

1 C.D. Michel – SBN 144258
Email: cmichel@michellawyers.com
2 Joshua R. Dale – SBN 209942
Sean A. Brady – SBN 262007
3 Anna M. Barvir – SBN 268728
MICHEL & ASSOCIATES, P.C.
4 180 E. Ocean Blvd., Suite 200
Long Beach, CA 90802
5 Telephone: (562) 216-4444
Facsimile: (562) 216-4445

6 Attorneys for Plaintiffs
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8 **IN THE UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**

11 MICHELLE FLANAGAN, et al.,

12 Plaintiffs,

13 v.

14 CALIFORNIA ATTORNEY
GENERAL XAVIER BECERRA, in
15 his official capacity as Attorney
General of the State of California, et
16 al.,

17 Defendants.
18

Case No.: 2:16-cv-06164-JAK-AS

**AMENDED [PROPOSED] ORDER
ON PLAINTIFFS' OBJECTIONS TO
THE DECLARATION OF P. PATTY
LI AND EVIDENCE SUBMITTED IN
SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

Judge: John A. Kronstadt
Action Filed: August 17, 2016
Trial Date: February 6, 2018

19 **PLEASE TAKE NOTICE** that Plaintiffs' Motion for Summary Judgment
20 and Defendant's Motion for Summary Judgment came for a regularly noticed
21 hearing before this Court on November 6, 2017. Plaintiffs, Michelle Flanagan,
22 Samuel Golden, Dominic Nardone, Jacob Perkio, and The California Rifle & Pistol
23 Association, timely lodged evidentiary objections to the declaration of P. Patty Li
24 and evidence submitted in support of Defendant's Motion for Summary Judgment.
25 The Court having considered the objections in the attached, Plaintiffs' Objections to
26 Evidence and Declarations Submitted in Support of Defendants' Motion for
27 Summary Judgment, hereby rules as indicated on each of the Plaintiff's objections.
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	<p>distinction between open and concealed carry. Exhibit 3 Deposition Transcript of John J. Donohue, Volume I (“Ex. 3”) at 197: 14-16. He further testified, “any time I’m making a prediction or estimate, I could be wrong” Ex. 3 at 220:12-18. The declarant has not proffered any preliminary evidence to lay the foundations that he attempted to research what open carry might be, as his research is solely based on concealed carry. FRE 702, 703.</p>	
<p>2. Ex. 2 at ¶33: These facts suggest that open carry of guns would be less socially desirable than concealed carry since the latter at least has the prospect of deterrence since criminals cannot know who is carrying weapons.</p>	<p>Conclusory: Declaration which sets forth only conclusions opinions, or ultimate facts is insufficient. (<i>Kramer v Barnes</i> 91963) 212 Cal. App.2d 440, 446; see also <i>Powell v Kleinman</i> (2007) 151 Cal. App. 4th 112, 123 [“an expert’s opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>

1 than the reasons and facts on
2 which it is based “[.]” FRE 602,
3 702.

4 **Not Proper Scientific**

5 **Testimony:** What is, or is not
6 “socially desirable” is a question
7 that does not require “scientific,
8 technical, or other specialized
9 knowledge[.]” meaning the issue
10 is not the proper subject of expert
11 testimony under FRE 702. *See*
12 *Range Rd. Music, Inc. v. E. Coast*
13 *Foods, Inc.*, 668 F.3d 1148, 1153
14 (9th Cir. 2012) (citing FRE 702
15 and quoting the advisory
16 committee notes to FRE 701:
17 “[T]he distinction between lay and
18 expert witness testimony is that
19 lay testimony results from a
20 process of reasoning familiar in
21 everyday life, while expert
22 testimony results from a process
23 of reasoning which can be
24 mastered only by specialists in the
25 field.”)

