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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

STEVEN RUPP, et al.,

Plaintiffs,

vs.

XAVIER BECERRA, in his official
capacity as Attorney General of the State
of California,

Defendant.

Case No.: 8:17-cv-00746-JLS-JDE

**PLAINTIFFS' MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO
EXCLUDE THE TESTIMONY OF
DEFENDANT'S EXPERT
WITNESS JOHN J. DONOHUE
UNDER FEDERAL RULE OF
EVIDENCE 702**

Hearing Date: July 5, 2019
Hearing Time: 10:30 a.m.
Judge: Josephine L. Staton
Courtroom: 10A

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INTRODUCTION

Expert witness testimony *should* assist the fact finder in developing an understanding of complex and technical matters material to the issues of the case. The expert's opinions are supposed to be empirically constructed, transparent, and unbiased. The testimony of the State's expert witness, Professor John Donohue, objectively lacks these requirements.

Donohue represents that he is an expert in the area of measuring the effect of law. Yet here he admits that he cannot discern a causal relationship between public violence and "assault weapons." This admission alone is enough to find that his testimony does not help the trier of fact. But it is far from the only issue with his testimony.

Donohue's report and deposition reveal that he is a passionate gun-control advocate who presents his opinions as infallible truths. His opinions are little more than speculation based on questionable sources that he himself had nothing to do with generating or vetting beyond mere perusal. Statements like "to defend themselves, private individuals only need to scare off criminals" and "no one has a greater desire or use for an assault weapon than a determined mass killer" are representative of the abjectly speculative and unscientific character of his opinions. Indeed, his report is more of an anti-Second Amendment screed of random data and glib lamentations about gun violence in the United States.

Donohue is also noticeably unqualified to offer most of the opinions in his report. He claims some general knowledge of gun policy, but the only paper he has published about gun control involves concealed-carry issues and not "assault weapons." And it is hard to see what value Donohue contributed to any of the data he claims supports his views, or how his expertise makes any of it more digestible for the fact finder. As a result, his opinions are unnecessary to explain what the data that he relies on really means. Even if they were, problems abound with Donohue's data.

Plaintiffs thus request that the Court find Donohue's report inadmissible under

1 Federal Rule of Evidence 702. This Court would not be the first to find that Donohue's
2 determinations "are simply not supported by a fair and neutral evaluation of the
3 record," or that in "his zeal" to make his opinions, Donohue has provided a report and
4 testimony "of little value to the Court." *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d
5 693, 742 (Del. Ch. Aug. 9, 2005).

6 LEGAL STANDARD

7 For expert testimony to be admissible, the expert must be "qualified as an expert
8 by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Under
9 *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-91 (1993) and *Kumho Tire*
10 *Co. v. Carmichael*, 526 U.S. 137 (1999), courts must act as "gatekeepers" to exclude
11 unreliable expert testimony. This requires courts to consider whether:

12 (a) [t]he expert's scientific, technical, or other specialized knowledge will
13 help the trier of fact to understand the evidence or to determine a fact in
14 issue; (b) [t]he testimony is based on sufficient facts or data; (c) [t]he
15 testimony is the product of reliable principles and methods; and (d) [t]he
expert has reliably applied the principles and methods to the facts of the
case.

16 Fed. R. Evid. 702. This list, of course, is not exhaustive. *Daubert*, 509 U.S. at 594-95;
17 *Kumho*, 526 U.S. at 150-51. And no single factor is necessarily determinative. *Kumho*,
18 526 U.S. at 150-51; *see also* Fed. R. Evid. 702, advisory committee's note to 2000
19 amendment.

20 Thus, not all opinions that happen to be held by an expert are "expert opinions."
21 *See United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991). Opinions falling
22 outside the expert's area of expertise are inadmissible. *See Watkins v. Schriver*, 52 F.3d
23 769, 711 (8th Cir. 1995) (affirming exclusion of a neurologist's testimony "that the
24 [plaintiff's neck] injury was more consistent with being thrown into a wall than with a
25 stumble into the corner"). And impressive professional qualifications alone are not
26 enough; the expert must have sufficient specialized knowledge to assist the trier of fact
27 in deciding the issues in the case. *See Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146,
28 162-163 (4th Cir. 2012). Moreover, an expert's suitability for testimony depends on the

1 facts of the case. Just because an expert may be qualified to opine on one subject has
2 no bearing on their suitability to opine on another unrelated subject. *See Jones v.*
3 *Lincoln Elec. Co.*, 188 F.3d 709, 723 (7th Cir. 1999).

