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 8

9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 11 WESTERN DIVISION (LOS ANGELES)
 12

13 **ULISES GARCIA; JORDAN**
 14 **GALLINGER; BRIAN HILL;**
 15 **BROOKE HILL; CRAIG DeLUZ;**
 16 **SCOTT DIPMAN; ALBERT**
 17 **DUNCAN; TRACEY GRAHAM;**
 18 **LISA JANG; DENNIS SERBU;**
 19 **MICHAEL VEREDAS; FIREARMS**
POLICY FOUNDATION;
FIREARMS POLICY COALITION;
MADISON SOCIETY
FOUNDATION; and THE
CALGUNS FOUNDATION,

20 Plaintiffs,

21 v.

22 **KAMALA D. HARRIS, in her official**
 23 **capacity as Attorney General of**
 24 **California,**

25 Defendant.
 26
 27
 28

Case No.: 2:16-cv-02572-BRO-AFM

**CALIFORNIA ATTORNEY
 GENERAL KAMALA D.
 HARRIS'S REPLY IN FURTHER
 SUPPORT OF MOTION TO
 DISMISS COMPLAINT**

Date: August 8, 2016
 Time: 1:30 p.m.
 Courtroom: 14
 Judge: The Honorable Beverly
 Reid O'Connell
 Acton Filed: April 14, 2016

1 The Attorney General respectfully submits the following reply in further
2 support of her motion, pursuant to FRCP 12(b)(6) and 12(b)(1), to dismiss
3 Plaintiffs' Complaint with prejudice (the "Motion" or "Mot." (Dkt. No. 14)).¹

4 INTRODUCTION

5 In their opposition to the Motion (the "Opposition" or "Opp'n"), Plaintiffs
6 concede that rational basis scrutiny applies to their equal protection claim
7 challenging the Retired Officer Exemption to the Gun-Free School Zone Act, Cal.
8 Penal Code § 626.9(o). (*See* Opp'n at 9:2-15.) The parties disagree, however, on
9 the proper test under rational basis scrutiny. In her opening papers, the Attorney
10 General demonstrated that the Retired Officer Exemption satisfies rational basis
11 scrutiny because it is, at a minimum, reasonably related to a legitimate government
12 purpose: the safety of retired peace officers. (Mot. at 14:16-18:11.) While
13 Plaintiffs acknowledge that "allowing retired peace officers to carry concealed
14 weapons in school zones may be a rational way for the government to promote their
15 safety" (Opp'n at 11:28-12:1), they insist that the Attorney General's focus on the
16 safety of retired peace officers "is too narrow" and that "[t]he right question is
17 whether the classification here is rationally related to achieving the broader purpose
18 of the 'Gun Free School Zone Act.'" (*Id.* at 1:3-7.) But that is not, and cannot be,
19 the law. In conducting a rational basis review of a statutory exemption, the Court
20 must "identify *any* hypothetical rational basis for the exception." *Silveira v.*
21 *Lockyer*, 312 F.3d 1052, 1090 (9th Cir. 2002), *abrogated on other grounds by*
22 *District of Columbia v. Heller*, 554 U.S. 570 (2008).

23 Nothing in Plaintiff's Opposition undermines the common-sense conclusion
24 that the Retired Officer Exemption has a rational basis. Plaintiffs have failed to
25 distinguish other cases upholding similar exemptions for retired peace officers from

26 ¹ Capitalized terms used but not defined herein shall be given the same
27 meaning ascribed to them in the Motion, which is expressly incorporated herein by
28 reference.

1 firearm restrictions based on the same interest in their personal safety. The only
2 case that Plaintiffs rely upon to support their claim is the *Silveira* decision. But that
3 case concerned an exemption to the California Assault Weapons Control Act (the
4 “AWCA”) permitting retired peace officers to obtain “personal pleasure military-
5 style weapons” upon retirement, 312 F.3d at 1091, which (unlike the firearms
6 permitted under the Retired Officer Exemption) could have had no *reasonable*
7 connection to any self-defense interest for retired officers. In addition, Plaintiffs
8 fail to explain how the Individual Plaintiffs are similarly situated to retired peace
9 officers or how the Organizational Plaintiffs have standing. The Motion should be
10 granted, and the Complaint should be dismissed with prejudice.

