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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

**JEFF SILVESTER, 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

**REQUEST FOR JUDICIAL NOTICE OF
DEFENDANT KAMALA D. HARRIS,
ATTORNEY GENERAL OF
CALIFORNIA**

Trial Date: March 25, 2014
Time: 8:30 a.m.
Courtroom: 2
Judge: The Hon. Anthony W. Ishii

Defendant Kamala D. Harris, Attorney General of California (the “Attorney General”), hereby requests that this Court take judicial notice of the following documents:

Category 1 – Dealer’s Record of Sales (DROS) Reports, DROS Statistics from 1991-2014, DROS Annual Statistics, Summary of DROS Annual Revenues, and other documents prepared by either the California Department of Justice or the California Bureau of Firearms. (Defendant’s Exhibits AA through AQ, AS through AZ, BA through BY, and CA through CC.)¹

Category 2 – Legislative histories of relevant statutory enactments. (Defendant’s Exhibits CD, CE, CF, CG, CH, CI, and CJ.)

Category 3 – Excerpts from history books, law review articles, and other scholarly articles. (Defendant’s Exhibits DA through DY, and EA through EK.)

Category 4 – Reports issued by governmental agencies other than the Department of Justice and one non-governmental organization. (Defendant’s Exhibits FA through FG.)

Category 5 – News articles. (Defendant’s Exhibits CU, GA through GL, GN, and GO.)

MEMORANDUM OF POINTS AND AUTHORITIES

I. This Court may take judicial notice of legislative facts to assist in the determination of whether the challenged statute is constitutional.

Plaintiffs are mounting a constitutional challenge to California’s longstanding “Waiting-Period Law,” codified at California Penal Code sections 26815 and 27540. It is well established that when the constitutionality of a statute is at issue, a court’s decision “must be based largely on legislative, as opposed to adjudicative, facts.” *Daggett v. Comm’n on Governmental Ethics and Election Practices*, 205 F.3d 445, 455-56 (1st Cir. 2000) (“In a [constitutional law] case like this, a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. . . . Our decision must be based largely on legislative, as opposed to adjudicative facts.”) (internal quotation and citation

¹ Attached as Exhibit 1 for the Court’s convenience is a copy of Defendant’s Index of Exhibits, which was submitted to the Court on March 20, 2014. The Index lists the alphabetic identifier of each exhibit with a corresponding description of the document.

omitted); see also *Korematsu v. United States*, 584 F.Supp. 1406, 1414 (N.D. Cal. 1984) (“Legislative facts are facts of which courts take particular notice when interpreting a statute or considering whether [a legislative body] has acted within its constitutional authority.”).

Legislative facts go to the content and justification for a statute, and are usually “not proved through trial evidence but rather by material set forth in the briefs, the ordinary limits on judicial notice having no application to legislative facts.” *Daggett*, 205 F.3d at 455-456 (internal quotation and citation omitted); *Assoc. of Nat’l Advertisers, Inc. v. Fed. Trade Comm’n*, 627 F.2d 1151, 1162 (D.C. Cir. 1979) (legislative facts are facts that help the court determine the content of law and policy, and need not be developed through evidentiary hearings); see also *Sachs v. Republic of Austria*, 737 F.3d 584, 596 n.10 (9th Cir. 2013) (court may rely on legislative facts, whether or not those facts have been developed on the record, if those facts are relevant to the “legal reasoning” and interpretation of the “lawmaking process”).

Where legislative facts are concerned, a court has broad discretion in granting judicial notice. Notably, there is *no* federal rule of evidence that *constrains* the judicial notice of legislative facts. See Advisory Comm. Notes to FED. R. EVID. 201(a) (Rule 201 “is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of ‘adjudicative’ facts. No rule deals with judicial notice of ‘legislative’ facts.”). Because “[l]egislative facts . . . are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body,” a “high degree of indisputability” is simply not required before a court may take judicial notice of such facts. *Ibid.* Thus, judicial notice of legislative facts is not limited by “any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level[.]” *Ibid.* citing *Borden’s Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934).

