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9

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
12
13

14 **VIRGINIA DUNCAN, et al.,**

15 Plaintiffs,
16

17 **v.**

18 **XAVIER BECERRA, in his official**
19 **capacity as Attorney General of the**
State of California; et al.,

20 Defendants.
21
22

17-cv-1017-BEN-JLB

**DECLARATION OF PROFESSOR
JOHN J. DONOHUE IN SUPPORT
OF DEFENDANT XAVIER
BECERRA'S OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Date: June 13, 2017
Time: 10:00 a.m.
Dept: 5A
Judge: Hon. Roger T. Benitez
Action Filed: May 17, 2017

DECLARATION OF PROFESSOR JOHN J. DONOHUE

BACKGROUND AND QUALIFICATIONS

1. I, John J. Donohue, am the C. Wendell and Edith M. Carlsmith Professor of Law at Stanford Law School. After earning a law degree from Harvard and a Ph.D. in economics from Yale, I have been a member of the legal academy since 1986. I have previously held tenured positions as a chaired professor at both Yale Law School and Northwestern Law School. I have also been a visiting professor at a number of prominent law schools, including Harvard, Yale, the University of Chicago, Cornell, the University of Virginia, Oxford, Toon University (Tokyo), St. Gallens (Switzerland), and Renmin University (Beijing).

2. For a number of years, I have been teaching at Stanford a course on empirical law and economics issues involving crime and criminal justice, and I have previously taught similar courses at Yale Law School, Tel Aviv University Law School, the Gerzensee Study Center in Switzerland, and St. Gallen University School of Law in Switzerland. I have consistently taught courses on law and statistics for two decades.

3. I am a Research Associate of the National Bureau of Economic Research, and a member of the American Academy of Arts and Sciences. I was a Fellow at the Center for Advanced Studies in Behavioral Sciences in 2000-01, and served as the co-editor (handling empirical articles) of the *American Law and Economics Review* for six years. I have also served as the President of the American Law and Economics Association and as Co-President of the Society of Empirical Legal Studies.

4. I am also a member of the Committee on Law and Justice of the National Research Council ("NRC"), which "reviews, synthesizes, and proposes research related to crime, law enforcement, and the administration of justice, and provides an intellectual resource for federal agencies and private groups." (See

1 <http://www7.national-academies.org/claj/> online for more information about the
2 NRC.)

3 5. I filed an expert declaration in each of two cases involving a National
4 Rifle Association (“NRA”) challenge to city restrictions on the possession of large-
5 capacity magazines: *Fyock v. City of Sunnyvale*, United States District Court (N.D.
6 Cal.), January 2014; *Herrera v. San Francisco*, United States District Court (N.D.
7 Cal.), January 2014.

8 6. I also filed an expert declaration in a case involving a challenge by NRA
9 to Maryland’s restrictions on assault weapons and large-capacity magazines: *Tardy*
10 *v. O’Malley*, United States District Court (District of Maryland), February 2014.

11 7. In all these cases, the relevant gun regulations have (ultimately) been
12 sustained in the relevant federal appellate courts.

13 8. I also just filed (June 1, 2017) an expert declaration in a case involving a
14 challenge by NRA to California’s restrictions on carrying of weapons in public:
15 *Flanagan v. Becerra*, United States District Court (C.D. Cal.), Case No. 2:16-cv-
16 06164-JAK-AS.

17 SUMMARY OF CONCLUSIONS

18 9. It is a sound, evidenced-based, and longstanding harm-reducing strategy
19 for governments to place constraints on the harm that weapons can inflict.
20 Restrictions on the size of large-capacity magazines (LCMs) sit comfortably in this
21 appropriate regulatory approach, and can be expected to reduce deaths and injury
22 from gun violence.

23 10. The LCM ban is well-tailored to limit the behavior of criminals engaging
24 in the most dangerous forms of violent criminal behavior, and at the same time is
25 likely to have little or no impact on the defensive capabilities of law-abiding
26 citizens.

