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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

**JEFF SILVERSTER, 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.**

**Case No. 1:11-cv-02137-AWI-SKO**

**PLAINTIFFS' OBJECTIONS TO  
EVIDENCE CITED IN DEFENDANT'S  
TRIAL BRIEF**

Judge: Hon. Anthony W. Ishii  
Courtroom: 8th Floor, Room 2  
Trial Date: March 25, 2014  
Time: 9:00 a.m.  
Case Filed: Dec. 23, 2011

[Filed concurrently with Plaintiffs'  
Response to Defendant's Trial Brief.]

1 Plaintiffs object to evidence cited in the Attorney General's Trial Brief on the  
2 following grounds:

3 **Objections to Legislative History**

- 4 1) July 7, 1975 letter from R. James Rasmussen to Frank Murphy, Jr.  
5 AG's Trial Brief at 5:3-5.
- 6 2) September 12, 1975 letter from Rodney J. Blonien to Edmund G.  
7 Brown, Jr. AG's Trial Brief at 5:5-11.
- 8 3) Cal. Assembly Comm. on Public Safety, Assembly Analysis of Sen.  
9 Bill 671 (1995-96 Reg. Sess.), Jul. 11, 1995, p. 3. AG's Trial Brief at  
10 5:17-20.
- 11 4) Cal. Senate Comm. on Crim. Proc., Report ("Firearm Dealer Record of  
12 Sale—Electronic Transmission to the Department of Justice") on Sen.  
13 Bill 671 (1995-95 Reg. Sess.), Mar. 28, 1995, p.3. AG's Trial Brief at  
14 5:3-5.
- 15 5) Cal. Senate Public Safety Comm., Analysis on Third Reading of Sen.  
16 Bill 1671 (1995-96 Reg. Sess.), as amended (RN9620429), p.4. AG's Trial  
17 Brief at 6:1-3.

18 Objection: Relevancy - the AG is attempting to introduce evidence that the  
19 10-day waiting period is needed to perform background checks to make sure that  
20 prohibited persons do not come into possession of another firearm. The AG also  
21 intends to use this evidence to justify the length of time it takes the DOJ to run a  
22 background check. Plaintiffs in this action, however, already have a firearm tied to  
23 their identity in state databases. If an individual already possesses a firearm, then  
24 nothing about this rationale would prevent that individual from acting on a sudden  
25 impulse to commit gun violence with a gun already in his or her possession.

26 Objection: Foundation - Plaintiffs' reserve their right to object on the basis of  
27 lack of foundation.

28 Objection: Judicial Notice - The court may only judicially notice a fact that is

1 not subject to reasonable dispute because it: (1) is generally known within the trial  
2 court's territorial jurisdiction; or (2) can be accurately and readily determined from  
3 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)  
4 (emphasis added); United States v. Mariscal, 285 F.3d 1127, 1131 (9th Cir. 2002).  
5 See also, Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070,  
6 1086 (2nd Cir. 1982).

7 Objection: Hearsay-- the AG is offering a statement from the article for its  
8 truth.

9 **Objections to News Articles**

- 10 1) “Brown Signs Tough Gun Control Bill,” The Sacramento Bee, Sept.  
11 24, 1975. AG’s Trial Brief at 5:3-5.

12 Objection: Relevancy - the AG is attempting to introduce evidence that the  
13 10-day waiting period is needed to perform background checks to make sure that  
14 prohibited persons do not come into possession of another firearm. Plaintiffs in this  
15 action, however, already have a firearm tied to their identity in state databases. If an  
16 individual already possesses a firearm, then nothing about this rationale would  
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22 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)  
23 (emphasis added); United States v. Mariscal, 285 F.3d 1127, 1131 (9th Cir. 2002).

24 Objection: Hearsay - The AG is offering a statement from the article for its  
25 truth. Fed. R. Evid. 802(c) No exception applies because statements in periodicals  
26 only fall under the exception if the statement is called to the attention of an expert  
27 witness on direct or cross-examination and the called publication is established as a  
28 reliable authority by the expert’s admission or testimony, by another expert’s

1 testimony, or by judicial notice. Fed. R. Evid. 803(18) Even if the court takes  
2 judicial notice that the publication is established as reliable, no expert can testify  
3 because “there was no expert discovery in this case.” AG’s Trial Brief at 7:10. No  
4 expert witness means the periodical is inadmissible for lack of foundation. See e.g.,  
5 Wilkins v. Kmart Corp., 487 F.Supp.2d 1216 (D.Kan.2007).

## 6 **Objections to Journal Articles**

- 7 1) David A. Brent, *Firearms and Suicide*, Annals of New York Academy  
8 of Sciences, 225 (2001). AG’s Trial Brief at 22:3-5.

