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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,)	
)	No. 19-CV-1537-JAH-AGS
Plaintiffs,)	
)	
v.)	February 5, 2021
)	
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,)	
)	Courtroom 5A
Defendants.)	
)	San Diego, California

TRANSCRIPT OF PROCEEDINGS

(Court Trial - Day 2)

BEFORE THE HONORABLE ROGER T. BENITEZ, SENIOR DISTRICT JUDGE

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24 ALSO PRESENT: MARK BECKINGTON
25 ADAM KRAUT

1 (Friday, February 5, 2021; 10:08 a.m.)

2

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

4

5 THE COURT: Well, good morning.

6 MR. LEE: Good morning.

7 THE ATTORNEYS: Good morning, your Honor.

8 THE COURT: Call the case, Glenn.

9 THE CLERK: One on calendar, 19-CV-1537, Miller, et
10 al., versus Becerra, et al., day 2.

11 THE COURT: All right. Counsel, if you will do me a
12 favor and please register your appearances for the record.

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

16 MR. DILLON: Good morning, your Honor. This is John
17 Dillon with the firm Dillon Law Group, APC, on behalf of the
18 plaintiffs.

19 MR. JAFFE: Good morning, your Honor. This is Erik
20 Jaffe of Schaerr Jaffe, LLP, on behalf of the plaintiffs.

21 MR. ECHEVERRIA: Good morning, your Honor. This is
22 John Echeverria, Deputy Attorney General, for the defendants.

23 MR. CHANG: Good morning, your Honor. This is Peter
24 Chang, Deputy Attorney General, for the defendants.

25 MR. ZELIDON-ZEPEDA: Good morning, your Honor --

1 MR. BECKINGTON: Good morning, your Honor. Mark
2 Beckington, Deputy Attorney General, also on behalf of
3 defendants.

4 MR. ZELIDON-ZEPEDA: Good morning, your Honor. José
5 Zelidon-Zepeda, Attorney General's Office, also for the
6 defendant.

7 THE COURT: All right. Good morning to all of you.
8 Sorry about the disruption last Wednesday. I don't know what
9 happened. I assure you it was nothing personal, Mr. Lee. But,
10 for whatever reason, we lost you all, and we were not able to
11 make reconnection.

12 And I hope I didn't inconvenience you too much by
13 asking you to be here this morning. But anyway.

14 Hey, Glenn, how come it's not tiled like it was last
15 time, where I was able to see everyone at the same time?

16 THE CLERK: I don't know, Judge.

17 THE COURT: Okay. All right.

18 Well, Mr. Lee, I think you were in -- in -- in the
19 process of making your combined opening/closing argument.

20 So if you want to pick up where you left off.

21 MR. LEE: Certainly, your Honor. And thank you very
22 much.

23 When we left off on Wednesday, I was about to start
24 (indiscernible) the testimony of Lucy Allen. And, in
25 particular, her finding with regard to a number of shots that

1 were -- the average number of shots that were fired in
2 self-defense incidents at the home.

3 So we -- I'm prepared to discuss that issue -- that
4 particular issue of the average number of shots fired for
5 several minutes. But once I discuss that, I -- I will be
6 passing on the -- this argument to my colleague, Mr. Dillon,
7 who will be addressing specifically the mass shooting analysis.

8 So with regard to Ms. Allen's testimony regarding the
9 average number of shots that were fired, she -- essentially,
10 her methodology, which is a methodology that she's employed in
11 several cases now, follows this line of thinking.

12 She has looked at what she calls an armed citizen
13 database, which is what -- she describes it as a database that
14 is maintained by the NRA or the National Rifle Association,
15 which collects a number of stories of self-defense incidents.
16 And her methodology was to go online to access the database, as
17 she calls it, to pick out the stories that only involve
18 self-defense in the home because, for some reason, they feel
19 that it's -- it should be limited to self-defense incidents at
20 the home.

21 So this excludes self-defense incidents outside the
22 home, in -- you know, where people have needed to defend
23 themselves in stores or convenience stores or gas stations;
24 robberies out in the street; or workplace defense; or, you
25 know, sadly, defensive incidences involving places of worship.

1 So all of those are excluded from her analysis. The
2 only thing she's focusing in on is self-defense incidents in
3 the home, which plaintiffs have never contended that -- the
4 right to self-defense in the home, of course. So -- nor are we
5 claiming that the claims in this case are limited to those
6 types of incidents. So that's just the first overall backdrop.

7 But what I think Ms. Allen fails to appreciate -- and
8 I think it became apparent during the -- during the deposition
9 testimony, which your Honor will surely read with interest.

10 But I think Ms. Allen failed to appreciate that the armed
11 citizen database, as she calls it, is actually a collection of
12 stories that comes from a magazine that has been kept for many,
13 many years. The NRA has -- for many years, has established a
14 number of publications, and publishes its -- its story in this
15 physical magazine. And I think it's replicated across several
16 magazines now. But, most prominently, the *American Rifleman*
17 magazine.

18 So when I asked Ms. Allen if -- at her deposition
19 whether or not she had any particular editorial insight as to
20 how the NRA goes about selecting its stories for publication in
21 the magazine, what editorial criteria they used, how many
22 stories were not published, that type of thing, she claimed to
23 have -- she absolutely claimed that she has editorial insight
24 as to how the NRA selects its stores.

25 THE COURT: I'm sorry. She said she did or did not?

1 MR. LEE: Absolutely claims that she has editorial
2 insight as to how the NRA selects its stories.

3 THE COURT: All right. Go ahead.

4 MR. LEE: When I pressed her on that, her supposed
5 knowledge of the NRA's editorial standards is only derived from
6 having read these stories for many years. When I asked her
7 specifically, did you ever have a conversation with anyone at
8 the NRA? Did you ever reach out to the NRA? Did you ever ask
9 anyone how they select these stories? What's the criteria?
10 Anything like that? She recalls some vague attempts to try to
11 reach out to the NRA, but never got -- getting any type of
12 satisfactory response.

13 So I think we can infer from that answer is that, no,
14 she never was able to actually speak to anyone at the NRA as to
15 what their selection criteria is for these stories, and -- and
16 that type of thing.

17 So -- so her -- her supposed editorial insight comes
18 only from reading these stories over the years. And, frankly,
19 that's a level of insight that you or I could have if we simply
20 were members of the NRA and we subscribed to the magazine every
21 year. But I think it's -- it shouldn't be lost that this is a
22 feature that appears in the magazine that has been published
23 for many years. And as she cited at her testimony, in her
24 deposition, she did not focus on the magazines at all. So she
25 -- I mean, the -- the physical publications. So -- so she

1 views this as a database. But what this actually is is a
2 selection of stories.

3 And, your Honor, what I like to do is to show your
4 Honor what this publication is and how it appears in the
5 physical magazine.

6 So -- so, your Honor, this has not been marked as an
7 exhibit but I will mark it certainly next in order. I think it
8 would be Plaintiff's Exhibit 34.

9 But this is the digital version of the *American*
10 *Rifleman* magazine. And I just -- this is the copy that gets
11 sent to me every month. And this is just, you know -- just for
12 convenience, this is this month's edition, February 2021
13 edition of American Rifleman magazine. And the print version
14 of this is identical.

15 So once you get past all of the gold ads and
16 advertisements and the table of contents and all of this stuff
17 that typically appears in *American Rifleman* magazine and other
18 NRA publications, you get to this page called "The Armed
19 Citizen."

20 So this is typically what you'll see in "The Armed
21 Citizen" feature. It's one page featuring a collection of
22 stories that purport to highlight some self-defense incidents
23 around the country. So this is what constitutes "The Armed
24 Citizen" database, as she -- Ms. Allen calls it.

25 Now, if you look at this page, which is page 10 of

1 this -- this magazine, there's a collection of one, two, three,
2 four, five, six stories involving self-defense incidents.

3 Now, of these six stories, the first one involves a
4 robbery out in public. So that wouldn't count. The second one
5 involves a robbery at a restaurant, so that wouldn't count.
6 The fourth one involves a construction worker defending a home
7 where he was working on. So that's not his home, so that
8 wouldn't count, presumably.

9 What we have here are two stories that -- that
10 describe self-defense incidents at the home. That presumably
11 would be the types of stories that would be counted in this --
12 in her analysis.

13 So this third story, talking about three armed --
14 three armed individuals forcing their way into a home in Baton
15 Rouge, Louisiana, talks about the homeowner was able to get his
16 gun and fire the (indiscernible) the invaders, striking two of
17 them.

18 But this doesn't say, for example, how many shots
19 were fired.

20 THE COURT: You know, Mr. Lee -- Mr. Lee, brilliant
21 minds think alike. I was about to ask you that question.

22 And the reason why I was going to ask you that
23 question is because I also read some other articles that have
24 been submitted. I can't recall the exhibit numbers. I am
25 going to say that maybe they're -- I don't know, two or three

1 through six, or something, of plaintiffs' exhibits. And in
2 reading those articles, I noted that maybe half of them
3 actually indicate how many shots were fired during the
4 incident.

5 It's not -- it's not a sexy -- it's not as sexy to
6 report that there were 30 shots fired as it is to report that
7 there were 30 bodies found at this shooting site. So it
8 doesn't seem like it's something -- in fact -- and many of them
9 don't even describe the type of gun used. Right?

10 So it doesn't seem like -- and the reason why I said
11 brilliant minds think alike is because that was something that
12 seemed to be so obvious to me, which is that, you know, a lot
13 of these news stories don't seem to report either the type of
14 gun that is used or the number of shots that are fired. So I'm
15 sorry to interrupt you, but that seems so obvious to me.

16 MR. LEE: No worries, your Honor. The -- both that
17 third story and I believe the fifth story talk about
18 self-defense incidents in the home, where -- where a number of
19 shots were fired, but it doesn't specify the number of shots
20 that were actually fired.

21 So I actually asked Ms. Allen about this at her
22 deposition. I asked her, well, what happens when you don't
23 have the number of shots that were actually fired that are
24 mentioned in the story?

25 THE COURT: Good. And what did she say?

1 MR. LEE: And she said what they do is they imply --
2 they find an imputed number.

3 THE COURT: What is that?

4 MR. LEE: And the imputed number -- well, you'll have
5 to read her deposition testimony at pages 129 to 130 to find
6 out exactly how she arrives at the imputed number.

7 But what they do is if -- first, they take the
8 information that's available in the story. For example, if it
9 says two people were shot, they know at least two people were
10 shot, or two shots were fired.

11 So then what they do is they take the average number
12 of shots that were fired that involved two or more shots. And
13 she couldn't tell me what that number was or what that imputed
14 number was. But that's the methodology -- methodology that she
15 employs to arrive at this number.

16 So, in other words, the very -- the average becomes
17 the source of its own validity. So because -- if there's an
18 average that they impute, that that somehow -- they apply that
19 average. And then that -- that somehow justifies or that --
20 that validates, in some way, the number of shots that they
21 presume to be -- were fired in this story.

22 Now, I think that's highly unscientific. I think
23 it's anecdotal. And I think that she admits -- and as -- at
24 her deposition testimony and actually as the district court in
25 New Jersey found, in -- in reviewing her -- her testimony on

1 the same issue, these stories were not compiled scientifically.

2 And her -- and so I don't think she can really come
3 up with this scientific analysis as to the actual number of
4 shots. I think the only thing you can reasonably say or
5 conclude from her analysis is that these are the average number
6 of shots that were fired in stories that appeared in *American*
7 *Rifleman* magazine.

8 But, again, I -- I don't think it should be lost that
9 this is a collection of stories that appears in a publication.
10 And when I asked her, for example, did you have any insight as
11 to, like, were there page limitations? Were there layout
12 limitations? Does American -- does "The Armed Citizen" run on
13 one or two pages per -- per magazine?

14 They couldn't tell me that -- any of that because
15 she, frankly, didn't seem to realize that this is a magazine
16 article. And -- and, most importantly, how many stories get
17 left on the cutting room floor? I asked her that, and she had,
18 of course, no idea because she's not part of the NRA's
19 editorial board or anything like that.

20 So -- so I think that her study on this is extremely
21 fraught and limited. And, moreover, it doesn't tell us
22 anything except what she believes is the average number of
23 shots fired in self-defense stories that are limited to the
24 home as reported by the NRA. I think -- so that's a huge
25 stretch.

1 THE COURT: Could I ask you a question? I've been
2 thinking about this a lot. As you know, this same issue, I --
3 I faced in the -- in the *Duncan* case. I've given this a lot of
4 thought. And it strikes me, does it really matter how many
5 shots somebody fired?

6 MR. LEE: No.

7 THE COURT: Because -- because -- let me tell you
8 why. And I think I started to ask you this question the other
9 day.

10 I believe that there have been two nuclear bombs that
11 have been dropped in -- in -- in -- in wartime, in -- in -- and
12 correct me if I'm wrong. And yet we have -- I don't know how
13 many -- hundreds, if not thousands of nuclear weapons in the
14 arsenal of the United States, in Russia, and China. And I was
15 thinking that there must be a reason why there have only been
16 two nuclear bombs dropped during that time, notwithstanding the
17 fact that we've had all of these other wars in the meantime.
18 Vietnam, for example. Iraq.

19 And the thought comes to me that it's not how many
20 bombs that you have actually used. It's the knowledge that
21 there are bombs out there that if -- if you wish to push for
22 mutual destruction, the bombs are there. And so the fact
23 that -- the fact that someone may just brandish a weapon,
24 which, of course, we would all hope would be the case. Right?
25 That a weapon would never have to be used. That would

1 certainly be ideal. Right? But the fact that the weapon is
2 brandished, the fact that a burglar or a robber or a rapist or
3 a murderer who is trying to do someone harm simply knows that
4 the other person has a weapon and that perhaps that weapon may
5 have the capacity to not just injure but possibly kill, that's
6 a deterrent. That's actually a good thing, I suspect. And
7 whether or not you actually have to fire 30 rounds out of a
8 magazine is irrelevant. If you have to -- I mean, if you have
9 to, I guess, you know, that's good. That's good.

10 But it seems to me that the actual number of rounds
11 fired is absolutely irrelevant to the discussion. And -- I
12 mean, do you understand what I'm saying?

13 MR. LEE: Yes, your Honor. Absolutely. It -- it
14 makes sense in that Ms. Allen's average (indiscernible) no
15 shots were fired at all. The best outcome, when no shots are
16 fired. So, naturally, when no shots are fired, zero number is
17 applied, and that will drag the average number down.

18 When I -- when I asked Ms. Allen, "Have you done an
19 analysis of the number of shots that were fired when shots were
20 necessary," she seemed to -- oh, she said, "No." In fact, she
21 seemed to quarrel with me what it meant -- "I don't know what
22 necessary means." So your Honor will see for yourself in the
23 deposition testimony that that was her -- that was her answer.
24 "I can't tell you what necessary is." But, no, she's never
25 done that. She's never done that analysis, as to the number of

1 shots that were fired when shots were actually fired, even
2 applying this flawed methodology, as we -- as we indicated.

3 But to your Honor's point, yes, the homeowner -- gun
4 owners have consistently -- responsible law-abiding gun owners
5 are consistently trained: The best outcome is when no shots
6 are fired. Use restraint. Don't -- you know, don't shoot
7 blindly. Know what you're shooting at. Know what your target
8 is.

9 And now it seems that if you were to say, well,
10 because gun owners show restraint, that somehow that should be
11 used against gun owners. Because, well, it seems like you only
12 need -- you only need, you know, what need means. 2.2 shots
13 per incident. Well, then we're not going to allow you to
14 have -- or we don't think you should be able to have more than
15 ten rounds in a -- in a firearm.

16 So, yes, to your Honor's point, currently those
17 outcomes -- which are the best outcomes in which no shots are
18 fired -- drag that average down. And so it's really not a true
19 reflection as to what -- for example, the deterrent capacity
20 or -- or the deterrent (indiscernible).

21 So I think for all of these reasons, I think that --
22 and as the district court in New Jersey found, Ms. Allen's
23 conclusions on this is really kind of tangential and -- and not
24 really scientifically supported. And, frankly, in this case,
25 is really only relevant to the sole issue of whether or not

1 there are firearms with fixed magazines that have the capacity
2 to fire more than ten rounds or hold more than ten rounds.

3 And, again, when I asked Ms. Allen if she was aware
4 of any incidents involving those types of firearms with fixed
5 magazines, she wasn't able to identify any.

6 With that discussion regarding the number of rounds
7 fired, your Honor, I would at this time like to turn over the
8 remainder of the -- this argument to my colleague, Mr. Dillon,
9 who will address the mass shooting issue.

10 THE COURT: All right. Mr. Dillon.

11 MR. DILLON: Good morning, your Honor.

12 So before discussing the mass shooting data that's
13 been presented in this case, I want to briefly address the
14 standard of review that's involved here.

15 So even if this Court were to apply the Ninth Circuit
16 two-step analysis, the defendants can't show that there's a
17 reasonable fit between the Government's claimed interests and
18 the assault weapons control act.

19 If any form of scrutiny is going to be applied, it
20 should be strict scrutiny. But even under intermediate
21 scrutiny, this is a high bar. In Second Amendment cases,
22 intermediate scrutiny is guided by First Amendment principles.
23 Therefore, if California's Assault Weapon Control Act cannot
24 alleviate the claimed harms to a material degree, it fails
25 under intermediate scrutiny.

1 And, second --

2 THE COURT: Let me -- let me -- let me interrupt you,
3 Mr. Dillon.

4 So why don't you tell me what would be a better fit
5 that would accomplish that?

6 MR. DILLON: A better fit?

7 THE COURT: Yeah, a better fit that would accomplish
8 the state's important interest?

9 MR. DILLON: Well, your Honor, there's all sorts of
10 things that, you know, arguably can be done. And, in
11 California, we've seen that they haven't hesitated to put in
12 place as many restrictions as they can when it comes to gun
13 control.

14 But, as you can see, the simple fact that the Assault
15 Weapons Control Act allows for a featureless rifle that shoots
16 a .223 round cartridge with a high-capacity magazine, that is
17 legal in California. But if you take that exact same platform,
18 that exact same gun and stick a stock on it that can be
19 adjusted, it's now illegal. So there's really no fit involved,
20 when it comes to, you know, this act and the state's control.

21 (Pause.)

22 THE COURT: Okay. I interrupted you. I guess I
23 threw you off of your --

24 MR. DILLON: Oh, yeah. I didn't know if you wanted
25 to continue a question or anything, but I'll continue.

1 THE COURT: That's okay.

2 MR. DILLON: So at the foundation, the Government's
3 purported interest in banning these commonly owned guns can't
4 undermine the very reason that guns are protected. There's no
5 doubt that guns are lethal. And the state's justification that
6 the same characteristics that make the firearms in this case
7 more suitable for lawful use also make them effective tools in
8 crime if they're misused and, thus, necessitating a ban, would
9 ultimately gut the Second Amendment.

10 Inevitably, under the state's reasoning, the notion
11 that improving a firearm's capability -- making a firearm
12 better, safer, or more accurate for lawful use -- likewise
13 makes it better for unlawful use, leads to the absurdity that
14 firearms are never going to be improved. Because the very fact
15 that it's more accurate and -- and even more lethal outweigh
16 the benefits and justify a ban.

17 So to give you an example here, you know, the
18 invention of rifling in firearms was a significant step forward
19 when it came to both the accuracy and lethality of a firearm.

20 They made firearms exponentially more accurate and
21 more lethal. Yet the state couldn't justify banning all guns
22 that have rifling because they're more accurate than those who
23 don't have rifling. And we can see the discussion of this in
24 Ashley Hlebinsky's deposition at page 135, line 15, through
25 page 139, line 5.

1 So considering these foundational factors, you know,
2 defendants' evidence, at best, meets only rational basis; not
3 the actual demanding standard of intermediate scrutiny, let
4 alone strict scrutiny.

5 So if we're go into the data here, if we're going to
6 make the argument that there's some distant correlation between
7 assault weapons and mass shootings, the simple fact is
8 defendants' evidence shows that assault weapons are not used in
9 the majority of mass shootings.

10 According to defense witness Lucy Allen, assault
11 weapons are used in 22 percent of mass shootings, and that's
12 Defense Exhibit A, paragraph 30.

13 This is consistent with Professor Klarevas's analysis
14 on gun massacres where he states, since 1980, 28 mass shootings
15 have involved assault weapons. That's 27 percent.

16 THE COURT: Is that -- is that nationwide?

17 MR. DILLON: I believe that stat was nationwide, your
18 Honor. Since 1980.

19 THE COURT: Okay.

20 MR. DILLON: But it's in Klarevas's declaration
21 exhibit -- Defense Exhibit E, paragraph 11, for your reference.

22 And similar to this, the state's focus on criminality
23 to justify --

24 THE COURT: What would you say to the argument that
25 one mass shooting is too many?

1 MR. DILLON: Well, I would say that's a dangerous,
2 slippery slope to base law and policy that would largely affect
3 law-abiding gun owners or even just law-abiding people in
4 general. You don't have to relegate this to a gun issue.

5 If you're going to ban things because of one
6 anecdotal incident, it's going to be a very quick process to
7 see that most everything in life is going to be quickly banned.

8 You know, we can do all we can. But the simple fact
9 is that bad guys who plan on doing really bad things are going
10 to do it. And especially when you're considering things that
11 are well planned out. You know, in fact, like these mass
12 shootings. You have -- Las Vegas, for example, seemed to be
13 something that was planned for a significant period of time.
14 And there's nothing that's going to stop that significant
15 planning if someone is that determined.

16 THE COURT: You just refreshed my recollection.

17 I thought I had asked for somebody to provide me with
18 the police reports, the investigation reports regarding that
19 Las -- the Las Vegas shooting. I don't -- I don't remember
20 ever seeing that.

21 Am I mistaken that -- that -- (A), that I have not
22 received those; and (B), that I did not ask for those to be
23 produced to me?

24 MR. DILLON: Your Honor, I remember the -- the
25 request. But I personally don't -- am not aware of whether it

1 was produced. But I'll allow the defense to answer that.

2 THE COURT: Well, maybe I can ask.

3 Mr. Echeverria, I think I see you there. There you
4 are.

5 Were there reports of the Las Vegas mass shooting --
6 because, clearly, that's -- that's -- that's, like, such an
7 aberration. Were those reports ever submitted to me?

8 MR. ECHEVERRIA: I believe they were, your Honor.
9 I'm actually looking into it right now.

10 If I recall correctly, your Honor had a discussion
11 with our expert, Louis Klarevas, about the Las Vegas shooting.
12 And you had asked for certain reports that he had looked at.

13 He did send those reports to me, and I do recall
14 filing them with the Court after the evidentiary hearing. And
15 I will confirm what the docket entry is for you.

16 THE COURT: Great. Hey, thank you. Appreciate it.

17 Okay. I apologize. Go ahead, Mr. Dillon.

18 MR. DILLON: No worries.

19 All right. So similar to this fact that, you know,
20 handguns are the -- most often found at the scene of a mass
21 shooting, the state's focus on the criminality to justify a ban
22 is similarly misplaced.

23 Even if there was a statistically significant effect
24 of an alleged higher incidence of assault weapons being used in
25 crimes or mass shootings or police shootings, it doesn't

1 justify the state's ban.

2 Overwhelmingly firearms are -- the firearm that's
3 most used in the commission of a crime is a handgun. And we
4 saw this in *Heller*. The Government argued that such a fact
5 established their interest in banning guns to prevent
6 firearm-related homicides. The majority rejected that argument
7 and stated that it lacked any fit to further the Government's
8 interests under any level of scrutiny. Here, the same thing
9 applies.

10 According to a 2018 FBI crime stats, the total number
11 of murders involving all types of rifles and shotguns,
12 regardless of their features, totaled 541 out of 10,265.
13 That's 5.3 percent. And you can see this in Lott's
14 declaration, Plaintiffs' Exhibit 10, paragraph 15.

15 On top of that, more homicides occurred in that year
16 using hands, fists, and feet, than all murders committed with
17 rifles and shotguns combined. And that's Exhibit 10, paragraph
18 16.

19 So even if this Court accepts defendants' claims that
20 assault weapons are used disproportionately against law
21 enforcement, this type of justification has been soundly
22 rejected by the Supreme Court in *Heller*.

23 Moreover, defendants' evidence underlying some of
24 these claims is lacking. They allege that assault weapons are
25 used disproportionately in crime. However, they state that

1 assault weapons account for 22 to 36 percent of crime guns.

2 However, when you look at the evidence that's relied
3 on for these numbers, it analyzes both assault weapons and all
4 semi -- semiautomatic firearms with large-capacity magazines.
5 That -- that's a -- significantly more guns than what would be
6 qualified as an assault weapon. And without distinguishing
7 these two categories, the stat's utterly useless.

8 But going into the effect -- effectiveness of assault
9 weapons bans in reducing gun violence or mass shootings,
10 plaintiffs' evidence shows that there's no demonstrable
11 correlation between the two. And you can see that in
12 Plaintiffs' Exhibit 10, paragraph 60 to 65. This is Dr. Lott's
13 declaration, as well as his Exhibits 10-2 to 10-19.

14 So, in other words, while defendants may find some
15 distant correlation between assault weapons and mass shootings,
16 the correlation is not statistically significant. Or, rather,
17 it's not different from zero.

18 So, over time, the rates of mass shootings -- public
19 mass shootings may rise and fall for any number of reasons.
20 But regardless of any other factors, if the federal assault
21 weapons ban was successful in reducing these attacks, the
22 percentage of attacks committed with assault weapons should
23 have decreased as a direct result of the ban. Again, we see
24 that in Dr. Lott's declaration, Exhibit 10, at paragraph 46.

25 But this is not the case. We do not see this

1 decrease in the percentage of assault weapons being used in
2 mass shootings during the federal assault weapons ban. And
3 this fact is true, regardless of the data set being relied on.
4 Whether it's the data from *Rampage Nation*, the data from *Mother*
5 *Jones*, the data from the Crime Prevention Research Center, none
6 of them show any significantly significant decrease during the
7 federal assault weapons ban.

8 Now, we've heard this before, and you'll see this in
9 the defense experts' declarations. The only rebuttal to this
10 fact is to simply deny it with a conclusory statement. And
11 you'll see several references to the terms "spillover effect"
12 and "substitution effect."

13 The only problem here is that defendants' experts,
14 nor defendants, never actually give an explanation to what
15 these effects are and the extent of the effects.

16 The only expert who's provided any kind of
17 explanation with regard to substitutional effects of the
18 federal assault weapons ban was Dr. Lott. And, specifically,
19 you can see this in Plaintiffs' Exhibit 32, starting at
20 paragraph 48. And, in fact, the substitution effects that are
21 routinely stated, they work in the opposite direction of what
22 defendants would claim.

23 And, that is, if the federal assault weapons ban was
24 effective, some killers are not going to commit a mass murder
25 with an assault weapon. Others -- or some may use a different

1 type of gun. So, in both of these instances, you're going to
2 see a lower percentage of attacks using assault weapons.

3 Similarly, if the federal assault weapons ban --
4 after the federal ban sunsetted, there should have been an
5 increase in the percentage of attacks using assault weapons but
6 the percentage consistently falls after the ban.

7 And defendants have provided no evidence that there
8 was a statistically significant decline in the percentage of
9 attacks with assault weapons during the ban or statistically
10 significant increase after the ban.

11 Again, I direct you to Plaintiffs' Exhibits 10 and
12 32, Lott's declarations.

13 Moving forward, again, this Court has already
14 commented several times on this issue. But the arbitrary
15 nature of defining assault weapons in mass shootings is also
16 repeatedly seen and highlighted in the declarations between
17 Dr. Lott and Professor Klarevas.

18 You know, we see Dr. -- Professor Klarevas claiming
19 that there are errors in Lott's analysis. But, at the same
20 time, this is just because Klarevas is substituting his own
21 data because he defines assault weapons in mass shootings
22 differently than what *Mother Jones* or the Crime Prevention
23 Research Center would define mass shootings or assault weapons.
24 Again, that's --

25 THE COURT: I think I began this hearing by

1 indicating that that was a real concern to me, the definition
2 of what's an assault weapon, the definition of what is a mass
3 shooting.

4 I may not have used this term. But, you know, the
5 definition of what is an active shooting. The definition of
6 what's a mass public shooting.

7 All of these definitions are -- seem to -- seem to be
8 malleable and -- and adapted -- I think by both sides -- almost
9 seemingly in order to arrive at a desired result. Which makes
10 it very difficult, as the trier of fact.

11 So, for example, you know, I -- I -- I would have
12 liked to have had someone tell me, okay, well, here's how many
13 of these mass shootings occurred. Again, assuming that we have
14 defined a standard for what a mass shooting is. Right? How
15 many of these mass shootings occurred where the weapon had a --
16 an adjustable stock? Here's how many of the mass shootings
17 occurred where the weapon had a pistol grip. Here's how many
18 of these mass shootings occurred where the weapon had a forward
19 pistol grip.

20 None of that appears to be -- as I pointed out
21 yesterday, I think I've been provided with about 13,000 pages,
22 just this last round of information. And maybe I may have
23 missed it. And if I have, that's why I make the comment. But
24 I -- I don't remember seeing anything that would, for example,
25 define, you know, the dangerousness of a weapon with a specific

1 evil feature, if you will.

2 So it is -- it is troubling for me, Mr. Dillon. It
3 has caused me considerable concern because, when I look at --
4 at all of this data -- and, frankly, I've looked at quite a bit
5 of it. I asked myself, well, wait a minute. First of all, is
6 this a mass shooting? Is this a mass school shooting? Is this
7 an active shooting? Is this a shooting of three or more
8 people? Four or more people? Six or more people? Does it
9 include the shooter? Does this weapon have this particular
10 feature that is -- that is being banned? Does it have that
11 other feature? And it makes it -- (laughing). It makes it a
12 rather difficult task.

13 Anyway, go ahead. I interrupted you, and I
14 apologize.

15 MR. DILLON: No problem, your Honor. In fact, those
16 are some of the exact statements I was going to be making in a
17 little bit later here.

18 But one thing that should help in trying to figure
19 all of this data out is even if this Court were to accept all
20 of Professor Klarevas's figures, none of the results are
21 consistent with what you would predict. The percentage of mass
22 shootings with assault weapons did not decline during the
23 assault weapons ban, and they did not increase after the ban's
24 sunset. And, again, you'll see Lott's declaration, Plaintiffs'
25 Exhibit 10 and Exhibit 32.

1 THE COURT: I may have asked -- I think I asked this
2 once before.

3 It seems to me that there was a recent article or a
4 recent study -- I'm not sure why, but I'm connecting it to
5 *Bloomberg*. I think it was the University of New Jersey. Maybe
6 I'm mistaken. But, anyway, they came up with -- there was a
7 study that said there was no correlation between assault
8 weapons and -- and these mass shootings. And the one
9 correlation that they could find, I think, was magazines with
10 higher capacity than ten rounds. Am -- does -- does that ring
11 a bell to anyone? No?

12 MR. DILLON: You know, your Honor, I'm not personally
13 aware of that study you're referring to.

14 THE COURT: Okay. All right.

15 MR. DILLON: But, again, your line of thinking is
16 similar to my own here.

17 In Plaintiffs' Exhibit 10, you know, Dr. Lott
18 provided, you know, a summary analysis of many studies that
19 have been conducted that address assault weapon ban,
20 high-capacity magazine restrictions, and mass shootings.

21 And based off of his review of all of these studies,
22 their methodology, the factors that were considered in each of
23 these studies, Dr. Lott concluded that there is no evidence
24 that assault weapon bans had any meaningful effect on reducing
25 homicides, and no discernable crime reduction impact. And

1 that's Exhibit 10, paragraph 63.

2 And, in fact, part of the studies that were viewed by
3 Dr. Lott are two surveys, at the end of his declaration, where
4 they did the very similar thing to what Dr. Lott did. Is they
5 reviewed those same studies and they tried to come to a
6 conclusion based off of surveying all of the various studies
7 that were out there. Both of those surveys concluded that
8 there was no statistically significant impact on the federal
9 assault weapons ban.

10 So all valid and credible research shows no
11 statistical significance of these bans. And the few studies
12 that are out there that do show, Dr. Lott provided some very
13 important critiques regarding their methodologies that would
14 cause them to be, you know, questioned with regard to
15 reliability. Or the fact that the changes that were found in
16 these studies were not statistically significant changes.

17 Fundamentally, you know, defendants' generalized
18 claim that the federal assault weapons ban may be distantly
19 correlated with some type of decrease in the number of mass
20 shootings or fatalities from mass shootings, it's just not
21 enough. Because a correlation that's not statistically
22 significant is no different than zero.

23 Defendants' evidence is empirically shallow. And,
24 you know, frankly, it just merely totals up numbers and doesn't
25 give any consideration to the numerous other factors that have

1 a -- a determining effect on mass shootings.

2 You know, for example, you know, this shallow
3 analysis of the overall numbers don't account for whether
4 multiple guns were used in the mass shooting. They don't
5 account for whether multiple magazines -- whether they were
6 ten-round magazines or high-capacity magazines or
7 large-capacity magazines were used. (Coughing.) Excuse me.
8 And, you know, frankly, all of defendants' evidence completely
9 ignores these factors.

10 You know, one other factor that is entirely ignored
11 is the intent of the shooter and what they were intending to
12 do. All of these things will have an effect on -- on the
13 number of people shot and the number of people killed, but none
14 of this is actually analyzed in the data.

15 And like your Honor said a few minutes ago, there's
16 no evidence that any particular feature had a statistically
17 significant effect on any one mass shooting. Even if there was
18 anecdotal evidence that guns with any combination of these
19 features have been used in a mass shooting, this anecdotal
20 evidence doesn't justify a ban under heightened scrutiny. It's
21 pure speculation that these firearm characteristics have an
22 effect. But they have -- defendants have offered no comparison
23 of whether mass shootings involving a featureless rifle versus
24 a mass shooting involving a rifle with a pistol grip -- we have
25 no such comparison.

1 And, in fact, defendants' expert admits that no
2 analysis was ever done to make a quantitative determination on
3 whether the presence of any identified assault weapon
4 characteristic made any difference in the outcome of a mass
5 shooting. And you can see this in Lucy Allen's deposition,
6 page 217, line 17, through 219, line 7.

7 You know, another example of this is, you know, this
8 Court's never been presented with any evidence of any kind that
9 a shooter in a particular mass shooting couldn't be located
10 during the shooting because his gun had a flash hider attached
11 to it. The defense would just like everyone to assume that a
12 flash hider makes a gun more deadly, without offering any proof
13 that it actually does.

