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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LEONARD FYOCK, SCOTT HOCHSTETLER,
WILLIAM DOUGLAS, DAVID PEARSON,
BRAD SEIFERS, and ROD SWANSON

Plaintiffs

vs.

THE CITY OF SUNNYVALE, THE MAYOR OF
SUNNYVALE, ANTHONY SPITALERI, in his
official capacity, THE CHIEF OF THE
SUNNYVALE DEPARTMENT OF PUBLIC
SAFETY, FRANK GRGURINA, in his official
capacity, and DOES 1-10,
Defendants.

CASE NO: CV 13-05807 RMW

**SUPPLEMENTAL DECLARATION
OF GARY KLECK IN SUPPORT
OF MOTION FOR PRELIMINARY
INJUNCTION**

DECLARATION OF GARY KLECK

1
2 1. Sunnyvale suggests that large-capacity magazines (LCMs) are rarely used for self-defense. Since
3 there are probably at least 1 million defensive gun uses (DGUs) per year (Kleck and Kates 2001, Chapter
4 6), even if just one in a thousand DGUs involved LCM use, this would be 1,000 defensive uses with LCMs
5 per year. And if Sunnyvale is asserting that it is reasonable to describe this many defensive uses of LCMs
6 as rare, the exact same characterization would apply at least as strongly to the number of times LCMs were
7 used in mass shootings and were likely to have affected the number of casualties simply because the latter
8 quantity may well be as low as three in the past 30 years.
9

10 2. The truth is no one knows how many times LCMs are used defensively. I suspect that only a tiny
11 fraction of DGUs involve over 10 rounds being fired. However, assuming that one is trying to assess the
12 relative costs and benefits of an LCM ban, it matters a great deal just how tiny this fraction is. It is clear
13 that the benefits are likely to be extremely limited, so DGUs in which large numbers of rounds had to be
14 fired to prevent deaths or injuries would not have to be very numerous in order to outnumber the shooting
15 incidents in which LCM use affected the number of casualties
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17 3. Sunnyvale relies on the Expert Report of Lucy Allen to support their claim that few DGUs involve
18 many rounds being fired. This report establishes no such thing. Allen analyzed a non-randomly selected
19 set of DGUs reported in the National Rifle Association magazine, The American Rifleman in its “Armed
20 Citizen” column, and drew conclusions about the entire population of DGUs based solely on this analysis;
21 specifically that it is “rare” (without specifying how rare) for a person to fire more than ten rounds when
22 using a gun in self-defense incidents. Leaving aside the validity of this conclusion, neither the NRA nor
23 Allen claims these incidents were chosen according to any acknowledged scientific random sampling
24 procedure. There was no formal basis for believing that this sample was representative of all U.S. DGUs,
25 with respect to number of rounds fired or any other attribute of the events. Therefore, it was impossible to
26 legitimately infer from an analysis of this sample the fraction of all U.S. DGUs that involve more than 10
27 rounds fired by the defender. Anyone who was a genuine expert on the conditions under which one can
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1 infer conclusions about a population from a sample would never draw the conclusions that Ms. Allen drew,
2 based on the sample she analyzed. This by itself is a strong indication that she is not an expert on these
3 matters.

4 4. Further, even if NRA staff had somehow selected a simple random sample of all DGUs, there were
5 far too few cases in the NRA sample analyzed by Allen. (n=279) to reliably estimate the share of DGU
6 incidents that involved more than 10 rounds being fired, if such incidents are relatively rare, though not as
7 rare as Allen claims. Consider the implications, for example, if just 1% of all DGUs involved over 10
8 rounds being fired. Since national surveys that have specifically asked about DGUs have consistently
9 indicated 0.5-3.5 million DGUs per year, it would be reasonable to assume an annual average of at least 1
10 million DGUs. *If this were the total frequency of DGUs, 1% would imply a number of DGU incidents with*
11 *over 10 rounds fired that was huge in absolute terms – about 10,000 per year.* Thus, this percentage does
12 not have to be very large in order for it to imply a huge absolute number of incidents.

13
14 5. Even if the NRA sample were a representative simple random sample of all DGUs, Allen's results
15 would not be statistically sufficient to reject the idea that 1% of DGUs involved over 10 rounds fired. Ms.
16 Allen's finding of 0% of DGUs with over 10 rounds fired *in her small sample of DGUs* is actually not
17 statistically inconsistent with the hypothesis that 1% of the *entire population* of DGUs involve over 10
18 rounds fired, since her 0% result is well within the bounds of what one could reasonably expect as a sample
19 result in a randomly selected sample of just 279 cases. Samples selected from larger populations of events
20 do not all perfectly resemble the population, since they are always subject to random sampling error. That
21 is, due to the random character of the sampling process, an analyst may, by pure chance, obtain a sample
22 that contains either more or fewer of the events of interest than would be the case if the sample resembled
23 the population perfectly.