27 11. Over the last few decades, the number of households owning firearms has
28 been declining, currently down to about 31 percent of Americans households. At

1 the same time, the growth in gun purchases reflects the highly concentrated rate of
2 ownership with 20 percent of gunowners now owning 60 percent of the nation's
3 firearms. While there is far less evidence on ownership of large-capacity
4 magazines, one would expect the ownership of such products to be at least as
5 concentrated as gun ownership.

6 DISCUSSION

7 12. A discussion of the social science literature concerning gun ownership
8 rates must begin with the General Social Science Survey (GSS), which is an annual
9 survey conducted by the National Opinion Research Center, headquartered at the
10 University of Chicago. The GSS is widely regarded by social science researchers
11 as the most reliable indicator of national social trends, in part because of its
12 professional implementation of face-to-face interviews using a very large sample
13 size (the latest GSS data comes from 2,867 respondents versus roughly 1000 in a
14 typical telephone survey) with a high response rate (always in excess of 70 percent
15 versus telephone survey responses which have fallen below 10 percent in recent
16 surveys). See Pew Research Center, "Assessing the Representativeness of Public
17 Opinion Surveys," (May 15, 2012); [http://www.people-](http://www.people-press.org/2012/05/15/assessing-the-representativeness-of-public-opinion-surveys/)
18 [press.org/2012/05/15/assessing-the-representativeness-of-public-opinion-surveys/](http://www.people-press.org/2012/05/15/assessing-the-representativeness-of-public-opinion-surveys/).

19 13. GSS data from 2016, the most recent year that data is available, states
20 that 30.8% of American households have at least one gun, and that 20.5% of adults
21 personally own a gun. See Donohue & Rabbani, "Recent Trends in American Gun
22 Prevalence," (attached as Exhibit B). A carefully executed 2015 national survey
23 showed that 34% of households owned guns, and that ownership of private firearms
24 is highly concentrated among a small percentage of gun owners.¹

25
26
27 ¹ Azrael et al., "The Stock and Flow of US Firearms: Results from the 2015
28 National Firearms Survey," Russell Sage Foundation J. Soc. Sci., forthcoming
(2017) (attached as Exhibit C).

1 14. This is a considerable drop from the approximately 50% of United States
 2 households with one or more guns in the late 1970s, as reflected in GSS surveys.
 3 See Donohue & Rabbani, *supra*. Other national surveys show similar results, such
 4 as research by the Pew Research Center and the National Behavioral Risk Factor
 5 Surveillance System. These studies consistently find a persistent decline in
 6 household gun ownership over the past several decades. A recent report from the
 7 Pew Research Center states:

8 The Pew Research Center has tracked gun ownership since 1993, and our
 9 surveys largely confirm the General Social Survey trend. In our December
 10 1993 survey, 45% reported having a gun in their household; in early 1994, the
 11 GSS found 44% saying they had a gun in their home. A January 2013 Pew
 12 Research Center survey found 33% saying they had a gun, rifle or pistol in
 their home, as did 34% in the 2012 wave of the General Social Survey.²

13 15. While the GSS in 2016 put the percentage of American households with
 14 guns at less than 31%, the most recent Gallup survey found that 39% of American
 15 adults live in a household that contains a gun, and 29% personally own one. There
 16 is no consensus about why Gallup's estimates are somewhat higher than those from
 17 the above sources, although it should be noted that the Gallup polls are far smaller
 18 surveys based on less reliable telephone interviews with dramatically lower
 19 response rates than the GSS. Nonetheless, every survey of gun ownership
 20 conducted over time—including Gallup—shows that the percentage of household
 21 with guns today is lower than it was two decades ago.

