

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHELLE FLANAGAN, et al.,

Plaintiffs,

v.

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

Defendants.

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

**ORDER RULING ON PLAINTIFFS'
OBJECTIONS TO THE
DECLARATION OF P. PATTY LI
AND EVIDENCE SUBMITTED IN
SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT (DKT. 59)**

Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Summary Judgment came for a regularly noticed hearing before this Court on November 6, 2017. Plaintiffs, Michelle Flanagan, Samuel Golden, Dominic Nardone, Jacob Perkio, and The California Rifle & Pistol Association, timely lodged evidentiary objections to the declaration of P. Patty Li and evidence submitted in support of Defendant's Motion for Summary Judgment. The Court having considered the objections in the attached, Plaintiffs' Objections to Evidence and Declarations Submitted in Support of Defendants' Motion for Summary Judgment, hereby rules as indicated on each of the Plaintiff's objections.

OBJECTIONS TO DECLARATION OF P. PATTY LEE, See Exhibit 1 ¶ 8.

EVIDENCE OBJECTED TO	GROUND FOR OBJECTION	COURT'S RULING
<p>1. Exhibit 2 Professor John J. Donohue's Expert Witness Report ("Ex. 2") at ¶32: While the empirical literature discussed above has largely focused on the impact of laws allowing citizens to carry concealed guns, this literature can be used to make informed predictions about the likely impact of allowing citizens to carry arms openly.</p>	<p>Lacks foundation, confuses the issues, wastes time and presents cumulative evidence: There is no foundation for the assumption that the literature about concealed carry can be used to make predictions about open carry. FRE 403, 702, 703. 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.") In fact, declarant admits that there is a</p>	<p>Sustained</p>

1		distinction between open and	
2		concealed carry. Exhibit 3	
3		Deposition Transcript of John J.	
4		Donohue, Volume I (“Ex. 3”) at	
5		197: 14-16. He further testified,	
6		“any time I’m making a prediction	
7		or estimate, I could be wrong” Ex.	
8		3 at 220:12-18. The declarant has	
9		not proffered any preliminary	
10		evidence to lay the foundations	
11		that he attempted to research what	
12		open carry might be, as his	
13		research is solely based on	
14		concealed carry. FRE 702, 703.	
15			
16	2. Ex. 2 at ¶33: These	Conclusory: Declaration which	Sustained
17	facts suggest that open	sets forth only conclusions	
18	carry of guns would be	opinions, or ultimate facts is	
19	less socially desirable	insufficient. (<i>Kramer v Barnes</i>	
20	than concealed carry	91963) 212 Cal. App.2d 440, 446;	
21	since the latter at least	see also <i>Powell v Kleinman</i> (2007)	
22	has the prospect of	151 Cal. App. 4 th 112, 123 [“an	
23	deterrence since	expert’s opinion rendered without	
24	criminals cannot know	a reasoned explanation of why the	
25	who is carrying	underlying facts lead to the	
26	weapons.	ultimate conclusion has no	
27		evidentiary value because an	
28		expert opinion is worth no more	

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 fails to identify any factual evidence to show what his opinion is based on. (<i>Taliaferro v Taliaferro</i> (1962)203 Cal. App. 2d 649, 651; FRE 702, 703 [failure to state facts upon which opinion is based may warrant disregard of opinion, especially where it is self-serving]; <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 than the reasons and facts on which it is based”].)</p> <p>Speculative: The declarant does not present any evidence to show that open carry produces a net waste of resources. Because there is no evidence, the statement is speculative. FRE 702, 703. In fact, the declarant testified that he</p>	<p>Sustained</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>Sustained</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 <i>arguendo</i> 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	Overruled
22		study on concealed carry is not	
23		relevant to any material fact at	
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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	<p>carry. The declarant admits that he did no research about open carry, nor did he examine data from any state that allows open carry. Ex. 3 at 178:3-12. The declarant further testifies that everything he states about open carry is inferred from his work on concealed carry study. (Ex. 3 at 185:17-20). And about his study, he says “I didn’t focus on open carry in this paper.” (Ex. 3 at 179:5). Further, he is not aware of any research of open carry’s potential impacts on criminality [Ex. 3 at 179:20-181:7]. Because this case is about open carry, Professor Donohue’s testimony and report will not assist the court in deciding Plaintiff’s Motion for Summary Judgment.</p>	
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OBJECTIONS TO DECLARATION OF P. PATTY LEE, See Exhibit 1 ¶ 5.

