

1 C.D. Michel-SBN 144258
Anna M. Barvir-SBN 268728
2 Tiffany D. Chevront-SBN 317144
MICHEL & ASSOCIATES, P.C.
3 180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
4 Telephone: (562) 216-4444
Email: cmichel@michellawyers.com

5 Attorneys for Plaintiffs B&L Productions, Inc., California Rifle & Pistol Association,
6 Incorporated, Gerald Clark, Eric Johnson, Chad Littrell, Jan Steven Merson, Asian
Pacific American Gun Owner Association, Second Amendment Law Center, Inc.

7 Donald Kilmer-SBN 179986
Law Offices of Donald Kilmer, APC
8 14085 Silver Ridge Road
Caldwell, Idaho 83607
9 Telephone: (408) 264-8489
Email: Don@DKLawOffice.com

10 Attorney for Plaintiff Second Amendment Foundation

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 B&L PRODUCTIONS, INC., d/b/a
14 CROSSROADS OF THE WEST;
GERALD CLARK; ERIC JOHNSON;
15 CHAD LITRELL; JAN STEVEN
MERSON; CALIFORNIA RIFLE &
16 PISTOL ASSOCIATION,
INCORPORATED; ASIAN PACIFIC
17 AMERICAN GUN OWNERS
ASSOCIATION; SECOND
18 AMENDMENT LAW CENTER, INC.; and
SECOND AMENDMENT
19 FOUNDATION,

20 Plaintiffs,

21 v.

22 GAVIN NEWSOM, in his official capacity
as Governor of the State of California;
23 ROB BONTA, in his official capacity as
Attorney General of the State of California;
24 KAREN ROSS, in her official capacity as
Secretary of California Department of Food
& Agriculture and in his personal capacity;
25 TODD SPITZER, in his official capacity as
District Attorney of Orange County; 32nd
26 DISTRICT AGRICULTURAL
ASSOCIATION; DOES 1-10;

27 Defendants.
28

Case No.: 8:22-cv-01518 JWH (JDEx)

**PLAINTIFFS' OBJECTION TO
THE STATE DEFENDANTS'
EXPERT DECLARATIONS;
MOTION TO STRIKE OR
EXCLUDE THE STATE
DEFENDANTS' EXPERT
DECLARATIONS**

**[Fed. R. Evid. 103, 401-403, 702-706;
Fed. R. Civ. P. 16(c)(2)(1)(D) & (F),
26(a)(2)]**

Date: April 6, 2023
Time: 9:00 a.m.
Courtroom: 9D
Judge: Honorable John D.
Holcomb

Action Filed: August 12, 2022

1 Plaintiffs B&L Productions, Inc., Gerald Clark Eric Johnson, Chad Littrell, Jan
2 Steven Merson, California Rifle & Pistol Association, Incorporated; Asian Pacific
3 American Gun Owners Association, Second Amendment Law Center, Inc., and
4 Second Amendment Foundation, by and through their respective counsel, object to
5 the testimony and filings by the State Defendants’ “experts” Patrick J. Charles, ECF
6 No. 31-1, and Saul Cornell, ECF No. 31-2.

7 Plaintiffs also seek an order striking the declaration of these experts submitted
8 by the State Defendants Gavin Newsom, Rob Bonta, Karen Ross, and 32nd District
9 Agricultural Association in support of their Second Supplemental Brief In
10 Opposition to Motion for Preliminary Injunction, ECF No. 31.

11 INTRODUCTION

12 The legal arguments in the State’s “expert” declarations belong in an amicus
13 brief, and not as part of the evidentiary record of this case. This Court should
14 exclude the testimony of both witnesses for at least three reasons: First, the
15 testimony violates the Federal Rules of Evidence in that it does not provide opinion
16 testimony about any facts based on scientific, technical, or other specialized
17 knowledge that will aid the Court as trier of fact in adjudicating Plaintiffs’ Motion
18 for Preliminary Injunction. Second, the testimony is irrelevant. And third, there has
19 been insufficient time for Plaintiffs to develop their own expert report or testimony,
20 assuming such testimony is proper.

21 ARGUMENT

22 I. THE STATE’S EXPERTS ARE NOT QUALIFIED TO PROVIDE LEGAL OPINION

23 Under rule 72 of the Federal Rules of Evidence a witness with particular
24 “knowledge, skill, experience, training, or education” may offer opinion testimony if
25 that witness’ knowledge “will help the trier of fact to understand the evidence or to
26 determine a fact in issue[.]” The proffered testimony by both of the State’s “experts”
27 purports to give opinion testimony on how to interpret laws from the Founding Era
28 under the Supreme Court’s recent decision in *New York State Rifle & Pistol Ass’n*,

1 *Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022). To the extent that the State’s “experts”
2 are offering legal arguments for or against a particular interpretation of historical
3 statutes, however, they should have applied for leave to file an amicus curie brief
4 with this Court. For they are *not* qualified to provide “expert” opinion on any legal
5 question.

