No. 16-56125

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ULISES GARCIA, 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' OPENING BRIEF

Bradley A. Benbrook
Stephen M. Duvernay
BENBROOK LAW GROUP, PC
400 Capitol Mall, Suite 1610
Sacramento, CA 95814
(916) 447-4900

Attorneys for Plaintiffs-Appellants

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants submit the following corporate disclosure statement:

Firearms Policy Coalition is not a publicly held corporation, does not have any parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Firearms Policy Foundation is not a publicly held corporation, does not have any parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Madison Society Foundation is not a publicly held corporation, does not have any parent corporation, and no publicly held corporation owns ten percent or more of its stock.

The Calguns Foundation is not a publicly held corporation, does not have any parent corporation, and no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this matter under 28 U.S.C. § 1331, because this case involves a federal question: whether California Penal Code § 626.9, subdivision (o) violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. This Court has jurisdiction under 28 U.S.C. § 1291. The district court's final order, disposing of all claims in the case, was entered August 5, 2016. The appeal is timely because the Notice of Appeal was filed August 8, 2016.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The California Gun-Free School Zone Act of 1995, Cal. Penal Code § 626.9 (the "Act"), originally acted as an additional penalty for persons caught carrying a gun at a school if they were otherwise unauthorized to carry a gun. The Act did not bar anyone licensed to carry a gun from carrying at a school. In 2015, the Legislature barred citizens licensed to carry concealed weapons from carrying on school campuses, while exempting a class of similarly-situated civilians: "honorably retired peace officers" who are licensed to carry. Appellants are responsible, law-abiding citizens who possess licenses to carry concealed weapons under California law. The issue presented in this case is whether the retired peace officer exemption violates the Equal Protection Clause because it treats two classes of similarly-situated civilians differently.

STATEMENT OF THE CASE

Appellants sued in district court, claiming that the retired peace officer exemption to the California Gun-Free School Zone Act, Cal. Penal Code § 626.9(o), violated the Equal Protection Clause. The District Court granted the State's motion to dismiss with prejudice, holding that although appellants and retired peace officers are similarly situated, the law survived rational basis scrutiny because it was rationally related to protect the safety of retired peace officers.

STATEMENT OF FACTS

A. The Gun-Free School Zone Act of 1995 Maintained Longstanding Exemptions For Civilians Authorized To Carry Concealed Firearms.

California law has criminalized possession of a firearm on school grounds since 1967, when the Legislature passed the Mulford Act to broadly prohibit the carry of loaded firearms in public places. Stats. 1967, ch. 960, § 2 (adding former Penal Code § 171c). In 1994, the Legislature passed the Gun-Free School Zone Act of 1995 to stiffen the applicable penalties for unlawfully bringing a firearm into a school zone. California Penal Code section 626.9[1] prohibits persons from possessing a firearm in a school zone, which is defined as "an area in, or on the grounds of, a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, or within a distance of 1,000 feet from the grounds of the

[1] The portion of Penal Code § 171c concerning school zones was moved to Penal Code § 626.9.

public or private school." Cal. Penal Code § 626.9(e)(4). Violation of the Act is a misdemeanor or felony. *See id.*, subd. (f).

The "Gun Free School Zone Act" was perhaps more aggressive in name than in its actual reach, however, as it maintained the Mulford Act's broad exemptions for civilians authorized to carry concealed firearms: anyone authorized to carry a firearm in California could carry it on school campuses. The Act contained a blanket exemption for all private citizens who were authorized to carry a concealed firearm pursuant to the licensing provisions of Penal Code § 26150. Former Cal. Penal Code § 626.9(1) exempted "a person holding a valid license to carry the firearm" pursuant to then Penal Code § 12050 (predecessor to current Penal Code § 26150). The Act further exempted "honorably retired peace officer[s] authorized to carry a concealed or loaded firearm" under several different Penal Code sections. *Id.*, subd. (o) (listing separate statutory authorizations). Both exemptions date back to the original 1967 law. Stats. 1967, ch. 960, § 2 (exempting "honorably retired" peace officers and "person[s] holding a valid license to carry [a] firearm").

Not surprisingly, the Act also exempted "duly appointed peace officer[s]" and other classes of law enforcement and military who carry a firearm as part of their professional duties. Cal. Penal Code § 626.9(l); *see also id.*, subd. (m) (exempting certain security guards authorized to carry a loaded firearm, while acting within the course and scope of their employment).

B. The Legislature Takes Up SB 707 To Eliminate The Major Civilian Exemptions, Then Bows To Political Pressure From The Police Lobby And Reinstates The Retired Peace Officer Exemption.

