KAMALA D. HARRIS, State Bar No. 146672
Attorney General of California
MARK R. BECKINGTON, State Bar No. 126009
Supervising Deputy Attorney General
JONATHAN M. EISENBERG, State Bar No. 184162
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-6505
Fax: (213) 897-5775
E-mail: Jonathan.Eisenberg@doj.ca.gov
PETER H. CHANG, State Bar No. 241467
Deputy Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102
Telephone: (415) 703-5939
Fax: (415) 703-1234
Email: Peter.Chang@doj.ca.gov
Attorneys for Defendant Kamala D. Harris, Attorney General of California

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

JEFF SILVESTER, et al., Plaintiffs, **v.** **KAMALA D. HARRIS, Attorney General of California, et al.,** Defendants.	1:11-cv-02137-AWI-SKO **DEFENDANT KAMALA D. HARRIS'S RESPONSE TO PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EXPERT OPINION TESTIMONY AND LIMIT LAY OPINION TESTIMONY (DKT# 54)** Date: March 11, 2014 Time: 1:30 p.m. Courtroom: 2 Judge: The Honorable Anthony W. Ishii Trial Date: March 25, 2014 Action Filed: December 23, 2011

Defendant Kamala D. Harris, Attorney General of the State of California (the "Attorney General"), submits the following opposition to Plaintiffs' motion in limine to exclude expert opinion testimony and limit lay opinion testimony.

INTRODUCTION

Plaintiffs seek an order from the Court that (1) neither party may introduce an expert witness and/or expert opinion evidence and (2) neither party may introduce any "expert opinion evidence masquerading as lay opinion." The Attorney General does not oppose Plaintiffs' motion to exclude expert witnesses or expert opinions. Indeed, the Attorney General filed a similar motion to exclude expert opinion testimony by Plaintiffs' witnesses. See Defendant's Motion in Limine No. 1 (Dkt.# 51). But Plaintiffs' motion to limit lay opinion testimony, untethered to any expected expert testimony, must be denied.

Although the expert witness prong of Plaintiffs' motion is unexceptional, Plaintiffs err in intimating that the Attorney General must present expert-witness testimony to be able to mount a successful defense of the firearms law in question here. Even if the Attorney General has the burden of proof of key issues in this case, there is no need for her to present expert-witness opinion in order to prevail. Indeed, in *United States v. Chovan*, 725 F.3d 1127 (9th Cir. 2013), an unsuccessful Second Amendment challenge to a federal firearms law, the victorious federal prosecutors who defended the law did not present, and the Ninth Circuit did not require, any expert-witness evidence of how the Second Amendment has been historically understood, the strength of the justifications for the law in question, or other issues.

Under *Chovan*, there is no requirement that the Attorney General present evidence on these topics solely through expert-witness testimony or forfeit the case. Rather, the Attorney General is permitted to ask the Court to take judicial notice of relevant history books, legislative history, and/or social-science studies (unaided by any "presenting" witness) as competent "evidence" on the key issues in this case. These types of documents are regularly and properly used by courts in evaluating laws subject to constitutional challenges. They need not be subject to the evidentiary process and, in fact, are routinely cited in the briefs by parties or in orders through the courts' own research. This is particularly true in constitutional law cases where decisions must be based largely on legislative, rather than adjudicative, facts. Legislative facts, which go to the justification for a statute, are usually not proved through trial evidence but rather by material set forth in the briefs. *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d

445, 455-56 (1st Cir. 2000). Indeed, in *United States v. Chovan*, the Ninth Circuit Court of Appeals decided the constitutionality of a federal firearm law in part by examining scientific publications and legislative history of the challenged statute without the aid of any expert witnesses. *See* Exhibit 1 to Declaration of Peter H. Chang (Declaration of Caroline P. Han Regarding Use of Expert Witnesses in *Chovan* Litigation), at paras. 4 & 5.

Furthermore, Plaintiffs' request to exclude "expert opinion masquerading as lay opinion" is far too vague to form the basis for an in limine order. Although the Attorney General does not oppose this request to the extent that it seeks to exclude "expert opinion" rather than "lay opinion" permissible under Rule 701,[1] the Attorney General opposes Plaintiffs' motion to the extent it seeks to "limit" the scope of lay opinion that the Attorney General's witnesses may appropriately offer under Rule 701.