II. Each individual category of documents listed above is appropriate for judicial notice.

The first category of documents comprises reports and statistics issued and compiled by the California Department of Justice and the California Bureau of Firearms, in part through the

1 Dealer's Record of Sale (DROS) system.² The fourth category of documents comprises reports
2 issued by governmental agencies other than the California Department of Justice and one non-
3 governmental organization. The reports in these two categories of documents provide detailed
4 information about firearm-purchaser background check systems in California and other
5 jurisdictions. This information is vital in evaluating the necessity of the 10-day period utilized by
6 California's background check system, and comparing California's system to systems in other
7 jurisdictions in terms of achieving the goal of minimizing gun violence.

8 These reports are a matter of public record and are proper subjects of judicial notice. See,
9 e.g., *Rusak v. Holder*, 734 F.3d 894, 898 (9th Cir. 2013) (judicial notice taken of governmental
10 reports regarding religious intolerance in certain countries to establish plaintiff's claim of past
11 persecution); *United States v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943,
12 955 (9th Cir. 2008) (judicial notice taken of a Department of Energy report, reasoning that
13 "[j]udicial notice is appropriate for records and reports of administrative bodies") (internal
14 quotation omitted); see also *Cactus Corner, LLC v. U.S. Dept. of Agriculture*, 346 F.Supp.2d
15 1075, 1098-1099 (E.D. Cal. 2004) (granting motion for judicial notice of the fact of existence and
16 authenticity of reports created and published by the Department of Agriculture), *aff'd*, 450 F.3d
17 428 (9th Cir. 2006), *citing Greeson v. Imperial Irr. Dist.*, 59 F.2d 529, 531 (9th Cir. 1932).

18 The second category of documents comprises the legislative histories of the statutory
19 enactments that make up the Waiting-Period Law. The legislative histories of these enactments
20 are relevant because they show the California Legislature's reasons and justifications for passing
21 the law. "Courts frequently take judicial notice of legislative history, including committee
22 reports." *Korematsu*, 584 F.Supp. at 1414 citing *Territory of Alaska v. American Can Co.*, 358
23 U.S. 224, 227 (1959) (taking judicial notice of an act's legislative history); *Rabkin v. Dean*, 856
24 F.Supp. 543, 546 (N.D. Cal. 1994) (taking judicial notice of the contents and legislative history of
25 a proposed city ordinance).

26
27 ² During trial, the Attorney General intends to call witnesses who will lay a foundation to
28 some or all of the documents in this particular category.

1 The third category of documents comprises excerpts from history books, law review
2 articles, and other scholarly articles including those in the field of social science, all of which are
3 proper subjects for judicial notice for the legislative facts contained therein. See e.g., *Leo Sheep*
4 *Co. v. United States*, 440 U.S. 668, 669-670 (1979) (referencing a number of history books that
5 discussed the commercial and social aspects of living on the western frontier during the 19th
6 century; “courts, in construing a statute, may with propriety recur to the history of the times when
7 [a challenged statute] was passed; and this is frequently necessary, in order to ascertain the reason
8 as well as the meaning of particular provisions in it”); *Brown v. Board of Education*, 347 U.S.
9 483, 494 (1954) (referencing a number of psychological and social science studies demonstrating
10 the harm of “separate but equal” doctrine in public education in support of the Court’s
11 determination that doctrine was unconstitutional); *Cooper v. Pate*, 324 F.2d 165, 166 (7th Cir.
12 1963) (judicial notice taken of “accredited social studies of the Black Muslim Movement” to
13 show political objectives of the group), *rev’d on other grounds* 378 U.S. 546 (1964) (per curiam).