In 2015, the California Legislature took up Senate Bill 707, sponsored by State Senator Lois Wolk, to expand the Gun-Free School Zone Act's prohibitions by eliminating the CCW exemption and the retired peace officer exemption. The Senate Committee on Public Safety's analysis of the bill explained:

1. Need for This Legislation

According to the Author:

> In recent years there has been a disturbing increase in the number of active shooter incidents on school, college, and university campuses across the country, with 42 such incidents in 2014. There have also been an alarming number of sexual assaults on college and university campuses. Recently, some gun rights proponents in other states have sponsored legislation to increase the opportunity to students and teachers to bring firearms on school campuses with CCWs, claiming this will deter sexual assaults and defend against active shooters. These efforts have been vigorously opposed by school public safety officials, school administrators, and public safety advocates. Research also indicates that bringing more firearms on campus will lead to more campus violence and increase the danger to students and others on campus.
>
> California law provides that the authority over school safety belongs with school/campus authorities. SB 707 maintains that authority and allows school officials to prohibit or allow a firearm on campus as they deem appropriate. Closing the CCW exemption in California law is consistent with efforts to maintain school and college campuses as safe, gun free, environments for students. SB 707 will ensure that students and parents who expect a campus to be safe and "gun free" can be confident that their expectation is being met and that school offi-

> cials remain in charge of who, if anyone, is allowed to bring a firearm on their campus.
>
> **2. Effect of the Legislation**
>
> Honorably retired peace officers authorized to carry a concealed or loaded firearm and individuals who possess a valid concealed carry permit, are currently allowed to carry a firearm on school campuses, including grade schools, high schools and college campuses. This legislation would, instead, prohibit these two groups from carrying firearms on school grounds, but would allow them to carry firearms within 1,000 feet of a school.

ER 28, S. Comm. on Pub. Safety, Analysis of S.B. 707 (2014-2015 Reg. Sess.), Apr. 14, 2015, at p. 5.

The Legislative Counsel's Digest to the bill described the new legislation similarly:

> Under existing law, certain persons are exempt from both the school zone and the university prohibitions, including, among others, a person holding a valid license to carry a concealed firearm and retired peace officers authorized to carry concealed or loaded firearms.
>
> This bill would instead allow a person holding a valid license to carry a concealed firearm, and a retired peace officer authorized to carry a concealed or loaded firearm, to carry a firearm in an area that is within 1,000 feet of, but not on the grounds of, a public or private school providing instruction in kindergarten or grades 1 to 12. This bill would also delete the exemption that allows a person holding a valid license to carry a concealed firearm, and a retired peace officer authorized to carry a concealed or loaded firearm, to possess a firearm on the campus of a university or college.

Sen. Bill No. 707 (2014–2015 Reg. Sess., Wolk), as introduced Feb. 27, 2015.

Thus, the explicit purpose of SB 707 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." *Id.* Furthermore, the bill sought to promote campus safety by allowing school officials—and not the licensing authorities—to determine who can carry firearms on their campuses.

This didn't sit well with political associations representing retired and active-duty peace officers. The California College and University Police Chiefs Association, *which originally sponsored the legislation*, recognized the political conflicts and changed its position to oppose the bill unless the retired peace officer exemption was restored: It asked "that SB 707 be amended to remove the provisions impacting honorably retired peace officers. If those provisions are amended, we will support the bill because the bill's focus will then properly be on addressing unrestricted campus access of persons who possess concealed weapons permits pursuant Penal Code Section 26150." ER 29, S. Comm. on Pub. Safety, Analysis of S.B. 707 (2014-2015 Reg. Sess.), Apr. 14, 2015, at p. 6.[2] The organization then argued "that it is a mistake not to have the ready availability of [retired peace] of-

[2] *See also* Motion for Judicial Notice, Exs. 2–4 (letters of support and opposition from the California College and University Police Chiefs Association).

ficers," because they "can play a role in helping to keep [active shooter] incidents in check." *Id.*

This was part of a broader organized effort by the police lobby to oppose the bill unless the retired peace officer exemption was reinstated. The legislative record is stacked with opposition letters from interest groups supporting peace officers,[3] only to change course after Senator Wolk caved to political pressure and amended the bill to restore the retired peace officer exemption.[4] As the Los Angeles Times explained: "[F]aced with opposition by police organizations, Wolk amended her bill to exempt retired law enforcement officers from the new ban. The reason for the concession is partly political: Wolk wanted to win police lobby support to help push the bill through the Senate." L.A. Times Editorial Board, *Making the Gun Free School Zone Act better*, L.A. Times (Aug. 30, 2015), http://lat.ms/2nINeay.

[3] Motion for Judicial Notice, Exhibits 3–17 (pre-amendment letters of opposition from 14 law enforcement associations).

[4] *Id*. Exhibits 18–31 (post-amendment letters of support from same 14 law enforcement associations and 5 others).

C. The Retired Peace Officer Exemption Sweeps A Broad Range Of Retired Government Employees Into The "Peace Officer" Category.

The retired peace officer exemption under section 626.9(o) extends far beyond retired police officers and deputy sheriffs. It applies, for example, to:

- Retired employees of the Department of Fish and Game who enforced the Fish and Game Code (§ 830.2(e));
- Retired employees of the Department of Parks and Recreation who enforced the Public Resources Code (§ 830.2(f));
- Retired employees of the Department of Forestry and Fire Protection who enforced the Public Resources Code (§ 830.2(g)); and
- Retired marshals "appointed by the Board of Directors of the California Exposition and State Fair" whose primary duty was enforcing Section 3332 of the Food and Agricultural Code, which establishes the powers of the board of the State Fair (§ 830.2(i)).

These retirees need only re-apply every five years to their former agency to continue carrying (and thus remain eligible for the exemption), *id*. § 25465, and the former agency needs "good cause" to *not* renew it, *id*. § 25470.