4 Under the standards for the admissibility of expert witness testimony set forth in Rule
5 702 and explained in *Daubert* and its progeny, Donohue's testimony is not admissible.
6 The Court should exercise its broad discretion to reject it.

7 **ARGUMENT**

8 Donohue cites a range of data throughout his report that ostensibly supports his
9 view that California's "assault weapons" regulations are "wise" and will reduce
10 firearm violence. Declaration of Sean A. Brady ("Brady Decl.") Ex. 1. Yet problems
11 abound with Donohue's methods, data, and basis for opining in the first place. Only a
12 fraction of the data that he claims supports his views is data developed from research
13 he performed. The overwhelming majority is other researchers' data, and his data has
14 not been peer reviewed or otherwise vetted.

15 In his own words, Donohue's expertise is "just in research—in the area relevant
16 to crime, and guns in particular, over an extended period of time." Brady Decl., Ex. 2,
17 at 9. But this case is about a class of firearms called "assault weapons." It is not about
18 guns "in general." His expertise is thus valuable only if he can apply his alleged
19 expertise in understanding data to show how "assault weapon" regulation achieves its
20 aims. Something he fails to do.

21 Furthermore, experts must be qualified by knowledge, skill, experience, training,
22 or education in the specific area pertinent to the case. *See Khoday v. Symantec*, 93 F.
23 Supp. 3d 1067, 1079 (D. Minn. 2017). By his own estimation, Professor Donohue is
24 not a subject matter expert in the area most relevant—"assault weapons"—or the
25 peripheral areas in which he also opines. When combined with biased selection and
26 evaluation of his sources, the value of his expert opinions about virtually all the topics
27 in his report is nil.

A. DONOHUE HAS NO BASIS FOR MAKING ANY DEFINITIVE STATEMENTS ABOUT THE IMPACT OF ASSAULT WEAPONS REGULATION

1. Donohue Admits He Cannot Isolate the “Assault Weapons” Aspect of the 1994 Federal Ban from the “Large Capacity Magazine” Aspect

The most important opinion here, and perhaps the only relevant one, is what Donohue has to say about the effect of “assault weapons” laws. Donohue acknowledges that his analysis of whether the 1994 federal ban on “assault weapons” affected crime rates includes the “large-capacity magazine” restriction. Brady Decl., Ex. 2 at 146-147. He states: “I’m not able to separate out for my analysis what the . . . independent effect of the magazine restriction is . . .” *Id.*, Ex. 2 at 147. He also states: “the less deadly part we are not sure whether that comes via the—the—the magazine-component element of the assault weapon ban or the gun-limiting element of the assault weapon ban.” *Id.*, Ex. 2 at 148. But the net incidence of episodes he says “probably” comes from the gun aspect. *Id.*

He does, however, think that the “reduction in the number of episodes, probably comes purely through the . . . gun effect as opposed to the gun-plus-high-capacity-magazine effect.” *Id.* When asked why, he stated that it’s “plausible, but not 100 percent certain” that “a lot of mass shooters seem to like the idea of having very potent and scary-looking weaponry in their hand, and the federal assault weapon ban sort of undermined their aspirations to some degree.” *Id.*

But Donohue has no evidence to support his speculation about the cosmetic appeal to mass shooters. He just thinks the appearance of the rifle has a big role to play in all this. When shown a picture of three AR-15 platform rifles still available for sale under the federal ban (because they lacked the features the law prohibited), Donohue admitted “that they all look scary.” *Id.*, Ex. 2 at 150. These prohibited features are a “flash-hider” which is affixed to the end of the firearm’s barrel, and a collapsible stock—a stock that can be adjusted to allow about three to four inches of movement where the rifle is braced against the shoulder.

