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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MICHELLE FLANAGAN, SAMUEL GOLDEN, DOMINIC NARDONE, JACOB PERKIO, and THE CALIFORNIA RIFLE AND PISTOL ASSOCIATION,

Plaintiffs,

v.

CALIFORNIA ATTORNEY GENERAL XAVIER BECERRA, in his official capacity as Attorney General of the State of California, and LOS ANGELES COUNTY SHERIFF JAMES MCDONNELL, in his official capacity as Sheriff of the County of Los Angeles,

Defendants.

2:16-cv-06164-JAK-AS

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: November 6, 2017
Time: 8:30 a.m.
Courtroom: 10B
Judge: Hon. John A. Kronstadt
Action Filed: August 17, 2016

Defendant Xavier Becerra, Attorney General of the State of California, sued in his official capacity ("Defendant"), submits this reply in support of his pending defensive motion for summary judgment (Dkt. 45 herein) adverse to Plaintiffs Michelle Flanagan, Samuel Golden, Dominic Nardone, Jacob Perkio, and the California Rifle and Pistol Association ("Plaintiffs").

INTRODUCTION

The four summary-judgment briefs already filed in this case fully explore the different conceptions that Plaintiffs and Defendant have about the scope of the Second Amendment to the U.S. Constitution, with respect to the open carry of firearms in public places. Plaintiffs contend that California's open-carry statutes—in conjunction with California's concealed-carry statutes, as administered by county sheriffs and city police chiefs—in effect completely prohibit the carrying of a firearm in public places in counties of more than 200,000 people, thereby destroying the core of the right guaranteed by Second Amendment. On the contrary, Defendant has demonstrated that, as historically understood, the Second Amendment does not protect any general right to the open carrying of a firearm in public places outside the home in the absence of a specific need.

Defendant will not further brief these overarching issues. Instead, Defendant will focus on and respond to the two categories of Plaintiffs' specific evidence and points:

1. Plaintiffs' inaccurate contentions about the true history of the regulation of open carry of firearms in England and the United States;

2. Plaintiffs' ineffectual attempts to cast doubt upon the reasonableness of the fit between California's open-carry statutes and the governmental and public interest in maintaining safe public spaces.

Because Plaintiffs have not traversed Defendant's presentation showing that California's open-carry statutes do *not* burden the Second Amendment right, and *do* reasonably advance important public-safety goals, this Court should grant summary

judgment in favor of Defendant and adverse to Plaintiffs.

ARGUMENT

I. PLAINTIFFS DO NOT REBUT DEFENDANT'S SHOWING THAT THE SECOND AMENDMENT DOES *NOT* PROTECT A GENERAL RIGHT TO CARRY A FIREARM OPENLY IN PUBLIC

Much of Plaintiffs' opposition brief's ("POB") discussion of the historical understanding of the Second Amendment repeats what is in Plaintiffs' opening brief on their offensive summary judgment motion (Dkt. 48). Defendant already opposed that presentation (Dkt. 55), and will not restate the counterpoints here.

Plaintiffs have made some new arguments attempting to show that law-abiding Americans historically have had an unfettered right to carry firearms in public. But none of these new counter-arguments enervate Defendant's well-documented case that, on the contrary, throughout U.S. history, there has been no general right to carry a firearm in public, especially in urban areas, without a specific need.

The *first* new counter-argument is that in the early years of the United States the Second Amendment undeniably protected people's right to muster in state militias outdoors, in public, and therefore must have protected all public carry of firearms. POB at 4. However, state militia drilling, by definition, involved groups of citizens under public oversight, not single people going about their own individual business. Any historical understanding of the significance of militia activities does not relate to historical conceptions of any general right to carry a firearm in public.

