Assault Weapons
23 Control Act governing rifles, pistols, and shotguns -- or
24 weapons that don't qualify as a rifle, pistol, or shotgun but
25 have certain features.

1 This is not a claim that was raised in their first
2 amended complaint. And they asked -- the plaintiffs' asked for
3 leave to amend their complaint to challenge these provisions
4 shortly before the October evidentiary hearing. And the Court
5 did not allow leave to amend.

6 The Court also observed that their -- or questioned
7 how -- how these newly invented weapons would --

8 THE COURT: What are they? I mean, is there such a
9 thing? What -- is there a weapon that's -- that's a
10 centerfired weapon, that's not --

11 MR. DILLON: Your Honor -- your Honor, if I may?
12 This is John Dillon.

13 THE COURT: Yes.

14 MR. DILLON: Yeah, so this kind of goes to the
15 overall theme of the ever-expanding definition in California of
16 what constitutes an assault weapon.

17 But with regard to your question on this new category
18 of firearm, you know, California's definitions surrounding
19 firearms have -- are very specific. And they identify, you
20 know, what is considered a rifle, what is considered a shotgun,
21 what is considered a handgun based on a mixture of, you know,
22 quite -- their features and how they're intended to be used.

23 For example, a rifle is defined as something that has
24 a rifle barrel and a buttstock that's meant to be fired --
25 bracing, firing against your shoulder. While a handgun is not

1 meant to be braced against your shoulder with a buttstock.

2 In this definition surrounding assault weapons or
3 assault rifles, assault pistols, and assault shotguns, there
4 was a company who created a new -- an arguably new class of
5 firearm in sense of it was just considered a firearm. It did
6 not meet the definition of a rifle, pistol, or shotgun under
7 California law because it had a rifle barrel over 16 inches in
8 length and it did not have a buttstock. So it didn't really
9 meet any of the definitions under California law.

10 And because it didn't meet any of the definitions
11 under California law at the time, it was not regulated by the
12 Assault Weapons Control Act.

13 THE COURT: Oh, I get it. I get it.

14 So, basically, if I -- if I can interrupt you for
15 just a second.

16 By the way, I did not -- I did not grant leave to
17 amend with regards to that. But it's only important to me in
18 regards to the question that I posed before, which is what
19 exactly is an assault weapon?

20 And, as I said, in some cases it's this, and in other
21 cases it's that, and in other cases it's that. And so if we're
22 going to talk about expert witnesses and their opinions, and so
23 on. And if we're going to read articles and we're going to
24 read -- we have to all have a definition that we're working
25 from. Otherwise, it's -- it's totally unmanageable.

1 But, anyway, so I asked the question about this
2 because I was trying to figure out, what -- what -- what the
3 heck is this thing that's -- that's not a rifle, a pistol, or a
4 shotgun?

5 If I understand you correctly, Mr. Dillon, this is
6 like a pistol but it has a barrel that's 16 inches long or
7 more. Is that correct?

8 MR. DILLON: Yes, I believe so, your Honor. So the
9 barrel length is a minimum of 16 inches or greater than 16
10 inches in length.

11 There's no actual buttstock on the firearm, so it's
12 not considered a rifle. And because it has a rifling, it's not
13 considered a shotgun.

14 THE COURT: So what do you consider a rifle barrel
15 that can fire a shotgun shell?

16 MR. DILLON: Well, again, the -- the laws often don't
17 account for the many, many variations of firearms.

18 I think your Honor's referencing the fact that there
19 are certain shotguns that have rifle barrels for hunting
20 purposes, like turkey -- turkey hunting. But under the laws,
21 those still count as shotguns.

22 THE COURT: What do you -- what do you -- what do you
23 call a handgun that can fire a shotgun shell but has a rifle
24 barrel?

25 MR. DILLON: Well, it depends on whether it's federal

1 law or California law, your Honor.

2 THE COURT: (Laughing.)

3 MR. DILLON: I believe under California law, there
4 are firearms that do fire shotgun shell -- handguns that fire
5 shotgun shells with a rifle barrel that are technically
6 considered short-barrel shotguns. But, again, we're going to
7 be getting into the weeds.

8 THE COURT: Well, that's -- that's -- that's the
9 problem. Is that, you know, California's got so many laws
10 and -- you basically have to have a lawyer at your hip in order
11 to know whether when you are handling a firearm you're
12 violating the law and committing a felony. Which has been part
13 of the problem, as I pointed out in the -- in -- in the *Duncan*
14 case.

15 But, anyway, all right. So we've strayed a little
16 bit far afield from where we were going.

17 Is there anything else you wanted to address, Mr. --
18 Mr. Echeverria, in connection with your *Daubert* motion?

19 MR. ECHEVERRIA: One final point. And this is a
20 point that also bleeds into the merits of Dr. Lott's share
21 test. Is that Dr. Lott fails to account for another
22 confounding variable, which was the existence of the ban on
23 large-capacity magazines that existed when the federal assault
24 weapons's ban was in effect. So when the ban was lifted,
25 large-capacity magazines were more readily available and usable

1 in non-assault weapons, allowing those shooters to commit mass
2 shootings killing the requisite number of victims. And,
3 therefore, it's not surprising to see that the share of mass
4 shootings not involving assault weapons may have increased or
5 may have stayed the same, as Dr. Klarevas shows.

6 THE COURT: Where's the evidence? Where's the
7 evidence to support that?

8 MR. ECHEVERRIA: The evidence to support the
9 proposition that large-capacity magazines were made available
10 after the expiration of the federal assault weapons ban and --

11 THE COURT: And used -- and used as a -- not assault
12 weapons. Isn't that what you said?

13 MR. ECHEVERRIA: So after the federal assault weapons
14 ban was lifted, we have evidence from Lucy Allen's study that
15 shows that large-capacity magazines are -- are used in roughly
16 a majority of public mass shootings. So they are used more
17 frequently than assault weapons, so it's not surprising that --

18 THE COURT: Well, wait a minute. Wait a minute.
19 That's -- I'm sorry. See, that's when I get a little confused.

20 But I thought, by definition, if it had the
21 large-capacity magazine, it was an assault weapon?

22 MR. ECHEVERRIA: That is not correct, your Honor.
23 The -- so the -- the large-capacity magazine restrictions in
24 the federal assault weapons ban were a separate aspect of the
25 assault weapons ban.

1 So by ignoring that large-capacity magazines also
2 cause significant fatalities and mass shootings, Dr. Lott --

3 THE COURT: What -- what weapons -- what weapons use
4 large-capacity magazines?

5 Look, so -- so tell me a specific instance where a
6 weapon was used in a mass shooting with a large-capacity
7 magazine, which -- for, again, purposes of making sure we're
8 talking about apples and apples and not apples and oranges, I'm
9 going to assume you're referring to a magazine that holds ten
10 rounds -- or more than ten rounds.

11 MR. ECHEVERRIA: That's right.

12 THE COURT: So what specific incident, for example,
13 can you point to me that tells me there was a weapon that was
14 used, that was not an assault weapon, that had a -- a magazine
15 that was ten rounds -- more than ten rounds? I did not see
16 that in Ms. Allen's declaration. Maybe it's in her deposition.
17 I -- I --

18 MR. ECHEVERRIA: So, I'm sure there are many. Many
19 examples of those kinds of shootings in Ms. Allen's appendix
20 where she lists every single one of the over 160 public mass
21 shootings that she examined.

22 One shooting that comes to mind readily -- because
23 the plaintiffs have made a major issue about it -- is the
24 Virginia Tech incident, where the shooter used, I believe it
25 was, two handguns with large-capacity magazines to murder --

1 well, an extraordinary number of victims. At the time, I
2 believe it was one -- if not the highest fatality mass shooting
3 in the country. So that was an example of a shooting that
4 occurred after the federal assault weapons ban, where someone
5 was able to use non-assault weapons with large-capacity
6 magazines to commit a public mass shooting, killing the
7 requisite number of victims.

8 THE COURT: And why was that not an assault weapon?

9 MR. ECHEVERRIA: It didn't qualify as an assault
10 weapon under federal law. He used, I believe, a Glock with .22
11 caliber ammunition. And I'm -- I'm unfortunately forgetting
12 what the other --

13 THE COURT: .22 caliber. That's rimfire. Right?

14 MR. LEE: Your Honor, this is George Lee. The
15 shooter in Virginia Tech used a Glock handgun. And a .22
16 Walther pistol.

17 MR. ECHEVERRIA: Oh, thank you.

18 THE COURT: Neither one of those is a rimfire?

19 MR. LEE: One -- the .22 -- well, the Walther is a
20 rimfire.

21 THE COURT: .22

22 MR. LEE: Right. The Glock was a 9 millimeter
23 handgun, I believe. And the shooter used a combination of
24 ten-round and 15-round magazines, allegedly.

25 THE COURT: So -- but if I understand the statutes

1 that are before me right now, you could still own a .22 rimfire
2 pistol that has a detachable magazine and holds more than ten
3 rounds. Am I not correct?

4 Am I incorrect in that?

5 MR. LEE: Well, your Honor, after your Honor's ruling
6 in *Duncan*, I believe that would be the case.

7 THE COURT: Okay.

8 MR. ECHEVERRIA: Your Honor, this is John
9 Echeverria --

10 THE COURT: Yes.

11 MR. ECHEVERRIA: -- if I may?

12 So in Lucy Allen's declaration, beginning on page
13 marked DEF0028, she provides an appendix, a listing of all of
14 the mass shootings that she evaluated, with columns coding
15 whether the mass shooting involved a large-capacity magazine --

16 THE COURT: Okay.

17 MR. ECHEVERRIA: -- and/or an assault weapon.

18 So your Honor can readily see -- I hate to add to the
19 workload that your Honor has.

20 THE COURT: That's okay.

21 MR. ECHEVERRIA: It appears that the Court may be
22 interested in this.

23 You can see the particular shootings that involved
24 non-assault weapons with large-capacity magazines and the
25 casualty counts from those shootings. That is all in Lucy

1 Allen's declaration.

2 THE COURT: Okay. Got it.

3 MR. ECHEVERRIA: So aside from the problems with the
4 reliability of John Lott's share test, which is readily
5 explained by substitution effects, spillover effects, and also
6 large-capacity magazine restrictions, there is the -- we -- we
7 do have a motion to preclude other testimony which we presented
8 by way of kind of an omnibus motion in limine that we would
9 also like to -- to present argument to the Court, if the Court
10 has interest in considering our arguments on the motion in
11 limine. I think that would be another important issue to
12 address before the merits.

13 THE COURT: I'm always interested --

14 MR. DILLON: Your Honor?

15 THE COURT: Yes.

16 MR. DILLON: Sorry. This is John Dillon.

17 Before we start going into defendants' arguments on
18 the motion in limine, I would like the opportunity to be heard
19 with regard to opposing the *Daubert* motion.

20 THE COURT: All right. Well, that's fair enough.

21 Go ahead.

22 MR. DILLON: Okay. So we -- we went over a lot of
23 different topics in the last hour but I'll try to be brief.

24 First, we agree with the Court that even if you
25 accept all of the defendants' claims, that they go to the

1 weight that is going to be given to Dr. Lott's testimony, and
2 they're not enough to exclude his testimony whatsoever.

3 We believe plaintiffs have provided sufficient
4 responses to the many allegations against Dr. Lott's
5 credibility in their motion through point-by-point responses in
6 our brief, as well as Dr. Lott's declaration and attached
7 exhibits.

8 We note that most of the credibility allegations
9 coming from defendants stem from, you know, largely a single
10 source of two individuals, Evan DeFilippis and Devin Hughes,
11 who seem to recirculate these same allegations against Dr. Lott
12 every few years or every time he publishes a new book on crimes
13 or gun violence.

14 And defendants have largely ignored the multiple
15 published point-by-point responses that Dr. Lott has drafted
16 over the years that address these allegations. Which, frankly,
17 are unsupported by any real evidence.

18 So we'll just point the Court to -- let's see.
19 Plaintiffs' Trial Exhibit No. 032, Exhibits 1 through 3 -- or 1
20 through 4, that specifically address all of these allegations.

21 Next, with regard -- (coughing) excuse me -- to the
22 allegations surrounding the survey data that the defendants
23 added in their reply brief to the *Daubert* motion, we want to
24 make something very clear to the Court. Is the defendants
25 have, you know, made the claim or at least implicitly implied

1 that Dr. Lott has lied under oath regarding whether or not he
2 gave certain survey data to professors who provided
3 declarations to the Court --

4 THE COURT: Okay. Let me -- let me -- let me stop
5 you, in the interests of time. Look, getting back to my
6 initial issue, we have declarations from people who say that
7 Dr. Lott lied.

8 Those people are -- are -- they're not in front of
9 me. They have not been deposed. There's been no
10 cross-examination. There's been no deposition taken.

11 I will take the allegations as Mr. Echeverria has
12 pointed out. I will consider that. I will consider whether or
13 not there's sufficient information -- I mean, so -- so -- so I
14 guess, to put a finer point on it, who's to say that those two
15 people are not lying, as opposed to Mr. Lott? You see?

16 So I'm going to take --

17 MR. DILLON: Your Honor?

18 THE COURT: Go ahead.

19 MR. DILLON: I'm sorry. I just have to make this
20 point. In fact, we don't even claim that the declarations by
21 the professors are -- we don't believe they're lying. In fact
22 we believe they've just provided testimony on the wrong
23 subject. And that's noted for your Honor's reference.

24 In Dr. Lott's deposition, pages -- (coughing) 169,
25 starting at line 19 --

1 THE COURT: So what you're telling me -- so what
2 you're telling me is that Dr. Lott, in his deposition, says
3 that what those people said in their declarations is incorrect?

4 MR. DILLON: Well, the declarations came after the
5 deposition.

6 Dr. Lott made very clear that there was two sets of
7 data. The data that was given to the professors had to do with
8 the crime deterrence and right to carry concealed handgun
9 article that was published in the *Journal of Legal Studies* in
10 1997.

11 And, in fact, attached to Dr. Hughe's -- or Professor
12 Mustard's declaration is the title page that specifically
13 thanks John Lott for providing that data to those individuals.
14 And Dr. Lott made that clear that was the data he provided
15 them. He never claimed that he provided this survey data --
16 the larger survey data to these professors with regard to a
17 claim about a 98 percent offensive gun use.

18 THE COURT: All right.

19 MR. ECHEVERRIA: Your Honor, this is John Echeverria.
20 Would you mind if I address that point very briefly?

21 THE COURT: No. Look. Look, I think we're spending
22 a lot of time on -- you know, I don't want to be rude, but I
23 think we're spending a lot of time on something that, in my
24 opinion, is not very fruitful. It sounds like we may be -- if
25 you'll pardon the pun -- once again talking about apples and

1 oranges. Or, on the other hand, we may have someone who's not
2 in court, is not subject to cross-examination. I can't see
3 their faces. I can't hear their voice. They say Dr. Lott is
4 lying or is -- is inaccurate. Dr. Lott says, "No, I'm
5 accurate." You know what? I'm going to look at this, and then
6 I'm going to make a decision. That's what I get paid the big
7 bucks to do. This is a -- a -- a trial on the bench. It's not
8 a jury trial.

9 Even if, Mr. Echeverria -- even if -- even if
10 Dr. Lott maybe -- I'll give you the benefit of the doubt.
11 Maybe Dr. Lott is not telling the truth in connection with that
12 particular aspect of his testimony. Perhaps. Maybe. But that
13 doesn't mean that -- that -- for example, that the rest of his
14 testimony, whatever it may be, is not worthy of consideration.

15 You know, our jury instruction says that when someone
16 is willfully false in respect to one part of their testimony,
17 the jury can -- can but is not required to disregard some or
18 all of the testimony. Right?

19 So that's -- I'm going to take your motion in that --
20 in that respect. I'm going to look at it. And I don't want to
21 spend any more time on this. I don't think it's fruitful.

22 So let's move on to the other motions that
23 Mr. Echeverria was about to argue about.

24 THE COURT: Mandy, how are you doing?

25 THE COURT REPORTER: Fine.

1 THE COURT: You doing okay?

2 THE COURT REPORTER: (Nods head.)

3 THE COURT: Okay. So, Mr. Echeverria, why don't you
4 argue the other motions. I think one of them has to do with
5 Mr. Mocsary. Is that correct?

6 MR. ECHEVERRIA: That's right, your Honor. So if the
7 Court will indulge us, my colleague, Mr. Zelidon-Zepeda, who
8 signed the motion in limine, is prepared to argue the motion in
9 limine in more detail and to address the Court's questions, if
10 that's okay.