Donohue's belief that "they all look scary," is essentially an admission that the ban did not affect the main thing that Donohue thinks attracts mass-murderers to these rifles in the first place: their appearance. Banned rifles and non-banned rifles all look scary to him. How this contradictory opinion could assist the Court here is unclear. What's more, Donohue employed *no* methodology to come to the conclusion that mass shooters like the way these guns look, it's just his gut feeling. In trying to walk that admission back, Donohue says that a collapsible stock is a difference in "functionality" because it might be of use in smuggling a rifle into an area of attack, but again he has not data supporting that conjecture. He instead conflates the issue with bringing in a disassembled rifle and then assembling it, which of course is not the same thing. *Id.*, Ex. 2 at 153.

So to summarize, Donohue has no hard data that he can point to support his claim that "assault weapons" are unusually lethal. He thinks that killers choose them because they look scary. And when asked "so your opinion is that there's evidence that the federal assault weapons ban was effective in limiting criminal use of assault weapons, but you could be wrong; that . . . the evidence is not necessarily . . . unequivocal; right?", his response was "Right." *Id.*, Ex. 2 at 160. This is not the stuff of admissible expert opinion. It is not backed by science and is not the product of specialized knowledge, skill, or training. It is contradictory, unhelpful to the Court, and nothing more than unsupported speculation.

2. Donohue Reveals That He Has No Basis to Link Crime Reduction to the 1994 Federal Ban on "Assault Weapons"

Donohue states that

the fact that all crime was going down—all crime continued to trend down after the federal assault weapon ban lapsed, but massacres rose sharply. That's suggestive of something else is going on here. And I'm happy to entertain what might be that other factor, but I have never heard anyone offer a plausible explanation for why we do see this elevation of mass shootings that corresponds to both the end of the federal assault weapon ban and the escalation of the purchase of these—these assault weapons.

1 *Id.*, Ex. 2. at 162. Of course, not having heard a plausible explanation otherwise is not
2 validation of his hypothesis.

3 Donohue was asked how the flash-suppressor and stock of a rifle could be
4 “isolated as being the cause of a reduction in crime?” *Id.* Donohue again responds that
5 his analysis is not based on just the rifle, it includes the magazine capacity aspect. *Id.* at
6 163. This admission is damning, and it again questions the validity of any opinions
7 about “assault weapons” based on it.

8 And where data might support Donohue’s position, there are several issues with
9 it. First, it is simply work that another researcher, Louis Klarevas, did. *Id.*, Ex. 2 at 168.
10 Second, that work implemented time series analysis methodology, which is number 4
11 of 5 on Donohue’s list of preferred research methodologies. *Id.*, Ex. 2 at 136, 240.
12 Third, Donohue acknowledges that time series analysis can reflect a spurious
13 correlation and not show actual causation. *Id.* at 168. And it too is silent on how the
14 causation works. *Id.*, Ex. 2 at 170. Fourth, he acknowledges that this data from
15 Klarevas is “data from the Gun Violence Archive and Mother Jones data set.” *Id.*, Ex.
16 2 at 174. So data compiled by third party gun-control advocates are the source of this
17 data. Even Donohue admits that Mother Jones has “their ax to grind.” *Id.* That any
18 credible researcher could fail to recognize the credibility issue there is surprising.

19 Donohue was asked why it would be accurate to attribute the increase in post
20 federal ban violence to the end of the ban when rifles different only in their lack of a
21 flash-suppressor and lack of a collapsing stock remained available under the ban. *Id.*,
22 Ex. 2 at 177-180. He responds, “to the extent that the prohibited features and the
23 prohibited guns were appealing to mass shooters, that would be consistent with this
24 decline in incidents . . .” *Id.*, Ex. 2 at 180. But he has no data to back up the claim that
25 those features do appeal to killers and acknowledges that if the features “were not of
26 particular interest or appeal to the mass killers, then it would not have an impact.” *Id.*
27 This is a conjectural opinion with no data to back it up. It cannot possibly be of any
28 help to the fact finder.

