

C. D. Michel – SBN 144258
cmichel@michellawyers.com
Sean A. Brady – SBN 262007
sbrady@michellawyers.com
Matthew D. Cubeiro – SBN 291519
mcubeiro@michellawyers.com
MICHEL & ASSOCIATES, P.C.
180 East Ocean Boulevard, Suite 200
Long Beach, CA 90802
Telephone: 562-216-4444
Facsimile: 562-216-4445

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

STEVEN RUPP, et al.,

Plaintiffs,

vs.

ROB BONTA, in his official capacity
as Attorney General of the State of
California,

Defendant.

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

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

Hearing Date: April 28, 2023
Hearing Time: 10:30 a.m.
Courtroom: 8A
Judge: Hon. Josephine L. Staton

INTRODUCTION

The purpose of expert witness testimony is to assist the fact finder with understanding complicated, technical issues that are beyond the ordinary fact finder's ability to understand. To be admissible, an expert witness's opinion must be based in something more than mere speculation and have a foundation in genuine knowledge about a complex factual issue that is material to the case.

John Donohue's declaration supporting the State's supplemental briefing meets none of these standards. To the extent that Donohue offers any discernable opinion(s) specifically about the banned firearms at issue in this litigation, his bases for such opinion(s) are neither data, experience, nor specialized knowledge, but rather an unabashed distaste for the Second Amendment and a fervent skepticism of armed self-defense. Rarely do expert witnesses assert their opinions with the degree of blatant hostility that Donohue does here. Regardless of his personal hostility towards firearm rights, the opinions he expresses in his declaration have nothing to do with the only questions that this Court was instructed to resolve on remand in light of *New York State Rifle & Pistol Assn. v. Bruen*, -- U.S. --, 142 S. Ct. 2111 (2022) ("*Bruen*"): (1) whether the banned firearms are protected "arms" under the Second Amendment; and (2) whether the State can prove that there has existed an enduring tradition in American history of state regulation that is sufficiently analogous to California's law challenged here. Because Donohue's opinions do nothing to inform either of those questions, they are irrelevant and thus not helpful to this Court.

Even if it were relevant, Donohue's testimony is not the product of reliable principles or methods. His report amounts to essentially his ruminations on gun violence with lazy references to others' purported scholarly investigations of gun violence—nothing original to him. And, of course, none does anything to assist this Court with applying *Bruen*, and assist the Court with the only question before it. Nor are his previous opinions in this matter, offered in support of the State's oppositions

1 to Plaintiffs’ motions for preliminary injunction and for summary judgment, of any
2 value to this Court at this stage of the case. Plaintiffs thus request that the Court find
3 Donohue’s testimony inadmissible under Federal Rule of Evidence 702.

4 **I. LEGAL STANDARD UNDER FEDERAL RULE OF EVIDENCE 702**

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

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

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

20 What’s more, not all opinions of an expert are necessarily “expert opinions.”
21 *See United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991). The expert must
22 have sufficient specialized knowledge to assist the trier of fact in deciding the
23 specific issues in the case. *See Belk, Inc. v. Meyer Corp.*, U.S., 679 F.3d 146, 162-
24 163 (4th Cir. 2012). Opinions outside the expert’s expertise are inadmissible. *See*
25 *Watkins v. Schriver*, 52 F.3d 769, 711 (8th Cir. 1995) (affirming exclusion of
26 neurologist’s testimony “that the [plaintiff’s neck] injury was more consistent with
27 being thrown into a wall than with a stumble into the corner”); *see, e.g., Religious*
28 *Tech. Ctr. v. Netcom On-Line Commun. Servs.*, No. C-95-20091, 1997 U.S. Dist.
LEXIS 23572 (N.D. Cal. Jan. 3, 1997) (striking expert testimony beyond the scope
of the expert’s knowledge). And an expert’s suitability for testimony depends on the

1 facts of the case; being qualified to opine on one subject has no bearing on that
2 person’s qualification to opine on another unrelated subject. *See Jones v. Lincoln*
3 *Elec. Co.*, 188 F.3d 709, 723 (7th Cir. 1999); *see, e.g., Burke v. Pitney Bowes Inc.*
4 *Long Term Disability Plan*, 640 F. Supp. 2d 1160 (N.D. Cal. 2009). In short, an
5 impressive resume is not enough to qualify someone to serve as an expert in any
6 given matter. *United States v. Hermanek*, 289 F.3d 1076, 1093 (9th Cir. 2002). (“It
7 is well settled that bare qualifications alone cannot establish the admissibility of . . .
8 expert testimony.”).