11 THE COURT: It's fine with me.

12 Mr. Zepeda.

13 MR. ZELIDON-ZEPEDA: Good morning, your Honor. José
14 Zelidon-Zepeda for the defendants.

15 Yes, we wanted to focus on the motion in limine. And
16 rather than rehashing all of the arguments that we made in the
17 motion in limine, we wanted to focus specifically on certain
18 aspects of our motion without obviously prejudicing the other
19 arguments that we made in the motion.

20 And before I do that, I wanted to see if there are
21 specific questions that the Court would like me to address,
22 first.

23 THE COURT: Well, no. I want to listen to you, and
24 then I'll ask questions. How's that?

25 MR. ZELIDON-ZEPEDA: Okay. So in that case, I wanted

1 to focus on -- the motion, overall, deals with six
2 depositions -- declarations, rather. But we wanted to focus on
3 declarations specifically as to Mr. Brown, Mr. Ostini, and
4 Mr. Segal.

5 And these declarations -- focusing, first, on
6 Mr. Segal because I think it's the one that's most
7 straightforward for purposes of this motion in limine. The
8 Court mentioned earlier how important the aspect of
9 cross-examination is.

10 Mr. Segal submitted a declaration, back in early
11 November, regarding certain -- the availability of certain
12 types of weapons. Mr. Segal was not made available for
13 deposition during this particular litigation.

14 So that's an aspect that we don't -- that is
15 highlighted in my declaration --

16 THE COURT: What do you mean he wasn't made
17 available?

18 MR. ZELIDON-ZEPEDA: I mean that we tried to arrange
19 for a deposition date with plaintiffs' counsel for Mr. Segal,
20 so we can go ahead and cross-examine him on the substance of
21 his declaration and the basis for it, and we were never given a
22 deposition date for Mr. Segal.

23 THE COURT: Well, let me -- let me interrupt you.

24 Mr. Lee? Mr. Dillon? What's that about?

25 MR. LEE: That's absolutely correct, your Honor. We

1 could not secure the appearance of Mr. Segal for deposition, so
2 Mr. Zepeda is correct.

3 THE COURT: You tried?

4 MR. LEE: Yes, of course.

5 THE COURT: Okay. But he -- what? He would not
6 submit himself to a deposition? Is that what you're telling
7 me?

8 MR. LEE: Yes, your Honor. That's the best way to --

9 THE COURT: Okay. Well, thank you. I appreciate
10 your -- your mentioning that, Mr. Zepeda.

11 MR. ZELIDON-ZEPEDA: And the other -- the other
12 witnesses, your Honor, besides the fact of the -- that we
13 couldn't cross-examine Mr. Segal, there are other evidentiary
14 issues regarding his declaration that overlap with evidentiary
15 issues for the declarations of Mr. Brown and Mr. Ostini.

16 Now, these individuals also submitted declarations
17 back in early November. Mr. Brown and Mr. Ostini were made
18 available for deposition, and Mr. Brown was deposed.

19 Now, generally, these declarations talk about the
20 availability of certain types of firearms in certain places.
21 The problem with these declarations are that these individuals,
22 as plaintiffs concede in their opposition to the motion in
23 limine, this particular testimony really hinges on records that
24 have not been made available in this litigation. Mr. Brown was
25 deposed, and he testified that basically he obtained the

1 information in his declaration from records maintained by
2 Benelli.

3 Now, Mr. Brown does not work for Benelli. He works
4 for his own company, called Brown & Associates, I believe. And
5 what Mr. Brown made clear at his deposition is that he is not
6 familiar with the way that Benelli keeps its records or any
7 other information regarding that. He has limited access to
8 certain types of information.

9 So this is a problem for two reasons. One, under the
10 best evidence rule, the best evidence of what the document says
11 is the document itself. In this particular situation,
12 Mr. Brown is testifying as to certain records, apparently, that
13 have not -- that were not made available before regarding that.

14 THE COURT: What's -- what's -- what's the
15 significance of his testimony, though? What's the relevance?

16 What's -- what's the -- you know -- what do I care
17 about his testimony?

18 MR. ZELIDON-ZEPEDA: Your Honor, according to --
19 according to plaintiffs, the reason why this testimony was
20 submitted is to show the availability, commonality aspect of
21 the legal analysis for this Court to assess regarding these
22 particular firearms.

23 THE COURT: Mr. Zepeda, are you, as an officer of the
24 court, telling me that whatever these weapons are that
25 Mr. Brown was testifying to are not in fact in common use and

1 in common distribution and -- throughout the country?

2 MR. ZELIDON-ZEPEDA: Your Honor, as an officer of the
3 court, I -- I -- our position is that whatever they're
4 testifying to, we do not know the basis for that, and we do not
5 have --

6 THE COURT: But you're the state. You have lots of
7 resources.

8 MR. ZELIDON-ZEPEDA: But --

9 THE COURT: And I don't want to waste time,
10 Mr. Zepeda, on -- on something that is not worth arguing about.

11 So are you telling me that based on all of the
12 research you, the state -- obviously, I'm assuming that the
13 legislature, when it passed these laws, it must have had some
14 idea of how many of these weapons were out there in -- in --
15 in -- in the market. Otherwise, I would assume they have
16 better things to do than to pass laws about weapons that just
17 really aren't out there in the marketplace.

18 So what I'm asking you, in the interests of time, are
19 you telling me that the state has no information as to whether
20 or not these weapons that Mr. Brown was talking about are not
21 in fact in common use and out in the marketplace throughout the
22 country?

23 MR. ZELIDON-ZEPEDA: Your Honor, there's two
24 responses to that.

25 The type of information that the declarations deal

1 with are the type of information that my understanding is --
2 and Mr. Echeverria being more familiar with those aspects of
3 the case can clarify. But my understanding is those are not
4 the types of records that our office would keep.

5 And, secondarily, I think it's important to emphasize
6 that this is an issue in which plaintiffs have the burden of
7 proof.

8 THE COURT: Well, I don't know that that is so,
9 Mr. Zepeda. Maybe it is. But the fact of the matter is that
10 on its face -- on its face, Mr. Zepeda, the Second Amendment is
11 pretty clear and the *Heller* opinion is pretty clear

12 And so I'm not sure if -- when we're talking about
13 depriving people of their constitutional rights by the state,
14 which has incredible power, that in fact it is true that an
15 individual defendant has to go out and dig for information that
16 it may not be able to obtain, when in fact it seems pretty
17 clear to me that either the state had the information and it
18 was sufficient for it to be able to make a legislative decision
19 on the subject or it did not. And if it did not, then it
20 certainly strikes me that this is a constitutionally-flawed
21 statute.

22 So, once again, I'm going to ask you, Mr. Zepeda, as
23 a person who represents -- and, by the way, you represent both
24 people that like guns and people that hate guns.

25 So my question to you is, do you deny that the

1 weapons that Mr. Brown was testifying in his declaration were
2 or are in fact common weapons that are distributed throughout
3 the country to people who are interested in owning them?

4 MR. ZELIDON-ZEPEDA: Your Honor, I don't have a basis
5 to be able to testify to that fact.

6 THE COURT: Yeah. Okay. All right.

7 MR. ZELIDON-ZEPEDA: Because of the particular --

8 THE COURT: Yeah, all right. Got you. Go ahead.

9 MR. ECHEVERRIA: Your Honor, this is John Echeverria.
10 Pardon me --

11 THE COURT: John, John, let me do this. Because this
12 can get really unwieldy.

13 MR. ECHEVERRIA: Yes.

14 THE COURT: I do this in trials, when I have more
15 than one lawyer. A lawyer will argue -- you know, will
16 argue -- make an opening statement, will question a witness,
17 will do a closing argument.

18 But I can't have lawyers going back and forth and
19 back and forth and back and forth because it gets, (A),
20 confusing for me, and it takes up a lot of time.

21 So -- all right. So let me -- Mr. Zepeda,
22 apparently, is the fellow who is most knowledgeable about this
23 motion in limine, so let me continue to hear from him.

24 All right. Go ahead.

25 MR. ZELIDON-ZEPEDA: And, your Honor, if I could add

1 to my response to the Court's questioning a couple of minutes
2 ago.

3 Mr. Brown's declaration -- and that was filed as
4 document 65, in the court's docket. Mr. Brown talks about
5 specific weapons distributed by Benelli and certain types of
6 models distributed both within and outside California. This is
7 testimony that is based on records of Benelli that have not
8 been presented and that Mr. Brown testified that he is not
9 aware of how the records are maintained and does not have
10 access to these particular records. And that is what heightens
11 our concerns regarding the admissibility under the rules of
12 evidence. And that's --

13 THE COURT: Did you -- did you, by any chance, make
14 any effort to contact Benelli to see if what Mr. Brown was
15 saying was accurate or not?

16 MR. ZELIDON-ZEPEDA: Your Honor, because the -- the
17 declaration of Mr. -- well, the short answer is no.

18 THE COURT: No.

19 MR. ZELIDON-ZEPEDA: But the reason for this is that
20 the declaration itself does not provide -- does not explain
21 that the basis for the testimony are records by Benelli. We
22 did not find that out until Mr. Brown's deposition a week and a
23 half ago, or so. And therefore, between now and then, we have
24 not had a chance to go to Benelli and see whether we can obtain
25 these particular records.

1 THE COURT: Did you pick up the phone and call
2 someone at Benelli to see if they could tell you this was
3 anywhere near the ballpark?

4 MR. ZELIDON-ZEPEDA: No, your Honor. We did not do
5 that.

6 THE COURT: Okay.

7 MR. ZELIDON-ZEPEDA: Given the particular types of
8 evidence and given when we found out this particular aspect of
9 it. And if we had had the information --

10 THE COURT: Do you have -- do you have any evidence
11 that contradicts or disputes what Mr. Brown said?

12 MR. ZELIDON-ZEPEDA: We have no evidence either way,
13 your Honor.

14 THE COURT: Okay.

15 MR. ZELIDON-ZEPEDA: We have no -- until his
16 deposition, we did not know the basis for this. And when we
17 tried to cross-examine him regarding what he knows about how
18 the records are kept, it was apparent, based on his testimony,
19 that he did not know anything about the underlying records.

20 THE COURT: How long have you had Mr. Brown's dec --
21 declaration, Mr. Zepeda?

22 MR. ZELIDON-ZEPEDA: The declaration was filed in
23 early November, your Honor.

24 THE COURT: Okay. All right. Go ahead. What else?

25 MR. ZELIDON-ZEPEDA: Now, as I -- we -- we discussed

1 earlier, the declaration of Mr. Segal -- which is very similar,
2 in terms of the type of information that it describes. But as
3 plaintiffs' counsel --

4 THE COURT: I'm inclined to strike his declaration.
5 If he won't submit himself to a deposition, his testimony is
6 worthless to me.

7 MR. ZELIDON-ZEPEDA: And lastly, your Honor, for
8 purposes of argument in this particular aspect of the case, the
9 declaration of Mr. Ostini -- now, Mr. Ostini's declaration,
10 according to him, what he did is he went and surveyed different
11 websites for the availability of certain types of weapons.

12 Now, Mr. Ostini was not deposed, but he was made
13 available for deposition. And the basis for our evidentiary
14 objection is similarly that Mr. Ostini is basically testifying
15 as to the truth of these particular websites that are
16 purportedly out there. And, therefore, that it's inadmissible
17 under the best evidence rule and the under the rule regarding
18 compilation of voluminous records. Because those underlying
19 records have not been shown to be within an exception to the
20 hearsay rule.

21 THE COURT: Did you -- did you look at any of the
22 websites?

23 MR. ZELIDON-ZEPEDA: I did look at some of the
24 websites, your Honor.

25 THE COURT: Okay. And what's the problem with his --

1 his discussion of what the website says?

2 MR. ZELIDON-ZEPEDA: Well, the problem is, your
3 Honor, that the only reason why that -- those particular
4 websites and the only reason why the declaration itself is
5 relevant is if it shows the availability of these weapons,
6 which depends on whether the websites are indeed the truth of
7 the matter stated and -- because, to that extent, they are
8 hearsay, and the plaintiffs bear the burden to show that there
9 is an exception to the hearsay rule.

10 THE COURT: So if I understand you correctly, I could
11 go and look up that website right now? Right?

12 MR. ZELIDON-ZEPEDA: For -- your Honor, yes. For the
13 website --

14 THE COURT: And so could Mr. Echeverria? So could
15 Mr. Lee? So could Mr. Dillon? So could my law clerk?
16 Correct?

17 MR. ZELIDON-ZEPEDA: To the extent it's still
18 available, that's correct, your Honor.

19 THE COURT: So in fact it's a matter that's out
20 there, available for -- for public consumption. Right?

21 MR. ZELIDON-ZEPEDA: The websites themselves are out
22 there, available to any member of the public. That is correct.

23 THE COURT: And whose websites are these?

24 MR. ZELIDON-ZEPEDA: Well, that's the problem, your
25 Honor. Because as -- as anything that's out there in the

1 Internet, it's not always clear whose websites --

2 THE COURT: Well, who -- who does the website purport
3 to be from?

4 MR. ZELIDON-ZEPEDA: It purports to be, your Honor,
5 from different businesses that are firearms dealers to --

6 THE COURT: What better -- what better source would
7 there be for finding out how many of these weapons are out
8 there in circulation, Mr. Zepeda, than a website by someone who
9 is in fact distributing these firearms? What -- what better
10 evidence can you think of?

11 MR. ZELIDON-ZEPEDA: Presumably, your Honor, if
12 there's an overall agency in the country that's -- that keeps
13 some sort of regulation over these, I would submit to the Court
14 that that would be the better --

15 THE COURT: You mean like the State?

16 MR. ZELIDON-ZEPEDA: No, your Honor. Because we're
17 talking about throughout the country, this would be more --

18 THE COURT: What agency would that be then?

19 MR. ZELIDON-ZEPEDA: Presumably some federal
20 agency --

21 THE COURT: Is there such an agency?

22 MR. ZELIDON-ZEPEDA: I -- I would say that an agency
23 such as the ATF might have something --

24 THE COURT: Well, do you know that for a fact?

25 MR. ZELIDON-ZEPEDA: I do not, your Honor.

1 THE COURT: Then why are you arguing that to me?

2 MR. ZELIDON-ZEPEDA: I'm just trying to answer your
3 Honor's questions.

4 THE COURT: So, in fact, the most reliable
5 information that we would have as to whether or not these
6 weapons are out there, common in the -- in the marketplace,
7 would be the website of people that either sell them or
8 manufacturer them, wouldn't it?

9 MR. ZELIDON-ZEPEDA: To the extent that the websites
10 are accurate and --

11 THE COURT: Yes, but that's true of everything,
12 including your argument. Right? To the extent that your
13 argument is accurate, it has a certain value or certain weight.
14 But if it's not, then it loses its weight. Correct? We agree
15 upon that?

16 MR. ZELIDON-ZEPEDA: As a general proposition, yes,
17 your Honor.

18 THE COURT: But you're familiar with the residual
19 clause of 803?

20 MR. ZELIDON-ZEPEDA: I am, your Honor.

21 THE COURT: You've been given notice of the fact that
22 this is something that is at issue; i.e, the commonality and
23 use of these weapons? You've had notice of that for a long,
24 long -- long, long time. Right?

25 MR. ZELIDON-ZEPEDA: We do not dispute that, your

1 Honor.

2 THE COURT: I'm sorry?

3 MR. ZELIDON-ZEPEDA: We do not dispute that.

4 THE COURT: Okay. All right. Great.

5 Anything else about Mr. Brown or Mr. Ostini's
6 declarations?

7 MR. ZELIDON-ZEPEDA: No, your Honor.

8 THE COURT: All right. Those objections will be
9 overruled under -- certainly under -- at least as to
10 Mr. Ostini. Certainly, under the residual clause of Section
11 803, this Court finds that it's -- these websites are -- are
12 supported by sufficient guarantee of trustworthiness.

13 And, secondly, that they're more probative on the
14 point than any other evidence that could be submitted or has
15 been submitted to me.

16 And I note, further, that the state has not submitted
17 any evidence to contradict the information that's contained in
18 those websites. And the Court, in any event -- since they're
19 publicly available to anyone -- the Court will take judicial
20 notice of them.

21 So, all right. Anything else?

22 MR. ZELIDON-ZEPEDA: Your Honor -- your Honor, if I
23 may, for clarification purposes, your Honor stated that the --
24 the Court was inclined to strike the deposition -- the
25 testimony of Mr. Segal because he wasn't available for

1 deposition. And I just wanted to make --

2 THE COURT: I think I said that.

3 MR. ZELIDON-ZEPEDA: Yes.

4 And the other aspects of it is whether the Court
5 wanted me to address the testimony regarding Mr. Mocsary and
6 Mr. Kraut and Plaintiff Hauffen, or whether the Court deems the
7 argument in our papers to be sufficient.