1 **3. Donohue’s Opinion that Mass Shootings Track “Assault Weapon”**
2 **Sales Relies on No Singular Definition of “Assault Weapon”**

3 Donohue opines that the incidence of public mass shootings closely tracks the
4 growth in the sale of assault weapons in the United States *Id.* at 183. Again, this data is
5 not Donohue’s. It was compiled by another researcher—Professor William English. *Id.*
6 Donohue cannot say that the definition of “assault weapons” used in that data is the
7 federal definition or some other definition because “the reports are varied.” *Id.* at 184.
8 He also acknowledges that this statistical study could mistake correlation for causation.
9 *Id.* If there is no way to be sure exactly what type of weapon was being tracked, we
10 cannot be sure what that data shows. Yet that does not stop him from presenting this
11 data to make the causation argument in his report.

12 **4. Donohue’s Opinion that the United States Has a Higher Rate of Mass**
13 **Shootings Is Knowingly Predicated on Bad Data**

14 Donohue opines that the United States has a higher rate of public mass shootings
15 than other advanced industrialized nations. *Id.*, Ex. 2 at 188. He says he cites the
16 Lankford study for this. *Id.* at 189. As for how Lankford obtained the counts he used
17 for his data, Donohue said that he culls what he can from the public record and then
18 draws “broad conclusions” about prevalence. *Id.*, Ex. 2 at 192. Donohue has not seen
19 his data or done an independent assessment of it. *Id.*

20 It turns out most of that data was originally created by the New York Police
21 Department, which “chose to restrict quantitative analysis to cases that took place
22 within the U.S. because the NYPD limited its Internet searches to English-language
23 sites, creating a strong sampling bias against international incidents.” *Id.*, Ex. 2 at 194.
24 Donohue admits this would “probably capture a higher percentage of the mass
25 shooting events in the U.S. as opposed to, you know, the non-English speaking
26 countries.” *Id.* He admits that the data would not allow for a “meaningful comparison
27 between the United States and non-English speaking nations.” *Id.*

28 So then, how can he justify forming an opinion based partially on this data when
he knows it is compromised? He says it is his “understanding” that Lankford used

1 more than just this data, but he “hasn’t looked at it in a while.” *Id.* This is not how
2 experts reach opinions. It shows poor data application and poor methodology.

3 **5. Donohue’s Opinion on the Prevalence of “Assault Rifles” in**
4 **California is Methodologically Unsound**

5 Donohue says that the number of these rifles [“assault weapons”] in California is
6 “pretty small.” *Id.*, Ex. 2 at 216. He says the number of rifles registered in California is
7 the way to “get a fix” on that figure. *Id.* But he is unwilling to grant that there are many
8 reasons the number of rifles registered as “assault weapons” in California may not
9 accurately reflect the number possessed. The most he will say is that various options or
10 actions an owner of a registerable rifle in California could take to avoid registration
11 “could” affect the number of rifles registered. *Id.* But he is not willing to include or
12 address those numbers in his estimate.

13 Donohue also admits that he was unaware that, when the most recent registration
14 period ended, *52,000 registration applications were pending.* *Id.*, Ex. 2 at 200. For
15 someone who believes that the number of registered rifles is the best data available, it
16 is surprising that he did not research the issue enough to learn this. Afterall, it would
17 greatly affect the figure of about 175,000 rifles currently registered. Indeed, it would
18 increase it by nearly 30%. The point is that Donohue does not thoroughly research or
19 base his opinions on complete data. He finds (or counsel provides, *id.*, Ex. 2 at 221)
20 just enough data to support the point he wants to make and then leaves it there.

21 Additionally, Donohue’s opinion that the circulation of these rifles does not
22 matter and that the “common use” test is “wholly misguided” is inadmissible because it
23 is a legal opinion. Brady Decl., Ex. 1 at ¶ 114. Donohue may not proffer opinion about
24 the correct legal approach for addressing scope-of-the-Second-Amendment questions.

