

1 statistical conclusions regarding defensive gun uses—in addition to the many biases and  
2 indicia of unreliability in such information—the declarant also does not discuss or  
3 account for alternative explanations for the data in reaching her conclusions. *See Claar*,  
4 29 F.3d at 502. The declarant neither mentions nor assesses an alternative explanation for  
5 the data such as that the magazine editors themselves culled reported submissions on  
6 defensive gun uses based on editorial or space limitations.

7 Again, whether any of these or other alternative explanations is true or not, is  
8 unclear, but there is no indication that the declarant took any action to obtain knowledge  
9 of how the data was compiled and what limitations were present. Her conclusions are  
10 unreliable and violate basic rules of statistical sampling.

11 **6. Declaration of Lucy P. Allen, in its entirety.** Fed. R. Evid. 701, 702;  
12 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590-93 (1993); *Dukes*, 222 F.R.D.  
13 189, 196-97 (N.D. Cal. 2004). Because the declarant engaged in a fundamentally-flawed  
14 statistical analysis of third-party anecdotal evidence, and proffered unqualified  
15 conclusions based upon such an unacceptable methodology, the Court should exercise its  
16 discretion to disregard the entirety of the declaration.

17 **7. Declaration of Daniel W. Webster, in its entirety.** Fed. R. Evid. 402, 701,  
18 702; *Daubert*, 509 U.S. at 590-93; *Daubert*, 43 F.3d at 1321-22; *Dukes*, 222 F.R.D. 189,  
19 196-97 (N.D. Cal. 2004). An expert's lack of certainty may lead to exclusion of evidence  
20 on the basis that the testimony is unreliable or unhelpful. *Daubert*, 43 F.3d at 1321-22.  
21 The Court may also exclude the testimony if there is too great a gap between the data and  
22 the opinion proffered. *Gen. Elec. Co.*, 522 U.S. at 146. Insofar as the declarant relied on  
23 the research and opinions of Dr. Christopher Koper—opinions which Dr. Koper has  
24 admitted lack sufficient support—the declarant misleads the trier of fact by only making  
25 speculative statements or making statements based on reports that are based on  
26 speculation. *See Barvir Decl.*, Exhibit NNN at 12, 30-34.

27 Plaintiffs will respectfully request the Court to sustain the above objections at the  
28 hearing on the motion and to strike the evidence referred to above. To the extent that the

1 many bullets, and therefore they are an appropriate target of government concern and  
2 regulation,” Donohue Decl., at 10:8-10.

3 Finally, as Defendants’ Opposition has a separate caption page and the signature  
4 block is on page 26 of the Opposition, it seems these paragraphs of the Declaration are a  
5 knowing attempt to gain an “extra” few pages of briefing, i.e., an impermissible gambit  
6 intended to circumvent the relevant page limit. *See* CivLR 7.1(h).

7 **5. Declaration of Lucy P. Allen, 3:12-5:21** (Paragraphs 7-11 and  
8 accompanying tables). Fed. R. Evid. 702-703; *Gen. Gelec. Co.*, 522 U.S. at 146; *Daubert*,  
9 43 F.3d at 1321-22; *Claar v. Burlington N. R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994);  
10 *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 196-97 (N.D. Cal. 2004). The declarant bases  
11 her opinions in these paragraphs, which refer to the average number of shots fired in  
12 defensive gun use scenarios, by using entirely anecdotal evidence drawn from a regular  
13 National Rifle Association magazine feature about defensive gun uses. The declarant  
14 provides no information as to how such data were collected by the NRA for its magazine  
15 feature, what biases the magazine’s editors might have had in culling the information that  
16 was used in the feature, or other indicia of methodology or reliability. *See Dukes*, 222  
17 F.R.D. at 196-97.

18 The lack of reliability in basing statistical conclusions on a self-selected group of  
19 self-reporting magazine readers, in which the declarant had no involvement or knowledge  
20 of what self-selection biases occurred, is patent. The declarant also provides no evidence  
21 that any credible member of the declarant’s field would rely upon self-reported anecdotal  
22 data generated by a third party to form statistical conclusions. As set forth by Plaintiffs’  
23 expert supplemental Kleck’s supplemental declaration, declarant’s reliance on such  
24 unknown, anecdotal data generated by a third party, with no knowledge of the  
25 methodology or indicia of reliability of the information, is not an accepted practice within  
26 the field of statistical analysis, and violates basic, cardinal rules of statistical sampling  
27 and analysis. Kleck Suppl. Decl. ¶¶ 9-10.