8 THE COURT: You know, I'll be happy to listen to you,
9 Mr. Zepeda, as I said.

10 Yeah, go ahead.

11 MR. ZELIDON-ZEPEDA: In that case, I'll go next to
12 the testimony of Mr. Mocsary.

13 Mr. Mocsary testified at the evidentiary hearing the
14 Court held in the fall.

15 The aspect -- we're focusing specifically on aspects
16 of Mr. Mocsary's testimony that are really legal conclusions.
17 And our objection is that under the case law, the
18 determinations regarding the law are the problems for the Court
19 to decide --

20 THE COURT: Yeah, let me -- let me save you some
21 time. I know what -- what a witness can testify to, and I know
22 what my job is.

23 And so to the extent that a legal conclusion is
24 expressed by any witness, those legal conclusions will be
25 disregarded. I'll make my own legal conclusions.

1 MR. ZELIDON-ZEPEDA: In that case, that's all we have
2 on the motion in limine, your Honor.

3 THE COURT: Well, good.

4 All right. I guess I should -- you know, we've been
5 going quite a while.

6 So tell me -- tell me how -- how else -- so we've
7 heard the motions. The motions in lim. How do you propose
8 that we go on from here?

9 Let's start with Mr. Lee.

10 MR. LEE: Yes, your Honor.

11 THE COURT: Or Mr. Dillon.

12 What's -- what's -- what's your thought?

13 MR. LEE: This is George Lee, your Honor.

14 Once again, I think that where the parties are
15 prepared, having gotten the preliminary motions out of the way,
16 to start discussing the evidence so that the Court can have the
17 parties understanding and view and characterization of the
18 evidence in mind as it starts to go through the evidence and
19 particularly to know where to look. So we'll be prepared to --
20 to discuss and argue that next.

21 THE COURT: All right. Mr. Echeverria, do you agree?

22 MR. ECHEVERRIA: Yes, your Honor. We're prepared to
23 discuss the -- the facts that we propose that the Court finds
24 and to discuss the legal conclusions that could be reached from
25 those facts.

1 THE COURT: All right. So -- so sort of, in essence,
2 if I can -- if I can -- if I can draw an analogy, what we're
3 talking about doing now is more or less a closing argument.
4 Right?

5 MR. ECHEVERRIA: (Nods head.)

6 MR. LEE: Your Honor, this is George Lee. It's sort
7 of a hybrid opening and closing because we're going to talk
8 about what the evidence that was just submitted yesterday has
9 shown and will show.

10 So, yes, in that -- but, in that respect, that is --
11 that is what we intend to do.

12 THE COURT: All right. Mr. Lee, how long do you
13 anticipate? As -- is it going to be you? Mr. Dillon? Who am
14 I going to be hearing from? I don't want to be hearing from --
15 from a whole bunch of folks. So --

16 MR. LEE: It will -- for the plaintiffs, your Honor,
17 it will be me, except to the extent that the Court wishes to
18 discuss anything pertaining to John Lott's testimony. I would
19 defer to Mr. Dillon as to any questions on the Lott testimony,
20 or rebuttal.

21 But other than that, to answer your Honor's first
22 question, how long can we go, well, how long do we have?

23 I mean, we -- there's a lot of evidence, as the Court
24 noted. And we can talk about this stuff all day, if it pleases
25 the Court. But if the Court wishes a more curtailed summary,

1 we can certainly endeavor to do that. But, as the Court noted,
2 there is a lot of material.

3 THE COURT: Okay. So -- so what do you -- you must
4 have had some inkling of how long you were going to -- to talk
5 about this, assuming that the judge didn't interrupt you and
6 ask a bunch of questions.

7 MR. LEE: Assuming no colloquy, your Honor, I think
8 we could probably go for 90 minutes or two hours.

9 But, of course, I'm sure the Court's going to want to
10 engage in robust colloquy on --

11 THE COURT: You know me too well. (Laughing.)

12 Okay. How about you, Mr. Echeverria? What's your
13 plan?

14 MR. ECHEVERRIA: So -- so our plan is to -- to make a
15 presentation to the Court, kind of like a hybrid closing
16 argument and opening statement highlighting the arguments that
17 we've presented to the Court in written form in our proposed
18 findings and conclusions of law. And -- and highlighting
19 particular evidence related to those findings of fact and
20 conclusions of law.

21 I -- I -- I don't want to belabor points that are
22 already made in our proposed findings of fact and conclusions
23 of law. And I would also emphasize, again, that we think it
24 would make sense, after the parties' presentations and after
25 the Court has formally admitted evidence into the record, that

1 the parties have an opportunity to provide in a succinct form
2 the proposed findings of fact and conclusions of law based on
3 all of the evidence and citations to the record. And perhaps,
4 your Honor, it may make sense to have an additional round where
5 the parties can add a column to their proposed findings of fact
6 and conclusions of law for rebuttal findings of fact and
7 conclusions of law.

8 That might be a very helpful way to present the
9 evidence to the Court. Because, you know, the defendants
10 appreciate that, you know, we do think that the statute is
11 straightforward in defining an assault weapon and that the
12 evidence about mass shootings and about the use of assault
13 weapons nationwide is pretty clear.

14 But we appreciate that there's a lot of evidence and
15 a lot of issues for the Court to handle and --

16 THE COURT: I -- I -- I think you're -- you're right
17 on, Mr. Echeverria. I shouldn't say "as always," but as most
18 often you are. And I think that would be a great suggestion
19 for the parties to be able to present the rebuttal to the
20 findings of fact and conclusions of law.

21 Okay. So I have something that I have to do at noon.
22 It will probably take an hour and a half. So that means that
23 we would be back at 1:30.

24 We still have a few minutes. I can listen for 15
25 minutes, or so, before we adjourn.

1 Mandy, are you still doing okay?

2 THE COURT REPORTER: Yes.

3 THE COURT: All right. You let me know. All right?

4 So who wants to go first?

5 MR. LEE: Your Honor, I think the plaintiffs should
6 go first, and I'm not sure if the Court's going to entertain it
7 in the sense that there may be some rebuttal. The Court can
8 structure it however it wishes, of course.

9 THE COURT: Yes, we'll see. We'll play it by ear.
10 This is kind of a novel situation. We'll see how it goes.
11 Okay?

12 All right. Go ahead.

13 MR. LEE: Thank you, your Honor.

14 First of all, thank you for indulging your
15 understanding and for allowing the parties to present their
16 evidence and bring this process in this very -- "unprecedented
17 times" is sort of an overused statement. But -- but for -- I
18 think Mr. Echeverria was right. That we would all prefer to be
19 there in person, questioning witnesses, cross-examining
20 witnesses, doing the usual stuff. And we certainly appreciate
21 the Court's indulging us and allowing to present the evidence
22 in this manner.

23 I think the benefit is that we were able to get this
24 matter to your Honor quicker this way for sure and in a
25 compressed time. But all of the evidence is in. And so we

1 appreciate the Court's indulgence in that regard.

2 Your Honor, we begin this discussion -- and we will
3 end it, of course, with *Heller*.

4 In *Heller*, the Court stated, in responding to the
5 suggestion that -- that only those arms in existence at the --
6 during the 18th century were protected by the Second Amendment,
7 the Court rejected that notion. Flat out said that the Second
8 Amendment extends prima facie to all instruments that
9 constitute bearable arms, even those that were not in existence
10 at the time of the founding. So we start with that principle.

11 And, of course, *Heller* went on to say that under all
12 of these principles that the -- when it comes to the
13 enshrinement of constitutional rights, that when that happens,
14 it necessarily takes certain policy choices off the table.

15 So we believe that this Court understands very well
16 these two principles when, at the beginning of the hearing back
17 in October, the Court sort of announced that this is the
18 framework under which the -- this Court would be viewing the
19 evidence.

20 And so -- but this is how we view the case. This is
21 how -- the eye in which we view the evidence. And I think it
22 makes sense for us to talk specifically -- as your Honor
23 referenced this morning, part of the confusion is that there's
24 many different definitions of assault weapons over the years.

25 So I think it's helpful for the plaintiffs now to

1 talk about what's at issue in this case and what isn't at issue
2 in this case. Because even under California law there's
3 several different types of assault weapons or definitions of
4 assault weapons.

5 So I want to talk very briefly, in the 15 minutes
6 that we have before the break, about the three categories of
7 assault weapons.

8 Now, these three categories of assault weapons go
9 back to 1989. And when I think about all of the various
10 assault weapons, laws that the State has attempted to enact
11 over the years, I think about the quote from that -- the Roman
12 orator, Marcus Tullius Cicero, who famously said that the more
13 laws there are, the less justice there is.

14 Nothing exemplifies this principle more than if you
15 take a look at California's tortured assault weapons bans that
16 from -- since 1989, have attempted, in an ever-expanding
17 definition, to justify the prohibition of the entire classes of
18 weapons by giving it a menacing label called "assault weapon."

19 There are three generally widely recognized
20 categories of assault weapons. And this isn't just me saying
21 it to your Honor. This is straight from the DOJ's website. I
22 tried to get a stipulation from the defense on this issue, but
23 there's also arguably a fourth category of assault weapon,
24 which we can talk about.

25 But what's at issue in this case, your Honor, is the

1 third category. Category 3. And these are firearms that are
2 defined as assault weapons based upon specific --

3 THE COURT: Just -- just very quickly. When you said
4 "DOJ," I'm assuming that you're talking about the California
5 Department of Justice. Right?

6 MR. LEE: Correct, your Honor. The California
7 Department of Justice. And I think Blake Graham, who is the
8 DOJ agent supervisor who submitted declarations in this case,
9 we're all on the same page. There's widely three --
10 recognized, three general categories of assault weapons.

11 Category 1 is a lists of firearms that are specified
12 and spelled out and stated right in the statute, which is --

13 THE COURT: That's the roster.

14 MR. LEE: It's not a roster, your Honor. It's
15 called -- it's called the list.

16 THE COURT: Okay.

17 MR. LEE: And it's found at Penal Code Section 30510.
18 And these originally named assault weapons are listed by name,
19 type, series, and models. And they pertain to rifles, pistols,
20 and shotguns.

21 Those are assault weapons by definition on the
22 California assault weapons law which are not at issue.

23 Category 1 is not at issue in this case.

24 The second category --

25 THE COURT: Well, let me stop you because -- because

1 this is important. You see, when we're talking about assault
2 weapons -- this -- this is what I said a little while ago that
3 is so concerning to me. So when we're talking about assault
4 weapons, one police report, one newspaper article, one expert
5 report may be talking about an assault weapon. Well, it kind
6 of makes a difference as to what is the assault weapon we're
7 talking about. Are we talking about apples and oranges?

8 So what is it about the weapons that -- I realize
9 these are not in -- in dispute. But it's important for me, in
10 a sense that -- so, for example, when I read -- I don't know.
11 Say -- say a newspaper article that says that, you know, John
12 Doe shot someone with an assault weapon.

13 Okay. What I need to know is what was that assault
14 weapon. What -- what are we talking about? Are we talking
15 about Category 1, Category 2, Category 3? Do you see what I'm
16 saying?

17 Does that make any sense to you?

18 MR. LEE: Yes, your Honor. And your Honor's latched
19 onto the importance -- the important point and how it ties in.

20 Because Lucy Allen, in her report, she was employing
21 the same methodology that she used in the *Rupp versus Becerra*
22 case in the Central District.

23 The plaintiffs in *Rupp* were challenging all of the
24 categories, including the Category 1 assault weapons. So when
25 Lucy Allen in this case, the case before your Honor, submits a

1 report that includes a list of mass shootings -- 161 mass
2 shootings -- public mass shootings that she looked at that
3 includes the California definition of assault weapon, she is
4 including -- necessarily -- assault weapons that are not at
5 issue in this case, the Category 1 assault weapons.

6 So -- so, yes, that is an important point. And I
7 think it undermines a lot of the reliance that the state has on
8 both the voluminous submissions that it -- that it submitted in
9 this case that relate to the *Rupp* case, as well as the expert
10 report of Lucy Allen.

11 I mean, if she's saying assault weapon is based on
12 purely the California definition -- and I -- by the way, I --
13 I -- I attempted to engage her in this in the deposition.

14 She refused to acknowledge that perhaps her -- her --
15 the scope of what she was asked to look at was broader than
16 what the plaintiffs are claiming in this case. But that's --
17 but that's exactly right, your Honor.

18 Case in point -- and as far as news stories, that --
19 that is -- that is exactly the point, your Honor.

20 If I may attempt to put an exhibit on the screen --
21 I'm not sure if -- if the Court will allow or if I may do this.
22 But this is Plaintiff's Exhibit No. 29, which we submitted to
23 the Court.

24 THE COURT: Okay. I don't know if -- Glenn, can you
25 do that?

1 MR. LEE: So I'm not sure if --

2 THE COURT: Okay. So I've got the exhibit in front
3 of me, but then I've lost you. So --

4 MR. LEE: And I'll switch off in a minute.

5 But here's -- here's a news report about a 2017
6 incident that took place here in San Francisco. A UPS driver
7 or worker shot three of his colleagues, or -- or -- or some
8 number like that. And it was reported in this -- in this news
9 report that this -- that they recovered two guns, including an
10 assault pistol.

11 And you simply take it as fact, when you read these
12 news reports, that this -- that this was a -- an assault
13 weapon, simply because the police may have described it as an
14 assault weapon or an assault pistol.

15 That -- as it turns out, the firearm that was used in
16 that case was a firearm that was an assault -- that was not
17 named as an assault weapon on the list. It's -- it -- it was a
18 similar type, but it was not specifically named as an assault
19 weapon. And I don't know what makes it an assault weapon in
20 anyone's analysis.

21 So I think that it's important to understand that --

22 THE COURT: Well, just a second. Because -- because
23 I read the exhibit. And what I read was -- and it was either a
24 semiautomatic or a fully automatic pistol, neither of which
25 really is an assault weapon, necessarily. A semiautomatic

1 pistol, I suppose, could be under some definitions. The fully
2 automatic pistol would be just completely illegal unless you
3 registered, as Mr. Dillon pointed out a little while ago.

4 So -- so it seems, from reading that paragraph of the
5 news article, that it -- at least one is not really an assault
6 weapon, as we're talking about it, because it's a fully
7 automatic weapon. Right? And the other one may or may not be,
8 depending on whether it has any -- whether it's on this list of
9 Category I or whether it has any of the features that -- you
10 know, what people refer to as the evil features. Right?

11 MR. LEE: Correct.

12 THE COURT: All right.

13 MR. LEE: So if it's fully automatic -- which it's
14 never really been determined. But if was it was fully
15 automatic -- and I don't think it was -- then it's not an
16 assault weapon. An assault weapon is semiautomatic, by
17 statutory definition.

18 So this highlights -- and I don't mean to rely on
19 this as like the smoking gun, so to speak, evidence.

20 THE COURT: (Laughing.)

21 MR. LEE: And this just highlights the problems
22 that -- that we encounter, as your Honor noted, in trying to
23 determine what the scope of the analysis was in the various
24 textbooks that have presented some -- some evidence before your
25 Honor.

1 Neither -- neither Category 1 nor 2 are at issue in
2 this case, your Honor. What is at issue are --

3 THE COURT: What's Category 2?

4 MR. LEE: Well, Category 2 is a second list that was
5 derived -- that -- that the Department of Justice published
6 pursuant to regulations.

7 And those are found at 11 California code of
8 Regulations Section 5499. And that's a list of --

9 THE COURT: If I could interrupt you. What -- what
10 made these weapons assault weapons? I mean -- (laughing.)

11 Okay. By definition, they're assault weapons because
12 we call them assault weapons. But what is it that made these
13 particular weapons -- what caused them to be on this Category 1
14 and Category 2 list as assault weapons that were prohibited by
15 citizens to own?

16 MR. LEE: I think that if you look at the legislative
17 history and what was happening at the time, there was a real
18 concern about, really, public shootings.

19 THE COURT: Yes.

20 MR. LEE: And that spurred the legislature to say,
21 well, let's name a bunch of weapons that the shooters use. For
22 example, the person who shot the McDonald's in San Ysidro -- I
23 think it was 1984 -- used an Uzi. So let's put an Uzi on the
24 list.

