No. 16-56125

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORDAN GALLINGER, et al.,
Plaintiffs-Appellants,

v.

XAVIER BECERRA, in his official capacity as Attorney General of California,
Defendant-Appellee.

On Appeal from the United States District Court
Central District of California
The Honorable Beverly Reid O'Connell
Case 2:16-cv-02572-BRO-AFM

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The State's Answering Brief cannot avoid the bottom-line point that this Court's decision in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), is controlling here. Granting a special exemption to carry concealed firearms to retired peace officer civilians while denying that same privilege to similarly-situated civilians – in a statute aimed at reducing access to firearms – violates the Equal Protection Clause. *Silveira* teaches that it is an *active* peace officer's role as a law enforcement agent that provides a rational basis for distinguishing between active peace officers and private citizens in such a statute. Because retired peace officer civilians are no longer engaging in law enforcement activity, however, it violates the Equal Protection Clause to favor them over their fellow civilians.

The few arguments the State musters to evade *Silveira* are foreclosed by *Silveira* itself. The factual quibbles and distinctions offered in opposition elide *Silveira*'s critical point: The State cannot "arbitrarily and unreasonably afford[] a privilege to one group of individuals that is denied to others." 312 F.3d at 1091. Allowing retired peace officers to carry concealed firearms in a school zone "bears no reasonable relationship to the stated legislative purpose of" the Gun Free School Zone Act, *Silveira*, 312 F.3d at 1091, which is to promote safety for students, teachers, and visitors alike by ridding guns from schools unless they are (1) being

used by active law enforcement or (2) authorized by the relevant school administrator.

The State also claims that the two groups – retired peace officer civilians with CCW licenses and civilians with CCW licenses who did not work for the government – are not "similarly situated" for equal protection purposes. Not so. The two groups are in all relevant respects alike: Both are groups of private citizens licensed to carry concealed firearms in public for the lawful purpose of self-defense. The State's argument that retired peace officers are different because they allegedly have a heightened need for self-defense skips ahead to the second step of the Equal Protection question, which asks whether there is a rational motivation for the distinction.

Finally, the State cannot escape the ream of evidence from the legislative record that shows that the Legislature included the retired peace office exemption to favor a politically powerful group and to disfavor a politically unpopular one. This, too, violates equal protection.

ARGUMENT

A. Private Citizens Licensed To Carry Concealed Weapons Are Similarly Situated To Retired Peace Officer Civilians Who Are Licensed to Carry Concealed Weapons.

The State cites this Court's amended opinion in *Arizona Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017) (*ADAC III*), as vindication of its claim

that retired peace officers and appellants are not "similarly situated" for purposes of evaluating whether the Gun Free School Zone Act's differing treatment of the two classes violated the Equal Protection Clause. The State finds it significant that the *ADAC III* court said "the 'similarly situated' analysis must focus on factors of similarity and distinction pertinent to the state's policy, not factors outside the realm of its authority and concern.'" *Id.* at 967. Because retired peace officers' "heightened safety risks" compared to CCW holders are "within the realm" of the State's "concern," the argument goes, they are not similarly situated to CCW holders. AAB 18. This argument is wrong.

First, the State ignores that the *ADAC III* panel applied precisely the same basic standard that it applied the first time around: To state an equal protection claim, "[t]he groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Id.* at 966 (quoting *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005)); *see Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1064 (9th Cir. 2014) (*ADAC II*) (applying identical language). And the Court emphasized that the groups "do not need to be similar in all respects . . ., but they must be similar in those respects that are relevant to [the government's] own interests and its policy." *ADAC III*, 855 F.3d at 966; *see also id.* ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently per-

sons who are in all *relevant* respects alike." (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992))).