24
25 6. The 95% confidence interval (CI) estimate of the percent of DGUs with over 10 rounds fired
26 (symbolized as p) is a range in which one would expect to find 95% of all the estimates one would obtain
27 if one selected an infinite number of samples of a given size. If one assumes that the true population
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1 percentage is 1% ($p=.01$), the 95% CI is -0.17 to 2.17%. This is the result of the following computations:

2 7. The formula for the 95% CI is: p plus or minus 1.96 (square root of ($p \times q$)/ n), where
3 $q=1-p$

4 8. If $p=.01$, then the 95% CI = 0.01 ± 1.96 (square root of $((.01 \times .99)/279)$) = $0.01 \pm$
5 $0.01168 = -0.00168$ to $.02168$, or -0.168% to 2.168%

6 9. This means that if the true population percentage of DGUs with over 10 rounds fired were 1%, and
7 one took an infinite number of random samples, each with 279 DGUs, one would expect 95% of sample
8 estimates of this percentage to be between -0.168% and 2.168%. Of course, percentages can't really go
9 below 0, but this is what statistical theory predicts.

10 10. In plain English, what this means is that even if 1% of all DGUs involved over 10 rounds, one
11 could nevertheless realistically expect to get a percentage of 0 in a sample of 279 DGUs, due solely to
12 random sampling error. Thus, getting a sample result of 0%, as Allen did, is not a statistically significant
13 result allowing one to reliably reject the idea that the percentage in the population of all DGUs with over 10
14 rounds fired is 1%.

15 11. Sunnyvale contends the evidence provided by Plaintiffs does not show there are "reasonable
16 grounds" to believe a crime victim would ever face multiple attackers requiring over 10 rounds to be fired
17 in defense; calling such scenarios "fantastical." The policy-relevant issue is whether DGUs in which
18 victims face multiple offenders in their homes occur *often enough* for the number of lives saved or injuries
19 avoided by defensive LCM use to exceed the number of such harms caused by LCM use by offenders.
20 Since the latter number is close to zero, even if crimes with multiple offenders were quite rare, they could
21 still result in far more harm averted by victim defensive use of LCMs than harm caused by offender use.

22 12. Suppose that only a tenth of 1% of DGUs involved victims facing multiple attackers in the home.
23 Since there are at least a million DGUs per year, this would imply 1,000 such DGUs a year, compared to
24 less than one mass shooting per year in which LCM use caused more casualties (or even the few mass
25 shooting generally per annum).

1 13. It is worth noting that the only reason I offered no evidence about the frequency of people facing
2 multiple offenders is simply because published NCVS data do not provide sufficiently detailed breakdowns
3 of number of offenders. Sunnyvale offers no evidence that such crimes do not occur frequently.

4 14. NCVS respondents, however, were asked for the exact number of offenders, so I therefore
5 examined an NCVS dataset I happened to have on my hard drive, covering the period 1992-1994. My
6 analysis of that dataset indicated that the NCVS estimated, for 1992-1994, that there were 30,497,554
7 violent crimes in which victims directly confronted offenders and could state the number of offenders. Of
8 these, 6,368,235 involved multiple offenders. Of these, 1,997,481 involved four or more offenders. Since
9 this total pertained to a three-year period, the annual average was 665,827. Thus, during that period
10 American crime victims faced four or more offenders in 665,827 violent crime incidents per year. This was
11 a peak crime period, but even if there were half as many in recent years, the annual total would be about
12 333,000. In short, by any reasonable standard, it is an eminently realistic prospect that an American crime
13 victim would face four or more offenders in a violent crime.
14

15 15. Sunnyvale characterizes my descriptions of typical mass shootings as “flawed and misleading.”
16 As purported evidence (aside from referring to a brief filed in a different case, which is addressed in
17 Paragraphs 31-46 below), Sunnyvale provides only one example of the way I addressed missing data. I
18 would say that my phrasing of some of my findings was not sufficiently precise, but not “flawed” or
19 “misleading.” Instead of saying that “no LCM was used in ... 35 incidents,” I should have stated that “no
20 LCM was *known to have been* used in 35 incidents.” My underlying assumption was that if an LCM had in
21 fact been used in a mass shooting, that at least one available news account would have reported this fact,
22 especially in light of the editorial policies of so many news outlets favoring bans on LCMs. It seems
23 unlikely that not a single such news outlet would take advantage of a mass shooting in which an LCM had
24 actually been used to report this fact to its audience. Further, I also made use of the compilations of LCM-
25 involved mass shootings by advocates of LCM bans like the Violence Policy Center, Mayors Against
26 Illegal Guns, and Mother Jones magazine, for reports of LCM use in mass shootings, on the assumption
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1 that these organizations were well-motivated to search for any evidence of such LCM use. If LCM use had
2 been reported in any news story, even one that my assistants and I missed, it was likely that the staff of
3 these organizations would have located at least one of these news stories. Thus, I stand by the position that
4 most mass shootings did not involve LCMs, and that, to phrase it very precisely, *there is no affirmative*
5 *evidence* that LCMs were used in 35 of the 57 mass shootings that I studied. In any event, as I have
6 maintained, whether a LCM is used in a mass shooting is rarely relevant.