<p>1 3. Ex. 2 at ¶34: Spending</p> <p>2 resources that shift</p> <p>3 burdens of crime from</p> <p>4 one ground to another</p> <p>5 without reducing the</p> <p>6 overall burden is a net</p> <p>7 waste of resources.</p> <p>8 Indeed, the billions of</p> <p>9 dollars that are spent</p> <p>10 each year buying guns</p> <p>11 for self-protection</p> <p>12 without any statistical</p> <p>13 support for the claim that</p> <p>14 they diminish crime</p> <p>15 could easily confer</p> <p>16 substantial crime</p> <p>17 reducing benefits if the</p> <p>18 money were directed to</p> <p>19 known crime-reducing</p> <p>20 expenditures.</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>Lacks Foundation: The statement</p> <p>fails to identify any factual</p> <p>evidence to show what his opinion</p> <p>is based on. (<i>Taliaferro v</i></p> <p><i>Taliaferro</i> (1962)203 Cal. App.</p> <p>2d 649, 651; FRE 702, 703</p> <p>[failure to state facts upon which</p> <p>opinion is based may warrant</p> <p>disregard of opinion, especially</p> <p>where it is self-serving]; <i>Powell v.</i></p> <p><i>Kleinman</i> (2007) 151 Cal. App. 4th</p> <p>112, 123 [“an expert’s opinion</p> <p>rendered without a reasoned</p> <p>explanation of why the underlying</p> <p>facts lead to the ultimate</p> <p>conclusion has no evidentiary</p> <p>value because an expert opinion is</p> <p>worth no more than the reasons</p> <p>and facts on which it is based”].)</p> <p>Speculative: The declarant does</p> <p>not present any evidence to show</p> <p>that open carry produces a net</p> <p>waste of resources. Because there</p> <p>is no evidence, the statement is</p> <p>speculative. FRE 702, 703. In</p> <p>fact, the declarant testified that he</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>
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	<p>didn't rely upon any data to measure the resource burdens that open carry imposes. And these are just his inferences. (Ex. 3 at 185:3-8)</p>	
<p>4. Ex. 2 at ¶36: Open carry of guns can spread fear and alarm in the community. An openly displayed gun in public also gives a muddy signal about the gun toter and could draw undue attention from police officers, directing law-enforcement resources inefficiently, which again makes law enforcement less effective, thereby further promoting crime.</p>	<p>Lacks Foundation: The declarant lacks foundation to testify regarding open carry. FRE 602, 702-704. The declarant has not proffered any preliminary evidence to lay the foundations that he attempted to research what open carry might be, as his research is solely based on concealed carry. FRE 602, 702-704.</p> <p>Speculative: The declarant does not present any evidence to show that displaying guns in public can spread fear and alarm. Because there is no evidence, the statement is speculative. FRE 702, 703.</p> <p>Conclusory: Declaration which sets forth only conclusions opinions, or ultimate facts is</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>

insufficient (*Kramer v Barnes* 91963) 212 Cal. App.2d 440, 446; see also *Powell v Kleinman* (2007) 151 Cal. App. 4th 112, 123 [“an expert’s opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based “].) FRE 702, 703.

Not Proper Scientific

Testimony: Whatever “signal” an “openly displayed gun” provides to the public is, by definition, a question that does not require “scientific, technical, or other specialized knowledge[.]” meaning the issue is not the proper subject of expert testimony under FRE 702. *See Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1153 (9th Cir. 2012) (citing FRE 702 and quoting the

1		advisory committee notes to FRE	
2		701: “[T]he distinction between	
3		lay and expert witness testimony	
4		is that lay testimony results from a	
5		process of reasoning familiar in	
6		everyday life, while expert	
7		testimony results from a process	
8		of reasoning which can be	
9		mastered only by specialists in the	
10		field.”) Additionally, even	
11		assuming arguendo the claim	
12		about “undue attention” by police	
13		is potentially a proper source of	
14		expert opinion, the Declarant is	
15		not a police officer. Indeed, he	
16		states “I don't really have a strong	
17		feeling on -- or a strong sense of	
18		what police are estimating.” Ex. 3	
19		at 114:22-23.	
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21	5. Ex. 2 at ¶¶1-36	Immaterial and Irrelevant: The	<input type="checkbox"/> Sustained
22		study on concealed carry is not	
23		relevant to any material fact at	<input type="checkbox"/> Overruled
24		issue in the case. FRE 402. Prof.	
25		Donohue’s study is wholly	
26		irrelevant because his study is	
27		exclusively focused on <i>concealed</i>	
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1		carry. The declarant admits that he	
2		did no research about open carry,	
3		nor did he examine data from any	
4		state that allows open carry. Ex. 3	
5		at 178:3-12. The declarant further	
6		testifies that everything he states	
7		about open carry is inferred from	
8		his work on concealed carry study.	
9		(Ex. 3 at 185:17-20). And about	
10		his study, he says “I didn’t focus	
11		on open carry in this paper.” (Ex.	
12		3 at 179:5). Further, he is not	
13		aware of any research of open	
14		carry’s potential impacts on	
15		criminality [Ex. 3 at 179:20-	
16		181:7]. Because this case is about	
17		open carry, Professor Donohue’s	
18		testimony and report will not	
19		assist the court in deciding	
20		Plaintiff’s Motion for Summary	
21		Judgment.	
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OBJECTIONS TO DECLARATION OF P. PATTY LEE, See Exhibit 1 ¶ 5.