Similarly, and perhaps even more broadly, Section 626.9(o) exempts "any honorably retired *federal* officer or agent of any federal law enforcement agency" covered by Penal Code section 25650 (which exempts retired federal officers from the Penal Code's ban on carrying a concealed weapon), regardless of whether that retired federal officer or agent ever carried a gun in their federal "peace officer" duties. Cal. Penal Code § 25650(a) (emphasis added). It is sufficient if the "officer

or agent" was simply "assigned to duty within [California] for a period of not less than one year" or "retired from active service in the state." *Id*. Under this exemption, a covered federal officer simply provides their local sheriff or chief of police with their agency's "concurrence" that the retiree "should be afforded the privilege of carrying a concealed firearm." *Id.*, subd. (b). This exemption covers agents that include, but are not limited to, retired agents from the United States Customs Service or "any officer or agent of the Internal Revenue Service." *Id.*, § 25650(a).

D. Appellants Are Private Citizens Authorized To Carry Concealed Weapons.

Individual Appellants are responsible, law-abiding citizens who possess licenses to carry concealed weapons under California law:[5]

- Ulises Garcia, M.D. is a Board Certified Emergency Medicine specialist practicing in the San Fernando Valley of Southern California. Dr. Garcia is married and has three school-age children. He sought and obtained a carry license to protect himself and his family in response to multiple threats of violence from a former patient. (ER 44, Compl., ¶ 10.)

[5] In addition to the individual Appellants, four organizational parties appeal the judgment below (Firearms Policy Foundation, Firearms Policy Coalition, Madison Society Foundation, and Calguns Foundation). Each of the organizations are dedicated to furthering civil rights, with a particular focus on the right to keep and bear arms and laws affecting firearms. (*See* ER 46–47, Compl., ¶¶ 20–23.) Each organization furthers its purposes by conducting public outreach, education, and legislative advocacy. *Id.* The organizations have spent funds educating the public about SB 707, and addressing their members concerns and complaints about Penal Code section 626.9(o). (*See id.*)

- Jordan Gallinger is a veteran of the United States Marine Corps who served in the war in Afghanistan and qualified as an expert in the Marine Corps Combat Marksmanship Program. He is currently enrolled as a full-time student at California State University, San Bernardino. (ER 44, Compl., ¶ 11.)

- Brian and Brooke Hill have two school-age children, and both regularly carried concealed weapons at their children's respective schools before Senate Bill 707 went into effect on January 1, 2016. (ER 44, Compl., ¶ 12.)

- Craig DeLuz serves as the President of the Robla School District Board of Trustees. He also serves as a coach for the cross country and track and field teams at Rio Linda High School. (ER 45, Compl., ¶ 13.)

- Scott Dipman is the father of two school-age sons with special needs who must be accompanied to their classrooms each morning. (ER 45, Compl., ¶ 14.)

- Albert Duncan served as a flight medic in the United States Army, and currently works as a firefighter-paramedic for the Oakland Fire Department. Duncan has a school-age son. (ER 45, Compl., ¶ 15.)

- Tracey Graham is a veteran of the United States Air Force. Graham's partner has school-age children. (ER 45, Compl., ¶ 16.)

- Lisa Jang is currently enrolled as a full-time student at California State University, Sacramento. She obtained her carry license for personal protection, in response to multiple reports of crime on and near the campus, including armed robbery, rape, and sexual assault. (ER 45, Compl., ¶ 17.)

- Dennis Serbu is a veteran of the Vietnam war and served ten years as a reserve police officer for the Cottonwood, Arizona police department. Now retired, he has twelve grandchildren and is involved with their school activities. (ER 45, Compl., ¶ 18.)

- Michael Veredas served as a hospital corpsman in the United States Navy and served three combat deployments with the United States Marine Corps before his honorable discharge in 2005. He has two children. (ER 45–46, Compl., ¶ 19.)

E. The Statutory Schemes Governing The Issuance of Concealed-Carry Licenses.

Appellants have satisfied—and must continue to satisfy—the state and local standards governing the issuance of carry licenses. In order to obtain a carry license, appellants were required to demonstrate "good moral character," complete a firearms training course, and establish "good cause." Cal. Penal Code §§ 26150, 26155. Licenses are generally valid for up to two years, *see id.*, § 26220(a), and renewal applicants must complete an additional training course of at least four hours, *id.*, § 26165(c).

In applying these standards, several counties have interpreted the "good cause" requirement to require that an applicant demonstrate an elevated need for self-defense due to a specific threats or previous attacks against them. The Los Angeles County Sheriff's Department Concealed Weapon Licensing Policy, for example, states:

> [G]ood cause shall exist only if there is convincing evidence of a clear and present danger to life, or of great bodily harm to the applicant, his spouse, or dependent child, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm.

ER 49, Los Angeles County Sheriff's Department, *Concealed Weapon Licensing Policy* at 2 (emphasis in original).

Retired "peace officers," by contrast, are not subject to these same screening requirements but rather appear to be eligible to carry firearms as a matter of course. California Penal Code section 25455, for instance, provides that retired California peace officers who *ever* carried a gun during their service "shall be issued an identification certificate by the law enforcement agency from which the officer retired" and "shall have an endorsement on the identification certificate stating that the issuing agency approves the officer's carrying of a concealed firearm." Cal. Penal Code § 25455(a), (c); *id*., § 25450(d).