7
8 16. Sunnyvale cites *three* cases occurring within the past thirty years, in which bystanders tackled
9 shooters two of which I had already acknowledged in my initial declaration (the 1993 Long Island railroad
10 incident and 1998 Oregon incident). The Gabrielle Giffords shooting in Tucson, however, is questionable
11 in this regard because it is unclear from media accounts whether bystanders were able to subdue the shooter
12 because (1) he was reloading (Sunnyvale's position), or because (2) his magazine had failed due to a
13 broken spring and he was unable to fire. Since such magazine defects would disrupt a mass shooter's firing
14 regardless of whether the magazine's capacity was large or small, interpretation (2) would not support the
15 position that use of non-LCMs would have made a difference.

16
17 17. Sunnyvale then pads out the list of cases supposedly supporting the proposition that magazine
18 changes affected casualty count in mass shooting by citing the Sandy Hook shooting, even though
19 bystanders did not tackle the shooter or otherwise intervene. Sunnyvale switches in mid-paragraph to an
20 entirely different argument as to why LCM use might affect casualty counts – that potential victims could
21 escape “while the shooter was switching magazines.” This is an especially deceptive passage, because
22 Sunnyvale switches from discussing facts to discussing evidence-free speculations, without informing the
23 reader of this critical shift. Their full statement reads: “And law enforcement sources have stated that a
24 half-dozen children *may* have been able to escape from Sandy Hook Elementary School while the shooter
25 was switching magazines” (8/8-10, emphasis added). The text of the supporting *Hartford Courant* article
26 cited by Sunnyvale makes it clear that this was just a speculation by one or more unnamed law enforcement
27 persons. Some children did indeed escape, and there was indeed a pause in the shooting, but *investigators*
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1 could not establish either (1) that the children escaped during the pause, or (2) that the shooter was
2 reloading during the pause (see States Attorney Report).

3 18. Investigators also found multiple magazines that had cartridges still left in them, indicating that
4 even when the shooter did change magazines, he did not do so because he *had to*, because he had exhausted
5 the magazines, but rather that he had *chosen* to change magazines even though he could have continued
6 firing with the same magazine. The significance of this is that at the time the children were escaping, the
7 shooter could have chosen to fire at them by simply continuing to fire the remaining rounds in the “old”
8 magazine, rather than changing magazines “prematurely,” as he repeatedly did. This means even *if* the
9 children escaped during the pause (which is not known), and even *if* the pause was due to a magazine
10 change (which is also not known), one could still not reliably conclude that the children escaped because
11 the shooter had to change a magazine. In sum, there was no factual foundation whatsoever for the
12 speculation that a need to reload saved any lives in the Sandy Hook incident.
13

14 19. John Donahue makes, or hints at, a plainly false claim in his paragraph 11. He vaguely alludes to
15 “a review of the resolution (sic) of mass shootings in the U.S.” on which he based his conclusions, but does
16 not say if this is a review he performed or if he was instead citing a review conducted by others. If it is the
17 former, he failed to describe or even briefly outline the methods by which he conducted the review, making
18 it impossible to judge whether it was competently done. If it is the latter, he failed to cite a source where a
19 reader could find a detailed description of the “review.” Expert scholars describe their methods and cite
20 sources. As things stand, there is no reliable basis for believing Donahue was doing anything in paragraph
21 11 other than stating his own unsupported personal opinions.
22

23 20. His specific claim is that “citizens have frequently taken advantage of a perpetrator stopping to
24 reload his weapon to tackle him or otherwise subdue him *in at least 20 separate shootings in the United*
25 *States since 1991*” (Donahue Declaration, p. 4). Donahue does not claim that these “shootings” were mass
26 shootings or that they involved semiautomatic weapons, multiple firearms, or multiple magazines, which
27 are normally used by mass shooters. There may well be shootings in which bystanders subdued shooters
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1 while they reloaded, in shootings bearing little resemblance to mass shootings, such as shootings in which
2 the perpetrators used types of firearms that take far longer to reload than the semi-automatic firearms used
3 in most mass shootings. These sorts of cases, however, would tell us nothing about whether banning LCMs
4 would do any good, because they have no relevance to the willingness of bystanders to intervene when
5 shooters have semi-automatic guns capable of accepting detachable, possibly large-capacity, magazines. It
6 is the latter sorts of shootings that are relevant to the question of whether LCMs should be banned. In
7 short, if Donahue's undocumented 20 shooting incidents were radically different from the mass shootings
8 in which LCMs might contribute to the casualty count, they are irrelevant to the merits of an LCM ban. In
9 any case, Donahue does not cite 20 specific cases, or cite any external sources that document these 20
10 cases. Further, I am not aware of more than two or three such cases over the past thirty years.