25	6. Exhibit 3 Deposition	Lacks Foundation. Declarant’s	<input type="checkbox"/> Sustained
26	Transcript of John J.	testimony is not based on an	
27	Donohue, Volume I	adequate foundation of reliable	<input type="checkbox"/> Overruled
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<p>(“Ex. 3”) at 114:22-114:23: [the research on disaggregated data for each category of violent crime] pretty much conforms of what we saw here [in the study].</p>	<p>data, and is not based on an adequate methodology to support his conclusion. FRE 702. The research is not particularly clear on the impact of right to carry laws on violent crime rates. Declarant had his staff run regressions for the disaggregated crimes in preparing the attached report, but he did not include them in the report. Scientific opinion is not admissible when a court concludes “that there is simply too great an analytical gap between the data and the opinion proffered.” <i>See Gen. Elec. Co. v. Joiner</i>, 522 U.S. 136, 146 (1997) (“Trained experts commonly extrapolate from existing data. But nothing in either <i>Daubert</i> or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the <i>ipse dixit</i> of the expert.”)</p> <p>In fact, declarant admits that some</p>	
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	<p>regressions are not consistent with his conclusions in his study, and that these regressions are very misleading, by saying “if you run enough regressions, [you can] pick out one that you like, you can really, really engineer results that are very misleading” Ex. 3 at 35:20-24, 36: 6-8.</p> <p>Lacks proper authentication: The predictions relied upon lacks proper authentication. FRE 403, 901, 902. The declarant has not produced evidence sufficient to support his finding that separate disaggregated data for each category of violent crime conforms with aggregated data in the study reported.</p>	
<p>7. Ex. 3 at 147: 7-16: I think there were actually some problems with [Concealed Carry Killers] when they first released that information and it was criticized, but</p>	<p>Lacks proper authentication: The predictions relied upon lacks proper authentication. FRE 403, 901, 902. The declarant has not produced evidence sufficient to support his finding that Concealed Carry Killers is a reliable website.</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>

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they have cleaned up the website quite a bit since then... and it is a useful resource of highlighting certain behaviors on the part of permit holders, that show that they engage in behavior that would either be criminal, reckless, or suggestive of not being the sort of person you want carrying guns around.	Not Proper Scientific Testimony: The proffered testimony here says a particular website, but not any particular data thereon, is “a useful resource in highlighting certain behaviors on the part of permit holders.” Inasmuch as the declarant is not offering testimony based on a <i>scientific</i> analysis of data—and because any layperson can see what is “highlighted” on the website—the issue is not the proper subject of expert testimony under FRE 702. <i>See Range Rd. Music, Inc. v. E. Coast Foods, Inc.</i> , 668 F.3d 1148, 1153 (9th Cir. 2012) (citing FRE 702 and quoting the advisory committee notes to FRE 701: “[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by	
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	specialists in the field.”)	
<p>8. Ex. 3 at 101: 6-25:</p> <p>California, New York, and Washington, D.C., were areas with the worst crack problems.</p>	<p>Speculative: The expert witness’s “knowledge” must be based upon “more than subjective belief or unsupported speculation.”</p> <p><i>Daubert</i> 509 U.S. at 590, 113 S. Ct. at 2795, 125 L. Ed. 2d at 481). FRE 702. The declarant does not present any evidence to show that states that do not have right to carry laws are worse on crack than adopters of right to carry states.</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>
<p>9. Ex. 3 at 123:16-20 We discussed sort of the ambiguities about what the net effect is on property crime, but we said for just looking at gun thefts, right to carry laws theoretically increase gun theft.</p>	<p>Lacks Foundation: The declarant has not produced evidence sufficient to support his finding that right to carry laws result in increased property crimes, including gun theft. FRE 702, 703. Indeed, the declarant necessarily, albeit impliedly, admits as much (“right to carry laws <i>theoretically</i> increases gun theft.”).</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>
<p>10. Ex. 3 at 203 4-23:</p> <p>Carrying gun openly</p>	<p>Lacks Authentication: The predictions relied upon lacks</p>	<p><input type="checkbox"/> Sustained</p>

1	where open carry is	proper authentication. FRE 403,	<input type="checkbox"/> Overruled
2	allowed suddenly	901, 902. The declarant has not	
3	triggers police	produced evidence sufficient to	
4	intervention.... We do	support his finding that carrying	
5	have the discussions of	gun openly triggers police	
6	police chiefs talking	intervention. His testimony simply	
7	about the amount of	relies on anecdotal information.	
8	attention that gun	Hearsay: The statement	
9	carriers can encourage	summarizes a discussion but does	
10	from the public.	not verify or properly authenticate	
11		the conversation. FRE 801.	
12		Not Proper Scientific	
13		Testimony: The proffered	
14		testimony here says open carry	
15		triggers police intervention.	
16		Inasmuch as the declarant is not	
17		offering testimony based on a	
18		<i>scientific</i> analysis of data—and	
19		because the claim about “police	
20		intervention” is potentially a	
21		proper source of expert opinion,	
22		the Declarant is not a police	
23		officer--the issue is not the proper	
24		subject of expert testimony under	
25		FRE 702. <i>See Range Rd. Music,</i>	
26		<i>Inc. v. E. Coast Foods, Inc.</i> , 668	
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	F.3d 1148, 1153 (9th Cir. 2012) (citing FRE 702 and quoting the advisory committee notes to FRE 701: “[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field.”)	
11. Ex. 3 at 196:23-197:13: I think there are strong reasons supported by police chief discussions that open carry would have yet more burdens and less benefits.	Lacks Foundation: The declarant has not produced evidence sufficient to support his finding that open carry would have more burdens and less benefits. FRE 702, 703. Hearsay: The statement summarizes a discussion but does not verify or properly authenticate the discussions by the chief of police. FRE 801. Not Proper Scientific Testimony: The proffered	<input type="checkbox"/> Sustained <input type="checkbox"/> Overruled