11 ARGUMENT

12 I. THE RETIRED OFFICER EXEMPTION SATISFIES RATIONAL BASIS 13 SCRUTINY

14 A. Plaintiffs Misstate the Standard for Rational Basis Scrutiny

15 Under the Equal Protection Clause of the Fourteenth Amendment, “the general
16 rule is that legislation is presumed to be valid and will be sustained if the
17 classification drawn by the statute is rationally related to a legitimate government
18 interest.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).
19 Despite this deferential standard, Plaintiffs insist that the Retired Officer Exemption
20 must be connected to one, and only one, government purpose: the purpose of the
21 Gun-Free School Zone Act. (*See* Opp’n at 1:3-7.) Plaintiffs are wrong. By its very
22 nature, an exemption to a statute may be “at odds” in some way with the purpose of
23 the statute, and yet a court must uphold the exemption under rational basis scrutiny
24 if it is reasonably related to “*any* hypothetical rational basis for the exception,
25 whether or not that reason is in the legislative record.” *Silveira*, 312 F.3d at 1090.

26 For example, in *Nordlinger v. Hahn*, 505 U.S. 1 (1992), the petitioner
27 challenged exemptions to the acquisition-value property tax scheme in Article
28 XIII A of the California Constitution “for two special classes of new owners:

1 persons aged 55 and older, who exchange principal residences, and children who
2 acquire property from their parents.” *Id.* at 16. The Court found that both
3 exemptions “rationally further legitimate purposes.” *Id.* at 17. The latter
4 exemption happened to further the same purpose as Article XIII A, which was to
5 promote neighborhood continuity.² The former exemption, however, was found to
6 further the distinct purpose of not discouraging “older persons . . . from moving to a
7 residence more suitable to their changing family size or income.” *Id.* This
8 exemption was upheld under rational basis scrutiny even though it provided an
9 incentive for older homeowners to leave their communities and, thus, conflicted
10 with the purpose of Article XIII A.

11 To justify their position, Plaintiffs rely exclusively on the *Silveira* court’s
12 initial observation that the retired peace officer exemption in the AWCA was
13 “wholly contrary to the legislature’s stated reasons for enacting *restrictions* on
14 assault weapons.” (Opp’n at 11:25-26 (quoting *Silveira*, 312 F.3d at 1090).) But
15 the *Silveira* court made clear that this initial observation “cannot end” its analysis
16 because the court “must attempt to identify *any* hypothetical rational basis for the
17 exception, whether or not that reason is in the legislative record,” after which the
18 court proceeded to examine, and reject, several potential rationales for the
19 exemption. *Silveira*, 312 F.3d at 1090-91. Accordingly, even if the Retired Officer
20 Exemption were “wholly contrary” to a “stated” purpose of the Gun-Free School
21
22
23

24 ² Compare *Nordlinger*, 505 U.S. at 17 (“[T]he people of California
25 reasonably could have concluded that *the interests of family and neighborhood*
26 *continuity and stability* are furthered by and warrant an exemption for transfers
27 between parents and children.” (emphasis added)), *with id.* at 12 (finding that
28 Article XIII A rationally furthers the “legitimate interest in local neighborhood
preservation, continuity, and stability” by discouraging “rapid turnover in
ownership of homes and businesses”).