25 The shooter at 101 California, down the street here

1 from where I am now, used an Intratec, tech -- tech --

2 THE COURT: I get you.

3 So what the legislature did, they looked at weapons
4 that had been used in particular shootings, and then they said,
5 "These particular weapons are now going to be considered
6 assault weapons and are therefore banned or protected." Right?

7 MR. LEE: Correct. Correct.

8 Category 2 is an interesting --

9 THE COURT: By the way, Mr. Echeverria, do you agree
10 with that assessment? Is that good enough for you?

11 MR. ECHEVERRIA: Which assessment are you referring
12 to specifically?

13 THE COURT: How we get to Category 1 and Category 2?

14 MR. ECHEVERRIA: Yeah, that's a fair
15 characterization.

16 Category 1 is the make and model. Category 2 is the
17 regulation list.

18 THE COURT: All right. But that -- but that they
19 were adopted or they were banned, or whatever, because they had
20 been specific -- types of specific weapons that were used in
21 incidents that were before the legislature.

22 In other words, as Mr. Lee pointed out, in the one
23 case someone used an Uzi. In the other case they used an
24 Intratec. And so the legislature was able to arrive at a list
25 of weapons that have been used in these particular shootings,

1 and that's how they came up with Category 1 and Category 2.

2 Is that -- is that fair?

3 MR. ECHEVERRIA: I wouldn't say that that's an
4 entirely accurate assessment. The legislature did not only
5 include firearms that had actually been used in documented mass
6 shootings.

7 I don't believe the record in this case has this
8 information. But in the *Rupp versus Becerra* case, one of the
9 expert witnesses named by the plaintiffs in this case was an
10 individual named Steven Helsley.

11 Steven Helsley is a former Department of Justice
12 official who became an NRA lobbyist. Mr. Helsley was the
13 individual who actually came up with the original list of
14 assault weapons that became what is now Section 30510.

15 The way in which he arrived at that list was an -- an
16 iterative process. Some of the weapons had been used actually
17 in mass shootings. Other weapons had similar features as those
18 weapons. So the -- the way in which the actual list was
19 arrived at was an iterative process.

20 But, frankly, it -- the way in which the list was
21 compiled, it had to be amended by regulation in what became
22 Category 2. Showed the problems with trying to regulate these
23 types of weapons and these types of configurations by listing
24 them.

25 And that's why California, in 2000, adopted the

1 features-based test.

2 THE COURT: Okay. Got you. Okay. All right.

3 MR. LEE: And, your Honor, if your Honor really wants
4 to get into this, we can talk about how Category 2 came about.
5 It's an --

6 THE COURT: The only reason why -- the only reason
7 why I'm asking the question is because I -- I'm going to assume
8 that our legislature doesn't act in a capricious and arbitrary
9 manner. Okay?

10 They don't -- they don't just pull stuff out of the
11 air and then say, Well, we're going to ban this. Why? Because
12 we like it, or because we feel like it today. Right?

13 So there has to be some reason why they do what they
14 do. And I'm trying to figure out why there is a distinction
15 between Category 1, Category 2, Category 3.

16 I think Mr. Echeverria kind of explained it to me by
17 telling me that originally it started by -- by identifying
18 specific models.

19 And then, when they concluded that that was not
20 enough, that's how they came up with this evil features problem
21 that I'm faced with today.

22 So, okay, that explains it to me. That's --
23 that's -- that satisfies my curiosity.

24 So sorry to interrupt you, but I hope you're ready to
25 be interrupted a lot because I ask a lot of questions.

1 MR. LEE: I welcome it, your Honor. I think it's
2 helpful for processing.

3 And I certainly can't adopt the Court's thinking that
4 the legislature does things -- doesn't do things arbitrarily.
5 I mean, I'm an advocate. And maybe I can say this. But I do
6 think that the list of weapons that they came up with, really,
7 are just arbitrary. It sounds like something scary. It sounds
8 like something they may have seen on *Miami Vice* at the time.
9 So let's just put it on the list. I think that's how --
10 frankly, how a lot of legislation gets done in this field.
11 But, you know, that -- we're getting far afield on that issue.

12 But if your Honor really wishes to delve into how
13 Category 1 and Category 2 are limited, there are two California
14 Supreme Court cases that are interesting as background. The
15 first is called *Kasler versus Lockyer*, and that's at 23 Cal 4,
16 472.

17 And the second case, which more limits -- is more
18 limiting of the first case, is called *Harrott versus County of*
19 *Kings*. It's at 25 Cal 4th, 1138. And that's a 2001 case.

20 And that really will tell you, your Honor, how the
21 Category 1 and 2 series of firearms were identified,
22 promulgated, and limited.

23 But, I should say, it's not that while those two
24 cases, *Kasler* and *Lockyer*, were working their way through the
25 court. That's when -- that's when the -- the legislature comes

1 up with this third category, which is found at -- which is now
2 found at Code Section 30515.

3 THE COURT: You know what? I'm sorry. I failed to
4 look at the clock. And I realize that it is noon, and I have
5 somewhere that I need to be. So why don't we pick up at 1:30.
6 Okay?

7 We'll be in recess until then. Thank you.

8 MR. LEE: Thank you, your Honor.

9 (Recess taken at 12:03 p.m.)

10 (Resuming at 1:30 p.m.)

11 THE CLERK: Your Honor, there is someone in the
12 waiting room with a phone number and no name, so I don't know
13 who that is. I'm not going to admit them.

14 MR. ECHEVERRIA: Your Honor, I believe -- this is
15 John Echeverria. I believe that's Peter Chang, who's counsel
16 for defendants.

17 THE COURT: The phone number is 714-791-4214. That's
18 what I'm showing.

19 MR. JAFFE: That sounds like Adam Kraut, that we have
20 previously let in for the first part of the hearing.

21 THE COURT: Okay. All right.

22 Okay. If it's Mr. Kraut, let him in. If it's
23 Mr. Chang, let him in.

24 THE CLERK: They're in.

25 THE COURT: I see Mr. Chang on the video.

1 All right. Well, good afternoon. We're back.

2 I believe, Mr. Lee, you were telling me what you
3 thought was important about the case. So why don't you go
4 ahead.

5 MR. LEE: Thank you, your Honor.

6 So I think what we've been trying to emphasize in
7 this -- in the few minutes before we broke is that this lawsuit
8 pertains to the definition of assault weapon as it appears
9 under Section 30515(a), where those features or
10 characteristics -- some call them SB23 assault weapons. But
11 those are the types of firearms that are issued in the case.

12 Now, beyond the magic incantations of capacity and
13 function, which is at the heart of the definition of assault
14 weapon, there are two unassailable facts that the state really
15 cannot reasonably dispute with regard to these firearms.

16 One, that these firearms are simply and functionally
17 semiautomatic firearms which are, today, by far and away a vast
18 majority of the firearms that are produced and sold today.

19 As we've established in the case, semiautomatic
20 technology has been around since the 1880s. So this is nothing
21 new. These are all, functionally, simply semiautomatic
22 firearms that are normal firearms.

23 And that the -- and, secondly, the state really
24 cannot dispute that these firearms are commonly owned in --
25 under any metric or under any measure -- or any way that you

1 want to look at it -- in the millions by our fellow Americans;
2 from our state of California to Maine.

3 So I don't really think that the state can dispute
4 that, or these two facts. One, that these are simply
5 functionally semiautomatic firearms. And, secondly, that they
6 are owned in the millions.

7 So I want to start, your Honor --

8 THE COURT: Wait a minute. When you -- when you say
9 they can't dispute that. I -- I think I took Mr. Zepeda to
10 task because he was essentially objecting to -- I believe it
11 was Mr. Brown or Mr. Ostini's declarations. And I thought that
12 the fact that there's millions of these out there, outstanding,
13 that that was sort of a given fact. And I thought that the
14 state would not argue about something that -- that was so
15 obvious. But Mr. Zepeda seemed to take issue with that.

16 So what -- what do you mean that the state doesn't --
17 doesn't -- doesn't take issue with the fact that these firearms
18 are commonly owned?

19 MR. LEE: I'm not saying that they are taking issue.
20 I'm saying they can't.

21 THE COURT: Oh, I'm sorry.

22 MR. LEE: There -- there really is no dispute that
23 these are -- these are firearms that are commonly owned in the
24 millions by our fellow Americans.

25 THE COURT: Well, there has to be a dispute. Because

1 if there's no dispute, then they would agree to it. And if
2 they agreed to it, then it wouldn't be an issue, we wouldn't
3 have wasted time talking about Mr. Ostini -- Ostini's
4 declarations and the websites, and all of that.

5 What -- what am I missing?

6 MR. LEE: Well, I -- I think your Honor is correct in
7 the sense that I don't really know what there is to talk about.
8 Although, we certainly have submitted a substantial amount of
9 evidence on all of these points.

10 And I would like to start, I think, with the most
11 basic premise or the most basic aspect of this. That under
12 *Heller*, as the Court is aware, the Court reaffirmed the right
13 of people to own firearms in common use for lawful purposes.
14 And commonality is the issue. And that's -- but that's
15 measured in a few ways.

16 We don't think it's purely a numbers test, but the
17 most simple way to look at it is commonality of ownership. Are
18 the arms in question commonly owned and by law-abiding people
19 for lawful purposes? And I think, again, your Honor is
20 correct, we have shown overwhelmingly that the firearms in
21 question are commonly owned.

22 Semiautomatic firearms bearing these features that
23 are prohibited by Section 30515(a) are widely available and
24 popular. These characteristics are most commonly found on
25 firearms that have the ability to accept a detachable magazine.

1 And the most popular among these firearms is, of
2 course, the AR-15 platform, or firearms that are modeled on the
3 AR-15 pattern. And that is true, of course, both nationally
4 and in the state of California. This is a hugely popular
5 rifle. It's -- it's popular in wide civilian circles and used
6 throughout the United States; I think as this Court
7 acknowledged and found in the *Duncan* decision.

8 Now, the AR-15, in particular, is especially popular
9 because of its light weight, because it's easy to shoot -- as
10 Mr. Kapelsohn testified, because it has mild recoil, and
11 because it has good ergonomics. All of which make it well
12 suited for (indiscernible due to interference) of all statures,
13 sexes, younger people. Just makes it an easy rifle to shoot
14 and to train on.

15 So -- and this is nothing new. The AR-15 rifle has
16 been existence since the 1950s. So this is not some type of
17 new-found technology, this is something that has steadily been
18 gaining popularity for the last half century.

19 Now, for common use, of course, we look nationwide.
20 We don't just limit our -- our look in California. And that
21 makes sense for several reasons.

22 First of all, the Second Amendment does mean
23 different things in different parts of the country. As -- as
24 the Supreme Court indicated in the *Caetano* case, the more
25 relevant statistic is that hundreds of thousands of Tasers and

1 stun guns have been sold to private citizens who may lawfully
2 possess them in 45 states.

3 So, of course, if the Supreme Court is indicating
4 that the look is to be nationwide, that that has to make sense.
5 And as this Court -- as the Ninth Circuit noted in affirming
6 this Court in *Duncan*, protected arms may not be numerically
7 common in a particular jurisdiction by virtue of an
8 unchallenged unconstitutional regulation.

9 So you can't say that a firearms commonality is -- or
10 uncommonality, that -- that a prohibition is the source of that
11 uncommonality. So that's why you have to look -- that's one
12 reason that you have to look nationwide and not just in that
13 particular jurisdiction. And several other courts have agreed
14 with this proposition; that a law's existence can't be the
15 source of its own constitutional validity.

16 So we look nationwide to -- first of all, to
17 determine how popular this rifle or these types of rifles are.
18 And we've submitted, your Honor, the declaration and the
19 testimony at the hearing in October, Mr. Curcuruto, who is a
20 leading industry source and authority and the only one,
21 frankly, to author this type of study that is to look at what
22 are the numbers. And, again, numbers are not dispositive but
23 numbers are helpful and certainly a guideline.

24 And in his declaration, your Honor, which we've
25 submitted as Plaintiffs' Exhibit 004 in this matter --

1 THE COURT: I'm sorry. Exhibit what?

2 MR. LEE: 004. So this is the Curcuruto declaration.

3 THE COURT: Okay.

4 MR. LEE: And he's indicated that there are
5 currently -- his conclusion is that there are currently an
6 estimated 19.8 million modern semiautomatic rifles produced in
7 the U.S. or imported between the years of 1990 and 2018.

8 And which he called -- as your Honor might recall
9 from his testimony, he calls modern sporting rifles, which are
10 firearms that have these characteristics that shift -- that
11 have a detachable magazine. Semiautomatic firearms that have a
12 detachable magazine. And that -- and that most of them share
13 these characteristics. Most notably, the pistol grip.

14 So I want to walk through Mr. Curcuruto's terminology
15 because I suspect that the state is going to dispute or nitpick
16 or take some issue with the way that Mr. Curcuruto arrived at
17 this number.

18 So this is laid out in his deposition --

19 THE COURT: Let me ask you a question. If I divided
20 that -- that number by ten -- okay? If I said Mr. Curcuruto is
21 all wet, he doesn't know what he's talking about, so I'm going
22 to -- I'm going to apply a factor of 10 percent and say he's 90
23 percent wrong, that would give me 1.98 million of these.

24 Now, I can't think that the state -- especially not
25 Mr. Echeverria, is going to look me in the eye and is going to

1 say to me the following. Number one, there are not 1.9 million
2 of these weapons in circulation in the United States. And,
3 number two, he's not going to say to me that that is not a
4 large number of these weapons.

5 Am I right, Mr. Echeverria?

6 MR. ECHEVERRIA: There is some truth in what your
7 Honor's saying but there are important points of clarification
8 that -- that I would make.

9 THE COURT: Okay. All right. So we -- we can get to
10 those.

11 So this is why I was pressing Mr. Zepeda. I didn't
12 mean to be rude to him.

13 But the fact of the matter is that even if you take
14 that 19 million and you say, okay, this -- this guy is all wet.
15 I'm only going to give him credit for 10 percent of these --
16 all right? 1.9 million is a lot. It's a lot of weapons of
17 this type out there.

18 Now, I'm not saying I'm discounting Mr. Curcuruto's
19 analysis. I'm not saying that. I'm just simply posing --
20 putting myself in the position and saying, you know, that --
21 that -- I mean, I -- I don't know. I think -- was it Kolbe?

22 I know that there are cases that have already talked
23 about the fact that -- that -- that there's no question that
24 there are a lot of these weapons out there.

25 So, frankly, I don't know why we're even spending

1 time on this issue. But --

2 MR. LEE: Thank you, your Honor.

3 There's two points to follow up on your Honor's
4 thoughts on this.

5 One is that, yes, the issue of commonality has
6 already been established in a number of cases. Again, *Caetano*,
7 *Heller 2*, *New York State Rifle and Pistol Association*, the
8 *Kolbe* decision decision before it went en banc. So in other
9 words, the 2016 *Kolbe* decision out of the Fourth Circuit. A
10 district court case called *Shu verses Malloy* (phonetic), all of
11 these cases have already established -- and these were cases
12 that are several years old and older, in which they were only
13 talking about, you know, several million of these. And we're
14 now talking about, now, 19, 20 million today in 2021.

15 So I think that your Honor's on the right track in
16 thinking that the commonality has already been established, for
17 sure. But more to the point -- and I do think that the -- the
18 state is going to take issue with Mr. Curcuruto's numbers.

19 But if that's the case, what's the state's numbers?
20 What's the state's estimate? Is it 5 million? Is it 10
21 million? Is it, as your Honor suggested, one -- you know, just
22 to take a round number, 1.9 million?

23 For as much issue as the state may take with
24 Mr. Curcuruto's methodology, they have not offered their own
25 number as to what the actual number of semiautomatic modern

1 sporting rifles or weapons that would be characterized as
2 assault weapons is, nationally speaking. So -- so I think that
3 the Court's instinct on how to look at that is correct.

4 But if the Court is interested in -- as -- as the
5 Court seems to be, in what the state's own numbers reveal, even
6 the state's own estimates as to what is within the state
7 will -- will certainly establish commonality.

8 If you look at, for example -- well, first, let me
9 start with this. I would like to put up Plaintiffs' Exhibit
10 24.

11 So, your Honor, Plaintiffs' Exhibit 24 is a
12 document -- and hopefully you can see it. It's a budget
13 proposal that the -- that the California Department of Justice
14 Bureau of Firearms submitted to the legislature in advance of
15 what they saw as a need to register new firearms. Excuse me.
16 Register assault weapons pursuant to a new registration scheme
17 that was going to take place in 2018.