PROCEDURAL BACKGROUND

Appellants fled this lawsuit on April 14, 2016, alleging a single claim for declaratory relief that the retired peace officer exemption violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution. (ER 41–52.) The State filed a motion to dismiss on June 10. (ER 56, Dkt. 14.) On August 5, 2016, the district court issued an order granting the State's motion to dismiss with prejudice. (ER 5–17.) Appellants filed this appeal on August 8, 2016. (ER 1–4.)

SUMMARY OF ARGUMENT

The retired peace officer exemption violates the Equal Protection Clause because it elevates the rights of retired peace officer civilians over a similarly-situated class of civilians, and that classification is inconsistent with the purpose of California's Gun-Free School Zone Act.

This Court's decision in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), is controlling. In *Silveira*, the Court concluded that favoring retired peace officers over similarly-situated civilians violated the Equal Protection Clause: favoring retired peace officers hoping to enjoy greater access to firearms didn't make sense in the context of a statute (there, the Assault Weapons Control Act) whose overall aim was *restricting* access to firearms. *Silveira* establishes that an *active* peace officer's role *as a law enforcement agent* provides a rational basis for distinguishing between a duly sworn and authorized peace officer and a private citizen for the purpose of the carrying of firearms in otherwise-proscribed areas such as school zones. Because retired officers are not authorized to engage in law enforcement activities any more than other private citizens, however, *Silveira* instructs that there is no rational reason to treat them differently than similarly-situated civilians by granting them a special exemption.

The same is true under the Gun-Free School Zone Act. Retired peace officers are, by definition, no longer engaging in law enforcement activity—just like their fellow private citizens. Individual appellants are responsible, law-abiding citizens who also possess a license to carry a handgun for self-defense under California law and are statutorily required to maintain their background check and proficiency with firearms. And until the 2015 amendments, civilians like appellants had been on equal footing with retired peace officers under California law for 48

years—as licensed civilians, they could possess guns on school grounds consistent with their licensure. Now they are criminals if they do so. But the similarly-situated retired peace officers are not.

The State argues that the exemption serves the state's interest in "the protection and safety of retired peace officers," presumably by allowing retirees to defend themselves in the case of confrontation in a school zone. But this rationale is at odds with the purposes of the Act, which are 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 retired peace office exemption further violates the Supreme Court's instruction, in cases like *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), and *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), that legislatures cannot enact distinctions among similarly-situated groups for the simple purpose of disadvantaging a disfavored group.

STANDARD OF REVIEW

This Court "review[s] *de novo* challenges to a dismissal for failure to state a claim under Federal Civil Rule 12(b)(6)." *New Mexico State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011). This "review is generally limited to the face of the complaint, materials incorporated into the complaint by ref-

erence, and matters of judicial notice." *Id.* And "[i]n undertaking this review, [the court] will 'accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs,' and will hold a dismissal inappropriate unless the complaint fails to 'state a claim to relief that is plausible on its face.'" *Id.* (citations omitted).

Further, this Court "review[s] for abuse of discretion a district court's decision to dismiss with prejudice." *Okwu v. McKim*, 682 F.3d 841, 844 (9th Cir. 2012). And "[d]ismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).

ARGUMENT

A. The Retired Peace Officer Exemption Violates The Equal Protection Clause Because It Bears No Rational Relation To The Purpose of the Gun-Free School Zone Act.

"The Equal Protection Clause . . . den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A 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 shall be treated alike.'" *Reed v. Reed*,

404 U.S. 71, 75–76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).[6]

1. The Classification Favors Retired Peace Officers Over A Similarly-Situated Group: Civilians With A Carry License.

"The first step in equal protection analysis is to identify the state's classification of groups." *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1064 (9th Cir. 2014) (citation omitted). "The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005). And "[t]he groups need not be similar in all respects, but they must be similar in those respects relevant to the [government's] policy." *Arizona Dream Act Coalition*, 757 F.3d at 1064.

Appellants meet this requirement. Appellants are private citizens who have been issued a concealed carry license through the licensing scheme set forth at California Penal Code section 26150, *et seq*. As the District Court explained, private citizens with carry licenses are similarly situated to the group of retired "peace officer" private citizens who possess concealed carry licenses: "Both Plaintiffs and

[6] Because the Equal Protection Clause demands a higher level of scrutiny when classifications involve fundamental rights, *see Plyler v. Doe,* 457 U.S. 202, 216–17 & n.15 (1982), this Court should defer consideration of this case if the Supreme Court grants the pending petition for a writ of certiorari in *Peruta v. Cnty. of San Diego*, 824 F.3d 919 (9th Cir. 2016), *petition for cert. filed sub nom. Peruta v. California*, No. 16-894 (Jan. 12, 2017).

retired peace officers may lawfully carry a concealed firearm for self-defense purposes, and neither group are active members of law enforcement that are required to carry concealed weapons for their occupation or for public safety. And yet the Act creates an exemption that allows retired peace officers to carry a concealed weapon on school property but does not create an exemption for Individual Plaintiffs." (ER 10–11.)

2. An Exemption That Arms Retired Peace Officers Over Similarly-Situated Civilians Is Irrational In A Law Whose Purpose Is Eliminating Civilians' Access To Arms On School Grounds.