9 Objection: Relevancy - the AG is attempting to introduce evidence that the  
10 10-day waiting period is needed to perform background checks to make sure that  
11 prohibited persons do not come into possession of another firearm. Plaintiffs in this  
12 action, however, already have a firearm. If an individual already possesses a  
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17 is not subject to reasonable dispute because it: (1) is generally known within the  
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19 from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.  
20 201(b) (emphasis added); United States v. Mariscal, 285 F.3d 1127, 1131 (9th Cir.  
21 2002).

22 Objection: Hearsay - The article is hearsay, and does not fall within the  
23 exception for a learned treatise. Fed. R. Evid. 803(18). The AG is offering a  
24 statement from the article for its truth. Fed. R. Evid. 802(c) No exception applies  
25 because statements in periodicals only fall under the exception if statement is called  
26 to the attention of an expert witness on direct or cross-examination and the called  
27 publication is established as a reliable authority by the expert’s admission or  
28 testimony, by another expert’s testimony, or by judicial notice. Fed. R. Evid.

1 803(18). Even if the court takes judicial notice that the publication is established as  
2 reliable, no expert can testify because “there was no expert discovery in this case.”  
3 AG’s Trial Brief at 7:10.

4 2) Greg M. de Moore, et al., *Survivors of Self-inflicted Firearm Injury*,  
5 160 The Medical Journal of Australia (1994). AG’s Trial Brief at  
6 20:21-22.

7 Objection: Relevancy- the AG is attempting to introduce evidence that the  
8 10-day waiting period is needed to perform background checks to make sure that  
9 prohibited persons do not come into possession of another firearm. Plaintiffs in this  
10 action, however, already have a firearm. If an individual already possesses a  
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18 (emphasis added); United States v. Mariscal, 285 F.3d 1127, 1131 (9th Cir. 2002).

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20 exception for a learned treatise. Fed. R. Evid. 803(18). Fed. R. Evid. 802(c) No  
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22 statement is called to the attention of an expert witness on direct or cross-  
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24 expert’s admission or testimony, by another expert’s testimony, or by judicial  
25 notice. Fed. R. Evid. 803(18) Even if the court takes judicial notice that the  
26 publication is established as reliable, no expert can testify because “there was no  
27 expert discovery in this case.” AG’s Trial Brief at 7:10.

28 3) Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 Harv.

1 J.L. & Pub. Pol’y 695, 698. AG’s Trial Brief at 20:10.

2 Objection: Relevancy- the AG is attempting to introduce evidence that the  
3 10-day waiting period is needed to perform background checks to make sure that  
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21 publication is established as reliable, no expert can testify because “there was no  
22 expert discovery in this case.” AG’s Trial Brief at 7:10.

23 4) Julia C. Babcock, et al., *Does Batterer’s Treatment Work? A Meta-*  
24 *Analytics Review of Domestic Violence Treatment*, 23 Clinical Psych.  
25 Rev 1023, 1039 (2004). AG’s Trial Brief at 20:11-12.

26 Objection: Relevancy- the AG is attempting to introduce evidence that the  
27 10-day waiting period is needed to perform background checks to make sure that  
28 prohibited persons do not come into possession of another firearm. Plaintiffs in this

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17 publication is established as reliable, no expert can testify because “there was no  
18 expert discovery in this case.” AG’s Trial Brief at 7:10.

### 19 **Objections as to Books**

- 20 1) James A. Fox, et al., *The Will to Kill: Making Sense of Senseless*  
21 *Murder*, 4th Ed. (Prentice Hall 2011). AG’s Trial Brief at 20:19-20.

22 Objection: Relevancy - the AG is attempting to introduce evidence that the  
23 10-day waiting period is needed to perform background checks to make sure that  
24 prohibited persons do not come into possession of another firearm. Plaintiffs in this  
25 action, however, already have a firearm tied to their identity in state databases. If an  
26 individual already possesses a firearm, then nothing about this rationale would  
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28 with a gun already in his or her possession.



1       Objection: Foundation- The burden is on the AG to lay the foundation. Fed.  
2 R. Evid. 901(a) The book here is not self-authenticating under Fed. R. Evid. 902  
3 because it does not qualify as newspapers, periodicals, or a book from a “public  
4 authority” See Fed. R. Evid. 902(5) and (6). A published book does not qualify as  
5 self-authenticating because the word “book” is not explicitly mentioned anywhere  
6 in the statute, except for books from a public authority. See Fed. R. Evid. 902(5) “A  
7 book, pamphlet, or other publication purporting to be issued by a public authority  
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11 exception applies because the word “book” is not mentioned anywhere within Fed.  
12 R. Evid. 803 exceptions to the hearsay rule, and does not qualify as non-hearsay.