18 So Plaintiffs' Exhibit 24 is this 2017 budget
19 document request by the California Department of Justice that
20 is submitted to the legislature. And in anticipation of the
21 registration scheme, the -- the Bureau of Firearms estimated
22 that between 1.5 -- 1 and 1.5 million assault weapons will be
23 registered by approximately 250,000 different owners in the
24 State of California. Now, that was just an estimate because
25 the state doesn't actually -- didn't actually have the number.

1 Didn't actually know how many people were going to. But that
2 was their best estimate. That there was going to be maybe
3 upwards of 1.5 million assault weapons that could be
4 registered, and it was in anticipation of this -- this budget
5 request.

6 So that's Plaintiffs' Exhibit 24. If you look at
7 what was actually registered -- and this is a registration
8 that -- this is a registration that -- these are registrations
9 that took place over a number of years, over a number of
10 periods.

11 Defense Exhibit CZ -- Charlie, Zeda -- is a
12 declaration from an employee for the Department of Justice, I
13 believe, who indicated -- just to give this Court some numbers
14 as to what's registered.

15 There are approximately 200,000 assault weapons
16 currently registered with the California Department of Justice,
17 of which approximately 180,000 are rifles, 16,000 are pistols,
18 and 3400 are shotguns. These are the approximations.

19 THE COURT: I'm sorry. What was that last number?

20 MR. LEE: Well, I can pull up the exhibit.

21 THE COURT: No, that's okay. Just tell me. What did
22 you just say?

23 MR. LEE: Okay. So -- so --

24 THE COURT: 200,000 --

25 MR. LEE: 200,039 assault weapons are currently

1 registered with the Department of Justice.

2 THE COURT: Right. 180,000 rifles, 16,000 pistols.

3 MR. LEE: 3478 are shotguns.

4 Now, if you back out law enforcement, apparently --
5 according to the declarant, excluding assault weapons
6 registered to peace officers, there are approximately --

7 THE COURT REPORTER: I need that number again.

8 THE COURT: Sorry. Can you do that again?

9 MR. LEE: Sure. 185,569 assault weapons, in total,
10 of which 165,804 are rifles, 16,306 are pistols, and 3,459 are
11 shotguns.

12 Now, these are just the firearms that are registered,
13 of course. We anticipate and would expect there is a lot of
14 noncompliance. But even just looking at these numbers, it
15 would appear that assault weapons or firearms that are
16 characterized as assault weapons --

17 THE COURT: What happened -- what happened to the 1
18 to 1 1/2 million estimate?

19 MR. LEE: Well, I think that there was -- we can
20 argue a lot about why they -- there weren't that many. I think
21 because, in the end, it turned out to be roughly about 70,000
22 who registered.

23 THE COURT: 70,000 people, as opposed to 250,000?

24 MR. LEE: I believe 70,000 firearms were actually
25 registered in this latest period. But that could be explained

1 by a number of reasons. One, the lack of notice. And I know
2 for sure that -- that the Department of Justice -- that there
3 wasn't enough notice to firearms owners, and a lot of people
4 are being taken by surprise as we speak about the new
5 registration requirement. Secondly, I think that there's
6 simply a lot of distrust and resistance to the idea of
7 registration.

8 So nobody really knows, but I -- I would suspect that
9 the lack of knowledge or the lack of knowledge is probably the
10 main issue that prevented -- that is, that explains why so many
11 people have not registered firearms in the state of California.
12 At least those that qualify for registration in 2018.

13 But I don't think, again, that these numbers are
14 really the starting and ending point. This is just sort of a
15 benchmark. It -- it does establish that certainly many, many
16 people own these for -- for a number of reasons.

17 And, again, the cases that have already established
18 commonality of AR-15-type rifles are now several years old, and
19 we are only talking about several million. So, again, as your
20 Honor stated, whether Mr. Curcuruto is off by a factor of a
21 half or a tenth, by any measure, just looking at the numbers,
22 there certainly is commonality in that sense.

23 But, again, these are functionally automatic firearms
24 like any other firearm.

25 THE COURT: What would you -- what would you do --

1 how would one go about calculating the fact that many people
2 might want to have these weapons. But because they're unlawful
3 unless you register them, they don't go out and purchase them?
4 Or at least perhaps they don't register them?

5 So how would you go about coming up with that number?

6 MR. LEE: I don't know that one can really come up
7 with the number of people who haven't registered for various
8 reasons. I mean, unless you were to do surveys. And even
9 then, it's not going to be reliable because nobody's going to
10 admit to, you know, not having a registered firearm.

11 THE COURT: Okay.

12 MR. LEE: So -- so I don't think that that's
13 something that is easily ascertainable.

14 THE COURT: Okay.

15 MR. LEE: Another way that we've looked at this, your
16 Honor, is taking a jurisdictional approach.

17 And this is in -- as your Honor knows, we submitted
18 the declaration and testimony of Professor George Mocsary,
19 which is now set forth as Plaintiffs' Exhibit 003.

20 And the -- the reason why -- as Professor Mocsary
21 explains, is the reason why we look at this from a
22 jurisdictional perspective is because Caye -- the Supreme
23 Courts decision in *Caetano* seems to suggest that this is
24 another appropriate way of taking a look at it.

25 The total number of jurisdictions that prohibit these

1 types of devices -- or in *Caetano*, it was stun guns or Tasers.
2 And to -- and to examine whether or not a sizable number of
3 Americans may purchase them in other jurisdictions. So what
4 Professor Mocsary did is -- taking sort of this line of
5 thinking further, is to take a look at all of the assault
6 weapons laws in the various states.

7 And his conclusions, which your Honor has questioned
8 him on already, is that citizens may possess semiautomatic
9 rifles in some form or another in all 50 states. They may
10 possess any semiautomatic rifle in 44 states. And there was
11 only a handful of -- of states -- I believe it was six -- that
12 had bans that were similar to the one that is before this Court
13 that pertains to assault weapons.

14 So -- so from a jurisdictional perspective, just
15 looking at it jurisdictionally, assault weapon bans themselves
16 are not common. And it would appear that millions of weapons
17 that California defines as assault weapons by virtue of this
18 30515 characteristics may legally be owned by people in a large
19 majority of the States.

20 On a related note, we're noting -- also noting that
21 the ban here in California is not longstanding. This is a
22 prohibition that goes back 30 years. To -- again, to the
23 original Category I description of assault weapons. This is 30
24 years old. And it -- it's not longstanding.

25 If you take a look at *Heller*, for example, *Heller*

1 overturned a 33-year-old handgun ban in the District of
2 Columbia. And so -- and on the federal level, as we've
3 explored already, the federal assault weapons ban only lasted
4 for ten years, from 1994 to 2004.

5 So assault weapons bans are neither a majority of the
6 states that we've looked at, nor are they longstanding bans;
7 including the first one here in California, which was enacted
8 in 1989.

9 So I think, to round out this commonality
10 discussion -- and, again, we have to emphasize that numbers are
11 not the -- or numbers are not the only measure of this. It's
12 really a matter of function.

13 Are semiautomatic rifles themselves or semiautomatic
14 firearms themselves lawful in most of the states? And the
15 answer is yes. Of course they are. They are the most popular
16 type of firearm that is being manufactured and purchased today.
17 The state can't prohibit a subset of these because they happen
18 to have characteristics which are also wildly popular.

19 So having established commonality of these firearms,
20 we look, also, to whether or not they have their -- they are
21 owned for lawful purposes, including self-defense.
22 Self-defense isn't, of course, the only lawful purpose but it
23 is a -- a primary purpose; a primary lawful purpose. So I
24 think that it is not just common use but common use for lawful
25 purposes.

1 So let's focus on the self-defense aspect of it. And
2 everyone agrees, of course, that AR-15s are one of the most
3 popular firearms in the country. Or at least it's not
4 disputed. And as the testimony has established, they are
5 commonly sold off the shelf, in other popular -- in other parts
6 of the country in their standard form, which contain pistol
7 grip, telescoping stock, and a flash suppressor. And those are
8 the three features that I think I would like to focus on. I
9 don't think we need to discuss all of them. Your Honor
10 already -- has already heard testimony regarding all of this.
11 But I think these are the three characteristics that we should
12 really focus on because I think this is very important to the
13 self-defense aspect of these firearms.

14 So pistol grips, which the defense would agree -- at
15 least Mr. Graham agreed -- is the most prevalent feature of
16 weapons that are described as assault weapons, are simply grips
17 that protrude conspicuously beneath the action of the weapon.
18 And these are the most common of the prohibited features on
19 just about all modern semiautomatic firearms.

20 Pistol grips enhance the ergonomics of the weapon and
21 are basically important, as Mr. Kapelsohn has testified, in a
22 straight-line design, such as the AR-15.

23 THE COURT: Wait a minute. What about the detachable
24 magazine?

25 You said the three things that are most common are

1 the pistol grip, telescoping stock, flash suppressor. What
2 about the detachable magazine?

3 MR. LEE: A detachable magazine is simply a standard
4 feature on many, or if not most, semiautomatic rifles today.

5 THE COURT: So that's another common feature? Am I
6 wrong? Or --

7 MR. LEE: Sort of.

8 THE COURT: Sort of.

9 MR. LEE: Because the state doesn't -- the state
10 doesn't prohibit detachable magazines. The state says you have
11 to have a fixed magazine if you're going to have one of these
12 other features.

13 THE COURT: Okay.

14 MR. LEE: So, in other words, it's requiring the --
15 it says, "If you are going to have these features, you have to
16 have fixed magazine."

17 So I could have a featureless firearm, as your Honor
18 knows, and -- and it could have a detachable magazine. So the
19 state does not prohibit detachable magazines on a
20 featureless, as long as it doesn't have one of these 30515(a)
21 characteristics. Which is why we're focusing on the 30515(a)
22 characteristics. Because these are normal, standard fare that
23 appears on most firearms that have a detachable magazine.

24 So pistol grips, again, is not just a -- a feature
25 that -- it -- that is preferred but it is good ergonomics, and

1 therefore it enhances the firearm's accuracy. And this is
2 something that Blake Graham, in his declaration, you know,
3 concedes. That a shooter using a, quote, assault rifle without
4 a pistol grip may shoot less accurately when -- with repeated
5 and especially rapid shots. And -- and this -- and pistol
6 grips themselves are nothing new. Again, we have established,
7 through the testimony of Adam Hlebinsky that pistol grips
8 appear on long guns dating back to at least the 1700s.

9 So this is an important feature of -- of the 30515(a)
10 feature, is that -- are -- the prohibition of which is being
11 challenged in this case.

12 The second issue I would like to address is folding
13 or telescoping stocks. Now, as your Honor knows or as has been
14 testified on an AR-15 rifle, a typical folding -- or a
15 telescoping stock will have an adjustable feature enabling it
16 to be capable between six and -- and three different positions
17 of adjustment; basically changing the length of the buttstock.
18 So this enables the rifle to be properly fitted to the user and
19 can be beneficial, as the Court has heard plenty of
20 testimony --

21 THE COURT: And that's different than a folding
22 stock. Right?

23 MR. LEE: Correct.

24 THE COURT: So what's the adjustment length on --
25 on -- on an adjustable stock versus the difference with a

1 folding --

2 MR. LEE: A folding stock -- a folding stock is -- is
3 meant to make the firearm more portable. It doesn't
4 necessarily make it more comfortable to shoot or enhance the
5 accuracy, or anything like that. Because the purpose of a
6 folding stock is to -- is to make it more portable or
7 maneuverable. That kind of thing.

8 The telescoping stock or the adjustable stock is --
9 enables the stock actually to be adjusted to a particular
10 length, depending on what the shooter needs. So that's the
11 difference between the two. But -- and the Court has heard
12 plenty of testimony that younger shooters, persons of smaller
13 stature, et cetera, may desire to and benefit from -- from
14 training and practicing and shooting a firearm with a
15 collapsible or adjustable stock.

16 I want to emphasize the training aspect of this for a
17 minute because I think this part sort of gets lost when we talk
18 about an individual -- you know, case-by-case assessment as to
19 whether a specific feature has utility in a specific
20 self-defense scenario.

21 I think what gets lost in this is that all of these
22 characteristics that we're talking about -- particularly the
23 pistol grip and the adjustable stock -- encourage and enhance
24 training and allows a shooter to train more, allows the shooter
25 to train more effectively. And that's important. Because if

1 you're not comfortable shooting, you're not going to train as
2 much and you're not going to be as accurate. And training is
3 an important part of -- of self-defense. Not in any one
4 specific scenario, of course, but cumulatively it is important
5 to allow people to be able to train effectively.

6 And, as Mr. Kapelsohn has testified, these features
7 allow somebody to train more often and more effectively. So I
8 don't think that that -- I think that's a point that shouldn't
9 get lost in all of this.

10 The folding stock, your Honor, makes a firearm more
11 portable but it doesn't turn a firearm or a rifle into an
12 easily concealable firearm for most criminal activities. And,
13 by far and away -- and as the Court knows and I'm sure the
14 defense would concede -- handguns are the most concealable and
15 the most prevalently used in crime of all of the firearms. So
16 it's not that -- that all of a sudden because you have a
17 folding stock on a rifle, that all of a sudden that that rifle
18 becomes a commonly used instrument in crime.

19 And so as your -- as this Court knows, even without a
20 folding stock, an AR-15 is easily separated in just a few
21 seconds by separating the upper and the lower receiver, pulling
22 out two pins to the right, and you basically have two halves of
23 a firearm that can be put into a backpack. So even without
24 special identified skill or training, a person can take an
25 AR-15 apart in a matter of seconds.

1 Again, folding or telescoping stocks have been --
2 long been a part of the features of firearms, dating back
3 centuries. And as Ms. Hlebinsky has submitted in her
4 testimony, the flexibility of stock size became an important
5 issue in the civilian market in the 20th century as they're
6 trying to customize more firearms to individual types of
7 shooters.

8 THE COURT: Let me ask you a question, Counsel.

9 The way this case is postured, is it -- is it
10 feasible or possible for the Court to find -- I mean, I know --
11 I know the broad general proposition. Okay? But is it
12 feasible or possible for the Court to find that restricting
13 this feature may violate the Second Amendment; this other
14 feature may not?

15 Say, for example, that I were to conclude, if you
16 will, that the collapsible stock, meaning an adjustable stock,
17 is protected by the Second Amendment. On the other hand, let's
18 say, a folding stock is not. Is there a severability clause in
19 the statute? Or is that something that I'm able to do?

20 I'm not saying I'm going to do it. I'm just simply
21 posing the -- the question.

22 The hand -- the grenade launcher -- again, getting
23 back to that thing -- could I, for example, find that a grenade
24 launcher, you know, feature is not protected for whatever
25 reason? What do you think, Mr. Lee?

1 MR. LEE: I would say no, your Honor, and -- and this
2 is why.

3 Well, first of all, if you look at -- the way we've
4 framed the case is, firstly, if it's a categorical ban of a
5 commonly owned popular firearm, in lawful use for lawful
6 purposes around the rest of the country in this form, then that
7 then is invalid. It's a categorical ban that is invalid. And
8 you don't have to get into any type of balancing test or any --
9 applying what's the state's rationale for it? Why did they
10 need it? That kind of thing.

11 THE COURT: Okay.

12 MR. LEE: So if -- so under that categorical *Heller*
13 approach, if we've met the test, we think that that -- the
14 entire ban fails.

15 THE COURT: Okay.

16 MR. LEE: If we get into, however, a tiered
17 discussion about what's the state's interest, then it still
18 fails because the State really hasn't provided any
19 justification as to why all the features must be prohibited.

20 So I don't think it's our burden, in that sense. I
21 think we've put forth a prima facie case showing that the state
22 doesn't have a -- a legitimate interest in prohibiting all of
23 these features. And, for that reason, we think that the --
24 that the entirety of the statute should fail the Court's
25 review.

1 THE COURT: All right.

2 MR. LEE: So the last of these features I would like
3 to discuss is the flash suppressor, which is a device that
4 diverts, you know, the muzzle flash through the holes on --
5 at -- extending out the barrel.

6 The primary advantage of this flash suppressor is to
7 reduce muzzle flash, so the shooter doesn't get blinded at
8 night. And as the -- Mr. Kapelsohn testified in his
9 deposition, he -- he's fired ARs that don't have a flash
10 suppressor, and at night, and they throw up what he called a
11 God-awful flame and muzzle blast as a result.

12 So -- and that's actually the stated purpose of a
13 flash suppressor, as pursuant to the -- the -- the -- the
14 state's regulations, is not to conceal a shooter's position but
15 to protect the shooter from being blinded when shooting at
16 night or in dark -- dark conditions.