14 So to conclude here, you know, defendants and their
15 experts' anecdotal evidence or personal opinions and their
16 general policy arguments relating to mass shootings, school
17 shootings, firearm ownership, the trauma involved to victims,
18 you know, after a mass shooting simply aren't relevant to the
19 legal considerations that need to be made and the protections
20 afforded by the Second Amendment to common firearms like
21 assault weapons.

22 THE COURT: Let me ask you -- ask you a question.
23 So --

24 MR. DILLON: Yeah.

25 THE COURT: So I watched a video of -- is it

1 Mr. Kraut?

2 I'm not sure if he's a doctor or a -- or a Mr. --

3 MR. DILLON: I think he would prefer Mr. Kraut.

4 THE COURT: All right. I -- I always hate to
5 disrespect people.

6 So I watched that video. And then he fired a weapon
7 with the -- with -- with the -- again, what's been referred to
8 as the evil features. And I frankly didn't see any difference,
9 either in the firing rate or in the -- or in the accuracy of
10 the weapon.

11 And so then I was sitting here thinking to myself,
12 okay, now, so if I'm someone who is thinking about
13 self-defense, there are two features -- again, I'm -- you know,
14 I'm limiting this mostly to the rifles because there really
15 doesn't seem to be a whole lot of, (A), discussion and, (B),
16 evidence on the pistols and the shotguns.

17 But regards to the rifles, I've read the -- the
18 deposition and heard testimony before about the fact that
19 not -- not a collapsible scope -- stock but certainly an
20 adjustable stock seems to make perfectly good sense. As I
21 mentioned yesterday, in some homes where people -- their
22 economic level is such that they can't afford to have, you
23 know, a lot of guns -- let's say they may only have one. And
24 there may be -- I think -- I'm trying to remember. Was it --
25 is it -- is it Dr. Hemly (phonetic), who said she was 5' tall

1 and her husband is 6'2, in her deposition? And -- and -- and
2 she pointed out that the adjustable stock makes it so that that
3 same weapon can be fired by her and her husband.

4 So if we go and we look at people that are in a lower
5 socioeconomic level, who may only be able to afford one
6 weapon -- whether it be for sport or for self-defense -- right?
7 It makes sense to me that the adjustable stock is something
8 that people might want on their weapons, so that if they wear
9 heavy clothing during the winter, they can adjust that. Or if
10 there's more than one person that uses that weapon, they can
11 adjust the weapon accordingly.

12 And the other feature that struck -- struck me --
13 that I know is controversial. But the other feature that
14 struck me that a person might want is to have the ability to
15 fire as many rounds as the circumstances warrant at the time,
16 which would mean a removable magazine. Or at least, at a
17 minimum, a fixed magazine that would hold, you know, more than
18 2.2 (laughing) rounds. And in one case I think that I read
19 where -- I don't know. 30 shots were fired. And there were
20 six -- six intruders, I believe. And there were 30 shots that
21 were fired. So, anyway -- so it struck me that those two
22 things are certainly features that one might seriously argue
23 about.

24 But, other than that, it struck me that there really
25 was no difference between the weapon -- the -- the -- the

1 California-compliant weapon and the noncompliant weapon, such
2 that, I suppose, if the state wanted to regulate it, one might
3 say why not? Say, you're a homeowner, and you've got the
4 weapon. And the weapon -- I forgot about the pistol -- the
5 pistol grip. Because the pistol grip adds -- yeah, adds
6 accuracy to the weapon. Which one would hope that the state
7 would agree that we would want people who use weapons in
8 self-defense to have a more-accurate weapon rather than a
9 less-accurate weapon, I think. I could be wrong.

10 But -- so -- so those three features strike me as
11 being features that, okay, those seem to be pretty essential
12 and seem to be defensible. But the other features seem to me,
13 like, so what? So -- so the -- the flash hider, the forward
14 pistol grip, the -- the -- the shroud, those just don't seem to
15 be features that, to me, would be very significant for purposes
16 of self-defense.

17 Now, we haven't even talked about -- yet about
18 (laughing) the other side of the coin, which is the militia
19 aspect. That's -- that's -- that's a horse of a different
20 color. But at least for the self-defense issues, which is what
21 almost everybody seems to be most -- most focused on.

22 And so what I ask myself, Mr. Dillon, is, okay -- and
23 I asked Mr. Lee this yesterday. And he said, "No, you can't do
24 that." But I'm sitting here thinking, okay, fine. So -- so
25 California decides, no, you can't have a flash hider on -- on a

1 weapon. No, you can't have a forward postal -- pistol grip on
2 a weapon. No, you can't have a barrel shroud. By the way, a
3 barrel shroud becomes necessary when you have fired so many
4 rounds that the barrel gets so hot that -- you know, which is
5 not likely to happen at least, again, in the civilian sense.

6 So -- so what do I do with that? I mean, you see
7 what I'm saying?

8 MR. DILLON: Well, your Honor, the Court has to
9 consider the fact that if the state can just arbitrarily, you
10 know, prohibit certain features because they have the opinion
11 that, you know, they really just don't make a big difference
12 in, you know, the person's ability to use a gun, the fact of
13 the matter is that's just the state taking away the person's
14 ability to choose what type of gun, what combination of
15 features is, you know, the most benefit to them in their
16 certain -- certain situations.

17 You know, like you said, this can't just be regulated
18 to self-defense scenarios. You know, it's for all lawful
19 purposes. And each one of these features has a distinct, you
20 know, advantage or benefit that can be used in all sorts of
21 various lawful purposes.

22 You know, and -- like I said, it's not limited
23 self-defense. But a flash hider, that would help and assist
24 someone not to become blinded by the -- you know, the muzzle
25 flash, firing their weapon. If they ever were to fire their

1 weapon in their home when the lights are out, in the middle of
2 the night during a break-in.

3 THE COURT: Who would be more likely to be blinded by
4 the flash? The person that's shooting the gun or the person
5 that's facing the gun?

6 MR. DILLON: Well, your Honor, I'm going to say,
7 common sense -- probably, if it's in the middle of the night,
8 in the dark, there's going to be an effect on both the shooter
9 and the person being shot at. But I think the person being
10 shot at is going to be more affected by the bullet impacting
11 them than the flash.

12 But, you know, all of these features -- whether it's
13 in a shroud that keeps your hand from being burned, or a
14 forward pistol grip or a pistol grip, they allow the firearm to
15 be configurable to that specific person so it can best suit
16 them.

17 And you see this in Ms. Hlebinsky's deposition. She
18 makes multiple references to people who may have, you know,
19 some sort of handicap. Where it's difficult to hold a gun in a
20 certain configuration. And so they add, you know, a pistol
21 grip or, you know, a forward pistol grip to the gun to help
22 assist in handling that firearm.

23 You know, to say that the state can just arbitrarily
24 go through and decide, well, these aren't really that effective
25 and they're really not that necessary, so let's just take away

1 people's ability to choose.

2 THE COURT: What about -- what about the threaded
3 barrel on the pistol? I mean, I'm sitting here trying to --
4 trying to -- I've read so much of this, and I'm trying to think
5 to myself, really, what's the -- what's the utility of a
6 threaded barrel? In the civilian context, okay? In the
7 civilian context, what is the utility of a threaded barrel to
8 the average citizen out there who, again, may want to use
9 the -- the weapon for self-defense; either in the home, or in a
10 business, or somewhere else?

11 MR. DILLON: Yeah. So, first, the idea of a threaded
12 barrel is not categorically prohibited by the state. You can
13 have, you know, rifles that have threaded barrels and shotguns
14 that have internal threading for chokes. They only don't like
15 threaded barrels on pistols, for some reason.

16 And, you know, to answer the Court's direct question
17 here, the ability to put on some type of muzzle device on
18 your -- on your pistol can be beneficial in a number of
19 different situations. If we're going outside of California,
20 you know, suppressors are in fact very legal and used all over
21 the country by a large number of people.

22 THE COURT: What's a suppressor? Is that a silencer?

23 MR. DILLON: I'm sorry. A suppressor, silencer; same
24 thing.

25 THE COURT: Well, what the heck do you need a

1 silencer for?

2 MR. DILLON: Well, in fact, there's a lot of argument
3 that it's actually beneficial for the shooter's hearing. So
4 just like a flash hider prevents the shooter from being blinded
5 by a muzzle flash, a suppressor attached to a firearm protects
6 the user's hearing. You know, if you get over a certain amount
7 of decibels, you get permanent hearing damage. And, you know,
8 shooting a gun is a loud thing.

9 THE COURT: In what context are you talking about?
10 Because, certainly, if you're talking about target practicing,
11 you're generally going to be wearing hearing protection anyway.
12 Right?

13 MR. DILLON: Well, in fact, you know, I personally
14 know of many people who wear hearing protection and use
15 silencers because it's just that much more protection for the
16 hearing.

17 If you want to get away from silencers, when you go
18 to flash hidere and muzzle brakes -- muzzle brakes, their whole
19 purpose is to reduce the --

20 THE COURT: Muzzle brakes -- all right. So you just
21 may have answered the question.

22 So muzzle brakes, as I understand it, are not
23 prohibited under California statute. Right?

24 MR. DILLON: You can attach a muzzle brake to a
25 rifle. Yes, your Honor.

1 THE COURT: You can. But you can't attach it to a
2 pistol because it's a threaded barrel. And so you --

3 MR. DILLON: It would require --

4 THE COURT: I see. Okay.

5 MR. DILLON: Yeah. So you can't put any muzzle
6 device on a pistol because it would require the firearm to have
7 a threaded barrel.

8 But, you know, for -- for women shooters, younger
9 shooters, people who have some sort of handicap, having a
10 muzzle device that would reduce the recoil impact of the
11 firearm is a significant thing and advantageous thing, you
12 know, to incorporate into your firearm.

13 You know, I believe Ms. Hoffman, in her declaration,
14 wanted to have the ability to attach various muzzle devices to
15 her concealed carry firearm.

16 If you're carrying at night, having some sort of
17 flash hider, again, will help if you are ever to discharge your
18 firearm at night. Having a muzzle brake attached to your
19 pistol will help, you know, reduce the recoil and make you more
20 accurate.

21 You know, this is the one thing that we can gloss
22 over. Is lawful owners and people that are, you know, using
23 their guns for lawful purposes, especially in self-defense, we
24 have an extremely high standard to meet. We can't just be
25 shooting all over the place. We have to be accurate. We have

1 to be precise with where we fire the gun and how many shots
2 that are, you know, fired; or else we're going to be held
3 accountable.

4 A mass shooter who just wants to go and kill
5 everyone, not very concerned about being deadly accurate, you
6 know, because they're going to get in trouble from the law.
7 They've already, you know, committed to doing a mass murder.
8 Which is, you know, arguably, the worst thing you could do.

9 So the fact that a stray bullet goes and -- you know,
10 has some -- results in some property damage or hits someone
11 that he didn't intend to hit, a mass shooter is not really
12 going to be worried about that.

13 A law-abiding citizen, using their gun for lawful
14 purpose and self-defense, they are going to be worried about
15 those factors. So they want to be the most accurate that they
16 can be. And they need to be able to have the choice to look at
17 their firearm and decide what features are best suited for them
18 and their intended purposes.

19 And the fact that these things can be misused by a
20 criminal whose intent is to kill a bunch of people anyway can't
21 be the reason to restrict lawful use.

22 THE COURT: Okay. Are you still with us?

23 MR. DILLON: Yeah, I'm here. I just didn't know if
24 you had a follow-up question. I'm sorry. (Laughing.)

25 THE COURT: Don't worry. I will interrupt. I'm not

1 shy.

2 MS. DILLON: All right.

3 THE COURT: I tend to be pretty active. When -- when
4 I'm the finder of fact, I'm not shy about asking questions.
5 Don't worry. Go ahead.

6 MR. DILLON: All right. Sounds good.

7 So just to end off that line of thinking, you know,
8 to try to make the determination of what specific features
9 are -- are good for the people is not something that the state
10 or the Court should, you know, even be doing. This is
11 something that is personal to the individual shooter. That --
12 and it depends on their specific -- specific circumstances.
13 You know, whether or not you have kids, whether or not you have
14 a handicap, whether or not you conceal carry or just have a gun
15 to go to the range; all of these things will change the
16 preferred combination and configuration of your firearm.

17 So the line of thinking that, you know, certain
18 features can be limited because we're just not sure how much of
19 a benefit for a lawful use it is, it borders along the lines of
20 absurdity.

21 And the fact that, you know, because a gun is more
22 accurate makes it more justifiably banned, you know, like I
23 said, would gut the Second Amendment. Because we would never
24 be able to improve firearms, improve accuracy, improve safety.

25 So, you know, for all of the reasons that we've

1 discussed -- you know, the mass shooting data, the lack of any
2 decrease in the percentage of assault weapons used in mass
3 shootings during any ban, and the lack of the percentage rising
4 after the ban sunset -- you know, it is the plaintiffs'
5 position and we believe we have shown that the government/state
6 interest is not substantially related to the assault weapon
7 control act. They're both intermediate scrutiny and strict
8 scrutiny.

9 THE COURT: Let me -- let me ask you this.

10 MS. DILLON: Your Honor -- yeah.

11 THE COURT: The state basically makes the argument,
12 which is somewhat supported by some of the case law, that,
13 look, preventing mass shootings is an important state interest.

14 And this legislation -- without this legislation, the
15 state would be less able to satisfy that important state
16 interest.

17 Do you have any comments on that?

18 MR. DILLON: Well, your Honor, I would say that the
19 State has never shown, you know, why they would be less able
20 to, you know. And that's part of why Mr. Kraut's video was
21 offered into evidence. It's to show that, you know, a person
22 who wants to hit a target at, you know -- I believe, if my
23 memory serves correctly, is 25 yards but we can confirm that, I
24 think, in the video. If someone wants to shoot a target,
25 they're going to do it, whether or not the gun has a pistol

1 grip, or not, you know. And Ms. Hlebinsky discusses this in
2 her deposition. You know, all of these features have some
3 effect at, you know, improving accuracy or control. But the
4 biggest determining factor is the shooter themselves and their
5 own personal ability.

6 You know, you can give the most decked out, you know,
7 rifle that has all of the features possible to improve accuracy
8 of that firearm -- you can give that to someone who's never
9 held a gun in their life. They're not -- arguably, they're not
10 going to be very good at shooting if they don't know how to use
11 the gun. You know, on the flip side of that, you can give a
12 very simple, you know, cheap handgun to a professional shooter,
13 and they're going to be deadly accurate with that gun.

14 So while these features do have an effect, like --
15 the state, you know, is ignoring the fact that it's the
16 shooter. It's the intent of the shooter, it's the ability of
17 the shooter that really makes the determining factor.

18 THE COURT: Let me -- let me ask you another
19 question. Maybe -- maybe you're not the right person to ask.
20 Perhaps I should ask Mr. Lee. And, if so, then I apologize.
21 But I can't recall. One of the experts -- I think it was
22 Dr. Donahue -- or Professor Donahue who pointed out -- don't --
23 don't quote me on this because I could be off. But I think it
24 was like 66 percent of the mass -- school mass shootings that
25 have occurred have occurred by young people, people under 25.

1 Now, one of the statutes that I think is at issue
2 here -- which, by the way, I really had not focused on until
3 this very hearing -- is the fact that we have a statute that
4 prevents people under 18 from possessing or using or in any way
5 having access to -- to -- to -- to one of these weapons,
6 however you may define an assault weapon.

7 So I'm wondering if you have a comment on whether or
8 not this legislation would work to the benefit or to the
9 detriment of society at large by not allowing, say, a parent,
10 for example, to take their child out target practicing or to a
11 range to shoot one of these weapons, so that they could see the
12 damage that these weapons can do. Right?

13 What -- what -- but -- but, as I said to Mr. Lee,
14 we've had age restrictions on lots of things over the years.
15 So I'm not terribly concerned about the age restriction. In
16 fact, it strikes me that there's plenty of evidence. If you
17 have 66 percent of mass school shootings occurring by -- by
18 young people, then it seems to me that maybe, you know, we need
19 to be a little more careful about having young people get their
20 hands on weaponry to begin with.

21 But -- but I'm wondering if you have any thoughts
22 about the lack of exceptions to the statute?

23 MR. DILLON: Yeah, several comments on that. You
24 know, I can't attest to the 66 percent number off the top of my
25 head.

1 THE COURT: Yeah, I wouldn't swear to that.

2 MR. DILLON: Even assuming -- even assuming that's
3 true, that's incorporating a significant group of people that
4 are, you know, above 18 and above 21. You know, under 25 is
5 incorporating adults. You know, not -- we're not necessarily
6 talking about kids when we're quoting that stat, you know.

7 And, two, we already have -- you know, there are some
8 age restrictions when it comes -- nationally speaking, age
9 restrictions generally surround the age of 18, for the most
10 part.

11 And, in California, they restrict it to 21. But
12 something to note is that, you know, while age restrictions
13 exist and historically have existed, they don't exist around
14 guns or rights, the constitutional rights. They -- they --

15 THE COURT: I acknowledge that. I acknowledge that.

16 MR. DILLON: They are based around smoking and
17 alcohol.

18 THE COURT: Yeah, I acknowledge that. And I'm very
19 reluctant to apply a historical perspective in one area to
20 another area. But --

21 MR. DILLON: Well --

22 THE COURT: I was just wondering if you had a thought
23 on it.

24 MR. DILLON: I do. So, you know -- so we have these
25 restrictions. Someone under 18 can't purchase a firearm. And

1 that's any firearm. You can't purchase it if you're under 18.

2 The assault weapon control act prohibits the
3 possession of someone under 18 with what would be considered an
4 assault weapon.

5 So, again, the state's trying to step into the home
6 and take away a parents' decision, an ability to be able to
7 teach their -- their kids, you know, proper firearm safety,
8 proper respect. And, like you said, go to the range. Really
9 see what can be done by firing a firearm. You know, it's not
10 the state's job to jump in and assume the role of a parent.

11 And, you know, these laws and the assault weapon laws
12 preventing even the mere possession, preventing a parent from
13 even trying to teach their kid, you know, safe -- safety with
14 respect to guns, it goes well beyond preventing a minor from
15 purchasing a firearm. That's already prevented by a separate
16 and distinct law. If you're under 18, I can't go into a gun
17 store and buy a firearm. I can't go into, you know, a gun show
18 and buy a firearm. I can't buy a firearm through a private
19 party transfer if I'm under 18. Yet the state just wants to,
20 you know, keep going further and take away the decision of the
21 parent to be able to go with their kids and teach their kids
22 about firearms with their gun.

23 It goes well beyond --

24 THE COURT: All right.

25 MR. DILLON: -- you know, preventing a kid.

1 So, in fact, if that restriction on possession was
2 entirely lifted -- you know, arguably, it would do nothing to
3 change, you know, the ownership or people under 18 possessing
4 firearms in any way.

5 THE COURT: All right. Anything else?

6 MR. DILLON: No, unless your Honor has any more
7 questions, I would be happy to answer them. But that's all I
8 have to say.

9 THE COURT: All right. Does the plaintiff have
10 anything else?

11 MR. LEE: No, your Honor.

12 THE COURT: Did you submit -- so -- so I was a little
13 confused. So I have a binder. I believe this binder comes
14 from the State. And I believe that to be true because it seems
15 to have a state logo on it, I think. And it has dep --
16 "deposition transcripts binder."

17 Maybe -- let me turn to Mr. Echeverria on this.
18 Mr. Echeverria, what -- what is this binder? What is it
19 that -- that is in this binder that's before me?

20 MR. ECHEVERRIA: Your Honor, it's my understanding
21 that that binder contains the excerpted pages from the
22 deposition transcripts that we designated and
23 counter-designated.

24 THE COURT: All right. Well, okay. That's kind of
25 what I thought. And I sort of got a little confused because,

1 for example, I didn't see anything in here -- is there more
2 than one volume? Or -- or -- or is it just one volume?

3 MR. ECHEVERRIA: I can check on the number of
4 volumes. It's one volume for the deposition excerpts.

5 THE COURT: Okay. The reason why I asked that
6 question is I didn't see anything from Professor Donahue.
7 There were no excerpts to his deposition.

8 MR. ECHEVERRIA: That's correct, your Honor. He was
9 not deposed. The plaintiffs -- the plaintiffs only deposed one
10 of our witnesses, and that was professor -- or, I'm sorry. Not
11 Professor Klarevas. Lucy Allen. Lucy Allen --

12 THE COURT: Oops, I lost you. I couldn't hear you.

13 MR. ECHEVERRIA: Sorry, your Honor. Lucy Allen was
14 the only witness for defendants that plaintiffs elected to
15 depose.

16 THE COURT: Okay. All right. Okay. That answers
17 that.

18 Now, I did not see a similar binder from the
19 plaintiff.

20 MR. DILLON: Your Honor, the binders that were
21 submitted by the plaintiffs, they included the full deposition
22 transcript with highlighted sections as our excerpts.

23 You know, since we were highlighting the -- the
24 deposition excerpts, we thought it would be somewhat redundant
25 to give you only highlighted portions and just give you an

1 entire folder of highlighted pages. So we thought we would
2 just do it in one transcript, highlight the excerpts.

3 THE COURT: Is there another document? This happens
4 in some cases that I've had, where the parties submit a list
5 of -- of -- of the pages and lines that they want me to look
6 at.

7 Did -- did you do at that?

8 MR. DILLON: We -- we exchanged lists with
9 defendants, your Honor. And if we haven't already lodged that
10 with the Court, we will do so today.

11 THE COURT: Okay. That would be good. Because --
12 because I tell you what (laughing), I'm not saying that I'm not
13 going to read the entire deposition. Because if there's
14 something in the -- in the excerpts that triggers my curiosity,
15 I will go back and I will look. But I really would rather not
16 have to read 13,000 pages worth of material, if I don't have
17 to.

18 So, anyway, okay. So --

19 MR. DILLON: Completely understandable.

20 THE COURT: All right. What time is it? 11:20? Is
21 that right?

22 THE CLERK: Yes, Judge.

23 THE COURT: Okay. So, let's hear from -- from the
24 State.

25 What do you want me to know?

1 MR. ECHEVERRIA: Thank you, your Honor. We have a
2 lot of discuss.

3 But before we get into the evidence now and -- and
4 our discussion about how that evidence shows that the assault
5 weapons control act is constitutional, there are a few issues,
6 I think, that we should kind of discuss up front. Some issues
7 of potential confusion.

8 THE COURT: Okay.

9 MR. ECHEVERRIA: And also some housekeeping matters.
10 Regarding the Las Vegas report that your Honor
11 mentioned and discussed with Professor Klarevas, we -- we filed
12 those reports at Docket Entry 61, after -- after the October
13 hearing.

14 THE COURT: All right.

15 MR. ECHEVERRIA: Additionally, we lodged our
16 deposition designations and counter-designations on February
17 3rd, which was two days ago, at Docket Entry 25.

18 So those documents will have the particular page
19 numbers that we find to be most interesting and most relevant
20 to the Court's consideration of this -- of this case.

21 THE COURT: Thank you. That's helpful.

22 MR. ECHEVERRIA: And we're going to get even more
23 specific for your Honor.

24 We -- we discussed the potential of having another
25 round of submissions, post-trial proposed findings of fact and

1 conclusions of law. And it's our intention to have very
2 pinpointed citations to those excerpts, so that your Honor can
3 see not just what excerpts we find to be relevant but you --
4 you can see exactly why we find those excerpts to be relevant.
5 And we'll tie those excerpts to the facts and to the law.

6 THE COURT: Outstanding. All right.

7 MR. ECHEVERRIA: The first -- the first issue that I
8 would like to discuss is the scope of the assault weapons
9 control act. What exactly does the law being challenged do?
10 How does it define assault weapons?

11 The AWCA is tailored in scope to particularly
12 dangerous semiautomatic firearm configurations. This is not a
13 ban on any class of weapons. It is a restriction on the way in
14 which certain weapons are used and configured. It prohibits a
15 certain enumerated list of configurations that relate to a
16 subset of firearms. With respect to rifles, those enumerated
17 configurations -- configurations are only applied if the rifle is a
18 centerfire rifle that does not have a fixed magazine, for
19 example.

20 The AWCA does not prohibit the sale or possession of
21 all semiautomatic guns.

22 THE COURT: Why the centerfire versus rimfire?

23 MR. ECHEVERRIA: Well, the evidence in this case
24 shows that centerfire rounds are generally more powerful than
25 rimfire rounds, and this is -- this was testified to by General

1 Youngman, for example.

2 So centerfire rifles are just, as a general
3 proposition, incrementally more dangerous than rimfire rounds.
4 And that would be another reason why the California statute is
5 tailored -- it is tailored to those rifles that are generally
6 more dangerous, not just all semiautomatic rifles.

7 It -- it doesn't prohibit the sale or possession of
8 semiautomatic modern sporting rifles, which is the phrase that
9 plaintiffs' expert, Curcuruto, uses throughout this case. And
10 he also used that phrase in -- that phrase has also been used
11 in other cases involving challenges to similar assault weapon
12 restrictions.

13 Mr. Curcuruto -- Curcuruto testified during his
14 deposition that Californians can continue to enjoy modern
15 sporting rifles -- "enjoy" is my words -- for self-defense,
16 sports shooting, and hunting. Your Honor can see that type of
17 testimony at pages 97, 98, and 103 to 104 of his deposition
18 transcript.

19 The AWCA does not prohibit the sale or possession of
20 essential components to operate centerfire semiautomatic
21 weapons, rifles, or other semiautomatic weapons.

22 And, under *Jackson*, the Ninth Circuit indicated that
23 the state cannot ban hardware that is necessary to operate the
24 firearm.

25 And -- and here, the -- the particular features that

1 are listed are not necessary to operate any of the firearms
2 that are subject to the assault weapons control act.

3 It's also important to note that California compliant
4 AR rifles -- AR platform rifles retain that straight line
5 design feature that Mr. Kapelsohn testified to in the video
6 demonstration.

7 If you recall during day one of the trial, during
8 redirect, Mr. Lee asked Mr. Kapelsohn to demonstrate what the
9 straight line design looks like. And he -- Mr. Kapelsohn held
10 up an AR rifle, an AR-15, with the -- there was that yellow
11 tape that showed a straight line through the barrel and through
12 the stock --

13 THE COURT: I think he did that at his deposition.
14 Right?

15 MR. ECHEVERRIA: That's correct. The redirect in the
16 deposition.

17 So a straight line runs through the barrel -- runs
18 through the barrel, through the stock. And that design is
19 retained for California compliant rifles.

20 The particular weapon that Mr. Kapelsohn was
21 demonstrating with would qualify as an assault weapon under
22 California law because it had a pistol grip beneath the action,
23 and it apparently had a flash suppressor on the muzzle. Take
24 away those features, that rifle still has the straight line
25 design that was such a great innovation, according to

1 plaintiffs' experts, with the M16 and the AR-15.

2 THE COURT: All right. Let me interrupt you there
3 for just -- just a question.

4 Does -- does the state believe that citizens should
5 have weapons for self-defense that are more accurate or less
6 accurate?

7 MR. ECHEVERRIA: Well, in general, the state has a --
8 a -- a profound interest in ensuring that Californians have
9 access to safe firearms.

10 All firearms are dangerous but the state --

11 THE COURT: Yeah, I understand that. But my question
12 was does the state take the position that the more accurate the
13 weapon is for a California citizen to use, the better it is?
14 Or does the state take the position that it would rather its
15 citizens have weapons that are not very accurate? Which of
16 those two is the state official position?

17 MR. ECHEVERRIA: Well, I don't have the state
18 official position on accuracy generally. I would assume that
19 the state -- because the state would want people to have more
20 accurate firearms generally. But the accuracy concern that the
21 state is focused on in this case is accuracy in rapid-fire
22 applications.

23 So when the plaintiffs say that the state is trying
24 to saddle Californians with less-accurate weapons, that is just
25 a mischaracterization of the accuracy concerns that the state

1 has been discussing time and time again and through our
2 experts.

3 The -- the accuracy concerns arise when a
4 semiautomatic weapon is fired rapidly, even in cases where you
5 might have sustained fire, suppressive fire. Those -- that
6 type of rapid firing is just not generally consistent with
7 lawful uses of firearms.

8 THE COURT: Let me -- let me interrupt you.

9 As you know by now, Mr. Echeverria, sometimes I'll
10 play devil's advocate.

11 But there was an article, when -- when -- one that --
12 that comes to mind where a pregnant woman -- her husband was
13 being beaten to death. And she had one of these weapons. And
14 she fired -- I don't remember how many rounds but she fired a
15 lot of rounds. Had it not been for the fact that she fired all
16 of those rounds, her husband might have easily been killed, and
17 so might have she.

18 So -- I don't know what a lot of rounds is. I don't
19 know what rapid fire is. But from reading that article, it
20 struck me that someone in that pregnant woman's position, we
21 would want her to be able to fire as many shots as she needs to
22 fire and hopefully to be as accurate as she could be in firing
23 those shots as she possibly could. Don't you think that's a --
24 that that makes sense?

25 MR. ECHEVERRIA: So I don't know exactly what article

1 your Honor is referring to and whether that victim was using an
2 assault weapon or a weapon that would qualify as an assault
3 weapon.

4 THE COURT: It was an AR-15. So -- so -- so -- so
5 the question, as I recall -- I think it's -- I think it's --
6 Bob, do you know which -- I think it's 3 or 4? Plaintiffs' 3
7 or 4? It was an AR-15.

8 So -- but just in a general -- in a general sense --
9 so you have this pregnant woman whose husband is being beaten
10 to death. And she goes and she grabs a gun. Whatever gun it
11 was, wherever it was, however she got it -- I'm not sure if she
12 made a conscious decision and said, well, look, I'm going to
13 grab a pistol; I'm going to grab a shotgun; I'm going to grab
14 an AR-15.

15 But, in any event, so she grabs this gun, and she
16 proceeds to --

17 (Judge handed document).

18 THE COURT: What is it? It's Plaintiffs' Exhibit
19 001-1. So -- and she did use an AR-15.

20 So the question that I have is -- I put myself in the
21 position of -- of this pregnant woman. If it was my wife, I
22 would want to have a weapon that will fire as many rounds as
23 can possibly be fired, however many I may need to fire. And I
24 want them to be as accurate as they can possibly be in order to
25 stop these people from killing my -- my spouse.

1 So, again, when you talk about rapid fire, I fully
2 and completely understand what you're saying. But I'm
3 wondering, sure. But what about -- what about the person like
4 the pregnant -- pregnant Florida mom? What would you say to
5 her? Would you want her weapon to be more accurate or less
6 accurate?

7 MR. ECHEVERRIA: Well, we would want to make sure
8 that that woman is operating a safe firearm. I would note that
9 the --

10 THE COURT: There's no such thing as a safe firearm.
11 A firearm is -- by its very nature, a firearm is dangerous. We
12 would all agree with that.

13 MR. ECHEVERRIA: Yes.

14 THE COURT: So my question is more focused than that.

15 My question is would you want that woman to have a
16 weapon that is more accurate or less accurate?

17 MR. ECHEVERRIA: As a general proposition, I would
18 say that we want individuals to have more accurate weapons.
19 But the evidence shows, in this case, that the use of rapid
20 fire is just not consistent with a self-defense use of an AR-15
21 or other assault weapons. If your Honor --

22 THE COURT: Well, let me ask you it about that
23 because this has troubled me. And I've had -- I have had
24 this -- this has been bothering me for an awfully -- a long
25 time. And that is this.

1 Look, when -- when did Sandy Hook happen? When did
2 that happen? Do you recall the year?

3 MR. ECHEVERRIA: 2012 -- 2012, I think.

4 THE COURT: Okay. It is not unusual for me today, in
5 2021, to pick up something -- some article, some newspaper
6 article that appears to -- something that indicates that
7 somebody is referring to the Sandy Hook shooting. Okay?

8 I can't say that I had ever read about this pregnant
9 Florida mom using an AR to kill home intruders. I can't say I
10 ever heard the news media report that.

11 I'm willing to bet you dollars to donuts that if they
12 did, they probably reported it very, very briefly, very
13 quickly, and everybody forgot about it. So the fact is that
14 this is not sexy. This is not something that the news media
15 would report. This is not something that's going to be used by
16 many people.

17 It was -- it was something that troubled me about
18 Ms. Allen's deposition, which is that she talks about articles,
19 she talks about average shots, but she doesn't talk about --
20 for example, she doesn't talk about -- so -- my recollection
21 is, in California, we've had six mass shootings where assault
22 weapons have been used since 1989. Six.

23 Now, I don't know how many times -- because nobody
24 has disclosed it. We don't know how many times have
25 homeowners, business owners, others, used one of these weapons

1 and fired rapid fire more than 2.2 rounds.

2 Getting back to my question. My question is
3 really -- and it's -- because I -- I see your point. I see the
4 state's point.

5 I understand -- I understand the concern. But I also
6 understand the concern of the people. As I said, at one point
7 in time, look, there are people who hate guns. There are
8 people who wish that all guns would go away. There are people
9 who will do anything they can do to control and ban guns. And
10 then there are people who will say, you know, there should be
11 absolutely no restrictions on guns. I don't think either one
12 of those is -- is realistic or should be realistic.

13 And I can see how there are competing interests. The
14 state has competing interests. They certainly want to minimize
15 the -- the unlawful use of these weapons.

16 My question, though, is to what extent do we then
17 jeopardize the safety and the security of people who may be in
18 a position where one of these weapons -- like this Florida mom
19 had to use this weapon and had to fire a lot of rounds?

20 So my thinking is -- I don't know. Call me stupid,
21 if you wish, but I would think that I would want people to have
22 a weapon that is as accurate as the weapon can possibly be.

23 And, of course, that works to the disadvantage if you
24 have someone who wants to engage in criminal behavior. Sure,
25 that works to the disadvantage. But for the average

1 law-abiding citizen, who's not going to be going out shooting
2 up people, to me it makes perfectly good sense that we would
3 want them to use the most accurate weapon that they could.
4 Doesn't that make sense?

5 MR. ECHEVERRIA: Well, I do see your Honor's concern
6 about that. But the state is not -- the particular features
7 that the state has identified does not materially diminish the
8 ability of a law-abiding citizen to operate an AR-15 rifle for
9 self-defense in an accurate fashion.

10 THE COURT: Isn't that the point of the pistol grip?
11 I'm not talking about a forward pistol grip. I'm talking about
12 the rear pistol grip. But isn't that the whole point of the
13 pistol grip?

14 MR. ECHEVERRIA: The pistol grip beneath the action
15 of a rifle stabilizes the rifle when the rifle is fired rapidly
16 and repeatedly. So it allows the shooter to maintain the sight
17 on the target.

18 And if you look at the exhibit to Plaintiffs' Exhibit
19 1 -- this is Exhibit -- this is the exhibit to Mr. Kapelsohn's
20 declaration, discussing the pregnant Florida mom. It -- the
21 article does not indicate how many -- how many shots she had to
22 fire. The article states that she used an AR-15.