6 Indeed, the qualification for interpreting and adjudicating the law in a case or
7 controversy in a federal court is to have been appointed to the court by the President
8 of the United States and confirmed by the Senate. U.S. Const., art. II, § 2. Indeed,
9 statutory interpretation is a legal question for a judge, not a factual question for the
10 trier of fact. *Commodores Ent. Corp. v. McClary*, 879 F.3d 1114, 1129 (11th Cir.
11 2018). Thus, the district court must take “adequate steps to protect against the
12 danger that [an] expert’s opinion would be accepted as a legal conclusion.” *United*
13 *States v. Herring*, 955 F.2d 703, 709 (11th Cir. 1992). That duty does not change just
14 because the legal question at issue involves some historical understanding of the
15 history of firearm regulation in America.

16 Justice Scalia and Bryan Garner’s text, *Reading the Law: The Interpretation*
17 *of Legal Texts*, addresses this very issue. In the Chapter 13: Falsities Exposed, the
18 authors expound on “[t]he false notion that lawyers and judges, not being historians,
19 are unqualified to do the historical research to originalism requires.” *Id.* at 399.
20 While “[i]t is reasonable to ask whether lawyers and judges can adequately perform
21 historical inquiry of this sort,” “[t]hose who oppose originalism exaggerate the
22 task.” *Id.* at 401. In some cases, it might be difficult, “[b]ut that is the exception, not
23 the rule. In most cases—and especially the most controversial ones—the originalist
24 answer is entirely clear.” *Id.*

25 Here, all the State must do is present laws from the relevant period that it
26 claims are “well established and representative” analogues SB 264 and SB 916.
27 *Bruen*, 142 S. Ct. at 2133. This Court then determines whether: (1) those proposed
28 analogues are indeed well established and representative, and (2) whether they are

1 relevantly similar enough to uphold the State gun show, gun sales ban. *Id.* at 2132-
2 33. Judges are better equipped than anyone to compare modern laws to old ones
3 without extrinsic aids. This Court should not be tempted to abandon the task of
4 interpreting historical laws to academics and scholars.

5 Instead, it should follow the lead of other district courts weighing Second
6 Amendment challenges since *Bruen*. For example, a New York district court recently
7 held that “[t]he Court’s view of the State’s expert’s declaration is that live testimony
8 and cross examination are not needed... The historical record itself, and not expert
9 arguments or opinions, informs the analysis.” *Hardaway v. Nigrelli*, No. 22-cv-771,
10 2022 U.S. Dist. LEXIS 200813, at *6 n.6 (W.D.N.Y. Nov. 3, 2022). Still another
11 New York district court explained that “[t]he State Defendants are fully capable of
12 meeting their burden of producing analogues (especially when prodded to do so),
13 and judges appear uniquely qualified at interpreting the meaning of statutes.”
14 *Antonyuk v. Hochul*, 2022 U.S. Dist. LEXIS 201944, at *125 n.73.

15 These district courts’ observations reflect the realities of *Bruen* itself. Recall,
16 *Bruen* never even made it past the pleadings in the district court. There was no
17 discovery. No battle of the experts. No diatribes from history professors speculating
18 about why our Forefathers refrained from passing restrictions on public carry with
19 any real regularity. There was nothing like that. And still, the Supreme Court
20 managed to analyze the historical laws the government presented and, without
21 remanding the case for further development, held that New York’s modern carry law
22 is not “consistent with this Nation’s historical tradition of firearm regulation.”
23 *Bruen*, 142 S. Ct. at 2126, 2156; *but see id.* at 2164 (Breyer, J., dissenting)
24 (complaining that the Court should remand the case to develop the record).

25 **II. THE STATE’S “EXPERT” TESTIMONY IS NOT RELEVANT**

26 Federal Rule of Evidence 702(a) requires that the expert’s opinion help the
27 trier of fact to understand the evidence or determine a fact in issue—that is, the
28 opinion must be relevant. *See Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 135

1 (2d Cir. 2013). Neither of the State’s “expert” declarations are relevant to any factual
2 question at issue.

3 Professor Cornell’s submission is well written, and it appears to employ
4 relevant citations to appropriate scholarly texts, but it is largely either an improper
5 attempt to relitigate matters already decided by the Supreme Court in *District of*
6 *Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S.
7 742 (2010), and *Bruen*, 142 S. Ct. 2111, or it impermissibly seeks to explain to this
8 Court how to apply the law of those cases to the facts here.