25 **6. Donohue Uses Data from Gun-control Advocacy Organizations to**
26 **Form His Opinions**

27 As for evidence that allegedly shows that the federal “assault weapons” ban was
28 effective at limiting criminal use of assault weapons, Donohue used data from the

1 Brady Campaign to Prevent Gun Violence. Brady Decl., Ex. 2 at 138. The Brady
2 Campaign is a gun-control advocacy organization. *Id.* It need not be explained in
3 detail why using data from a gun-control advocacy organization calls the conclusions
4 Donohue reached with that data into question. Indeed, Donohue admits that the
5 methodology employed to obtain that data is “lower” on his preferred hierarchy of
6 methodological techniques for research. Brady Decl., Ex. 2 at 140.

7 Donohue was informed that the Brady Campaign used data originally generated
8 by the ATF, about which the ATF stated “firearms selected for tracing are not chosen
9 for purposes of determining which types, makes, or models of firearms are used for
10 illicit purposes. The firearms selected do not constitute a random sample and should
11 not be considered representative of the larger universe of all firearms used by criminals
12 or any subset.” *Id.*, Ex. 2 at 143-144. When asked “if that same disclaimer is in the
13 2004 version of ATF trace data that the Brady Center relied on, would that make you
14 question their conclusions in that report that rely on ATF trace data to determine the
15 types of firearms that are used for illegal purposes?” Donohue responds “well, not
16 necessarily.” *Id.*, Ex. 2 at 144. His response is indefensible and shows that he is not
17 applying scientific rigor to his selection or analysis of data.

18 Donohue also quotes Josh Sugarman, the executive director of another gun
19 control advocacy group, for the principle that the end of the “assault weapons” ban
20 allowed for the customization and modification of assault weapons to make them look
21 even more militaristic and “grand” in the eyes of their owners. *Id.*, Ex. 2 at 185.
22 Donohue’s response was that he probably should have found a quote to the same effect
23 from a gun manufacturer. Brady Decl., Ex. 2 at 185. In any event, none of this is
24 relevant to his opinion about the effect of “assault weapons” laws.

25 ///

26 ///

B. DONOHUE’S PERIPHERAL OPINIONS ARE JUST AS SPECULATIVE AND UNFOUNDED AS HIS CORE “ASSAULT WEAPON” OPINIONS

The Court can also exclude the remainder of Donohue’s opinions on the basis that Donohue simply is not qualified as an expert on the subjects. Another basis would be that his opinions simply are not relevant to any issues here. But these opinions also reveal that (1) Donohue has no peer reviewed research of his own to rely on; (2) he ignores data when it suits him; (3) he categorically rejects the potential existence of data that would disconfirm his beliefs; (4) he would prefer that research questions are worded vaguely to capitalize on the public’s confusion; and (5) he will not hesitate to offer hypothesis as fact. Thus, these opinions simply cannot assist the trier of fact here.

1. Donohue’s Gun Prevalence Opinion Is Based on Knowingly Incomplete Data

Donohue opines that general gun ownership is declining while gun ownership is increasingly more and more concentrated in a shrinking group. *Id.* at 12-14. This is not relevant to this litigation, except maybe for the question of “common use” (which Donohue improperly opines is not even really relevant, *see* Part II.A.5, *supra*). To reach this conclusion, he consulted data in the General Social Science survey and a Pew research center survey. *Id.* These surveys, per his review, suggest that around 30% of the American public own firearms, which reflects an established downward trend. *Id.* When asked why he rejects data from a Gallup survey and a newer 2017 Pew study which show 43% and 42% (respectively) for firearms ownership, his answer is less than convincing. *Id.*, Ex. 2 at 51.

He rejects the Gallup survey as an “outlier” for a “variety of reasons” *Id.*, Ex. 2 at 34. His logic essentially boils down to the argument that because it is an outlier, it cannot be credible. *Id.*, Ex. 2 at 35. When asked why he did not use Pew poll data from 2017 which shows a number over 40%, his answer is that this data came out after he drafted his opinion. *Id.*, Ex. 2 at 42. He insists that the data must be wrong but cannot

1 articulate why. *Id.*, Ex. 2 at 44. Legitimate expert opinions do not ignore data simply
2 because it does not suit their opinions.