23 If that individual lived in California, she could
24 have used any weapon for self-defense, including an AR-15,
25 provided the AR-15 had a fixed magazine, for example. She --

1 she could have had a pistol grip beneath the action, in fact,
2 if she had a fixed magazine that didn't hold more than 30
3 rounds.

4 So while I appreciate your Honor's general concerns
5 about -- about accuracy of firearms, and share those concerns,
6 the particular concerns raised by restricting these features is
7 about having enhanced accuracy in rapid fire that is not
8 consistent with lawful uses.

9 The -- we have provided an exhibit, the U.S. Army's
10 training manual. This is Exhibit L. And at page DEF541 the
11 training manual discusses rapid semiautomatic fire as a combat
12 fire technique. And the pistol grip helped stabilize the
13 weapon in that kind of rapid fire. I have no -- I have not --

14 THE COURT: That's a given. Right? I mean,
15 that's -- that's -- that's the whole purpose of the pistol grip
16 is to have more accurate shooting. Right?

17 MR. ECHEVERRIA: In rapid fire.

18 And I have seen no evidence presented by the
19 plaintiffs that -- that any of these seven anecdotes that the
20 plaintiffs have found, that were attached to Mr. Kapelsohn's
21 declaration, involved the kind of rapid fire that we're
22 discussing.

23 In addition, California compliant AR-15s use the same
24 kind of ammunition as other AR-15s. .223 5.56 NATO rounds.
25 This is the kind of ammunition that General Youngman identified

1 as one of the other great innovations of the M16 in battle. It
2 allowed soldiers to use the same kind of interchangeable
3 ammunition. It was also an intermediate round, so it generally
4 weighed less so soldiers could carry more in battle.

5 And California compliant AR-15s can use the same kind
6 of ammunition. They can be supplied by the same ammunition
7 supply chains that General Youngman discussed during his
8 deposition.

9 You can see that discussion at Youngman deposition
10 excerpt page 114 to 117.

11 I would also like to note that California
12 specifically authorizes the use of assault weapons in
13 competition shooting. I know that your Honor emphasized
14 that -- that the law-abiding -- or the lawful uses that the
15 Second Amendment contemplates is not focused solely on
16 self-defense. That is where the -- right under the Second
17 Amendment is most acute, when self-defense is in the home or
18 defense of hearth and home.

19 But with respect to competition shooting and other
20 sporting uses, Penal Code Section 30515(d)(2) -- this is
21 following the features definition in subdivision (d)(2). The
22 statute provides a list of several pistols that would otherwise
23 qualify as an assault weapon under 30515(a). And these pistols
24 are exempt from the statute because there is a determination
25 that these are -- these are suitable for competition shooting,

1 particularly in the Olympics.

2 And that list has been added to over time under
3 subdivision 3. Also --

4 THE COURT: But what about rifles?

5 MR. ECHEVERRIA: So regarding rifle -- so subdivision
6 (d) (2) is only pistols.

7 Regarding rifles, sub -- Penal Code Section
8 30660(a) (3) and 30665 are relevant. 30660(a) (3) allows an
9 individual with a registered assault weapon -- which could be a
10 registered assault rifle -- to lend that weapon to somebody
11 else to use in a competition shooting at a target range.

12 And then Section 30665 allows a nonresident to import
13 an assault weapon, which could include an assault rifle, into
14 the state for the limited purpose of using that firearm in a
15 competition on a target range. So --

16 THE COURT: So just -- maybe I misunderstood
17 something. And -- gosh. So are you saying that somebody in
18 California can in fact own a weapon that would qualify as an
19 assault weapon under the California definition of an assault
20 weapon but only if they register it?

21 MR. ECHEVERRIA: Only if they had registered it.
22 There were very -- there were defined windows under which
23 individuals who had lawfully owned firearms that were going to
24 be prohibited, they had an opportunity to register the weapon.
25 And, therefore, their weapons, if they were duly registered and

1 maintained possession by them, they would be grandfathered in
2 under the --

3 THE COURT: Okay. So that's -- that's -- that's what
4 I understood the law to be.

5 So -- so the problem is that -- so if they're aware
6 of those weapons, they could own them, you could register them.
7 But you could no longer buy new of these weapons, even if you
8 register them. Right?

9 MR. ECHEVERRIA: I believe that's correct, your
10 Honor.

11 THE COURT: All right. And there's a grandfather
12 clause -- and this is going to be like -- like the
13 large-capacity magazine. Where, at some point in time, the
14 state's going to come in, and it's going to say that there was
15 a loophole. That -- that -- that when we grandfathered
16 these -- these guns in -- well, there was a loophole, and we
17 shouldn't have done that. And now they're going to be banned
18 as well. Right?

19 MR. ECHEVERRIA: I'm not aware of any -- any proposed
20 legislation to that effect or any discussion of that. The law,
21 as it stands before the Court, provides for grandfathering.

22 And the Ninth Circuit, in *Duncan versus Becerra*, was
23 very concerned in that case. And your Honor understands that I
24 have a different view in that case. But the Ninth Circuit
25 panel did find the lack of grandfathering to raise

1 constitutional concerns under the Second Amendment. We don't
2 have those concerns in this case.

3 THE COURT: Okay. I knew that. But it was just that
4 you had said -- so -- so if I understand what you're saying,
5 Mr. Echeverria, is that right now there are certain people who
6 have these assault weapons in California. They have been
7 registered. And so to the extent that those people have those
8 weapons, they can use them for competition. They can also loan
9 them to others.

10 But as these weapons become -- as we all know,
11 mechanical things have a finite lifespan. As -- as these
12 weapons, then, begin to disappear from the inventory, there
13 will be fewer and fewer and fewer of these in the State of
14 California. Agreed?

15 MR. ECHEVERRIA: It's possible. I hadn't -- and if
16 there is a concern about needing particular weapons in
17 particular competitions -- and there's no evidence in the
18 record that Californians are unable to compete. But if there
19 is some issue where there are certain competitions that require
20 certain weapons that have been phased out due to deterioration,
21 maybe that's something that could be addressed by the
22 legislature at a later time. It's not -- that particular
23 narrow prospective concern doesn't raise constitutional
24 concerns about the way the statute is constructed today and --
25 and the statute that has been challenged today in court.

1 THE COURT: Okay.

2 MR. ECHEVERRIA: And I would also like to note that,
3 you know, the statute has changed over time. It -- it was
4 enacted in 1989. It was amended in 2000 to add the feature
5 test that the plaintiffs are challenging here. And then it was
6 amended again recently with another -- or relatively recently
7 with another window for registration to restrict the bullet
8 button issue. And then there was another round of amendments
9 where the three new definitions targeting the Franklin
10 Armory-type weapon -- that is not at issue in this case. But
11 there have been multiple amendments because the state -- the
12 state legislature has had to improve the law to address efforts
13 by manufacturers and retailers to circumvent that law.

14 THE COURT: Have any of those laws -- let me ask you
15 this. Have any of those laws made it easier for people to own
16 these weapons, as opposed to making it more difficult for
17 people to own these weapons?

18 MR. ECHEVERRIA: If the -- if the state had been
19 enacting amendments that would make it easier to own these
20 weapons, I think it would be -- that would raise constitutional
21 concerns, frankly. Because then the state would be basically
22 talking out of two sides of its mouth in effect --

23 THE COURT: No, not necessarily so.

24 Let's suppose, for example, hypothetically, that the
25 state, exercising its best judgment, had concluded, for

1 example -- you know, we've looked at the number of mass
2 shootings that have occurred. Say whether you want to use
3 nationwide or statewide. And we have concluded that, you know,
4 very few, if -- maybe none of these have -- have ever had, say,
5 a flash suppressor or a forward grip pistol grip or a -- or a
6 barrel shroud.

7 One would think that the legislature would say, you
8 know, we enacted this law before but -- where we made it
9 difficult, if not impossible, for citizens to own this weapon.
10 But, in retrospect, we think that's overregulation. We don't
11 really need it. And so we're going -- we're going to get rid
12 of it.

13 Do you see what I'm saying? Has that happened?

14 MR. ECHEVERRIA: Oh, I'm -- I'm not aware of that.
15 Well, that has not happened with respect to the AWCA. But I
16 can certainly appreciate that, you know, political judgments
17 can change over time, as evidence changes over time. As the
18 views of the people who elect their representatives in our
19 country change over time. So I'm not disputing that -- that
20 policies can change.

21 But, here, the state has been consistent in trying to
22 restrict access to these particularly lethal weapons and has
23 amended the statute over time consistently to make that goal a
24 reality. Or as much of a reality as is possible.

25 So this is not an example of -- of a slippery slope

1 where the state -- where the state is in ad hoc fashion just
2 adding additional features. You know, like adding a -- a
3 trigger, for example, as a prohibited feature; which would
4 definitely raise constitutional concerns, I would think.

5 So the state has been acting in a -- in a focused
6 manner since 1982 -- since 1989 in trying to restrict these
7 types of weapons.

8 You know, the state of California was the state that
9 innovated assault weapon restrictions like the AWCA and like
10 the federal assault ban. And it was in response to the 1984
11 San Ysidro shooting with an Uzi and the Stockton shooting with
12 an AK-47. We have experience in this state with mass
13 shootings, and we have been trying, since then, to restrict
14 access to those weapons and particularly to reduce their use in
15 mass shootings and in gun violence against law enforcement
16 personnel.

17 THE COURT: You know, I recall the state's
18 representative being here in the *Duncan* case. And I asked a
19 question -- I think I asked the same question of Dr. Donahue --
20 or Professor Donahue when he was here at the last hearing. I'm
21 going to ask you the same question, and that is this.

22 So -- so let's just assume, hypothetically, that we
23 get rid of all of the assault weapons currently defined under
24 California statute. We wave the magic wand. We've sealed the
25 borders both in Mexico, Arizona, Nevada, Oregon, and the ocean.

1 And we have now gotten rid of all of these weapons -- okay? --
2 that are banned under this assault weapons control act. That
3 will still leave available to the citizenry, by your own
4 admission, weapons like, say, the Ruger Mini-14, which is a
5 centerfire rifle with high-firing capacity that fires a similar
6 round. That weapon is still legal in the state of California.

7 Now, when we get the next criminal or deranged person
8 who decides that he or she is going to go out and commit a
9 heinous crime, there's a good probability that -- at some point
10 in time -- they're going to start using these Ruger Mini-14s.

11 So the concern, of course, is that at some point in
12 time now, then the state -- because, remember, the San Ysidro
13 shooting occurred with an Uzi, which has been banned in the
14 State of California for, gosh, I don't know how long.

15 So the next set of mass shootings that we're likely
16 to see -- or at least some of them -- will be using the Ruger
17 Mini-14 and weapons like it.

18 And so then, based upon the logic that I'm hearing
19 from you, is that then the State, in the exercise of its
20 judgment, trying to deal with an important state interest --
21 i.e., the minimization of gun violence -- will then ban the
22 Mini-Ruger-14.

23 Does that -- does that make sense to you?

24 MR. ECHEVERRIA: Yeah, I'm not aware of any plans to
25 expand the AWCA to apply to the --

1 THE COURT: No, no. I'm not asking you for plans.
2 But I'm asking you, looking for the historical development
3 of -- of -- of commonsense gun safety measures in the state of
4 California, that would be the logical progression, wouldn't it?

5 MR. ECHEVERRIA: I -- I don't know, your Honor.
6 The -- the fact of the matter is, is that the state of
7 California is trying to be focused on the particular features
8 that make centerfire semiautomatic rifles more dangerous, more
9 lethal in criminal applications, particularly mass shootings
10 and gun violence against law enforcement.

11 THE COURT: I understand. I hear you. And you've
12 said that several times. And --

13 MR. ECHEVERRIA: Yes.

14 THE COURT: -- in your pleadings, and so on.

15 But the fact of the matter is that that logic -- when
16 you mentioned the slippery slope, that's what got me thinking
17 about this discussion.

18 I had the same discussion having to do with the
19 high-capacity magazines.

20 The logic is this. So Lucy Allen says that, look,
21 you really only need 2.2 shots for a homeowner for
22 self-defense, on average. That's all you need. So if you can
23 get a derringer that will fire two and a half shots, you're in
24 pretty good shape.

25 The problem with the logic, as I see it, is that this

1 is a logic that is very, very faulty because criminals and
2 deranged people are going to use whatever weapons they can get
3 their hands on.

4 And if you get rid -- assuming you could wave this
5 magic wand and get rid all of the AR currently noncompliant
6 weapons, the next time around, what they're going to use is
7 California-compliant AR-15s and AR -- AK-47s. And then you're
8 going to get rid of those because the same thing is going to
9 happen.

10 Criminals and deranged folks are going to use those
11 weapons, at least in some of the instances. And then you're
12 going to get rid of those. And then you'll be left with a
13 Ruger Mini-14. And then that will become the weapon of choice.
14 And then once you have got rid of those weapons, there will be
15 something else. It may be a five-round .30/06.

16 And so the slippery slope argument is not really just
17 a -- is not hyperbole. It's real. If you look at the
18 evolution of -- of California's gun control -- for example,
19 we -- we talked about -- what was it? Category 1, Category 2,
20 and now Category 3. And, in fact, we now have a Category 4.
21 And that's exactly what happens, is that as time goes by -- we
22 no longer have machine guns. I don't know. When was the last
23 time -- I don't remember reading or hearing about a mass
24 shooting in California or anyone using an M16 or an Uzi, or
25 anything of that sort. So what have people been using? Well,

1 among them, they've been using these AR-15, AK-47 rifles.

2 Right?

3 And so what the state did is they said, okay, we're
4 going to ban these, and we're going to ban them by lists. So
5 they did that.

6 But that didn't solve the problem, so then they come
7 up with Category 2. That didn't solve the problem, so now
8 we've got Category 3. And then now we have Category Number 4.

9 And so the question becomes -- and it's -- it's a
10 really important question at the heart of all of this. And
11 that is this: What, if any, are the limits of the state
12 regulating the rights of law-abiding citizens to own or possess
13 guns? Are there any limits? What are those limits?

14 MR. ECHEVERRIA: There are absolutely limits, your
15 Honor. We have -- we have acknowledged those limits, and we
16 have been trying to legitimate within those limits. And the
17 limits are -- are delineated by the two-step framework that the
18 Ninth Circuit has adopted for adjudicating Second Amendment
19 claims. When the burden of the law on the core Second
20 Amendment right rises to the level of a severe burden, then the
21 state is subject to a high -- a higher form of scrutiny -- of
22 strict scrutiny, and it makes it harder for the state to
23 justify the law. It's -- it's a spectrum.

24 And, right now, we are at one end of the spectrum.
25 Your Honor is concerned about the other end of the spectrum

1 that we're not at. And the law that is before the Court in a
2 facial challenge that the plaintiffs' are making, it does not
3 contemplate or does not -- it's not relevant to the facial
4 claim -- like some hypothetical law that may happen in the
5 future.

6 You know, I tried to address the evolution of the
7 AWCA. And I wanted to address the slippery slope argument
8 head-on because I know it's something your Honor is concerned
9 about. I was the attorney arguing *Duncan* before you.

10 THE COURT: Were you? I'm sorry. I forgot about
11 that.

12 MR. ECHEVERRIA: It's okay. I did not forget. But
13 it's okay.

14 THE COURT: (Laughing.) Well, you did a good job,
15 just like you're doing a great job now.

16 But for some reason I thought there was a -- a female
17 AUSA --

18 MR. ECHEVERRIA: Oh, I apologize. Yes, Alexandra
19 Robert Gordon, who is now a superior court judge, she argued
20 the preliminary injunction in front of your Honor. I argued
21 the summary judgment motion.

22 THE COURT: Okay. Okay. All right.

23 MR. ECHEVERRIA: Summary judgment argument was me.

24 THE COURT: So -- so let me -- let me turn to a
25 different -- a different issue. Because, again, it troubles

1 me. And that is -- and I think I asked about this last time
2 that you were here.

3 In *Heller*, the Supreme Court did a wonderful job, I
4 thought, of reconciling two -- two aspects of the Second
5 Amendment. The first -- the first aspect, as I recall, was
6 that the Supreme Court talked about the right of self-defense
7 not even really being a right protected or delineated in the
8 Bill of Rights. It's -- it's a natural right. It's a right
9 that exists and that nobody should be able to deny someone
10 else, which is the right to self-defense.

11 And so the Supreme Court said, look, there are
12 people -- back at the founding of our country, there were
13 people that had muskets and pistols. And they had these
14 muskets and pistols, and they used them for several reasons;
15 whether it be for self-defense or for hunting or whatever.

16 But there was also something else that happened, they
17 said. It was also this desire to have a militia, which is why
18 the prefatory clause of the Second Amendment addresses the
19 militia. And the Supreme Court reconciled those two by saying,
20 obviously, if the people have a musket or a pistol for hunting
21 or for self-defense, if it should become necessary -- as it did
22 in Lexington and Concord -- for them to bring whatever weapons
23 they happen to have on hand, we need those people to bring
24 these weapons to be an effective fighting force as a militia.

25 By the way, if I have misstated anything, don't

1 hesitate to -- to correct me.

2 Now, here's the problem. I think I asked someone to
3 brief for me the other *Miller* case. I can't recall the --
4 the -- the citation, nor do I recall the date. I think it was
5 like in the 1930s, or thereabouts.

6 My recollection of that *Miller* case was there was a
7 question about someone who had a shotgun -- a sawed-off
8 shotgun. And apparently there was a taxation statute or
9 something that said you couldn't have these. And, in the end,
10 the United States Supreme Court said that sawed-off shotguns
11 were not protected by the Second Amendment. They said there is
12 no evidence which indicates that sawed-off shotguns have any
13 useful purpose for military purposes.

14 So the converse of that is that if a weapon has use
15 for military purpose, then in fact it is protected by the
16 Second Amendment.

17 Now, of course, I think *Heller* -- as I said, *Heller*
18 did a wonderful job of reconciling two different but -- but --
19 but somewhat -- sorry. English is my second language, and
20 sometimes I lose -- I can't find the appropriate word.

21 But -- but *Heller* found a way to explain why people
22 could own certain weapons. And those weapons would be useful
23 not just for hunting, not just for self-defense, but also if it
24 came time and they needed to bring these weapons to the
25 battlefield, they would have these -- they would be available

1 to them.

2 So, on the one hand, you can argue that, look, a
3 weapon with a flash suppressor, a pistol grip, a shroud, those
4 are weapons that would not be useful for self-defense. But
5 they certainly are useful if in fact -- and I think I used this
6 phrase last time you were here. If the dastardly Russians were
7 to be -- come marching down through Broadway, San Diego, they
8 would have to face a barrage of citizenry who would be armed
9 with these weapons. They might not eventually succeed, but
10 they would certainly -- as they did in Concord and Lexington --
11 they would do significant damage. Perhaps enough to make them
12 turn around and go back. Who knows.

13 As best as I can tell, *Miller* has never been
14 overruled. It's still good law. I've had my law clerks look
15 into this over and over and over again. I can't find a single
16 case that says that *Miller* has been overruled. Why? Because
17 it makes perfectly good sense when one reads the *Heller*
18 opinion. Because there's a difference.

19 In other words, *Heller* -- *Heller* -- *Heller* reconciled
20 *Miller* and the natural right to self-defense and said, "Well,
21 there's a difference." And I'm going to use my own -- my own
22 example. But there's a difference between the citizenry, for
23 example, possessing hand grenades -- which really have no use
24 for self-defense or for hunting or for anything else -- or
25 flamethrowers or even M16s, that are submachine guns or -- not

1 submachine guns but machine guns; as opposed to a weapon that
2 law-abiding citizens can own for lawful purposes but which can
3 also be used in the event that a militia becomes necessary.

4 So when you say that we want the weapon to be
5 accurate for -- for -- for self-defense purposes but we don't
6 want it to be so accurate for rapid firing, well, that only --
7 that only addresses half of the equation. It doesn't address
8 the other half of the equation. Right?

9 What do you do -- is it not preferable should -- God
10 forbid -- we ever have a need to muster up the militia, would
11 we not want it to be preferable for the citizenry to have
12 weapons that in fact are effective in the battlefield?

13 (Pause.)

14 MR. ECHEVERRIA: Your Honor?

15 THE COURT: Yes.

16 MR. ECHEVERRIA: If I may, I -- I don't want -- I
17 don't want the Court to infer from my silence that -- that we
18 don't have any thoughts on -- on your -- what your Honor was
19 saying.

20 I -- I agree with you that *Miller* is still good law.
21 I agree with you that *Heller* reconciled *Miller* with the -- with
22 the current scope of the Second Amendment as defined by the
23 Supreme Court in *Heller* and again in *McDonald*.

24 But the court in *Heller* did not reconcile *Miller* by
25 saying that the Second Amendment protects those weapons that

1 are useful for militia service, even though the *Miller* opinion
2 did use some language that could be construed to that effect.

3 Justice Scalia was very clear in *Heller* -- in
4 *District of Columbia v. Heller*. On page 623 -- that's 554 U.S.
5 570, pin cite 623, quote:

6 "Miller stands only for the proposition that the
7 Second Amendment right -- whatever its nature --
8 extends only to certain types of weapons, period."

9 And then Justice Scalia went on to say that we might
10 as well consider, at this point, what types of weapons *Miller*
11 permits.

12 Read in isolation, *Miller's* phrase, "part of ordinary
13 military equipment" could mean that only those weapons useful
14 in warfare are protected. That would be a startling reading of
15 the opinion because then it would mean that machine guns could
16 be legal.

17 THE COURT: Well, no. That only those weapons would
18 be protected by the Second Amendment. So, for example, perhaps
19 a single-shot .410 shotgun or a double-barreled shotgun would
20 not be.

21 MR. ECHEVERRIA: Well, that's not exactly what
22 Justice Scalia goes on to say. He says that it would be a
23 startled reading of *Miller* since it would mean that the
24 National Firearms Act's restrictions on machine guns might be
25 unconstitutional; not that individuals would only have access

1 to machine guns, if that makes sense.

2 THE COURT: All right.

3 MR. ECHEVERRIA: What -- what *Heller* was saying was
4 that *Miller* did not recognize a sawed-off shotgun as protected
5 because that is not a weapon in common use for lawful purposes
6 like self-defense.

7 The prefatory clause has been decoupled from the
8 operative clause over time. And that -- that's what Justice
9 Scalia explained in *Heller*. That at the time of the founding,
10 the same weapons that people had for common use, like -- like
11 self-defense in the home, were the same weapons that they
12 brought to militia service.

13 Today the gap between the preparatory clause and the
14 operative clause has -- has widened. Because, you know, no
15 amount of small arms could stand up to, you know, the Russian
16 military, as your -- your Honor was referencing in the
17 hypothetical.

18 THE COURT: Well, I think that's -- I don't -- I
19 don't want to argue with you, but I don't think that's true.

20 And as I pointed out to you last time, that's --
21 that's a complete inaccurate reading of -- of history.
22 Because, as you know -- and I think I pointed out -- people who
23 make that argument just refuse to -- what was it? Somebody
24 said those who -- what is it? Those who refuse to learn
25 history are bound to repeat it, or something.

1 That -- that -- that's a totally invalid argument,
2 but it's -- it's truly neither here nor there. But the fact of
3 the matter is, as you know, I was born and raised in Cuba. I
4 fled Cuba because a dictatorial government came into power.
5 That -- that dictatorial government came into power because
6 there was a very, very small -- small group of people -- I
7 can't tell you how many. But it was a very, very small group
8 of people that came armed with old M1s, as I recall, and
9 Garands. And I think they had one or two machine guns. And
10 that small group of people eventually overthrew a government
11 that had been largely armed by the United States, that had
12 bombers and tanks. I've seen those tanks. Tanks and -- and --
13 and howitzers, and all sorts of firepower. So the idea -- I
14 mean, that idea is just -- is just flawed. It's not -- it's
15 not supported by historical fact.

16 You know, in -- in -- in -- in Iraq, after we
17 defeated Saddam Hussein, again, a small group of people armed
18 with all kinds of strange weapons -- IEDs -- almost brought
19 this great country, the most powerful Army, Navy, and Air Force
20 in the world, brought us to our knees. I mean, we almost lost
21 the Iraq war. And during World War II, the Jewish resistance,
22 the French resistance, those are people that made a big
23 difference.

24 So the idea -- I mean, it's not even required -- the
25 Second Amendment doesn't require that -- that we be able to

1 defeat the enemy. That's not what's required. What's required
2 is that if there was a battle, as there was in Lexington and
3 Concord, that people be able to take up weapons and attempt --
4 maybe not succeed, perhaps -- as happened in Cuba, for example,
5 they did succeed. But at least to attempt -- attempt to do
6 something, rather than just simply surrendering. Right?

7 So *Miller* is pretty clear. *Miller* says -- I mean,
8 the language in *Miller* is absolutely clear. It says there is
9 no evidence to support the fact that a sawed-off shotgun has
10 any military use whatsoever, and therefore, is not protected by
11 the Second Amendment.

12 In that statement, what they're saying is in order
13 for a weapon to be protected by the Second Amendment, it has to
14 have some military use.

15 I think what *Heller* does, if I'm not mistaken, is
16 what *Heller* says is -- but there's a difference. There's a
17 difference between a flame thrower, which has no real civilian
18 application, and other weapons such as, for example, a pistol.
19 Right? A semiautomatic pistol. Which can do both. It can be
20 both -- be used both by the militia and by the people in --
21 other lawful purposes.

22 And so -- so it seems to me -- and maybe I've beaten
23 this dead horse too much. But it seems to me that the problem
24 is that on the one hand we want weapons to be accurate, I hope.
25 But apparently the state says, but we don't want them to be too

1 accurate for too long. Which may be fine except for that if in
2 fact those weapons became necessary for militia use, we would
3 want those weapons to be accurate and to be accurate for long.
4 Wouldn't we?

5 MR. ECHEVERRIA: Well, your Honor, I think it's
6 important to -- to clarify that our -- again, our concern about
7 accuracies, about rapid fire, not -- you know, rapid fire can
8 happen over a long period of time, but it's the intervals
9 between the shots that make the rate of fire rapid, not the
10 duration of the firing, necessarily.

11 But, you know, we -- we -- we have a different -- the
12 state has a different reading of *Heller* and how *Heller*
13 reconciled the language in *Miller*.

14 This -- it's the state's position that *Heller*, in
15 effect, reread *Miller* or gloss -- provided a gloss over *Miller*.
16 That -- that it -- that the Second Amendment protects only
17 those weapons in common use for lawful purposes, and a
18 sawed-off shotgun is not one of those weapons.

19 Your Honor said that in *U.S. versus Miller* the
20 Supreme Court determined that the short-barreled shotgun had no
21 reasonable connection to militia service.

22 There are law enforcement agencies throughout the
23 country that use weapons that may qualify as short-barreled --

24 THE COURT: No, but -- but you didn't hear me
25 correctly. Because, in fact, what *Miller* said was that there

1 is no evidence -- in other words, the Court did not have any
2 evidence before it at the time that it made its ruling, that
3 would allow it to make that finding.

4 I don't think I ever said that those weapons are not
5 useful. What I was saying is that that's what *Miller* said.
6 *Miller* said that --

7 MR. ECHEVERRIA: Right.

8 THE COURT: -- the evidence before it does not allow
9 me to make a finding. Am I not correct?

10 MR. ECHEVERRIA: No, I think that's fair. Yeah,
11 that's fair.

12 THE COURT: And you know what? It's a quarter after
13 12:00. And I -- I have been -- I've been grilling you long
14 enough, Mr. Echeverria. How about if we take a lunch break,
15 and then give you a chance to -- to -- well, collect your
16 thoughts; give me a chance to go have some lunch; give my
17 reporter, who I'm sure must be worn out by now, give her a
18 chance to catch her breath.

19 So I think it's a quarter after 12:00, isn't it?
20 Right? Yeah, that's right. How about if we come back at 1:30.
21 And I really do want to wrap this up today.

22 And I know I ask a lot of questions, and I apologize
23 for that. But I'm just a curious guy.

24 So anyway, all right. We'll see you at 1:30. Thank
25 you.

1 MR. ECHEVERRIA: Thank you, your Honor.

2 (Recess taken at 12:17 p.m.)

3 (Resuming at 1:32 p.m.)

4 THE COURT: Okay. Good afternoon. I hope everyone
5 had a great lunch.

6 Can you hear me?

7 THE ATTORNEYS: Good afternoon, your Honor.

8 MR. ECHEVERRIA: I can hear you.

9 THE ATTORNEYS: Good afternoon, your Honor.

10 THE COURT: Before I go any further, listen, I had
11 alluded to a report that was -- that I had mentioned
12 previously. And I found it over the lunch hour. I know I had
13 mentioned this once before. But it was -- it was a report by
14 the Bloomberg, Johns Hopkins group. I think I said it was by
15 New Jersey. But it wasn't. It was a Johns Hopkins Bloomberg
16 School of Public Health.

17 And what I was alluding to was the following.

18 There's a sentence that says:

19 "In addition, the study did not find an
20 independent association between assault weapon
21 bans and the incidence of fatal mass shootings
22 after controlling for the effects of bans on
23 large-capacity magazines."

24 So, in other words, they found that large-capacity
25 magazines -- however you define those -- was -- did seem to

1 have an impact on -- on mass shootings.

2 Now, I also had a chance to find the article that I
3 was referring to, Mr. Echeverria, which is the -- the problem
4 that I have with the idea that citizens should not have
5 accurate weapons. And the article is -- again, it's one of
6 plaintiffs' exhibits. The title of the article is as follows.
7 It says:

8 "Deputies. 30 rounds fired from AR-15 in deadly
9 Florida home invasion."

10 So -- so it struck me from that -- and, again, you
11 know, most of these news articles seldom tell you how many
12 rounds are fired. But here's one example. Here's one perfect
13 example of folks who repelled a home invasion, and one of the
14 victims happened to get lucky enough to have an AR-15 and he
15 fired 30 rounds in repelling the invaders.

16 So it strikes me that perhaps the state is making a
17 determination that the value of a life of the victims is less
18 than the value of the life of the victims in mass shootings,
19 which is a -- a determination that I am not sure the state
20 should ever be entitled to make.

21 But, certainly, had these people not had this AR-15
22 and fired 30 rounds, who knows what might have happened to
23 them?

24 MR. ECHEVERRIA: Well, that is -- your Honor, that is
25 absolutely not the position of the state. The state would

1 mourn the loss of any life, including the life of a -- of an
2 individual trying to defend themselves in their home.

3 The -- the fact of the matter -- the fact remains
4 that even if somebody needs to fire 30 rounds in self-defense,
5 the particular provisions being challenged in this case, in the
6 assault weapons control act, do not limit the number of rounds
7 that can be fired, with the exception of the fixed-magazine --
8 fixed-magazine provisions.

9 And otherwise, Californians -- if they so choose --
10 they can decide whether or not to arm themselves with an
11 AR-platform rifle in the state of California and --

12 THE COURT: But -- but does it -- but -- and I'm not
13 trying to argue with you. I'm just simply trying to figure out
14 the bases for the State's position.

15 So I argued -- or I asked you early on, does the
16 state believe that people should have accurate weapons or
17 less-accurate weapons?

18 And you conceded to me -- and I appreciate your doing
19 that -- that the state would prefer that people have accurate
20 weapons, and that makes sense.

21 And then I said to you, I said, "Well, with that sort
22 of speech in favor of people having the pistol grip -- not
23 necessarily the forward pistol grip, but certainly the pistol
24 grip behind the action. And you said to me, "Well, but --
25 but -- but the reason why we have this ban is because what we

1 want to do is we want to stop rapid firing." Right?

2 But this case -- in this instance, they fired 30
3 rounds from the AR-15. Which, you know, I'm -- I'm going to
4 take a wild guess that that was rapid firing. I mean,
5 that's -- I know that's what I would do if I had to stop an
6 intruder in my home. I'm going to -- right? So, in that case,
7 you would also want that weapon to be accurate, wouldn't you?

8 Because, if it wasn't, you might strike innocent
9 people. Or, as the state sometimes argues, the bullet might
10 penetrate -- this was a mobile home, by the way. Might
11 penetrate the wall and perhaps strike someone next door.

12 So what's your response to that?

13 MR. ECHEVERRIA: I -- so these are themes that I'm
14 sure are going to carry through the rest of the presentation
15 (indiscernible).

16 THE COURT REPORTER: I'm sorry. I couldn't hear.

17 THE COURT: I'm sorry. My court reporter can't hear
18 you because sometimes you lean --

19 MR. ECHEVERRIA: Oh, I apologize.

20 THE COURT: That's okay. All right. Go ahead.

21 MR. ECHEVERRIA: Yeah. So the -- the discussion that
22 we're having right now, your Honor, concerned themes that will
23 likely carry through the balance of my presentation to the
24 Court --

25 THE COURT: Okay.

1 MR. ECHEVERRIA: -- about the evidence in the case,
2 under the two-step framework.

3 The state is not trying to saddle Californians with
4 less accurate, less safe weapons.

5 The particular features that had been restricted on
6 particular types of firearms -- you can have a pistol grip with
7 a rimfire AR-15, in California. The particular features that
8 are being restricted on certain types of firearms enable not
9 just accurate fire but accurate rapid fire. There is no
10 evidence that when someone fires 30 rounds in self-defense --
11 you know, that that particular incident could last hours. We
12 just don't know.

13 And I -- I would caution the Court -- I would caution
14 the Court to read too deeply into anecdotes where, you know,
15 it's possible that that individual could have used another
16 weapon and fired 30 rounds in self-defense just as effectively.

17 The state of California is trying to make a judgment
18 based on the available -- the best available evidence to
19 protect public safety without unduly jeopardizing the ability
20 of individuals to protect themselves with firearms. It's a
21 balancing act.

22 And under intermediate scrutiny -- and we'll get into
23 this later on, I'm sure, your Honor. But under intermediate
24 scrutiny, the courts do generally defer to the judgments of the
25 legislature if the burden on the core Second Amendment right is

1 not severe.

2 And we -- we respectfully submit -- I don't like to
3 use the word "respectfully" because people say that, when an
4 advocate uses the word "respectfully" before a judge, you're
5 not going to be respecting the judge.

6 THE COURT: It means quite the opposite.

7 MR. ECHEVERRIA: (Indiscernible). So I apologize for
8 using that word.

9 THE COURT: That's okay.

10 MR. ECHEVERRIA: But we -- we believe that the
11 intermediate scrutiny does apply because the burden is minimal.
12 And -- and -- and the evidence of the effective assault weapons
13 in mass shootings is demonstrated by the evidence in this case.