Second, and more fundamentally, the basic problem with the State's argument is that it imports into the first step of the Equal Protection analysis (are the groups similarly situated?) its argument at the second step (is there a rational basis for the distinction?). Thus, when the State says the groups aren't similarly situated because retired peace officers have a heightened need for self-defense, the State is skipping ahead to the supposed rationale for the distinction. When the *ADAC III* court said the goal of the control-group analysis at the first step is "that the factor motivating the alleged discrimination can be *identified*," 855 F.3d at 966 (emphasis added), it plainly meant that the motivating factor would be evaluated under the appropriate level of scrutiny at the second step. Every equal protection case involves a distinction among citizens. The alleged motivation for the distinction does not factor into the analysis of whether groups are similarly situated.

The State's reliance on *Nichols v. Brown*, 2013 WL 3368922 (C.D. Cal. 2013), and *Williams v. Puerto Rico*, 910 F. Supp. 2d 386 (D. P.R. 2012), only proves the point. The State cites these cases to support its assertion that "retired peace officers face unique and heightened safety risks in comparison with the general public, including individuals with CCW permits, due to their prior service in law enforcement," and therefore they are not similarly situated to CCW permit

holders. AAB 18. Both *Nichols* and *Williams* involved challenges to licensing schemes that gave preferential treatment to retired government officials in carrying firearms. But neither court found that the plaintiffs and the law enforcement agents weren't similarly situated. Rather, both courts proceeded to the second step, and it is those portions of the opinions on which the State relies. AAB 18–19 (citing *Nichols*, 2013 WL 3368922 at *6 ("Legislature could have reasonably believed that certain groups, such as retired peace officers, were in greater need of self-protection and thus should be allowed to openly carry a firearm"), and *Williams*, 910 F. Supp. 2d at 399).

In this case, private citizens licensed to carry concealed weapons are in all relevant respects alike to retired peace officers who possess concealed carry: Both are groups of private citizens licensed to carry concealed firearms in public for the lawful purpose of self-defense. Once licensed, they stand on equal footing in the context of legislation aimed at making schools "gun-free." For the purposes of the Act and establishing a "control group," these are the critical points. *See ADAC III*, 855 F.3d at 966 (the groups "must be similar in those respects that are relevant to [the government's] own interests and its policy"). Here, Appellants have an even stronger claim to being similarly situated to the retired peace officer class than in

Nichols and *Williams*, as the plaintiffs in those cases were not even licensed to carry.[1]

Finally, it is revealing that the State chose to dismiss *Silveira* in a footnote, claiming that the case did not "discuss whether honorably retired peace officers were similarly situated to members of the general public." AAB at 21 n.10. But of course this Court would not have found an Equal Protection violation without first concluding that the classes were similarly situated. Indeed, the Court acknowledged this threshold requirement at the outset of its analysis: "First, in order for a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately." *Silveira*, 312 F.3d at 1088 (citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); *Nordlinger*, 505 U.S. at 10; and *Dillingham v. I.N.S.*, 267 F.3d 996, 1007 (9th Cir. 2001)). If the Court could have avoided striking down the exemption at the second step on the grounds that the groups weren't similarly situated, it would have done so.[2] Implicit in its

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[1] In both *Nichols* and *Williams*, the plaintiffs' primary claim was that the Second Amendment protected the right to carry a firearm outside the home. *See Nichols*, 2013 WL 3368922 at *3; *Williams*, 910 F. Supp. 2d at 394. The equal protection claims were premised on the government's decision to apply different licensing standards to retired government officials than to members of the general public. *Nichols*, 2013 WL 3368922 at *6; *Williams*, 910 F. Supp. 2d at 398–400. Thus, unlike in this case, plaintiffs were not challenging a distinction between similarly *licensed* persons.

[2] It is this Court's practice to "favor narrow constitutional rulings over broad ones." *Farris v. Ranade*, 584 F. App'x 887, 890 (9th Cir. 2014). To that end, the

equal protection analysis, then, is that the Court considered retired peace officer civilians and private citizens to be similarly situated for the purposes of considering whether the AWCA's exemption worked an equal protection violation. Here, private-citizen CCW holders are even more similarly situated to retired peace officer civilian CCW holders.