1 Zone Act (and it is not), the Court must uphold the Retired Officer Exemption if it
 2 is reasonably related to *any* legitimate government purpose.³

3
 4 **B. The Retired Officer Exemption Furthers the Legitimate
 Government Purpose of Protecting Retired Peace Officers**

5 As a general matter, retired peace officers may face unique safety concerns
 6 based on their prior service in law enforcement. As the Sacramento County
 7 Sherriff’s Association advocated in support of preserving the Retired Officer
 8 Exemption in the 2015 Amendment: “Retired peace officers protected and served
 9 the public while earning the enmity of those in society who ran afoul of the law.
 10 Retired officers carry their weapons as a means of personal protection. Recent
 11 attacks demonstrate the need for peace officers—even retired peace officers—to be
 12 able to defend themselves if necessary.” (Request for Judicial Notice (Dkt. No. 15),
 13 Ex. A (April 14 Committee Analysis) at 7.)⁴ Due to retired peace officers’ unique
 14 safety concerns, courts have upheld similar exemptions for retired peace officers
 15 from other firearm restrictions. *See Mehl* Dismissal Order at 11 (“[Retired peace

16
 17 ³ In a revealing footnote, the *Silveira* court observed that, even though “the
 18 grandfather clause [in the AWCA] may also appear to be inconsistent with th[e]
 19 legislative intent [of the AWCA],” “the argument that a rational basis for the
 20 grandfather clause exists is entirely different from, *and likely more substantial than*,
 those put forward to justify the off-duty exception.” *Silveira*, 312 F.3d at 1090 n.57
 (emphasis added). This passage confirms that an exemption can satisfy rational
 basis scrutiny even if it conflicts with the purpose of the statute.

21 ⁴ Plaintiffs object to the Request for Judicial Notice, relying exclusively on
 22 California state authorities to argue that the Court may not take judicial notice of
 23 certain statements reflected in the committee analyses for SB 707. (*See* Objection
 24 to Defendant’s Request for Judicial Notice (Dkt. No. 17) at 1:3-2:6; Opp’n at 16
 25 n.10.) The Court may take judicial notice of these statements as part of the
 26 legislative history of SB 707. *See Chaker v. Crogan*, 428 F.3d 1215, 1223 & n.8
 27 (9th Cir. 2005) (noting that “[n]umerous law enforcement agencies throughout the
 28 state supported the enactment of [a statute]” and taking judicial notice of the
 legislative history of the statute); *Rocky Mountain Farmers Union v. Goldstene*,
 719 F. Supp. 2d 1170, 1186 (E.D. Cal. 2010) (“To the extent that the legislative
 histories conflict, or represent the statements of individual legislators, this Court
 will consider the weight to give to the statements and resolve all doubts in favor of
 plaintiffs pursuant to motion to dismiss standards.”). At a minimum, the Court may
 take judicial notice of the fact that such statements were made because the sources
 are not subject to reasonable dispute. *See* Fed. R. Evid. 201.

1 officers] are entitled to carry concealed weapons to protect themselves from the
2 enemies they have made in performing their duties. While an officer’s duty to
3 respond to the public’s calls for help stops when he retires, the threat of danger
4 from enemies he might have made during his service does not.”); *Nichols v. Brown*,
5 No. CV 11-09916 SJO (SS), 2013 WL 3368922, at *6 (C.D. Cal. July 3, 2013)
6 (“[T]he California Legislature could have reasonably believed that certain groups,
7 such as retired police officers, were in *greater need of self-protection* and thus
8 should be allowed to openly carry a firearm.” (emphasis added)). The logic of
9 these well-reasoned decisions applies with equal force here. (Mot. at 15:19-16:2.)