12 21. Instead, Donahue cites only three cases that he claims fit his description, and then tosses in a
13 fourth case that, even based on his own inaccurate description, did not involve victims subduing a shooter,
14 while he was reloading or at any other time. The first case, occurring near the White House, was not a
15 mass shooting; indeed, the gunman did not shoot a single person. Further, there was no indication he was
16 going to shoot any of the people who tackled him, making it far safer to do so than would be the case in a
17 mass shooting. The incident was indeed a shooting in the sense that a person was criminally firing a gun,
18 but was not a shooting in the sense that the gunman was shooting people. It therefore has no clear
19 relevance to the merits of banning LCMs.

21 22. The 1993 Long Island shooting cited by Donahue does genuinely fit Donahue's description, but
22 the 2011 shooting involving Gabby Giffords is not so clear, as explained above in Paragraph 17, because it
23 cannot be determined from eyewitness accounts whether bystanders were able to subdue the shooter
24 because he was reloading (as Donahue claims) or because he was struggling with a malfunctioning
25 magazine (a spring broke in one of the magazines he was using, or trying to use). If the latter is correct, it
26 does not help support an LCM ban, since any magazine, of any size, might fail, thereby giving bystanders a
27 chance to intervene. Finally, Donahue makes the same speculative and unfounded claim about 11 children
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1 at Sandy Hook Elementary School being able to escape because the shooter was reloading refuted above in
2 Paragraphs 18-19.

3 23. In sum, Donahue could cite only one genuinely supportive incident (the 1993 Long Island
4 shooting), and one possibly supportive case (the Gabby Giffords shooting), over a period of 30 years, to
5 support his claim that citizens have “frequently” subdued shooters while they stopped to reload. One or
6 two cases in 30 years probably would not fit most people’s notions of what “frequently” means. As to his
7 claim that there have been “at least 20 separate shootings” where this happened, Donahue provides no
8 documentation at all. Twenty cases in thirty years, in a nation with over 300 million people, is not very
9 frequent either, but Donahue did not supply supporting evidence of this many or even half this many.
10

11 24. Thus, Sunnyvale actually offered nothing to support the claim that victims in mass shootings have
12 escaped while the shooter was changing magazines.

13 25. Sunnyvale asserts that where LCMs are used there are more casualties. But, correlation is not
14 causation, i.e., this simple statistical association does not establish that LCM use *causes* a higher casualty
15 count. Instead, all evidence known to me, including all evidence presented by Sunnyvale, is completely
16 consistent with the proposition that LCM has no causal effect of its own on body count, but rather is merely
17 the result of some mass shooters’ more lethal intentions, which are what actually cause higher casualty
18 counts. Neither Dr. Koper nor Ms. Allen has offered *any* evidence, of any quality, that this association
19 reflects a causal effect of LCM use on the number of people killed or injured in mass shootings, as distinct
20 from it being a spurious association due to the fact that the lethality of mass shooters affects both the
21 casualty count and the choice of weapons and magazines.
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23 26. Sunnyvale points out that LCMs are used more often in certain crimes, but mere use of an LCM in
24 a crime is irrelevant unless more than 10 rounds were actually fired, because, as I explained in my original
25 declaration in this matter, LCMs merely provide surplus rounds that are not fired. Since criminals rarely
26 fire large numbers of rounds in a given crime incident -- only 2.5-3.0% of all violent crime in which a
27 handgun was fired involved over 10 rounds fired (under 1% of all handgun crimes) – the fact that they use
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1 LCMs more often further supports that magazine capacity usually does not matter in a crime.

2 27. Unless LCM use actually *causes*, to some degree, the number of victims harmed in crime
3 incidents, or specifically in mass shootings, there is no valid evidence supporting restrictions on LCMs, let
4 alone banning possession by law-abiding individuals. The City offers no evidence, and I am not aware of
5 any, that removing LCMs from the homes of the law-abiding will reduce crime or increase safety in any
6 way. A mere statistical association between LCM use and casualty count is not sufficient to establish that
7 one causes the other. Sunnyvale correctly notes that the number of rounds fired and victims shot in mass
8 shooting with LCMs is larger than the number in those without LCMs, but fails to note that this would be
9 true *even if LCM use had no causal effect whatsoever on the harm done in these shootings*. This is so
10 because the lethality of the shooter's intentions, i.e. the degree to which he intends to shoot many people,
11 almost certainly affects both (1) the number of people he in fact ends up shooting, and (2) the choice to
12 bring LCMs (along with more guns and more total rounds of ammunition) into the incident. Mass
13 shootings are typically planned, and thought about by the shooter for a long time, offering plenty of time
14 for offenders to make preparations such as acquiring guns, ammunition, and magazines.