B. The Retired Peace Officer Exemption Is Not Rationally Related To A Legitimate Government Interest Under The Circumstances.

1. The State's Theories Supporting Favorable Treatment Do Not Pass The Rational Basis Test.

The State argues that the retired peace officer exemption passes rational-basis scrutiny because it supports two state interests: (1) promoting the individual protection and safety of retired peace officers, and (2) promoting "public safety" because of "the extensive training that law enforcement personnel receive regarding the safe storage and operation of firearms." AAB at 28. Neither interest passes the admittedly low bar for rational-basis scrutiny in this case.

Elevated self-defense need. The State principally claims that the retired peace officer exemption serves the interest in "the protection and safety of retired

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Court will neither "anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Tyars v. Finner*, 709 F.2d 1274, 1283 (9th Cir. 1983) (citations omitted). In *ADAC III*, for instance, after reviewing the Equal Protection claims, this Court invoked the constitutional avoidance doctrine to decide the case on narrower, nonconstitutional grounds (preemption). 855 F.3d at 970–71; *see also id.* at 963 and 978.

peace officers," who have "earn[ed] the enmity of those in society who ran afoul of the law." AAB at 28. But this rationale is not supported by the breadth of the exemption, which stretches the definition of "peace officer" to include broad classes of retired government employees regardless of whether they actually carried a firearm in the course of their prior government employment.

The State claims half-heartedly that Fish and Game agents or State Fair marshals "are sometimes required to engage with the public in confrontational situations." AAB at 29. Its real argument, however, is that "perfection" is not required in drawing classifications. AAB 30. True enough, but in classic "heads we win, tails you lose" fashion, the State *also* claims it doesn't matter that many California counties require an elevated showing of need for self-defense in order to obtain a CCW permit—that is, the very same quality that the State claims sets the retired peace officers apart. *See* AOB 11, ER 49 (quoting Los Angeles County Sheriff's Department, *Concealed Weapon Licensing Policy* at 2). The en banc court recently highlighted the heightened "good cause" requirements in San Diego County, *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 926 (9th Cir. 2016) (en banc) ("[s]imply fearing for one's personal safety alone is not considered good cause;" rather, good cause requires showing of "documented threats, restraining orders and other related situations where an applicant can demonstrate they are a specific target at risk"),

and Yolo County. *Id*. at 927 (good cause does not include "[s]elf protection and protection of family (without credible threats of violence)").

While "perfection" is indeed not required, the Legislature does not have free reign to divide citizens into classes however it sees fit—the Equal Protection Clause requires a link between the classification and the statutory objective. *See, e.g.*, *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993); *Romer v. Evans*, 517 U.S. 620, 632 (1996). It perverts rational basis review to grant preferential treatment to untold numbers of desk-job "peace officers" who may never have carried a gun on the *theory* that they have elevated self-defense needs (which in many cases is obviously fiction) over the class of citizens who, in order to receive a carry license, have to prove to the government that they have an *actual*, *particular* need to carry a firearm in public for self-defense purposes. That classification is irrational and arbitrary, and that is the heart of this case. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) ("the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced can be treated alike").

The irrationality of the classification becomes all the more apparent when considering that one of the similarly-situated groups (the non-retired-peace-officer CCW holders) are now felons if they act just like their retired peace officer counterparts do—and just like the law allowed them to do for 48 years until the 2015

amendment. *See* AOB at 3, Stats. 1967, ch. 960, § 2 (exempting "honorably retired" peace officers and "person[s] holding a valid license to carry [a] firearm").

At a minimum, the district court should have given the association Appellants the opportunity to proceed on behalf of their members living in counties that impose an elevated "good cause" standard. "A district court shall grant leave to amend freely 'when justice so requires,'" and "this policy is to be applied with extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.,* 244 F.3d 708, 712 (9th Cir. 2001) (citations omitted). This policy applies even where a party seeks leave for the first time on appeal. *Heath v. City of Desert Hot Springs*, 618 F. App'x 882, 885–86 (9th Cir. 2015) (directing district court to grant leave to amend on remand).