22 16. The evidence that gun ownership is concentrated is strong and
 23 uncontradicted. Researchers analyzing the results of a 2015 national survey found
 24 that 8% of individual gun owners reported owning ten or more firearms—
 25 collectively accounting for 39% of the American gun stock—and that the 20% of

26
 27 ² [<http://www.people-press.org/2013/03/12/section-3-gun-ownership-trends-and-demographics>.]
 28

1 gun owners who owned the most guns collectively possessed about 60% of the
2 nation's guns.³ A decade earlier, researchers found a similar pattern: a 2004 survey
3 indicated that 48% of gun owners possessed four or more guns and that the top 20%
4 of firearms owners possessed 65% of all firearms.⁴

5 17. The FBI publishes records of the number of background checks
6 requested, and such background checks are often initiated pursuant to a desired
7 purchase of firearms. With only a couple of exceptions, the trend has been for the
8 number of background checks conducted each year to grow every year.⁵ Gun
9 industry trade groups cite increased background checks and an increase in
10 collections of the federal excise taxes collected on the sale of firearms and
11 ammunition as reflecting strong demand for firearms.⁶

12 18. Because reliable social science data shows that the number of households
13 that own guns has likely dropped in recent decades, and certainly has not grown, it
14 seems most likely that robust gun sales can be attributed not to increasingly broad
15 gun ownership but instead largely to purchases of guns by members of households
16 that previously owned guns.

17 19. I am not aware of any current social science research providing an
18 estimate for the number of American households that own large-capacity magazines
19 or LCMs (defined as an ammunition feeding device with the capacity to hold more
20 than 10 rounds of ammunition) or for the number of LCMs in private hands in
21 America.

22 ³ See Azrael et al., *supra*.

23 ⁴ Hepburn et al., "The US Gun Stock: Results from the 2004 National
24 Firearms Survey," *Injury Prevention* 2007;13:15–19.

25 ⁵ See National Instant Criminal Background Check System (NICS) Firearm
26 Checks: Month/Year 2017, available at https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year.pdf/view.

27 ⁶ See, e.g., NRA-ILA, "The Myth Of "Declining" Gun Ownership," (Jul. 13,
28 2016), available at <http://dailycaller.com/2016/07/13/the-myth-of-declining-gun-ownership/>.

20. It is reasonable to assume that consumer demand for large-capacity magazines is broadly similar to demand for firearms generally. If anything, one would expect the specialized product of a large-capacity magazine to appeal to only a subset of gun owners. Accordingly, LCM ownership by household is likely to be at least as concentrated, with increased numbers of LCMs held by a declining share of households. This would be consistent with a January 2013 New York Times/CBS News poll of 1,110 adults nationwide showing that nearly two-thirds of Americans favored a ban on large-capacity magazines.⁷

21. A review of the resolution of mass shootings in the U.S. suggests that bans on large capacity magazines can help save lives by forcing mass shooters to pause and reload ammunition. Citizens have frequently taken advantage of a perpetrator stopping to reload his weapon to tackle him or otherwise subdue him in at least 20 separate shootings in the United States since 1991, notably including the December 7th, 1993 shooting of passengers on a Long Island Railroad car,⁸ the October 29th, 1994 shooting near the grounds of the White House,⁹ and the January 8th, 2011 shooting in Tucson, AZ that targeted U.S. Congresswoman Gabby Giffords.¹⁰ In many other incidents, targeted victims were able to escape while a shooter reloaded. Perhaps the most vivid illustration of this benefit was seen when

⁷ http://www.nytimes.com/2013/02/19/us/politics/lawmakers-look-at-ban-on-high-capacity-gun-magazines.html?_r=1&.

⁸ "DEATH ON THE L.I.R.R.: The Rampage; Gunman in a Train Aisle Passes Out Death," *The New York Times*, December 9, 1993 - <http://www.nytimes.com/1993/12/09/nyregion/death-on-the-lirr-the-rampage-gunman-in-a-train-aisle-passes-out-death.html> (9-millimeter pistol, 15 round magazine).

⁹ "Public Report of the White House Security Review," Department of the Treasury, 1995 - <http://www.fas.org/irp/agency/ustreas/ussst/t1pubrpt.html> (Chinese-made SKS semiautomatic rifle, 30 round magazine).