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	<p>testimony here says open carry would have more burdens and less benefits. Inasmuch as the declarant is not offering testimony based on a <i>scientific</i> analysis of data—and because the claim about “burdens of open carry” is potentially a proper source of expert opinion, the Declarant is not a police officer--the issue is not the proper subject of expert testimony under FRE 702. <i>See Range Rd. Music, Inc. v. E. Coast Foods, Inc.</i>, 668 F.3d 1148, 1153 (9th Cir. 2012) (citing FRE 702 and quoting the advisory committee notes to FRE 701: “[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field.”)</p>	
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<p>12. Ex. 3 at 212: 18-25; 213: 1-15: I suspect, if anything, the open carriers would be much less law-abiding than the concealed carriers.</p>	<p>Speculative: The expert witness’s “knowledge” must be based upon “more than subjective belief or unsupported speculation.” <i>Daubert 509 U.S.</i> at 590, 113 S. Ct. at 2795, 125 L. Ed. 2d at 481). FRE 702. The declarant does not present any evidence to show that open carriers are less law-abiding than concealed carriers.</p> <p>Conclusory: Declaration which sets forth only conclusions, opinions or ultimate facts is insufficient. (<i>Kramper v Barnes</i> (1963) 212 Cal. App. 2d 440,446.) FRE 702, 703.</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>
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OBJECTIONS TO DECLARATION OF P. PATTY LEE, See Exhibit 1 ¶ 6.

<p>13. Exhibit 4 Deposition Transcript of John J. Donohue, Volume II (“Ex. 4”) at 353: 16-353:20: The synthetic controls estimates, regardless of the particular set of</p>	<p>Speculative: The expert witness’s “knowledge” must be based upon “more than subjective belief or unsupported speculation.” <i>Daubert 509 U.S.</i> at 590, 113 S. Ct. at 2795, 125 L. Ed. 2d at 481). FRE 702. In this case, there has been no showing that the facts or</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>
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1 2 3 4 5 6 7 8 9	explanatory variables that was used, showed a highly statistically significant impact on aggravated assault rising when right to carry laws were [adopted].	data relied upon by Prof. Donohue are of a type reasonably relied upon by experts in the field. Accordingly, his opinion regarding open carry does not meet the <i>Daubert</i> standard.	
10 11 12 13 14 15 16 17 18 19 20 21 22	14. Ex. 4 at 5-25; 328 1-4: One huge way is guns are much more likely to be stolen when you're taking them around town and walking around.	Speculative: There is no evidence presented to validate declarant's belief that guns are more likely to be stolen when one is outside their home, as he cannot recollect any reports. FRE 702, 703. Conclusory: Declaration which sets forth only conclusions, opinions or ultimate facts is insufficient. (<i>Kramper v Barnes</i> (1963) 212 Cal. App. 2d 440,446.) FRE 702, 703.	<input type="checkbox"/> Sustained <input type="checkbox"/> Overruled
23 24 25 26 27 28	15. Ex. 4 at 331:13-14, 332:13-16: NRA was looking around for other ways to stimulate gun sales... the one	Speculative: The expert witness's "knowledge" must be based upon "more than subjective belief or unsupported speculation." <i>Daubert</i> 509 U.S. at 590, 113 S.	<input type="checkbox"/> Sustained <input type="checkbox"/> Overruled

1 unifying theme in NRA
2 conduct is, as far as I
3 can tell, that they favor
4 anything that stimulate
5 gun sales and oppose
6 anything that might
7 reduce gun sales.

Ct. at 2795, 125 L. Ed. 2d at 481).
FRE 702. The declarant does not
present any evidence to show that
NRA was looking to stimulate gun
sales.

Conclusory: Declaration which
sets forth only conclusions,
opinions or ultimate facts is
insufficient. (*Kramper v Barnes*
(1963) 212 Cal. App. 2d 440,446.)
FRE 702, 703.

14 IT IS SO ORDERED.

17 Dated: _____

Honorable Judge John A. Kronstadt
United States District Court Judge