14 Concerning the Bloomberg John Hopkins study, I -- I
15 don't believe that -- that that was admitted -- or has been
16 submitted as evidence in this case. I don't believe that any
17 of the experts had an opportunity to opine on it.

18 I hate to ask the Court for information about that
19 exhibit.

20 Do you happen to know the date of the Bloomberg Johns
21 Hopkins study?

22 THE COURT: Yeah. And I just happened to run into
23 this. It popped up in one of my news services. That's how I
24 learned of it.

25 Let me see. I can tell you.

1 It's not going to tell you a lot, by the way, just so
2 that you know. Because it's actually mostly focused -- it was
3 originally focused on the issues of licensing for private sales
4 and -- let's see. What else? (Pause, referring.) I don't
5 recall.

6 But, anyway, so here's the citation --

7 MR. ECHEVERRIA: Do you know what the date was?

8 THE COURT: Huh?

9 MR. ECHEVERRIA: Do you know what the publication
10 date was for that --

11 THE COURT: Well, I'll give you -- I'll give you a
12 link.

13 It's www.jhsph.edu/news/news-releases/2020/firearm-purchaser.
14

15 Look, I'm not relying on this, to be honest with you,
16 but I thought it was -- but I thought it was interesting. I
17 mean, Hopkins. Can you imagine? I mean, it's a Bloomberg
18 funded -- I mean, if you can imagine that -- (laughing) they
19 probably will lose their funding after publishing this. But
20 the fact is that they -- they have this sentence, which I
21 thought was really interesting, that said:

22 "In addition, the study did not find an
23 independent association between assault weapon
24 bans and the incidence of fatal mass shootings
25 after controlling for the effects of bans on

1 large-capacity magazines."

2 So for whatever it's worth, in this study they also
3 concluded that, you know -- and I can understand -- I can
4 certainly understand their finding that high-capacity
5 magazines, as anyone with any common sense could figure out,
6 yeah, sure, it -- it could lead to more fatalities and more
7 injuries, of course.

8 So anyway, I --

9 MR. ECHEVERRIA: Yeah -- yeah. I see your Honor's
10 point.

11 So, I mean, there are studies that are focused on
12 other aspects of gun safety regulation that will make
13 observations about other aspects of gun safety legislation.
14 But our -- our experts were focused on studying assault
15 weapons.

16 None of the plaintiffs' experts, including Dr. Lott,
17 accounted for this particular article during the course of this
18 case. But, in any event, the evidence that we have presented
19 does show that large-capacity magazines are used in most --
20 most public mass shootings. This is from Lucy Allen's study.
21 We -- we acknowledge that -- we acknowledge that the fatality
22 and injury counts, on average, are substantially higher when
23 large-capacity magazines are used.

24 But if your Honor looks at Lucy Allen's declaration,
25 which has been marked as Defendants' Exhibit A, she -- she

1 finds that even more individuals, on average, are killed and
2 injured when you have large-capacity magazines used in
3 conjunction with an assault weapon. So there is an association
4 of even greater fatality counts and greater casualty counts
5 when assault weapons are used.

6 But we can get to that -- that data later, when we're
7 discussing Step 2.

8 I would also like to address a point made by the
9 Court that there may be a concern that the assault weapons
10 control act discriminates against certain individuals on the
11 basis of income.

12 And I -- I think if I -- I think the argument was as
13 follows. That in a household with multiple people who may have
14 different body sizes, they may want to have just a single go-to
15 rifle with an adjustable stock to fit the body size of
16 different members of the family. And that the assault weapons
17 control act somehow forces them to purchase multiple firearms
18 to fit each person.

19 Is that -- is that a fair characterization?

20 THE COURT: Yeah, I think that's fair. Yeah.

21 MR. ECHEVERRIA: Okay. So the assault weapons
22 control act only restricts that feature if it's a centerfire
23 rifle without a fixed magazine. So you can have other types of
24 weapons with the adjustable stock. The evidence in this case
25 shows that there are fixed stocks available at varying lengths.

1 Now, I understand that there may be other individuals
2 in the household who have a different body size, but I'm aware
3 of aftermarket products and accessories that can be acquired to
4 attach to the buttstock of a fixed stock, to extend the length
5 of that stock, to -- to assist with recoil and -- and accuracy.
6 So it's not --

7 THE COURT: Well, that's interesting. Let me
8 interrupt you because that's an interesting -- an interesting
9 point.

10 So let's see. So let me ask you, first of all, the
11 following question. There's no limit to the amount of
12 adjustment on that -- on that -- on that stock. Right? In
13 AWCA, there's no limit.

14 So, for example, you could have a stock that could be
15 shortened four inches or lengthened four inches. Right? That
16 would be banned, assuming certain other configurations, under
17 AWCA. That's why I thought I mentioned that -- that I can
18 certainly see a distinction, for example, between a collapsible
19 stock and an adjustable stock in -- in that, at best, one might
20 make a difference, say, for example, for 4 inches.

21 And I can't, for the life of me, understand why, so
22 long as the length of the rifle when that stock is collapsed,
23 does not exceed the minimum length, why -- why the difference?
24 What's the point? What's the -- what's the reason for not
25 having an adjustable stock? Do you follow what I'm saying?

1 MR. ECHEVERRIA: The reason for -- for having the
2 adjustable stock? Because --

3 THE COURT: Okay. Let me -- let me see if I
4 understand.

5 So I understand under AWCA the minimum length of the
6 rifle can be 30 inches. Is that correct?

7 MR. ECHEVERRIA: Correct.

8 THE COURT: And under federal law it's 26 inches.
9 Right?

10 MR. ECHEVERRIA: That's correct. The overall length
11 of the rifle, yes.

12 THE COURT: Okay. So answer this for me.

13 If you have a rifle -- say an AR-15 -- and you
14 collapse that stock to its shortest configuration, if that
15 stock -- if that rifle at that point in time, the measurement
16 was 30 inches, what difference does it make, for example, if
17 that stock is now lengthened another four inches? So in other
18 words, the rifle, instead of being 30 inches, would not be 34
19 inches. Why -- why does that make that -- create any kind of
20 security risk to anyone?

21 And the reason that came to mind is because you
22 mentioned something that I thought, yeah, this is an absolutely
23 superfluous feature. Because if you buy -- if you have a --
24 a -- a rifle that has a 30-inch length but you can attach a --
25 something to it that will make it longer than 30 inches but yet

1 allow another shooter to be more comfortable when they shoot
2 that weapon, what difference does it make? What's -- what's --
3 what's the safety concern? What you're concerned about --
4 which, by the way, I understand is the potential for that
5 weapon to be hidden or concealed. Just like the sawed-off
6 shotgun. You know, that's how the sawed-off shotgun became --
7 right. Because bank robbers would put it under their -- under
8 their raincoats, or whatever, and walk into a bank and --
9 right? So I understand that.

10 But the collapsible stock, to me, seems like a non
11 sequitur, as long as the rifle itself -- barrel, stock -- is 30
12 inches, who cares whether the stock can be extended another
13 inch or 2 inches or 3 inches or 4 inches?

14 MR. ECHEVERRIA: Well -- that's a judgment that was
15 made by the legislature. If the court doesn't --

16 THE COURT: Yeah, but the legislature can't make
17 judgments on a whim. They can't be capricious and arbitrary.

18 MR. ECHEVERRIA: I'm not saying that, your Honor.

19 THE COURT: No, I know. But I'm saying it.

20 MR. ECHEVERRIA: Okay.

21 THE COURT: So tell me why, explain to me what's the
22 rationale for saying that, if you have a rifle, that all --
23 that in the shortest configuration is 30 inches. What
24 difference does it make if that rifle can be extended another
25 one inch, two inch, three inch, four inches in -- in the stock?

1 MR. ECHEVERRIA: So there is an incremental effect on
2 the concealability of that weapon. And the ATF has determined
3 that a telescoping stock is a military feature. It is part of
4 a military configuration of the M16.

5 This is another point that I would like to make for
6 the Court. I think it's a helpful way to think about this.
7 And I -- I'm hesitant to bring in the large-capacity magazine
8 case here because they are different cases with different
9 records. And, frankly, I think this case is a much stronger
10 case for the state of California with respect to assault
11 weapons, given that large-capacity magazines were -- were
12 determined by the Ninth Circuit to be half of all magazines,
13 which is a lot. You know, but we're -- that's on appeal.

14 But I recall your Honor asking the state, me in
15 particular, about why the number of ten? What's the magic
16 number about ten? Why ten rounds?

17 And ten rounds happen to be the number that was
18 settled upon. The first LCM restriction from the state of New
19 Jersey was 15 rounds. They moved to ten.

20 But the determination -- we -- what the state knew
21 was that more rounds, as you approach the standard military
22 configuration of 30 rounds for the M16 or an AR-15, the more
23 rounds you have, the more dangerous those magazines are and the
24 more dangers they pose to the public; particularly in mass
25 shootings or shootouts with law enforcement. So it was kind of

1 an inductive process.

2 But with respect to the features that the state of
3 California has identified in the statute, it was a deductive
4 process. The starting point was let's look at weapons that are
5 not protected by the Second Amendment. I mean, this happened
6 before *Heller*. But we know that machine guns, they can be
7 banned under -- consistent with the Second Amendment. So we
8 start at that position.

9 And we were asking what features are on that weapon?
10 And there's substantial evidence in the record from the federal
11 government, the two ATF reports about the suitability and
12 importability of certain semiautomatic weapons; and the pistol
13 grip, flash suppressor, and the telescoping or folding stock
14 were identified as standard military configurations. So that
15 is why that feature is enumerated.

16 And we have evidence in the record showing that there
17 is an incremental effect on the ability of somebody to smuggle
18 or to -- to use that weapon in a concealed way with a
19 telescoping stock. Maybe there are multiple shooters, and the
20 telescoping stock would help in that respect.

21 But if the Court finds that there's no real effect of
22 the telescoping stock and there are all of these other
23 accessories that can be used, then there is no burden on the
24 Second Amendment right. And -- and --

25 THE COURT: Well, let me ask you. That's

1 interesting. But let me ask you this.

2 I mean, you -- okay. So in the case of the
3 pregnant -- the pregnant mother, whose husband was being
4 beaten, and apparently the daughter was also about to be in
5 jeopardy. Okay. So they have -- they have an AR. And I don't
6 know. I can't tell you whether or not this was a fact in that
7 case. But a lot of what the state is doing is essentially
8 speculating. And so I think we can speculate both ways. And
9 here's my speculation.

10 So you have -- so you have a mother and you have a
11 father and somebody's being beaten up. If that weapon is more
12 suitable to that pregnant woman by either shortening or
13 lengthening that stock at the moment, at the moment when they
14 need it, why not provide that additional safety to the civilian
15 who is having to protect -- in this case, the woman's having to
16 protect her husband and her daughter?

17 I can understand -- as I said, I can certainly
18 understand the argument. That it makes sense to -- although,
19 of course, we know that a pistol is perhaps the most
20 concealable weapon that there is. Right? We know that. All
21 right. Fine.

22 And we know as, for example, with the shooting of
23 Representative Giffords and my friend Judge Roll that the
24 shooter used a -- used a pistol with a magazine that held more
25 than ten rounds. That's pretty -- that's pretty concealable,

1 and that's pretty deadly. Right? As it proved, it's pretty
2 deadly.

3 But, okay, fine. I'll give -- I'll give the state
4 the idea -- or the -- or the point that, well, we don't want
5 people walking around being able to conceal AR-15s or AK-47s
6 under their jackets. Fine. No problem. I'll grant you that.

7 Okay. But what I don't understand is the overbreadth
8 in -- in -- in this -- in this definition of a collapsible
9 stock if the collapsible stock, at the time that it is
10 collapsed to its minimum length, if the overall length of that
11 rifle is 30 inches, tell me the -- the danger to the citizenry
12 by allowing that same stock to be able to be expanded to make
13 that rifle 31 inches, 32 inches 33 inches, 34 inches? The fact
14 that that may be a feature that's featured in the M16 or the M4
15 or some other rifle is irrelevant. That doesn't make any
16 difference, does it? What really matters is is this a weapon
17 that is safe for the civilian to use and which, according to
18 the state, is relatively safe for the purposes that it's
19 attempting to accomplish?

20 I don't see -- and if -- if this pregnant woman, when
21 her husband's being beat up, has to go find whatever it is that
22 she has to put on this weapon in order to make the weapon fit
23 her -- I've never been pregnant, so I have no idea what
24 happens. But my guess is that somehow your reach may be
25 affected by that. As opposed to being able to simply click a

1 button and extend that stock, I don't see it. I mean, I'm
2 missing -- I'm missing the safety factor.

3 MR. ECHEVERRIA: Well, the safety factor is the
4 telescoping stock. Maybe -- maybe the weapon, when it's fully
5 collapsed, is no -- no less than 30 inches in length. But
6 maybe it's a centerfire rifle that can hold attachable
7 magazines. That makes it incrementally more dangerous.

8 An individual can have a telescoping stock on a -- on
9 a shotgun, for example. Even the AWCA allows that, provided it
10 doesn't also have a pistol grip beneath the action.

11 Telescoping stocks are not being prohibited here. An
12 individual can have a telescoping stock. The -- I mean, your
13 Honor, the state has evidence -- hard evidence of assault
14 weapon -- of, sorry. The state has hard evidence that these
15 features are classified as military features. That's the
16 starting point. We also have evidence showing that when
17 assault weapons are used in mass shootings, more people are
18 killed and injured.

19 THE COURT: But there's also evidence -- there's also
20 evidence that there are civilian features, as well.

21 MR. ECHEVERRIA: But the -- they're really -- they're
22 really hypotheticals.

23 THE COURT: No, no. No, no, no, no. In 44
24 jurisdictions throughout this country, every one of these
25 features is acceptable for use by civilians.

1 MR. ECHEVERRIA: Sure. But the -- the -- the stories
2 that are in the record, the anecdotes concerning the use of the
3 AR-15 or other weapons for self-defense, do not show that any
4 of the particular features were -- were, you know, factored in.
5 You know, there's no evidence that --

6 I hate to keep on bringing up this victim from the
7 exhibit, but I am not aware of there being a number of shots
8 reported. You know, we could assume -- you know, what if there
9 were a hundred people breaking into their home? What if it's
10 the zombie apocalypse? I mean --

11 THE COURT: In which case I would want a
12 hundred-round magazine?

13 MR. ECHEVERRIA: In which case I would like a
14 howitzer and a bazooka.

15 THE COURT: But you can't have a howitzer because
16 it's solely -- because a howitzer has only one use, and that's
17 for military purposes and that's --

18 MR. ECHEVERRIA: Let me -- let me back up. The
19 zombie apocalypse is a hypothetical that can never happen.

20 THE COURT: Are you sure?

21 MR. ECHEVERRIA: The fact of the matter is that the
22 state of California is trying to make -- make a judgment call.
23 Do we -- you know, when faced with evidence, hard evidence of
24 these types of weapons being used by criminals, particularly
25 mass shootings; particularly by people who are in gunfights,

1 protracted gunfights with our law enforcement, peace officers,
2 who risk their lives every day to enforce the law, serving
3 warrants --

4 THE COURT: Do this -- do this for me. Because
5 you -- you tell me that these anecdotes are not -- are not
6 useful.

7 So let me ask you this. All of the evidence,
8 basically, that is before me, that I have seen so far, is
9 pretty much anecdotal. It's only anecdotal, perhaps -- it may
10 be anecdotal, reported to a so-called expert, who then reports
11 on it, anecdotally, based on his or her experience. Right?
12 All of this --

13 MR. ECHEVERRIA: Well --

14 THE COURT: All of this is anecdotal. I mean, I have
15 yet to see one controlled study done by anyone. I mean, I
16 guess the closest we would come to would be Mr. Kraut's
17 exhibition of the firing of the weapons. But I have yet to
18 see --

19 So I was going to ask you this. Can you cite me --
20 to me, Mr. Echeverria, one case in the record where a
21 collapsible stock weapon was used in a mass shooting?

22 MR. ECHEVERRIA: I would have to -- so this is
23 another point I want to tell the Court.

24 All of the information that Lucy Allen based her
25 analysis on -- which I guess your Honor would characterize it

1 as 161 anecdotes. These are 161 incidents of mass -- mass
2 public shootings. In exhibit -- sorry, Appendix C to
3 Defendants' Exhibit A, which is her declaration, she provides
4 all of the information about the weapons that were used in
5 those shootings that she and her team were able to find. We
6 didn't just take, you know, *Mother Jones* and the *Washington*
7 *Post* and the Citizens Crime Commission at their word. There
8 was supplemental research to try to gather as much information
9 as we can from public reports about the weapons used.

10 I don't know, off the top of my head, whether some of
11 the weapons featured an adjustable stock. I think it's fair to
12 say that it's very likely that the shooting occurred in a
13 jurisdiction where there are not assault weapon restrictions
14 like California's. But all of the information is available for
15 the Court, if the Court wants to take a deep dive into the
16 shootings.

17 THE COURT: Well --

18 MR. ECHEVERRIA: But we think the -- but -- so our
19 view is that Lucy Allen's evidence and the other evidence that
20 we have, including the legislative evidence relied on by the
21 five circuit courts that have uniformly upheld very similar
22 restrictions, those are not just anecdotes. These are -- these
23 are studies of a -- a much larger data set than seven news
24 articles.

25 I am not saying that the AR-15 has never been used in

1 self-defense. It apparently has. But individuals in
2 California can arm themselves with the AR-15. They can arm
3 themselves with the AR-15 with any of the features that they
4 like if it has a fixed magazine or if it's a rimfire. There
5 are a lot of options for California citizens.

6 And I really just need to emphasize that the state is
7 not prohibiting individuals from possessing firearms that are
8 effective for self-defense.

9 THE COURT: But, wait a minute. So -- and I'm sorry.
10 I know I interrupted you. But you asked -- you say things that
11 causes me to -- to ask questions.

12 But you can't have a fixed magazine that has more
13 than ten rounds. Right?

14 MR. ECHEVERRIA: Sure.

15 THE COURT: Okay. So getting back to this Florida
16 case where these people fired 30 rounds --

17 MR. ECHEVERRIA: Was it -- I didn't see 30 rounds
18 fired in that case, your Honor. I apologize.

19 THE COURT: Oh, I'm sorry. I thought I read it to
20 you. 30 rounds fired from AR-15 in deadly Florida home
21 invasion.

22 I think you're talking about -- I think you were
23 looking at the Florida -- at the woman -- the pregnant woman
24 article. And you're right --

25 MR. ECHEVERRIA: I'm looking at the exhibit. Yeah.

1 THE COURT: But the pregnant woman article does
2 not -- which, of course, is part of the problem. Is that the
3 media seldom will tell us the type of weapon, the number of
4 rounds fired, the amount of time. But they will certainly tell
5 us if there were 30 bodies found laying on the ground. So
6 that's -- that's -- that's part of the problem with a lot of
7 this anecdotal evidence.

8 But here's -- here's -- here's a perfect case. So
9 they have a picture of four -- four of the guys who broke into
10 this -- into this -- into this home.

11 And the people that were there, one guy grabs his
12 AR-15, and he fires 30 rounds.

13 Now, if he had only had a ten-round magazine -- if
14 you're -- he would have to -- and it was a fixed magazine. He
15 would have to find some way to break that weapon down, reload
16 it, hopefully -- hopefully do a lot of praying, keep his -- his
17 fingers crossed and hope to heck that by firing the first ten
18 rounds, he was either able to hit these four guys or able to
19 drive them away. And if he wasn't, then he would have to
20 reload the magazine again, and he would have to do this three
21 times in order to fire those 30 rounds.

22 Where does the state -- I mean, the arrogance of the
23 state is -- is incredible to say to these people, listen, you
24 only get ten rounds. And if you can't deter the people that
25 are coming to rape you, rob you, or murder you, too bad, so

1 sad. You have to surrender yourself, be killed, be raped, be
2 robbed. And when it's all over, we, the state, are going to
3 investigate and we're going to hopefully find the perpetrator.
4 And then we will deal with them. But, in the meantime, you're
5 dead, or you're raped, or you're robbed.

6 And so, you know, my -- my thinking is -- what I was
7 trying to get at and what I was trying to ask you is simply
8 this. Is there an article? Is there something that I could
9 look to that says that an AR-15 or an AK-platform rifle is in
10 fact more deadly, more dangerous with a stock that will
11 collapse or will expand to 31, 32, 33, 34 inches? Is there
12 evidence in the record of that?

13 Because I'm willing to bet you dollars to donuts that
14 there's not. Why? Because the weapon itself is not more
15 deadly. It is not. The weapon is as deadly as it can be,
16 regardless of the length of the stock. It doesn't make it more
17 deadly. It may make it more portable if it's less than 30
18 inches.

19 But -- but the point that you can -- but expanding
20 that stock to 31, 32, 33, 34 inches, that doesn't affect the
21 lethality of that weapon. Which, by the way -- as we all
22 know -- that's not a test. I think *Heller* specifically talked
23 about lethality is not -- is not a test

24 But you see -- I don't want to argue with you. I'm
25 sorry. But it just seems to me that this is -- you see, I can

1 understand certain things in -- in this law. And I can say
2 even though I agree that a 30 -- a -- a rifle that's 30 inches
3 long is much less maneuverable than if somebody broke into my
4 bedroom and I had to break out a 26-inch rifle as opposed to a
5 30-inch rifle -- with a 30-inch rifle, I may very well hit my
6 head -- my wife's head with the barrel, knock her out, and give
7 her a concussion; whereas I wouldn't with a 26-inch barrel.
8 But, to me, it's -- you know, it's a "so what?" Okay. 26
9 versus 30 inches. You know? But the -- the collapsible stock,
10 as long as the overall length of the -- of the rifle remains no
11 less than 30 inches; the pistol grip, so long as the pistol
12 grip provides greater accuracy when you're table to fire that
13 weapon, so that you don't hit an innocent bystander or hit
14 someone outside -- those two things to me seem -- it just seems
15 arbitrary and capricious.

16 MR. ECHEVERRIA: Well, the state has presented
17 evidence that all of these features have been identified for --
18 going back decades, by the -- by the ATF as military features.
19 They are the features on the M16.

20 The particular -- you know, whether your Honor is
21 going to find, on Lucy Allen's list of 161 public mass
22 shootings, a shooting involving a weapon with just a
23 telescoping stock; and whether we can determine that that
24 adjustable stock caused any more people being killed, I don't
25 think so. The goal -- the goal being promoted by the

1 adjustable stock restriction and also the flash suppressor
2 restriction is that these weapons are more concealable. Not
3 necessarily that they're going to cause more fatalities. It's
4 possible. But the fact of the matter is, is there is evidence
5 in the record that these features do make the weapons
6 incrementally more dangerous, especially when those weapons are
7 fired rapidly, which is not consistent with a lawful use.

8 I do know that there -- there is one article that the
9 Court has been referencing about 30 rounds fired. The 30
10 rounds -- I will note that there was -- in that case it was a
11 home invasion, and there were -- many of the criminals were
12 firing rounds. And there was an estimate by the victim, saying
13 how many rounds he fired. The number of rounds is really
14 beside the fact for purposes of this case.

15 Individuals can arm themselves with shotguns, other
16 rifles, handguns to defend themselves in their home. The state
17 of California is not -- in restricting particular assault
18 weapon configurations is not acting arrogantly. It is acting
19 consistent with the way that the federal government acted in
20 1994, identifying many of the same features, applying a
21 single-feature test to try to target those features that make
22 the weapons incrementally more dangerous in mass shooter
23 situations or in gunfights against law enforcement.

24 That's -- I'm sure that we're going to be talking
25 about these issues as we go along. But unless the Court has

1 any -- anything further to discuss on the particular point --

2 Okay. So the other -- another -- I haven't even
3 gotten into my -- into the nuts and bolts of my outline. I'm
4 trying my best, your Honor.

5 THE COURT: It's okay.

6 MR. ECHEVERRIA: Another topic that I planned on
7 addressing up front -- and that your Honor raised again
8 today -- is the different definitions that we have of assault
9 weapons, and the different definitions that we have of mass
10 shootings. The fact that there are different definitions does
11 not undermine the constitutionality of this law, of the assault
12 weapons control act. And it -- it shouldn't muddy the waters
13 here.

14 THE COURT: But it does make a difference, doesn't
15 it?

16 I mean, you will agree that if we define mass
17 shootings as, say, three or more, four or more, five or more,
18 six or more, it changes the database that is used in arriving
19 at our conclusion. Right?

20 MR. ECHEVERRIA: Absolutely. Absolutely.

21 THE COURT: And the same for -- the same for the
22 features of the weapon. Because -- I don't know. Maybe you do
23 know. But I don't know if the features that California has
24 prohibited are identical to the features that were prohibited
25 under the -- under the federal ban. I don't know that they're

1 identical. Are they?

2 MR. ECHEVERRIA: There are -- there is substantial
3 overlap.

4 If the Court looks at Exhibit J, pages DEF432 to 433,
5 there is a list under features that were prohibited under the
6 federal law.

7 THE COURT: So what -- what has California added
8 that -- that federal ban did not have?

9 MR. ECHEVERRIA: Added? I would have to -- I -- I
10 was planning on reading through them. I don't have a
11 side-by-side.

12 THE COURT: That's okay. I'll find it.

13 MR. ECHEVERRIA: But I know that -- I know that
14 California law did add the -- the flare launcher. I don't
15 believe that was a feature identified in the federal statute.

16 The federal statute identified a bayonet lug, or
17 bayonet mount, which is not present in the California Assault
18 Weapons Control Act.

19 But it -- at Exhibit J, page 432 to 433, the federal
20 law defines a semiautomatic rifle with attachable magazine as
21 an assault weapon if it has two qualifying features: A pistol
22 grip beneath the action, a folding or telescoping stock, a
23 bayonet mount, a flash suppressor, or a grenade launcher.

24 So it appears that the federal statute does not have
25 a forward pistol grip listed, which is something that

1 California did add.

2 THE COURT: So in the federal ban -- let me -- so in
3 the federal ban, you could use a semiautomatic weapon,
4 centerfire rifle that had a pistol grip, had none of the other
5 features, it would not be prohibited by the federal ban?

6 MR. ECHEVERRIA: That's right. It was -- it was --

7 THE COURT: Why can't California do that?

8 MR. ECHEVERRIA: Because that wasn't effective. Or
9 it wasn't as effective. I don't want to say it wasn't
10 effective. You got me to trip up, your Honor.

11 THE COURT: (Laughing.)

12 MR. ECHEVERRIA: To the extent that people claim the
13 federal assault weapons ban was not effective, we dispute that
14 point. That was not the finding of Dr. Koper in his 2004
15 study. He said that more time was needed. And he has
16 concluded that it was effective, after the fact, through
17 further research and more data.

18 But the federal assault weapons ban was not as
19 encompassing as California's assault weapons ban, which allowed
20 individuals to circumvent the restrictions much more easily
21 than they can under California's law, which has a
22 single-feature test for everything except for semiautomatic
23 shotguns. There's still that two-feature test, if they have a
24 telescoping stock and pistol grip.

25 And then regarding semiautomatic pistols, a

1 semiautomatic pistol with a detachable magazine was defined
2 under the federal assault weapons ban as an assault weapon if
3 it had two of the following features: A magazine that -- that
4 is loaded outside of the grip, consistent with California; a
5 threaded barrel capable of accepting a barrel extender, a flash
6 suppresser, a forward grip, or silencer, and a barrel shroud.

7 And then regarding a semiautomatic shotgun, there's a
8 two-feature test under federal law. It would have to have a
9 folding or telescoping stock, pistol grip, fixed magazine of
10 holding more than five rounds, or the ability to -- to accept a
11 detachable magazine.

12 So those are the features that the federal government
13 listed. And the federal government was, in many ways, building
14 off of what California started when California came up with the
15 make-and-model list in the wake of the Stockton shooting in
16 1989.

17 And then California, in 2000, followed the lead of
18 the federal government. This is how federalism, frankly, is
19 supposed to operate, your Honor. This is federalism at work,
20 when the state of California is leading the way and also being
21 informed by experiences in other jurisdictions.

22 And we came up with our own list of definitions, most
23 of which were consistent with the federal definition. But, as
24 you can see, there's some variation. And variation is totally
25 acceptable under the Second Amendment. Variation between the

1 states that currently prohibit assault weapons is permissible
2 under the Second Amendment.

3 In *McDonald*, the Supreme Court made clear in the
4 plurality opinion that experimentation will continue under
5 *Heller*. *Heller* does not require one-size-fits-all safety gun
6 laws throughout the country. There are minimal constitutional
7 standards that have to be met, and the state of California has
8 met those standards here.

9 Regarding another -- another definitional issue, if I
10 may, is the different definitions of mass shootings.

11 Okay. One -- one more thing about the definition of
12 assault weapon. Even if a weapon is classified as an assault
13 weapon under federal law -- so let's say during the -- during
14 the federal assault weapons ban, there is a weapon used in a
15 mass shooting that was an assault weapon because it had two or
16 more of the features. That definitional issue isn't a problem
17 for the assault weapons control act because our statute has a
18 single-feature test; it is generally more expansive. So a
19 weapon that qualifies as an assault weapon under federal law
20 would in -- all likely, also qualify as a prohibited
21 configuration under California's law.

22 THE COURT: Wait. But that confuses me. That
23 confuses me. Let me tell you why. Because I think what I
24 understood you to say, that under the federal law you could
25 have an AR-15, AK-platform rifle. It could have a pistol grip.

1 And that would be sufficient to -- that would not be banned
2 under the federal --

3 MR. ECHEVERRIA: Under the definitions that we laid
4 out in the features list. If it only has one feature, then it
5 would not qualify as an assault weapon.

6 It was a -- it was a problem with the way that the
7 federal statute was designed. And Dr. Koper, in the 2004
8 study, noted how several of the exceptions and the loopholes
9 built into the federal law made it difficult to see the true
10 effects of the assault weapons ban by the time the ban was
11 allowed to lapse. That's why Dr. Koper wrote that it was
12 premature to make any judgments on the efficacy of the federal
13 assault weapons ban, and it's with why California improved that
14 regime by having a single-feature test.

15 Regarding the definition of mass shootings, mass
16 public shootings, active shooters, the differences in the
17 definitions -- while sometimes it can tend to muddy the waters,
18 it shouldn't muddy the water. And it helps the state's case.

19 The fact that there are different ways of defining
20 these mass casualty events and the fact that this -- that the
21 data is consistent no matter how you define it -- of a shooting
22 three or more, a shooting of four or more in a public case, a
23 shooting of six or more anywhere -- which is what Klarevas
24 uses -- any way you define these mass casualty events, the data
25 is consistent in showing that assault weapons are associated

1 with more people being killed and injured. That helps our
2 case.

3 But I would like to walk through, briefly, the
4 definition. Just so we know when we're talking about a public
5 mass shooting or a mass shooting, we -- we are using the same
6 terms. I think it's helpful to kind of set the definitions
7 straight.

8 Lucy Allen discloses, in Plaintiffs' Exhibit A, what
9 criteria she used in classifying a -- or -- or in identifying
10 shootings to count on her list of 161 public mass shootings.

11 And she borrowed from the list of mass shootings
12 identified by *Mother Jones* and the Citizens Crime Commission in
13 identifying those shootings. In -- in *Rupp versus Becerra* and
14 in *Duncan versus Becerra*, she used a similar methodology for
15 identifying a mass shooting.

16 In this case, we took -- we took to heart some of the
17 concerns that your Honor expressed about *Mother Jones*. We --
18 we don't share those concerns, but we -- we made sure that we
19 provided the Court with as robust a data set as we could.

20 So Lucy Allen and her team at NERA found two
21 additional --

22 THE COURT: What is NERA? What is that? What is
23 NERA?

24 MR. ECHEVERRIA: National Economic Research
25 Consultants. It's a consulting organization that Lucy Allen is

1 employed by. And it's -- so they have different teams that
2 provide different consulting services, and Lucy Allen is on one
3 of those teams.

4 But, anyway, so -- when they were -- when they were
5 trying to identify mass shootings or public mass shootings this
6 time, they looked at four sources: Admin@theviolenceproject
7 listed public mass shootings and the lists identified by the
8 *Washington Post*.

9 Both of those sources postdated her work on *Rupp*
10 *versus Becerra*, which was the other assault weapons control act
11 case from the Central District. That's now before the
12 (indiscernible) circuit. So we have an even more robust set of
13 data.

14 I really found it puzzling -- and I assume it was
15 just a -- an accidental misstatement. But the -- the data set
16 that Lucy Allen has presented in this case is larger than the
17 data set in *Rupp*.

18 I believe I heard plaintiffs' counsel state that the
19 data set is smaller in this case. The *Rupp* case involved 109
20 public mass shootings, and this case has 161 public mass
21 shootings; even though it only has -- had a year or more in
22 addition to analyze.

23 And part of the reason why the number increased so
24 much for this case was that Lucy Allen was able to identify
25 additional shootings that satisfy the criteria she set out,

1 that she disclosed, to add to the list.

2 So, trying to plug in all of the gaps, in Plaintiff's
3 Exhibit A, Lucy Allen also explained that the shootings that
4 were added that were found through The Violence Project and the
5 *Washington Post* generally had fewer casualties, fewer
6 fatalities. Kind of like the issue that your Honor was
7 discussing. That, you know, the -- the news is less likely to
8 pick up a story that doesn't have 30 bodies. You know, less
9 sensational incidents are harder to pick up in the media.
10 But -- but she was able to find additional shootings. Same
11 result: More people killed, more people injured.

12 Professor Klarevas, he looked at 103 mass -- mass
13 shootings that he -- there are particular kinds of mass
14 shootings that he calls gun massacres. These are mass
15 shootings that occur anywhere: In a private residence. Could
16 be related to gang violence. Could be a bank robbery. Could
17 be an act of terrorism like the Fort Hood shooting. And these
18 gun massacres involved six or more people killed.

19 In either Lucy Allen's data set and Klarevas's data
20 set, neither of them include the perpetrator encountered in the
21 house. The perpetrator is excluded.

22 Additionally, Lucy Allen's data set is consistent at
23 a four-or-more-fatality threshold. Because I -- I recall that
24 your Honor had some concerns that *Mother Jones* changed its
25 definition in 2013 to a three-or-more count. So Lucy Allen's

1 report in this case is consistent throughout the entire time
2 period study.

3 And we were -- and we're clear. When we're talking
4 about public mass shootings or mass shootings, we're very clear
5 about what we're referring to, and the experts are very clear
6 about what their definitions are.

7 Another definition that's been offered in this case
8 came from one of plaintiffs' experts, and that's John Lott.
9 And he -- he claimed to apply a definition that was an official
10 FBI definition for mass public shooting.

11 And I would like to -- I would like to share my
12 screen with the Court, if I may, to share an exhibit with you.

13 (Pause, referring.)