Public safety/training. The State claims that the retired peace officer exemption supports "public safety" generally "due to the extensive training that law enforcement personnel receive regarding the safe storage and operation of firearms." AAB 28. The State offers no citation whatsoever identifying any of the firearm training, extensive or otherwise, that the government provides to Customs officers, IRS agents, Fish and Game employees, and the like when they are employed, let alone what sort of ongoing training they receive ten, twenty, or thirty years after

their retirement.[3] Even if the State's assumption is correct, it ignores that California law expressly requires CCW permit holders to pass safety tests in order to get and keep their licenses. Cal. Penal Code §§ 26150(a)(4), 26155(a)(4), 26165. The State further ignores that Appellant and Afghanistan war veteran Gallinger was qualified as an expert in the Marine Corps Marksmanship Program, ER 44, Compl., ¶ 11, and appellants Serbu and Veritas likewise served in combat in defense of the Nation, ER 45–46, Compl., ¶¶ 18–19. They and countless other mere citizens like them are all extensively trained in firearms too.

In any event, the State fails to explain *how* allowing retired peace officers to carry concealed firearms on school zones furthers this general "public safety" interest. Presumably the State is envisioning a scenario where retired peace officers may act to intervene in a violent situation at a school. As *Silveira* notes, however, retired peace officers are no longer authorized to act in a law enforcement capacity once they are retired, so if they are acting to quell a violent incident at a school, they are acting as a private citizen, just like their private-citizen neighbor with a concealed carry license. 312 F.3d at 1091 (considering and rejecting the hypothet-

[3] On this score, the legislative record is replete with evidence that this supposed training doesn't prevent accidents even for active-duty officers, and that the training appears to wear off in retirement. *See, e.g.*, Motion for Judicial Notice, Ex. 32, Jonathan Bullington, *Retired cop drops gun, shoots self at Des Plaines school*, Chicago Tribune (Apr. 16, 2013); *see also id.*, Exs. 33–35, 37 (chronicling firearm mishaps at schools involving active and retired officers).

ical rationale that "[a]n exception to the assault weapons law for retired officers might arguably be rational if California required its retired peace officers to participate as reserves in the event of an emergency.").

The State quietly acknowledges in a footnote that *Silveira* rejected this precise "retired peace officers are better trained" argument, AAB at 29 n.13, so it's worth reviewing what the *Silveira* court said on this score:

> [T]he state argues that because some peace officers receive more extensive training regarding the use of firearms than do members of the public, allowing any retired officer to possess assault weapons for non-law enforcement purposes is reasonable. This justification is basically inconsistent with the legislative purpose of the AWCA; it bears no reasonable relationship to the stated legislative purpose of banning the possession and use of assault weapons in California, except for certain law enforcement purposes. The object of the statute is not to ensure that assault weapons are owned by those most skilled in their use; rather, it is to eliminate the availability of the weapons generally. Not only is the retired officers exception contrary to the purpose of the AWCA, its relationship to *any* legitimate state goal "is so attenuated as to render the distinction arbitrary or irrational."

Silveira, 312 F.3d at 1091 (quoting *City of Cleburne*, 473 U.S. at 446).

The State posits that this case is distinguishable from *Silveira* because "ensuring that individuals with the most skill in the safe handling of firearms is *not inconsistent* with the purposes of the Act." AAB at 29 n.13 (emphasis added). "Not inconsistent" isn't the test. A retiree's skill in handling firearms "bears no reasonable relationship to the stated legislative purpose of" the Gun Free School Zone Act, *Silveira*, 312 F.3d at 1091, which is to promote safety for students, teachers, and

visitors alike by ridding guns from schools unless they are (1) being used by active law enforcement or (2) authorized by the relevant school administrator.