The second step of the rational basis analysis asks whether the "classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Although deferential, the rational-basis standard "is not a toothless one," *Mathews v. Lucas*, 427 U.S. 495, 510 (1976), and "even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993). When conducting rational-basis review, 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. And because "[t]he search for the link between classification and objective gives substance to the Equal Protection Clause," *Romer v. Evans*, 517

U.S. 620, 632 (1996), courts "insist on knowing the relation between the classification adopted and the object to be attained," *id.*

To that end, the State may not "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational," *City of Cleburne*, 473 U.S. at 446, and courts "must examine the possible justifications for the policy in light of the factual context in the record." *Philips v. Perry*, 106 F.3d 1420, 1434 (9th Cir. 1997). In doing so, courts consider a law's "'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'" *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967).

As shown above, prior to SB 707, civilians authorized to carry firearms in California were treated identically for 48 years. Under the "Gun Free School Zone Act of 1995," like its predecessor statute dating back to 1967, no one authorized to carry a firearm outside the home was actually prohibited by the law from carrying at a school. In reality the law only operated to provide an additional punishment for unauthorized carrying of a firearm on or near a school. *See* Cal. Penal Code § 626.9(f) (setting criminal penalties for violation of the Act).

That changed in 2015. SB 707 was introduced to make school zones "free" of guns by removing the Act's two significant exemptions. The legislative record was replete with materials deriding the presence of guns on schools and college campuses—even including articles recounting gun-related mishaps caused by re-

tired policemen.[7] Senator Wolk's statement in introducing SB 707 noted that "there has been a disturbing increase in the number of active shooter incidents on school, college, and university campuses," as well as "an alarming number of sexual assaults on college and university campuses." ER 28, S. Comm. on Pub. Safety, Analysis of S.B. 707 (2014-2015 Reg. Sess.), Apr. 14, 2015, at p. 5. Closing the exemptions would "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." *Id.* The bill also sought to give school officials "authority over school safety" by "allow[ing] school officials to prohibit or allow a firearm on campus as they deem appropriate." *Id*.

After encountering massive resistance from the law enforcement lobby and related interest groups, the bill was ultimately amended to restore the broad retired peace officer exemption.

a. *Silveira* Controls The Outcome Here.

There is no connection between the retired peace officer exemption and the purpose of the Gun Free School Zone Act. Indeed, arming one class of civilians over a similarly-situated class of civilians actively undermines the purpose of the Act, which is to eliminate access to guns on school grounds by anyone who is not

[7] Motion to Take Judicial Notice, Exhibits 32–38.

(1) authorized to perform law enforcement activities or (2) granted approval to carry by the relevant school administrator.

This Court's decision in *Silveira v. Lockyer* is controlling here. In *Silveira*, California civilians who either owned or wanted to acquire assault weapons challenged the constitutionality of the California Assault Weapons Control Act ("AWCA"). 312 F.3d at 1056, 1059. Plaintiffs claimed, among other things, that the AWCA violated the Equal Protection Clause by creating exemptions for off-duty peace officers and retired peace officers. *Id.* at 1059. The district court granted the State's motion to dismiss each of plaintiffs' claims, and dismissed the case in its entirety. *Id.* at 1059–60.

This Court upheld the dismissal of the Equal Protection challenge to the exemption for *off-duty* (but still active) peace officers, observing that "off-duty officers may find themselves compelled to perform law enforcement function in various circumstances, and that in addition it may be necessary that they have their weapons readily available." *Id*. at 1089. The off-duty peace officer exemption was "designed to further the very objective of preserving the public safety that underlies the AWCA," *id*., and thus the distinction did not violate the Equal Protection clause.

Here, the Act likewise provides categorical exemptions for peace officers and security personnel who are performing their duties. Cal. Penal Code § 626.9(l)

(exempting on-duty peace officers, members of the military, and armored vehicle guards); *id.*, subd. (m) (exempting certain security guards authorized to carry a loaded firearm, while acting within the course and scope of their employment). These exemptions are not at issue: as in *Silveira* they "further the very objective" of the Act by promoting safety on school grounds.

The same cannot be said for the retired peace officer exemption, however, both in the AWCA and in the Gun-Free School Zone Act. In *Silveira*, the Court stated the general rule that "there must exist some rational connection between the state's objective for its classification and the means by which it classifies its citizens." 312 F.3d at 1088. It held that "the retired officers exception arbitrarily and unreasonably affords a privilege to one group of individuals that is denied to others . . . ." *Id.* at 1091. In reaching this conclusion, the Court examined the legislative record and determined that the retired peace officer exemption ran contrary to the overriding goal of the AWCA (*i.e.*, to reduce, if not eliminate, the availability of assault weapons):

> In light of the unequivocal nature of the legislative findings, and the content of the legislative record, there is little doubt that any exception to the AWCA unrelated to effective law enforcement is directly contrary to the act's basic purpose of eliminating the availability of high-powered, military-style weapons and thereby protecting the people of California from the scourge of gun violence.

Id. at 1090 (citing *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973), for the proposition that "[t]he challenged statutory classification . . . is clearly irrelevant to the stated purpose of the Act.").

That same rationale applies to SB 707. Exempting retired peace officers from a broad prohibition on carrying firearms on school grounds, while subjecting similarly-situated civilians to the prohibition, is inconsistent with the basic purpose of the Gun-Free School Zone Act. Once SB 707 eliminated the broad exemption for *non*-retired peace officer holders of carry licenses, the Act was indistinguishable in concept from the AWCA's restrictions on assault weapons. The Act's goal is to restrict access to firearms on school campuses. Yet, just as the AWCA did, the retired peace officer exemption grants a blanket exemption to a broadly-defined group of retired "peace officers," none of whom have continuing authority to engage in law enforcement activities.