14 MR. ECHEVERRIA: Can your Honor see this document on
15 the screen?

16 THE COURT: I can.

17 MR. ECHEVERRIA: Great. This document has been
18 marked by plaintiffs as Plaintiffs' Exhibit 32. And this is
19 the declaration of John Lott in support of plaintiffs'
20 memorandum in opposition to defendants' *Daubert* motion.

21 This was the first time in this case that John Lott
22 disclosed to the Court and to the defendants what particular
23 definition his organization, CPRC, was using to identify the
24 incidents that he analyzed.

25 There was some confusion because his initial

1 declaration didn't explain the criteria. Didn't explain the
2 definition. And that's why when we had our expert, Professor
3 Klarevas, look at the data, you know, Professor Klarevas
4 noticed instantaneously that John Lott had misclassified a lot
5 of Klarevas's own data from *Rampage Nation*. There were also
6 some errors concerning *Mother Jones*. But it was kind of a
7 black box, how John Lott was deciding to include or exclude
8 shootings.

9 For example, the Fort Hood shooting was not
10 considered by John Lott, but it was a shooting considered by
11 Professor Klarevas. And we were wondering why. And that's why
12 Professor Klarevas's corrected declaration in support of our
13 *Daubert* motion showed there was such a high error rate for the
14 CPRC data.

15 It's not that high, we now know, because we know the
16 definition John Lott was using. There still were errors in
17 CPRC's data set, but let's take a look at the definition that
18 the CPRC was claiming to use.

19 On page 14 of Plaintiffs' Exhibit 32, at paragraph
20 35, John Lott states: "CPRC used, quote, the traditional FBI
21 definition of mass public shootings in all such posts."

22 And then there are three bullet points kind of
23 further explaining this traditional FBI definition. He goes on
24 in the first bullet to say:

25 "The official FBI definition of active, as well as

1 public" -- I'm sorry. "As well as mass public
2 shootings excludes shootings that resulted from
3 gang or drug violence or that occurred in
4 commission of another crime such as robbery."

5 And here John Lott cites a report by Blair and
6 Schweit, dated 2014. In footnote 14, your Honor can see that
7 John Lott is citing to a report of the FBI entitled "A study of
8 active shooter incidents, 2000 to 2013."

9 This is -- this is generally referred to as the 2014
10 active shooter report. It was a report about active shooter
11 incidents.

12 I would like to show your Honor this report which has
13 been marked as Defendants' Exhibit DS. This is the -- a study
14 of active shooter incidents in the United States between 2000
15 and 2013. On page 5, which is marked DEF3462, I have
16 highlighted a portion of this report. The report states:

17 "This is not a study of mass killings or mass
18 shootings but, rather, a study of a specific type
19 of shooting situation law enforcement and the
20 public may face."

21 So, here, the report is clearly stating that it is
22 not providing a definition of a mass shooting or a mass public
23 shooting. It is providing a definition of an active shooter
24 incident.

25 Going back to Exhibit 32, John Lott claims that the

1 traditional FBI definition from that report that he's applying
2 excludes shootings that resulted from gang or drug violence or
3 that occurred in the commission of another crime, such as
4 robbery.

5 We go back to the report. We can go to page 10.
6 Page 10, marked DEF3467And I have -- I have created call-outs
7 for the Court, so that the Court can read it more easily,
8 hopefully.

9 But, here, I've called out the portion that says:
10 "Of note, male shooters also acted violently
11 against women with whom they had or once had a
12 romantic relationship."

13 This is discussing incidents of domestic violence.
14 So -- so the FBI definition of an active shooter does include
15 active shootings that may have been conducted in connection
16 with another crime.

17 Another type of crime that is included in the FBI
18 definition of an active shooting is terrorism.

19 Here on page 32, page DEF3489, I have a call-out.
20 The Fort Hood soldier -- the Fort Hood shooting which happened
21 on November 5th, 2009, was an act of terrorism; a crime that
22 happened to involve, also, an active shooter incident that
23 satisfied the FBI's definition of an active shooter.

24 Another example of -- of a type of incident that John
25 Lott and the CPRC excluded from its data set, even though it's

1 purporting to apply the FBI's definition, the Fort Hood
2 shooting is not included in the CPRC data set. And it's not
3 clear why because he was claiming to apply the FBI definition,
4 at least, of active shooters. There is no FBI definition of a
5 mass public shooting, like John Lott says.

6 And I would note that another part of the definition,
7 going back to Plaintiffs' Exhibit 32, John Lott testifies, in
8 paragraph 35, that the FBI also includes only shootings in
9 public places. And it goes on to say that residents --

10 THE COURT: Wait, wait, wait. Let me stop you for
11 just a minute.

12 MR. ECHEVERRIA: Sorry, your Honor.

13 THE COURT: Go back to the report and show me where
14 they talked about robberies.

15 MR. ECHEVERRIA: Well, I -- I am not accounting for
16 every single aspect of what John Lott was saying. I was just
17 pointing out things that he didn't include that were included,
18 if that makes sense.

19 THE COURT: I see.

20 MR. ECHEVERRIA: There were aspects of the definition
21 that he did apply.

22 THE COURT: Yeah. Because -- go back to that -- to
23 his bullet points.

24 MR. ECHEVERRIA: Okay.

25 THE COURT: So --

1 MR. ECHEVERRIA: Yes.

2 THE COURT: So he's right -- let me make sure I
3 understand. So he's right in that the report does not address
4 gang or drug violence. And he's right to the extent that the
5 report does not address robbery. He's wrong when he says that
6 it does not include shootings that occur during the commission
7 of any other crime, such as domestic violence or terrorist
8 attacks.

9 MR. ECHEVERRIA: And the biggest mistake is that he's
10 wrong that the report provides an official FBI definition of a
11 mass public shooting. I mean, that's the biggest, most glaring
12 error in this statement.

13 That -- see, we -- we don't want the Court to think
14 that there is some official FBI definition of a mass public
15 shooting that the state is not applying. If there were an
16 official definition, we would apply that. We --

17 THE COURT: Yeah, I'm not -- that doesn't -- you
18 know, an official definition of the FBI doesn't -- doesn't do
19 anything for me.

20 What has troubled me is that here we have, for
21 example, a clear example of what I was talking about. In some
22 cases they talk about mass shootings. In some cases they talk
23 about mass public shootings. In other cases they talk about
24 active shootings.

25 And so try to figure out who's talking about what and

1 trying to make -- create some consistency was difficult for me.
2 But I -- but I'm glad that you've pointed out what you pointed
3 out. It's helpful.

4 MR. ECHEVERRIA: Yeah, I just -- I want the Court to
5 understand that if there is confusion about the use of mass
6 public shooting and different criteria, the confusion is really
7 being generated by -- by John Lott and the type of bespoke
8 definition that he's providing here in Exhibit 32.

9 An additional inconsistency with the way he applied
10 the definition is in the -- the private residences point. He
11 states, in the second bullet point, that the FBI only -- also
12 includes only shootings in public places.

13 And if I can address -- or direct your Honor's
14 attention to page 19, marked as DEF3476 of defendants'
15 exhibit -- I'm blanking on the number.

16 THE COURT: Yeah, I see what -- what you're referring
17 to. The seven incidents that occurred solely at a residence.
18 That's what you were getting at?

19 MR. ECHEVERRIA: Right. Right.

20 THE COURT: I see it.

21 MR. ECHEVERRIA: That first sentence is a blatant
22 contradiction.

23 It says that the FBI did include shootings that
24 occurred solely at a residence.

25 THE COURT: Yeah, I got it.

1 MR. ECHEVERRIA: It's really puzzling. Honestly,
2 your Honor, it's puzzling how -- how John Lott purported to
3 apply a traditional FBI definition that the FBI doesn't
4 provide.

5 And even under that definition, he didn't accurately
6 apply it -- or accurately convey to the Court what that
7 definition is with respect to active shooters.

8 I would also like to note that at Exhibit DT --
9 Defendants' Exhibit DT at page DEF3576, Pete Blair, who's the
10 author of the FBI active shooter study cited by Lott, has
11 written an article, quote -- titled, quote, "Misrepresenting
12 the FBI active shooter report," colon, "a response to Lott."
13 The author of the 2004 active shooter study has been battling
14 with John Lott in public about how John Lott is conflating the
15 FBI's definition of an active shooter incident with a mass
16 shooting or a mass public shooting. They're different things.

17 So I just think it's important that when we're
18 talking about mass public shootings or mass shootings, we
19 disclose what the criteria are being used to include and
20 exclude incidents. Our experts have been fully transparent
21 about that criteria. I would note that I have -- I'm not aware
22 of the plaintiffs identifying a single -- a single inaccurately
23 coded or inaccurately included shooting that Ms. Allen included
24 or that Professor Klarevas included. They raise questions that
25 maybe Lucy Allen may have misquoted, whether an assault weapon

1 was used, without any evidence that she misquoted anything.
2 Or -- we are consistently applying the definitions that we have
3 conveyed to the Court. And the plaintiffs are confusing the
4 matter with this made-up definition from John Lott that is
5 falsely being attributed to the FBI.

6 Unless your Honor has any other questions -- and I do
7 want to address any confusions that the Court has, going
8 forward -- I would like to -- to move on to the two-step
9 analysis and to -- to walk through how the evidence shows that
10 the AWCA is constitutional. It's constitutional under both
11 steps but we -- we think, at a minimum, it -- it's
12 constitutional at the second step of the analysis under
13 intermediate scrutiny.

14 THE COURT: Go ahead.

15 MR. ECHEVERRIA: So at step one -- so step one is a
16 two-step framework adopted by the Ninth Circuit. Asks whether
17 the regulated conduct is protected by the Second Amendment or
18 whether the statute that has been challenged burdens the Second
19 Amendment.

20 And there are many reasons why the AWCA does not
21 burden the Second Amendment. Taking the dangerous and unusual
22 analysis first, this has been the focus of much of plaintiffs'
23 evidence. Plaintiffs' evidence has been focused on whether the
24 restricted weapons and configurations are in common use.

25 And the Supreme Court has not established any

1 particular numerical threshold that has to be met. Justice
2 Alito's concurrence in *Caetano* was not adopted by the
3 (indiscernible) opinion. It has not been adopted as the law,
4 let alone in the Ninth Circuit.

5 THE COURT: Has it been criticized?

6 MR. ECHEVERRIA: It hasn't been adopted.

7 THE COURT: That wasn't my question.

8 Has it been criticized?

9 MR. ECHEVERRIA: I don't know, your Honor. I can do
10 some additional research on that for you. I didn't dwell on
11 the concurrence because it's not the law.

12 In addition, there is -- there is this -- this report
13 that was submitted by the plaintiffs from a -- Professor
14 Mocsary. I just want to preserve, for the record, our
15 objection to the admissibility of Professor Mocsary's opinion
16 with respect to the common use legal analysis and Justice
17 Alito's concurrence in *Caetano*.

18 THE COURT: But you -- you could preserve it. But I
19 think I told you, I'm not paying any attention to that. So --

20 MR. ECHEVERRIA: Yeah, I just -- well, I recall your
21 Honor said that you would be able to tell what's admissible and
22 inadmissible testimony. I just wanted to --

23 THE COURT: Okay. All right.

24 MR. ECHEVERRIA: -- assert for the record that we
25 believe that this portion of the declaration is clearly

1 inadmissible legal testimony.

2 THE COURT: I think -- I don't know. I'm not the
3 brightest light bulb in the building, but I think I can
4 determine what -- what the law is, or at least as I interpret
5 the law. And I don't need a lawyer, I don't need Professor
6 Donahue, I don't need Mr. Mocsary to tell me what the law is.
7 I -- I will -- I will muddle my way through it the best that I
8 can.

9 MR. ECHEVERRIA: I appreciate that, your Honor.

10 The -- but what we do know, from a logical
11 perspective -- and, frankly, the plaintiffs admit as much -- is
12 that numbers -- numbers is not the dispositive (indiscernible).
13 We can't just count up how many -- how many weapons have these
14 configurations and determine that that satisfies or doesn't
15 satisfy the common use test necessarily.

16 A common use test based solely on numbers would be
17 circular, as the -- as the Fourth Circuit observed in *Kolbe* and
18 the First Circuit in *Mormon*. And the plaintiffs agree that the
19 common use inquiry cannot turn on the fact-bound sales numbers
20 of particular makes and models or even specific configurations.
21 That's from paragraph 31 of plaintiffs' pretrial proposed
22 findings of fact and conclusions of law

23 We agree that numbers are not the end of the inquiry.
24 But we do want to address the numbers because I know that the
25 Court is curious about them and concerned about them. And we

1 endeavored to provide to the Court the numbers that the state
2 of California has on these types of weapons. And those numbers
3 were presented at Defendants' Exhibit CZ.

4 Exhibit CZ is a declaration -- the Glover declaration
5 that provides the registration figures for the state of
6 California. In Exhibit CZ, Ms. Glover reports that there are
7 roughly 90,000 individuals -- sorry. 90,886 individuals, as of
8 December 3rd, 2020, with registered assault weapons. And that
9 would be a registered assault weapon, assault rifle, assault
10 pistol, or assault shotgun. And in paragraph 7 of Exhibit CZ,
11 Ms. Glover reports the breakdown of those registered weapons,
12 excluding weapons registered by law enforcement officers
13 because the Second Amendment common use test is about common
14 use among civilians.

15 So paragraph 7 reports that there are approximately
16 185,569 assault weapons currently registered with the
17 California Department of Justice. And the breakdown of that is
18 that there was -- that there were 165,804 rifles, 16,306
19 pistols, and 3,459 shotguns.

20 So breaking that down, of the weapons that were
21 registered with the state of California since the inception of
22 the assault weapons control act during the different windows
23 for registration, assault pistols comprise 8.7 percent of all
24 registered assault weapons. And assault shotguns comprised 1.7
25 percent of all registered assault weapons. So with respect to

1 pistols and shotguns, they are a sheer minority of registered
2 assault weapons, which I think should impact the Court's
3 assessment of whether pistols and shotguns that qualify as
4 assault weapons are in common use as the plaintiffs indicate --

5 THE COURT: But -- but don't we have to look at
6 national?

7 MR. ECHEVERRIA: We do. It is --

8 THE COURT: Yeah.

9 MR. ECHEVERRIA: That's another point of
10 clarification.

11 The state is not trying to cabin the Court's inquiry
12 to just California. Any data that we present, we are trying to
13 provide national data. So Lucy Allen looked at all mass
14 shootings nationwide. Klarevas, mass shootings all over the
15 country. We are trying to look at nationwide trends. Even for
16 common use, we do not -- we concede that the common use
17 analysis is a national analysis. But we are providing the
18 information that the state of California has -- has in its
19 possession that hopefully can help the Court determine what the
20 common -- how the common use test should apply nationwide.

21 But we don't have registration numbers from other
22 states. We don't have that kind of information. We have
23 estimates --

24 THE COURT: Let me interrupt you there.

25 Since you had Ms. Allen do all of this other research

1 for you, why -- why -- why could she not compile this -- this
2 important number? Why could she not research --

3 MR. ECHEVERRIA: So we think there are other reasons
4 why, at step one, the assault weapons control act is
5 constitutional. So it wasn't a priority for us.

6 Number two, we only had about a month to prepare
7 Ms. Allen's declaration in opposition to the preliminary
8 injunction motion. And we have a -- you know, I -- we have
9 limited resources. We are -- we are the state of California.
10 But we are defending California law with California tax money,
11 and we are --

12 THE COURT: Okay.

13 MR. ECHEVERRIA: -- we're trying to be judicious in
14 how we are allocating those resources to defend the law. And
15 we do -- we do believe it's -- this would be something that
16 plaintiffs should be able to come forward -- as plaintiffs have
17 come forward in *Rupp* and in *Duncan* -- with -- with -- trying to
18 provide estimates of how many of these weapons are out there
19 nationwide.

20 But we do have numbers for how many -- how many
21 assault weapons were registered with the state of California,
22 and we believe those numbers speak for themselves. That
23 pistols and shotguns just are not owned at the rates of rifles
24 that qualify as assault weapons.

25 THE COURT: You know what? That makes perfectly good

1 sense. Maybe that doesn't necessarily mean that they're not
2 commonly owned, does it?

3 MR. ECHEVERRIA: It's part -- it's part of the
4 Court's consideration. It's part of the mix.

5 THE COURT: Okay.

6 MR. ECHEVERRIA: We think it's relevant information
7 for the Court to know. And the Court asked for that
8 information, so we wanted to be as responsive as we could.

9 THE COURT: Okay. Thank you.

10 MR. ECHEVERRIA: I would like to mark as a new
11 exhibit, this is Defendants' Exhibit DY. I'm going to share my
12 screen with the court.

13 Can your Honor see this document?

14 THE COURT: I can. But -- let me see if I can read
15 it if I put on my glasses.

16 (Pause, referring.)

17 THE COURT: Okay. Yeah, I can read it.

18 MR. ECHEVERRIA: So Defense Exhibit DY is a -- an
19 abstract reporting the results of a survey. And the -- the
20 article was -- was titled, "Firearm ownership and acquisition
21 in California. Findings from the 2018 California safety and
22 well-being survey."

23 And in this abstract, there's a reporting of the
24 findings that roughly one in four California adults live in a
25 home with a firearm, including 4.2 million adults who

1 personally own a firearm.

2 Additionally, this study found -- and this is based
3 on survey data. This survey found that approximately half of
4 the firearm stock in California is owned by the 10 percent of
5 owners who own ten or more firearms, which is consistent with
6 Professor Donahue's opinion in his declaration that firearm
7 ownership is increasingly concentrated.

8 I would like to also mark, related to this exhibit,
9 Defendants' Exhibit DZ. Defendants' --

10 THE COURT: Wait, wait, wait. What's the date --
11 what's the date of this report?

12 I could be wrong, but it seems to me that
13 particularly since COVID -- I have been reading articles in the
14 paper how the FBI and ATF, and other folks, that the background
15 check -- I think it's the NICS system, perhaps, has come to
16 a -- a grinding halt because of the increasing number of people
17 that have been buying firearms.

18 This is 2018. Right? This survey?

19 MR. ECHEVERRIA: It's 2018. I'm not representing to
20 the Court that this is a snapshot of current firearm ownership
21 rates in California today. It is -- it is a survey from two
22 years ago.

23 And I have seen those media reports. I don't have
24 any -- that evidence is just not in the record concerning any
25 increase in gun ownership in the state of California since

1 2018, especially in light of the pandemic. But I would note --

2 THE COURT: Since you were going to submit this to
3 me, I would have thought -- or I would think that the state
4 would easily be able to update this information.

5 I mean, this is all computerized. Isn't it?

6 MR. ECHEVERRIA: Well, this -- so this information
7 was not compiled by the state. I want to make that clear.

8 And, also, I was going to point out why any increase
9 in firearm ownership rates does not affect the point that I'm
10 going to be making.

11 THE COURT: Okay.

12 MR. ECHEVERRIA: Because individuals are not
13 acquiring assault weapons in California because they're
14 currently prohibited under the AWCA. So to the extent that
15 firearm ownership is increasing, the number of households that
16 do not own assault weapons is increasing. And I'm going to
17 compare --

18 THE COURT: But that's -- that's because of the --
19 you know, that's -- that's because of your legislation. Right?
20 So you have legislation that prohibits buying these weapons.
21 And so one -- one doesn't have to be a genius to figure out if
22 the state prohibits being able to buy these weapons, the number
23 of households that are going to have these weapons is going to
24 go down. Right?

25 MR. ECHEVERRIA: Absolutely. That's why we're not

1 making -- that's why it wouldn't be fair for us to rely on
2 firearm ownership rates today. So I --

3 THE COURT: The argument -- let me -- let me -- let
4 me -- this reminds me of an argument that was made in the
5 ammunition case before me.

6 The argument that the state made was, look, Judge,
7 the state has done such a wonderful job with this ammunition
8 background check that look at how few of people were actually
9 restricted purchasers who were deterred from purchasing
10 ammunition because of this great law that we enacted.

11 So that was the argument. This was like, you know,
12 you've got a broken leg, you take two aspirins, six months
13 later your -- your leg heals. And the people who sold you the
14 aspirin said, "See, that's -- look at what a great job the
15 aspirin did. It healed your leg."

16 So the argument kind of goes like this. There are
17 very few prohibited persons who were found as a result of this
18 reg -- background check. And that's because they weren't able
19 to come and buy ammunition. That same argument goes here,
20 doesn't it?

21 The fact is that we don't know how many people would
22 have bought these weapons but for the fact that there's a state
23 law that prohibits them from buying them. Right?

24 MR. ECHEVERRIA: Your Honor, it's impossible for me
25 to provide evidence of how many assault weapons would be

1 purchased in the state of California --

2 THE COURT: Of course.

3 MR. ECHEVERRIA: -- if there weren't an assault
4 weapons control act. These type of counter-factuals are
5 impossible for us to provide.

6 THE COURT: I agree.

7 MR. ECHEVERRIA: But what we do know -- what we do
8 know is the number of assault weapons registered in the state.
9 And -- and we now have information about how many -- at least
10 in 2018, how many households personally owned firearms. And
11 it's 14 percent of the adult population. But that translates
12 into 2.1 percent of California gun owners owning a registered
13 assault weapon. 2.1 percent.

14 Now, maybe if you go back in time, closer to the
15 registration periods, maybe that number would increase. I'm
16 just trying to provide the Court with the best available
17 information that we do have.

18 THE COURT: All right. So home -- how many -- how
19 many people does -- does this thing tell you -- how many
20 California residents do own assault weapons?

21 MR. ECHEVERRIA: So this survey, if I can go back to
22 Exhibit DZ. Exhibit DZ, on page DEF3579, provides a breakdown
23 of the survey results.

24 We were not able to get the survey itself in the past
25 like hour or so, two hours. But we were able to find this

1 breakdown for the Court. And this is -- this breakdown is
2 being reported by the University of California.

3 So, here, there's a chart titled "The majority of
4 guns in California are long guns such as rifles and shotguns."
5 And then it breaks down the ratio of long guns that are
6 assault-type weapons.

7 If your Honor can see the gray number?

8 THE COURT: I can see it. I can see it.

9 MR. ECHEVERRIA: Yeah. So according to the survey, 5
10 percent of California gun owners own a assault-type weapon.

11 Our -- if you compare the 4.2 million with our
12 number, the state's number of individuals who have registered
13 assault weapons of about 90,000, our number comes out to about
14 2.1 percent. But either way you cut it, 5 percent or 2.1
15 percent, it's still a sheer minority of gun owners in the state
16 of California.

17 And the 5 percent is based on self-reporting. So
18 someone may think they own an assault-style weapon because they
19 have a rimfire AR-15 with all of the features, even though that
20 weapon would actually not qualify as an assault weapon under
21 California law.

22 But all of this information --

23 THE COURT: Let me ask you this, though. Because
24 that also cuts the other way, doesn't it? How was this survey
25 conducted?

1 MR. ECHEVERRIA: I -- I do not know how the survey
2 was conducted. I can go back to Exhibit DY.

3 THE COURT: So how many people do you suppose -- in
4 keeping with your last comment -- how many people do you
5 suppose do own assault weapons but would never confess to
6 owning an assault weapon?

7 MR. ECHEVERRIA: So this was a point that was raised
8 by plaintiffs' counsel. That there's a high rate of
9 noncompliance. I believe that -- I believe plaintiffs' counsel
10 used the phrase "a lot of noncompliance."

11 The state of California is not going to -- there
12 definitely is some incidence of noncompliance. That's just the
13 nature of any -- any registration regime that you have in any
14 context.

15 But there's no evidence in the record of -- of a lot
16 of noncompliance or such widespread noncompliance that the
17 state's data reflected in Exhibit CZ would be inaccurate. And
18 if that were the case, then the individuals who owned those
19 weapons that were not registered would no longer be law-abiding
20 citizens.

21 So we are taking plaintiffs at their word that these
22 gun owners are law-abiding citizens.

23 THE COURT: Yeah. That's not -- when they're talking
24 about law-abiding citizens, look, that's not what they're
25 talking about.

1 You know -- you know what they're talking about.
2 They're talking about people that don't use these weapons to --
3 to commit murder or to rob banks or to rape women. That's what
4 they're talking -- I mean, that's what the law is obviously
5 talking about.

6 MR. ECHEVERRIA: Well, I assume that's included, but
7 I didn't know that there were certain types of laws that they
8 were excluding from that calculus. In any event, there is
9 no -- there is no --

10 THE COURT: Well, tell me what the lawful -- tell me
11 what the lawful use is of someone who has a weapon that can't
12 be registered in the state of California? So -- so what's the
13 lawful use?

14 MR. ECHEVERRIA: Of a weapon that -- I'm sorry, your
15 Honor. Can you repeat the question? I was having difficulty
16 hearing you.

17 THE COURT: So -- so *Heller* talks about commonly
18 possessed by law-abiding citizens for lawful purposes. If I
19 own --

20 MR. ECHEVERRIA: Yes.

21 THE COURT: -- which I don't. But if I owned one of
22 these, suppose I moved from -- oh, I don't know. Arizona, or
23 whatever. And I moved to California, and I have one of these
24 weapons. I haven't used it unlawfully. Right? But -- but I'm
25 not registering it. So you're right. Technically, I mean,

1 there's a violation of the law. But that's not what -- I don't
2 think that's what *Heller* was talking about.

3 But, in any event, certainly -- certainly, you don't
4 think that 5 percent of the population in the state of
5 California is -- is -- is commonly owned? And if you
6 extrapolated that around -- assuming that the rate was that low
7 in, say, Arizona, Nevada, Oregon, Washington, New Mexico,
8 Texas, Oklahoma, and so on -- if you extrapolated that 5
9 percent across the nation, you don't think that would be a
10 pretty large number of these numbers possessed by law-abiding
11 citizens for lawful purposes?

12 MR. ECHEVERRIA: The number -- so the number, in
13 connection -- in relationship to the population of the state of
14 California is even lower. It's like .03 percent of the
15 California population. We weren't -- we weren't relying on
16 that. We're trying to provide a ratio of people with
17 registered assault weapons in connection with other -- with all
18 gun owners in the state of California.

19 I do assume -- I mean, we don't have evidence on this
20 because it's hard to get this evidence. But I assume that the
21 ownership rates of assault weapons would be higher in other
22 jurisdictions and there would be fewer gun owners because
23 California is such a populous state.

24 We're not -- we're not representing to the Court that
25 this data shows that assault weapons are in common use or are

1 not in common use as a matter of law. It's part of the
2 Court's -- it's part of the mix of facts that the Court needs
3 to consider.

4 THE COURT: Yeah. Okay. I agree with that. I agree
5 with that.

6 MR. ECHEVERRIA: So -- so there's a lot of -- a lot
7 of issues, by looking at just the sheer numbers. And in
8 this -- the evidence -- Defendants' Exhibit DY and DZ further
9 complicate the inquiry about how many of these weapons are
10 owned by civilians and whether that number is high enough.

11 Again, there has been no number that's been
12 designated by the courts as the threshold that qualifies for
13 common use.

14 THE COURT: Let me -- let me ask you a question. Let
15 me ask you a question.

16 That 5 percent in -- in that study you just showed
17 me, what's the number? What's the actual number of long guns?
18 It doesn't talk about -- I don't know if shotguns are included
19 in the long guns or not.

20 MR. ECHEVERRIA: Your Honor, I'll turn to Exhibit DZ.

21 THE COURT: Yeah. Okay. That's pretty small for me
22 to read. But, okay. So -- so --

23 MR. ECHEVERRIA: Can I try to zoom.

24 THE COURT: Now, that's okay. You can help me.

25 Okay. So it's 5 percent. But what's the number?

1 What's the -- let's -- 5 percent is what? Like -- what?
2 10,000? 30,000? 50,000?

3 MR. ECHEVERRIA: I'm a lawyer. Math is not my strong
4 suit, your Honor.

5 THE COURT: (Laughing.)

6 MR. ECHEVERRIA: I can get that calculation for you.

7 And we can also -- if your Honor would find it
8 helpful, we -- we have these two exhibits, but we can endeavor
9 to get the full text of the study, which may disclose more
10 information; if your Honor's interested if that.

11 THE COURT: I'm trying -- yeah, it would be great
12 because I don't see the number. I see a percentage. But I
13 don't see --

14 MR. ECHEVERRIA: Right. And --

15 THE COURT: I don't see -- by the way, I just noticed
16 that -- I guess long guns would include shotguns, apparently.

17 MR. ECHEVERRIA: Oh, yes.

18 THE COURT: Okay. Does not include handguns.
19 There's no mention of handguns.

20 So let me ask you. Down at the bottom there's the
21 wheel-type graph.

22 MR. ECHEVERRIA: Yes.

23 THE COURT: Why -- why does it have the gray say 6
24 percent? Up at the top it says 5 percent. What's the
25 difference? Do you know?

1 MR. ECHEVERRIA: Well, just looking at the face of
2 this document, it appears that the wheel chart for long guns,
3 the 6 percent for the gray area, is people who own the long
4 guns by way of inheritance. So the color gray in the circle
5 charts --

6 THE COURT: Is different.

7 MR. ECHEVERRIA: -- corresponds to acquisition by
8 inheritance.

9 THE COURT: Got it.

10 MR. ECHEVERRIA: The color gray in the middle is
11 assault weapons.

12 THE COURT: Got it. Got it. Okay. That confused me
13 for the moment.

14 MR. ECHEVERRIA: Actually, we're on it, your Honor.
15 Our library has obtained a copy of the full article, and we
16 will file that and number the exhibit appropriately for the
17 Court.

18 THE COURT: Okay. So we don't know what the number
19 is. We don't know -- we know the percentage, according to this
20 survey, but we don't know the number?

21 MR. ECHEVERRIA: We -- I do not know the number,
22 sitting here today, from the survey. But we have even more
23 accurate numbers about the number of assault weapons. And
24 people -- so I guess this issue is that some of the 5 percent
25 may own -- may possess an assault weapon that has not been

1 registered. Like an illegally possessed assault weapon. I
2 guess that is a possibility.

3 But the number that the state is confident in is the
4 number of registered assault weapons with the Department of
5 Justice. And that number is reflected in Exhibit C --

6 THE COURT: Okay. Okay. I'll buy that.

7 MR. ECHEVERRIA: But if the Court looks at
8 defendants -- sorry, plaintiffs' estimates of the number of
9 these weapons that are in circulation, their numbers are
10 over-inclusive. Mr. Curcuruto's estimates of the number of
11 modern sporting rifles is over-inclusive because the state of
12 California does not prohibit modern sporting rifles. As I said
13 before, the AR-15 can be sold in the state of California in a
14 California compliant variation.

15 Curcuruto's estimates include rimfire rifles, which
16 are not assault weapons under the California law. Rifles with
17 fixed magazines. Rifles possessed by law enforcement agencies,
18 which should be excluded from the Court's calculation. Rifles
19 that are no longer operable, can't be fired.

20 According to Plaintiffs' Exhibit 4-3, which is, I
21 believe, one of the NSSF reports, it's clear that their
22 estimates include lower receivers. So the lower receiver,
23 without an upper receiver, is not an operable firearm. And --
24 and those lower receivers are being included in the count.

25 If you look at the declaration of Ostini and Brown,

1 they also make clear that there are California variations of
2 the weapons they claim are prohibited that are available for
3 sale in California.

4 And I do -- I do want to preserve for the record -- I
5 understand that the Court has ruled on these -- on the motion
6 in limine. But I do want to preserve our objection to the
7 declarations of Ostini and Brown. We maintain that it is still
8 an inadmissible hearsay. But to the extent that the Court
9 wants to look at those declarations, they actually help the
10 State's position in some ways. Particularly in showing that
11 some of these weapons -- even if they may be sold with
12 qualifying features that would make them as -- that would
13 qualify them as assault weapons, they can be sold here in
14 California without those features.

15 Now, the plaintiffs -- the plaintiffs acknowledge,
16 and the parties agree on this, that numbers is not the end of
17 the survey. That the Court should look at other aspects, too.

18 The state -- the state represents that *Heller*
19 instructs the Court to look at the qualitative characteristics
20 of the weapons that are being prohibited. And -- and we
21 believe that the qualitative characteristics of the particular
22 features show that they are combat-oriented features.

23 In Defendants' Exhibit H, which is the -- or 1980s
24 ATF report, there's a description of each feature, and how each
25 feature is a military configuration and serves specific combat

1 functions. So --

2 THE COURT: But getting back to my question earlier,
3 the fact that it may be a combat-helpful feature doesn't mean
4 that it is a prohibited feature. Because if in fact -- I mean,
5 what -- what kind of a militia weapon -- you know, I somewhat
6 sarcastically referred to the Second Amendment as not
7 protecting foam baseball bats and down pillows. The Second
8 Amendment, specifically -- by its very clear terms -- seems to
9 include those weapons that would be useful for militia
10 purposes. I'm not making that up. That's the clear -- I mean,
11 one has to do a lot of gymnastics -- mental and linguistic
12 gymnastics to find that the Second Amendment -- the problem, of
13 course, as you know, Justice Breyer and others believe that
14 it's is a collective right. It's a right of the militia.

15 Well, you can argue about that. That's way above my
16 pay grade. We're past that point. The fact of the matter is
17 that clearly the Second Amendment says that weapons that are
18 useful for the militia are protected by the Second Amendment.

19 Now, how -- how -- how in the world can anyone -- I
20 mean, you can say that shouldn't be that way. Okay? You can
21 argue that. You can say, well, you know, the -- the framers
22 were all wet. They shouldn't -- they shouldn't have said that.
23 Or, you know, Justice Breyer's correct. That it is a
24 collective right. That it's only the militia that is entitled
25 to own these -- these weapons.

1 But the fact of the matter is when you read the
2 Second Amendment and then you read *Heller*, you're left with the
3 conclusion that the weapons that the Second Amendment protects
4 are those weapons that are commonly owned by law-abiding
5 citizens. That if it should become necessary for them to use
6 and bring to the battlefield, will be helpful to them in --
7 in -- in that endeavor. I can't see any way that anyone can
8 possibly interpret the Second Amendment any other way. Whether
9 it's a collective right or not, that's a different issue
10 altogether. That's not before me. And, as I said, that's
11 above my pay grade.

12 But clearly, if you're going to bring a weapon to a
13 battlefield, you want a weapon that's accurate and that's going
14 to provide the maximum amount of firepower that you can have at
15 the time. I mean, that just seems so logical to me, I don't
16 understand what the argument is about that.

17 MR. ECHEVERRIA: So, you know, we discussed this
18 earlier today. The state has a different reading of *Heller* and
19 how *Heller* has interpreted *U.S. versus Miller*.