10 Plaintiffs try to distinguish these cases by arguing that *Mehl* “arose in the
11 context of [a] licensing scheme designed to *facilitate* access to firearms,”
12 suggesting that the exemption for retired peace officers in that case was consistent
13 with that purpose. (Opp’n at 1:18-20.) Plaintiffs make a similar argument with
14 respect to the statute in *Nichols*, claiming that the open carry ban at issue in that
15 case was somehow a “statutory scheme *permitting* the open carry of firearms.” (*Id.*
16 at 13 n.8 (emphasis added).) Plaintiffs mischaracterize these statutes.
17 Notwithstanding any other exemptions or permitting processes in those statutory
18 schemes, those statutes were, undeniably, *bans* on the concealed carrying and the
19 open carrying of firearms, respectively. *See* Cal. Penal Code § 12025 (1999)
20 (currently Cal. Penal Code § 25400) (concealed weapons ban); Cal. Penal Code §
21 25850 (open carry ban). The exemptions for retired peace officers in those cases
22 were exemptions from those *prohibitions*. *See* Cal. Penal Code § 12027(a) (2008)
23 (currently Cal. Penal Code § 25450) (exempting retired peace officers from Penal
24 Code section 12025); Cal. Penal Code § 25900 (exempting retired peace officers
25 from Penal Code section 25850). As in those cases, the Retired Officer Exemption
26 to the Gun-Free School Zone Act is reasonably related to the legitimate government
27 purpose of protecting retired peace officers.
28

1 It does not matter that the exemption in *Mehl* applied only “if [the retired
2 peace officers] used firearms in the line of duty” or that “the plaintiffs in *Mehl* did
3 not have concealed-carry licenses.” (Opp’n at 13:4-13.) The Legislature could
4 have reached the reasonable determination that retired peace officers are at greater
5 risk due to their prior service in law enforcement, whether or not they were issued
6 firearms in the course of their service. Whatever safety concerns CCW permit
7 holders may have (*see id.* at 14:17-23), they do not necessarily face the same
8 pervasive threats as retired peace officers, and, given the rational basis for the
9 Retired Officer Exemption, the fact that the Gun-Free School Zone Act may be
10 over- or under-inclusive does not affect the outcome of this case. (Mot. at 16:6-15.)

11 Plaintiffs highlight certain categories of retired peace officers to argue that
12 “the notion of a need to protect against ‘enemies’ made in the line of duty is silly to
13 the point of irrationality as applied to a Fish and Game agent, a State Fair marshal,
14 or an IRS agent who spent most of their career outside of California but happened
15 to retire here.” (Opp’n at 15:17-21.) In so doing, Plaintiffs understate the potential
16 risk to these officers—who sometimes engage the public in confrontational
17 situations and have the power to arrest—and seek to substitute their judgment for
18 the Legislature’s in determining which retired peace officers may reasonably be at
19 risk. The Retired Officer Exemption is constitutional, not (as Plaintiffs erroneously
20 contend) because a “favored class would benefit from the preference” (*id.* at 12:3-
21 6), but because the Legislature could have determined that the preference was
22 needed to address the unique safety concerns faced by former law enforcement
23 officers.

24 **C. The *Silveira* Decision Is Not Controlling**

25 Plaintiffs rely solely on the *Silveira* decision to argue that the Retired Officer
26 Exemption fails under rational basis scrutiny. (*See* Opp’n at 10:7-12, 11:15-13:1.)
27 That case concerned an exception to the AWCA that allowed retired peace officers
28 to receive assault weapons upon retirement. While the *Silveira* court did not

1 expressly address any self-defense interest for retired peace officers, Plaintiffs
2 stress that the court sought to “identify *any* hypothetical rational basis for the
3 exemption,” suggesting that the court considered and rejected the very justification
4 proffered in this case. (*See id.* at 12:19-24.) Even so, it is not surprising that the
5 court would reject a personal safety interest in that case because making “high-
6 powered,” “personal pleasure military-style weapons” available to retired peace
7 officers would not have been reasonably connected to the legitimate government
8 purpose of ensuring their personal safety. *See Silveira*, 312 F.3d at 1090-91.
9 Plaintiffs note the “truism” that “possessing more powerful weapons enhances
10 one’s self-defense” (Opp’n at 12:24-25), but the relationship between assault
11 weapons and self-defense would have been “so attenuated as to render the
12 distinction arbitrary or irrational.” *Silveira*, 312 F.3d at 1091. In contrast to the
13 weapons at issue in *Silveira*, the firearms permitted under the Retired Officer
14 Exemption have a very close connection to the self-defense interests for retired
15 peace officers. *See Heller*, 554 U.S. at 629 (“[T]he American people have
16 considered the handgun to be the quintessential self-defense weapon.”).

