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10 **IN THE UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**  
12 **WESTERN DIVISION**

13 **MICHELLE FLANAGAN, et al.,**

14 **Plaintiffs,**

15 **v.**

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

19 **Defendants.**  
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Case No.: 2:16-cv-06164-JAK-AS

**SUPPLEMENTAL BRIEF  
REGARDING PROPRIETY OF  
GRANTING DEFENSE MOTION  
FOR SUMMARY JUDGMENT,  
WITH CONFLICTING EXPERT-  
WITNESS EVIDENCE**

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

1 Defendant Xavier Becerra, Attorney General of California (“Defendant”),  
2 sued in his official capacity, submits the following supplemental brief, concerning  
3 whether the Court can grant the pending defense motion for summary judgment, as  
4 the Court requested orally at the hearing on the motion on November 6, 2017.

5 The Court can grant the pending defense motion for summary judgment,  
6 upholding California’s open-carry firearm statutes against Plaintiffs’ attack under  
7 the Second Amendment to the U.S. Constitution, even though the evidence in the  
8 record contains conflicting expert testimony regarding whether there is the requisite  
9 “reasonable fit” between the open-carry statutes and California’s asserted interests  
10 in bolstering public safety and minimizing firearm violence. The relevant Second  
11 Amendment case law teaches that the determination of whether there is such a  
12 reasonable fit focuses on whether the defense evidence about the fit is sufficiently  
13 substantial to justify a hypothetical reasonable legislative body in enacting the  
14 regulation. That analysis is not dependent on whether the defense evidence is  
15 uncontested or undisputed. The court handling the matter is tasked not with  
16 weighing the affirmative evidence against the rebuttal evidence and picking a  
17 winning side, but instead with gauging whether there is sufficient evidence to  
18 substantiate the defense position. *Jackson v. San Francisco*, 746 F.3d 953, 966 (9th  
19 Cir. 2014) (adjudicating an application for a preliminary injunction). Per *Jackson*,  
20 746 F.3d at 965, acceptable defense evidence could come from the legislative  
21 history of the challenged statutes or post-enactment research aggregated by defense  
22 counsel. Consequently, in this case, the Court can grant summary judgment for the  
23 defense, notwithstanding the conflict of defense evidence and plaintiff-side  
24 evidence as to the real-world effects of California’s open-carry statutes.

25 Several directly on-point case precedents validate this Court’s power to grant  
26 the defense motion for summary judgment. At least four times over the last five  
27 years, a federal appellate court has affirmed a trial court’s ruling granting a defense  
28 motion for summary judgment about whether a governmental regulation violated

1 the Second Amendment, even though the record contained conflicting evidence  
2 related to the merits of the dispute.

3       • *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), about  
4 the Second Amendment implications of New York’s permitting scheme for  
5 carrying handguns in public, is the earliest case decision in this group. In  
6 *Kachalsky*, the U.S. Court of Appeals for the Second Circuit, reviewing a  
7 trial court’s ruling granting summary judgment to the defense, expressly  
8 acknowledged that there was conflicting social-science evidence about the  
9 relationship between (lawful) handgun ownership and violent crime—which  
10 correlation the government defendants had to establish to justify the licensing  
11 regime. *Kalchasky*, 701 F.3d at 99. However, this conflict did not preclude  
12 summary judgment, because “[i]t is the legislature’s job, not ours, to weigh  
13 conflicting evidence and make policy judgments.” *Id.* The *Kachalsky* Court  
14 determined that the evidence for the defense was sufficiently strong as to the  
15 correlation and hence affirmed the trial court’s ruling. *Id.* at 99.

16       • Like *Kachaslky*, *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013),  
17 adjudicated a defense summary-judgment motion seeking to protect from a  
18 Second Amendment challenge Maryland’s permitting scheme for carrying  
19 handguns in public. The Fourth Circuit examined evidence about the  
20 reasonableness of the fit between Maryland’s requirement that people have  
21 “good and substantial reason” to carry firearms in public and the objective of  
22 “protecting public safety and preventing crime.” *Woollard*, 712 F.3d at 877-  
23 81. It was held to be appropriate to consider not only the information and  
24 materials before the Maryland Legislature when it enacted the statutes but  
25 also “more recent evidence proffered by the State in this proceeding.” *Id.* at  
26 877. And, at 712 F.3d at 881, *Woollard* quoted and followed *Kachalsky* with  
27 respect to deferring to legislative policy choices. The proper role for the  
28 court is to ensure that there is a satisfactory, although not necessarily perfect,

1 connection between such legislative judgments and important societal  
2 objectives. *Woollard*, 712 F.3d at 882.

3 • *Heller v. District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015),  
4 concerning D.C. firearm registration requirements,<sup>1</sup> had the same procedural  
5 posture that *Kachalsky* and *Woollard* had, and an analogous conflict of  
6 evidence and outcome. Not only did the *Heller* Court affirm the lower  
7 court's ruling granting a defense motion for summary judgment about the  
8 right to keep and bear arms, despite conflicting expert-witness evidence,  
9 because "the District ha[d] adduced *substantial evidence*" of the efficacy of  
10 the laws. *Id.* at 277-78 (emphasis added). Also the *Heller* Court affirmed the  
11 lower court's admission into evidence of challenged expert reports. *Id.* at  
12 267-72.

13 • Finally, *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), concerning  
14 Maryland's assault weapons law, had the same procedural posture that the  
15 first three cases had, and an analogous conflict of evidence and outcome. In  
16 *Kolbe*, both the plaintiffs and the government defendants proffered and relied  
17 on expert-witness opinions, on such topics as the ubiquity or rarity of assault  
18 weapons, relevant to the constitutionality of the act. *See, e.g.*, 849 F.3d at  
19 124 & n.3 (discussing defense expert-witness evidence), 155 (Traxler,  
20 Niemeyer, Shedd, and Agee, JJ., dissenting; discussing plaintiffs' expert-  
21 witness evidence). The trial court granted summary judgment for the defense  
22 (*id.* at 120); and the en banc Fourth Circuit affirmed that ruling (*id.* at 149).

23 Furthermore, as far as Defendant is aware, no federal appellate court has reversed a  
24 trial court ruling granting a motion for summary judgment about whether a  
25 government regulation violated the Second Amendment, because the evidence in  
26 the record included conflicting evidence related to the merits of the dispute.

27 <sup>1</sup> This case has the same name as—but is *not*—the landmark U.S. Supreme  
28 Court case concerning a District of Columbia ordinance regarding people's keeping  
of operable handguns inside their own homes.

1 In the present case, the conflicting expert opinions address the part of the  
 2 reasonable-fit analysis regarding whether there is sufficient evidence of the  
 3 beneficial effects of California's open-carry laws, "reasonably believed to be  
 4 relevant[,] to substantiate [California's] important interests" in bolstering public  
 5 safety and minimizing firearm violence. *See Fyock v. Sunnyvale*, 779 F.3d 991,  
 6 1000 (9th Cir. 2015) (adjudicating an application for a preliminary injunction),  
 7 quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986). As just  
 8 shown, this Court can conduct that reasonable-fit analysis and reach an affirmative  
 9 determination, despite conflicting expert evidence. The Court should conclude that  
 10 Defendant deserves to have this case resolved favorably to the defense by summary  
 11 judgment.

12 Dated: November 13, 2017

Respectfully submitted,

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