3 When asked how he could look at conflicting polling results and conclude as he
4 did, Donohue responds that he basically had to assess the “overall validity.” *Id.*, Ex. 2
5 at 52. He says that the General Social Science survey is “widely considered by social
6 scientists to be the gold standard of survey research.” *Id.*, Ex. 2 at 54. But the type of
7 data in that source is survey data, which Donohue admits is not perfect, but “he will
8 use it.” *Id.*, Ex. 2 at 55. This is surprising, given Donohue’s testimony in another
9 matter: “I’m an economist, which means, almost by trade, I don’t believe what people
10 say in public opinion surveys.” *Id.*, Ex. 2 at 62. He tries to qualify this statement by
11 stating “I am very cautious about public opinion survey data,” but clearly not cautious
12 enough to refrain from using it when it serves his agenda. *Id.* He also says that the
13 long-term pattern that the survey shows suggests that it is reliable. *Id.*, Ex. 2 at 63. But
14 if data is unreliable, simply increasing the quantity does not ameliorate the qualitative
15 defect.

16 Donohue also claims that he did not use Pew 2017 data to formulate his opinion
17 about the prevalence of firearm ownership because his writing on that issue was
18 already done and he just did not update it. *Id.*, Ex. 2 at 95. That said, he did cite Pew
19 2017 survey data to show opposition to “assault weapons.” *Id.* He claims he did not see
20 it, but if he had, he still would not have included it because it would not have really
21 changed his point. *Id.*, Ex. 2 at 98. Even if that is true, it shows that the level of
22 consistency, attention to detail, and thoroughness of the efforts done to accumulate,
23 evaluate, and deduct conclusions from research is lacking. At a minimum, it shows his
24 methodology is compromised.

25 What is so alarming about all this is that Donohue’s reasons for discounting this
26 data are not scientific and do not address the specific merits failures of the work. He
27 failed to identify factual reasons why the data is wrong. He just assumes the data is
28 wrong because it is out of sync with the data that conveniently helps him make his

1 point. And lastly, as to data he himself has been involved in publishing, Donohue
2 admits that his own work on the subject is not published or peer reviewed. *Id.* at 58. So
3 its evidentiary value is deficient to say the least—and so is his methodology.

4 **2. Donohue’s Opinion that People Do Not Want “Assault Weapons” for**
5 **Self Defense Is Groundless Speculation**

6 Donohue claims that most gun-owning households do not possess
7 “assault weapons” because they do not believe that doing so is important to their self-
8 defense. *Id.*, Ex. 2 at 64. But Donohue is not an expert on peoples’ preferences about
9 self and home defense weaponry choices. And he seems to admit his opinion here is
10 pure conjecture, although he is confident that he is not going “out on a limb here
11 saying that most people think that assault weapons are not important to their self-
12 defense.” *Id.*, Ex. 2 at 66. In fact, he genuinely believes that no one could honestly
13 think that people choose “assault weapons” self-defense. *Id.*, Ex. 2 at 69, 83. He admits
14 that price may be a barrier, but the true evidentiary foundation for his opinion here is
15 that if you do what he does long enough, it would look that way to you too. *Id.*, Ex. 2 at
16 70. He has reviewed no data to confirm this. *Id.* He just thinks the real reason people
17 seek “assault weapons” is a “flagging sense of masculinity.” *Id.*, Ex. 2 at 74.

18 This is simply indefensible. Donohue is entirely comfortable dismissing the
19 *possibility* of data that would contradict his conviction here. And if there is such data,
20 he is convinced that it is “NRA” data, cannot be trusted, and would “undermine the
21 authority” of anyone who would rely on it. *Id.*, Ex. 2 at 72.

22 To the extent that he can point to some data for support, he defers to a former
23 army Colonel named Dean Winslow. *Id.*, Ex. 2 at 76. Winslow’s opinion, allegedly, is
24 that AR-15 rifles have no use in self-defense. *Id.* But a statement offered to prove the
25 truth of what it asserts, no matter who offers it, adoptively admitted and without data to
26 back it up—says nothing about its merits or its value to this Court.

27 Donohue also contends that the advertisements gun manufacturers have
28 published support his belief that people do not buy them for self-defense. *Id.*, Ex. 2 at

1 81. Yet he offers no proof or reasoning—just conjecture. This is an opinion lacking in
2 support, which Donohue has no qualifications to offer in the first place.