The Attorney General's proposed witnesses, other than Plaintiffs themselves, are current or former employees of the California Bureau of Firearms ("BOF"), part of the California Department of Justice. Each of the proposed BOF witnesses has particularized knowledge by virtue merely of his or her position at BOF. Under Rule 701, these witnesses may properly provide opinion testimony based on their particularized knowledge. *See* Rule 701 Advisory Committee's Notes to 2000 Amendments.

Plaintiffs admit that whether testimony is admissible lay opinion under Rule 701 is more appropriately resolved at trial. As Plaintiffs seek to clarify the scope of Rule 701, the Attorney General does so here as well for the convenience of the Court.

DISCUSSION OF FED. R. EVID. 701

Rule 701 permits a lay witness to opine on matters (a) rationally related to the witness's perception, (b) helpful to clearly understanding the witness's testimony or to determine a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Rule 701. So long as the requirements of Rule 701 are met, there is no basis to "limit" the scope of lay opinion testimony.

[1] Unless otherwise stated, "Rule __" herein refers to Federal Rules of Evidence.

Types of opinion testimony that courts have found to be appropriate lay opinion testimony include:

1. Lay opinion that a specific model of gun was a type used by drug traffickers because of its intimidation value, where the opinion was rationally based on the witness's perceptions during the investigation at issue and prior investigations. *United States v. VonWillie*, 59 F.3d 922 (9th Cir. 1995).

2. Opinion by supervisor and employee as to the ownership of certain monies when the witnesses either handled or supervised the handling of money transactions as part of their employment duties. *United States v. Hairston*, 64 F.3d 491 (9th Cir. 1995).

3. Inferences of what another party "knew or should have known," where it was based on the witness's prior professional dealings and discussions with the party. *Winant v. Bostic*, 5 F.3d 767 (4th Cir. 1993).

4. Lay opinion as to whether a warehouse facility was operating as a legitimate auto repair shop, where opinion was based the witness's experience and personal knowledge. *United States v. Thomas,* 676 F.2d 239 (7th Cir. 1980).

In *VonWillie*, the court found that a police officer's lay testimony about the nexus between drug trafficking and the possession of a certain type of weapon was admissible lay witness opinion. 59 F.3d at 929. Specifically, a police officer testified based on his experience with the Drug Enforcement Bureau that (1) it was common for drug traffickers to possess and use weapons to protect their drugs and intimidate buyers; (2) one of the guns found in the defendant's bedroom was a particularly intimidating gun and he knew of drug dealers who used that specific weapon, and (3) drug traffickers commonly kept a weapon near their drugs. *Id.* The Ninth Circuit Court of Appeals held that these observations are common enough and required a limited amount of expertise that they can be deemed lay witness opinion. *Id.*

In *Hairston*, the court permitted employees of the Veterans Administration Center ("VAC") to testify that certain money stolen by the defendant was the property of the United States. 64 F.3d at 493. The Ninth Circuit Court of Appeals upheld the admissibility of the employees' testimony because they were familiar with the operations of VAC and either handled or

supervised the handling of the VAC's deposits of money as part of their duties. *Id.* The court reasoned that the employees' opinions as to the ownership of the stolen money were rationally based on their perceptions, and their employment experience provided a sufficient basis from which they could rationally infer that the stolen deposits were property of the United States. *Id.*

In *Winant*, the court permitted a state official to opine as to what developers "knew or should have known" based on prior professional dealings with the developers. The court found that the state official testified as to inferences that could have been drawn from facts of which the state official had personal knowledge. 5 F.3d at 772.

In *Thomas,* the court found that an FBI agent properly opined on whether the defendant had been operating a legitimate auto repair shop. 676 F.2d at 245. The agent based his lay opinion on his work at an auto repair shop in college and his experience rebuilding cars as a hobby. *Id.* The court found that the testimony was relevant and was based on the agent's first-hand knowledge and observations, and was thus properly admitted under Rule 701. *Id.*

As these cases illustrate, lay witnesses may properly provide opinion testimony under Rule 701 so long as the opinion is (a) rationally related to the witness's perception, (b) helpful to clearly understanding the witness's testimony or to determine a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion to the extent it seeks to limit lay opinion testimony under Rule 701.