As discussed further below and as shown in the opening brief, the State cannot wriggle out of *Silveira*'s grasp. It is controlling here.

2. *Silveira* Demonstrates That The Retired Peace Officer Exemption Fails Rational Basis Scrutiny Because It Undermines The Purpose Of The Act.

The State refuses to come to terms with this case's fundamental similarity to *Silveira*: Allowing a retired peace officer to be armed in the case of a confrontation in a school zone *undermines* the Act's purpose, which is to promote the safety of schools by ensuring that they are gun free. *Silveira* teaches that the link between classification and objective is the critical ingredient in equal protection analysis. "[T]here must exist some rational connection between the state's objective for its classification and the means by which it classifies its citizens," and it is the Court's "duty to scrutinize the connection, if any, between the goal of a legislative act and the way in which individuals are classified in order to achieve that goal." *Silveira*, 312 F.3d at 1088.

Silveira is no outlier in requiring a connection between the distinction and the purpose of the legislation. *See Royster Guano*, 253 U.S. at 415 ("the classification . . . must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced

can be treated alike"); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (rejecting "challenged statutory classification" as "clearly irrelevant to the stated purposes of the Act"); *Romer*, 517 U.S. at 632 (because "[t]he search for the link between classification and objective gives substance to the Equal Protection Clause," courts "insist on knowing the relation between the classification adopted and the object to be attained."); *Heller*, 509 U.S. at 321 ("even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation.").

That link is missing here. A retired officer's need for personal protection may be a rationale for allowing retired peace officers to obtain concealed carry licenses in the first place, but it bears no relationship to allowing retired peace officers to carry a firearm in a school zone in the context of "the stated purpose[] of the Act," *Moreno*, 413 U.S. at 534, namely, ridding school zones from guns except by active-duty law enforcement or persons authorized by the school itself.

The State's efforts to avoid *Silveira* by drawing minor factual distinctions are unavailing. First, the State attempts to minimize the fact that this Court did not analyze a self-defense rationale in *Silveira* by pointing out that *Silveira* concerned assault weapons, while this case concerns handguns. AAB at 32–33. Surely a more powerful weapon is desirable for those who have a supposedly elevated need for self defense. But allowing retired peace officers to keep assault weapons for self

defense would be inconsistent with the basic purpose of the AWCA. That same rationale applies here.

Nor does it matter that the Act carves out narrow exemptions for people who are granted approval to carry by the relevant school administrator, or for those who are "in grave danger" and have a current restraining order. *See* AAB at 33–34. The first exemption is fully consistent with the purposes of the Act—it ensures that that school authorities maintain control over school safety. And allowing those possessing a restraining order to carry in a school zone is an exceedingly narrow exemption focused on a specific, ongoing safety threat is a marked contrast to the broad exemption granted to retired peace officers.

But these factual distinctions miss *Silveira*'s critical point: The State cannot "arbitrarily and unreasonably afford[] a privilege to one group of individuals that is denied to others." 312 F.3d at 1091. Put simply, "[a] statutory exemption that bears no logical relationship to a valid state interest fails constitutional scrutiny." *Id.* Such is the case here.

The State relies on *Nordlinger* in arguing that "an exemption to a statute will often run counter to the purpose," and "that alone will not render an exemption unconstitutional." AAB at 26. Yet in *Nordlinger* the Supreme Court cautioned that equal protection "review *does* require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental deci-

sionmaker." 505 U.S. at 15 (emphasis added) (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528–29 (1959), and citing *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981), for the proposition that a "classificatory scheme must 'rationally advanc[e] a reasonable and *identifiable* governmental objective'"). Beyond this, *Nordlinger*'s applicability here is limited by its context: The statutory classification there arose in a tax statute, where the "[rational basis] standard is especially deferential." 505 U.S. at 11; *see also id.* at 17 (for purposes of rational-basis review, the "latitude of discretion is notably wide in . . . the granting of partial or total exemptions [from tax statutes] upon grounds of policy." (quoting *Royster Guano*, 253 U.S. at 415)).