3 What is most unsettling about this passage from Donohue’s deposition is his
4 unwillingness to even contemplate the existence of data contrary to his view. One of
5 the core truisms about the scientific method is that facts are only as good as their
6 ability to be empirically ascertained and established. There is no such thing as a fact
7 that is above challenge—everything is categorically subject to new evidence that
8 disproves it. But not the premise that people do not want “assault weapons” for self-
9 defense—that’s gospel to Professor Donohue.

10 **3. Donohue’s Opinion About Public Support for Gun Control Is Based**
11 **on Data He Did Not Vet**

12 Again, Donohue does not have intimate, expert knowledge about the public’s
13 support for gun control. His views on this subject are the product of research and polls
14 not conducted by him. In a moment of commendable candor, Donohue even admits
15 that certain factual contentions made in his report about public support for gun control
16 were at best misworded or “not right.” *Id.*, Ex. 2 at 87-88.

17 Donohue claims that the nationwide trend supports banning “assault weapons,”
18 which is allegedly evident from a survey published in the New York Times. He knows
19 that the New York Times did not do the survey itself, but essentially defends the
20 survey on the basis that if the New York times thought the data was good, then it
21 probably is. *Id.*, Ex. 2 at 90-91. When presented with a different New York Times poll
22 showing only 44% support for “assault weapons” prohibition, his response is that one
23 poll does not mean much when there are many polls showing otherwise. *Id.*, Ex. 2 at
24 93. So again, Donohue does not find it necessary to investigate or explain why data
25 that contradicts him is wrong—or to apply any specialized knowledge of his own to vet
26 the data.

27 ///

1 **4. Donohue’s Orwellian and Biased Sense of Survey Question Accuracy**
2 **Is Unacceptable**

3 One of the most distressing passages of Donohue’s deposition involves his
4 explanation of what makes for a good survey question about banning “assault
5 weapons.” Donohue was asked to look at a Gallup Poll survey question which asked:
6 “Are you for or against a law which would make it illegal to manufacture, sell, or
7 possess semiautomatic guns known as ‘assault rifles’?” *Id.*, Ex. 2 at 98. The poll shows
8 consistent minority support for such a law. *Id.*, Ex. 2 at Ex. 7 at 7. Donohue’s response
9 “Yeah . . . So I actually thought this was . . . a poorly worded question, so not . . .
10 relevant to our inquiry.” *Id.*, Ex. 2 at 98-99. When asked to explain his view, he says
11 “my fear was that we are defining assault weapons as semiautomatic guns . . . and
12 people aren’t in favor of banning all semiautomatic guns . . . and I thought this
13 particular phrasing was . . . very likely to give the wrong answer.” *Id.*, Ex. 2 at 99. He
14 thinks this question “seems like it’s not likely to give a good result.” *Id.*

15 If by “good result,” he means an answer favorable to the gun-control agenda,
16 then he is correct. But his stance here cannot be characterized as anything but a
17 preference that pollsters craft the question in a way that capitalizes on the widespread
18 confusion that “assault weapon” means machine gun, because that is more likely to
19 elicit a pro-gun control response. *Id.*, Ex. 2 at 100. Donohue thinks that really is not an
20 issue though, because he thinks “people probably have the right thing in mind” if the
21 question is phrased more like “should we go back to banning assault weapons the way
22 we did for ten years.” *Id.* This, of course, does not address the confusion question. It
23 dodges it. With no foundation at all, Donohue assumes that people “would have—at
24 least have an understanding of the federal assault weapon ban . . .” *Id.*, Ex. 2 at 103.
25 That might be true of some academics and legal professionals, but it is unlikely to be
26 true of the general population. Either way, he offers zero data to support it. And
27 unsurprisingly, he is unfamiliar with data that shows that as much as 39% of survey
28

1 takers are confused about what an “assault weapon” really is. *Id.*, Ex. 2 at 104. This is
2 a damning insight into how Donohue views and assesses data.