Silveira recognized the importance of a retired peace officer's retirement: They have returned to the ranks of private citizens.[8] Thus, when the California Col-

[8] The California Attorney General likewise stressed this distinction in 2010, when asked whether "a peace officer who purchases and registers an assault weapon in order to use the weapon for law enforcement purposes [would be] permitted to continue to possess [it] after retirement." Att'y Gen. Op. No. 09-901, 93 Ops. Cal. Atty. Gen. 130 (2010). Relying on *Silveira*, then-Attorney General Edmund G. Brown, Jr., explained why the answer was "No":

> *Silveira* teaches that it is the a [sic] peace officer's role *as a law enforcement agent* that provides a rational basis for distinguishing be-

lege and University Police Chiefs Association argued that the retired peace officer exemption should be restored because retired peace officers "can play a role in helping to keep [active shooter] incidents in check," ER 29, any such "checking" would be done in the retiree's capacity as a private citizen—no different than any other citizen trained and authorized under California law to carry a firearm. This distinction is irrational under *Silveira*. As in that case, a broad exemption for retired peace officer civilians is contrary to the Act's basic purpose.

The retired peace officer exemption is further inconsistent with SB 707's objective of promoting campus safety by making school officials responsible for determining who can carry concealed firearms on campus. The blanket exemption for retired peace officers undermines this authority—school officials have no say over whether retired peace officers can carry on their campuses.

Indeed, even after the retired peace officer exemption was restored, SB 707's author continued to state that "SB 707 will ensure [1] that students and parents who expect a campus to be safe and 'gun free' can be confident that their expectation is being met and [2] that school officials are fully in charge of who is being allowed to bring a firearm on their campus." ER 36, Assem. Comm. on Pub.

> tween a peace officer and a private citizen for purposes of possessing and using assault weapons. A retired officer is not authorized to engage in law enforcement activities.

Id. at *8 (emphasis in original).

Safety, Analysis of S.B. 707 (2014-2015 Reg. Sess.), July 14, 2015, at p. 4. The retired peace officer exemption runs directly contrary to both of those stated purposes of the legislation. The exemption is therefore unconstitutional under *Silveira* because the classification is "contrary to the legislative goals of the [Act]" and "arbitrarily and unreasonably affords a privilege to one group of individuals that is denied to others." 312 F.3d at 1091.

b. *Silveira* Demonstrates That The State Cannot Justify The Distinction By Linking It To A Goal That Is Untethered To—And Indeed Contrary To—The Basic Purpose Of The Statute In Which The Distinction Appears.

The State argued below that the retired peace officer exemption survived rational basis review so long as there was any "conceivable basis which might support it." (ER 18, citing *Heller*, 509 U.S. at 320.) The district court accepted the State's argument that the exemption serves the State's interest in "the protection and safety of retired peace officers," presumably by allowing retirees to defend themselves in the case of confrontation in a school zone.[9] The district court concluded that it "*need not scrutinize the connection* between the purpose of the Act

[9] When it initially opposed SB 707, for example, the Sacramento County Deputy Sheriffs' Association argued that "Retired peace officers protected and served the public while earning the enmity of those in society who ran afoul of the law. Retired officers carry their weapons as a means of personal protection. Recent attacks demonstrate the need for peace officers—even retired peace officers—to be able to defend themselves if necessary." ER 30, S. Comm. on Pub. Safety, Analysis of S.B. 707 (2014-2015 Reg. Sess.), Apr. 14, 2015, at p. 7.

and the Retired Peace Officer Exemption, because it finds that the Exemption is rationally related to a legitimate state interest." (ER 14–15 (emphasis added).) In other words, the distinction poses no Equal Protection concern so long as it rationally relates to *any* state interest, even if that interest is inconsistent with the purpose of the law in which it appears.

This is incompatible with *Silveira*, which stressed that it manifestly 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." 312 F.3d at 1088 (emphasis added). Thus, rational-basis scrutiny requires a connection between the distinction (favoring retired peace officers over other, similarly-situated civilians by allowing them to carry guns on school grounds) and the Act's goal of *reducing the existence of guns* on school grounds to promote safety. *See Silveira*, 213 F.3d at 1090 ("allowing residents of California to obtain assault weapons for purposes unrelated to law enforcement is wholly contrary to the legislature's stated reasons for enacting *restrictions* on assault weapons.") (emphasis added).

To be sure, *Silveira* acknowledged that the Court "must attempt to identify *any* hypothetical rational basis for the exception, whether or not that reason is in the legislative record." 312 F.3d at 1090 (citing *Moreno*, 413 U.S. at 534) (emphasis in original). Yet even when it was considering proffered justifications not ap-

pearing in the legislative record, *Silveira still* analyzed the justifications according to whether they were consistent with the AWCA's basic purpose.

Silveira thus rejected the argument that "some peace officers receive more extensive training regarding the use of firearms than do members of the public," because it did not align with the broader reason for the law: "[t]he 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." *Id*. at 1091. The same goes for the retired peace officer exemption here as well: the purpose the Act is not to promote the safety of visitors to school grounds by being armed, it 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. If the purpose of the law were aimed at promoting the safety of visitors, there would be no need for SB 707's classification that treats similarly-situated CCW holders differently when they visit schools: their safety interests would be just as well served by allowing them to carry on school grounds too.