¹⁰ "Crowd members took gunman down," *Los Angeles Times*, January 9, 2011 - <http://articles.latimes.com/2011/jan/09/nation/la-na-arizona-shooting-heroes-20110110> (9mm Glock handgun, 30 round extended magazine).

1 11 children at Sandy Hook Elementary School were able to escape while Adam
2 Lanza reloaded his 30 round LCM.¹¹

3 22. The complaint in this case makes the following wholly untenable
4 argument against the LCM ban:

5 Banning magazines over ten rounds is no more likely to reduce criminal abuse
6 of guns than banning high horsepower engines is likely to reduce criminal
7 abuse of automobiles. To the contrary, the only thing the ban ensures is that a
8 criminal unlawfully carrying a firearm with a magazine over ten rounds will
have a (potentially devastating) advantage over his lawabiding victim.

9 23. This unsupported argument is incorrect for a host of reasons. First, as I
10 just mentioned, Adam Lanza was able to kill more (a total of 20 children and six
11 adults) because he was using lawfully purchased weapons equipped with a 30 round
12 LCM. It may well be that Lanza would have criminally abused the guns that his
13 mother had made available to him even if he had not had an LCM, but there is
14 every reason to believe that he would have killed fewer individuals if he had to
15 persistently reload during his murderous rampage. In other words, the LCM ban is
16 designed precisely to save lives and by raising the costs for killers, the LCM ban
17 would be expected to advance that goal.

18 24. Second, the quoted argument conjures a situation that a law-abiding
19 citizen will be overwhelmed by a criminal who carries a firearm with an LCM. But
20 the federal assault weapons ban – which did not contain a ban on possession of
21 LCM, and thus would be less effective than the more complete California
22 prohibition – led to increases in the price of LCM's. Therefore, California's LCM
23 ban should elevate the cost that a criminal will need to pay to procure an LCM,
24 which means that fewer criminals will be equipped with LCM's (under standard

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26 ¹¹ "Legislative Leaders Say Bipartisan Agreement Could Yield Nation's
27 Strongest Gun-Control Bill," *The Hartford Courant*, April 1, 2013. -
28 <http://www.courant.com/news/politics/hc-gun-deal-newtown-0413-20130401,0,7341094.story> (Bushmaster .223 caliber rifle, high capacity 30 round magazine).

1 economic principles). In other words, fewer law-abiding individuals will be
2 confronted by a criminal with an LCM because of the LCM ban.

3 25. Third, most mass killings by Americans involve the use of guns, and
4 many of these killers – Adam Lanza (Newtown), James Holmes (the Batman movie
5 killer in Aurora, Colorado killed 12 and injured 70), Jared Loughner (shooting
6 Congresswoman Gabbie Giffords) to name just a few – were drawn to a vision of
7 killing large number of individuals in a certain way that included the use of LCM's.
8 On November 5, 2009, Nidal Hassan killed 13 and injured more than 30 others
9 at Fort Hood, near Killeen, Texas. When Hasan purchased his killing arsenal, he
10 asked for "the most technologically advanced weapon on the market and the one
11 with the highest standard magazine capacity."¹² This is exactly what one would do
12 if one wanted to simply kill as many people as possible in the shortest amount of
13 time. If one is serious about stopping mass killings, a good first step is to deprive
14 such killers of their preferred killing approaches.¹³

15 26. In this regard, consider what happened in Australia after a crazed gunman
16 killed 35 people in Port Arthur, Tasmania in 1996. The Australian federal
17 government persuaded all states and territories to implement tough new gun control
18 laws. Under the National Firearms Agreement (NFA), firearms legislation was
19 tightened throughout the country, national registration of guns was imposed, and it
20

21 ¹² Scott Huddleston, "Hasan Sought Gun with 'High Magazine Capacity,'"
22 October 21, 2010, <http://blog.mysanantonio.com/military/2010/10/hasan-sought-gun-with-high-magazine-capacity/>.