15 28. If these premises are correct, the result would be a spurious (noncausal) association between
16 LCM use and number of casualties. Sunnyvale's experts do nothing to rule out or even mildly undercut
17 this interpretation of the associations they cite. The desire to increase the death toll would cause an
18 increased likelihood that an aggressor would acquire and bring LCMs to a shooting.

19 29. The claim that LCM use has an actual causal effect of its own on victim count in mass shootings
20 would be more plausible if close analysis of the details of actual incidents indicated the LCM use was
21 actually necessary to inflict as many injuries as were inflicted in LCM-involved mass shootings. This sort
22 of analysis, however, indicates precisely the opposite. There are no mass shootings in which the details
23 indicate that the shooter needed an LCM to inflict the amount of harm he inflicted. Instead, in all incidents
24 where the relevant information was available, mass shooters had either multiple guns or multiple
25 magazines, and thus could easily fire many rounds either without reloading or by quickly reloading a
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1 detachable magazine. The details likewise show that even if shooters had lower capacity magazines and
2 had to reload slightly more often, this would not slow their rate of fire, since the killers in actual mass
3 shooting average so low a rate of fire that the 2-4 seconds it takes to reload would be no longer a time
4 period than the average interval between shots fired in mass shootings (Kleck Declaration).

5 30. Attached hereto as Exhibit F is a true and correct excerpt of my book, *Targeting Guns: Firearms*
6 *and Their Control* 125 (Aldine De Gruyter 1997).

7 **Rebuttal of San Francisco's Critiques**

8 31. Sunnyvale references a brief filed by the City of San Francisco in a separate lawsuit against that
9 city challenging its similar ordinance, as purportedly showing that the effectively identical declaration I
10 submitted on behalf of the plaintiffs in that case as to the one I submitted in this case contains claims that
11 are "flawed and misleading." The following paragraphs are my responses to each of the City of San
12 Francisco's attacks on my work. Citations to "SF" refer to the page and line(s) from San Francisco's brief,
13 according to internal pagination, where the relevant text occurs. E.g., the first line of SF's section titled
14 Statement of Facts would be cited as 1/18, denoting p. 1, line 18.

15 32. 5/25-27. It's probably a minor point, but SF subtly mischaracterizes my DGU estimates,
16 claiming that we estimated that there were 2.5 million DGUs "each year." This is misleading. The survey
17 that generated that estimate was conducted in early 1993, and the strongest estimates generated by the
18 survey pertained to the previous 12 months. Thus, the 2.5 million estimate pertained to a specific single
19 year, 1992, which was a peak crime year, and also likely to be a peak year for defensive uses of firearms by
20 crime victims. In more recent years, with lower crime rates, the annual number of DGUs would likely be
21 smaller.

22 33. 5/23 to 6/11. Every single one of the criticisms of the Kleck-Gertz estimates of DGU frequency
23 cited by SF, as well as all other published criticisms, have been thoroughly rebutted for years – a handy
24 source compiling all of the rebuttals into one place is Chapter 6 of the 2001 book Armed (Kleck and Kates
25 2001). *None of the experts or sources cited by SF have refuted a single one of these rebuttals.*