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15 court's territorial jurisdiction; or (2) can be accurately and readily determined from  
16 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)  
17 (emphasis added); United States v. Mariscal, 285 F.3d 1127, 1131 (9th Cir. 2002).

18       2) Robert A. Hahn, et al., *Firearms Laws and the Reduction of Violence:*  
19       *A Systematic Review*, 28 American Journal of Preventive Medicine 40  
20       (2005). AG’s Trial Brief at 21:24-25.

21       Objection: Relevancy- The AG is attempting to introduce evidence that the  
22 10-day waiting period is needed to perform background checks to make sure that  
23 prohibited persons do not come into possession of another firearm. Plaintiffs in this  
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 16 expert discovery in this case.” AG’s Trial Brief at 7:10. No expert witness means  
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 18 487 F.Supp.2d 1216 (D.Kan.2007).

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 22 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)  
 23 (emphasis added); United States v. Mariscal, 285 F.3d 1127, 1131 (9th Cir. 2002).

24 3) Samuel Johnson, *A Dictionary of the English Language* (10th Ed.)  
 25 (1792) AG’s Trial Brief at 14:22-27.

26 Objection: Relevance- the definitions are not relevant

27 Objection: Foundation the Defendants have not laid a foundation for the  
 28 book.

1           4) Jack Larkin, *The Reshaping of Everyday Life*, 1790-1840 (Harper &  
2           Row 1988). AG's Trial Brief at 15:6-8.

3           Objection: Relevancy- the AG is attempting to introduce evidence that the  
4           10-day waiting period is needed to perform background checks to make sure that  
5           prohibited persons do not come into possession of another firearm. The plaintiffs in  
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16          book, pamphlet, or other publication purporting to be issued by a public authority  
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19          suspicion of their authenticity, (b) is found in a place where, if authentic, they  
20          would likely be, and (c) is 20 years old or more. Fed. R. Evid. 901(b)(8). .

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22          exception for a learned treatise. The AG is offering a statement from the book for  
23          the truth. Fed. R. Evid. 803(18), Fed. R. Evid. 802(c). No exception applies  
24          because the word “book” is not mentioned anywhere within Fed. R. Evid. 803  
25          exceptions to the hearsay rule, and does not qualify as non-hearsay.

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1 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)  
2 (emphasis added); United States v. Mariscal, 285 F.3d 1127, 1131 (9th Cir. 2002).

3 5) Matthew Miller and David Hemenway, *The Relationship Between*  
4 *Firearms and Suicide: A Review of the Literature for Aggression and*  
5 *Violent Behavior* 59 (1999). AG’s Trial Brief at 21:5-7.

6 Objection: Relevancy- the AG is attempting to introduce evidence that the  
7 10-day waiting period is needed to perform background checks to make sure that  
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28 (emphasis added); United States v. Mariscal, 285 F.3d 1127, 1131 (9th Cir. 2002)

1           5) Linda G. Peterson, et al., *Self-inflicted Gunshot Wounds: Lethality of*  
2           *Method Versus Intent*, 142 American Journal of Psychiatry 228 (Feb.  
3           1985). AG's Trial Brief at 20:27-28.

4           Objection: Relevancy- the AG is attempting to introduce evidence that the  
5           10-day waiting period is needed to perform background checks to make sure that  
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26          (emphasis added); United States v. Mariscal, 285 F.3d 1127, 1131 (9th Cir. 2002).

27          6) Charles Sellers, *The Market Revolution: Jacksonian America*, 1815-1846  
28          (Oxford Univ. Press 1991). AG's Trial Brief at 15:6-7.

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27      R. Evid. 803 exceptions to the hearsay rule, and does not qualify as non-hearsay.

28      7) Robert J. Spitzer, *The Politics of Gun Control*, Fifth. Ed. (Paradigm

Publishers 2012). AG's Trial Brief at 12:16-17.

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Objection: Judicial Notice - The court may only judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b) (emphasis added); United States v. Mariscal, 285 F.3d 1127, 1131 (9th Cir. 2002).

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1 the hearsay rule, and does not qualify as non-hearsay.

2 8) U.S. Department of Justice, Federal Bureau of Investigation, *Criminal*  
3 *Justice Information Services Division, National Instant Background*  
4 *Check System (NICS) Operations* 2011 (2012). AG's Trial Brief at 19:11-  
5 14.

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19 investigation; and (B) neither the source of information nor other circumstances  
20 indicate a lack of trustworthiness. Fed. R. Evid. 803(8). However, "evaluative  
21 reports" or "status reports" do not qualify. See, e.g. Lomax Transp. Co. v. United  
22 States, 183 F.2d 331 (9th Cir. 1950).