28 In using anecdotal evidence gleaned from a third-party’s magazine feature to make

No. 17-56081

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

VIRGINIA DUNCAN; RICHARD LEWIS; PATRICK LOVETTE; DAVID MARGUGLIO;  
CHRISTOPHER WADDELL; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC.,  
a California Corporation,

*Plaintiffs-Appellees,*

v.

XAVIER BECERRA, in his official capacity as  
Attorney General of the State of California,

*Defendant-Appellant.*

On Appeal from the United States District Court for the  
Southern District of California,  
No. 3:17-cv-01017-BEN-JLB

**SUPPLEMENTAL EXCERPTS OF RECORD**

**Volume I of III**

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January 5, 2018

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MARGUGLIO, CHRISTOPHER  
12 WADDELL, CALIFORNIA RIFLE &  
PISTOL ASSOCIATION,  
13 INCORPORATED, a California  
corporation,

14  
15 Plaintiffs,

16 v.

17 XAVIER BECERRA, in his official  
18 capacity as Attorney General of the State  
of California; and DOES 1-10,

19 Defendants.  
20

Case No: 17-cv-1017-BEN-JLB

**PLAINTIFFS’ OBJECTIONS TO  
DEFENDANT’S EVIDENCE IN  
SUPPORT OF OPPOSITION TO  
MOTION FOR PRELIMINARY  
INJUNCTION**

Date: June 13, 2017  
Time: 10:00 a.m.  
Dept: 5A  
Judge: Hon. Roger T. Benitez

1 PLEASE TAKE NOTICE that Plaintiffs Virginia Duncan, Richard Lewis, Patrick  
2 Lovette, David Marguglio, Christopher Waddell, and California Rifle & Pistol  
3 Association, Inc., through their undersigned counsel, object to the following evidence  
4 presented by Defendant Xavier Becerra in support of his Opposition to Plaintiffs' Motion  
5 for Preliminary Injunction, set for hearing before this Court at 10:00 a.m. on June 13,  
6 2017.

7 **1. Declaration of John J. Donohue, III, 4:19-21** (Paragraph 15; conclusion  
8 that "every survey of gun ownership conducted over time . . . shows that the percentage  
9 of household [sic] with guns today is lower than it was two decades ago."). The Court  
10 may exclude testimony if there is too great a gap between the data and the opinion  
11 proffered. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146-47 (1997); Fed. R. Evid. 702-703.  
12 The declarant does not identify the data upon which he bases the conclusion that every  
13 gun survey shows decline in ownership by household. Nothing in the prior statements by  
14 the declarant lays a foundation for reaching the conclusion, as the declarant identified  
15 only three past surveys of gun ownership he relied upon. In fact, the cited-to report  
16 attached as Exhibit "B" to the declaration states that "the percentage of individuals  
17 owning firearms has remained relatively constant over the past several decades (GSS  
18 2010)." Declaration of John J. Donohue, III ("Donohue Decl."), Ex. B, at 6.

19 **2. Declaration of John J. Donohue, III, 6:1-8** (Paragraph 20; assumption  
20 regarding the demographic trends on ownership of magazines over ten rounds). Fed. R.  
21 Evid. 702-703; *Glen Elec. Co.*, 522 U.S. at 146; *Daubert v. Merrell Dow Pharm., Inc.*, 43  
22 F.3d 1311, 1321-22 (9th Cir. 1995). An expert's lack of certainty may lead to exclusion  
23 of evidence on the basis that the testimony is unreliable or unhelpful. *Daubert*, 43 F.3d at  
24 1321-22. The declarant admits in the preceding paragraph that he has no basis for making  
25 the conclusions he reaches in paragraph 20: "I am not aware of any current social science  
26 research providing for an estimate for the number of American households that own  
27 large-capacity magazines . . . or for the number of LCMs in private hands in America."  
28 Donohue Decl., at 5:17-21. Despite this lack of knowledge or data, the declarant

1 admittedly speculates (“It is reasonable to assume . . . .”) about the demographic trends  
2 regarding owners of magazines with a capacity greater than ten rounds.