Second, Plaintiffs offer thin accounts about three Founding Fathers to paint a misleading picture of public-carry rights in the Founding Era of the United States. POB at 6-7. The reference to *George Washington*'s alleged public carrying appears in Benjamin Ogle Tayloe's 1872 memoirs, *In Memoriam*,[1] recounting an alleged incident from approximately 90 years earlier, around 1783. *Id.* at 95. The story is

[1] *See* https://books.google.com/books?id=TpMEAAAAYAAJ [last visited Oct. 15, 2017].

that Washington once traveled by horseback on a Virginia private road "that lay through the farm of a desperado," and Washington had pistols holstered to the horse's saddle. *Id.* at 95. The most pertinent detail is that Washington was carrying a firearm *not* in public, but on a *private* road. *Id.* Moreover, the story, even if credible, has no lasting significance, because Virginia adopted the restrictive Statute of Northampton in 1786, three years after this alleged incident. 1786 Va. Laws 3, ch. 21. *Thomas Jefferson*'s advice to a nephew to carry a gun "o[n] your walks" was just a physical-health or exercise tip, not advocacy of public carry. *See* Don B. Kates, Jr. *Handgun Prohibitions and the Original Meaning of the Second Amendment* , 82 Mich. L. Rev. 204, 229 (Nov. 1983) (giving complete quote, showing context). Jefferson's own words on any public-carry right reflect a more limited view, specifically that a "free man" had a right to use firearms, but only "*in his own lands*." *Id.* at 229 (quoting model state constitution that Jefferson drafted around 1776; emphasis added). And as Georgia Gov. Nathan Deal recently discovered and recalled, Jefferson, as one of the administrators of the University of Virginia, a public institution, forbade students to "*keep* or use weapons or arms of any kind. . ." on campus. "Veto Number 9 (HB 859)," in *2016 Session of the Georgia General Assembly General Legislation – Veto Messages* (emphasis added).[2] Finally, the *John Adams* quote from the trial about the Boston Massacre is itself a quote from the ancient Hawkins law treatise, authorizing a person to use a firearm for self-defense against "dangerous rioters," i.e., in exigent circumstances, and *not* condoning or even addressing public carry without specific need. *The Works of John Adams, Second President of the United States [Etc.], Vol. II*, at 532 (1850).[3]

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[2] *See* https://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/press_release/2016%20veto%20statement%20memos.pdf [last visited Oct. 10, 2017].

[3] *See* https://books.google.com/books?id=-JQKAQAAIAA [last visited Oct. 10, 2017].

The *third* new counter-argument is that some locales in colonial America required some people to carry firearms in public places in certain circumstances, such as in churches. POB at 7. Of course, the existence of laws *requiring* people to carry guns sometimes does not prove anything about whether people were generally entitled to carry guns in public *by choice*. Furthermore, Plaintiffs fail to provide the full context. For example, South Carolina's Security Act of 1739 required adult *white* men to carry their firearms to church on Sundays. Robin Santos Doak, *Slave Rebellions* 35 (2006).[4] The law reflected white people's fear of slave rebellions, which, it was believed, were most likely to occur on Sundays, when slaves generally were allowed some free time. *Id.* at 34-35. (Slaves did not have their own guns, of course, but potentially could steal white people's guns if left unguarded while the owners were at church.) In short, these laws provide no historical support for Plaintiffs' claims of an unfettered right of public carry.

Plaintiffs' *fourth* new argument is that the Statute of Northampton permitted people to carry firearms in public unless such carrying actually terrorized other people. POB at 8. However, the Ninth Circuit already has (convincingly) rejected that misinterpretation of that law. *Peruta v. County of San Diego*, 824 F.3d 919, 932 (9th Cir. 2016) (en banc) (citing several law sources describing that Statute of Northampton applied to covert as well as overt carrying of firearms). Likewise, Plaintiffs are incorrect in claiming that the influential 1836 Massachusetts version of the Statute of Northampton was enforceable only if another person complained of being terrorized by the open carrying. The respected Massachusetts jurist Peter Oxenbridge Thacher published a contemporaneous (1837) jury instruction interpreting that law as forbidding public carry "without reasonable cause to apprehend an assault or violence to his person, family, or property," without mention of an element of terrorizing other people. Quoted in Saul Cornell, *The*

[4] *See* https://books.google.com/books?id=6iIpWR4gBzUC [last visited Oct. 10, 2017].