Dated: March 3, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General

/s/ *Peter H. Chang* _____
PETER H. CHANG
Deputy Attorney General
Attorneys for Defendant Kamala D. Harris

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KAMALA D. HARRIS, State Bar No. 146672
Attorney General of California
MARK R. BECKINGTON, State Bar No. 126009
Supervising Deputy Attorney General
JONATHAN M. EISENBERG, State Bar No. 184162
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-6505
Fax: (213) 897-5775
E-mail: Jonathan.Eisenberg@doj.ca.gov
PETER H. CHANG, State Bar No. 241467
Deputy Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102
Telephone: (415) 703-5939
Fax: (415) 703-1234
Email: Peter.Chang@doj.ca.gov
Attorneys for Defendant Kamala D. Harris, Attorney General of California

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

JEFF SILVESTER, et al., Plaintiffs, **v.** **KAMALA D. HARRIS, Attorney General of California, and DOES 1 to 20,** Defendants.	1:11-cv-02137-AWI-SKO **DECLARATION OF PETER H. CHANG IN SUPPORT OF DEFENDANT KAMALA D. HARRIS'S OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE EXCLUDE EXPERT OPINION TESTIMONY AND LIMIT LAY OPINION TESTIMONY**

I, Peter H. Chang, declare as follows:

1. I have personal knowledge of the following facts and, if called as a witness in a relevant proceeding, could and would testify competently to these facts.

2. I am an attorney admitted to practice law in the State of California and the United States District Court, Eastern District of California.

3. I am a deputy attorney general in the Office of the California Attorney General. I am an attorney of record for Defendant Kamala D. Harris, sued in her official capacity as Attorney General of California, in the above-captioned case.

4. Attached hereto as Exhibit 1 is a true and correct copy of the Declaration of Caroline P. Han Regarding Use of Expert Witnesses in *Chovan* Litigation.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I signed this declaration on March 3, 2013 at San Francisco, California.

/s/ Peter H. Chang
Peter H. Chang

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KAMALA D. HARRIS, State Bar No. 146672
Attorney General of California
MARK R. BECKINGTON, State Bar No. 126009
Supervising Deputy Attorney General
JONATHAN M. EISENBERG, State Bar No. 184162
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-6505
Fax: (213) 897-1071
E-mail: Jonathan.Eisenberg@doj.ca.gov
Attorneys for Defendant Kamala D. Harris, Attorney General of California

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

JEFF SILVESTER, MICHAEL POESCHL, BRANDON COMBS, THE CALGUNS FOUNDATION, INC., a non-profit organization, and THE SECOND AMENDMENT FOUNDATION, INC., a non-profit organization, Plaintiffs, **v.** **KAMALA HARRIS, Attorney General of California (in her official capacity), and DOES 1 to 20,** Defendants.	1:11-cv-02137-AWI-SKO **DECLARATION OF CAROLINE P. HAN REGARDING USE OF EXPERT WITNESSES IN *CHOVAN* LITIGATION**

I, Caroline P. Han, declare as follows:

1. I have personal knowledge of the following facts and, if called as a witness in a relevant proceeding, could and would testify competently to these facts.

2. I am an attorney admitted to practice law in the State of California; the U.S. District Court, Southern District of California; and the U.S. Court of Appeals, Ninth Circuit.

3. I am an Assistant U.S. Attorney in the U.S. Attorney's Office in the Southern District of California. I am one of the attorneys of record for the United States of America (the "United States") in the case of *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). I was the lead prosecutor in district court and co-wrote the appellate briefing and orally argued the appeal in the Ninth Circuit.

4. The United States did not notice or use a testifying expert witness in *Chovan*.

5. In litigating the question in *Chovan* of whether 18 U.S.C. § 922(g)(9) violates the Second Amendment, the United States cited to the Ninth Circuit both (A) colonial era statutes, academic texts, and law-journal articles relating to the scope of the Second Amendment right as historically understood, and (B) other case law citing social science studies and at least one published medical-research study relating to the public-safety rationale for 18 U.S.C. § 922(g)(9).

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I signed this declaration on February 27, 2014 at San Diego, California.

Caroline P. Han