Finally, to emphasize that it really was struggling to consider every possible basis to uphold the distinction, *Silveira* went on to say that "[w]e may not complete our evaluation of the statute's validity merely by examining the state's proffered justifications for the law. Rather, we must determine whether *any* reasonable theo-

ry could support the legislative classification." 312 F.3d at 1091 (citing *Heller*, 509 U.S. at 320) (emphasis in original). It goes without saying that possessing more powerful weapons enhances one's self-defense. And the retired peace officers' need for self defense surely existed just as much in 2002 as now. Yet despite this, the need for self-defense eluded the *Silveira* panel as a legitimate justification. This was no oversight. The reason *Silveira* did not identify the safety of retired officers as a legitimate justification for letting them keep assault weapons was because that reason did not further the basic purpose of the AWCA, not because it wasn't a potential theory.

* * *

The district court said it "need not scrutinize the connection between the purpose of the Act" and the exemption, ER 14–15, because "the 'general rule' is that legislation will be sustained so long as "the classification drawn by the statute is rationally related to a legitimate state interest," ER 14 (citing *City of Cleburne*, 473 U.S. at 439). The district court, however, overlooked that *Silveira* cited *City of Cleburne* four times while also repeatedly applying the rule that "there must exist some rational connection between the state's objective for its legislative classification and the means by which it classifies its citizens." 312 F.3d at 1088. *See id*. at 1090 ("In light of the unequivocal nature of the legislative findings, and the content of the legislative record, there is little doubt that any exception to the AWCA

unrelated to effective law enforcement is directly contrary to the act's basic purpose"); *id.* at 1091 (the justification for a classification may not be "inconsistent with the legislative purpose"). Indeed, the Supreme Court has stressed that "the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation," *Heller*, 509 U.S. at 321, and that legislative classifications must be viewed in light of a statute's "'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'" *Reitman*, 387 U.S. at 373.

Silveira was following the Supreme Court's command that the "challenged statutory classification" be relevant "to the stated purposes of the act." *Moreno*, 413 U.S. at 534; *see Silveira*, 312 F.3d at 1090 (citing *Moreno*). The classification in this case, as in *Silveira*, undermines the purposes of the Act.

3. The Breadth Of The Exemption Further Undermines Any Claim That The Classification Is Rational.

Likewise, the exemption's formulation demonstrates not only the absence of a connection between the classification and the statutory objective, it also demonstrates the irrationality of the classification itself. Here, the exemption covers, for example, retired employees of the California Department of Fish and Game who enforced the California Fish and Game Code, and retired marshals appointed "to keep order and preserve peace at the California Exposition and State Fair." Cal.

Penal Code §§ 830.2, 25450; Cal. Food & Agric. Code § 3332(j). The exemption is so broad that it even applies to retirees from "any federal law enforcement agency" now authorized to carry a concealed weapon, regardless of whether they ever used a weapon as a peace officer in their pre-retirement duties. Thus, for instance, retired Internal Revenue Service agents and other federal agents are exempt simply by virtue of retiring in California or working for the agency in California for more than a year. Cal. Penal Code § 25650(a).

While the self-defense rationale is an insufficient justification for the reasons noted above, it is irrational to favor the self-defense needs a State Fair marshal from assumed "enemies they have made in performing their duties," ER 9, over the self-defense needs of the innumerable citizens at large who have *real* enemies—like appellant Ulises Garcia, M.D., who obtained a carry license to protect himself and his family in response to multiple threats of violence from a former patient. ER 44. Likewise, it is irrational to protect a Fish and Game agent from assumed enemies over a veteran of the Afghanistan war like appellant Jordan Gallinger, a Marine marksman who surely has real and dangerous enemies. ER 44.

Conversely, since the state claims the retired peace officer exemption is really designed to protect the safety of Californians who are retired peace officers against their enemies gained in the line of duty, why limit it to peace officers who served in California or federal agencies who happened to retire in California? Cal.

Penal Code § 25650(a). Indeed, why limit it to retirees? Former peace officers from other states—and former California peace officers who didn't serve long enough to retire from the force—have enemies too.[10]

These questions show that the retired peace officer exemption is, in "practical effect," *Moreno*, 413 U.S. at 537, simply another form of retirement benefit for a large group of retired government employees. It is not a rational classification, and it therefore violates the Equal Protection Clause.

B. The Retired Peace Officer Classification Further Violates The Equal Protection Clause Because It Is Simply A Benefit Conferred On A Politically Powerful Class That Is Denied To A Politically Unpopular Class.

The evidence the State submitted to the district court supports yet another reason that the retired peace officer exemption violates the Equal Protection Clause: It demonstrates that the Legislature included the exemption for the improper purpose of favoring a politically powerful group and to disfavor a politically unpopular one. This and the additional legislative history submitted with our opening brief show the potent lobbying efforts by the law enforcement community, directed at obtaining preferential treatment for their constituents—and that this lobbying was responsible for the reinstatement of the statutory classification at issue in this case. (*See, e.g.*, Motion for Judicial Notice, Exhibits 3–17 (letters of op-

[10] Plaintiff Dennis Serbu, for instance, served for ten years as a reserve police officer in Arizona. ER 45.

position from peace officer interest groups); Exhibits 18–31 (post-amendment letters of support from peace officer interest groups).)