17 And, again, this is not some new type of device.
18 This is a device that has appeared on firearms since the early
19 20th century and has always appeared on AR-type firearms since
20 they were invented in the 1950s.

21 So let's talk about rifles under 30 inches, just very
22 briefly. As -- as we've indicated, the federal limit on the
23 length of a rifle is 26. California says it's 30. So what
24 we're talking about are firearms between 26 and 30 inches in
25 length.

1 That's a difference. Rifles that have shorter
2 overall lengths have more -- more advantages to the user
3 because they're able -- more maneuverable. Especially if
4 you're defending your home, having to come around hallways and
5 doorways, and that kind of thing.

6 And even as Mr. Graham testified, he has a
7 shorter-barreled AR for his personal use. And he -- you know,
8 depending on the mission, of course, is how he testified. But
9 all things being equal, he would rather have one with a shorter
10 barrel for maneuverability purposes.

11 But there's another reason why a shorter barrel -- a
12 shorter firearm is -- is advantageous. It's because of the
13 length weight. The barrel that has a longer length is more
14 heavy. And again, for training purposes or to be able to hold
15 the rifle out for an extended period of time, that could make a
16 difference.

17 THE COURT: Well, is there a limit? I mean, is there
18 some -- some limit that the state could adopt with regards to
19 the length of the barrel? I mean, what about two inches?

20 MR. LEE: 16 inches is the minimum barrel length for
21 a rifle under federal law, as I know. So most civilian
22 shooters would -- would want to have or tend to have rifles
23 that have barrels of 16 inches in length.

24 But the whole idea of a carbine -- which is basically
25 a shorter rifle, which is -- you know, this -- it's been around

1 for many, many years -- is -- it basically refers to a rifle
2 with a barrel that has less than 20 inches in length.

3 So let's talk about fixed-magazine firearms, because
4 this is how the -- this is how the magazine capacity issue
5 comes into play.

6 So a fixed magazine is a -- the state calls it an
7 ammunition feeding device that's permanently attached to a
8 firearm in such a manner that the device cannot be removed
9 without disassembly of the firearm mentioned.

10 So the state's statute prohibits a -- a firearm that
11 has a fixed magazine that has the capacity to accept more than
12 ten rounds.

13 Now, in *Duncan*, it prohibits it by calling it an
14 assault weapon. So, in *Duncan*, this Court has already
15 addressed the legality of the laws that pertain to
16 large-capacity magazines as the state uses that term; as
17 defined by the Penal Code of being more than ten rounds --
18 being -- being able to accept more than ten rounds of
19 ammunition.

20 What we contend in this case is that the state can't
21 continue to prohibit the possession of large-capacity magazines
22 by calling firearms that have them assault weapons simply
23 because they're attached to them. And I think that, for all of
24 the state's overkill in terms of addressing the large-capacity
25 magazine issue, the state has not presented any evidence in

1 this case about any crimes being committed with a rifle or
2 pistol that contained a fixed magazine that had the ability to
3 accept more than ten rounds of ammunition. Nor has the state
4 presented any evidence to show that any mass shootings were
5 committed with a rifle or pistol that contained a fixed
6 magazine with the ability to accept more than ten rounds of
7 ammunition. I'm not saying that that hasn't happened. I'm
8 certainly willing to accept that that may have happened
9 somewhere along the way, or there may have been a crime with a
10 fixed-magazine rifle that has more than ten rounds. But we
11 haven't heard about it.

12 So if -- if this is a problem, you think we would
13 know why the state exactly wants to prohibit the large -- a
14 fixed-magazine rifle with a capacity to have more than ten
15 rounds of magazine, aside from the capacity itself. And,
16 again, it's not our intention or desire to re-litigate the
17 Duncan matter, which has been litigated extensively in several
18 courts now.

19 So if there cannot be a prohibition on magazine
20 capacity under the Constitution, then you can't -- the state
21 can't accomplish that same goal simply by calling a firearm an
22 assault weapon because it has a fixed magazine with the same
23 capacity.

24 THE COURT: Well, let me -- let me -- let me
25 interrupt you for just a second. Because this is -- this is

1 part of the problem and confusion that this case has -- has --
2 engendered, if you will.

3 All right. So, for example, you say that there are
4 no cases that have been pointed out where a -- a rifle that had
5 a fixed magazine of more than ten rounds was used in a -- in a
6 mass shooting. Right?

7 So -- so as you were saying that, I was thinking,
8 well, okay. Well, what -- what about -- where -- where's the
9 evidence that, say, a shotgun -- like the one that's --
10 that's -- that is being banned, that that was used in -- in --
11 in a mass shooting? Where's the evidence that -- and if we say
12 one is enough, boy, that's a pretty -- pretty slippery slope.
13 Same thing for a pistol. A pistol with a detachable magazine.
14 You see what I'm saying?

15 So -- so when I was looking through some of the
16 material that I've looked at so far, it struck me that there
17 was a dearth of evidence to -- to support a finding that, you
18 know, these were weapons that were largely used in -- in these
19 mass -- mass shootings.

20 Do you follow what I'm saying?

21 MR. LEE: Well, and I appreciate the Court's thinking
22 on this.

23 Because it's not like once there is one, then, ah-ha.
24 You know, now we can ban them. Certainly that's not our -- the
25 suggestion.

1 THE COURT: Right. I -- I understand.

2 MR. LEE: We're saying the state is -- is actively
3 providing solutions to things that are not problems.

4 There is no suggestion that what -- what is the
5 danger of a fixed-magazine firearm that has the capacity to
6 accept more than ten rounds; aside from what has already been
7 litigated in *Duncan*? Okay? If the state can't offer anything
8 more than what has already been litigated in *Duncan*, that's my
9 point. Is that, okay, we understand the state thinks it's
10 accomplishing something by prohibiting firearms that can fire
11 more than ten rounds. But aside from what's already been
12 litigated in *Duncan*, we're -- what's the concern about
13 fixed-magazine firearms in particular? And that has not been
14 addressed in the evidence that at least has been submitted.

15 So -- so, in other words --

16 THE COURT: That's -- that's sort of -- that --
17 that's -- that's sort of a given. The idea -- which is the
18 same idea as in the -- in -- in the, quote, large-capacity
19 magazine, end of quote, issue; which is obviously the more
20 rounds that you have in a magazine, the more shots you can
21 fire. The more shots you can fire, the more likely you are --
22 perhaps -- to injure or kill people. I -- I -- I don't know
23 that that requires evidence. I mean, that just requires common
24 sense. Right? To know that that's true? We know that.

25 You know, there's no point in you telling me that you

1 don't believe that in fact, you know, if you have a -- one of
2 these rifles with -- with a fixed magazine that holds 30
3 rounds -- by the way, I remember in *Duncan* saying, for example,
4 that, you know, 30 rounds may not be unusual. Because we all
5 know that the test is dangerous and unusual. A hundred rounds,
6 on the other hand, might be. Right?

7 So, again, if you have a weapon with a fixed magazine
8 with a hundred rounds, you know, you can fire a lot more shots
9 without reloading. And the potential for injuring people and
10 killing people with those hundred rounds exist

11 Of course, you've got to go through further steps.
12 You've got to do more analysis than just that. Because we all
13 know every gun is a dangerous gun. Right?

14 I suspect that there are many people -- many in the
15 government -- who would want to ban all guns, if they had their
16 way. If they could -- you know, somebody died and made them
17 king, they would ban all guns. And maybe that's -- you know,
18 some people suspect that might be the ultimate goal. But --
19 but I don't think I have to have evidence. I don't think I
20 have to have Mr. Echeverria or -- or the state tell me that a
21 firearm that holds 30 rounds in a fixed magazine is, perhaps,
22 more dangerous -- right? -- than one that holds ten rounds? In
23 a hypothetical sense. Right?

24 MR. LEE: Yes.

25 And -- and my point, again, is not to re-litigate

1 *Duncan* or to make the state -- you know, put them to the test
2 about what has already been litigated and decided in *Duncan*.

3 My only point is aside from what has already been
4 litigated in *Duncan*, what is the -- why are we fixing --
5 fixating on how -- or how can we fix -- how can we -- how can
6 you prohibit something by simply calling it an assault weapon,
7 if the issue has already been decided elsewhere.

8 I understand the state's arguments. And I'm sure
9 your Honor does, too. Your Honor heard them far more
10 extensively than I did. But that's the only point.

11 THE COURT: Okay.

12 MR. LEE: Okay. So I just wanted to just briefly
13 discuss pistols and shotguns.

14 You know, your Honor -- at the hearing in October,
15 the Court asked the parties to supply information pertaining to
16 the commonality of assault weapon pistols and assault weapon
17 shotguns.

18 The Court primarily asked the state to provide what
19 evidence it had pertaining to numbers that it may be able to
20 produce. And I think that the State's response is set forth in
21 the defense exhibit that I referred to earlier, Defense Exhibit
22 CZ, which contains at least the registration numbers of assault
23 weapons that are broken down by rifle, pistol, and shotgun.

24 But, you know, we took it on ourselves, of course,
25 not just to rely on the state's evidence, which is, of course,

1 limited to this state. But also to look at what else is out
2 there. To give -- to try to give the Court some color and some
3 basic understanding as to how common are these types of
4 firearms and firearm parts? And -- and how readily available
5 are they in the market?

6 And so we've submitted the declaration of Mr. Ostini,
7 who did this survey and looked at websites and catalog
8 information from 73 different firearm manufacturers. And found
9 that there's plenty of manufacturers that are offering firearms
10 that are offered for sale, defined as assault weapons, pistols,
11 and shotguns under these definitions.

12 So the -- Mr. Ostini's survey is attached to his
13 declaration, which is Exhibit 005. And no one is saying this
14 is a comprehensive list. No one is saying this is the -- this
15 is the exclusive list of what types of weapons that are out
16 there. But this gives the Court some general understanding as
17 to the types of firearms that are being offered for sale to
18 citizens in other parts of the country.

19 And this -- these are simply website links that --
20 that describe the product. And the state has not -- you know,
21 the state has attempted to exclude Mr. Ostini's declaration but
22 they are not offered something of their own that criticizes any
23 of his particular findings. Or saying that in any particular
24 instance a -- one of these items is not classified as an
25 assault weapon or that is severely over-inclusive for whatever

1 reason.

2 So this is just more in the context of what the Court
3 was -- trying to give the Court what it was asking for at the
4 hearing in October, in terms of providing some type of general
5 survey information.

6 We've also submitted the declaration of Mr. Brown,
7 who -- at least in this very limited slice -- has provided some
8 testimony as to the sales of the -- the number of sales of this
9 popular Benelli shotgun. He called it M1014. Which by --
10 according to the Department of Justice, is a shotgun assault
11 weapon. And he's provided some sales figures in several
12 thousands of these that were distributed in his area, which is
13 the western region, from 2016 through 2020.

14 So, again, this is not meant to be comprehensive.
15 This is not meant to be a total, full explanation. But when
16 your Honor asked us -- or the parties to try to get whatever
17 information we could pertaining to assault weapon shotguns and
18 pistols, you know, we reached out and tried to find your Honor
19 some numbers. And these numbers are reflected in these
20 declarations.

21 So, your Honor, let's talk about the suitability of
22 the AR-15, in particular, for militia service.

23 We put through the testimony of General Youngman, who
24 is extremely well qualified to testify to this issue as he was
25 at -- a general for the state of Kentucky. He's a career

1 military man who has been actively involved in planning and
2 readiness of our reserve forces and in the state of Kentucky.

3 And his opinion testimony that we've submitted, which
4 is set forth in Plaintiffs' Exhibit 009 and at the hearing back
5 in October, is that the AR-15 rifle, with its commonality of
6 parts and its standardized parts such as magazines -- and,
7 frankly, the -- the familiarity of many Americans, two
8 generations of Americans -- make the AR-15 an ideal weapon for
9 service in a militia.

10 Now, this Court has already found, in *Duncan*, that
11 *Miller* implied that -- the *United States versus Miller* case
12 implied that possession of a weapon that could be used for
13 militia service by a law-abiding citizen could contribute to
14 the common defense of the United States and, therefore, is
15 protected by the Second Amendment.

16 If we just take this one step further and say if a
17 weapon is particularly well suited for militia service, then it
18 must be protected both under *Heller* and under *Miller* because
19 this is the logical extension of this -- of this -- of this
20 argument.

21 So firearms that are in common use for lawful
22 purposes in the United States under *Heller*, those lawful
23 purposes include militia service.

24 Those would be protected by the Second Amendment
25 under both *Miller* and -- and under both *Heller* and *Miller*.

1 THE COURT: Would an M16 be protected?

2 MR. LEE: Well, I could argue yes, but I also
3 understand the limitation of -- that the Justice Scalia set
4 forth in *Heller*. And I'm going to acknowledge that and --

5 THE COURT: Which was -- which was what?

6 MR. LEE: Which was that the -- that the Second
7 Amendment may not protect -- now, Justice Scalia did not say
8 that it does not protect. He says there may be some
9 limitations, such as M16 firearms.

10 THE COURT: Why would that be?

11 MR. LEE: Why would that be? I would suggest to your
12 Honor that the distinction between an M16 and an AR-15 is its
13 ability to fire in a fully automatic capability. But I don't
14 think --

15 THE COURT: And would that include the fact that --
16 that -- that people don't commonly own M16s because they're --
17 like bazookas, hand grenades, they're not useful in any other
18 sense other than for military purposes?

19 MR. LEE: Well, I don't know that I'm ready to
20 concede that, your Honor.

21 I mean, I would say that -- that the problem that you
22 set up there is that, again, a weapon is rendered uncommon by
23 virtue of its prohibition.

24 So in the 1920s, for example, you could mail order a
25 Thompson submachine gun just in a catalog. You can go to the

1 hardware store and buy a Thompson submachine gun --

2 THE COURT: I got you. I understand that.

3 But there's a longstanding prohibition against fully
4 automatic weapons.

5 MR. LEE: Since the 1930s.

6 THE COURT: Well, and that's enough for me. Anyway,
7 at least -- at least at this moment.

8 But -- but the reason why there's that prohibition is
9 because M16s and fully automatic weapons really don't have much
10 use in any other purpose other than for military purposes.

11 Right?

12 MR. LEE: And, to be clear, General Youngman said he
13 does not see the M16 in this role for militia. Takes
14 additional training, et cetera.

15 This is a rifle that a -- an AR-15 rifle is one that
16 a person puts in their home, their house; hang it over their
17 fireplace; and be ready to -- to call to muster if your country
18 or your state or your community needs you. So this is an ideal
19 weapon for that purpose. And I don't think General Youngman
20 went to the extent to say that an M16 is something that fills
21 that role.

22 So I'm not -- I'm just saying I'm not willing to
23 exclude the possibility. I'm just saying that that -- this is
24 what General Youngman has testified to. So --

25 THE COURT: But if you file that lawsuit, would you

1 do me a favor and file it in some other district or -- or file
2 a motion to recuse me? So -- (laughing) because -- (laughing.)
3 I think the case law is pretty -- pretty clear.

4 Justice Scalia was a man who was a -- a wordsmith.
5 And -- and I understood -- I understood what he -- what he was
6 saying when -- when he talked about the fact that one -- one
7 might object that the M16, or weapons like the M16 -- but --
8 but it was pretty clear to me that what he was saying was that
9 there are weapons that are for military purposes, such as the
10 flame thrower and the bazooka and the hand grenade that serve
11 no other purpose in civilian life.

12 And so if you file a lawsuit to have a ban on the M16
13 as being unconstitutional, please file it somewhere else.

14 Okay?

15 MR. LEE: We'll try to keep that in mind, your Honor.

16 THE COURT: All right.

17 MR. LEE: But I think that the distinction, though,
18 between these firearms is -- is a big distinction, despite what
19 the state is going to try to argue. That an AR-15 is basically
20 indistinguishable from an M16 in this regard.

21 It is -- it is -- there is a big distinction, and
22 that's because -- as your Honor has suggested -- it's more -- a
23 fully automatic may be more akin to something like a bazooka or
24 a hand grenade because it takes -- (A), it takes additional
25 amount of training to become -- and, two, is that there's

1 greater potential for collateral damage if you have something
2 that is hard to control, from that perspective. An M16 that
3 has -- capable of fully automatic fire is -- is -- is a
4 harder-to-control weapon.

5 And our focus in this case is these features that
6 enhance a firearm's accuracy -- because accuracy is the -- most
7 critical, important to a civilian shooter for a number of
8 reasons and certainly for self-defense. It's more difficult to
9 make that argument in this context with -- with regard to M16s
10 because a fully -- something that's capable of fully automatic
11 fire has that ability to have more collateral damage. So one
12 could make that argument that it's probably more akin to hand
13 grenades than -- than it is to a semiautomatic rifle.