14 Judicial notice of this category of documents is especially appropriate given plaintiffs’
15 Second Amendment challenge to the Waiting-Period Law. Pursuant to recent Ninth Circuit
16 authority, the Court is expected to consult historical materials about how the Second Amendment
17 was understood. See *Peruta v County of San Diego*, No. 10-56971, 2014 WL 555862, at *4 (9th
18 Cir. Feb. 13, 2014) (petition for en banc review pending). This consultation necessarily takes into
19 account history books and scholarly articles, precisely the types of documents that the Attorney
20 General seeks judicial notice of. Plaintiffs agree as much, stating in their reply to the Attorney
21 General’s opposition to their motion in limine regarding the exclusion of expert testimony:
22 “Plaintiffs herein cannot (and do not) object to [historical evidence of the scope and meaning of
23 the Second Amendment] being derived from academic studies and law-journal articles.” (Doc. 63
24 at 2.)

25 Likewise, in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), an unsuccessful
26 Second Amendment challenge to a federal firearms law, the victorious federal prosecutors who
27 defended the law presented relevant social-science studies (unaided by any “presenting” witness)
28 as competent “evidence” on the key issues in the case. *Chovan*, 735 F.3d at 1137 & 1139 (citing

1 publications such as C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L.
 2 & Pub. Pol'y 695, 698, 708 (2009) and Julia C. Babcock, et al., *Does Batterer' Treatment Work?*
 3 *A Meta-Analytics Review of Domestic Violence Treatment*, 23 Clinical Psychol. Rev. 1023, 1039
 4 (2004), and analyzing the legislative history of the challenged federal statute); *see also*
 5 Declaration of Caroline Han Regarding Use of Expert Witnesses in *Chovan* Litigation, paras. 4 &
 6 5.³ While the topic of judicial notice did not expressly arise in *Chovan*, the Ninth Circuit's
 7 decision in that case makes clear that appellate courts take notice of social science studies as part
 8 of their decision making process. It defies logic to think that an appellate court, in reviewing a
 9 trial court's decision on the constitutionality of a challenged statute, should consider evidence that
 10 the trial court did not or could not.

11 In sum, the history books and scholarly articles, including those in the field of social
 12 science, offered by the Attorney General in this third category of documents are relevant to
 13 plaintiffs' Second Amendment challenge by giving the history necessary to judge if the Waiting-
 14 Period Law would have been seen by ordinary voters in the Founding Era as constitutional, and
 15 by showing the efficacy of the law in minimizing gun violence.

16 The fifth category of documents comprises news articles relevant to the issues presented in
 17 this case.⁴ To the extent these news articles contain legislative facts that bear directly on the
 18 issues presented in this case, such as historical context and whether waiting periods effectively
 19 prevent violence, they are highly relevant and appropriate subjects of judicial notice. *See*
 20 Advisory Comm. Notes to FED. R. EVID. 201(a) (legislative facts that are relevant to legal
 21 reasoning and the lawmaking process need not have a "high degree of indisputability" to be
 22 considered proper subjects of judicial notice). To the extent this Court is inclined to take judicial
 23 notice of these documents for their adjudicative facts, it also has the discretion to do so. *See*
 24 *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458-59 (9th Cir. 1995) (holding that district court's

25 ³ The Han Declaration was submitted as Exhibit 1 to the Declaration of Peter H. Chang
 26 filed in conjunction with Defendant's Opposition to Plaintiffs' Motion in Limine Regarding
 Exclusion of Documents.

27 ⁴ The Attorney General notes that Exhibit CU was an exhibit at a deposition, and thus has
 28 an independent ground for admission into the trial record.

1 judicial notice of a news article regarding layoffs at an airplane manufacturer pursuant to Fed. R.
2 Evid. 201 was not an abuse of discretion).

3 For the reasons cited above, the Attorney General respectfully requests that this Court take
4 judicial notice of the documents contained in Categories 1 through 5 listed above.