17 Additionally, while Plaintiffs fixate on the *Silveira* court’s initial observation
18 that the exemption in that case was “wholly contrary to the legislature’s stated
19 reasons for enacting restrictions on assault weapons,” 312 F.3d at 1090, the Retired
20 Officer Exemption is not “wholly contrary” to any “stated” purpose of the Gun-
21 Free School Zone Act. Unlike the statute in *Silveira*, the Act has no “stated”
22 legislative purpose or legislative findings. (*See* Opp’n at 3:20-21 (“The legislative
23 record contains no legislative findings explaining the purposes of the 2015
24 amendments.”) Moreover, contrary to AWCA, which applied to all assault
25 weapons after the date of enactment, the Gun-Free School Zone Act does not
26 eliminate the presence of handguns on school grounds.⁵ The Act contains

27 ⁵ Plaintiffs claim that the AWCA was “hardly a ‘comprehensive ban’” in
28 light of the statute’s grandfather clause for assault weapons purchased prior to
(continued...)

1 exemptions for individuals who have obtained a restraining order or the prior
 2 written permission of the appropriate school authorities. *See* Penal Code § 626.9(b),
 3 (c)(3), (h), (i).)⁶

4
 5 **D. Plaintiffs’ Suggestion that the Retired Officer Exemption Was
 the Result of Political Lobbying Is Irrelevant**

6 Without citation to legal authority, Plaintiffs devote a significant portion of
 7 their Opposition to their specious claim that the Retired Officer Exemption violates
 8 the Equal Protection Clause because it “favor[ed] a politically powerful group.”
 9 (Opp’n at 16:15-18.) As discussed in the moving papers, this argument is irrelevant
 10 to the Court’s assessment of the Retired Officer Exemption under rational basis
 11 scrutiny. (Mot. at 15:12-18 (citing *Alva v. Lockyer*, 220 Fed. App’x 621 (9th Cir.
 12 2007)).)

13 Plaintiffs’ Opposition also makes new assertions, nowhere alleged in the
 14 Complaint, that CCW permit holders are politically unpopular and that the 2015
 15 Amendment was a result of some form of animus towards them. (*See* Opp’n at
 16 17:15-18:16.) ““In determining the propriety of a Rule 12(b)(6) dismissal, a court
 17 *may not* look beyond the complaint to a plaintiff’s . . . memorandum in opposition
 18 to a defendant’s motion to dismiss,”” but the Court may consider new facts raised in
 19 the Opposition in “determining whether to grant leave to amend or to dismiss the
 20 complaint with or without prejudice.” *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2

21 (...continued)
 22 enactment. (Opp’n at 10 n.6.) Notwithstanding Plaintiffs’ attempt to minimize the
 23 scope of the AWCA, the *Silveira* court described the statute’s purpose in sweeping
 24 terms. *See Silveira*, 312 F.3d at 1090 (describing the “act’s basic purpose of
 eliminating the availability of high-powered, military-style weapons” (emphasis
 added)); *id.* at 1091 (noting that the purpose of the act was “to eliminate the
 availability of the [assault] weapons generally” (emphasis added)).

25 ⁶ Notwithstanding the title of the Gun-Free School Zone Act, the Legislature
 26 could not have intended for the Act to eliminate guns from school grounds given
 27 the exemptions allowing firearms on school grounds. *See United States v.*
 28 *Nakashima*, 160 F. 842, 845 (9th Cir. 1908) (noting that “[t]he title of the act . . .
 may not be used to extend or restrain any positive provisions found in the body of
 the act”).

1 (9th Cir. 2003) (citation omitted). The Court should ignore these new assertions
2 because they are conclusory and belied by the fact that CCW permit holders were
3 afforded an exemption to the Gun-Free School Zone Act so long as they are not on
4 school grounds. *See* Penal Code § 626.9(c)(5).