20 In our view, the Supreme Court made clear in Justice
21 Scalia's majority opinion that the preparatory clause does not
22 really impact the scope of the operative right, which is to
23 protect law-abiding citizens' access to weapons that are in
24 common use for lawful purposes; not weapons that are useful in
25 militia or military service.

1 I would -- I would also note -- I have -- for fear of
2 leading us off on another tangent, I think the concept of the
3 militia and the concept of the Second Amendment right as
4 providing a right for people to have weapons to serve in a
5 militia, it has never been adopted by the courts as part of the
6 scope of the right. It has been talked about in the literature
7 about the Second Amendment; this right to insurrection, the
8 right to -- to have the weapons useful for militia service.

9 And I think that that conception of the Second
10 Amendment is problematic at any time, but especially in -- in
11 the wake of the events that happened in Michigan, where there
12 were the -- the people who were arrested for trying to kidnap
13 the governor and armed protesters who stormed state capitol,
14 armed with many of the very weapons that are being restricted
15 under California's law.

16 And then there was the uprising at the Capitol on
17 January 6th. That -- that riot literally happened while I was
18 deposing General Youngman, who is plaintiffs' expert, who
19 opines that the AR-15 is ideal for militia service.

20 There were a lot of people in that crowd. There were
21 a lot of people who went to Kenosha, Wisconsin, including Kyle
22 Rittenhouse, who may have thought that they were part of the
23 militia. They were bringing the arms that they have in service
24 to protect property, to protect themselves, to protect others.

25 THE COURT: Well, wait a minute. Because I don't --

1 MR. ECHEVERRIA: To be honest --

2 THE COURT: On the January 6th incident -- and I
3 don't want to get us into a political debate.

4 MR. ECHEVERRIA: I don't either.

5 THE COURT: But in the January 6th incident, I read
6 about someone, supposedly, who took a pipe bomb to the RNC and
7 a pipe bomb to DNC. I've never heard anything more about that.
8 I don't know if the fellow's been identified. I don't know if
9 they were really bombs or if they just looked like bombs. But
10 I haven't read a single article about the number of AR-15s or
11 AK-47s or Glocks or Sig Sauers that were seized during this
12 January 6th incident. Am I missing something?

13 MR. ECHEVERRIA: Yes, there are -- there have been
14 reports of people who tried to bring in assault weapons, or
15 people who were found in possession of illegal weapons in the
16 District of Columbia. The reason why --

17 THE COURT: Wait, wait, wait. That were in the
18 District of Columbia is very different than having them at the
19 Capitol. Those two things are not the same.

20 MR. ECHEVERRIA: They are the same for the purposes
21 of making it difficult for anyone to go to the Capitol with
22 prohibited weapons. It was more difficult for these people --
23 for individuals to smuggle in weapons that are prohibited in
24 the District of Columbia and then bring those weapons to the
25 Capitol.

1 THE COURT: If that's true, why weren't they used,
2 Mr. Echeverria?

3 I mean, the way you make it sound is that there were
4 all of these people who came to D.C., and they were all armed
5 with AR-15s and AK-47s. And they were going to mount this
6 insurrection.

7 MR. ECHEVERRIA: Oh, no.

8 THE COURT: Well, that's the way I interpreted what
9 you were saying.

10 MR. ECHEVERRIA: Oh, I'm sorry, your Honor. No, I
11 didn't -- no, that's the opposite of what I'm saying.

12 THE COURT: Oh, okay.

13 MR. ECHEVERRIA: What I'm saying is that there was
14 not widespread possession of assault-style rifles and weapons
15 at the January 6th --

16 THE COURT: Okay.

17 MR. ECHEVERRIA: -- rally and then riot.

18 THE COURT: Okay.

19 MR. ECHEVERRIA: And the reason why that is -- and
20 it's a good thing that those weapons were not present, as I am
21 sure your Honor would agree --

22 THE COURT: I agree a hundred percent.

23 MR. ECHEVERRIA: The reason why those weapons were
24 not present, in large part, was because the District of
25 Columbia has such strict regulations on the possession of

1 firearms, including assault-style weapons, which made it --

2 THE COURT: You can't prove that. You can't prove
3 that. I mean, many of the people that -- that were in
4 Washington, D.C., drove their cars into Washington, D.C. They
5 could have --

6 MR. ECHEVERRIA: They did.

7 THE COURT: Been like the guy in Las Vegas, who had
8 however many weapons in the trunk of their car. That gets us
9 into a change, and I don't think we need to talk about it. The
10 point simply is this. I think the Second Amendment is pretty
11 clear. It does talk about a militia.

12 The *Miller* case does talk about weapons that are
13 protected by the Second Amendment. We've gone over this
14 already.

15 I think Justice Scalia did a wonderful point of
16 explaining why these two things do come together. There's a
17 nexus between the two of them.

18 The fact that these weapons may also be useful in a
19 somewhat military concept, in my opinion, really doesn't add
20 anything to the equation. In fact, I think it probably
21 detracts. I think it's more in the plaintiffs' favor than it
22 is in the --

23 Now, granted. I mean, you and I both agree -- I
24 hope -- that insurrection is hopefully never going to happen or
25 should not happen. And I think we can agree on that. And --

1 and that if it did, any kind of weapon, whatever the weapon may
2 be, could be used, would be used. Right? But hopefully that
3 will never happen. But, nonetheless, that's what the Second
4 Amendment says.

5 I didn't make this up. I mean, I can go find it for
6 you. But that's what the Second Amendment says. And it also
7 says "shall." "Shall," which means there is no discretion.
8 "Shall." In -- in the law, when you say "shall," it means
9 there's no discretion. "Shall" not be infringed.

10 So I don't know. To me, it doesn't make any
11 difference whether a weapon could be -- my hunting .30/06 could
12 be used, if -- if I was called upon, to fight the Russians or
13 the Chinese or the North Koreans, or whoever. I would use my
14 .30/06. But I will tell you what. My .30/06 would not be as
15 good a weapon to use as an AR-15 platform rifle

16 MR. ECHEVERRIA: Or a machine gun.

17 THE COURT: Huh? I'm sorry. Go ahead.

18 MR. ECHEVERRIA: Or a machine gun. Machine guns are
19 an ideal weapon for militia or military service. But those can
20 be banned.

21 But the point of the matter -- and I -- I *Heller* says
22 what it says. And we can agree to disagree -- you're the
23 judge, so you --

24 THE COURT: (Laughing.) Well, thank you for
25 acknowledging that.

1 MR. ECHEVERRIA: Yeah. But -- but we think that
2 *Heller* says what it says.

3 But moving on to some of the -- some of the other
4 aspects that the plaintiffs say that the Court should look at,
5 they point to the functionality. They claim that the regulated
6 weapons and configurations are functionally common in their
7 proposed findings of fact and conclusions of law.

8 And their functional commonality is based on the
9 simple fact that these weapons have a semiautomatic action.
10 Again, the state of California is not prohibiting semiautomatic
11 weapons. We are prohibiting certain configurations on a
12 certain subspecies of semiautomatic weapons.

13 Regarding jurisdictional commonality, the fact that
14 there are different jurisdictions that allow these weapons to
15 be acquired in the state of California and Massachusetts and
16 Illinois, and other states prohibit these weapons, that's --
17 that's the federal design. That is not -- that does not doom
18 those states that happen to be in the minority at this time.
19 Because that -- you know, the political winds can change.
20 That's just -- *Heller* -- *Heller* -- *Heller* accommodates
21 variation among the states, as explained in *McDonald*.

22 And then the plaintiffs say that the weapons are
23 characteristically common. And this is really -- the
24 characteristic commonality is really just a rehash of the
25 numeric commonality point that they make. Because they claim

1 that they are, quote, commercially popular types of arms with
2 various common types of characteristics.

3 The qualitative characteristics of these weapons, the
4 particular features that are enumerated, in the state's view
5 and as shown in the state's evidence, are combat-oriented
6 features. They stabilize a weapon in rapid semiautomatic fire,
7 which is the -- the kind of default setting for soldiers in the
8 battlefield. They are instructed to generally set their arms
9 for semiautomatic fire because it's more accurate and more
10 deadly.

11 And this -- this actually traditions into one of the
12 main reasons why in the state's view the assault weapons
13 control act does not burden the Second Amendment. And that
14 is --

15 THE COURT: If what you said was true, why don't we
16 just allow machine guns, then, instead of semiautomatic
17 firearms?

18 MR. ECHEVERRIA: I'm sorry, your Honor. What was the
19 question?

20 THE COURT: If what you said was true, that the
21 semiautomatic rifle is more dangerous -- if the semiautomatic
22 rifle is more dangerous, then why don't we -- why don't we go
23 ahead and ban semiautomatic weapons but legalize machine guns
24 and -- and the M16s?

25 MR. ECHEVERRIA: It's -- fully automatic fire is

1 dangerous in different respects.

2 THE COURT: Agreed, agreed.

3 MR. ECHEVERRIA: But -- and regarding banning all
4 semiautomatic weapons, that's just not what the AWCA does.

5 THE COURT: I know.

6 MR. ECHEVERRIA: Yeah. We're prohibiting
7 semiautomatic weapons with the features that make them more
8 dangerous in combat applications.

9 The AWCA does not burden the Second Amendment because
10 the restricted assault weapon configurations make them like the
11 M16. And under *Heller*, the M16 can be banned.

12 And this was a conclusion reached in *Kolbe*, where the
13 Fourth Circuit found that assault weapon restrictions do not
14 burden the Second Amendment because assault weapons are like
15 the M16. And this was also a holding adopted by --

16 THE COURT: How is it that they're like the M16,
17 again?

18 MR. ECHEVERRIA: So they're like the M16 for a
19 variety of reasons, as Judge Staton determined in *Rupp versus*
20 *Becerra*.

21 The weapons have the semiautomatic -- well, the
22 weapons have the ability to fire multiple rounds repeatedly,
23 like a fully automatic weapon. They have the same feature --

24 THE COURT: But that's different. A semiautomatic
25 weapon fires a round for every finger pull.

1 MR. ECHEVERRIA: Correct.

2 THE COURT: An automatic weapon fires many rounds
3 with a single finger pull. So how is that like --

4 MR. ECHEVERRIA: That's absolutely correct.

5 So the first point is that these weapons have the
6 same features. The only distinction that has really been
7 identified is the distinction between semiautomatic and fully
8 automatic or select fire.

9 So the M16 is capable of fully automatic fire.
10 That's not really a material distinction for purposes of the
11 Second Amendment because there is legislative evidence,
12 legislative facts indicating that the rate of fire for a
13 semiautomatic weapon can approach 300 to 500 rounds per minute.
14 This was in Exhibit J, the legislation that enacted the federal
15 assault weapons ban.

16 THE COURT: Is that -- let me interrupt you.

17 There's a difference between the cycling rate and the
18 firing rate. The cycling rate is a hypothetical rate which is
19 a mechanical function, assuming that the weapon was adequately
20 lubricated, et cetera

21 MR. ECHEVERRIA: Um-hmm.

22 THE COURT: That it would -- if you were able to put
23 it on a machine that would be able to pull that trigger a
24 certain number of times without the machine getting tired --
25 right? -- that it would be able to fire a certain number of

1 rounds.

2 A firing rate, on the other hand, takes into account
3 the fact that you may be able to pull the trigger faster than I
4 do. Your finger may not get as tired as quickly as my finger
5 would. So -- so -- are we talking about firing rate or are we
6 talking about cycling rate?

7 MR. ECHEVERRIA: So regarding the -- the House of
8 Representatives' report, I -- I do not know. So typically
9 cyclic rates are discussed in the context of fully automatic
10 weapons, where you don't have to depress the trigger to fire
11 each round.

12 But we have testimony, in this case, that backs up
13 the determination of the U.S. Congress. And that testimony is
14 from Mr. Kapelsohn, who testified at the October 2020 hearing
15 in this case that an average shooter can fire between five to
16 seven rounds per second in semiautomatic mode and can keep up
17 that rate of fire for quite a while. That was his testimony at
18 the evidentiary hearing. And that testimony would not be
19 referring to cyclic rate. That would be the actual rate of
20 fire.

21 THE COURT: Yeah, I heard him say that. And I --
22 and -- as you know, we always talk about evidence. And --
23 and -- and, for example, peer review of articles, and so on and
24 so forth.

25 But what -- what nobody asked him was how -- how he

1 arrived at that conclusion. Because I wonder, for example, how
2 many -- how many people has he watched fire a weapon? How many
3 has he timed? There's a lot of variables that -- that -- that
4 I don't know that he ever testified to, or anyone has testified
5 to.

6 You know, we have -- normally, in a trial, very
7 often, we'll have a jury view. I think it would be
8 fascinating --

9 Are you afraid of guns, Mr. Echeverria?

10 MR. ECHEVERRIA: I'm not afraid of guns, to the
11 extent that's relevant.

12 THE COURT: (Laughing.) I'm going to tell you why I
13 ask that question. It would be really interesting to get the
14 marshals to get us one of these AR-15s, and you and I go out
15 and run an experiment, and see how many times you and I could
16 pull the trigger for how long, and see how many rounds that
17 really could -- that gun could really fire.

18 Don't you think that would be interesting?

19 MR. ECHEVERRIA: That would be fun, your Honor. But
20 the evidence in this case is really not disputed on this point.

21 This is plaintiffs' expert. The plaintiffs have put
22 forth Mr. Kapelsohn as an expert based upon his extensive
23 experience with firearms. We have not contested his
24 qualifications. We didn't file a *Daubert* motion to --

25 THE COURT: He said 3- to 500 for a semiautomatic

1 weapon. Now, what's a fully automatic weapon?

2 MR. ECHEVERRIA: So he's testified it is 300 -- or
3 750 to 900 rounds per minute.

4 THE COURT: Are those the same?

5 MR. ECHEVERRIA: They are different. They -- they
6 are different.

7 So -- there are more rounds that can be fired per
8 second from a fully automatic weapon. We're not disputing
9 that. But a five-to-seven rate of fire from a semiautomatic
10 weapon can be maintained for quite a while. That is the
11 plaintiffs' expert testimony in this case. And I asked him, as
12 he sat in deposition, where he still stood by that testimony;
13 and he said, yes.

14 THE COURT: Yes.

15 MR. ECHEVERRIA: That testimony backs up the evidence
16 that the U.S. Congress collected in enacting the federal
17 assault weapons ban. So we have legislative evidence, we have
18 expert evidence, undisputed, that the rate of fire of a
19 semiautomatic weapon is between five to seven rounds per
20 second. That is not a materially lower rate of fire when
21 you're getting -- if you're on the receiving end of -- of a
22 rain of bullets from a semiautomatic weapon being fired at that
23 rate or a fully automatic weapon being fired at a higher rate.
24 It's just not going to be a material distinction for Second
25 Amendment purposes.

1 THE COURT: Well, let me ask you this, though. But
2 that rate of fire doesn't change whether you have a California
3 compliant AR-15 or AK-47 and a noncompliant. The rate of fire
4 doesn't change.

5 MR. ECHEVERRIA: We -- we would dispute that.

6 The -- the analysis that we're offering the rate of
7 fire evidence for is to show that semiautomatic weapons that
8 fire in -- sorry. Weapons that fire in semiautomatic mode fire
9 at a rate that is approaching fully automatic mode.

10 There are other -- and then it also has all of the
11 other factors. So there -- there are other reasons why the
12 regulated assault weapon configurations make them like the M16
13 or like machine guns.

14 And -- and an additional reason is that the military
15 does instruct its soldiers to generally fire in semiautomatic
16 mode because it's more accurate. And General Youngman backed
17 that -- that up.

18 So we have the Army training manual as Defendants'
19 Exhibit L, at page DEF545, quote:

20 "Automatic or burst fire is inherently less
21 accurate than semiautomatic fire."

22 THE COURT: If I was -- if I was driving down the
23 road -- my numbers may not be absolutely accurate on this. But
24 I think they're relatively close. If I was driving down the
25 road and I got stopped by highway patrolman and the highway

1 patrolman said to me, "Judge Benitez, you were -- you were
2 driving 125 miles an hour." And then I showed up before the
3 traffic referee, and I said to the traffic referee -- he said,
4 "Well, Judge, you were -- you were exceeding the
5 65-mile-an-hour speed limit.

6 And I said, "Yeah, but, look, judge. I was only
7 going 125 miles an hour, which is -- which is almost like 65
8 miles an hour."

9 Do you think the traffic referee would let me off the
10 hook?

11 MR. ECHEVERRIA: Yeah, I really don't know, your
12 Honor. I --

13 THE COURT: You know. You do know. And you know
14 what would happen is that the judge would -- the traffic
15 referee would say, "Thank you very much, Judge Benitez. Leave
16 your check at the door as you go out."

17 If I owed the state -- if I owed the state \$125,000
18 of state income tax but I showed up at your office and I said,
19 "Mr. Echeverria, here's -- here's a check for \$50,000." And
20 you would say, "Well, wait, wait, wait. Wait a minute. That's
21 not \$125,000. And I would say, "Yeah, but they're almost the
22 same."

23 Would you let me off the hook?

24 MR. ECHEVERRIA: Well, I think when we're talking
25 about assault weapons and whether they are protected at step

1 one under -- under the Second Amendment, I think the rules are
2 different. I -- I just don't know that the analogy is apt.

3 The fact of the matter is -- is there's undisputed
4 testimony that the rate of fire for semiautomatic weapons is
5 five-to-seven rounds per second and --

6 THE COURT: Yeah. Okay.

7 MR. ECHEVERRIA: If you do the math, the cyclic rate
8 of fire for an automatic weapon is greater.

9 Your Honor can make the determination about whether
10 there's a material difference between -- between the relative
11 rates of fire. There have been two courts that have concluded
12 that that difference, that delta doesn't -- doesn't save
13 semiautomatic weapons -- or does not raise semiautomatic fire
14 within the scope of the Second Amendment, necessarily. It has
15 not been a material distinction from two other courts.

16 THE COURT: Okay.

17 MR. ECHEVERRIA: But the evidence is in there for the
18 Court to consider. It's in the record.

19 THE COURT: I read the deposition.

20 MR. ECHEVERRIA: I would like to move on to step two
21 because a lot of this argument has dwelled on step one. It's a
22 threshold inquiry to determine whether the AWCA is
23 constitutional. It's been the focus of plaintiffs' evidence,
24 but it's not necessary.

25 The Court can assume some degree of burden on the

1 core -- or some degree of burden on the Second Amendment right,
2 to move on to step two and uphold the law at step two under the
3 applicable level of scrutiny. This is what most courts have
4 done.

5 And when plaintiffs' counsel, Mr. Lee, suggested that
6 most courts have found that step one is satisfied, that's just
7 not correct. Most courts have assumed for the purposes of its
8 analysis that there was some burden, without making a finding
9 on that prong, and move on to step two and uphold the laws of
10 step two. And this Court can do the same thing.

11 So at step two of the two-step framework adopted by
12 the Ninth Circuit and employed by the vast majority of other
13 federal circuit courts in the wake of *Heller* asks what level of
14 burden is the law -- is the law -- is the law imposing on the
15 core Second Amendment right to use -- to use a firearm in
16 defense of hearth and home? And then depending on the level of
17 burden, what level of scrutiny should apply? And does the law
18 satisfy the level of scrutiny?

19 Here, the burden on the core Second Amendment right
20 of defense of hearth and home is minimal. Every federal
21 circuit court that has examined this issue has concluded the
22 same thing.

23 The -- for all of the reasons that we discussed about
24 how the AWCA's narrow in focus shows that the burden is
25 minimal. And, you know, your Honor mentioned that there are --

1 THE COURT: Wait, wait. Would you say that -- would
2 you say that to these people that fired 30 rounds from the
3 AR-15? Would you -- would you say to them that, hey, you know,
4 if we had restricted you to, say, ten rounds, for example --
5 would you say to them that the burden upon you was minimal, if
6 in fact these four people that broke into their house had
7 killed one or more of the residents? Would you say that to
8 them?

9 MR. ECHEVERRIA: What if the Russians invaded and
10 invaded their house or there is a zombie apocalypse? I mean --

11 THE COURT: That wasn't my question. My question
12 was -- in that particular case -- and this is not a -- this is
13 not a hypothetical. This is not about the Russians marching
14 down Broadway.

15 MR. ECHEVERRIA: The persons survived.

16 THE COURT: Yes, they did. I know. I understand
17 that.

18 MR. ECHEVERRIA: Right.

19 THE COURT: They survived, at least in part, because
20 they fired 30 rounds from an AR-15, which is an assault weapon.
21 Right? So they fired 30 rounds. But had they not had -- had
22 the ability to fire those 30 rounds or had a weapon that was
23 able to be accurate and to fire the way they had to fire, had
24 they been shot, had they been killed, Mr. Echeverria, would --
25 would -- would you look at -- at their spouses or their mothers

1 or their fathers and you would say, you know, look, you know,
2 we're sorry that your loved one is now dead. But -- but, you
3 know, we have these laws that impose a minimal burden on the
4 Second Amendment right.

5 Would you say that to them?

6 MR. ECHEVERRIA: Well, as an attorney defending the
7 assault weapons control act, the burden on the core Second
8 Amendment right is not assessed by anecdotes and hypothetical
9 extrapolations from those anecdotes.

10 THE COURT: How do you assess it?

11 MR. ECHEVERRIA: Quite frankly, there -- you know,
12 there are actual mass shootings that happen with assault
13 weapons.

14 THE COURT: Sure, here's --

15 MR. ECHEVERRIA: People who are actually killed.

16 THE COURT: Here's an actual shooting of someone who
17 fired 30 rounds in the defense of home. That's -- that's no
18 different than the mass shooting in Sandy Hook or Parkland, or
19 anywhere else. Those are real incidents. These aren't -- you
20 know, this isn't a hypothetical. These are real.

21 MR. ECHEVERRIA: So the -- just to be clear, the
22 assault weapons control act does not limit the amount of rounds
23 that an individual can fire. Neither does the -- the
24 large-capacity magazine restriction that's on appeal with the
25 Ninth Circuit.

1 The -- the -- an individual can fire 30 rounds. An
2 individual in California can fire 30 rounds. An individual can
3 fire 30 rounds from an AR-15. I mean, there might be some
4 cases, your Honor, where someone may have needed a grenade
5 launcher to defend themselves from an invasion; from a
6 particularly well-armed --

7 THE COURT: That's only useful for military purposes.
8 It's not really useful -- and it's not commonly owned by
9 law-abiding citizens.

10 MR. ECHEVERRIA: Well, see, that's kind of bringing
11 in the step one analysis in step two.

12 I'm trying to focus on the burden of the core Second
13 Amendment right.

14 THE COURT: And so am I. So am I. That's why I'm
15 saying to you, look, look, I fully and completely understand
16 your position. And I fully and completely understand the
17 stakes. But here's what you're telling me. You're telling
18 me -- I'll just -- I'll leave it to the state of California.

19 Okay. The state of California has had -- what? Six
20 mass shootings in 30 years. Okay? Six.

21 MR. ECHEVERRIA: With the assault weapons control act
22 in effect, yes.

23 THE COURT: Okay. Six mass shootings in 30 years.
24 That's two per decade. Okay?

25 MR. ECHEVERRIA: Right.

1 THE COURT: When you look at it, in perspective,
2 that's not a lot. I mean, that's not a lot. It's a lot for
3 the poor people that were shot, I grant you. Tragic, tragic,
4 tragic. But it is also true that there are many instances
5 where people have to use a weapon -- for example, as in this
6 case -- where these people had to fire 30 rounds to -- to
7 defend themselves. Otherwise, they would have been a
8 statistic. And the statistic would have been that they would
9 have been a victim rather than being a survivor; they would
10 have been a victim.

11 And so that's why I don't understand, when you say
12 that it's a minimal burden on the Second Amendment right to
13 self-defense in your home and hearth, I don't understand what's
14 minimal. I bet if you asked the people that fired those --
15 those 30 rounds, I bet you they wouldn't tell you that it was a
16 minimal burden.

17 MR. ECHEVERRIA: Well, your Honor, I -- I can only
18 say that the position that -- that appears to be advanced by
19 the plaintiffs is that personal preferences trump political
20 judgments about public safety. It's the balancing act that we
21 were discussing before.

22 Again, nothing is stopping an individual from arming
23 themselves in their home with any range of firearm they want,
24 provided it's not a prohibited weapon.

25 The -- the plaintiffs are proposing a standard that

1 would lead to more mass shootings. More people would have
2 these assault weapons.

3 THE COURT: Prove that? Prove that?

4 MR. ECHEVERRIA: Even though there would be --

5 THE COURT: What's the evidence to support that?

6 MR. ECHEVERRIA: Well, the evidence to support that
7 is in Louis Klarevas's analysis, where he shows that the
8 incidence of mass shootings went down during the federal
9 assault weapons ban and went up after the ban. And
10 jurisdictions that have enacted an assault weapons ban
11 generally experience fewer mass shootings.

12 So when your Honor says that there were only X number
13 of mass shootings in California, and while your Honor
14 acknowledges that only -- you know, no --

15 THE COURT: Nothing to celebrate. Nothing to
16 celebrate.

17 MR. ECHEVERRIA: Nothing to celebrate, exactly.

18 But it does indicate that the assault weapons control
19 act worked. There are fewer of those incidents in the state of
20 California, generally, when compared to other jurisdictions.

21 THE COURT: That takes me to the question that I
22 asked you earlier this afternoon.

23 What, if any, are the limits of the state restricting
24 the rights of law-abiding citizens to own or possess guns to
25 defend themselves and their family?

1 Where do I find -- where do I find that limit?

2 MR. ECHEVERRIA: Can you repeat the limit that your
3 Honor is interested in? I just want to make sure --

4 THE COURT: I'm trying to find out what is the
5 limit -- so today if I -- let's assume that -- that I agree
6 with you and I find that -- that this ban is constitutional
7 under the Second Amendment. Right? Is that it? Is that going
8 to be it?

9 And, if so, where do I find something that says,
10 okay, state of California, you've given it your best shot. You
11 have all of these laws on the books. You have more laws on the
12 books regarding guns than the Federal Internal Revenue Code.

13 Now, you've got Category 1, Category 2, Category 3,
14 and now Category 4. This is it. It's the end. You can't --
15 you can't -- you can't interfere with a law-abiding citizen's
16 use of a weapon for home self-defense.

17 Is that it? Is that the limit?

18 MR. ECHEVERRIA: So I -- I was trying to -- I -- I
19 want to give the Court comfort that there is a limiting
20 principle. The limiting principle is this -- the two-step
21 framework, about when a restriction crosses the line to impose
22 a severe burden on the core right of self-defense. The AWCA
23 does not cross that line.

24 THE COURT: According to -- according to your expert
25 witness, Lucy Allen, the limit is 2.2 shots.

1 MR. ECHEVERRIA: That is not her testimony.

2 THE COURT: Well, that's --

3 MR. ECHEVERRIA: That is not Lucy Allen's testimony.

4 So Lucy Allen does not provide an opinion about how
5 many shots people need. She provides an expert opinion based
6 on her -- her expertise as an economist about how many shots on
7 average are fired when a weapon is used in self-defense, and
8 she's consulted multiple sources about that.

9 And, frankly, plaintiffs' counsel has distorted
10 what -- what she analyzed and what she found, just today. She
11 found that, on average, around two shots are fired.

12 And then the state is making arguments about that
13 average. And the point that we're making in this particular
14 case is that a high rate of fire is not generally associated
15 with a use of a firearm in self-defense based on her analysis.
16 I would also like to note that the armed citizen database that
17 she looked at was not limited to home defensive gun uses.

18 If your Honor looks at Lucy Allen's declaration,
19 which has been marked as Plaintiffs' Exhibit A, she makes
20 clear -- it's right there on the chart -- that there's a
21 breakdown in the NRA reports between overall self-defense gun
22 uses. And then she provided a breakdown of defensive uses in
23 the home.

24 And the reason why we asked to provide that more
25 narrow definition -- by the way, the numbers are remarkably

1 similar, whether the defensive gun use is outside or inside.
2 But we asked her to break that down. Not because the state of
3 California thinks that firearms should -- or can only be used
4 in the home but because that's where the core of the Second
5 Amendment lies according to the Supreme Court and according to
6 the courts that have interpreted *Heller*, including the Ninth
7 Circuit. That's why the focus has been on the home with Lucy
8 Allen and the 2.2 rounds that she has found based on her
9 analysis.

10 But the -- the fact of the matter is -- is that under
11 intermediate scrutiny -- which is the standard that applies
12 today. There may be a higher standard that would apply some
13 other day in connection with some other law.

14 And I've tried to -- I've tried to give the Court
15 comfort about the limiting principle; not just under the
16 two-step framework but also based on how we got here under the
17 AWCA, with all of these amendments.

18 These amendments were enacted over time to respond to
19 attempts by gun manufacturers and firearm retailers to
20 circumvent the AWCA's restriction. So these are basically
21 attempts by the legislature to plug the spouts, to plug the
22 holes; to make sure the law is as effective as possible in
23 restricting access to the weapons with these features. And
24 that's including Category 4, where a gun manufacturer tried to
25 get around all of the restrictions by removing the stock.

1 So could there be some law in the future that adds a
2 feature -- like what if -- what if a trigger is an enumerated
3 feature?

4 THE COURT: Well, I don't think it's going to be a
5 trigger because a trigger would, of course, affect the
6 functionality of -- of -- of the weapon.

7 MR. ECHEVERRIA: Yeah, exactly.

8 THE COURT: So you wouldn't be able to use that.
9 But, I mean, you know, in fact I think -- this is such a
10 difficult case because you can argue every one of these --
11 every one of these things two ways.

12 So you can also say that, as -- as I pointed out
13 earlier, that the next set of mass shootings -- if you were to
14 wave a magic wand and make these weapons go away completely,
15 the next set of mass shootings would probably be with
16 California compliant AR-15s, AK-47s, and so on.

17 And so given what you have told me --

18 MR. ECHEVERRIA: Yes.

19 THE COURT: -- as I'm listening to you, is that the
20 next step is that the legislature, in its wisdom, would sit
21 down and say, well, look. You know, we've got to stop these
22 mass shootings. And so we're going to do, now, is we're going
23 to close the loophole. Number one, we're going to get rid of
24 the grandfathering clause. And we're also going to ban any
25 further possession or sale of what was previously

1 California-compliant weaponry. See?

2 So now -- now they've done that. And you're going to
3 come in here, and you're going to make the very same argument
4 to me, Mr. Echeverria. And the very same argument would make
5 perfectly good sense to you and to the state and -- and to the
6 legislature. The people who it would not make sense to would
7 be the pregnant mother who had to defend her husband. It would
8 not make sense to the person who was here trying to protect
9 themselves from these four intruders who broke into their home,
10 and so on.

11 MR. ECHEVERRIA: Your Honor?

12 THE COURT: Yeah.

13 MR. ECHEVERRIA: Yeah, I don't know how I would
14 respond to that -- to a hypothetical lawsuit about a
15 hypothetical law.

16 THE COURT: Well, you would, because you represent
17 the state. And you would be doing your great job, just like
18 you are --

19 MR. ECHEVERRIA: I don't know what the state's
20 position would be. It's a fact -- your Honor, it's very hard
21 to -- to think about these slippery slope hypotheticals because
22 they're all going to be fact-bound. The evidence is going to
23 be different.

24 I mean, if the evidence shows that after, you know,
25 assault weapons are effectively -- you know, the assault weapon

1 restrictions are effectively eliminated and mass shootings will
2 still happen. Many of these incidents will still happen. They
3 do. That doesn't mean that the law is constitutional. All
4 laws can be violated, as John Lott acknowledged in his
5 deposition. But we have to look at the relative dangers.

6 You know, are the fatality rates involving certain
7 weapons much higher, like they are for assault weapons? I
8 don't know.

9 The state is responding to data that shows that
10 there's a spike when assault weapons are used in mass
11 shootings. We're responding to data that these weapons are
12 used disproportionately in gun violence against law
13 enforcement, which makes common sense. Because law enforcement
14 officers are generally armed with either AR-15 or select-fire
15 weapons, like the M4. So criminals are able to have the same
16 firepower to give back. They -- they can engage in protracted
17 gunfights, putting law enforcement officers' lives at greater
18 risks, as we saw when the two FBI agents were murdered on
19 February 2nd, as reported by *The New York Times*, at the hands
20 of somebody with an assault weapon when they were trying to
21 serve --

22 THE COURT: How do you respond, then, to -- I can't
23 remember his name now, but let me see if I can find it for you.

24 I think it was -- I think it was Mr. Kapelsohn who in
25 fact has and does and trains law enforcement people with the

1 use of firearms. That -- I mean, this is -- this is -- you
2 see, this is -- to me, this is really significant testimony
3 because this is a guy who is not -- he's not getting paid to
4 come up with an opinion about something. And he has --

5 MR. ECHEVERRIA: That's incorrect, your Honor. He is
6 being paid in this case.

7 THE COURT: Yeah, I know. But this is not his --
8 this is not his -- his -- this is not his livelihood. He may
9 be getting paid for it but this is -- I mean, I -- I don't
10 know. It didn't come out --

11 MR. ECHEVERRIA: He runs a company to provide
12 consulting services and to provide services like this. But
13 it's okay.

14 THE COURT: Okay. Fine. So maybe I'm wrong. It
15 would be the second time this year, and we're only in February.
16 So I guess I'm doing okay. So maybe I'm wrong.

17 But here's a guy who actually -- he has hands-on
18 experience. I mean, he not only teaches law enforcement people
19 how to use these weapons, and yet he is saying, you know, the
20 state's all wet. Right? So he obviously doesn't see these
21 weapons as being that much of a danger to law enforcement.

22 Do you follow what I'm saying?

23 MR. ECHEVERRIA: Well, that was definitely not within
24 the scope of his expert opinion that he offered in this case.

25 There has been zero -- zero testimony and zero

1 evidence, to my knowledge, that plaintiffs have offered to
2 rebut our evidence about the dangers posed by assault weapons
3 to law enforcement officers.

4 I am well aware, your Honor, that there are law
5 enforcement officers who support assault weapons bans and who
6 oppose assault weapons bans. Law enforcement officers do not
7 all think uniformly about -- about these types of issues

8 But what I will tell you is that the evidence in this
9 case shows that assault weapons pose a higher danger to law
10 enforcement officers when law enforcement officers encounter
11 individuals equipped and armed with assault weapons.

12 But the burden in this case is minimal for an
13 additional reason. This is not a categorical ban. The
14 plaintiffs have been using that phrase, seizing on this Court's
15 use of that language in *Duncan*. But this is not a categorical
16 ban. It is a restriction on certain configurations of features
17 on certain types of weapons. It is more akin to a use
18 restriction.