Finally, we cannot help but note the irony of the State's effort to brush aside the sponsor's statement that the purpose of the law was to "maintain school and college campuses as safe, gun free, environments for students" and "ensure that students and parents who expect a campus to be safe and 'gun free' can be confident that their expectation is being met." *See* AAB at 25 n.12 (citing statement in *Consumer Prod. Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980), that "ordinarily even the contemporaneous remarks of a single legislator who sponsor a bill are not controlling in analyzing legislative history"). The State separately argues that the purpose of the exemption should be determined by reading letters of *opposition* from special interest groups. AAB at 8–9 and 28. Letters of opposition,

by their very nature, are not "indicative of the intent of the Legislature as a whole." *Metro. Water Dist. of S. Cal. v. Imperial Irrigation Dist.*, 80 Cal. App. 4th 1403, 1425 (2000); *Ades v. Omni Hotels Mgmt. Corp.*, 46 F. Supp. 3d 999, 1005 (C.D. Cal. 2014) ("[W]here consideration of legislative history is appropriate, 'legislative history must shed light on the collegial view of the Legislature *as a whole*.'").

As in *Silveira*, the preference given to retired peace officers over fellow civilians in the Gun Free School Zone Act violates the Equal Protection Clause.

3. The Retired Peace Officer Exemption Violates The Equal Protection Clause Because It Discriminates Against A Politically Unpopular Group.

The retired peace officer exemption also violates the Equal Protection Clause because it is the product of naked favoritism that discriminates against a politically unpopular group. The few brief points the State offers in defense of the law are insufficient to overcome this fact.

The State faults Appellants for failing to produce evidence at the district court to support their claim, AAB at 36, but the court did not give Appellants an opportunity to develop a factual record. As the Cato Institute explained in its *amicus* brief, equal protection analysis looks to the "totality of the relevant facts" when evaluating legislative motives. ECF No. 14, Br. of Cato Institute as *Amicus Curiae* at 4–11; *accord Reitman v. Mulkey*, 387 U.S. 369, 373 (1967) (courts consider a law's "'immediate objective,' its 'ultimate effect' and its 'historical context and the

conditions existing prior to its enactment.'"). Appellants have now supplied the Court with a ream of evidence from the legislative record showing that the Legislature initially removed the retired peace officer exemption, only to restore it after potent lobbying efforts by the politically powerful law enforcement community made clear that the bill would not pass unless the exemption was retained. This evidence is sufficient to state an equal protection claim.

Nor does it matter that carry licensees are not a "discrete and insular minority." AAB at 37. *Moreno* makes crystal clear that drawing classifications based on political unpopularity violates the Equal Protection Clause: "[A] bare [legislative] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534. The Equal Protection guarantee applies to everyone, not just "discrete and insular" minority groups. If anything, California gun owners are precisely the sort of "anonymous and diffuse" group that merits more concern from the courts. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713, 723–24 (1985).

Finally, the State argues that "CCW permit holders are recipients of a special privilege not afforded to other civilians," AAB at 38, as if to suggest they should be satisfied with this "special privilege" and stop complaining that a similarly-situated class of citizens gets even more special treatment. Once the state issues a license it does not retain unfettered discretion to subject licensees to unequal

treatment. It is retired peace officers—not CCW holders—who are "are recipients of a special privilege not afforded" to other, similarly situated civilians.

CONCLUSION

For the reasons set forth above and in the Opening Brief, the Court should reverse the district court's decision.

Respectfully Submitted,

s/ Bradley A. Benbrook
Attorney for Plaintiffs-Appellants

Dated: June 16, 2017

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,580 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Times New Roman.

Dated: June 16, 2017

s/ Bradley A. Benbrook
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 16, 2017.

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Dated: June 16, 2017

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