9 Relevant to Donohue’s report, the Supreme Court has explained that while
10 “judicial deference to legislative interest balancing is understandable—and,
11 elsewhere, appropriate—it is not deference that the Constitution demands here.”
12 *Bruen*, 142 S. Ct. at 2131. Because all of Donohue’s report is about interest
13 balancing arguments – specifically the problem of mass shootings, January 6 (which
14 didn’t actually involve any of the banned firearms), and other political concerns – it
15 is not appropriate testimony under *Bruen*.

16 **II. ARGUMENT**

17 **A. Donohue’s Testimony Does Not Help the Court Apply *Bruen***

18 Under the standards for admissibility of expert witness testimony set forth in
19 Rule 702 and explained in *Daubert* and its progeny, Donohue’s testimony is not
20 admissible. He does not offer any specialized knowledge relevant to the subject
21 matter at issue. *Daubert*, 509 U.S. at 591. (“Expert testimony which does not relate
22 to any issue in the case is not relevant and, ergo, non-helpful.”). He has not reliably
23 applied any principles or methods to the facts of the case. His opinions are thus
24 neither the product of reliable principles and methods nor are they based on
25 sufficient facts or data. *See Fed. R. Evid. 702*. This Court should thus exercise its
26 broad discretion to reject his testimony entirely. As thoroughly explained in
27 Plaintiffs’ supplemental briefing, *Bruen* reiterated that *District of Columbia v.*
28 *Heller*, 554 U.S. 570 (2008) rejected the public-safety-interest-balancing approach to

1 analyzing Second Amendment challenges that wrongly proliferated in lower courts
2 post-*Heller*. *Bruen*, 142 S. Ct. at 2127. *Bruen* directs courts to determine only
3 whether a challenged law implicates the Second Amendment’s text and, if it does, to
4 find the law unconstitutional if the government cannot prove that there is an
5 enduring tradition in American history of state regulation that is sufficiently
6 analogous to the challenged law at issue. *Bruen*, 142 S. Ct. at 2118.

7 Apparently, no one explained this to Mr. Donohue. His expert report does not
8 say a word about *Bruen*, except that he was the author of an amicus curiae brief
9 submitted in it. Nor does his opinion say a word about whether there is a historical
10 cannon of firearms laws that are sufficiently analogous to the rifle ban that Plaintiffs
11 challenge here.

12 While surprising, it is not entirely shocking. Afterall, Donohue is not a legal
13 historian, or a Second Amendment or firearms historian, nor an expert on the laws of
14 the early Republic. He is a law professor whose work intersects with economics.
15 Indeed, his opinion is so far off the main issue before the Court that it cannot survive
16 Rule 702 scrutiny. A supposed “expert” witness report that does not even talk about
17 the key issue obviously cannot help the court understand the key issue.

18 While application of the *Bruen* test may depend on facts about what laws were
19 in place during the relevant time periods, whether there exists a historical canon of
20 sufficiently analogous laws to the one being challenged is essentially a legal
21 determination for courts to decide. The “admissibility of expert opinion generally
22 turns on preliminary questions of law determined by the trial judge, including inter
23 alia, whether the testimony is relevant and reliable, and whether its probative value
24 is substantially outweighed by risk of unfair prejudice, confusion of issues, or undue
25 consumption of time.” *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir.
26 2000). Regardless of whether it is a legal or factual question, Donohue’s expert
27 opinions do not assist with the Court’s resolution of the issue because the issues his
28 report covers are not relevant to the historical inquiry question. Indeed, he does not

1 discuss historical regulations at all. “Expert testimony which does not relate to any
2 issue in the case is not relevant and, ergo, non-helpful,” and should therefore be
3 excluded. *Daubert*, 509 U.S. 591.