19 You can own an AR-15 in the state of California. You
20 can own it in a rimfire form, with all of the features you
21 want. You can own a semi -- or a centerfire version of the
22 AR-15 if you have none of the prohibited features.

23 There are -- and then there are, of course, the vast
24 range of other weapons that are not even touched by the AWCA
25 that can be lawfully possessed in the state of California.

1 This is not a categorical ban. And even if it were -- and it's
2 not. But the -- the Ninth Circuit, in *Duncan versus Becerra*,
3 didn't adopt a categorical approach. And even though the --
4 the Ninth Circuit did determine that there was a severe burden.
5 It applied strict scrutiny. It still engaged in the
6 tiers-of-scrutiny analysis that is called for by the two-step
7 framework.

8 But the fact that this is a use restriction on
9 certain configurations is just -- it minimizes any burden there
10 is on the core Second Amendment right.

11 And the plaintiffs really haven't addressed this
12 argument. It is critical to the state's position that this is
13 a restriction on certain configurations. And there is evidence
14 in the record -- legislative evidence -- showing that those
15 particular configurations make already dangerous weapons even
16 more dangerous. Particularly in mass shootings and shootings
17 with law enforcement. Each of those shootings.

18 Another point I would like to clarify regarding the
19 flash suppressor. We've discussed many of the features, so I
20 don't want to belabor the Court. I -- I have in my notes to
21 cover them all, but we've been covering a lot of the features,
22 so I'm going to be kind of picking and choosing what I address
23 because I don't want to belabor the Court with points we've
24 already discussed.

25 But regarding the flash suppressor, plaintiffs'

1 counsel repeatedly claimed in its argument, on day one and
2 today, that flash suppressors do not include flash hidiers.
3 That -- that flash suppressors are intended solely to mitigate
4 temporary blindness when a firearm is discharged in low-light
5 settings.

6 But according to Section 5471, Subdivision R of the
7 California Code of Regulations -- and your Honor may find this
8 regulation helpful, that Section 5471, because it provides
9 regulatory definitions for different terms in the assault
10 weapons control act.

11 And we do cite to the regulation in the way that we
12 describe the features, but it may be helpful for the Court to
13 consult the regulation as well.

14 And in the definition of a flash suppressor, the
15 definition expressly states, quote:

16 "A device labeled or identified by its
17 manufacturer as a flash hider would be deemed a
18 flash suppressor."

19 And, the experts did not meaningfully dispute that
20 there can be some flash-hiding effect with a flash suppressor,
21 even if the flash suppressor is not designed to -- to -- to
22 suppress the flash and hide the location of a shooter.

23 THE COURT: How about somebody at risk -- and I don't
24 know the difference. But somebody addressed a brake -- a
25 muzzle brake.

1 MR. ECHEVERRIA: A muzzle brake? That is not
2 prohibited under the AWCA. You can have a hybrid, where it
3 could be a muzzle brake and a flash suppressor. Those are
4 available. Mr. Kapelsohn discusses that in his deposition
5 testimony. But muzzle brakes are not prohibited.

6 Another -- another --

7 THE COURT: But why is that? Why --

8 MR. ECHEVERRIA: The state of California -- so here's
9 the thing. Every feature that is added incrementally adds to
10 the burden.

11 So, you know, intermediate scrutiny is not a
12 Goldilocks test. You know, where if we restrict too few of
13 features, we're under-inclusive and we're violating the
14 Constitution. And if we do too many features, we're
15 over-inclusive and violating the Constitution. It would put
16 the state of California -- and any legislature, for that
17 matter -- in an untenable position, regulating a very important
18 area of gun violence and public safety.

19 But what we can see is that the burden on the core
20 Second Amendment right is minimal because the uses for which
21 the features are designed, combat-oriented applications, are
22 just not generally needed in a self-defense scenario. I know
23 there are hypotheticals that can be conjured up or there could
24 be articles that could be interpreted in different ways where
25 there are anecdotal evidence where an individual may have used

1 an AR-15, with 30 rounds, to defend themselves. But, in
2 general, the evidence shows that no more than 2.2 rounds are --
3 are fired in self-defense.

4 Mr. Lee, this morning, spent some time criticizing
5 Lucy Allen's analysis of the defensive gun uses and the point
6 that she was making, and regarding the Bactiva (phonetic)
7 study, in particular -- the Bactiva study was focused on
8 in-home defensive gun use, because that's where the core Second
9 Amendment right lies. And the plaintiffs tried to suggest that
10 there was something improper that Lucy Allen had done in her
11 analysis. It -- it was -- it was (indiscernible) that she
12 imputed an average when a news article that she found indicated
13 that shots were fired but she was unable to determine how many
14 shots were fired. And Mr. Lee characterized her method as --
15 quote/unquote -- unscientific and -- quote/unquote --
16 anecdotal. There is nothing unscientific with what Lucy Allen
17 did.

18 You can look up on Wikipedia statistical imputation.
19 It is a widely accepted method for filling out gaps in a data
20 set to provide more reliable statistical findings.

21 If Lucy Allen did not do statistical imputation, then
22 you would have a denominator of defensive gun uses that would
23 be larger than the data set that you're identifying, you know,
24 how many shots were fired in the numerator. It would create
25 distortions in the data.

1 And the way that she imputed the data --

2 THE COURT: Why not -- why not simply take -- why not
3 simply take the cases where you know how many shots were fired,
4 just take those. And then figure out how many shots were
5 fired, and then divide those, and then come up with that
6 average?

7 MR. ECHEVERRIA: Because that data won't be reliable.
8 Because you're excluding entire cases simply because you don't
9 have one piece of data, even though you know that that was a
10 case in which multiple shots were fired because the article
11 says "shots were fired."

12 And I believe that Mr. Lee mentioned, during this
13 morning's session, that Lucy Allen imputed the 2.2 average when
14 there was a gap. She did not do that.

15 The Court can look to her declaration in this case,
16 which has been marked as plaintiffs -- or Defendants' Exhibit
17 A, where she explains, in her declaration, that she imputed --
18 that she did the imputation method.

19 So on page 5 of Lucy Allen's declaration, footnote
20 11, she states:

21 "When the exact number of shots fired was not
22 specified, we used the average for the most
23 relevant incidents with the known number of shots.
24 For example, if the story stated that shots were
25 fired, this would indicate that at least two shots

1 were fired. And, thus, we" would -- "and thus, we
2 used the average number of shots fired in all
3 incidents in which two or more shots were fired
4 and the number of shots was specified."

5 She did not fill in the gaps with her conclusion of
6 2.2 rounds. She did not include in the imputed average cases
7 in which no shots were fired, which would drive down the
8 average.

9 She took the average number that she was able to
10 determine when there were two or more shots fired, and then
11 used that number to fill it in. It explain --

12 THE COURT: Okay. So wait a minute. So what's the
13 scientific -- what's the scientific validity of that?

14 So let me just -- let's just talk about this -- this
15 article that I have been holding up, where it says, "30 rounds
16 fired from an AR-15."

17 Now, let's assume that it didn't say 30 rounds fired.
18 Okay? It just said shots fired.

19 MR. ECHEVERRIA: Okay. Yes.

20 THE COURT: Scientifically, how would it be valid for
21 her to attribute 2.2 shots to this article?

22 Where would the scientific bases be for that?

23 MR. ECHEVERRIA: Well, if the article did not specify
24 the number of shots, then statistically, if Lucy Allen would
25 impute an average for that incident, that would be

1 scientifically valid, even if it would not -- ultimately, at
2 the end of the day, be inaccurate.

3 See, science is not about necessarily determining
4 truth and falsity. It's about the process of trying to
5 interpret --

6 THE COURT: My wife was a chemistry teacher,
7 Mr. Echeverria. I think I have a pretty good handle on what
8 science is.

9 MR. ECHEVERRIA: Regardless of your wife's
10 occupation, I'm sure you do.

11 I just want to make clear that what Lucy Allen did is
12 not unscientific, like the plaintiffs are claiming.

13 It was disclosed in her declaration the -- the exact
14 average -- or the type of average that she was using for her
15 imputations was explained in the declaration. She discussed
16 this during her deposition.

17 So to make these allegations that she was, you know,
18 engaging in junk science is just -- it's kind of surprising,
19 your Honor, to be honest with you.

20 THE COURT: Well, both sides have had -- look, this
21 is not the first case I've ever tried. And I -- and I know
22 that both sides generally -- when we have a battle of the
23 experts, both sides tend to try to impugn the -- the other's
24 experts. That's the name of the game.

25 But I have to tell you, I've looked at her study.

1 I've looked at it now twice. I've got some problems with it.
2 I think there's a lot of assumptions that she make -- makes
3 that are not supported by the data that she has.

4 So I'm not saying it's junk science. I'm not saying
5 that I necessarily agree with plaintiffs' counsel. But I do
6 think this whole idea of, you know, we only have 2.2 shots per
7 incident is just not supported by -- by the data.

8 And I -- right here, I have a perfect example of, in
9 this article -- for example, the case of the pregnant woman.
10 It doesn't say how many shots were fired. So she imputes 2.2
11 shots to that. And of course --

12 MR. ECHEVERRIA: No. She -- she imputes the average
13 for incidents that have two or more shots.

14 2.2 includes no shots.

15 THE COURT: So what is the average she imputed?

16 MR. ECHEVERRIA: I don't have the average handy.

17 THE COURT: Is it in her report?

18 MR. ECHEVERRIA: I can try to find out what the
19 average is. I don't believe plaintiffs asked her on the record
20 what the average is either, during her deposition.

21 But -- but it's okay, your Honor. I just wanted
22 to -- to make clear that she was not just plugging in her
23 conclusion to fill in the gaps.

24 THE COURT: Okay.

25 MR. ECHEVERRIA: That would be improper.

1 THE COURT: Okay. Gotcha. I don't want to do this
2 to you, but I do want to break at five o'clock. And I would
3 like to give plaintiffs' counsel some time to -- for rebuttal.

4 So how much longer do you think you have?

5 MR. ECHEVERRIA: I -- I can't say, your Honor. It --
6 I think it depends on --

7 THE COURT: (Laughing.) Don't say it.

8 MR. ECHEVERRIA: You know what I'm saying.

9 THE COURT: (Laughing.)

10 MR. ECHEVERRIA: I would love to get through this in
11 an hour. I -- you know, our position is that the burden is
12 minimal and that intermediate scrutiny applies. And I was
13 about to get into the discussion of intermediate scrutiny.

14 THE COURT: Well, why don't you do that.

15 How about if I give you 20 minutes. Then, after
16 that, I'll cut you off, and then I'll let Mr. Lee do some
17 rebuttal, or Mr. Dillon, or whoever. Okay?

18 MR. ECHEVERRIA: I will certainly try to get through
19 it as expeditiously as possible.

20 I will -- I will say, though, that we -- I do have a
21 lot of evidence to get through. And the plaintiffs presented
22 their case for -- you know, day one and then half of -- you
23 know, the morning session today. I think that the defense
24 needs to be given equal time, I guess, for lack of a better
25 phrase. Especially where it's the state's burden under

1 intermediate scrutiny to defend the constitutionality of the
2 law. But I will -- I will endeavor to get through it as
3 expeditiously as possible for the Court.

4 THE COURT: All right.

5 MR. ECHEVERRIA: So under intermittent scrutiny, the
6 state has to show that there's a reasonable fit.

7 Or another -- another way of describing it, as the
8 Ninth Circuit has described it, is the -- the state has to show
9 that the law would be less effective absent the regulation.

10 And, here, if the state -- if the state's definition
11 of an assault weapon, based on the features, is eliminated,
12 then the assault weapons control act would be less effective in
13 achieving its goal. I mean, that's -- that's why the features
14 test was added in the first place, was to enhance the
15 effectiveness of the assault weapons control act.

16 So the question really is, is there a reasonable fit?
17 And -- the test for whether there's a reasonable fit can
18 involve an assessment of any evidence reasonably believed to be
19 relevant. So the Court -- the state is presenting the Court
20 with evidence from other jurisdictions. So this -- the Court
21 would have to consider mass shootings in other jurisdictions.
22 That's all relevant.

23 The Court should also consider the -- the evidence
24 cited in the five Federal Circuit cases that have all upheld
25 substantially identical assault weapon restrictions, which

1 discuss many of the same issues. You know, this is -- this is
2 the last of -- of the most recent of a long line of cases that
3 have all upheld very similar restrictions.

4 And every case, while being repetitive in some ways
5 in the cases that came before them -- and I appreciate that
6 some of our case is repetitive of all of the rationales and
7 evidence that have already been credited by other Federal
8 Circuit courts. But we have tried to build into this record
9 additional evidence that we hope can give the Court more of an
10 evidentiary basis for determining that the intermediate
11 scrutiny standard has been achieved -- has been satisfied.

12 Another point that I would like to address before I
13 get into the particular application of intermediate scrutiny is
14 the question of how instructive are First Amendment cases in
15 the Second Amendment context.

16 The plaintiffs over-rely on prior restraint cases
17 from the First Amendment context. The -- the courts have made
18 clear that the First Amendment is a guide for how Second
19 Amendment jurisprudence is going to be developed over the next
20 many years, but it's not a one-to-one ratio.

21 The interests that are implicated in First Amendment
22 cases -- particularly freedom speech cases or freedom of
23 religion cases -- are qualitatively different than the
24 interests that are implicated in a Second Amendment case, which
25 concerns self-defense and gun violence and public safety.

1 In the First Amendment context, I would note -- this
2 is the area that has not been fully developed, so I don't -- I
3 just want the Court to be aware that there should be some
4 caution when the Court reads First Amendment cases being cited
5 to support Second Amendment propositions.

6 And the reason is that a Second Amendment claim
7 should not be evaluated as, like, a First Amendment exercise of
8 expression or exercise of an opinion or an exercise of a
9 political viewpoint.

10 The Second Amendment protects a right to
11 self-defense, which is less personal, less based on personal
12 preference. And that's why, under the burden analysis, the
13 Court assesses whether there is a severe burden on the core
14 Second Amendment right. And -- and the core Second Amendment
15 right is not really a right that involves individual
16 expression. I -- I just wanted to make that point at the
17 outset. So to the extent that the plaintiffs are relying on
18 prior restraint cases, they're not applicable necessarily to
19 this case.

20 But under intermediate scrutiny from the First
21 Amendment context -- but especially in Second Amendment context
22 as the Ninth Circuit has developed the two -- the two-step
23 framework -- the state has to show that there's an important
24 government interest and that the regulation being challenged is
25 reasonably related to that interest.

1 I -- I was a bit surprised in this case, your Honor,
2 that the plaintiffs appear to be contesting whether there is an
3 important government interest implicated in this case.

4 THE COURT: Well, don't spend your time -- don't
5 spend your time on that. Because of course I understand --

6 MR. ECHEVERRIA: Thank you.

7 THE COURT: Who could possibly quarrel with the
8 proposition that it's not important state interest to -- to --
9 to protect people? The question -- the question --

10 MR. ECHEVERRIA: I agree.

11 THE COURT: -- that is more serious and more
12 difficult to answer is which lives are more important? The
13 lives of a few criminals who abuse the use of weapons? Or the
14 lives of people like the pregnant mother or this other fellow
15 that used the AR-15, the 30 rounds. So therein lies the
16 balance. Therein lies the question. It's not whether it's an
17 important interest.

18 Who -- I can't imagine Mr. Lee or Mr. Dillon, or
19 anybody else, actually arguing with a straight face that it's
20 not an important state interest for the state to try to
21 minimize fatalities in connection with gun -- gun control.
22 Although I will say this. It's kind of -- kind of odd that you
23 mentioned this because I just -- one of our cases here from San
24 Diego went up to -- went up to L.A. to be prosecuted. A fellow
25 who allegedly killed two people. There was a gun -- a gun

1 enhancement. I remember when gun enhancements were enacted.
2 The -- you'll recall -- no, you're probably too young to
3 remember. But the -- the phrase that was used was "Use a gun,
4 go to prison." Why? Because the state decided that if you use
5 a gun -- you misuse a gun, you should pay a price for it.

6 Well, interestingly, we're seeing that, throughout
7 the state, these gun enhancements are now being stricken. So
8 it's kind of interesting to think about, well, okay. So is
9 there -- has the state made a determination that the lives of
10 people who are shot in mass shootings are somehow more
11 important than the lives of people who are using these weapons
12 in defense of their home and their hearth?

13 The fact that it's --

14 MR. ECHEVERRIA: Your Honor --

15 THE COURT: -- an important right, nobody can quarrel
16 with that.

17 MR. ECHEVERRIA: I appreciate that. I -- I am -- I
18 understand that your Honor views the interests to be important.
19 I believe that your Honor expressed that view in *Duncan* as
20 well.

21 I -- I did -- I did hear the plaintiffs contesting
22 that point, however. So I felt like it was my obligation --

23 THE COURT: Well, don't spend time on it. Don't
24 spend time on it.

25 MR. ECHEVERRIA: I won't.

1 But I also want to make clear that in the reasonable
2 fit analysis, the state is not choosing whose life is more
3 important. That is not what the state has done.

4 I would like to quote brief -- very briefly from the
5 *Worman versus Healey* from the First Circuit. Case citation is
6 922 F.3d 26. And on page 40, the court addressed this very
7 argument. That in prohibiting features that could be used for
8 self-defense, to prevent criminals from using it, the state is
9 choosing to -- to punish law-abiding citizens, basically.
10 Here's what the court says. Quote:

11 "According to the plaintiffs, the forbidden
12 assault weapons and LCMs are ideal for domestic
13 self-defense for many of the same reasons that
14 such weapons are ideal for mass shootings. They
15 are easier to hold and to shoot, require less user
16 accuracy, and allow a shooter to fire many times
17 without reloading. Thus, the plaintiffs assert
18 any regulation prohibiting law abiding,
19 responsible citizens from possessing such weapons
20 sweeps too broadly. This assertion is too facile
21 by half, and we reject it."

22 THE COURT: It is what?

23 MR. ECHEVERRIA: And I asked the Court --

24 THE COURT: I'm sorry. What did the Court say? It's
25 too what?

1 MR. ECHEVERRIA: Facile. That argument is too --
2 it's too cheeky, too easy, too facile.

3 THE COURT: Yeah. Okay. Why?

4 MR. ECHEVERRIA: Because it gives short shrift to the
5 legislative investigation and the legislative judgment in
6 assessing the dangers posed to the public at large by these
7 particular weapons.

8 And I would urge the Court to review the *Worman*
9 *versus Healey* decision, which is the most recent Federal
10 Circuit case analyzing assault weapons bans. And it expressly
11 rejects the argument that the plaintiffs have been advancing in
12 this case, that the state has basically decided -- you know, is
13 picking and choosing who -- who should win and who should lose.
14 That is not what the state is doing here.

15 THE COURT: Well, what -- when the Court made that
16 statement, why? What did it say? I mean, why -- why is it --

17 MR. ECHEVERRIA: I can read on.

18 THE COURT: Why is it too facile by half?

19 MR. ECHEVERRIA: Yeah. I can read on. I didn't want
20 to, you know, dwell on this, but I'll read the rest into the
21 record.

22 The Court says:

23 "This assertion is too facile by half and we

24 reject it. Although we acknowledge that in

25 dealing with a complex societal problem like gun

1 violence there will always be room for reasonable
2 minds to defer about the optimal solution, the
3 plaintiffs give unduly short shrift to the, quote,
4 legislative prerogative to weigh the evidence,
5 choose among conflicting inferences, and make the
6 necessary policy judgments. The role of the
7 reviewing court is limited to ensuring that in
8 formulating its judgments, the legislature has
9 drawn reasonable inferences based on substantial
10 evidence. And that the fit between the asserted
11 government interest and the means chosen to
12 advance them is close enough to pass intermediate
13 scrutiny."

14 In reading that passage from *Worman*, I have excluded
15 citations to other cases.

16 THE COURT: Okay. Great. Thank you.

17 MR. ECHEVERRIA: For readability.

18 So the reasonable fit, in this case, is established
19 for many of the same reasons that a reasonable fit was found in
20 *Worman* and in *Heller 2*, and the other -- and the *Niserpa*
21 (phonetic) case out of the Second Circuit. That all of the
22 five Federal Circuit cases have similar rationales for why the
23 assault weapons control act is constitutional, and shows a
24 reasonable fit.

25 The first reason why there's a reasonable fit has

1 been discussed exhaustively in this argument and is covered in
2 the evidence. That each of the individual features enumerated
3 in Section 30515(a) serve military purposes. They're -- and --
4 and each of those features was identified by the ATF as a
5 military configuration of the M16. So the -- the state has not
6 arbitrarily included features. These are features that were
7 deduced. That was why I was trying to make that point about
8 induction versus deduction. These were features deduced from
9 prior research.

10 The evidence also shows that when assault weapons are
11 used in mass shootings, more people are killed and more people
12 are injured.

13 Defendants' Exhibit A, which is Lucy Allen's
14 declaration at page 18, she explains having 161 mass public
15 shootings involving four or more victims, excluding the
16 shooter, that occur in a public place, significantly more
17 individuals are killed, on average. It's a 100 percent jump,
18 from six to 12 on average, for fatalities. And there's also a
19 significant jump -- a substantial jump for injuries as well.

20 And -- and, again, I would like to -- to reiterate
21 that the plaintiffs have not identified, to my knowledge, a
22 single incident that Lucy Allen has incorrectly coded as an
23 assault weapon mass shooting.

24 But even if they're -- you know, I -- she was basing
25 her research off of the best available evidence. So it is

1 possible that maybe there was some shooting that didn't
2 actually involve an assault weapon. They haven't identified
3 one. But even if they do, we're talking about a universe of
4 161 shootings. So the numbers wouldn't -- wouldn't move that
5 much anyway.

6 Lucy Allen has consistently -- in all of the cases
7 she -- in *Rupp* and in this case, she has found a substantial
8 increase in the number of fatalities and injuries in mass
9 shootings involving assault weapons.

10 I would also note that the plaintiffs presented to
11 the Court, on day 1, a Plaintiffs' Exhibit 29, which was an
12 article -- if your Honor recalls -- about a UPS shooting that
13 occurred in San Francisco. And the article reported that an
14 assault weapon had been used but it apparently was not an
15 assault weapon. That particular shooting was not included in
16 Lucy Allen's analysis in this case. So I just wanted to make
17 that clear. That that particular article is irrelevant to Lucy
18 Allen's study.

19 I -- I would also note -- I believe I said this
20 before but I'll say it again. It -- it's worth repeating.
21 That weapons that are listed -- so the plaintiffs are trying to
22 say maybe Lucy Allen coded a shooting as involving an assault
23 weapon that is solely an assault weapon because it's on the
24 make and model list of Section 30510. And that maybe that
25 weapon didn't have any features that would also make it an

1 assault weapon under 30515.

2 In Defendants' Exhibit AT -- A, as in Apple; T as in
3 Tom. At page DEF (indiscernible).

4 THE COURT REPORTER: I'm sorry. I didn't catch that.
5 I didn't hear what he said.

6 THE COURT: Yeah, can you repeat that, please.

7 Exhibit AT --

8 MR. ECHEVERRIA: I will, your Honor.

9 Defendants' Exhibit AT -- Apple, Tom -- at page
10 DEF1629.

11 Defendants' Exhibit AT is a rebuttal report from
12 Blake Graham in *Rupp versus Becerra*, where he states, on page
13 6, Footnote 2, quote:

14 "There may be certain assault weapons identified
15 in Penal Code Section 30510 that are rimfire or
16 have fixed magazines. In other words, they would
17 not qualify as assault weapons under 30515."

18 Mr. Graham goes on:

19 "These, however, are extremely rare, and I have
20 yet to encounter one in my career."

21 Unquote.

22 So if Lucy Allen did happen to code something based
23 solely on 30510 -- which she doesn't say that she did -- it is,
24 in all likelihood -- that weapon would, in all likelihood, also
25 qualify as an assault weapon under the features test. And,

1 again, plaintiffs have not identified any particular shooting
2 that she erroneously coded.

3 And Professor Klarevas also has a similar finding
4 with respect to the mass shootings that he analyzed, that
5 involved six or more killed anywhere; even if it's in
6 connection with domestic violence or gang-related violence,
7 similar -- a similar correlation is observed.

8 The -- the plaintiffs' counsel routinely acknowledged
9 that there may be some distant correlation -- I recall the
10 phrase "distant correlation" being used repeatedly during this
11 morning's presentation. But we would -- we would say that the
12 correlation is not distant. It's apparent in multiple ways of
13 defining mass shootings, and it has been uncontested in this
14 case.

15 The -- I would also -- and it's very important to --
16 to raise this point about John Lott. John Lott testified
17 during the October 22nd hearing in this case, in response to a
18 question from your Honor, about whether he has observed that
19 assault weapons lead to more deaths.

20 I don't know if your Honor recalls that particular
21 discussion with -- with John Lott. But he -- I'm sorry, your
22 Honor. I'm looking for the particular pin cite to the
23 testimony at the hearing -- at that hearing. I'm not seeing it
24 immediately.

25 THE COURT: Just tell me what you think he said.

1 MR. ECHEVERRIA: So -- so you asked him:
2 "Have you conducted any studies to determine
3 whether or not the guns, the weapons that are
4 banned under the California bans are any more
5 deadly? In other words, had there been any more
6 fatalities or injuries using the weapons that are
7 banned in California, as opposed to other types of
8 weapons, like the California-compliant AR-15."

9 And John Lott responded:

10 "If you do a statistical test, if you say, well,
11 how about mass public shootings that are only
12 committed with assault weapons or only involve
13 people that use large-capacity magazines or only
14 involve multiple weapons or some combination of
15 those, you don't find any real statistically
16 significant difference in terms of the average
17 number of people that are killed in those
18 attacks."

19 So during the October hearing, Mr. Lott appeared to
20 suggest that he had conducted a statistical study comparing
21 mass shootings with assault weapons, with LCM, and with
22 multiple weapons. And if you recall, during the -- during the
23 hearing, Mr. Lott indicated that it was the presence of
24 multiple weapons that was really driving an increase in
25 fatalities.

1 So I asked him, during his deposition, if he
2 conducted that kind of statistical test. And he -- and he
3 testified that he did. And that's at Lott deposition
4 transcript, excerpt page 314, lines 1 through 14.

5 And I asked him where this study is discussed. And
6 he responded on line 20 to 22 that it was in his book, *The War*
7 *On Gun*.

8 *The War On Guns* was a book published in 2016. And he
9 didn't attach any portion of *The War On Guns* to his
10 declaration. And he did attach substantial excerpts -- I mean,
11 from *More Guns, Less Crime*. The excerpts from his book *more*
12 *Guns, Less Crime* comprise a significant portion of his over
13 1,000-page preliminary injunction submission. But he didn't
14 attach anything from *The War On Guns*.

15 And -- and we went to *The War On Guns* to try to see
16 what John Lott has found about the use of assault weapons in
17 mass public shootings.

18 And I'm going to put up, as a document that we have
19 previously lodged with the Court --

20 (Court and court reporter confer.)

21 MR. ECHEVERRIA: Trying to do this as fast as I can,
22 your Honor. I appreciate the Court's indulgence.

23 THE COURT: That's fine. I understand.

24 MR. ECHEVERRIA: Thank you.

25 So this is a declaration that I filed with a notice

1 of lodging of defendants' impeachment Exhibit DX. This is
2 where I explained to the Court how I found the excerpts from
3 *The War On Guns*. I had to download the book onto a Kindle and
4 take screenshots of it. So it's not the -- it's not an ideal
5 form of exhibit. And the defendants are -- are more than
6 willing to lodge with the Court actual Xerox pages from the
7 book, *The War On Guns*, or better printouts if the Court is
8 interested in that.

9 So this is Exhibit DX. And if we -- if we look at --
10 this is from Chapter 10 of his book, *The War On Guns*. John
11 Lott asks:

12 "So are there more fatalities when assault weapons
13 are used?"

14 And he goes on, in this paragraph, to discuss the
15 Fort Hood shooting, which was included in the FBI report but
16 not included in the CPRC data set that he was using for his
17 declaration.

18 But he goes on to discuss the Fort Hood shooting,
19 which did not involve -- which did not involve an assault
20 weapon. We do not argue that it did involve an assault weapon.
21 But this anecdote does not prove that assault weapons do not
22 cause more fatalities.

23 Instead, at figure 1 -- and I'm going to have a
24 call-out here which hopefully will make it more easy -- easy
25 for the Court to review. It's a little out of focus,

1 unfortunately.

2 But he says:

3 "In figure 1, while the differences between
4 large-capacity magazines and multiple guns suggest
5 that multiple guns result in more mortalities,
6 none of the differences are statistically
7 significant. But the results do indicate that
8 banning large-capacity magazines will do nothing
9 to reduce fatalities."

10 And then in figure 1 -- in figure 1, which is on the
11 next page, he provides a chart, which is very hard to read.
12 And I apologize to the Court. And, again, we are willing to
13 lodge a cleaner exhibit, if the Court is interested.

14 But I have a blowup here of figure 1, which is
15 titled, "Number of people killed in mass public shootings in
16 cases 2009 to 2015."

17 I would note that the date range, 2009 to 2015, is
18 different than the date range that Lott was testifying about at
19 the -- at the October hearing. It's also a very strange period
20 to analyze. John Lott has explained that it's important for
21 researchers to disclose why they have selected certain time
22 periods to measure because it's possible for researchers to
23 leave out critical data if they are analyzing incorrect periods
24 of time. There is no explanation for why 2009 is the starting
25 point for his analysis. And I assume 2015 is the ending point

1 because the book was published in 2016.

2 But, in any event, if the Court looks at the
3 different chart -- at the different bar graphs for figure 1,
4 he's comparing the use of large-capacity magazines and multiple
5 guns. He is not analyzing assault weapons. He did not do that
6 study.

7 In footnote 13, page DEF3575, footnote 13, it
8 confirms that the study he's referring to is comparing
9 large-capacity magazines and multiple guns, not assault
10 weapons.

11 Comparing large-capacity magazines without multiple
12 guns and multiple guns without large-capacity magazines finds
13 that the different means, 6 and 8.5, are only statistically
14 significant -- are only statistically significantly different
15 at the 37 percent level. And there's a -- some statistical
16 reference. A T-statistic.

17 Anyway, the Court can review footnote 13. There is
18 nothing about assault weapons being studied there. John Lott
19 had -- was extrapolating from this study, which is not
20 necessarily reliable in the first place, to conclude that there
21 is no difference for assault weapons being used in mass public
22 shootings, and that's just not the case.

23 I would also reiterate that -- or make the point that
24 the multiple gun comment is a red herring. Multiple guns could
25 be multiple assault weapons in mass shootings, potentially

1 contributing to even more fatalities. And the use of multiple
2 guns in mass shootings was a possibility even during the
3 federal assault weapons ban and after the federal assault
4 weapons ban. But you didn't see -- you still saw a dip in the
5 number of shootings and in the number of people killed during
6 the federal assault weapons ban. Then an increase after the
7 ban expired, even though multiple guns was an option throughout
8 the entire time period. So the multiple guns point really is
9 not a material point.

10 But I think the -- there's a larger issue that's
11 raised by John Lott's misrepresentation of his study but also
12 comments he's made throughout this case that statistical
13 significance is some magic phrase. I believe that Mr. Dillon,
14 earlier today, indicated that the absence of a statistically
15 significant difference means that the difference is no
16 different than zero. This is a point that John Lott testified
17 to when he was discussing one of Dr. Koper's studies. He said
18 that Dr. Koper didn't find statistically significant
19 relationships, so the difference is basically zero.

20 This is not how statistical significance operates.
21 Statistical significance is not an on-or-off switch. A study
22 is not valid because it's statistically significant at the 10
23 percent threshold and invalid because it's significant at the
24 11 percent threshold.

25 And Dr. Lott explains this himself. He explained

1 this in Exhibit 10 to his own declaration, which was
2 Plaintiffs' Exhibit 10.

3 This was an excerpt for *More Guns, Less Crime*. And
4 on page -- this is marked page 772, from defendants' -- from
5 Plaintiffs' Exhibit 10. Pardon me. John Lott states:

6 "The simple conventions are, however, fairly
7 arbitrary. And it would be wrong to think that we
8 learned nothing from a value that is -- that is
9 significant at only the 11 percent level, while
10 attaching great -- while attaching a great deal of
11 weight to one that is significant at the 10
12 percent level. The true connection between the
13 significance level and what we learned involves a
14 much more continuous relationship. We are more
15 certain of a result when it is significant at the
16 10 percent level, rather than at the 15 percent
17 level. And we are more certain of a result at the
18 1 percent level than the 5 percent level. The
19 fact of the matter is that statistical
20 significance lies on a continuum, a continuum of
21 confidence."

22 And the fact of the matter is, is that the state has
23 presented un rebutted evidence of a positive coefficient
24 relating to the use of assault weapons in -- in mass public
25 shootings to higher numbers of fatalities and higher numbers of

1 injuries. Whether it's statistically significant does not
2 impact the fact that there is a correlation. The correlation
3 is greater than zero. It's a positive correlation.

4 And a statistically significant -- a requirement
5 imposed on the state of showing statistical significance would
6 be an unworkable way of adjudicating Second Amendment claims.
7 Correlative evidence is sufficient to show a reasonable fit
8 because I -- it's impossible to -- it's impossible. I asked
9 Gary Kleck this. He was an expert witness for the plaintiffs
10 in *Rupp versus Becerra*. He was also an expert in *Duncan versus*
11 *Becerra*. So your Honor does have some experience with Gary
12 Kleck. Gary Kleck -- I asked him, what kind of experiments can
13 we conduct that can control for the intent of the shooter? I
14 believe the plaintiffs, today, indicated that the intent of the
15 shooter is a variable that impacts the number of people who are
16 killed in a mass shooting.

17 And Gary Kleck said he didn't think that there could
18 be an experiment that could be conducted that way. You can't
19 control for the intent of a shooter. We can't do controlled
20 experiments to see what -- what -- to see how mass shootings
21 unfold when a shooter has just a flash suppressor or just a
22 telescoping stock. These types of experiments cannot be
23 ethically conducted.

24 THE COURT: All right. I -- I hate to interrupt you
25 mid-thought, but -- but I get your point. I understand what

1 you're saying. Let's take a ten-minute recess. Come back at a
2 quarter -- quarter till.

3 I'm going to give you 15 more minutes, and then I'm
4 going to give the plaintiff 30 minutes for rebuttal. Okay?

5 So let's take a break.

6 MR. ECHEVERRIA: Thank you, your Honor.

7 THE COURT: Thank you.

8 (Recess taken at 4:34 p.m.)

9 (Resuming at 4:45 p.m.)