3 The declarant also attempts to base his conclusion on a January 2013 New York  
4 Times/CBS News poll. *See Glen. Elec. Co.*, 522 U.S. at 146; Fed. R. Evid. 702-703.  
5 Little information is given about the poll except that it queried adults on whether they  
6 favored a ban on “high-capacity magazines.” The declarant offers no basis as to why a  
7 poll on preferences on the legality of “high-capacity magazines” is reliable indicia of  
8 ownership of magazines with a capacity greater than ten rounds. Nothing in the  
9 declarant’s statements suggests that use of such a poll regarding respondents’ preferences  
10 on firearms laws is an accepted method within the declarant’s field for determining  
11 firearms or magazine ownership rates. And the declarant offers no information that he is  
12 aware of the types of questions posed in the survey he relied upon, and whether such  
13 questions show indicia of being the same or similar to the issues raised in this lawsuit’s  
14 challenge (e.g., whether the term “high-capacity magazine” was represented to poll  
15 respondents in eliciting the responses as magazines greater than ten rounds, or thirty  
16 rounds, or fifty rounds).

17 **3. Declaration of John J. Donohue, III, 6:9-7:8** (Paragraph 21; “A review of  
18 the resolution of mass shootings in the U.S. suggests that bans on large capacity  
19 magazines can help save lives by forcing mass shooters to pause and reload ammunition.  
20 Citizens have frequently taken advantage of a perpetrator stopping to reload his weapon  
21 to tackle him or otherwise subdue him in at least 20 separate shootings in the United  
22 States since 1991 . . .”). Fed. R. Evid. 402, 702-703; *Glen Elec. Co.*, 522 U.S. at 146. The  
23 declarant provides no data or other citation for his claim that “shootings” were halted on  
24 20 separate occasions while a perpetrator was reloading a magazine. First, the declarant  
25 does not confirm that the 20 “shootings” were mass shootings. Second, he does not  
26 indicate if he performed the “review” or if it was the work of some currently anonymous  
27 source. Third, it is impossible to determine if the review is, or includes the type of data,  
28 reasonably relied on by experts in the relevant field. *See* Fed. R. Evid. 703. If the 20

1 shootings referred to are not mass shootings, the declarant's statement is irrelevant to the  
2 instant discussion and should be ignored by the Court. *See* Fed. R. Evid. 402. There is  
3 reason to suspect at least some of those shootings are not relevant to the discussion of  
4 mass shootings because declarant refers to a shooting where no one was shot (the incident  
5 of October 29, 1994, outside the White House). Donohue, Decl., at 6:15.

6 Further, though declarant's other three references are to mass shootings, the  
7 declarant provides no actual data or information as to why those instances support the  
8 conclusion that a ban on magazines with a capacity greater than ten rounds would have a  
9 statistically significant effect in reducing the number of casualties in mass shootings. For  
10 the sources declarant uses are based on hearsay accounts that a pause in reloading a  
11 magazine allowed the perpetrator to be subdued or for victims to escape. And declarant  
12 provides no context about what percentage of mass shootings the four shootings relied  
13 upon by the declarant represent as a total of mass shootings over a sampled period. The  
14 Court may exclude the testimony if there is too great a gap between the data and the  
15 opinion proffered. *Gen. Elec. Co.*, 522 U.S. at 146. Also, because the testimony is not  
16 founded on any media reports or facts or data that show there have been 20 mass  
17 shootings that ended because of a shooter having to change magazines, there is no data  
18 for the expert to reasonably rely on in making his opinion, which means that opinion is  
19 further inadmissible pursuant to Federal Rules of Evidence, rules 702 and 703.

20 **4. Declaration of John J. Donohue, III, 9:11-12:4** (Paragraphs 28-36; legal  
21 arguments). Fed. R. Evid. 403, 701-703; *Daubert*, 509 U.S. at 590-93; *Daubert*, 43 F.3d  
22 at 1321-22; *Dukes*, 222 F.R.D. 189, 196-97 (N.D. Cal. 2004). An expert witness cannot  
23 give an opinion on his legal conclusion, i.e., an opinion on an ultimate issue of law." Fed.  
24 R. Evid. 403, 702; *United States v. Boulware*, 558 F.3d 971, 975 (9th Cir. 2009).  
25 Declarant reframes and analyzes Plaintiffs' evidence which simultaneously unfairly  
26 prejudices Plaintiffs, confuses the issues, misleads the trier of fact, and results in  
27 inadmissible legal conclusions.