5 Dated: March 24, 2014

Respectfully submitted,

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7 Attorney General of California
8 MARK R. BECKINGTON
9 Supervising Deputy Attorney General
10 JONATHAN M. EISENBERG
11 Deputy Attorney General
12 PETER H. CHANG
13 Deputy Attorney General

/s/ Kim L. Nguyen

14 KIM L. NGUYEN
15 Deputy Attorney General
16 *Attorneys for Defendant Kamala D. Harris,*
17 *Attorney General of California*

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EXHIBIT 1 of 1

Index of Defendant's Exhibits

INDEX OF DEFENDANT'S EXHIBITS

EXHIBIT #	DESCRIPTION	ADMITTED IN EVIDENCE	OBJECTION FOUNDATION	OTHER OBJECTION
AA	DROS Annual Statistics			X
AB	DROS Reports and Statistics 1999			X
AC	DROS Reports and Statistics 2000			X
AD	DROS Reports and Statistics 2001			X
AE	DROS Reports and Statistics 2002			X
AF	DROS Reports and Statistics 2003			X
AG	DROS Reports and Statistics 2004			X
AH	DROS Reports and Statistics 2005			X
AI	DROS Reports and Statistics 2006			X
AJ	DROS Reports and Statistics 2007			X
AK	DROS Reports and Statistics 2008			X
AL	DROS Reports and Statistics 2009			X
AM	DROS Reports and Statistics 2010			X
AN	DROS Reports and Statistics 2011			X
AO	DROS Reports and Statistics 2012			X
AP	DROS Reports and Statistics 2013			X
AQ	DROS Reports and Statistics 2014			X
AR	Emails re DROS Statistics			X
AS	Summary of DROS Actual Revenues			X
AU	DROS Front End Replacement			X
AV	Long Gun Retention			X
AW	DROS Notification to FBI NICS			X
AX	DROS Review of Mental Health Data 1991			X
AY	Mini-Feasibility Study			X
AZ	APPS			X
BA	NCHIP Year-8 Grant			X
BB	CFIS 1995			X
BC	CFIS 2000			X
BD	DROS Review of Mental Health Data 1991			X
BE	DROS Review of Mental Health Data 1998			X
BF	DROS Feasibility			X
BG	Long Gun Feasibility 1990			X
BH	Long Gun Feasibility 2011			X
BI	MHRS Redesign			X
BJ	NICS Mental Health Notification			X
BK	MHFPS Redesign			X
BL	CJIS Redesign			X
BM	NICS Audit Report 4th			X
BN	Review of ATFE's Enforcement of Brady Act Violations			X
BO	NICS Operations 2011			X
BP	BFEC Databases			X
BQ	Firearms Transaction Denials			X
BR	DROS Transactions			X
BS	BOF Firearms Purchaser Clearance Section			X
BT	BOF Organization Chart			X
BU	Graham Resume			X
BV	Buford Resume			X

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EXHIBIT #	DESCRIPTION	ADMITTED IN EVIDENCE	OBJECTION FOUNDATION	OTHER OBJECTION
BW	Matsumoto Resume			X
BX	Orsi Resume			X
BY	NICS Audit Report 3rd			X
CA	Firearms Prohibiting Categories			X
CB	CFIS DROS Processing			X
CC	NICS Point of Contact States			X
CD	A.B. 263 Statute 1923 c.339 Legislative History			X
CE	A.B. 1919 Statute 1953 c.36 Legislative History			X
CF	A.B. 3508 Statute 1955 c.1521 Legislative History			X
CG	S.B. 671 (1995-96) Legislative History			X
CH	A.B. 1441 (1975-76) Legislative History			X
CI	A.B. 1564 (1964-65) Legislative History			X
CJ	A.B. 3509 (1954-55) Legislative History			X
CK	Harris Interrogatories to Silvester			X
CL	Harris Interrogatories to Coombs			X
CM	Harris Interrogatories to CGF			X
CN	Harris Interrogatories to SAF			X
CO	Silvester Interrogatories Responses			X
CP	Coombs Interrogatories Responses			X
CQ	CGF Interrogatories Responses			X
CR	SAF Interrogatories Responses			X
CS	Silver Star Custom Leather			X
CT	First Amended Complaint			X
CU	California's Background-Check System Article			X
DA	Brent and Bridge, Firearms Availability and Suicide, in American Behavioral Scientist (2003)			X
DB	Blodgett-Ford, The Changing Meaning of the Right to Bear Arms, in Seton Hall Constitutional Law Journal (1995)			X
DC	Cornell, The Ironic Second Amendment, in Albany Law Review (2008)			X
DD	Cornell and De Dino, A Well Regulated Right: The Early American Origins of Gun Control, in Fordham Law Review (2004)			X
DE	Cozzolino, Gun Control: The Brady Handgun Violence Prevention Act, in Seton Hall Legislative Journal (1992)			X
DF	Daponde, New Residents and Collectors Must Register Out-of-state Handguns, in McGeorge Law Review (1998)			X
DG	Lewiecki, Suicide, Guns, and Public Policy, in American Journal of Public Health (2013)			X
DH	Ludwig and Cook, Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act, in Journal of the American Medical Association (2000)			X
DI	Volokh, Implementing the Right to Keep and Bear Arms for Self-defense: An Analytical Framework and a Research Agenda, in UCLA Law Review (2009)			X
DJ	Winkler, Heller's Catch 22, in UCLA Law Review (2009)			X