We recognize, of course, that the legislative process ordinarily involves multiple groups lobbying for their respective interests on proposed legislation, and that the process typically results in "winners" and "losers" in some respect. The Equal Protection Clause is not implicated unless similarly-situated groups are treated differently in the result of the legislative process, whether out of irrational decision-making or simply a desire to disadvantage a politically-unpopular group. Here we have both.

The SB 707 legislative record reveals the legislature's goal of advantaging the politically-powerful law enforcement community over the politically-unpopular, but in this case similarly-situated, civilian community of CCW permit holders. Once it became clear that the stated goal of finally making school grounds "free" of guns could not be achieved because the law enforcement community opposed removal of the retired peace officer exemption, the only way the Legislature could get a "win" was to disadvantage a similarly-situated group of civilians by removing the CCW permit exemption.

The United States Supreme Court has long held that drawing classifications based on political unpopularity violates the Equal Protection Clause. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at

the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534; *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("some objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests.").

In *Moreno*, the Supreme Court decided that disqualifying members of unrelated households from receiving food stamps was wholly irrelevant to the ostensible purpose of preventing fraud. 413 U.S. at 536–38. That law failed rational basis scrutiny because the legislative history revealed that Congress' purpose in enacting the statutory classification was to prevent "hippies" living together from obtaining the same benefits offered to similarly situated households. *Id.* at 534–35. The Court explained that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.*

Likewise, in *Cleburne*, the Supreme Court held that a city failed to show a rational basis for its requirement that homes for the mentally retarded obtain a special use permit. 473 U.S. at 447–50. The court struck down the law as unconstitutional because the city did not impose the same permitting requirements on other buildings (such as apartment buildings and fraternity houses) that posed the same

concerns the city claimed to be addressing with the special use requirement. *Id.* at 448–50. Put simply, the law violated Equal Protection because it "appear[ed] . . . to rest on an irrational prejudice against the mentally retarded." *Id.* at 450.

The district court brushed plaintiffs' claim aside based on the conclusion that no such claim was possible "[a]bsent evidence of explicit legislative intent to cause harm to civilian gun owners," as occurred in *Moreno*, with the colorful "hippie" references. ER 16. Setting aside the fact that retired peace officers are civilians too, this does not appear to be a correct statement of the law. The legislative record in *Cleburne*, for instance, revealed no similarly candid statements of a desire to disadvantage "mentally retarded" people, yet the Court divined this intent from the very operation of the permitting law. 473 U.S. at 448–50.

In any event, the legislative record here does reveal exactly what happened: two similarly-situated groups who had been treated identically in the past would now be treated entirely differently, simply because one group had more political clout. Indeed, SB 707's author admitted that the decision to retain the retired peace officer exemption was the result of this political pressure: "[F]aced with opposition by police organizations, Wolk amended her bill to exempt retired law enforcement officers from the new ban. The reason for the concession is partly political: Wolk wanted to win police lobby support to help push the bill through the Senate." L.A. Times Editorial Board, *Making the Gun Free School Zone Act better*, L.A. Times

(Aug. 30, 2015), http://lat.ms/2nINeay.[11] Such is the political reality: The police lobby is powerful. Without its support, the bill was doomed. It may be good politics, but it violates the Equal Protection Clause.

In the district court, the State quoted the Sacramento County Sheriff's Association's argument for favorable treatment:

> Forcing our retired members to choose between picking up their children or grandchildren form [sic] school or attending school events and ensuring their own ability to protect themselves or their loved ones Is a decision they should not be required to make. Neither should retired officers be forced to jeopardize their safety in order to take college classes.

(ER 31, S. Comm. on Pub. Safety, Analysis of S.B. 707 (2014-2015 Reg. Sess.), Apr. 14, 2015, at p. 8.)

Not only does this theory fail to provide a rational basis for the distinction for the reasons set out above, it begs many obvious questions: why should Dr. Ulises Garcia, who received a license to carry in response to a threat of violence from a former patient, be "forc[ed] . . . to choose between" protecting himself and his family and attending school events? Likewise, why should Scott Dipman be "forced" to make the same choice while hand-delivering his sons to class? What quality about a retired Fish and Game warden justifies a heightened allowance for self-defense when dropping off their grandchildren at school over the self-defense

[11] The L.A. Times editorial is in the Author's File. See Motion for Judicial Notice, Exhibit 39.

needs of Lisa Jang, who walks across her college campus late at night and obtained a carry license out of fear over multiple reports of rape and sexual assault?

The plain fact is, through SB 707, the Legislature has singled out a class of persons for special treatment, then denied it to others who are similarly situated, and the only rationale appears to be political power. This violates the Equal Protection Clause.

CONCLUSION

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

Respectfully Submitted,

s/ Bradley A. Benbrook
Attorney for Plaintiffs-Appellants

Dated: April 3, 2017

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Appellants state that they are unaware of any related cases.

Dated: April 3, 2017

s/ Bradley A. Benbrook
Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,464 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: April 3, 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 April 3, 2017.

All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: April 3, 2017

s/ Bradley A. Benbrook
Attorney for Plaintiffs-Appellants