14 One could make that argument over that distinction.
15 And I think that that's -- it's not just a matter of, well, an
16 AR-15 has a theoretical cyclical rate of being able to fire a
17 certain number of rounds per minute. And so, therefore, it's
18 basically indistinguishable from an M16. That simply is not
19 the case, and I don't think that that -- that's a very good
20 argument that I think the state is going to try to make.

21 So, your Honor, getting away from the militia issue,
22 there's other lawful purposes for these firearms, not just
23 self-defense, not just militia. But there's many other
24 reasons. There's hunting, self-defense, recreation,
25 competition, collecting. As Mr. Curcuruto has testified to and

1 has plainly set forth in the exhibits to his declaration,
2 many -- many reasons why people desire to own these types of
3 firearms, and those are among the reasons.

4 And one actually doesn't need to look any further
5 than one of the defense exhibits, and that is a Defense Exhibit
6 BI --

7 THE COURT: I'm sorry. Is that D as in dog?

8 MR. LEE: B as in bravo. I as in India.

9 THE COURT: Okay.

10 MR. LEE: And at page 8 of their book called -- it's
11 a book by Patrick Sweeney called *The AR-15*. He talks at length
12 about competition with the AR-15. Discussing practical
13 competition, bench rest competition, long-range distance
14 shooting, varmint shooting. Something called --

15 THE COURT: You just raised an interesting point.
16 Something that has been troubling me, which is this.

17 So -- so -- there's a lot of focus on using these
18 weapons for self-defense. And there's no doubt that, of
19 course, that is something that is important. But it dawned on
20 me that the statute that bans this type of weapon actually
21 discriminates against people of lower income. Why? And tell
22 me if you think I'm wrong. But here's why I think it does.

23 I -- I can afford to own a pistol at home, to -- for
24 self-defense. I can also afford to own a sporting rifle. I
25 can have both.

1 So if I -- if I like to do competition shooting or
2 hunting, I know there are people who say that you don't use
3 sporting rifles for hunting. But, frankly, I think they're all
4 weapons. It's not true. They're a good firearm, for example,
5 to shoot coyotes with. Which I know of a couple I wouldn't
6 mind taking out, since they have taken out my chickens.

7 But -- so -- so there are people out there who -- who
8 would like to own both a pistol for self-defense and a sporting
9 rifle for hunting or competition or target practicing or
10 self-defense.

11 If you are of a higher social or economic level, you
12 can afford to own both. On the other hand, if you are of a
13 lesser economic level, you are going to have to make a choice.
14 You can have one. So you've got a choice. You can either buy
15 the pistol, in which case you can forget all about taking care
16 of the coyotes or taking care of -- you know, going out and
17 doing competition. I suppose there's pistol competitions as
18 well. But, you know. But -- but it very much limits you as to
19 what you can do. So you may have a much better shot -- that's
20 a terrible word to use. No pun intended.

21 You may have a better -- a better argument for owning
22 that for self-defense but you've cut yourself out of a whole
23 bunch of other potential uses, like taking your kids out, for
24 example, and teaching them responsible gun ownership and
25 teaching them how to -- how to -- you know, what they call

1 plinking; how to shoot, how to aim, et cetera.

2 But if you're of a lower economic position, you may
3 have to choose one or the other. You can't have both. So
4 which would you much rather have?

5 Well, you might want to have a sporting rifle because
6 it can be used. Not -- not that it will be used, not that it
7 has been used. But that it has the potential for being used
8 for self-defense, as well as all of the other things. Right?

9 MR. LEE: That's a good point, your Honor. And not
10 only that. Because the law -- the self-weapon law prohibits
11 possession of an assault weapon by anyone under age 18 -- and
12 there's no exception to this, by the way. There's no parent
13 supervision exception. There's no training-day-at-the-range
14 exception. Because of the -- the firearm's classified as an
15 assault weapon, I cannot train a younger shooter on this
16 firearm. And then I have -- and, of course, therefore, if I
17 want them to learn how to shoot a firearm, I have to, of
18 course, purchase a different type of firearm that is not an
19 assault weapon, if I want to teach my -- my child, who's under
20 the age of 18, how to do that. The law is severe. It makes no
21 exception -- again, for parent training, for -- you know,
22 simply handing it to your child, to familiarize themselves for
23 a bit for --

24 THE COURT: To learn to respect them.

25 MR. LEE: Yeah, exactly. That -- that -- that's --

1 that's prohibited by the law. So that's another -- that's
2 another reason --

3 THE COURT: I have to tell you, I had not focused on
4 that being part of this lawsuit until the other day when I was
5 reading, I think -- well, it might have been something that you
6 filed.

7 And, I mean, that's part of the problem with this
8 case is that there's so much that's at issue that, you know,
9 I'm trying to keep it all, you know, in front of my mind. It's
10 kind of difficult. But I didn't realize that that was part of
11 what we were addressing here. And did not realize, until you
12 pointed it out, that in fact there is no exception.

13 So, for example, you can't take a -- someone who's 17
14 to the gun range and let them fire an AR-15 so that they can
15 learn what -- you know, what kind of damage it can do, so that
16 hopefully that you can teach them that, hey, this is not
17 something that you want to take to your school and -- just
18 because you're -- you know, somebody stole your girlfriend, or
19 whatever. Right?

20 I had no idea that this was part of this lawsuit
21 until the other day. So I apologize for that.

22 MR. LEE: Sure. Quite all right. Your Honor --

23 THE COURT: Quite interesting.

24 But you know age can -- so age has been used, you
25 know -- as we all know, for example, you can't buy cigarettes

1 for a certain age. You can't buy alcohol. You can't get a
2 driver's license. Right? So age restrictions have been in
3 effect for a long, long, long, long time. Right?

4 Perhaps the problem with the statute is that it has
5 no exceptions. Which, again, strikes me -- again, I don't know
6 if that was intentional or whether it was just simply an
7 oversight on the part of the legislature, that realizing that
8 perhaps it might not be a bad idea to teach kids respect for
9 weapons.

10 I don't know. Anyway. So --

11 MR. LEE: So, we were talking about just competition
12 and other lawful purposes, including competition. And I just
13 wanted to point out one more thing on this issue. Is that
14 there is also evidence in the record that muzzle brakes and
15 compensators, which are attached to pistols on -- with threaded
16 barrels, are very commonplace in competition. So that's
17 another -- certainly a lawful use that could be -- that we --
18 we have submitted to the Court.

19 So I think, in conclusion, with regard to this lawful
20 purposes discussion we've shown that the *Heller* test has been
21 met and that -- that the statute bans a broad category of
22 firearms by reference to their features, which are not --
23 neither both dangerous nor unusual. And, to the contrary,
24 they're -- they're common in every respect. They're common
25 functionally because these are basically semiautomatic firearms

1 that function the same in their operation. They're common
2 characteristically because it's basically the same type of
3 commercial -- commercially available firearm that's available
4 off the shelf. They're common jurisdictionally in a majority
5 of the states. And -- and not limited to -- of course, they're
6 common numerically, as they're owned by citizens in other
7 states by the millions.

8 And all of this means that these -- this class --
9 classification of firearms meets the *Heller* test for common use
10 for lawful purposes. And, therefore, because it bans a -- a
11 sizable number of firearms that are overwhelmingly being chosen
12 by Americans for the lawful purposes, including self-defense,
13 it -- it fails this *Heller* categorical ban test, full-stop.
14 That we don't even have to get into a discussion about what --
15 what level of scrutiny to apply. However, of course, you know,
16 we always go through the exercise and we always do discuss --
17 because I think we would be remiss if we did not discuss, you
18 know, whether a heightened level of scrutiny should apply.

19 And in taking a look at that, if the Court is
20 inclined to apply a -- a -- the two-part test that applies to
21 Second Amendment cases under the *Shomat* (phonetic) case, we
22 think that this new law fails that test as well.

23 First of all, it -- the law establishes a substantial
24 burden on law-abiding gun owners and their ability to own
25 firearms that are suitable and preferred for self-defense.

1 It's not enough for the state to say that you get to have a
2 featureless firearm, and therefore it's not a substantial
3 burden because a featureless firearm is some type of
4 second-rate substitute.

5 The very qualities that make the firearms
6 advantageous -- these -- these Section 30515(a) characteristics
7 that make them advantageous for purposes of self-defense is
8 what makes them advantageous for the law-abiding citizens to
9 have.

10 THE COURT: Just out of curiosity, though, why are
11 you focusing on self-defense? Because -- because the *Heller*
12 test, the *Heller* test is, is it dangerous and unusual? Are
13 they commonly possessed by law-abiding citizens for lawful
14 purposes, including self-defense?

15 So -- is there a reason why you're focusing on
16 self-defense?

17 MR. LEE: Well, because -- (A), because self-defense
18 is a lawful purpose.

19 THE COURT: Yes, I agree. I understand.

20 MR. LEE: (Indiscernible.)

21 THE COURT REPORTER: I'm sorry. I couldn't hear.

22 THE COURT: I'm sorry. Could you repeat what you
23 just said.

24 MR. LEE: Yes, certainly.

25 Because, first of all, self-defense is a lawful

1 purpose and may be one of the more important lawful purposes.

2 THE COURT: Okay.

3 MR. LEE: But, secondly, if the Court is inclined to
4 also look at this from a -- applying the Second Amendment test
5 that -- that the circuits have seemed to be applying to the
6 Second Amendment cases, one has to look at the impact that it
7 has on the core -- on the Second Amendment rights, including
8 the core right of self-defense.

9 So we think, of course, because it's categorical ban,
10 this Court can strike -- strike down the law, full-stop,
11 without having to get to this next section, this next inquiry.

12 But I think we also have to go through the motion of
13 discussing this -- this -- this second -- this secondary
14 discussion about whether -- what test to apply.

15 It's a substantial burden on law-abiding citizens
16 because it deprives them of an important choice. A choice to
17 defend themselves in -- in the home, with a firearm that they
18 choose.

19 And it's not enough for the state to say you're okay;
20 that the private citizen is -- is -- is -- that he's not
21 burdened because they're relegated to featureless firearms.

22 So we've heard a lot in this case already about the
23 Ruger Mini-14 ranch rifle, which is depicted in the defense
24 Exhibit D. And it's undisputed that the Ruger 14 in its common
25 form, which doesn't have a flash hider and has a traditional

1 stock, is legal to purchase and own in California. And that
2 one can have a detachable magazine on -- on that firearm.

3 So it's a firearm that fires the exact same round,
4 which -- as the AR-15, which is a .223 round. But the truth
5 is -- and this is, I think, borne out by all of the discussion
6 about the popularity of the AR-15. The truth is that people
7 prefer the AR-15 because it's more comfortable by design.

8 And, by that, we've had testimony from Mr. Kapelsohn
9 that shows what he means by the straight-line design and what
10 makes it more controllable, with less muzzle rise than a
11 Mini-Ruger-14 or another firearm with a traditional stock.

12 Now, your Honor said that at the beginning of this
13 hearing that your Honor misses the ability to hear live
14 witnesses and see them and have them explain, et cetera.

15 I have cued up about six minutes of deposition
16 testimony from Mr. Kapelsohn that explains the differences
17 between an AR-15 and a Mini-14 in terms of the advantages the
18 AR-15 gives with this straight-line design. And I am prepared
19 to play this for the Court, if the Court desires to actually
20 hear some witness testimony on the issue.

21 THE COURT: I have that already, I assume, on --

22 MR. LEE: Well, it's video. And we only got the
23 video last night. So we will lodge the entire video with the
24 Court by -- by way of a memory stick.

25 THE COURT: Why don't you go ahead and play it now.

1 Let's see what's there.

2 MR. LEE: Okay.

3 MR. ECHEVERRIA: Your Honor, this is John Echeverria
4 for defendants, if I may very quickly.

5 THE COURT: Yes.

6 MR. ECHEVERRIA: It was defendants' understanding
7 that there would be no -- no testimony.

8 I -- I'm not going to object to this limited portion
9 of the video deposition being played. But it was our
10 understanding, based on a meet-and-confer with plaintiffs, that
11 there would be no presentation of witness testimony at this --
12 at this trial. So we have not prepared any snippets of
13 deposition video that we want to present to the Court. But
14 I -- so I just would like to make that point noted for the
15 record.

16 Thank you, your Honor.

17 THE COURT: All right. So -- but you don't have any
18 objection to this limited one?

19 MR. ECHEVERRIA: This limited portion of the
20 testimony, no, your Honor.

21 THE COURT: Okay. Let's do that, and then we'll move
22 on.

23 Okay. Go ahead and play it.

24 MR. LEE: Your Honor -- and just for the record and
25 for Mr. Echeverria, this deposition excerpt starts at page 178,

1 line 17, and will go to page 183, line 4.

2 So this is Mr. Kapelsohn talking about the
3 straight-line design advantage. And hopefully you can all hear
4 it.

5 THE WITNESS: Thank you.

6 (The following video presentation was reported as
7 follows:)

8 UNIDENTIFIED SPEAKER: Mr. Kapelsohn, I want to
9 ask you a follow-up on some of the questioning and
10 examination that Mr. Echeverria undertook" --

11 THE COURT: Just a second. Just a second.

12 (Video playing paused.)

13 THE COURT: Is it okay with you if I do not have my
14 court reporter transcribe this?

15 MR. LEE: Yes, your Honor. It's -- it's all part of
16 the deposition transcript.

17 THE COURT: Okay. All right. Go ahead.

18 (Video played off the record.)

19 THE COURT: Okay.

20 MR. LEE: So, your Honor, this -- Mr. Kapelsohn's
21 testimony, which is in the deposition, again, from page 178 to
22 183, demonstrates why a featureless firearm such as the Ruger
23 Mini-14 is not preferred or why an AR-15 rifle is preferred is
24 because it's more -- it has less muzzle rise, more
25 controllable, it's more accurate, and it's more ergonomic.

1 THE COURT: But -- but the firing capacity is about
2 the same. Right?

3 MR. LEE: The firing capacity, in terms of how many
4 rounds it can fire, is solely a function of its magazine. So
5 a -- you know --

6 THE COURT: All right. It's a centerfire rifle that
7 is a semiautomatic rifle. Right?

8 MR. LEE: Correct, yes. Right.

9 THE COURT: Okay.

10 MR. LEE: And if they have the same barrel length, in
11 theory, using the same bullet, using the same projectile, it is
12 going to have an equivalent muzzle velocity and -- and a
13 similar ballistics.

14 So while AR -- so -- so that was a featureless Ruger
15 Mini-14. And as the Court knows from the demonstration we did
16 from Mr. Kraut, AR-type firearms may also be made featureless
17 in that some of the key components of the standard AR -- such
18 as the pistol grip or the telescoping stock or the flash
19 suppressor -- can be removed and replaced by other devices.
20 And the video that we submitted by plaintiffs' witness,
21 Mr. Kraut, which is now set forth in Plaintiffs' Exhibit Number
22 11, demonstrates his ability to fire this same rifle -- one
23 with the features and one without the features. And -- and the
24 purpose of the video was to demonstrate that in either
25 configuration it was possible for a shooter to shoot a man-size

1 target at 25 yards, in rapid succession, using either a
2 California featureless rifle or a standard configuration AR-15.

3 Now, what was the purpose of that? It's to show that
4 if a person was determined and -- the existence of the
5 prohibited features aren't going to make any difference to a
6 person who is intent on committing a crime or mayhem.

7 A person may want to commit a crime with a weapon
8 simply to -- as a robbery, for example, to intimidate. The
9 person could do that easily -- just as easily with or without a
10 pistol grip. A criminal isn't going to care, necessarily,
11 about accuracy.

12 But to a law-abiding and responsible citizen,
13 firearms that enhance a -- features that enhance a firearm's
14 accuracy or the comfort or, most importantly of all, the
15 ability of that citizen to control the firearm accurately,
16 that's what's key and that's what's most important. Because a
17 citizen must be accountable for every shot that they take.

18 A criminal doesn't necessarily care. A mass shooter
19 doesn't necessarily care about accuracy. Isn't -- obviously,
20 isn't being accountable for every shot. Whereas every shot
21 that goes astray for a citizen is a round that goes someplace
22 where they didn't intend it do go. It could injure an innocent
23 bystander. It could create an intent -- a large amount of
24 liability.

25 So that's why accuracy is really important to a

1 law-abiding citizen who is defending himself or herself.