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EXHIBIT #	DESCRIPTION	ADMITTED IN EVIDENCE	OBJECTION FOUNDATION	OTHER OBJECTION
DK	Bangalore, et al, Gun Ownership and Firearm-related Deaths, in American Journal of Medicine (2013)			X
DL	Cantor and Slater, The Impact of Firearm Control Legislation on Suicide in Queensland: Preliminary Findings, in Medical Journal of Australia (1995)			X
DM	de Moore, et al., Survivors of Self-inflicted Firearm Injury: A Liaison Psychiatry Perspective, in Medical Journal of Australia (1994)			X
DN	Frierson and Lippmann, Psychiatric Consultation for Patients with Self-inflicted Gunshot Wounds, in Psychosomatics (1990)			X
DO	Novak, Why the New York State System for Obtaining a License to Carry a Concealed Weapon Is Unconstitutional, in Fordham Urban Law Journal (1988)			X
DP	Vigdor and Mercy, Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Violence?, in Evaluation Review (2006)			X
DQ	Warner, Firearm Deaths and Firearm Crime After Gun Licensing in Tasmania, presented at the Third National Outlook Symposium on Crime, Canberra, Australia (1999)			X
DR	Zeoli and Webster, Effects of Domestic Violence Policies, Alcohol Taxes, and Police Staffing Levels on Intimate Partner Violence, in Injury Prevention (2010)			X
DS	Peterson, et al., Self-Inflicted Gunshot Wounds: Lethality of Method Versus Intent, in American Journal of Psychiatry (1985)			X
DT	Miller and Hemenway, The Relationship Between Firearms and Suicide: A Review of the Literature, in Aggression and Violent Behavior (1998)			X
DU	Wright, et al., Effectiveness of Denial of Handgun Purchase to Persons Believed to be at High Risk for Firearm Violence, in American Journal of Public Health (1999)			X
DV	Wintemute, Parham, et al., Article			X
DW	Brent Article			X
DX	Hahn, et al., Firearms Laws and the Reduction of Violence: A Systematic Review, in American Journal of Preventive Medicine (2005)			X
DY	Wintemute, Wright, et al., Article			X
EA	Cornell, A Well-regulated Militia (2008)			X
EB	Hawke, Everyday Life in Early America (1989)			X
EC	Larkin, The Reshaping of Everyday Life: 1790-1840 (1989)			X
ED	Nisbet, ed., The Gun Control Debate: You Decide (1990)			X
EE	Rakove, Original Meanings (1997)			X
EF	Sellers, The Market Revolution (1994)			X
EG	Spitzer, Gun Control: A Documentary and Reference Guide (2009)			X