1 34. More specifically, every single claim made by David Hemenway and cited by SF was false. For
2 example, our survey did not “show 132,000 perpetrators killed or wounded by defenders each year,” and
3 thus there could not be any conflict between our survey results and hospital data on numbers killed or
4 injured. We had too few DGU sample incidents (n=213, unweighted) to reliably estimate the share that
5 resulted in wounded offenders, so our survey did not imply any particular number of “perpetrators killed or
6 wounded by defenders each year,” and it was therefore impossible to show any contradiction between our
7 estimates and hospital data.
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9 35. Likewise, our survey did not show that “more guns are wielded to defend against rapes each year
10 than there are actual rapes or attempted rapes each year,” for the simple and indisputable reason that we do
11 not know the actual number of such crimes that occur each year (among many other problems with
12 Hemenway’s claim). It is universally understood among criminologists that neither the National Crime
13 Victims Survey (“NCVS”) nor any other source can tell us the total number of sexual assaults or any other
14 crime, because the true number of crimes is almost certainly larger than the NCVS indicates. Hemenway
15 also compared data on the wrong universe of sexual assaults, citing figures that pertained to a smaller,
16 noncomparable, subset of these crimes (Kleck and Kates 2001, Chapter 6).
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18 36. In sum, there is no scholarly foundation for the claim that the Kleck-Gertz or other survey-based
19 estimates of DGU frequency are too high. Quite the contrary, the overwhelming weight of scholarly
20 evidence favors the proposition that surveys are more likely to *underestimate* the frequency of this sort of
21 crime-related experience than to overestimate it. To report a DGU in a survey requires that the respondent
22 who has had such an experience be willing to report (1) a victimization experience (otherwise there can be
23 no defensive reaction to a crime), (2) their possession of a gun (otherwise the defensive action could not be
24 classified as a defensive use of a gun), and (3) (usually) the crime of unlawful possession of a firearm in a
25 public place (since most DGUs occur in public places where, in 1993, it was unlawful for all but a tiny
26 percent of the population to possess a gun). The scientific literature on survey response errors *uniformly*
27 indicates that survey respondents in the general adult population on net underreport (1) crime
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1 victimizations, (2) gun possession, and (3) unlawful behaviors by the respondent. Consequently, estimates
2 of DGU frequency are far more likely to be too low than too high (see Kleck and Kates 2001, Chapter 6 for
3 supporting citations).

4 37. Most outrageously of all, SF quotes a claim from David Hemenway that “all attempts at external
5 validation [have] reveal[ed] it to be a huge overestimate,” when in fact every attempt at external validation
6 has *confirmed* our estimates of DGU frequency. Our survey figures were not only completely consistent
7 with hospital data on numbers of persons medically treated for gunshot wounds, and estimates of the
8 frequency of sexual assaults and other crimes, but have also been consistently confirmed by the results of
9 other professionally conducted national surveys of representative samples of the U.S. adult population. By
10 2001 there were at least 20 such surveys that *all* indicated huge numbers of DGUs each year, exceeding the
11 number of crimes in which offenders used guns (Kleck and Kates 2001, Chapter 6).

12 38. 6/22-28. SF criticizes me for concluding that LCM use does not affect rates of fire in mass
13 shootings because some shooters were not shooting continuously. My conclusion did not rely in any way
14 on an assumption that any shooters fired continuously, or that a constant rate of fire was maintained. My
15 data pertained to *average* rates of fire throughout the period of firing, and I assume as a matter of course
16 that rates of fire during any given brief segment of time within those periods were sometimes higher than
17 average and at other times lower than average – including periods when there was no firing at all. This,
18 however, has no bearing on whether any mass shooters have ever needed to fire any more rapidly than
19 these average rates in order to harm as many victims as they did, which is the relevant question. The
20 policy-relevant fact is that all mass shooters for whom we had the relevant information regarding rates of
21 fire had ample time to fire as many rounds as they did, even if they had needed to take a few more seconds
22 to change magazines. Whether the shooters fired faster during some subperiods than they averaged over
23 the whole shooting period is irrelevant.

24 39. SF brings up a red herring in this connection – stating that the rates of fire that I reported do not
25 approximate how fast a mass shooter with an LCM “*can fire*” (7/4, emphasis added). The theoretical upper
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1 limit rate of fire that such a shooter might hypothetically attain is completely irrelevant to the issue of how
2 fast real-world mass shooters *actually* had to shoot in order to inflict all the injuries and deaths they
3 inflicted, for the simple reason that no real mass shooter has ever come even remotely close to this
4 maximum possible rate of fire. Eyewitnesses have repeatedly described mass shooters as firing deliberately
5 and taking careful aim at specific individual victims, rather than firing as fast as they could. The high
6 percentage of wounded victims who die (reaching 100% in some incidents) also supports the view that
7 mass shooters shoot carefully, aiming for vital areas of the victim's body, rather than firing rapidly and
8 inaccurately. In short, the rates of fire that mass shooters *could* sustain is irrelevant to the rate they actually
9 *do* sustain, and it is only the latter that can affect the number of casualties actually inflicted.
10

11 40. SF mischaracterizes my positions on when LCMs are likely to affect the number of casualties,
12 claiming that I asserted that this is true "*only* where the shooter possesses only one gun and only one LCM"
13 (7/11-12). This is false, since I explicitly stated that LCM use also could affect the casualty count if there
14 were bystanders willing to tackle the shooter when he was reloading. Under that circumstance, use of an
15 LCM prior to the bystander intervention LCM could affect the number of rounds fired, and thus the number of
16 victims hurt before the magazine change (Kleck Declaration, 6/6-10). It is dubious that SF could have
17 honestly misunderstood this point, since I made it quite clearly: "One circumstance in which use of an
18 LCM could affect the number of casualties even if the shooter possessed multiple guns or multiple
19 magazines is if there were bystanders willing to tackle the shooter during his attempt to change magazines
20 or firearms, the use of an LCM prior to that time could affect the number of victims shot, since the killer
21 could have fired more rounds before needing to reload or switch guns."
22