23 ¹³ Anders Breivik who committed mass murder in Norway was aided in his
24 efforts because of lax rules concerning LCM's in the United States. Breivik was
25 very unhappy that he could not get the large-capacity magazines that he wanted to
26 use since they were banned in Europe. In his manifesto, he wrote about his
27 attempts to legally buy weapons, stating, "I envy our European American brothers
28 as the gun laws in Europe sucks ass in comparison." Under the section titled,
"December and January - Rifle/gun accessories purchased," Breivik wrote that he
purchased ten 30-round ammunition magazines from a U.S. supplier who mailed
the devices to him. Stephanie Condon, "Norway Massacre Spurs Calls For New
U.S. Gun Laws," CBS News, July 28, 2011,
<http://www.cbsnews.com/news/norway-massacre-spurs-calls-for-new-us-gun-laws/>.

1 became illegal to hold certain long guns that might be used in mass shootings. The
 2 effect was that both while there were 13 mass shootings in Australia during the
 3 period 1979–96 (a per capita rate that was higher than in the U.S. at the time), there
 4 have been none in the 21 years since (while the problem of mass shootings in the
 5 United States is getting worse¹⁴).

6 27. The important point of the Australian experience for present purposes is
 7 that by depriving disturbed individuals of the vehicle by which they imagined they
 8 would unleash their murderous impulses, Australia showed that mass shootings can
 9 be dramatically reduced – even if guns are still widely available, as they remain in
 10 Australia.

11 28. In the face of the clear evidence from around the United States and the
 12 world, the NRA has provided expert statements that conjure a mythical old or
 13 disabled homeowner who is only able to thwart a violent home invasion by having
 14 enough bullets to blast enough shots without reloading. In this one-sided analysis,
 15 the only effect of the LCM ban is that it prevents a law-abiding citizen from
 16 protecting his or her family from criminal attack. The NRA experts opine that
 17 criminals rarely need to shoot more than a bullet or two, so there is no real benefit
 18 of the ban on LCM's, while the old lady or disabled person quaking with the
 19 blasting gun in her shaking hands will protect herself and her loved ones if she can
 20 only get off 30 plus shots without re-loading. These unsupported assertions are
 21 either irrelevant or have no empirical support.

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 24 ¹⁴ Tristan Bridges and Tara Leigh Tober, “Mass shootings in the US are on the rise. What
 25 makes American men so dangerous?” *The Society Pages*, December 31, 2015,
 26 [https://thesocietypages.org/socimages/2015/12/31/mass-shootings-in-the-u-s-what-makes-so-](https://thesocietypages.org/socimages/2015/12/31/mass-shootings-in-the-u-s-what-makes-so-many-american-men-dangerous/)
 27 [many-american-men-dangerous/](https://thesocietypages.org/socimages/2015/12/31/mass-shootings-in-the-u-s-what-makes-so-many-american-men-dangerous/); Dan Diamond, “Mass Shootings Are Rising. Here's How To
 28 Stop Them,” *Forbes*, June 18, 2015,
[https://www.forbes.com/sites/dandiamond/2015/06/18/charleston-deaths-are-an-american-](https://www.forbes.com/sites/dandiamond/2015/06/18/charleston-deaths-are-an-american-tragedy-mass-shootings-are-rising/#12bd32ef787b)
[tragedy-mass-shootings-are-rising/#12bd32ef787b](https://www.forbes.com/sites/dandiamond/2015/06/18/charleston-deaths-are-an-american-tragedy-mass-shootings-are-rising/#12bd32ef787b).

1 29. First, the notion that safety will be enhanced if someone with quaking
2 hands that prevent them from hitting their target in the first ten shots is able to spray
3 additional bullets is ludicrous. Bullets from modern guns with large-capacity
4 magazines can easily penetrate walls, which means that poorly directed shooting
5 will pose a significant threat to other family members and neighbors.

6 30. Second, it is irrelevant if most times that criminals use guns, they don't
7 fire their guns more than ten times. The LCM ban is designed to address one
8 particularly societally damaging problem – that of mass shootings. By definition,
9 these incidents will involve firing of many bullets, and therefore they are an
10 appropriate target of government concern and regulation.