9 Mr. Charles’ submission is even less relevant as it appears to address itself
10 solely to a historical defense of laws restricting the possession of arms in “sensitive
11 places.” But the Orange County Fair & Event Center is not a “sensitive place” and
12 possession of firearms and ammunition is not at issue. Neither SB 264 nor SB 915
13 ban firearms at the fairgrounds. The State itself concedes that it is not seeking to ban
14 gun shows, or even the possession of guns at gun shows at state fairgrounds. *See*
15 *Defs.’ Opp’n Mot. Prelim. Inj. 1, 10*. And its latest brief argues that “the purchase or
16 sale of firearms or ammunition is prohibited *only* on state property—and such items
17 may be sold and are readily accessible in ample alternative locations.” *Defs.’ 2d*
18 *Suppl. Br. 1* (citing *Defs.’ Suppl. Br. 1, 4-5*).

19
20 **III. THE SUBMISSION OF EXPERT REPORTS WAS NOT REQUESTED BY THIS
COURT, AND IT PREJUDICES PLAINTIFFS**

21 This Court’s first order for supplemental briefing on Plaintiffs’ preliminary
22 injunction motion asked the parties to “file simultaneous supplemental briefs ...
23 providing an analysis of the issues discussed above.” Order (Jan. 6, 2022), ECF No.
24 25. The Court did not request or suggest that expert testimony would assist it. And
25 footnote 6 anticipated briefs displaying the virtue of brevity.

26 Likewise, this Court’s second order for supplemental briefing omitted any call
27 for expert testimony, but provided the “Defendants with an opportunity to ‘justify its
28 regulation by demonstrating that it is consistent with the Nation’s historical tradition

1 of firearm regulation.” Order (Feb. 1, 2023), ECF No. 28 (citing *Bruen*, 142 S. Ct.
2 at 2130). The Court most certainly did not ask for expert opinions on a matter that
3 invades the duty of the Court to interpret the law.

4 Finally, this case is at a preliminary stage. There has been no discovery plan
5 filed with the court or scheduling order. *See generally* Fed. R. Civ. P. 16(c)(2)(1)(D)
6 & (F), 26(a)(2). Regardless of the outcome of the hearing on Plaintiffs’ Motion for
7 Preliminary Injunction, there is ample time for the Court to schedule and the parties
8 to comply with the normal rules for expert disclosure and discovery.

9 **CONCLUSION**

10 For these reasons, the Court should sustain the Plaintiffs’ Objection to the
11 State Defendants’ Expert Testimony and strike the declarations of Patrick J. Charles,
12 ECF No. 31-1, and Professor Saul Cornell, ECF No. 31-2.

13 Dated: March 10, 2023

MICHEL & ASSOCIATES, P.C.

14 /s/ Anna M. Barvir

15 Anna M. Barvir
16 Counsel for Plaintiffs B&L Productions, Inc.,
17 California Rifle & Pistol Association,
18 Incorporated, Gerald Clark, Eric Johnson, Chad
Littrell, Jan Steven Merson, Asian Pacific
American Gun Owner Association, Second
Amendment Law Center, Inc.

19 Dated: March 10, 2023

LAW OFFICES OF DONALD KILMER, APC

20 /s/ Donald Kilmer

21 Donald Kilmer
22 Counsel for Plaintiff Second Amendment
Foundation

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ATTESTATION OF E-FILED SIGNATURES

I, Anna M. Barvir, am the ECF User whose ID and password are being used to file this PLAINTIFFS’ RESPONSE TO STATE DEFENDANTS’ SECOND SUPPLEMENTAL BRIEF RE: MOTION FOR PRELIMINARY INJUNCTION. In compliance with Central District of California L.R. 5-4.3.4, I attest that all signatories are registered CM/ECF filers and have concurred in this filing.

Dated: March 10, 2023

/s/ Anna M. Barvir
Anna M. Barvir

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Case Name: *B & L Productions, Inc., et al. v. Newsom, et al.*
Case No.: 8:22-cv-01518 JWH (JDEx)

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’ OBJECTION TO THE STATE DEFENDANTS’ EXPERT
DECLARATIONS; MOTION TO STRIKE OR EXCLUDE THE STATE
DEFENDANTS’ EXPERT DECLARATIONS**

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

Nicole J. Kau, Deputy Attorney General
nicole.kau@doj.ca.gov
300 South Spring Street, Suite 1702
Los Angeles, CA 90013-1230
Attorney for Defendants

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

Executed March 10, 2023.


Christina Castron