

1 KAMALA D. HARRIS, State Bar No. 146672
Attorney General of California
2 MARK R. BECKINGTON, State Bar No. 126009
Supervising Deputy Attorney General
3 PETER H. CHANG, State Bar No. 241467
Deputy Attorney General
4 JONATHAN M. EISENBERG, State Bar No. 184162
Deputy Attorney General
5 300 South Spring Street, Suite 1702
Los Angeles, CA 90013
6 Telephone: (213) 897-6505
Fax: (213) 897-5775
7 E-mail: Jonathan.Eisenberg@doj.ca.gov
Attorneys for Defendant Kamala D. Harris,
8 *Attorney General of California*

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF CALIFORNIA
12 FRESNO DIVISION

13
14 **JEFF SILVESTER, BRANDON COMBS,**
15 **THE CALGUNS FOUNDATION, INC., a**
16 **non-profit organization, and THE SECOND**
AMENDMENT FOUNDATION, INC., a
non-profit organization,

17 Plaintiffs,

18 v.

19 **KAMALA D. HARRIS, Attorney General of**
20 **California (in her official capacity),**

21 Defendant.

1:11-cv-02137-AWI-SKO

DEFENDANT KAMALA D. HARRIS'S
OBJECTIONS TO NEW ARGUMENTS
AND NEW EVIDENCE PRESENTED IN
PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
RESPONSE TO DEFENDANTS'
CLOSING BRIEF [DOCKET # 98]

Dept: 8th Flr., Crtrm. 2
Judge: Hon. Anthony W. Ishii
Trial Date: March 25, 2014
Action Filed: December 23, 2011

22
23 Defendant Kamala D. Harris, Attorney General of California (“the Attorney General”),
24 submits the following objections to an argument and evidence appearing for the first time in the
25 present case in the June 30, 2014, memorandum of points and authorities (“Plaintiffs’ Closing
26 Response Brief”) of Plaintiffs Jeff Silvester (“Silvester”), Brandon Combs (“Combs”), The
27 Calguns Foundation, Inc. (“CGF”), and The Second Amendment Foundation, Inc. (“SAF”;
28

1 together with Silvester, Combs, and CGF, “Plaintiffs”), which memorandum responded to the
2 Attorney General’s June 16, 2014, closing brief.

3 The Attorney General objects that Plaintiffs’ Closing Response Brief improperly makes a
4 new argument based on a never-before-disclosed document, unrelated to responding to any
5 arguments or evidence that the Attorney General presented in her June 16, 2014, closing brief.
6 The Court should disregard the new argument and evidence or, alternatively, permit the Attorney
7 General to respond to them.

8 The Attorney General specifically objects to the argument and citations at page 1, lines 11
9 to 23 and 27 to 28, page 2 (entire page), and page 3, lines 1 to 24, of Plaintiff’s Closing Response
10 Brief, as well as to the associated exhibit, which is docket item 98-1, to the extent that the exhibit
11 does more than cite to laws and regulations.

12 The gist of the objectionable argument is that California’s laws mandating a 10-day waiting
13 period between the application to purchase and delivery/receipt of a firearm, for all California
14 citizens not exempt from the laws, are not “part of the current national norm” and, therefore, they
15 burden the Second Amendment right to keep and bear arms. (Plaintiffs’ Closing Response Brief
16 at 3:22-3:24.) The objectionable evidence comprises excerpts from the 2010-11 edition of the
17 Bureau of Alcohol, Tobacco, Firearms and Explosives’ report, *State Laws and Published*
18 *Ordinances*. Plaintiffs did not list this report in the pretrial statement (docket item 45) as one of
19 the documents to be used at trial. Consequently, the report is not listed in the pretrial order
20 (docket item 48). There is no copy of this report in the pre-marked trial exhibits; nor was the
21 report used at trial.

22 A trial court should not consider a litigant’s new (not rebuttal) argument raised for the first
23 time in a response to a closing brief following a trial, because the opposing litigant is obviously
24 prejudiced by being unable to respond. *Cf. United States v. Anekwu*, 695 F.3d 967, 985 (9th Cir.
25 2012) (discussing reply briefs on appeal); *Kennedy v. Lockyer*, 379 F.3d 1041, 1063 (9th Cir.
26 2004) (same). Alternatively, the court should grant the opposing party an opportunity to respond
27 to the new argument. *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1040-41 (9th Cir. 2003).
28

1 A trial court should not consider new evidence offered after the presentation of evidence at
2 trial has ended, unless the propounding party moves to reopen evidence and thereby justifies why
3 the evidence in question was not offered earlier. L.R. 281(b)(11); *Contempo Metal Furniture Co.*
4 *of Cal. v. E. Tex. Motor Freight Lines, Inc.*, 661 F.2d 761, 767 (9th Cir. 1981); *see also Pac.*
5 *Contact Labs., Inc. v. Solex Labs., Inc.*, 209 F.2d 529, 533-34 (9th Cir. 1953) (discussing motion
6 for new trial); *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (motion
7 to amend judgment); *cf.* L.R. 291.1; L.R. 291.2.

8 Here, Plaintiffs' new argument is based on the new evidence, so the Court should hold
9 Plaintiffs to the requirement of moving to reopen evidence, before considering the new argument
10 or the new evidence. If the Court is inclined to consider the new argument or the new evidence,
11 however, the Attorney General would request an opportunity to respond substantively to
12 Plaintiff's new argument and evidence.

13 Dated: July 15, 2014

Respectfully Submitted,

14 KAMALA D. HARRIS
15 Attorney General of California
16 MARK R. BECKINGTON
17 Supervising Deputy Attorney General

18 /s/ Jonathan M. Eisenberg
19 JONATHAN M. EISENBERG
20 Deputy Attorney General
21 *Attorneys for Defendant Kamala D. Harris,*
22 *Attorney General of California*