Right to Bear Arms, in The Oxford Handbook of the U.S. Constitution 746 (Mark Tushnet, et al, eds., 2015). Plaintiffs' counter-argument also neglects that law-enforcement officers, such as justices of the peace, remained empowered on their own to enforce the public-carry laws. Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 L. & Contemporary Problems 11, 31-32 & n.146 (2017).

II. PLAINTIFFS HAVE FAILED TO REBUT DEFENDANT'S SHOWING, VIA EXPERT WITNESSES, THAT CALIFORNIA'S OPEN-CARRY STATUTES REASONABLY ADVANCE THE IMPORTANT INTEREST IN PUBLIC SAFETY

As this Court has held in the context of cross-motions for summary judgment on a Second Amendment challenge to California's *concealed*-carry laws:

> [T]o prevail on their motion for summary judgment, Defendants need not prove that California's approach . . . is more empirically sound, that Plaintiff's expert is incorrect, or that California's approach is otherwise the 'correct' one. Rather, Defendants need only show a sufficient 'fit'. . . . The Legislature's decision in balancing or addressing competing views will be upheld where . . . it is substantially related to the important objectives described.

Birdt v. Beck, No. LACV1008377JAKJEMX, 2012 WL 12918365, at *6 (C.D. Cal. Jan. 13, 2012). In previous briefing (Dkt. 45-1 at 19-25), Defendant has made the pertinent showing that there is a reasonable fit between California's open-carry statutes and their objectives of bolstering public safety and minimizing firearm violence in public. Defendant made this showing via, primarily, two supporting expert opinions, which Plaintiffs counter with three rebuttal expert opinions, but Plaintiffs do not thereby cast sufficient doubt upon the reasonableness of the fit.

A. Plaintiffs Fail to Rebut the Testimony of Stanford Law Professor John Donohue

The first defense expert witness is John Donohue, a Stanford Law School professor who specializes in empirical research about the real-world effects of laws and regulations, particularly firearm statutes. Donohue presented his new academic study, which analyzes approximately 40 years of U.S. crime data according to two different statistical methodologies, and processed through multiple statistical

models, and which concludes that permitting people to carry concealed firearms in public leads to, on average, a double-digit increase in the violent-crime rate, and in particular the rate of aggravated assaults, after ten years. Another academic paper, by Prof. Michael Siegel of the Boston University School of Public Health, also submitted with Defendant's opening-round summary-judgment papers, shows that the murder rate increases significantly, as well.

Opposing summary judgment for the defense, Plaintiffs disparage Donohue's scholarship as "irrelevant," "obviously unscholarly," "shoddy," "undeniably biased," etc. (POB at 22), but no substance backs up the string of harsh adjectives. Plaintiffs do not address the Siegel study.

Plaintiffs' *first* critique of Donohue's work is that his data set concerns concealed carry, not open carry. *See* POB at 21-22. However, as Plaintiffs know, and as Donohue explained, the reason that *all* scholars' empirical work in this area of inquiry focuses on concealed carry—which is obviously closely related to open carry—is that there is sufficient data about concealed carry and very little data about open carry. Decl. of Jonathan M. Eisenberg Regarding Def.'s Reply in Support of Mtn. for Summ J. ("Eisenberg Decl."), Exh. 1 at 81-83. Open carry in urban areas is a new phenomenon in the United States.[5] While Plaintiffs fault Donohue for making inferences about open carry from the research findings about concealed carry (POB at 22), Plaintiffs do not rebut any of those inferences—about the probable drain on law-enforcement resources, and the probable increase in the number of stolen firearms, etc. (Eisenberg Decl., Ex. 1 at 81-105).

