

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 JONATHAN M. EISENBERG, State Bar No. 184162  
 Deputy Attorney General  
 4 300 South Spring Street, Suite 1702  
 Los Angeles, CA 90013  
 5 Telephone: (213) 897-6505  
 Fax: (213) 897-5775  
 6 E-mail: Jonathan.Eisenberg@doj.ca.gov  
 PETER H. CHANG, State Bar No. 241467  
 7 Deputy Attorney General  
 455 Golden Gate Ave., Suite 11000  
 8 San Francisco, CA 94102  
 Telephone: (415) 703-5939  
 9 Fax: (415) 703-1234  
 Email: Peter.Chang@doj.ca.gov  
 10 *Attorneys for Defendant Kamala D. Harris, Attorney  
 General of California*

11  
 12 IN THE UNITED STATES DISTRICT COURT  
 13 FOR THE EASTERN DISTRICT OF CALIFORNIA  
 14 FRESNO DIVISION

<p>16 <b>JEFF SILVESTER, et al.,</b>          17          Plaintiffs,          18          v.          19  <b>KAMALA D. HARRIS, Attorney General of          California, and DOES 1 to 20,</b>          20          Defendants.          21          22          23</p>	<p>1:11-cv-02137-AWI-SKO  <b>DEFENDANT KAMALA D. HARRIS’S          OPPOSITION TO PLAINTIFFS’          MOTION IN LIMINE RE: BURDEN OF          PROOF (DKT# 55)</b>          Date: March 11, 2014          Time: 1:30 p.m.          Courtroom: 2          Judge: The Honorable          Anthony W. Ishii          Trial Date: March 25, 2014          Action Filed: December 23, 2011</p>
---	---

24 Defendant Kamala D. Harris, Attorney General of California, (the “Attorney General”)  
 25 submits the following opposition to the Plaintiffs’ motion in limine addressing the burdens of  
 26 proof and the related evidentiary burdens in the case at bar.  
 27  
 28

1 **INTRODUCTION**

2 Plaintiffs bring a Second Amendment challenge to California’s statutory 10-day waiting  
3 period between application to purchase and delivery/receipt of a firearm (Cal. Penal Code  
4 §§ 26815, 27540; together, the “Waiting-Period Law”). Plaintiffs seek to enjoin the Attorney  
5 General from enforcing the Waiting-Period Law against persons who (1) have gone through the  
6 waiting period at least once before in connection with a past firearm transaction, and (2) lawfully  
7 possess a firearm that the State of California knows about.

8 Plaintiffs seek, by their “motion in limine,” for the Court to determine the parties’ burdens  
9 of proof and the applicable level of scrutiny for this case, and that Plaintiffs have (or will have)  
10 met their burden of proof. Plaintiffs’ motion improperly seeks the resolution of substantive  
11 matters that should not be resolved by a motion in limine. A motion in limine is an evidentiary  
12 motion intended to allow a court to resolve evidentiary disputes ahead of trial before potentially  
13 prejudicial evidence is presented to the jury. It is not an appropriate vehicle for the Court to  
14 resolve substantive issues. Moreover, Plaintiffs misstate and misapply the relevant law.  
15 Therefore, the Court should deny this motion.

16 **ARGUMENT**

17 **I. PLAINTIFFS’ REQUEST FOR A DETERMINATION THAT THEY MET THEIR BURDEN OF**  
18 **PROOF APPROXIMATES A SUBSTANTIVE MOTION IN DISGUISE AND IS IMPROPER**

19 A motion in limine is a motion “to exclude anticipated prejudicial evidence before the  
20 evidence is actually offered.” *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984). It is designed to  
21 “narrow the evidentiary issues for trial and to eliminate unnecessary trial interruptions.” *Bradley*  
22 *v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1069 (3d Cir. 1990). The instant motion does not seek  
23 resolution of any evidentiary disputes ahead of trial. Rather, Plaintiffs ask the Court to resolve  
24 substantive issues relating to the Attorney General’s burden of proof and the applicable level of  
25 scrutiny, as well as whether Plaintiffs met their burden of proof. Motion in Limine Re: Burden of  
26 Proof (“Motion”) (Dkt. #55), at p. 3. These requests raising non-evidentiary issues are  
27 inappropriate for a motion in limine. *See Louzon v. Ford Motor Co.*, 718 F.3d 556, 562 (6th Cir.  
28

1 2013). This is particularly true in a bench trial, where non-evidentiary issues can be more  
2 thoroughly explored in trial briefs and resolved at trial.