10 THE COURT: Okay. We're back.

11 I'm going to stop you at five o'clock.

12 So, if you notice, I've tried to keep my comments way
13 down since we started.

14 So, go ahead, Mr. Echeverria.

15 MR. ECHEVERRIA: Thank you, your Honor.

16 So just to close up about the correlation evidence,
17 in *Rupp versus Becerra* Gary Kleck testified that there is a
18 correlation between the presence of assault weapons and higher
19 fatality and injury rates. He thinks that the correlation is
20 not causation. That the correlation is caused by the intent of
21 the shooter. But he admitted it.

22 And he also testified that if two events are causally
23 related, it makes them -- or, sorry. If two events are
24 correlated, it makes it more likely that they're causally
25 related.

1 There is a point that John Lott also admitted at
2 deposition transcript excerpt page 325, one to five. And this
3 is a point that Judge Staton, in *Rupp versus Becerra*, concluded
4 with. That the correlation evidence that the state has is
5 sufficient, and the state shouldn't be expected to turn a blind
6 eye to that evidence in the face of evidence that assault
7 weapons increase the lethality of mass shootings.

8 The assault weapons ban that was enacted by the
9 federal government was effective. Louis Klarevas explains in
10 his declaration about how the incidence of mass shootings went
11 down during the assault weapons ban and went up after the ban.

12 The only rebuttal evidence that the plaintiffs have
13 presented in this case to address that expert opinion is this
14 share test that John Lott came up with.

15 And opposing counsel, today, towards the end of
16 the -- of their presentation, stated that Klarevas would
17 predict that the share of mass shootings involving assault
18 weapons would go down during the assault weapons ban, only to
19 go up after the expiration of the ban. This is not something
20 that Klarevas would predict. He's never predicted this. This
21 is an idea that John Lott has come up with. And Klarevas would
22 not predict this because of the -- the presence of
23 large-capacity magazine restrictions that were also lifted,
24 that caused an explosion in mass shootings involving
25 non-assault weapons with LCMs, that were able to kill the

1 requisite number of people to qualify as a mass shooting.

2 The share -- the share test makes no logical sense.
3 It doesn't account for large-capacity magazines. It doesn't
4 account for substitution effects where John Lott admits that
5 individuals who can't acquire an assault weapon may use a
6 different weapon to try to commit a mass shooting. He admitted
7 during his deposition that it's possible that the substitution
8 would be of a less-effective weapon, so that the shooter may
9 not kill the requisite number of people to qualify as a mass
10 shooting, drive -- driving down the denominator and possibly
11 keeping a stable share before, during, and after the federal
12 assault weapons ban. And the spillover effect is seen if
13 somebody decides to not engage in any mass shooting, including
14 a mass shooting without an assault weapon.

15 So all of these can account for the phenomenon that
16 John Lott observed. And when the data is corrected, Klarevas's
17 single share will be accounted for as well. The share test is
18 not in the literature, it's not a reliable method, and it does
19 not rebut the evidence that the federal assault weapons ban was
20 effective.

21 Finally -- two final points. It is important for the
22 state of California to restrict the ability to purchase assault
23 weapons.

24 John Lott, in his declaration -- Plaintiffs' Exhibit
25 10 -- had -- had a discussion about how criminals generally

1 obtain their guns illegally. That was a red herring.

2 During his deposition he admitted, without any
3 resistance, that mass -- that individuals who engage in mass
4 shootings overwhelmingly acquire their guns legally. You could
5 say the same for active shooters. This is all consistent with
6 Lucy Allen's conclusion in her declaration at Defendants'
7 Exhibit A, paragraph 38, that over 70 percent of shooters who
8 engage in mass shootings acquire their guns legally.

9 And the final point is the other important and
10 compelling government interest that the state has, which is in
11 mitigating violence against law enforcement personnel. Again,
12 there is no evidence in the record that plaintiffs have
13 presented to rebut that important interest.

14 And -- and, finally, for all of the reasons that we
15 discussed concerning a reasonable fit and the fact that the
16 interests are compelling, it's the state's position that even
17 under intermediate scrutiny -- which should not be the
18 standard -- the state still prevails and the assault weapons
19 control act is constitutional.

20 So, in conclusion, there -- that's -- that is the
21 conclusion of my presentation. And I -- I -- I appreciate -- I
22 welcome any questions that the Court may have about -- about
23 those points.

24 But, in conclusion, I would like to reiterate that
25 the facts and the evidence present in the record in this case

1 are not properly seen as adjudicative facts. These are
2 legislative facts that the legislature and this Court can --
3 can look at in determining whether the law is constitutional.

4 There aren't real factual disputes that the Court
5 needs to resolve by trial. These are legislative facts that
6 should inform the constitutional analysis.

7 We also ask that if the Court is inclined to issue an
8 injunction in this case -- no injunction should issue. But if
9 one should issue, we ask for an immediate stay of any judgment,
10 so that we can consider our appellate rights without having any
11 disruption of the status quo.

12 This is something that we requested after the fact in
13 *Duncan versus Becerra*. And we are asking for it now, before
14 the fact, just in case. Just to ensure that there would be an
15 orderly appeal, in the event that the Court is inclined to
16 enjoin any portion of the assault weapons control act.

17 Of final note, I would ask that the Court formally
18 admit into evidence the exhibits that the defendants have
19 marked, including impeachment Exhibit DX and the two additional
20 exhibits that I marked today, Exhibit DY and Exhibit DZ.

21 And -- and, finally, after the plaintiffs have had an
22 opportunity to make their closing presentation, I think that it
23 might be a good idea to discuss post-trial briefing and
24 scheduling of that.

25 With that, your Honor, I leave it to you and the

1 plaintiffs to close out this trial.

2 THE COURT: Let me -- let me ask you a question
3 before you go.

4 I'm very troubled by -- by -- by the test. When --
5 when you read me the quote from -- what is it, the First
6 Circuit? Where they talk about the plaintiffs' argument --
7 argument being too facile by half --

8 MR. ECHEVERRIA: Um-hmm.

9 THE COURT: -- I'm kind of troubled by -- by that
10 test.

11 I -- I never -- never realized that we, the courts,
12 were that deferential to the legislative findings or
13 conclusions or enactments when it comes down to constitutional
14 issues. And the test troubles me for the following reasons.

15 I think I indicated once before how many more crimes
16 could be solved, for example, if we just didn't require Fourth
17 Amendment warrants for searches and seizures? For example, I
18 -- I have presided over cases where people have brought
19 drugs -- sorry, but it's usually women who have brought drugs
20 into prisons, you know, concealed within their bodies.

21 I've always wondered -- okay. So I wonder, if the
22 state of California said, you know, it's an important state
23 interest to not have drugs smuggled into the -- into prisons.

24 And, you know, we could do a bod -- bodily -- a
25 search on every person that comes in to visit an inmate. And,

1 in fact, we're going to require that. Because -- because that
2 would accomplish the important -- or help us accomplish the
3 important state interest of not allowing drugs to be brought
4 into the prisons.

5 And I am wondering -- I wonder how long it would take
6 the First Circuit, the Ninth Circuit, or any other circuit in
7 the nation to say no. No. You can't do that. I wonder if --

8 MR. ECHEVERRIA: Of course.

9 THE COURT: -- if the state said, you know, there's
10 an awful lot of drunk driving going on. A lot of people being
11 killed by drunk drivers.

12 And, it's an important state interest for the state
13 to say we -- we need to avoid drinking and driving.

14 So we're going to stop -- start pulling people over
15 without probable cause. Because that will assist us in
16 accomplishing the important state interest of not having drunk
17 drivers on the road.

18 I wonder how long it would take the First Circuit or
19 the Ninth Circuit or any other circuit to say, sure, that's an
20 important state interest. It could be accomplished less
21 effectively without this road [sic]. I wonder how long that
22 would withstand judicial scrutiny.

23 MR. ECHEVERRIA: Not long at all, your Honor. And
24 the reason is that there is an additional hurdle that the State
25 would have to negotiate. And they would fall flat on their

1 face at the first hurdle.

2 THE COURT: What's that?

3 MR. ECHEVERRIA: Which is assessing the burden.

4 THE COURT: They pull people over.

5 MR. ECHEVERRIA: The burden -- sorry?

6 THE COURT: What's the burden to pulling somebody
7 over, and walking up to them, and saying, "Hey, have you been
8 drinking?" What's -- what's --

9 MR. ECHEVERRIA: What's the burden?

10 Your Honor, I -- there are a lot of hypotheticals
11 that were offered in the Fourth Amendment context. But in
12 terms of -- you know, in cases of, you know, the individuals
13 who are smuggling drugs and having, you know, full body
14 searches, the -- I -- in the Second Amendment context, there
15 are two gates that have to be cleared at step two.

16 The first is the burden analysis. The --The
17 principle doesn't change. The principle doesn't change. If we
18 use the analysis that says, look, we defer to the state. When
19 the state finds that it's an important state interest and --
20 and the -- and the important state interest can be achieved
21 less effectively by having this law, if that's the principle,
22 does it really matter whether it's a Second Amendment, a First
23 Amendment, a Fifth Amendment? Where would we find that in the
24 Bill of Rights, where it says, look, you can apply this
25 standard for First Amendment, Fourth Amendment, Fifth

1 Amendment, Sixth Amendment? Use a different standard for the
2 Second Amendment. Where would I find that?

3 MR. ECHEVERRIA: Your Honor, different standards do
4 apply in connection with different enumerated rights.

5 If you look at the First Amendment, for example, the
6 First Amendment particularly -- particularly carves out of the
7 First Amendment true threats. So these would be words that are
8 spoken that will lead to violence. And the reason why true
9 threats are carved out of the First Amendment is that the words
10 will cause harm directly.

11 In -- in other contexts, the Fourteenth Amendment,
12 equal protection, there are various degrees of scrutiny that
13 are applied. It's not -- it's not unfathomable that in a
14 Second Amendment context we apply different tiers of scrutiny
15 to different types of laws. We do that in a First Amendment
16 context. Commercial speech is subject to intermediate
17 scrutiny.

18 So if there is a burden that is severe, then the
19 state is not entitled to the kind of deference that the First
20 Circuit was referring to in *Worman*. There would be -- they
21 would -- they would not have deference. It would be strict
22 scrutiny.

23 Here, because the burden is minimal, the state is
24 entitled to deference. And it's not just blind deference, your
25 Honor. We're not asking for a blank check. We are showing the

1 evidence that we have that supports the constitutionality of
2 this law. And this evidence has been credited by not just one
3 court; five Federal Circuit courts and a sister district court
4 in the Ninth Circuit, in California, which is currently on
5 appeal.

6 There is a lot of evidence --

7 THE COURT: Let me ask you something. How long has
8 the *Rupp* case been on appeal?

9 MR. ECHEVERRIA: How long has it been on appeal?

10 THE COURT: Yes.

11 MR. ECHEVERRIA: So *Rupp* was argued before the Ninth
12 Circuit, I believe, in October. I did not argue the case. But
13 it was in October, I believe. And it is still being -- it's --
14 it's still under submission.

15 THE COURT: If it's so clear -- if your position is
16 so clear, why is it taking so long?

17 I've sat with the Ninth Circuit. I've written an
18 opinion in -- oh, I don't know. Less than 30 days.

19 If it's so clear -- what you're saying to me is so
20 clear, why -- why is *Rupp* taking so long? It should be a
21 slam-dunk case.

22 MR. ECHEVERRIA: I -- why -- any case involving
23 constitutional rights, I think, is not -- shouldn't be -- I --
24 I -- look, your Honor, I don't know. I'm not on the Ninth
25 Circuit. I wouldn't know --

1 THE COURT: Okay. That wasn't a fair question. That
2 wasn't a fair question.

3 MR. ECHEVERRIA: It wasn't a preliminary injunction
4 appeal, so there was no expedited schedule for the appeal. It
5 was a merits appeal. I don't know. That might explain some of
6 it.

7 THE COURT: That wasn't fair. I apologize.

8 But, look -- okay. Mr. Lee, Mr. Dillon, do you have
9 any rebuttal?

10 MR. LEE: Yes, your Honor. Thank you. And I --
11 hopefully you can hear me okay.

12 I will endeavor to be brief. I know that the Court
13 has heard a lot of argument on this. There is a lot of
14 material to go through, and -- and the Court has heard
15 extensively from the parties. So I'm just going to try to keep
16 it to some of the salient points that were raised.

17 MR. LEE: And, in particular, the points that seem to
18 interest the Court, I would like to address.

19 Starting with the slippery slope argument, which
20 seemed to be a recurring theme in the Court's concern. And
21 that's frankly the reason why we're here, is because this has
22 been a long cascading series of laws, starting from 1989 and
23 continuing to the present, which continues to -- to constrict
24 law-abiding gun owners and to continue to simply add to the
25 number of firearms and the number of ways that you will break

1 the law if you endeavor, intentionally or otherwise, to obtain
2 one of these weapons that has one of these features.

3 Now, Mr. Echeverria has done a great job of easing
4 all of our concerns about this is simply a legislative
5 experiment and that there is no real intent to go further.

6 THE COURT: Well, he didn't really say that. He
7 didn't say one way or the other.

8 MR. LEE: Well, he said, I think, that this is --
9 this is where -- this is what the -- the legislature states,
10 and this is the only thing before the Court.

11 THE COURT: Right.

12 MR. LEE: And -- and there is no -- there is no real
13 danger of a slippery slope.

14 And if it was just up to Mr. Echeverria and I, I
15 think, you know, we could have a great discussion over lunch
16 about this, and leave it at that and part as friends.

17 But the fact of the matter is it's not Mr. Echeverria
18 that we're worried about. It's his client, the legislature.
19 And when it comes to the legislature, we just have to take them
20 at their word.

21 The express language of Penal Code Section 30510(e),
22 which states the -- the -- the legislative intent in connection
23 with the original Category 1 assault weapons ban, said that
24 they've listed these firearms and any other models that are
25 only a variation of those weapons with minor differences,

1 regardless of the manufacturer. That that's their intent to --
2 to prohibit those. And -- and the legislature goes on to say
3 in that Section E:

4 "The legislature has defined assault weapons as
5 the types, series, and models listed in this
6 section because it was the most effective way to
7 identify and restrict a specific class of
8 semiautomatic weapons." End quote.

9 So, when the legislature tells you that they intend
10 to ban a class of weapons, as much as I credit Mr. Echeverria
11 and -- and in good faith, that this isn't really a ban on a
12 class of weapons but a specific list of configurations -- is
13 how he put it -- I am going to have to just take the
14 legislature's word on it. That their intention was to ban a
15 class of semiautomatic weapons.

16 And, in fact, to the specific statute in question,
17 which is enacted by Senate Bill 23, in connection with Senate
18 Bill 23, the legislature state -- stated expressly that it was
19 the original intent of the legislature, in enacting Chapter 19
20 of the statutes of 1989, to ban all assault weapons regardless
21 of their name, model number, or manufacturer.

22 "It is the purpose of this act to effectively
23 achieve the legislature's intent to prohibit all
24 assault weapons." Close quote.

25 So, again, as much as Mr. Echeverria says this is a

1 limited application, we take the legislature's word for it.

2 And when -- when -- frankly, when legislatures go on
3 record and say -- the ones who are responsible for crafting
4 this legislation -- that -- that there will be no assault
5 weapon possession, no debate, no discussion, period -- which is
6 the way it was put -- well, then, that's what -- this is what
7 happens, your Honor. A lawsuit happens.

8 When a -- when a United States senator says if it was
9 up to her, she would tell -- tell Mr. and Mrs. America to round
10 them all up, to turn them all in, we have to take the
11 people's -- the legislators who craft this legislation, we have
12 to take them at their word that this is their intention to ban
13 every assault weapon.

14 And the only reason why they haven't is because they
15 can't. But the only reason why they can't is because they
16 can't do it all at once.

17 So this is an incremental series of -- of laws,
18 starting with that original assault weapons control act ban,
19 Category I. They realized that that was under-inclusive, so
20 they need to go promulgate an extra list to Category 2.

21 They realize that we need to start banning features
22 because the federal assault weapon ban is expiring. So
23 they're -- so they're coming up with these 30515(a) features,
24 prohibitions.

25 So, again, as much as Mr. Echeverria says this is

1 just a simple ban on a serious of configurations, we take his
2 client's word at it, that this is their intention.

3 And this leads to another point. Is that if we start
4 simply banning all of these categories of weapons, is that
5 really going to accomplish anything as far as, for example, the
6 mass shootings?

7 Well, I -- I think everyone can agree that it
8 probably won't have a statistically relevant effect on crime
9 overall because assault weapons are used in a very small
10 percentage of crimes. I think everyone acknowledges that.

11 But will it make a difference, for example, with mass
12 shootings? Which I think is the -- the -- the very reason why
13 all of these laws are being enacted.

14 And your Honor raised the point, well, look, if the
15 only thing that is available is a Ruger Mini-14 or a
16 featureless rifle -- let's just say -- won't a mass shooter
17 simply use that? And the answer is absolutely -- that's
18 absolutely correct.

19 And, again, I think in the hearing in October, I -- I
20 asked Professor Donahue about these incidents. But there was
21 an incident -- a horrible incident in Norway in which the
22 shooter killed, I think, 69 people -- kids at a summer camp, on
23 an island -- this right-wing extremist, using a Ruger Mini-14.

24 Again, there was, likewise, a -- a terrible incident
25 in 1980s, in Canada, at a woman's college, in which a person

1 slaughtered a number of women at -- at a college using a Ruger
2 Mini-14.

3 So then the next round is, well, you know, clearly
4 these assault weapons bans aren't working to alleviate the --
5 the stated concern. We need to go the next step. We need to
6 incrementally start banning semiautomatic firearms in general,
7 semiautomatic rifles. That's clearly the next step. I -- and
8 so I -- I don't see how anyone can really, frankly, deny that.

9 But more to the point that your Honor was concerned
10 with, are shooters simply going to revert to the -- to what's
11 available? And what's available is what they're going to use.
12 And I don't think you can say that it -- it's going to make any
13 meaningful difference in the outcome because the -- the facts
14 are -- or the defense in this case hasn't claimed that the
15 absence of any features is going to make a meaningful
16 difference.

17 I think the defense relies mostly on statistics in
18 saying that there is correlation. But, again, correlation
19 doesn't mean causation. And, not only that, I don't think that
20 the -- the -- the defense, in this case, is even suggesting
21 that there's causation. The existence of a flash hider isn't
22 going to cause me to go out and commit a crime. The existence
23 of a pistol grip or a collapsible stock isn't going to cause me
24 to go out and -- and to commit a crime.

25 THE COURT: But -- but certainly -- certainly some of

1 the features may reduce the number of injuries or the number of
2 fatalities.

3 I don't know that I need -- I don't know that I
4 need -- I mean, I think it's common sense to understand that if
5 you have a semiautomatic rifle that fires a lot of rounds, that
6 that weapon -- if used -- is likely to cause more injuries or
7 more fatalities.

8 I mean, that seems like -- I don't know. Do I really
9 need to have a study -- a scientific study to come up with a
10 conclusion that that's likely to happen? I think not.

11 But my question -- and this is -- this is why I think
12 I asked Professor Donahue about this. And this is why I was
13 pestering Mr. Echeverria with the issue, which is -- excuse me.

14 You get rid of the featured weapons, only thing
15 that's going to happen is that somebody is going to start using
16 the -- the featureless rifles. And you're going to have an
17 increase in fatalities and -- and injuries.

18 And then the state will come around and will say,
19 well, we're -- we're going to get rid of the featureless
20 weapons. And then you'll be left with the Ruger Mini-14. And
21 then people who are intent on killing people or injuring people
22 are going to get the Mini-14. At least some of them will, just
23 like some of them used the current assault weapons. And
24 they're going to use those, and there will be people killed.

25 And so at some point in time, I suppose, the

1 legislature will wind up down to -- I suspect -- the 2.2 shots.
2 So you can only have 2.2 shots in your -- in -- in your weapon
3 because the legislature deems it acceptable to have 2.2
4 fatalities or injuries. That's okay. That's all right. So
5 we'll let you have that weapon that -- that will only kill or
6 injure, perhaps, 2.2 people. That -- that's my concern.

7 MR. LEE: Sure.

8 And -- and not only will -- and not only will a --
9 someone intent on committing a horrible crime use a featureless
10 weapon. But, frankly, all they will do is take the features --
11 reattach the features.

12 It's -- it's -- the shooters at San Bernardino, for
13 example, they took completely legal -- California legal rifles
14 which were attached with bullet-buttons. And they simply took
15 the bullet-buttons off and made them fully functional AR-15s
16 that they used in connection with that attack.

17 Now, who's -- who's going to comply with the law?
18 The -- both -- the people who are both law-abiding citizens and
19 responsible and the people who are knowledgeable about -- about
20 these laws.

21 THE COURT: You know, let me interrupt you for just a
22 second. I know it's your time, but I've got a question.

23 Because it dawned on me -- there was a question that
24 I was going to ask -- I was going to ask Mr. Echeverria, as
25 well as you.

1 But in some of these mass shootings, as I recall,
2 there's also called -- something called a bump stock. And it
3 seems to me that in some of these mass shootings the shooters
4 used a bump stock. Which, my recollection is, turns the weapon
5 into more of a fully automatic weapon. And I don't know that
6 that was ever accounted for in any of the discussions that we
7 have had or any of the studies that have been conducted.

8 I believe that that feature is also banned in the
9 state of California. Isn't it?

10 MR. LEE: Yes, your Honor.

11 And -- and -- and we have largely not discussed that
12 because, frankly, it's an open question as to whether or not
13 bump stock was actually used in connection with that incident,
14 which is the Las Vegas incident. It was alleged that the
15 shooter in that incident used -- allegedly used a bump stock.
16 At least that's the common allegation that's made. I don't
17 think that that's yet been determined or proven. And so I
18 think we hesitate to wade into that.

19 But it doesn't really matter because a bump stock
20 device, I think, is separately prohibited under California law.
21 So it doesn't --

22 THE COURT: So what I was trying to get at is when
23 we're talking about weapons being like -- for example, being
24 like an M16 -- before me, nobody is challenging the prohibition
25 on the bump stock. And I certainly could see how someone who

1 is somewhat skeptical about these prohibitions would say, yeah,
2 that bump stock really does make this weapon a lot more like
3 the M16 than the evil-featured AR-15 or AK-47.

4 I forgot to ask about that. We had so many things
5 going on.

6 All right. Go ahead. I interrupted you. I
7 apologize.

8 MR. LEE: Thank you, your Honor. And it's no
9 problem.

10 I -- I didn't want to raise the issue because I don't
11 think it's, frankly, germane to -- to this incident.

12 But -- but on the mass shootings incident, your Honor
13 is troubled -- and Mr. Echeverria spent some time talking about
14 the specific definition of the mass shooting.

15 And -- and while there are many different terms that
16 are used -- mass shooting, public mass shooting, active
17 shooter -- we haven't really quarreled too much with the
18 specific definition because largely, your Honor, it doesn't
19 matter.

20 Mr. Echeverria is -- by the way, is absolutely right
21 when I -- I mixed up Ms. Allen's report. The report she did in
22 *Rupp*, in the *Rupp* case actually involved a smaller set of data
23 of -- of mass shooting incidents. The report that she did in
24 the present case involved the 161 incidents, I believe. And so
25 it was a larger data set. But her conclusion actually went --

1 as to the number of -- of those incidents involving assault
2 weapons, actually went down. I think it was from something
3 like -- if memory serves, something from like 26 percent to 22
4 percent. But the reason why we don't really -- when she
5 changed her definition of -- of public mass shooting.

6 But the reason why it doesn't matter, because it's
7 still -- it doesn't really matter. It is still not a majority
8 of the -- of the firearms that are used in public mass
9 shootings under -- under either of her cases. And when I asked
10 her was she surprised that the -- that the number of -- that
11 the percentage of assault weapons went down when you look at a
12 larger data set, she wasn't surprised. And I'm not surprised
13 either.

14 If your Honor really wants an eye-opening look at
15 simply totally raw mass shooting data in which all they do is
16 they take -- all they say is that if four people are shot,
17 period, end of story -- including the shooter. If four people
18 are shot, they call it a mass shooting. Doesn't matter where
19 it took place or -- or what the circumstances were. And this
20 is a -- this is the database that's compiled at a place called
21 the mass shooting tracker site -- or massshootingtracker.site.
22 And this is really revealing.

23 MR. ECHEVERRIA: I'm sorry. This is John Echeverria.
24 I'm not aware of this study being offered as an exhibit in this
25 case. This is the plaintiffs' reply. I -- I -- I would need

1 an opportunity to review this and to consider it. I don't
2 think it's fair to the defense, offering new evidence on reply.

3 MR. LEE: Well, I understand Mr. Echeverria's point,
4 your Honor. And I'm not going to introduce it or discuss it at
5 length. All I'm saying is that when you just take raw data and
6 you just -- you -- you factor out all of the things, like
7 whether it was used in commission with another crime, or
8 whether it was in a public place, or any of these other things,
9 there's a lot of people being shot, your Honor, in what would
10 be called mass shootings.

11 And so would the number of assault weapons that are
12 used in connection with mass shootings, under that definition,
13 go down? I'm sure it would.

14 I'm -- there's no -- been no study on this, but I'm
15 sure it would. Because by and large, I think as everyone
16 acknowledges, crime in the United States -- or -- or gun crime
17 in the United States is largely a handgun issue. And that's
18 borne out by the data and the -- and the information in the
19 exhibits that have been submitted to the Court in this case.

20 So the point is -- the point of all of this is, your
21 Honor, we haven't quibbled too much with the definition of mass
22 shooting because it doesn't matter.

23 According to Ms. Allen, four out of five of her
24 public mass shootings did not involve the -- the use of an
25 assault weapon.

1 By and large, if you look at all of the exhibits that
2 we've cited in our -- in our presentation on Wednesday, the
3 most prevalent firearm is a handgun. And it doesn't -- and --
4 and the existence of an assault weapon ban does not have a
5 meaningful effect upon crime rates overall.

6 So I -- so I don't think we need to really quarrel
7 with all of that or quibble with the specific definition of
8 mass shooting or -- for -- for those matters.

9 But I think the most important aspect of why it's not
10 really important is because Ms. Allen doesn't say -- nor does
11 the defense claim in this case -- that the presence of any
12 particular assault weapon feature would have made a difference
13 in the outcome of any of those shootings. They didn't look
14 at -- they didn't parse any one of these 161 incidents. They
15 didn't say the shooter shot X number of people with assault
16 weapons and a Y number with non-assault weapons. They are not
17 saying that -- that the existence of any of these 30515(a)
18 features would have made a difference in the outcome. Nor can
19 they.

20 So, for these reasons, I think that's why -- I don't
21 think the Court -- while I certainly appreciate the Court's
22 concern over the various definitions that have been used, I
23 don't think, largely, that all of that -- that it matters all
24 that much because --

25 THE COURT: Well, the only reason why I raised it,

1 Mr. Lee, is because, you know, it's like anything else. You
2 have to have a standard to go from. And if someone is act --
3 is talking about a mass shooting in one -- using one definition
4 and someone else is using another definition, as Mr. Echeverria
5 so competently pointed out with regards to Dr. Lott's FBI
6 report. If -- if we're talking about apples and apples, well,
7 then it's meaningful. But if we're talking about apples and
8 oranges, well, now you've got a different problem. You're
9 talking about something different. But I also understand your
10 point. So anyway, go ahead.

11 MR. LEE: I mean, we can -- we can debate all of this
12 stuff. But, at the end of the day, even if you accept
13 Ms. Allen's findings in her report in Defense Exhibit A, four
14 out of five mass shootings did not involve the presence of an
15 assault weapon and they're not claiming that it would have made
16 a difference.

17 All we can say, your Honor -- which -- and I think
18 all they have been saying is that there is some correlation
19 between mass shootings and the presence of an assault weapon.
20 There is some correlation. And that the fatalities tend to be
21 higher in those cases. But, again, they're not saying that it
22 actually did make a difference.

23 Am I surprised that there is a greater -- a higher
24 fatality rate -- and another problem, of course, with these
25 studies is they conflate the term -- they conflate assault

1 weapon with the large-capacity magazine issue, too.

2 So that's a problem, is that the -- when you start
3 conflating these things, it becomes difficult to parse out what
4 exactly is the true cause of -- of the -- of the fatality.

5 But at -- at the end of the day, am I surprised that
6 there is a higher incidence than one might think of the use of
7 assault weapons or large-capacity magazines in connection with
8 these incidents?

9 I'm not surprised, because these are extremely
10 popular available firearms all around the country. And that's
11 our very point.

12 Their very ubiquity, their very commonality which
13 makes them being held in common -- in common use, in this case,
14 for unlawful purposes -- sure. The reason why people use these
15 is because they're popular and they're available. So I'm
16 certainly not surprised. But, again, there's no evidence that
17 it would have made a difference in the outcome in any of these
18 cases and particularly with regard to the 30515(a) features.

19 And, you know, we're not unmindful. And neither
20 should this Court be unmindful of what the -- of what the
21 problem of -- that's posed by these incidents or in crime in
22 general. But I -- I would say -- I mean, the very last
23 paragraph of the majority of opinion in *Heller*, Justice Scalia
24 said, quote:

25 "We are aware of the problem of handgun violence

1 in this country, and we take seriously the
2 concerns raised by the many amici who believe that
3 prohibition of handgun ownership is the solution.
4 The Constitution leaves the District of Columbia a
5 variety of tools for combating that problem,
6 including some measures regulating handguns, but
7 the enshrinement of constitutional rights
8 necessarily takes certain policy choices off the
9 table." End quote.

10 One can be -- so, your Honor, one can be mindful that
11 there is a serious problem. That the majority opinion was
12 mindful that there is a problem of handgun violence in the
13 District of Columbia. No question.

14 But if certain policy choices are taken off the
15 table, and that includes a categorical ban of a class of
16 weapons that's overwhelmingly chosen by the American people for
17 self-defense and other lawful purposes, then that is a policy
18 choice that is taken off the table. And it is not enough for
19 the Court or for Mr. -- or for the state to say, as
20 Mr. Echeverria argued, that the burden is minimal because other
21 types of firearms are available. That was another argument
22 that the court rejected in *Heller*.

23 If the Court will recall, the District of Columbia
24 was attempting to say, well, the handgun ban doesn't really
25 burden Second Amendment interests or the right to self-defense

1 because a homeowner in the District of Columbia had other
2 options; such as a shotgun, for example.

3 But the -- the Court rejected that argument. It said
4 you can't just simply ban an entire class of weapons that's
5 overwhelmingly chosen by --

6 THE COURT: What -- what -- what do you say to the
7 argument that Mr. Echeverria makes, which has -- has some
8 weight. Which is, look, this is not banning an entire class of
9 weapons. This is only banning certain features that make this
10 weapon more dangerous.

11 MR. LEE: I could -- it is a ban of a class of
12 weapons, as the legislature expressly told us exactly what they
13 were going to do: Try to ban an entire class of weapons, per
14 the legislative intent that I raised at the beginning of this
15 rebuttal. But --

16 THE COURT: But -- but -- but it's not a complete ban
17 if in fact there are other -- see, this is the -- this is why I
18 said at the very beginning that the definition of an assault
19 weapon is important. And -- whether it's intentionally so
20 or -- or not, but it also confuses the issue.

21 So if an assault weapon is what we define an assault
22 weapon to be -- right? We say, "This is an assault weapon."
23 Right?

24 Now, the legislature has left open other weapons that
25 one could arguably say are assault weapons. Right? In a

1 broader definition. That is the featureless AR-15, AK-47
2 weapons. Right?

3 So are those a class of assault weapon? Are those
4 the kinds of weapons that the legislature is talking about
5 banning? Will they be banning those in the future when we see
6 that those are the weapons that are then used, perhaps, by some
7 to commit these horrible crimes?

8 MR. LEE: I would suspect, your Honor, that when
9 it's -- when it's determined that -- that that -- that banning
10 these features is not sufficient for the state, that they would
11 attempt to simply ban other -- other categories of weapons.

12 So -- but -- but, again, that's -- that's somewhat
13 supposition. To your Honor's question, is this banning an
14 entire class of weapons? Yes, of course it is.

15 The most -- all one has to do -- you know, this --
16 this commonality question, your Honor -- you know, we put
17 numbers up. We put Mr. Curcuruto's testimony up. We've done a
18 jurisdictional analysis. This is all somewhat overkill in the
19 sense that all one has to do is to go into any gun store in any
20 other state in the country and look on the shelf and say -- and
21 look at what's available.

22 And one will see stores of AR-15 rifles. The most
23 popular common rifle out there. And if they're not on the
24 shelf, it's because, as Mr. Peterson testified before your
25 Honor back in October, it's because he can't keep them on the

1 shelf. It's because they -- they're selling out so quickly
2 they can't -- their supply can't keep up with demand.

3 So Mr. Echeverria --

4 THE COURT: Wait. But he can't be selling -- he
5 can't be selling the weapons with the evil features in
6 California, can he?

7 MR. LEE: He said he sells black rifles, which are
8 tactical rifles. That, at this point, he's limited to -- he's
9 limited to featureless rifles. Correct.

10 But what I'm saying is that -- is that if you go to
11 any gun store in any other part of the country, you'll see
12 AR-15s with all of the features. And that's how they chose the
13 class. That's how they chose these -- these configurations, as
14 Mr. Echeverria puts it.

15 Now, I think the state tries to have it both ways.
16 First, they try to say that --

17 (Videoconferencing call disconnected.)

18 THE CLERK: Your Honor, I'm sorry. But there's
19 technical issues. I couldn't control it.

20 THE COURT: Can we reconnect?

21 THE CLERK: That would have to be through Bruno or
22 Brian, if they're still here.

23 (Pause.)

24 THE CLERK: No, they're not here, Judge. The call
25 was initiated from Bruno at his desk. So --

1 I can message everyone right now, I'm pretty sure.

2 THE COURT: I don't know if they can hear me.

3 THE CLERK: I don't think they can.

4 (Pause.)

5 THE COURT: Okay. Well, that's all we can do.

6 I will issue an order. The order will -- will set
7 forth a schedule for the findings of fact and conclusions of
8 law. We'll issue a minute order on that.

9 Because of technical issues, this hearings is
10 concluded. Thank you.

11 (Conclusion of proceedings 5:31 p.m.)

12 --oOo--

13
14 I certify, by signing below, that the foregoing is a correct
15 stenographic transcript of the oral proceedings had in the
16 above-entitled matter this 16th day of February, 2021. A
17 transcript without an original signature or conformed signature
18 is not certified. I further certify that the transcript fees
19 and format comply with those prescribed by the Court and the
20 Judicial Conference of the United States.

21 /S/ Amanda M. LeGore

22 _____

23 AMANDA M. LeGORE, RDR, CRR, CRC, FCRR, CACSR 14290

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