For a *second* critique of Donohue's work, Plaintiffs cite the rebuttal report of Gary Kleck, a retired Florida State University professor. POB at 22. Yet Kleck's primary criticism of Donohue, for aggregating four categories of violent crime

[5] Team Trace, "What You Need to Know About Open Carry in America," *The Trace* (Jul. 18, 2016; updated Aug. 16, 2017) (https://www.thetrace.org/2016/07/rise-of-open-carry-explained/ [last visited Oct. 6, 2017].)

rather than breaking out each category individually (*see* Decl. of Sean A. Brady in Opp. to Mtn. for Summ J. ("Brady Decl."; Dkt. 57-1), Ex. 6 at 213-14), is wrong on the facts. In ongoing academic research reported in discovery in this case, Donohue *did* process the data for each individual crime—and the results remained the same, confirming the strong link between permissive concealed-carry statutes and large increases in rates of violent crimes. *See* Decl. of Jonathan M. Eisenberg in Support of Defendant's Mtn. for Summ J. ("Eisenberg Decl."), Ex. 1 at 114-16. The Siegel study further corroborates the link, specifically with respect to murder. Kleck's second opinion, that, because other studies of the same topic have reached different conclusions, Donohue's results are "unstable" (*see* Brady Decl., Ex. 6 at 218-19), is demonstrably false. For one, the Tomislav Kovandzic study that Kleck lauds as the best one on this topic found, just as Donohue did, that permissive concealed-carry laws lead to double-digit increases in rates of aggravated assault. Eisenberg Decl., Exh. 2 at 68-73.[6] For two, Kleck ignores Donohue's cogent discussions of errors in other, older, apparently contradictory studies, caused mostly by failing to account for the crack-cocaine epidemic in the late 1980s and early 1990s. *Id.*, Ex. 2 at 18-20. Kleck's third opinion, accusing Donohue of "missing the main point of right-to-carry laws," supposedly giving people chances to use firearms to defend themselves in public (*see* Brady Decl., Ex. 6 at 220), fails to mention that Donohue's study expressly acknowledges and analyzes the possibility of increases in so-called defensive gun uses in jurisdictions that permit widespread public carry. Decl. of Patty Li in Support of Def.'s Mtn. for Summ J. ("Li Decl.," Dkt. 45-1), Exh. 4 at 40-41; Eisenberg Decl., Exh. 1 at 66, 79-80.

Plaintiffs' *third* critique consists of a series of single-phrase criticisms followed by supposedly revealing cites to Donohue's deposition testimony, without

[6] The Kovandzic study, as published, erroneously misplaced a decimal point in a key figure, apparently misleading Kleck about the results; when corrected the study fully corroborates Donohue's findings. (See Donohue declaration, submitted herewith.)

elaboration or proof of these supposed failings. POB at 22. Hence the lead claim, that Donohue "misleadingly quotes various studies as supporting his conclusions when they do not" neglects to explain that Donohue noted that some of the scholars whose overall conclusions differed from Donohue's nonetheless had specific research findings that aligned with his. The next claim, that Donohue "relied on undeniably biased and problematic sources," is equally problematic. Donohue was candid that some of the data sets have flaws, but these data sets are the ones that all the scholars in this field have available and use. Eisenberg Decl., Ex. 1 at 18-25. Plaintiffs' final claim, that Donohue "ignore[d] relevant data about right to carry laws," also falls short, as Plaintiffs do not establish the relevance of any such data.

Perhaps most inexplicable is Plaintiffs' assertion that Donohue's "entire study" is fatally flawed because he "failed to control for" the alleged fact that many of the U.S. states studied have permitted *open* carry all along. POB at 22. But if open carry has been permitted all along, it is a *constant* that, by definition, cannot be controlled for; only (relevant) *variables* need to be controlled for. Avdhesh S. Jha, *Social Research Methods* at 82 (McGraw Hill Education (India) 2014).[7] In any event, Donohue carefully accounted for so-called "fixed effects," reflecting variations from jurisdiction to jurisdiction. Eisenberg Decl., Ex. 1 at 14-16.