23 41. Consequently, it is especially outrageous for SF to claim that "[Kleck's] narrow criteria for when
24 an LCM matters *exclude the single incident where he admits that a shooter was tackled while reloading—*
25 *that is, where actual events proved that magazine capacity mattered—because that shooter had three guns*
26 *and three LCMs,"* (SF 7/23-25), a reference to the 1998 Springfield, Oregon shooting by Kip Kinkel. My
27 criteria obviously did not exclude this incident, since I had carefully explained why LCM use might matter
28

1 in certain rare circumstances even if the shooter possessed multiple guns or multiple magazines. Thus, SF
2 misstated my position, creating a false impression of some contradiction or inconsistency in my work. I
3 also noted, however, just how extremely rare this circumstance is in mass shooting incidents. It is known
4 to have occurred just two or three times in the past 30 years.

5 42. SF also made a blatantly false claim about shootings I had supposedly missed, presumably for the
6 sake of suggesting that my work was sloppy. SF cites two cases of single-gun shootings that SF alleged
7 were mass shootings that I “missed” (7/16-20). These cases, occurring in 2013 in Hialeah, FL and
8 Herkimer, NY were *not* mass shootings according to the definition I was using, and therefore did not
9 belong in my dataset. The Mother Jones dataset on which SF relied, and the news stories the magazine
10 cited as sources, indicated that both incidents involved six victims shot. I had clearly stated that my dataset
11 encompassed shooting incidents in which *more* than six victims were shot, not including the shooter
12 himself (Kleck Declaration 4/17). Their claims that these single-gun incidents belonged in my dataset were
13 plainly wrong.

14 43. SF also suggests that I believed, or somehow relied on the belief, that “it is just as fast to switch
15 guns or magazines as it is to keep shooting with the same magazine” (SF 7/21-22). This too is false, as I
16 never stated, hinted at, or assumed any such thing. Instead, I made a more subtle and far more relevant
17 observation about mass shootings: that the 2-4 seconds it takes to change detachable magazines on semi-
18 automatic firearms does not slow the *actual* rates of fire maintained by actual mass shooters. It is true that
19 a hypothetical shooter attempting to fire as fast as possible would take 2-4 seconds longer to switch
20 magazines and resume firing than it would to keep shooting with the same magazine, but this is completely
21 irrelevant to actual mass shootings that have occurred in the past or are likely to occur in the future, since
22 actual mass shooters do *not* fire anywhere near as fast as they possibly can, and if they did, they would not
23 fire nearly as accurately as they unfortunately do.


24 44. SF claims to have identified an inconsistency between my Declaration in a New York case, and
25 my Declaration in the SF case (8/17). There is no inconsistency. I wrote the New York Declaration in
26

1 April of 2013 before I had conducted my study of mass shootings in the period 1994-July 2013. I stated at
2 that time that I *knew of* just one mass shooting in which bystanders had intervened while the shooter was
3 reloading – a Long Island incident that I had studied for a brief analysis of mass shootings published in my
4 1997 book, Targeting Guns, which covered only cases that occurred between 1984 and 1993. My
5 statement in the NY Declaration was exactly correct – it was indeed the only such case that I knew of as of
6 April 2013. I began my analysis of the 1994-2013 cases three months later, in July of 2013, at which point
7 I discovered one, and possibly two, more such cases – the 1998 Springfield Oregon case and possibly the
8 Tucson shooting in which Gabrielle Giffords was shot. Rather than this being an inconsistency, it is simply
9 a reflection of the growth of my knowledge – I knew of one relevant case in April 2013, and learned of one
10 or two more by July 2013. The addition of one or two more such cases, however, does not alter the
11 conclusion that incidents in which bystanders subdue a mass shooter while he is trying to reload are
12 extremely rare, as only two or three cases are known to have occurred in the past 30 years.

14 45. SF quibbles with my assertions about civilian marksmanship in DGU incidents, but seem unaware
15 of the implications of their own arguments (10/21-22). They note that the 37% hit rate I cited in my
16 Declaration was a per-incident rate, not a per bullet hit rate (just as I accurately noted in the Declaration).
17 The per bullet hit rate, however, will necessarily be even lower since at least some incidents involve
18 multiple bullets being fired, meaning that the denominator in the hit rate (number of bullets fired) would be
19 even larger, and the per bullet hit rate even lower, than the per-incident rate. This in turn implies that
20 lawful defenders would need even more rounds to achieve a given number of hits, i.e. be in even greater
21 need of larger capacity magazines. SF’s comment, then, supports the Plaintiffs’ case rather than
22 undercutting it.