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EXHIBIT #	DESCRIPTION	ADMITTED IN EVIDENCE	OBJECTION FOUNDATION	OTHER OBJECTION
EH	Spitzer, The Politics of Gun Control, 5th Ed. (2012)			X
EI	Uviller and Merkel, The Militia and the Right to Arms (2002)			X
EJ	Webster and Vernick, eds., Reducing Gun Violence in America (2013)			X
EK	Winkler, Gun Fight: The Battle Over the Right to Bear Arms in America (2013)			X
FA	Office of the U.S. President, Now is the Time; The President's Plan to Protect Our Children and our Communities by Reducing Gun Violence (2013)			X
FB	Centers for Disease Control, Injury Fact Book (2006)			X
FC	Legal Community Against Violence, Model Laws for a Safer America (2012)			X
FD	U.S. Department of Justice, Draft Report on Systems for Identifying Felons Who Attempts to Purchase Firearms; Notice and Request for Comment, in Federal Register (1989)			X
FE	Violence Policy Center, States with High Gun Ownership and Weak Gun Laws Lead Nation in Gun Deaths (2013)			X
FF	USDOJ OIG Review of ATF Brady Act Enforcement			X
FG	Federal Bureau of Investigation, National Instant Criminal Background Check System (NICS) Operations (2011)			X
GA	Amar and Amar, Guns and the Constitution: Telling the Right Constitutional Story, in FindLaw – Legal Commentary (2001)			X
GB	Cornell, The Second Amendment You Don't Know, in New York Daily News (2012)			X
GC	Emberton, The Real Origin of America's Gun Culture, in History News Network (2013)			X
GD	Ifill, 7-day Wait for Gun Purchases Hits Crucial Obstacle in House, in New York Times (1991)			X
GE	Koerner, Californians Buying Guns at Record Rate, in Orange County Register (2012)			X
GF	Leger, Obama Demand Could End Research Blackout into Gun Violence, in USA Today (2013)			X
GG	Marois, California's Gun Repo Men Have a Nerve-racking Job, in Businessweek (2013)			X
GH	Platt, New York Banned Handguns 100 Years Ago... Will We Ever See that Kind of Gun Control Again?, in History News Network (2011)			X
GI	Pugh, Baltimore Gun Violence Summit Conclude with Recommendations, in McClatchy DC (2013)			X
GJ	Richman, California's Gun Background-Check System Could Be National Model, in San Jose Mercury News (2013)			X
GK	Robinson, Delay for Buying Guns OK'd by Legislature, in San Jose Mercury News (1991)			X
GL	Sweeney and Cornell, All Guns Are Not Created Equal, in The Chronicle Review (2013)			X
GM	Winkler, The Secret History of Guns, in Atlantic (2001)			X

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EXHIBIT #	DESCRIPTION	ADMITTED IN EVIDENCE	OBJECTION FOUNDATION	OTHER OBJECTION
GN	Repeal of Missouri's Background Check Law Associated with Increase in State's Murders			X
GO	Chokshi, Study: Repealing Missouri's background check law associated with a murder spike			X
HA	Goodin, Brief for English/American Historians as Amicus Curiae [Etc.], in McDonald v. City of Chicago (2010)			X
HB	Bogus, Brief of Amici Curiae Jack N. Rakove [Etc.], in District of Columbia v. Heller (2008)			X

*Defendant Attorney General's Statement Regarding Objections Based on Lack of Foundation:

Defendant Attorney General objected to Plaintiffs' proposed exhibits on the basis of, among other things, lack of foundation. However, Defendant objected to the books and government reports that Plaintiffs seek to introduce based on lack of foundation solely because Plaintiffs have made the same objections to books, government reports, and other publications that Defendant seeks to introduce. Defendant believes that such publications are self-authenticating, proper subject for judicial notice, and no further foundation need to be laid. The Court should deny this foundation objection as to all books, government reports, articles, etc., whether submitted by Plaintiffs or Defendant. Should Plaintiffs withdraw their foundation objections to Defendant's exhibits, Defendant will withdraw the same objections as against Plaintiffs' exhibits.