3
4 **5. Donohue Admits That His Opinion that Concealed Carriers Are
More Like to Hurt Than Help Is Nothing More Than Hypothesis**

5
6 Donohue’s opinion that concealed carriers are more likely to hurt than help in
7 emergencies is largely irrelevant to this litigation. But the problems with Donohue’s
8 methodology here reveal a global problem with his work. Donohue admits that his
9 opinion that well-intentioned Good Samaritans looking to intervene with a firearm in
10 an active shooter event are more likely to “add to the mayhem” is a guess or a best a
11 “working hypothesis.” In other words, it is conjecture, not published research with data
12 to support it. *Id.*, Ex. 2 at 125. He also admits that he only looked at a report published
13 by the FBI which looked at 160 incidents to reach his conclusion that intervenors with
14 guns have helped only *one* time, and the intervenor happened to be a Marine. *Id.*, Ex. 2
15 at 132-133. This falls well below the threshold for expert opinion. A working
16 hypothesis about something is fine, but it is not admissible expert witness testimony. A
17 hypothesis does not assist the fact finder. The fact finder is helped where the witness
18 can explain why evidence takes something beyond a mere hypothesis.

19 **6. Donohue Knows Almost Nothing About Firearms or Ballistics**

20 Donohue has no personal knowledge or experience with firearms or ballistics
21 that would allow him to determine whether the information he is looking at is correct.
22 *Id.*, Ex. 2 at 200-201. He does not dispute that. *Id.* Yet he opines that “this class of
23 guns [assault weapons] is more lethal,” *id.*, Ex. 2 at 206, that Adam Lanza’s attack in
24 Sandy Hook would have been less lethal had his rifle lacked certain features, *id.*, Ex. 2
25 at 208, that “flash suppressors help people who are trying to rain down as many bullets
26 as fast as they can,” *id.*, and that Nidal Hasan “certainly used a weapon that was
27 prohibited by the federal assault weapon ban,” *id.* at 213. Given the verifiably false
28

1 claim about Hasan's weapon,¹ there is no doubt Professor Donohue is no firearms
2 expert. And if he lacks knowledge in this domain, his opinions about the mechanics of
3 "assault weapons" or firearms or claims about how their features enhance lethality lack
4 any basis of admissibility.

5 CONCLUSION

6 Donohue's opinions lack the required scientific, technical, or other specialized
7 knowledge required for admissible expert witness testimony. None of what Donohue
8 presents helps the trier of fact here. It is unsupported speculation and is compromised
9 by the lack of proximity between Donohue and his data, and the questionable and
10 likely compromised origins of much of that data. The conjectural nature of the
11 opinions Professor Donohue offers simply is too great to pass muster as expert witness
12 opinion.

13 Plaintiffs thus request the Court consider Professor John Donohue's report
14 inadmissible.

15 Dated: May 28, 2019

MICHEL & ASSOCIATES, P.C.

16 /s/ Sean A. Brady

17 Sean A. Brady
18 Attorneys for Plaintiffs
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21
22
23
24

25 ¹ Hasan committed his attack with an FN Herstal 5.7—a pistol. James C.
26 McKinley Jr. and James Dao, *Fort Hood Gunman Gave Signals Before His Rampage*,
27 N.Y. Times (Nov. 8, 2009), available at [https://www.nytimes.com/2009/11/09/us/](https://www.nytimes.com/2009/11/09/us/09reconstruct.html)
28 [09reconstruct.html](https://www.nytimes.com/2009/11/09/us/09reconstruct.html). That firearm would not have been prohibited under the 1994
"assault weapons" ban because it does not have two or more of the prohibited features.
See former 18 U.S.C. § 922 (repealed 2004).

CERTIFICATE OF SERVICE
IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case Name: *Rupp, et al. v. Becerra*
Case No.: 8:17-cv-00746-JLS-JDE

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

I am not a party to the above-entitled action. I have caused service of:

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO EXCLUDE THE TESTIMONY OF
DEFENDANT'S EXPERT WITNESS JOHN J. DONOHUE UNDER FEDERAL
RULE OF EVIDENCE 702**

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed May 28, 2019.

/s/ Laura Palmerin
Laura Palmerin