4 **B. Donohue’s 2022 Report Opinion Offers No Discernable Opinion on**
5 **the Firearms at Issue**

6 Donohue explains that, with respect to his report, “I have been asked by the
7 California Department of Justice to update the opinions expressed in my 2019
8 Report with currently available information. I continue to stand by the opinions and
9 conclusions expressed in my 2019 Report.” Supplemental Expert Report and
10 Declaration of John J. Donohue, Declaration of Sean A. Brady (“Brady Decl.”) Ex. 1
11 at ¶ 13. As with those previous opinions, Donohue’s 2022 report is more of a screed
12 against gun rights than a data intensive investigation of the rifles that California
13 bans. Donohue clearly conflates “assault weapons” with magazines over ten rounds
14 and active shooter incidents. He views them as inextricable parts of one big gun
15 violence problem. Donohue Report, *passim*.

16 For example, he says that the 2018 mass killing at Parkland High School and
17 the May 2022 mass killing in Uvalde “vividly underscored how police responses to
18 violence are impaired when the officers are confronted by a shooter armed with an
19 assault rifle and high-capacity magazines.” *Id.* at ¶ 18. Donohue offers no predicate
20 explanation for that conclusion; he just asserts it as if it were an obvious fact. And if
21 it is, then the Court does not need his expert testimony to understand it.

22 Similarly, Donohue asserts that “[o]ne of the unfortunate consequences of the
23 continuing advances in the lethality and power of modern firearms is that without
24 appropriate government action the dangers posed by civilian weaponry will continue
25 to outpace any legitimate crime-reducing benefit that firearms might provide.” *Id.* at
26 ¶ 26. This exemplifies the sort of bold assertion for which Donohue provides zero
27 explanation or predicate factual-foundation to support.
28

1 Much of Donohue’s report is simply quoting others’ studies and reports
2 without providing any original commentary on them based on his expertise. *See*,
3 e.g., *Id.* at ¶¶ 19, 22. That does not qualify as expert opinion. Anyone can simply
4 provide quotes from other materials they agree with.

5 Donohue concludes his 2022 report with references to how laudable gun
6 control in Canada, New Zealand, and Australia is, and then bizarrely asserts that
7 “assault weapons” and magazines over ten rounds threaten American democracy
8 because a fairly significant number of Americans have expressed their belief that
9 violence against the government could be justified. *Id.* at ¶¶ 31-33. None of this is
10 relevant to the issues before this Court: the presence of absence of a historical
11 tradition of regulating the rifles that California bans.

12 This Court should thus disqualify Donohue from providing any expert opinion
13 in this matter. It would not be the first time a court found Donohue’s credentials and
14 content wanting. *See In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 742 (Del.
15 Ch. Aug. 9, 2005) (noting that Donohue’s testimony was “simply not supported by a
16 fair and neutral evaluation of the record,” and that in “his zeal” to make his opinions,
17 he had provided a report and testimony “of little value to the Court.”).

18 CONCLUSION

19 Donohue’s Ivy league education and academic background do not make him
20 an expert witness on firearms issues. None of his opinions are derived from the
21 application of specialized knowledge, or processes, or evaluation of hard, unbiased
22 data. He has not applied any original insights or evaluation to works of others that he
23 references, he ignores the key issue under *Bruen*, and clearly has a strong bias
24 against firearms and self-defense. None of the opinions he has offered in this

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26 ///

27 ///

28 ///

1 litigation help this Court with the task before it on remand since *Bruen*, and should
2 therefore be excluded under Federal Rule of Evidence 702.

3
4 Dated: March 24, 2023

MICHEL & ASSOCIATES, P.C.

/s/ Sean A. Brady

Sean A. Brady

Email: sbrady@michellawyers.com

Attorneys for Plaintiffs

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

Case Name: *Rupp, et al. v. Bonta*
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:


**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' 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.

Xavier Becerra
Attorney General of California
Anna Ferrari
Deputy Attorney General
Email: anna.ferrari@doj.ca.gov
Christina R.B. Lopez
Email: christina.lopez@doj.ca.gov
John D. Echeverria
Email: john.echeverria@doj.ca.gov
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

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

Executed March 24, 2023.


Laura Palmerin