24 46. SF states that “even if ... a civilian is likely to miss with 63% of his bullets, he is still likely to hit
25 a target with a legal 10-round magazine” (10/25-27). This is misleading because, as noted in the previous
26 paragraph, the per bullet hit rate is lower than 37%, so civilian defenders would miss with *more than* 63%
27 of their rounds, by SF’s own reasoning.

1 I declare under penalty of perjury that the foregoing is true and correct. Executed within the United
2 States on February 9, 2014.

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Garv Kleck

1 **IN THE UNITED STATES DISTRICT COURT**

2 **NORTHERN DISTRICT OF CALIFORNIA**

3 **SAN JOSE DIVISION**

4 LEONARD FYOCK, SCOTT) **CASE NO: CV13-05807 RMW**
HOCHSTETLER, WILLIAM DOUGLAS,)
5 DAVID PEARSON, BRAD SEIFERS, and)
ROD SWANSON,) **CERTIFICATE OF SERVICE**

6 Plaintiffs,)
7)

8 vs.)

9 THE CITY OF SUNNYVALE, THE)
MAYOR OF SUNNYVALE, ANTHONY)
SPITALERI, in his official capacity, THE)
10 CHIEF OF THE SUNNYVALE)
DEPARTMENT OF PUBLIC SAFETY,)
11 FRANK GRGURINA, in his official)
capacity, and DOES 1-10,)

12 Defendants.)
13)

14 IT IS HEREBY CERTIFIED THAT:

15 I, the undersigned, am a citizen of the United States and am at least eighteen years of age.
16 My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

17 I am not a party to the above-entitled action. I have caused service of

18 **SUPPLEMENTAL DECLARATION OF GARY KLECK**
IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION
19 **TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

20 on the following party by electronically filing the foregoing with the Clerk of the District Court
using its ECF System, which electronically notifies them.

21 Roderick M. Thompson
22 Anthony P. Schoenberg
Rochelle L. Woods
23 Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
24 aschoenberg@fbm.com

25 I declare under penalty of perjury that the foregoing is true and correct. Executed on
26 February 10, 2014.

27 /s/ C. D. Michel
C. D. Michel
28 Attorney for Plaintiffs

EXHIBIT “F”

wounded. There is usually much less information available from press accounts about incidents involving fewer victims, and it would be harder to argue for the significance of large magazine capacity in connection with cases with fewer victims, and thus presumably fewer shots fired.

Of the fifteen mass shootings, no more than four involved weapons banned under any existing federal or state AW bans: the Gian Luigi Ferri case, which involved two Intratec DC9 pistols; the Joseph Wesbecker case, involving a gun loosely described as an "AK-47," which might fall within the banned category; the Patrick Purdy case, which involved a Model 56S variant of an AKM-47; and the James Huberty incident, which involved a semiautomatic Uzi carbine. In all four of these cases the killer was also armed with other, non-AW guns, and it is therefore not clear how many of the wounds were inflicted with AWs. For example, it is not known if any of Huberty's victims were killed with the Uzi because he also used an ordinary Browning pistol, which used the same caliber ammunition (9 mm) as the Uzi and at least half of the dead victims were killed with a shotgun. In eleven of the seventeen mass shootings, the killer was armed with multiple guns, and in at least five cases it was known that the killers reloaded their guns at least once (Ferguson, Henard, Purdy, Sherril, and Huberty). Both of these facts support the assertion that in these cases the killer did not require a single gun with a large magazine to kill or wound so many people.

For those incidents where the number of rounds fired and the duration of the shooting were both reported, the rate of fire never was faster than about one round every two seconds, and was usually much slower than that. Witnesses commonly reported that the killers went about their deadly work in a "calm," "matter-of-fact," or "almost methodical" fashion, taking careful aim at victims and seemingly taking their time (e.g., *Los Angeles Times*, 19 July 1984, p. 1, 18 January 1989, p. 3; *Washington Post*, 15 September 1989, p. A1; *Houston Post*, 17 October 1991, p. A-1). For example, Joseph Wesbecker, who killed seven people and wounded seventeen over a period of thirty minutes, "showed extreme "shooting discipline," . . . firing directly at his human targets and taking few random shots" (*Louisville Courier Journal*, 15 September 1989). None of the mass killers maintained a sustained rate of fire that could not also have been maintained—even taking reloading time into account—with either multiple guns or with an ordinary six-shot revolver and the common loading devices known as "speedloaders." Further, there is no evidence that these killers could not have taken more time than they actually did.

Inflicting the number of casualties in even these extreme and rare cases did not require the large-capacity magazines and/or high rate of fire provided by either AWs or by semiautomatic guns in general. It therefore is highly unlikely that shootings with fewer rounds fired and fewer vic-