11 31. Third, it is worth noting that the vast majority of the time that an
12 individual in the United States is confronted by violent crime, they do not use a gun
13 for self-defense. Specifically, over the period from 2007-2011 when roughly 6
14 million violent crimes occurred each year, data from the National Crime
15 Victimization Survey shows that the victim was not able to defend with a gun in
16 99.2 percent of these incidents – this in a country with 300 million guns in civilian
17 hands.

18 32. Fourth, even if a gun were available for self-defense use, the need for a
19 LCM is slight according to decades of statements by NRA affiliated and pro-gun
20 experts. For example John Lott has repeatedly made the following claims:

- 21 • based on “about 15 national survey[s] ... about 98 percent of [defensive
22 gun uses] involve people brandishing a gun and not using them.”¹⁵
- 23 • “When victims are attacked, 98 percent of the time merely brandishing a
24 gun is enough to cause the criminal to stop his attack.”¹⁶

25 ¹⁵ Statements by John R. Lott, Jr. on Defensive Gun Brandishing Posted by
26 Tim Lambert on October 17, 2002
27 <http://scienceblogs.com/deltoid/2002/10/17/lottbrandish/>. Page 41, State of
28 Nebraska, Committee on Judiciary LB465, February 6, 1997, statement of John
Lott, Transcript prepared by the Clerk of the Legislature, Transcriber's Office.

¹⁶ John R. Lott, Jr., Packing Protection, Letters, *Chicago Sun-Times*, April
(continued...)

- “Considerable evidence supports the notion that permitted handguns deter criminals. In 98% of the cases, people simply brandish weapons to stop attacks.”¹⁷

33. As for Gary Kleck, the NRA expert in this case, we hear a similar albeit less precise claim: “More commonly, guns are merely pointed at another person, or perhaps only referred to (“I’ve got a gun”) or displayed, and this is sufficient to accomplish the ends of the user, whether criminal or non- criminal.”¹⁸

34. Gun Owners of America cite published survey results on gun brandishing by Gary Kleck for the following statement about gun brandishing: “Of the ... times citizens use their guns to defend themselves every year, the overwhelming majority merely brandish their gun or fire a warning shot to scare off their attackers.”¹⁹

35. In other words, a gun is used in defense less than 1 percent of the time when someone is attacked in the United States. In the “overwhelming majority” of cases (according to the NRA’s expert) in the small percentage of the time that a gun is used, brandishing is all that is needed for defense. One would imagine that the vast majority of the times that the gun is fired in this increasingly small subset, it will be fired less than 10 times.

36. Should there be a future case of a law-abiding citizen who 1) has a gun and 2) the need and opportunity to use it in self-defense, and 3) the desire to fire more than 10 rounds, the individual can either re-load the defensive weapon by inserting a new clip or by using a second weapon, which an increasingly large

(...continued)
30, 1997, Pg. 52.

¹⁷ John R. Lott Jr., “Unraveling Some Brady Law Falsehoods,” *Los Angeles Times*, July 2, 1997.

¹⁸ Guns and Self-Defense by Gary Kleck, Ph.D.,
<http://www.pulpless.com/gunclock/kleck2.html>.

¹⁹ Gary Kleck and Marc Gertz, “Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun,” 86(1) *Journal of Criminal Law and Criminology* 150-187 (Fall 1995).
<https://pdfs.semanticscholar.org/91da/afbf92d021f06426764e800a4e639a1c1116.pdf>.

1 number of gun owners currently possess. This implies that the LCM ban is well-
2 tailored to limit the behavior of criminals engaging in the most dangerous forms of
3 violent criminal behavior, and at the same time is likely to have little or no impact
4 on the defensive capabilities of law-abiding citizens.

5
6 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
7 is true and correct.
8

9 Executed on: June 5, 2017
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13 JOHN J. DONOHUE III
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