5
6 **E. Plaintiffs Fail to Identify How They Are Similarly Situated to Retired Peace Officers**

7 Even though CCW permit holders and retired peace officers are both permitted
8 to possess concealed weapons “for the lawful purpose of self-defense” (Opp’n at
9 8:8-11), CCW permits do not make the Individual Plaintiffs similarly situated to
10 retired peace officers. Retired peace officers face unique safety concerns due to
11 their prior work in law enforcement. *See Nichols*, 2013 WL 3368922, at *6 (noting
12 retired peace officers’ potential “greater need of self-protection”). Contrary to
13 Plaintiffs’ suggestion that *Freeman v. City of Santa Ana*, 68 F.3d 1180 (9th Cir.
14 1995), does not apply at the pleadings stage (Opp’n at 8 n.4), Plaintiffs are required
15 to plead sufficient facts to allege that they are similarly situated to retired peace
16 officers. *See Guerrero v. De Leon*, No. EDCV 12-299-PA(SH), 2012 WL
17 5574631, at *5 (C.D. Cal. Sept. 24, 2012) (dismissing equal protection claim
18 because plaintiff failed to allege sufficient facts to allow the court to “know whether
19 [other individuals] were similarly situated”). Even if Plaintiffs have adequately
20 alleged that they are similarly situated to retired peace officers on account of their
21 CCW permits—and they have not due to, *inter alia*, the different county
22 requirements for establishing “good cause” to obtain a CCW permit (*see* Opp’n at
23 4:22-5:2)—the Court should still dismiss the Complaint because the Retired Officer
24 Exemption satisfies rational basis scrutiny. (*See* Section I.B, *supra*.)

25 **II. THE ORGANIZATIONAL PLAINTIFFS LACK STANDING**

26 The Organizational Plaintiffs lack standing because Plaintiffs’ equal protection
27 claim under the Fourteenth Amendment does not implicate any Second Amendment
28

1 interests.⁷ Plaintiffs claim that this “litigation is germane to the organizations’
2 purposes, as it challenges the discriminatory treatment suffered by some citizens
3 (including members of the plaintiffs’ organizations) *who seek to exercise their right*
4 *to keep and bear arms for self-defense.*” (Opp’n at 18:24-27 (emphasis added).)
5 But, as discussed in the moving papers, this litigation has nothing to do with the
6 Second Amendment or any right to keep and bear arms. (See Mot. at 18:24-20:16.)
7 If anything, in attempting to invalidate the Retired Officer Exemption, Plaintiffs are
8 seeking to *restrict* the ability of certain individuals to possess firearms on school
9 grounds. As demonstrated by the authorities cited in the moving papers—and
10 conspicuously ignored by Plaintiffs—the general equal protection interest asserted
11 in this litigation is not germane to the alleged purposes of the Organizational
12 Plaintiffs. (*Id.* at 18:24-19:18.) The only case cited by Plaintiffs in support of their
13 argument is *Silvester v. Harris*, 41 F. Supp. 3d 927 (E.D. Cal. 2014). (Opp’n at
14 18:27-19:1.) That case, however, supports the conclusion that the Organizational
15 Plaintiffs lack standing because, unlike the general civil rights interest asserted
16 here, the organizational plaintiffs in that case were asserting a Second Amendment
17 interest in attempting to invalidate the 10-day waiting period for purchasing
18 firearms. *Id.* at 942. The Organizational Plaintiffs lack standing and, at a
19 minimum, their claims must be dismissed.

20 CONCLUSION

21 For the reasons set forth above and in her opening papers, the Attorney
22 General respectfully urges this Court to grant the Motion and dismiss the Complaint
23 with prejudice and without leave to amend.
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27 ⁷ Plaintiffs do not address the argument raised in the moving papers that the
28 Organizational Plaintiffs lack direct standing. (See Mot. at 18 n.15.)

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Dated: July 25, 2016

Respectfully submitted,
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