28 Declarant unduly prejudices and misleads the trier of fact by incorrectly identifying

1 Plaintiffs as “the NRA.” Donohue, Decl., at 9:12, 9:16, 11:3-4, 11:13-14.

2 Declarant unduly prejudices, confuses the issues, and misleads the trier of fact with  
3 hyperbole, stating “while the old lady or disabled person quaking with the blasting gun in  
4 her shaking hands will protect herself and her loved ones if she can only get off 30 plus  
5 shots without re-loading.” Donohue, Decl., at 9:18-20. California bans magazines capable  
6 of holding more than 10 rounds—not more than 30 rounds. And Plaintiffs did not argue  
7 that self-defense against an attack is not possible without “get[ting] off 30 plus shots  
8 without re-loading.”

9 Declarant unduly prejudices, confuses the issues, misleads the trier of fact, and  
10 makes a legal conclusion when declarant states: “First, the notion that safety will be  
11 enhanced if someone with quaking hands that prevent them from hitting their target in the  
12 first ten shots is able to spray additional bullets is ludicrous.” Donohue, Decl., at 10:1-3.  
13 Plaintiffs’ expert declared that the stress of an attack affects the fine motor skills of a  
14 victim, preventing the victim from efficiently changing a magazine during the attack.  
15 Declarant misleads the Court by suggesting Plaintiffs’ expert was referring to the impact  
16 on gross motor skills needed to hold, point, and shoot a firearm against an attacker or  
17 multiple attackers. Further, Declarant does not identify any data upon which he bases his  
18 opinion.

19 Declarant does not identify any data upon which he bases his opinion that “the  
20 notion that safety will be enhanced if someone with quaking hands that prevent them  
21 from hitting their target in the first ten shots is able to spray additional bullets is  
22 ludicrous.” Donohue, Decl., at 10:1-3.

23 Declarant unduly prejudices, confuses the issues, misleads the trier of fact, when  
24 he declares, without identifying any data upon which he bases his statement, that  
25 “[b]ullets from modern guns with large-capacity magazines can easily penetrate walls,  
26 which means that poorly directed shooting will pose a significant threat to other family  
27 members and neighbors.” Donohue, Decl., at 10:3-5.

28 Declarant unduly prejudices, confuses the issues, and misleads the trier of fact by

1 stating that the “vast majority” of victims of violent crime “do not use a gun for self-  
2 defense.” Donohue Decl., 10:6-7. The statistics regarding attacks *without* firearms is  
3 irrelevant to the instant discussion and should be ignored by the Court. Declarant refers to  
4 data from the National Crime Victimization Survey over the period from 2007-2011, but  
5 does not provide information as to how such data was collected, what biases the collector  
6 may have had in culling the information that was used, or other indicia of methodology or  
7 reliability. *See Dukes*, 222 F.R.D. at 196-97.

8 Declarant unduly prejudices, confuses the issues, and misleads the trier of fact by  
9 implying that a magazine over ten rounds cannot be “used” by an individual for self-  
10 defense. Donohue Decl., at 9:11-10:10 (purposefully using verbs: “blast,” “spray,” or  
11 “get off” instead of the verb “used”).

12 Declarant also injects legal conclusions by making statements such as:

- 13 • “These unsupported assertions are either irrelevant or have no empirical assert.”  
14 Donohue Decl., at 9:20-21.
- 15 • “The LCM ban is designed to address one particularly societally damaging  
16 problem—that of mass shootings.” Donohue Decl., at 7-8.
- 17 • “[A]nd therefore they are an appropriate target of government concern and  
18 regulation.”
- 19 • “This implies that the LCM ban is well-tailored to limit the behavior of  
20 criminals.” Donohue Decl., at 12:1-2.

21 Declarant does not identify any data upon which he bases his opinion that  
22 “[b]ullets from modern guns with large-capacity magazines can easily penetrate walls,  
23 which means that poorly directed shooting will pose a significant threat to other family  
24 members and neighbors.” Donohue, Decl., at 10:3-5.

25 Declarant does not identify any data upon which he bases his opinion that “it is  
26 irrelevant if most times that criminals use guns, they don’t fire their guns more than ten  
27 times. The LCM ban is designed to address one particularly societally damaging  
28 problem—that of mass shootings. By definition, these incidents will involve firing of