3 Courts have routinely denied substantive motions disguised as motions in limine. *See, e.g.,*  
4 *TVT Records v. Island Def Jam Music Group*, 250 F.Supp.2d 341, 344-45 (S.D.N.Y. 2003)  
5 (denying motions in limine where the motions were substantive motions filed “in the guise of  
6 addressing limited evidentiary issues”); *Chopourian v. Catholic Healthcare West*, No.09-cv-  
7 2972-KJM-KJN, 2011 WL 6396500, at \*11-12 (E.D. Cal. Dec. 20, 2011) (denying motion in  
8 limine because “the motion is . . . a substantive motion disguised as a motion in limine”).

9 Plaintiffs here do not raise any issues as to the admissibility of evidence but rather raise  
10 substantive issues inappropriate for an evidentiary motion. The Court should thus deny Plaintiffs’  
11 “motion in limine.”

12 **II. PLAINTIFFS’ REQUEST FOR A DETERMINATION OF THE PARTIES’ RESPECTIVE**  
13 **BURDENS OF PROOF AND THE APPROPRIATE DEGREE OF SCRUTINY IS ALSO**  
14 **IMPROPER**

15 As with Plaintiffs’ request for a ruling that they will have met their burden of proof, their  
16 request for the Court to determine the Attorney General’s burden of proof and applicable level of  
17 scrutiny in this case should not be resolved by way of an evidentiary motion as they are  
18 substantive issues. A determination of the applicable burden of proof for both parties and the  
19 appropriate level of scrutiny requires consideration and resolution of legal and factual issues not  
20 raised or addressed by Plaintiffs’ motion in limine.

21 If the Court wishes to address these issues, the Attorney General submits that it can seek  
22 briefing from the parties on the recent authority from the Ninth Circuit Court of Appeals in  
23 *United States v. Chovan* 75 F.3d 1127, (9th Cir. 2013) and *Peruta v. County of San Diego*, Case  
24 No. 10-56971, 2014 WL 555862, at \*3 (9th Cir. Feb. 13, 2014).<sup>1</sup>

25 In denying the Attorney General’s summary-judgment motion, this Court, relying on the  
26 *Chovan* decision, found preliminarily that the Waiting-Period Law burdens the Second  
27 Amendment right. However, the Attorney General completed its summary judgment briefing

28 <sup>1</sup> Petitions for rehearing or en banc review are pending in both *Chovan* and *Peruta*. The Attorney General filed one of the petitions for en banc review in *Peruta*.

1 before the release of the *Chovan* opinion, which altered the applicable legal standard in this  
2 circuit. Since the Court issued its summary judgment order, the Ninth Circuit has also issued  
3 *Peruta*, which further elucidated the relevant analytical framework applicable in the instant case  
4 for the Court to determine the appropriate burden of proof on the parties and, if necessary, the  
5 level of scrutiny.<sup>2</sup> The Attorney General intends to brief these substantive issues in its trial brief.

6 **CONCLUSION**

7 For the foregoing reasons, the Court should deny Plaintiffs' motion in limine, which seeks  
8 resolution of substantive issues not appropriate for resolution by way of an evidentiary motion.

9 Dated: March 3, 2014

10 Respectfully submitted,

11 KAMALA D. HARRIS  
12 Attorney General of California  
13 MARK R. BECKINGTON  
14 Supervising Deputy Attorney General

15 /s/ Peter H. Chang  
16 PETER H. CHANG  
17 Deputy Attorney General  
18 *Attorneys for Defendant Kamala D. Harris*

19 SA2012104659

20  
21  
22  
23  
24  
25  
26  
27 <sup>2</sup> Assuming that either case survives the pending petitions for en banc review. See  
28 footnote 1, *supra*.