2 Whereas, to a criminal, it doesn't matter.

3 So a featureless design which mainly lacks a pistol
4 grip, basically, is less ergonomic. It is less accurate. A
5 featureless AR-15 rifle which lacks standard pistol grip is
6 also not ergonomic and is -- and is also of poor design.

7 But there's another reason why the featureless AR-15
8 firearm is not advantageous or not preferred or that it's less
9 safe. Now, the lack of a pistol grip makes it less safe when
10 it comes to clearing a malfunction.

11 On an AR-15 rifle, the standard process for clearing
12 a malfunction is to perform several steps to do that. And
13 that's hindered by one's inability to wrap their hand around
14 the pistol grip because they don't maintain the same degree of
15 control when performing that function.

16 Now, I have another video cued up of Mr. Kapelsohn
17 who demonstrates this. It lasts about seven minutes. I can
18 play it for the Court. Or if the Court would like me to move
19 on --

20 THE COURT: Well, I think -- I think
21 Mr. Echeverria -- I don't know that that's necessarily a valid
22 objection that -- that -- I mean, I don't remember saying that
23 we weren't going to play portions of depositions, if they were
24 videoed, or whatever. But I think in the interests of time, if
25 you would make sure to submit that to me by flash drive, I'll

1 watch it on my own. And rather than spending time now -- and I
2 know Mr. Echeverria is going to object, as he did already. So
3 there's no point in wasting time. Okay?

4 MR. LEE: Understood, your Honor.

5 I -- we will submit the entire video on a flash
6 drive. And the portions that I was going to play for the Court
7 are at his deposition at -- starting at page 188 through page
8 193.

9 But what Mr. Kapelsohn would demonstrate in the video
10 is that your -- the first step to clearing a malfunction on an
11 AR-15 is to tap the bottom of the magazine and to rack it --
12 the action back on -- on -- and to lock the bolt back. To --
13 and then to push the bolt forward to see if that clears the
14 malfunction.

15 Now, if that doesn't work, the second step is to lock
16 the bolt back and to remove the magazine. To rack the action
17 back several times to try to clear any malfunction or stovepipe
18 rounds, to reinsert a new magazine, and then to push the bolt
19 forward.

20 All of that requires you, your Honor, to be able to
21 hold onto that firearm with a firm grip, with your -- with your
22 dominant hand; as Mr. Kapelsohn demonstrates.

23 THE COURT: Wait a minute. Isn't the bolt on the
24 same side as your dominant hand?

25 MR. LEE: The bolt is activated by a charging handle,

1 which one typically uses -- and there can be ambidextrous
2 versions. But typically for a right-handed shooter, the
3 charging handle would be pulled back with the left hand.

4 THE COURT: Okay.

5 MR. LEE: Okay?

6 So what -- what the video that your Honor will see
7 demonstrates is that a featureless AR-15 is also less safe from
8 that regard because it impedes one's ability to maintain
9 control of the firearm and to perform properly the -- the
10 malfunction clearance procedure.

11 So what's the state actually getting at, though, when
12 it -- when -- when what it -- in trying to accomplish what it's
13 trying to accomplish here?

14 What it amounts to is what is set forth in the
15 state's brief, which is that rapid fire somehow -- which is
16 accurate is somehow dangerous. And I think that this position
17 is frankly untenable.

18 There's -- the state can't really dispute that
19 semiautomatic firearms -- any semiautomatic firearms are
20 capable of rapid fire. So what the state is saying here is
21 that, well, we can't have people who are rapidly firing
22 accurately. That does nothing, again, except to punish the
23 law-abiding citizen; who, again, is accountable for every shot.
24 And it does nothing to deter someone like a mass shooter, who
25 isn't particularly trying to be careful but is simply

1 indiscriminately firing at a large group of people.

2 So I think that this is, frankly, an untenable
3 position for the state to take, to say that weapons are somehow
4 too effective. That we can't allow weapons to be all that
5 accurate because, somehow, having accurate weapons is
6 dangerous. I just don't really see how the state can really
7 make that argument in good faith.

8 Your Honor, the -- the argument that the state makes
9 is similar to arguments that were made pertaining to
10 semiautomatic firearms generally.

11 One of the defense exhibits, Exhibit CM -- that is
12 Charlie, Mike -- is an article that was written pre-*Heller*. It
13 was an article by Koper in 2003. And they were talking
14 about -- and this is before *Heller*, again. But this is talking
15 about semiautomatic firearms in general. And I'll just quote
16 from this article.

17 It says -- in talking about semiautomatic firearms,
18 it says:

19 "Pistol" --

20 And, actually, I can put it up on the screen, if your
21 Honor wants.

22 THE COURT: Just tell me what it is.

23 MR. LEE: Okay. It -- it is Exhibit CM.

24 It says:

25 "Pistols enable shooters to fire more shots more

1 rapidly, potentially increasing the number of
2 persons hit and wounds inflicted per shooting
3 incident. Accordingly, it is possible that the
4 increasing substitution of pistols or revolvers
5 has increased deaths and injuries from gun
6 violence. Such concerns have spurred legislation
7 to restrict or deter the use of semiautomatic
8 weaponry"

9 So, your Honor, five years after this -- this type of
10 thinking was published, the Court decided *Heller*, in which the
11 Court said it doesn't matter that semiautomatic handguns are
12 used for criminal purposes or that they are more accurate or
13 that they allow someone to shoot more rapidly

14 This is the same argument, basically, that's now
15 being recycled as to the assault weapon debate or this assault
16 weapons case, in which the state is essentially trying to say,
17 well, it's the same kind of concern that we had before *Heller*,
18 pertaining to semiautomatic handguns, that they fire -- allow
19 someone to fire rapidly and accurately, and we just can't have
20 that. And I -- again, I just don't think that that's a very
21 good argument for the state to make.

22 Your Honor, I would like to discuss a few other
23 items, at least, pertaining to what the -- the state is
24 claiming.

25 First, they're claiming that somehow the AR-15 is

1 easy to convert to fully automatic. But that's simply not
2 true. There's no evidence to that effect. In fact, all of the
3 evidence that has been submitted in this case, including
4 Defense Exhibit DA, which is a book by Dr. Dimaya; the
5 testimony of General Youngman; and, again, Defense Exhibit BI,
6 which is "Bravo, India," all state that AR-15 rifles are not --
7 it's not something that is common or frequent, and it isn't
8 something that is easy to do.

9 THE COURT: Well, let me ask you this: Were there
10 any instances -- either by Ms. Allen or by anyone else -- that
11 showed that there was a frequency of -- of these weapons being
12 converted to be fully automatic and then subsequently used in
13 some mass shooting?

14 MR. LEE: Not only are they not frequently, they're
15 not really even existent.

16 In any of the mass -- the high-profile mass shootings
17 that we looked at -- and, again, I'm not discounting the fact
18 of the possibility that there may be an isolated incident here
19 or there, depending if you look really hard.

20 But your Honor's point is good to follow up on.
21 Because if -- if this is the case, that AR-15 rifles are -- are
22 easy to convert to full-auto, where is the bloodbath of
23 full-automatic firearms fire that -- that we experience in the
24 streets? It just simply doesn't exist.

25 There's -- none of the mass -- high-profile mass

1 shootings that we looked at involve fully automatic fire, they
2 all involve semiautomatic fire. The last fully-automatic-fire
3 incident that I can think of -- and this is just from my
4 recollection -- is a shootout in North Hollywood in 19 -- it
5 was '97 or 2007, I believe, in which the -- the perpetrators
6 used converted fully automatic firearms.

7 But, again -- but no one was even -- no one was -- I
8 don't believe anyone was killed in that incident, so that
9 doesn't qualify as a mass shooting.

10 So where is all of these converted -- fully converted
11 to fully automatic AR-15s that we were finding on the streets?
12 I'm sure the state can find some, but this simply is not a
13 feature in the mass shootings that have been looked at.

14 In a related sense, the state is also trying to claim
15 that assault weapons somehow fire more powerful rounds.

16 They've submitted the testimony of Dr. Colwell, who
17 has opined that assault weapon victims generally suffer more
18 extensive and more numerous gunshot wounds, suggesting or
19 implying that the wounds that one suffers from an assault
20 weapon are somehow more dangerous or -- or lethal than firearms
21 that are fired from non-assault weapons.

22 And I think the Court has already addressed that.
23 And -- and the defense, ultimately, had to concede -- or
24 Dr. Colwell, at least, had to concede that for all of his hype
25 about the lethality of assault weapons, he would not be able

1 to -- himself, to distinguish between wounds that were caused
2 by an AR-15 as opposed to a non-assault weapon using the same
3 caliber such as the Ruger Mini-14. So I think the Court
4 understands that point perfectly well.

5 Another argument, however, that the state tries to
6 make is that gunfire from assault weapons somehow are uniquely
7 able to pierce body armor worn by law enforcement. And this
8 isn't just a suggestion. This is a flat-out statement that
9 they make in their declarations. But, again, your Honor, this
10 is simply nonsense.

11 Body armor worn by law enforcement is generally
12 intended to protect from handgun bullets and not rifle bullets.

13 As the testimony has shown, any rifle rounds,
14 including the intermediate cartridges fired by -- such as the
15 .223 5.56 round or the 7.62 by 39 millimeter round. Any of
16 those rounds would penetrate body armor specifically worn by
17 law enforcement unless the body armor is specifically rated to
18 withstand that. And that's not just us and our witnesses
19 saying that, your Honor. Defense Exhibit AY -- or "alpha,
20 yankie" -- is a U.S. Department of Justice guide to body armor,
21 in which they talk about -- they say that's -- soft armor is
22 designed to offer protection against assaults with handguns and
23 is intended for daily wear. And most police officers wear soft
24 body armor.

25 Whereas hard armor, which includes the plates that

1 are worn in tactical armor is for high-risk situations. And
2 that -- the document goes on to say that rifle caliber bullets
3 will penetrate through soft armor panels. Hard armor plates
4 are required to defeat them.

5 So even the state's own evidence suggests that if --
6 any rifle round will pierce body armor that's worn by most law
7 enforcement. So I think that, again, this is just another one
8 of these arguments that -- the scare-tactic-type arguments to
9 suggest that assault weapons have some unique characteristic
10 that make them uniquely more lethal in that regard, and that's
11 simply not the case.

12 So let's talk -- I guess the big issue is mass
13 shootings. And that's the issue, I think, that this state has
14 concentrated on. And, frankly, that's the issue that has
15 spawned a lot of this -- the legislation that -- that's at
16 issue.

17 First of all, if we're going to make this argument
18 that there's some type of correlation between assault weapons
19 found at mass shootings or used at mass shootings, then the
20 plain fact of the matter is -- which the defense cannot deny or
21 dispute -- that assault weapons are not used in a majority of
22 the mass shootings.

23 According to Ms. Allen, in her analysis -- which is
24 Defense Exhibit A -- in her analysis of 161 incidents
25 constituting what she calls public mass shootings, as she

1 defined the term, assault weapons under California law --
2 which, again, may or may not include the 30510 Category 1
3 weapons. But assault weapons were used in 32 percent of them.
4 And that's 22 percent where the type of weapon could be
5 determined.

6 If you were to assume that -- that assault weapons
7 were not used in all of the 161 -- or the -- the remaining
8 incidents where the type of weapon could not be determined, the
9 number is about 20 percent.

10 So four out of five of the public -- public mass
11 shootings that Ms. Allen looked at did not involve assault
12 weapons. But if you're just going to say involving because
13 it's at the scene or that it's used, it -- and -- and you were
14 to say -- also take a look at what's the firearm that is most
15 prevalent or found at the scene of a mass shooting, it by far
16 and away has to be a handgun. That's not just my --

17 THE COURT: Refresh my recollection. Did Ms. Allen
18 limit her analysis to California? Or was it nationwide?

19 MR. LEE: Nationwide.

20 THE COURT: Okay.

21 MR. LEE: She looked at 161. In -- in rough, she
22 looked at a greater set of -- she looked at a greater sense of
23 mass -- what she called public mass shootings.

24 In this case, the *Miller versus Becerra* case before
25 your Honor, she changed the definition of public mass shooting,

1 and looked at 161 separate incidents. And these are
2 nationwide.

3 And if you look at her -- her report -- or her
4 declaration, she attaches, as Mr. Echeverria notes, an Appendix
5 C, in which lists the type of firearm that is used, or that was
6 found or described.

7 And she didn't concede this. She refused to concede
8 this at the deposition. But it's really apparent that in
9 almost -- in a vast majority of those incidents, a handgun was
10 found at the scene. But support for this is also found
11 elsewhere, your Honor.

12 If your Honor looks at Defense Exhibit CW, there's a
13 pictorial look at the types of weapons that are used in 19 mass
14 shootings that -- that that article featured.

15 Defense Exhibit CG, or "Charlie, Golf," is a *Mother*
16 *Jones* 2012 article. It says in the 62 mass shootings we
17 analyzed, 54 of the killers had handguns; including in all 15
18 of the mass shootings since the surge of pro-gun laws began in
19 2009. And the Defense Exhibit BM says, contrary to popular
20 belief --

21 THE COURT: I'm sorry. Say that again. Is that --
22 is that "bravo" --

23 MR. LEE: "Bravo, Mike."

24 THE COURT: "Bravo, Mike." Okay.

25 MR. LEE: Contrary to popular belief, assault rifles

1 were not the predominant type of weapon used in these types of
2 crimes. In fact, according to a recent study, handguns were
3 the most commonly used type of firearm in mass shootings.

4 So, again, if we're just going to look at the firearm
5 that's present and say that -- that were used in this respect,
6 as following Ms. -- Ms. Allen's logic or thinking on this, one
7 has to say that, well, the most -- assault weapons are not
8 involved in four out of five of the mass shootings that she
9 looked at. And the most common and the most prevalent is the
10 handgun.

11 But also, her study, again, was over-inclusive
12 because it included a -- her study included all California
13 assault weapons, including the Category 1 and Category 2. And
14 those may or may not also fit the description of Category 3,
15 but that's not how she framed the -- that's not how she framed
16 her study. She framed it, if it met the definition of assault
17 weapon under California law, she was going to count it as a
18 mass shooting involving a -- a -- an assault weapon in that
19 regard.

20 MR. LEE: Your Honor, another part of Ms. Allen's
21 declaration focuses on the shots fired per -- number of shots
22 fired per second -- I'm sorry, per incident in home defense
23 scenarios, involving her look into the armed-citizen database.

24 I can address that for the Court, if -- if the Court
25 is interested. Or if the Court finds that this is

1 cumulative --

2 THE COURT: You know, I was not persuaded by that in
3 the -- in the -- in the *Duncan* case. I was not persuaded by
4 that when I saw her latest -- or her declaration. I was not
5 persuaded by that when I heard her testify because I don't
6 think it's a really -- a very good case. And I'll tell you
7 why. Here's why.

8 How many -- how many -- how many nuclear bombs have
9 been exploded in war in the history of mankind? I think two.

10 Uh-oh, what happened?

11 THE CLERK: No idea, Judge.

12 (Pause.)

13 THE CLERK: Hold on, Judge. They're still there.
14 Hold on.

15 THE COURT: Are you folks still there? Because I
16 can't see you.

17 THE CLERK: I can see them on my screen, Judge.

18 THE COURT: Something happened. I don't have any --
19 I don't have any audio, and I don't have any video.

20 THE CLERK: Let me get IT over here, Judge.

21 (Pause.)

22 THE CLERK: I texted them, Judge.

23 (Pause.)

24 THE CLERK: Your Honor, I can message everyone here.
25 I don't know if you want me to take down a message but --

1 THE COURT: All right. So here's -- I have lost
2 connection. I can neither see nor hear the parties at this
3 point in time. We have tried to reestablish connection several
4 times and have not been able to do so.

5 I am going to conclude this hearing today. We will
6 resume this hearing on Friday at 10:00 a.m.

7 We will hopefully try to get the -- the audiovisual
8 problems resolved between now and then.

9 So this hearing is concluded. Thank you.

10 (Conclusion of proceedings at 3:30 p.m.)

11 --oOo--

12

13 I certify, by signing below, that the foregoing is a correct
14 stenographic transcript of the oral proceedings had in the
15 above-entitled matter this 14th day of February, 2021. A
16 transcript without an original signature or conformed signature
17 is not certified. I further certify that the transcript fees
18 and format comply with those prescribed by the Court and the
19 Judicial Conference of the United States.

20

/S/ Amanda M. LeGore

21

22 AMANDA M. LeGORE, RDR, CRR, CRC, FCRR, CACSR 14290

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