23 Objection: Judicial notice - The court may only judicially notice a fact that is  
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27 (emphasis added); United States v. Mariscal (9th Cir. 2002) 285 F3d 1127, 1131]

28 9) Daniel W. Webster and Jon S. Vernick, Eds., *Reducing Gun Violence*



1                   *in America: Informing Policy with Evidence and Analysis* (The Johns  
2                   Hopkins Univ. Press 2013). AG's Trial Brief at 19:1-5.

3           Objection: Relevancy- the AG is attempting to introduce evidence that the  
4           10-day waiting period is needed to perform background checks to make sure that  
5           prohibited persons do not come into possession of another firearm. The plaintiffs in  
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3 the hearsay rule, and does not qualify as non-hearsay.

4 10) Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in*  
5 *America* (W.W. Norton 2011). AG’s Trial Brief at 4:20-21; 15:16-18.

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5 and does not qualify as non-hearsay.

6       12) Garen J. Wintemute, et al., *Subsequent Criminal Activity Among*  
7       *Violent Misdemeanants Who Seek to Purchase Handguns: Risk*  
8       *Factors and Effectiveness of Denying Handgun Purchase*, 285 Journal  
9       of the American Medical Association 1019 (Feb. 2001). AG’s Trial  
10       Brief at 19:15-18.

11       Objection: Relevancy- the AG is attempting to introduce evidence that the  
12 10-day waiting period is needed to perform background checks to make sure that  
13 prohibited persons do not come into possession of another firearm. The plaintiffs in  
14 this action, however, already have a firearm tied to their identity in state databases.  
15 If an individual already possesses a firearm, then nothing about this rational would  
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6        **Information Obtained From Internet**

7            1) Law Center to Prevent Gun Violence, Waiting Periods Policy Summary,  
8            June 24, 2013 (available online at [http://smartgunlaws.org/waiting-](http://smartgunlaws.org/waiting-periods-policy-summary/)  
9            [periods-policy-summary/](http://smartgunlaws.org/waiting-periods-policy-summary/)). AG’s Trial Brief at 12:17-20.

10           2) Law Center to Prevent Gun Violence, Licensing Gun Owners &  
11           Purchasers Policy Summary, Aug. 23, 2013 (available online at  
12           [http://smartgunlaws.org/licensing-gun-owners-purchasers-policy-](http://smartgunlaws.org/licensing-gun-owners-purchasers-policy-summary)  
13           [summary](http://smartgunlaws.org/licensing-gun-owners-purchasers-policy-summary)). AG’s Trial Brief at 12:20-24.

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1 because statements in periodicals only fall under the exception if statement is called  
2 to the attention of an expert witness on direct or cross-examination and the called  
3 the publication is established as a reliable authority by the expert's admission or  
4 testimony, by another expert's testimony, or by judicial notice. Fed. R. Evid.  
5 803(18). Even if the court takes judicial notice that the publication is established as  
6 reliable, no expert can testify because "there was no expert discovery in this case."  
7 AG's Trial Brief at 7:10.

### 8 **Deposition Testimony**

9 1) Deposition of Jeff Silvester. AG's Trial Brief at 7:14-26; 8:1-7.

10 2) Deposition of Brandon Combs. AG's Trial Brief at 8:8-28; 9:1-6.

11 Objection: Relevancy - the AG is attempting to introduce evidence that the  
12 10-day waiting period is needed to perform background checks to make sure that  
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17 possession.

### 18 **CONCLUSION**

19 Based on the foregoing objections, Plaintiff's respectfully request that the  
20 evidence cited in Defendant's trial brief be excluded from evidence at trial.

21 DATED: March 18, 2014

22 OTTEN & JOYCE, LLP

23  
24 /s/

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Victor Otten, Esq.  
26 Attorneys for Plaintiffs  
27  
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**DECLARATION OF E-SERVICE**

Case Name: Silvester v. Harris

Court Name: U.S. District Court, Eastern District of California (Fresno)

Case No.: 1:11-cv-02137-AWI-SKO

I, Donald Kilmer, declare:

I am employed in the at 1645 Willow Street, Suite 150, San Jose, CA . I am 18 years of age or older and not a party to this matter.

I understand that all parties to the above-entitled case are represented by at least one attorney who is registered for electronic filing and service in the above-entitled court.

On March 18, 2014, I electronically filed and, therefore, to the best of my understanding, caused to be electronically service through the Court's ECF system the attached PLAINTIFFS' OBJECTIONS TO EVIDENCE CITED IN DEFENDANTS' TRIAL BRIEF.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 18, 2014, at San Jose, California.

/s/ Donald Kilmer

Attorney for Plaintiffs.