B. Plaintiffs Fail to Rebut the Testimony of Former Covina Police Chief Kim Raney

The second defense expert witness is former Covina Police Chief Kim Raney, who had a distinguished 39-year law-enforcement career, including many years as a police officer on the beat, executive positions within a municipal police department, and leadership positions in statewide law-enforcement organizations. Li Decl., Ex. 10 at ¶¶ 2-13. Raney testified how even a single person in civilian clothing carrying a firearm in public alarms and concerns other people, leading to

[7] *See* https://books.google.com/books?id=7XPvAwAAQBA [last visited Oct. 9, 2017].

frantic telephone calls to police departments, which must respond quickly to a potentially deadly situation. Eisenberg Decl., Ex. 4 at 7-10.

Plaintiffs counter that Raney's opinions constitute only ill-informed speculation because he did not consult with academic researchers or other leaders in law enforcement. POB at 24. However, Plaintiffs cite no legal authority holding that expert witness qualified by real-world experience (as permitted by Federal Rule of Evidence 702) must consult with other experts before stating a valid opinion.

Plaintiffs also claim that Raney lacks relevant experience, because he never served in a jurisdiction that permitted open carry. Yet Guy Rossi, one of the rebuttal law-enforcement expert witnesses, served in a jurisdiction (New York) that is more restrictive than California regarding open carry.[8] More importantly, neither rebuttal expert's qualifications can compete with Raney's qualifications. Rossi retired from active law enforcement almost twenty years ago, at the rank of sergeant. Eisenberg Decl., Ex. 5 at 8-9. Rossi's expert report and deposition testimony contain various inconsistent or improbable statements regarding the impact of open carry on public safety. See *id.* at 10-29. At one point, Rossi testified that when a law-enforcement officer has an encounter with a civilian, the civilian's possession of a firearm does *not* affect the safety of the situation. *Id.* at 10. But Rossi subsequently testified, to the contrary, that when an officer assesses such a civilian, the presence of a weapon is "a very important factor. . ." *Id.* at 15. And Rossi assisted in the research and writing of an amicus brief to the Ninth Circuit, in the *Peruta* litigation, which describes how open carry inspires precisely the law-enforcement response that Raney discusses:

> When a civilian sees someone engaged in lawful open carry . . . he may call 911 and report "a man with gun." Such a report is likely to result in a swift and aggressive response by multiple police units. At the least, the response will be a tremendous waste of police time, and

[8] New York prohibits the open carrying of a loaded handgun in public; there are no open-carry licenses available statewide. *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 85-86 (2d Cir. 2012).

the worst, a mistake could lead to the shooting of an innocent civilian. Eisenberg Decl., Ex. 5 at 28-29; see id. at 19-20; Brady Decl., Ex. 7 at 256.

The experience of Plaintiffs' second rebuttal expert witness, former Weld County, Colorado, Sheriff John Cooke, gives him little basis to offer an informed opinion on how restrictions on open carry affect public safety in California. *See* Eisenberg Decl., Ex. 6 at 6-21. Cooke lacks experience with jurisdictions resembling Los Angeles County, or California as a whole, in terms of population density. *Id.* at 19. Cooke estimated that the largest town over which his sheriff's office had primary jurisdiction had a population of just 2,500-to-3,000 people. *Id.* at 6. And Cooke revealed deep-seated biases regarding firearms regulations by declaring that, because of personal disagreement, he would not enforce Colorado laws requiring background checks for firearms purchases and restricting the sale and possession of large-capacity magazines. *Id.* at 8-15, 21-22.[9]

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendant's opening papers on this motion for summary judgment, the Court should grant summary judgment for Defendant and adverse to Plaintiffs.

Dated: October 16, 2017

Respectfully submitted,

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[9] The rebuttal experts agree with some of Raney's conclusions about open carry's impact on public safety. Rossi testified that people often call for law-enforcement assistance when they see firearms carried openly. Eisenberg Decl., Ex. 5 at 16. Cooke acknowledged that open carry can complicate the law-enforcement response to certain types of violent crime. *Id.*, Ex. 6 at 16-17.