6. Exhibit 3 Deposition Transcript of John J. Donohue, Volume I	Lacks Foundation. Declarant’s testimony is not based on an adequate foundation of reliable	Overruled
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(“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].

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.” *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (“Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”)

In fact, declarant admits that some

	<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>	Sustained

1	they have cleaned up the	Not Proper Scientific	
2	website quite a bit since	Testimony: The proffered	
3	then... and it is a useful	testimony here says a particular	
4	resource of highlighting	website, but not any particular	
5	certain behaviors on the	data thereon, is “a useful resource	
6	part of permit holders,	in highlighting certain behaviors	
7	that show that they	on the part of permit holders.”	
8	engage in behavior that	Inasmuch as the declarant is not	
9	would either be criminal,	offering testimony based on a	
10	reckless, or suggestive of	<i>scientific</i> analysis of data—and	
11	not being the sort of	because any layperson can see	
12	person you want	what is “highlighted” on the	
13	carrying guns around.	website—the issue is not the	
14		proper subject of expert testimony	
15		under FRE 702. <i>See Range Rd.</i>	
16		<i>Music, Inc. v. E. Coast Foods,</i>	
17		<i>Inc.</i> , 668 F.3d 1148, 1153 (9th Cir.	
18		2012) (citing FRE 702 and	
19		quoting the advisory committee	
20		notes to FRE 701: “[T]he	
21		distinction between lay and expert	
22		witness testimony is that lay	
23		testimony results from a process	
24		of reasoning familiar in everyday	
25		life, while expert testimony results	
26		from a process of reasoning which	
27		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.” <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>	Overruled
<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>	Sustained
<p>10. Ex. 3 at 203 4-23:</p> <p>Carrying gun openly</p>	<p>Lacks Authentication: The predictions relied upon lacks</p>	Overruled

1 where open carry is
 2 allowed suddenly
 3 triggers police
 4 intervention.... We do
 5 have the discussions of
 6 police chiefs talking
 7 about the amount of
 8 attention that gun
 9 carriers can encourage
 10 from the public.

proper authentication. FRE 403,
 901, 902. The declarant has not
 produced evidence sufficient to
 support his finding that carrying
 gun openly triggers police
 intervention. His testimony simply
 relies on anecdotal information.

Hearsay: The statement
 summarizes a discussion but does
 not verify or properly authenticate
 the conversation. FRE 801.

Not Proper Scientific

Testimony: The proffered
 testimony here says open carry
 triggers police intervention.
 Inasmuch as the declarant is not
 offering testimony based on a
scientific analysis of data—and
 because the claim about “police
 intervention” 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. *See Range Rd. Music,*
Inc. v. E. Coast Foods, Inc., 668

	<p>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>	
<p>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.</p>	<p>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.</p> <p>Hearsay: The statement summarizes a discussion but does not verify or properly authenticate the discussions by the chief of police. FRE 801.</p> <p>Not Proper Scientific Testimony: The proffered</p>	<p>Overruled</p>

1 testimony here says open carry
2 would have more burdens and less
3 benefits. Inasmuch as the
4 declarant is not offering testimony
5 based on a *scientific* analysis of
6 data—and because the claim about
7 “burdens of open carry” is
8 potentially a proper source of
9 expert opinion, the Declarant is
10 not a police officer--the issue is
11 not the proper subject of expert
12 testimony under FRE 702. *See*
13 *Range Rd. Music, Inc. v. E. Coast*
14 *Foods, Inc.*, 668 F.3d 1148, 1153
15 (9th Cir. 2012) (citing FRE 702
16 and quoting the advisory
17 committee notes to FRE 701:
18 “[T]he distinction between lay and
19 expert witness testimony is that
20 lay testimony results from a
21 process of reasoning familiar in
22 everyday life, while expert
23 testimony results from a process
24 of reasoning which can be
25 mastered only by specialists in the
26 field.”)

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

unifying theme in NRA
conduct is, as far as I
can tell, that they favor
anything that stimulate
gun sales and oppose
anything that might
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.

IT IS SO ORDERED.

Dated: May 7, 2018



JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE