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 8

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

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.

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

**NOTICE OF MOTION AND**  
**MOTION TO DISMISS**  
**COMPLAINT BY CALIFORNIA**  
**ATTORNEY GENERAL KAMALA**  
**D. HARRIS; MEMORANDUM OF**  
**SUPPORT AND AUTHORITIES IN**  
**SUPPORT OF MOTION TO**  
**DISMISS**

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

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1 PLEASE TAKE NOTICE that, at 1:30 p.m. on August 8, 2016, or as soon  
2 thereafter as the matter may be heard in the above-entitled Court, Defendant  
3 California Attorney General Kamala D. Harris (the “Attorney General”) will and  
4 presently does move this Court to dismiss the complaint filed by Plaintiffs Ulises  
5 Garcia, Jordan Gallinger, Brian Hill, Brooke Hill, Craig DeLuz, Scott Dipman,  
6 Albert Duncan, Tracey Graham, Lisa Jang, Dennis Serbu, Michael Veredas,  
7 Firearms Policy Foundation, Firearms Policy Coalition, Madison Society  
8 Foundation and The Calguns Foundation (collectively, “Plaintiffs”). The hearing  
9 on this motion will be heard by the Honorable United States District Judge Beverly  
10 Reid O’Connell in Courtroom 14 of the United States District Court, Central  
11 District of California, Western Division, located at 312 North Spring Street in the  
12 City of Los Angeles, California.

13 This motion is brought pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal  
14 Rules of Civil Procedure on the grounds that:

15 (1) Plaintiffs fail, as a matter of law, to state a claim upon which relief can be  
16 granted; and

17 (2) Plaintiffs Firearms Policy Foundation, Firearms Policy Coalition, Madison  
18 Society Foundation and The Calguns Foundation lack standing under Article III of  
19 the United States Constitution to proceed with their claims.

20 This motion to dismiss is based upon the instant Notice of Motion, the  
21 accompanying Memorandum of Points and Authorities in support of the motion to  
22 dismiss, the Request for Judicial Notice, filed concurrently herewith, and the  
23 pleadings and papers filed in this action.

24 This motion is made following the conference of counsel pursuant to Local  
25 Rule 7-3, which was conducted by telephone on June 2, 2016.

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Dated: June 10, 2016

Respectfully submitted,  
KAMALA D. HARRIS  
Attorney General of California  
MARK R. BECKINGTON  
Supervising Deputy Attorney General

/s/ John D. Echeverria  

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JOHN D. ECHEVERRIA  
Deputy Attorney General  
*Attorneys for Defendant Kamala D.  
Harris, California Attorney General*

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1 Defendant California Attorney General Kamala D. Harris (the “Attorney  
2 General”) respectfully submits the following memorandum of points and authorities  
3 in support of her motion, pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal  
4 Rules of Civil Procedure (“FRCP”), to dismiss the complaint (the “Complaint”  
5 (Dkt. No. 1)), filed on April 14, 2016 by Plaintiffs Ulises Garcia, Jordan Gallinger,  
6 Brian Hill, Brooke Hill, Craig DeLuz, Scott Dipman, Albert Duncan, Tracey  
7 Graham, Lisa Jang, Dennis Serbu, Michael Veredas, Firearms Policy Foundation,  
8 Firearms Policy Coalition, Madison Society Foundation and The Calguns  
9 Foundation (collectively, “Plaintiffs”).<sup>1</sup>

## 10 INTRODUCTION

11 The Gun-Free School Zone Act of 1995 (the “Act”) generally prohibits any  
12 person from knowingly possessing a firearm on or within 1,000 feet of a public or  
13 private school without the prior written permission of the school district  
14 superintendent. Cal. Penal Code § 626.9(b) (2016).<sup>2</sup> The Act also prohibits any  
15 person from possessing a firearm on certain property of a college or university,  
16 without the prior written permission of the college or university president. Cal.  
17 Penal Code. §§ 626.9(h), (i).

18 Prior to January 1, 2016, the Act provided exemptions for, *inter alia*, (i) any  
19 person licensed to carry a concealed weapon (“CCW”), Cal. Penal Code § 626.9(l)  
20 (2012), and (ii) any “honorably retired peace officer authorized to carry a concealed  
21 or loaded firearm” (the “Retired Officer Exemption”), *id.* § 626.9(o) (2012). In  
22 2015, the California Legislature passed Senate Bill 707 (“SB 707”), which

23  
24 <sup>1</sup> Plaintiffs Ulises Garcia, Jordan Gallinger, Brian Hill, Brooke Hill, Craig  
25 DeLuz, Scott Dipman, Albert Duncan, Tracey Graham, Lisa Jang, Dennis Serbu  
26 and Michael Veredas will be referred to as the “Individual Plaintiffs,” and Plaintiffs  
27 Firearms Policy Foundation, Firearms Policy Coalition, Madison Society  
28 Foundation and The Calguns Foundation will be referred to as the “Organizational  
Plaintiffs.”

<sup>2</sup> Unless otherwise noted, citation to the Act will be to the current version of  
the statute, effective January 1, 2016.

1 modified the exemption for CCW license holders to permit them to possess a  
2 firearm within 1,000 feet of a school, provided they are not “in, or on the grounds”  
3 of, the school. Cal. Penal Code § 626.9(c)(5). While the initial version of SB 707  
4 also proposed removing the Retired Officer Exemption, the final version of the bill  
5 preserved the exemption. (Compl. ¶ 29.)

6 In their only cause of action against the Attorney General, Plaintiffs contend  
7 that the Retired Officer Exemption—both facially and as applied—violates the  
8 Equal Protection Clause of the Fourteenth Amendment by “irrationally favor[ing] a  
9 broad class of retired ‘peace officers’ authorized to carry concealed weapons over  
10 Plaintiffs.” (Compl. ¶ 40.) Plaintiffs seek “declaratory and injunctive relief to  
11 invalidate [the Retired Officer Exemption] and enjoin its enforcement or  
12 application.” (*Id.* ¶ 7; *see also id.* at 11:3-7 (Prayer for Relief).) Plaintiffs’ equal  
13 protection claim is unusual in that Plaintiffs do not contend that they are entitled to  
14 carry firearms on school grounds; rather, Plaintiffs seek to deprive honorably  
15 retired peace officers of that privilege by eliminating the Retired Officer Exemption.  
16 For the reasons discussed below, Plaintiffs fail to state an equal protection claim  
17 and, even if they could, the Organizational Plaintiffs lack standing.

18 ***First***, the Retired Officer Exemption does not in any way violate the Equal  
19 Protection Clause. Even if Plaintiffs satisfied their threshold burden of identifying  
20 a class of individuals who are similarly situated to honorably retired peace officers  
21 (and they have not), rational basis scrutiny applies to their equal protection claim, a  
22 forgiving standard that the Retired Officer Exemption meets. Even though the  
23 Second Amendment protects a fundamental right to keep and bear arms, Plaintiffs  
24 do not (and cannot) allege that the Act violates the Second Amendment or employs  
25 a suspect classification. Thus, rational basis scrutiny applies to the Act and its  
26 exemptions. *See Nordyke v. King*, 681 F.3d 1041, 1043 n.2 (9th Cir. 2012) (“As to  
27 the [plaintiffs’] equal protection claim, because the ordinance does not classify  
28 shows or events on the basis of a suspect class, and *because we hold that the*

1 ordinance does not violate either the First or Second Amendments, rational basis  
2 scrutiny applies.” (citations omitted and emphasis added)); *Teixeira v. Cnty. of*  
3 *Alameda*, \_\_ F.3d \_\_, 2016 WL 2849245, at \*3 (9th Cir. May 16, 2016) (“[W]e will  
4 uphold a legislative classification so long as it ‘neither burdens a fundamental right  
5 nor targets a suspect class,’ and ‘bears a rational relation to some legitimate end.’”  
6 (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996))). The Retired Officer  
7 Exemption is reasonably related to the goal of protecting retired peace officers,  
8 which is a legitimate government purpose.

9 **Second**, even if Plaintiffs could conceivably state an equal protection claim  
10 (and they cannot), the four Organizational Plaintiffs lack standing because the  
11 Fourteenth Amendment interest at issue in this case is not germane to the  
12 Organizational Plaintiffs’ alleged purpose of protecting and promoting Second  
13 Amendment rights.

14 Accordingly, pursuant to FRCP 12(b)(6) and 12(b)(1), the Court should  
15 dismiss the Complaint. Because the Retired Officer Exemption satisfies rational  
16 basis scrutiny, leave to amend would be futile and such dismissal should be with  
17 prejudice and without leave to amend.

## 18 BACKGROUND

### 19 I. OVERVIEW OF THE GUN-FREE SCHOOL ZONE ACT OF 1995

#### 20 A. The Pre-Amendment Version of the Act

21 The California Legislature enacted the Gun-Free School Zone Act of 1995 to  
22 prohibit the possession of “a firearm in a place that the person knows, or reasonably  
23 should know, is a school zone . . . , unless it is with the written permission of the  
24 school district superintendent, his or her designee, or equivalent school authority.”  
25 Cal. Penal Code § 626.9(b); *People v. Mejia*, 72 Cal. App. 4th 1269, 1271-72  
26 (1999); *People v. Tapia*, 129 Cal. App. 4th 1153, 1163 (2005). The Act defines  
27 “school zone” as “an area in, or on the grounds of, a public or private school  
28 providing instruction in kindergarten or grades 1 to 12, inclusive, or within a

1 distance of 1,000 feet from the grounds of the public or private school.” Cal. Penal  
2 Code § 626.9(e)(1). The Act also prohibits the possession of a firearm on certain  
3 property owned and operated by a public or private university, unless “it is with the  
4 written permission of the university or college president, his or her designee, or  
5 equivalent university or college authority.” *Id.* § 626.9(h), (i).

6 Prior to the 2015 amendment, the Act carved out several exemptions,  
7 including an exemption for “a[ny] person holding a valid license to carry the  
8 firearm pursuant to [California Penal Code section 26150 *et seq.*]” (*i.e.*, CCW  
9 license holders). Cal. Penal Code § 626.9(l) (2012). The Act also recognized an  
10 exemption for “an[y] honorably retired peace officer,” provided the retired peace  
11 officer is authorized to carry a firearm pursuant to one of the following statutory  
12 grants of authority:

- 13 (1) “Article 2 (commencing with Section 25450) of Chapter 2 of Division 5  
14 of Title 4 of Part 6” exempting active and honorably retired state peace  
15 officers from the concealed weapon ban in California Penal Code section  
16 25400 subject to certain conditions set forth in section 25455;
- 17 (2) “Section 25650” exempting honorably retired federal officers from the  
18 concealed weapon ban in California Penal Code section 25400 subject to  
19 certain conditions;
- 20 (3) “Section 25900 to 25910, inclusive” exempting active and honorably  
21 retired state peace officers from the ban on carrying a loaded firearm in  
22 public in California Penal Code section 25850 subject to certain  
23 conditions; and
- 24 (4) “Section 26020” exempting honorably retired federal officers from the  
25 ban on carrying a loaded firearm in public in California Penal Code  
26 section 25850 subject to certain conditions. *Id.* § 626.9(o)(1)-(4) (2012).

1           **B. The 2015 Amendment**

2           In 2015, the Legislature passed SB 707 to amend the Act. As initially  
3 proposed, SB 707 would have eliminated the exemptions for CCW license holders  
4 and honorably retired peace officers, while permitting them to possess firearms  
5 within 1,000 feet of, but not on the grounds of, a school. *See* S. Comm. on Pub.  
6 Safety, Analysis of SB 707 (2014-2015 Reg. Sess.), Apr. 14, 2015, at 1 (the  
7 “April 14 Committee Analysis”).<sup>3</sup>

8           The California College and University Police Chiefs Association initially  
9 opposed the legislation on the ground that the removal of the Retired Officer  
10 Exemption would undermine public safety: “[W]e consider the presence of an  
11 honorably retired peace officer—with their decades of training and  
12 professionalism—to be a distinct asset in our ability to carry out our mission. The  
13 sad reality is that active shooter incidents take place disproportionately on our  
14 campuses and an honorably retired peace officer can play a role in helping to keep  
15 such incidents in check.” (Request for Judicial Notice, Ex. A (April 14 Committee  
16 Analysis) at 6.)

17           The Sacramento County Sheriff’s Association also initially opposed the  
18 legislation, arguing that the removal of the Retired Officer Exemption would  
19 jeopardize the personal safety of retired peace officers:

20           SB 707 would make criminals out of our retired peace officer members who  
21 visit a school campus. . . . Retired peace officers protected and served the  
22 public while earning the enmity of those in society who ran afoul of the law.  
23 Retired officers carry their weapons as a means of personal protection.

24  
25           <sup>3</sup> A copy of the April 14 Committee Analysis is annexed as Exhibit A to the  
26 Request for Judicial Notice, filed concurrently herewith. As discussed in the  
27 Request for Judicial Notice, the Court may properly take judicial notice of the  
28 legislative history of SB 707 because, under Rule 201 of the Federal Rules of  
Evidence, such materials are not subject to reasonable dispute. *See Anderson v.*  
*Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012).

1 Recent attacks demonstrate the need for peace officers—even retired peace  
2 officers—to be able to defend themselves if necessary. [¶] Forcing our  
3 retired members to choose between picking up their children or grandchildren  
4 form [sic] school or attending school events and ensuring their own ability to  
5 protect themselves or their loved ones is a decision they should not be  
6 required to make. Neither should retired officers be forced to jeopardize their  
7 safety in order to take college classes.

8 (Request for Judicial Notice, Ex. A (April 14 Committee Analysis) at 7-8.)

9 On July 2, 2015, SB 707 was amended to preserve the Retired Officer  
10 Exemption.<sup>4</sup> *See* S. Comm. on Pub. Safety, Analysis of SB 707 (2014-2015 Reg.  
11 Sess.), July 14, 2015, at 5 (the “July 14 Committee Analysis”).<sup>5</sup> The California  
12 College and University Police Chiefs Association and the Sacramento Deputy  
13 Sheriffs’ Association withdrew their opposition and registered support for the  
14 legislation. *See id.* at 7-8. Opponents of the legislation, however, took issue with  
15 the preservation of the Retired Officer Exemption, including at least one of the  
16 Organizational Plaintiffs named in this action. The Firearms Policy Coalition  
17 argued that SB 707, as amended, violated the Equal Protection Clause of the  
18 Fourteenth Amendment, citing *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002),  
19 *abrogated on other grounds by District of Columbia v. Heller*, 554 U.S. 570 (2008).  
20 *Id.* at 5. The legislation was approved by the Governor on October 10, 2015 and  
21 took effect on January 1, 2016.

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25 <sup>4</sup> The amendment also added a fifth statutory grant of authority for retired  
26 peace officers to qualify for the Retired Officer Exemption. *See* Cal. Penal Code  
27 § 626.9(o)(5) (exempting retired reserve officers authorized to carry concealed and  
28 loaded firearms pursuant to Penal Code section 26300(c)(2)).

<sup>5</sup> A copy of the July 14 Committee Analysis is annexed as Exhibit B to the  
Request for Judicial Notice, filed concurrently herewith.

1 **II. ALLEGATIONS IN PLAINTIFFS' COMPLAINT**

2 On April 14, 2016, Plaintiffs filed their Complaint, pursuant to 42 U.S.C.  
 3 § 1983, asserting a single equal protection claim. The Individual Plaintiffs are  
 4 alleged to be “responsible, law-abiding citizens who possess licenses to carry  
 5 concealed weapons under California law.” (Compl. ¶ 33.) In order to obtain their  
 6 CCW licenses, the Individual Plaintiffs were allegedly required to “demonstrate  
 7 ‘good moral character,’ complete a firearms training course, and establish ‘good  
 8 cause.’” (*Id.*) Plaintiffs allege that “several counties have interpreted the ‘good  
 9 cause’ requirement to require that an applicant demonstrate an elevated need for  
 10 self-defense due to a [sic] specific threats or previous attacks against them.” (*Id.*)<sup>6</sup>  
 11 Plaintiffs contend that retired peace officers “are not subject to the same screening  
 12 requirements but rather appear to be eligible to carry firearms as a matter of  
 13 course.” (*Id.* ¶ 34.)

14 Plaintiffs go on to allege that, under California Penal Code section 25455,  
 15 “retired California peace officers who *ever* carried a gun during their service ‘shall  
 16 be issued an identification certificate by the law enforcement agency from which  
 17 the officer retired’ and ‘shall have an endorsement on the identification certificate  
 18 stating that the issuing agency approves the officer’s carrying of a concealed  
 19 firearm.’” (Compl. ¶ 34 (quoting Cal. Penal Code §§ 25455(a), (c); *id.*  
 20 § 25450(d).)<sup>7</sup> Plaintiffs note that retired peace officers must reapply every five  
 21 years and that the issuing agency may decline to renew the officer’s privilege to  
 22

23  
 24 <sup>6</sup> The Individual Plaintiffs allegedly obtained their CCW licenses from  
 25 various sheriffs departments throughout the State of California. (*See* Compl. ¶¶ 10-  
 19.) Plaintiffs do not allege what “good cause” each of the Individual Plaintiffs  
 were required to demonstrate in connection with their applications.

26 <sup>7</sup> While Plaintiffs’ allegations may suggest that eligibility to carry a  
 27 concealed firearm is automatic, the issuing agency may deny issuance of an  
 28 identification certificate or endorsement, subject to review at a hearing. Cal. Penal  
 Code § 26310.



1 carry a concealed firearm upon a finding of “good cause.” (*Id.* (citing Cal. Penal  
2 Code §§ 25465, 25470).)

3 Plaintiffs also allege that, “perhaps even more broadly” than the exemption for  
4 retired state peace officers, the Retired Officer Exemption applies to honorably  
5 retired federal officers and agents who were “simply ‘assigned to duty within the  
6 state for a period of not less than one year’ or ‘retired from active service in the  
7 state’” and that such an officer “simply provides their local sheriff or chief of police  
8 with their [federal] agency’s ‘concurrence’ that the retiree ‘should be afforded the  
9 privilege of carrying a concealed firearm.’” (Compl. ¶ 35 (quoting Cal. Penal Code  
10 § 25650).)<sup>8</sup>

11 Plaintiffs allege that the “net result is that the Act bars law-abiding citizens  
12 who maintain a government-issued CCW from possessing a firearm ‘in or on’  
13 school grounds, but it grants a blanket exemption to a broadly defined group of  
14 retired ‘peace officers,’ none of whom have continuing authority to engage in  
15 ‘peace officer’ activities.” (Compl. ¶ 36.) Plaintiffs pray for, *inter alia*, (i) a  
16 declaratory judgment pursuant to 28 U.S.C. § 2201 stating that the Retired Officer  
17 Exemption violates the Equal Protection Clause, and (ii) a preliminary and  
18 permanent injunction enjoining enforcement of the Retired Officer Exemption. (*Id.*  
19 at 11:1-10 (Prayer for Relief).)

## 20 LEGAL STANDARD

21 A motion to dismiss pursuant to FRCP 12(b)(6) tests the legal sufficiency of a  
22 complaint. “To survive a motion to dismiss, a complaint must contain sufficient  
23 factual matter, accepted as true, to ‘state a claim that is plausible on its face.’”  
24 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,

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25  
26 <sup>8</sup> Again, honorably retired federal officers and agents are not automatically  
27 exempt from the CCW permitting requirements; the sheriff must approve such an  
28 officer’s application for a CCW permit and the retired federal officer must reapply  
every five years. Cal. Penal Code §§ 25650(a), (b).

1 550 U.S. 544, 570 (2007)). A complaint “that offers ‘labels and conclusions’ or ‘a  
2 formulaic recitation of the elements of a cause of action will not do,” *id.* at 678  
3 (quoting *Twombly*, 550 U.S. at 555), and “[t]hreadbare recitals of the elements of a  
4 cause of action, supported by mere conclusory statements, do not suffice,” *id.* at  
5 678. Rather, a plaintiff’s factual allegations must nudge the claims in the complaint  
6 “across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570.  
7 Determining whether a complaint states a plausible claim for relief is “a context-  
8 specific task that requires the reviewing court to draw on its judicial experience and  
9 common sense.” *Iqbal*, 556 U.S. at 679.

10 A motion to dismiss pursuant to FRCP 12(b)(1) for lack of subject matter  
11 jurisdiction may properly raise the issue of standing. *Chandler v. State Farm Mut.*  
12 *Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). Under Article III of the United  
13 States Constitution, a suit brought by a plaintiff who lacks standing is not a “case or  
14 controversy” over which a federal court can have subject matter jurisdiction.  
15 *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). A motion to dismiss  
16 under FRCP 12(b)(1) may be either facial or factual. *Safe Air for Everyone v.*  
17 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a facial attack, the challenger  
18 asserts that the allegations contained in a complaint are insufficient on their face to  
19 invoke federal jurisdiction.” *Id.* The party asserting jurisdiction bears the burden  
20 of establishing subject matter jurisdiction on a Rule 12(b)(1) motion to dismiss.  
21 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

22 Dismissal without leave to amend is appropriate when the deficiencies in the  
23 complaint could not be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758  
24 (9th Cir. 2003); *see also Watison v. Carter*, 668 F.3d 1108, 1117 (9th Cir. 2012)  
25 (dismissal with prejudice is appropriate if the district court “determines that the  
26 pleading could not possibly be cured by the allegation of other facts” (quoting *Doe*  
27 *v. United States*, 58 F.3d 494, 497 (9th Cir. 1995))).  
28

## ARGUMENT

### I. THE RETIRED OFFICER EXEMPTION DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Under the Equal Protection Clause of the Fourteenth Amendment, no state shall “deny to any person within its jurisdiction the equal protection of the laws,” U.S. Const. amend. XIV, § 1, which is “essentially a directive that all persons similarly situated should be treated alike,” *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). “Where a statutory challenge is based on equal protection grounds, the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate government interest.” *Edwards v. Ollison*, 621 F. Supp. 2d 863, 875(C.D. Cal. 2008) (citing *City of Cleburne*, 473 U.S. at 440, *Robinson v. Marshall*, 66 F.3d 249, 251 (9th Cir. 1995), and *United States v. Harding*, 971 F.2d 410, 412 (9th Cir. 1992)).

#### A. Plaintiffs Fail to Identify a Class of Individuals Who Are Similarly Situated to Honorably Retired Peace Officers.

“The first step in equal protection analysis is to identify the [government’s] classification of groups” and, “[o]nce the plaintiff establishes governmental classification, it is necessary to identify a ‘similarly situated’ class against which the plaintiff’s class can be compared.” *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995) (citation omitted); *see also Silveira*, 312 F.3d at 1088 (“[I]n order for a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately.” (citing *City of Cleburne*, 473 U.S. at 439)). As a preliminary matter, Plaintiffs do not allege that the Individual Plaintiffs (or any broader class of CCW license holders) are similarly situated to honorably retired peace officers covered by the Retired Officer Exemption.

In their Complaint, Plaintiffs do not define the parameters or characteristics of any similarly situated “control group” against which retired peace officers can be compared. *See Freeman*, 68 F.3d at 1187 (“The similarly situated group is the

1 control group.” (quoting *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir.  
2 1989))). Plaintiffs allege that the Retired Officer Exemption “irrationally favors”  
3 honorably retired peace officers “over Plaintiffs” (Compl. ¶ 40), which suggests  
4 that Plaintiffs’ proposed control group consists of at least the ten Individual  
5 Plaintiffs named in the Complaint. Plaintiffs also suggest that their control group  
6 does not include *all* CCW license holders, as the “purpose of [their] lawsuit is not  
7 to engineer a restoration of the exemption for ‘mere’ private citizens with a license  
8 to carry.” (*Id.* ¶ 6.) It is unclear, however, whether Plaintiffs’ control group  
9 includes other CCW license holders beyond the Individual Plaintiffs and, if so,  
10 what additional characteristics, beyond the mere possession of a CCW license, are  
11 shared by the individuals in such a group. See *Rosenbaum v. City and Cnty. of San*  
12 *Francisco*, 484 F.3d 1142, 1154 (9th Cir. 2007) (plaintiffs’ “undifferentiated  
13 control group” “was not comparable because these groups were not similarly  
14 situated because of their varying characteristics”).<sup>9</sup>

15 Even if Plaintiffs could define a control group, Plaintiffs do not allege  
16 sufficient facts to establish—or even a conclusory allegation—that their proposed  
17 group is “similarly situated” to retired peace officers covered by the Retired Officer  
18 Exemption. Because Plaintiffs have failed to identify a similarly situated class of  
19 individuals to compare against honorably retired peace officers covered by the  
20 Retired Officer Exemption, Plaintiffs have failed to meet their threshold burden in  
21 attempting to state an equal protection claim.

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25 <sup>9</sup> The various characteristics alleged with respect to the Individual  
26 Plaintiffs—prior threats or reports of violence (Compl. ¶¶ 10, 17), military service  
27 (*id.* ¶¶ 11, 15, 16, 18, 19), being a parent or grandparent of a school-age child (*id.*  
28 ¶¶ 10, 12, 14, 15, 16, 18), participation in school activities (*id.* ¶¶ 13, 18), and  
attendance at a college or university (*id.* ¶¶ 11, 17)—provide little guidance in  
defining the contours of Plaintiffs’ control group.

1           **B. Plaintiffs Cannot Demonstrate that the Retired Officer**  
2           **Exemption Fails Rational Basis Scrutiny.**

3           Even if Plaintiffs could identify a similarly situated control group, Plaintiffs  
4           *cannot* demonstrate that the Retired Officer Exemption violates the Equal  
5           Protection Clause. Even though Plaintiffs have failed to satisfy their threshold  
6           burden of establishing a similarly situated control group, the Court can dispose of  
7           Plaintiffs’ claim—and this lawsuit—by determining that (i) rational basis applies to  
8           Plaintiffs’ claim and (ii) the Retired Officer Exemption satisfies rational basis  
9           scrutiny based on *any* proposed classification.

10           **1. Rational Basis Applies to Plaintiffs’ Equal Protection**  
11           **Claim.**

12           Rational basis is the appropriate level of scrutiny for examining the Retired  
13           Officer Exemption because the Act neither violates a fundamental right (including  
14           the Second Amendment) nor employs a suspect classification. *See Nordyke*, 681  
15           F.3d at 1043 n.2 (“As to the [plaintiffs’] equal protection claim, because the  
16           ordinance does not classify shows or events on the basis of a suspect class, and  
17           *because we hold that the ordinance does not violate either the First or Second*  
18           *Amendments*, rational basis scrutiny applies.” (citations omitted and emphasis  
19           added)); *Teixeira*, 2016 WL 2849245, at \*3 (“[W]e will uphold a legislative  
20           classification so long as it ‘neither burdens a fundamental right nor targets a suspect  
21           class,’ and ‘bears a rational relation to some legitimate end.’” (quoting *Romer*, 517  
22           U.S. at 631)); *Nichols v. Brown*, No. CV 11-09916 SJO (SS), 2013 WL 3368922,  
23           at \*6 (C.D. Cal. July 3, 2013) (holding that, with respect to plaintiff’s equal  
24           protection challenge, the statutory exemption for retired peace officers to open  
25           carry licensing requirements would be subject rational basis scrutiny). Indeed,  
26           Plaintiffs’ own allegations confirm that rational basis is the appropriate standard in  
27           this case. (*See* Compl. ¶ 36 (“There is no *rational reason* to treat [honorably retired  
28           peace officers] differently than Plaintiffs.” (emphasis added)); *id.* ¶ 32 (“Section  
          626.9(o) *arbitrarily and irrationally* subjects Plaintiffs to unequal treatment in

1 violation of the Equal Protection Clause of the Fourteenth Amendment to the  
2 Constitution.” (emphasis added).<sup>10</sup>

3 Plaintiffs do not allege any violation of the Second Amendment or any other  
4 fundamental right and they are not seeking to vindicate some purported Second  
5 Amendment right to possess a firearm on school grounds.<sup>11</sup> Nor could they. The  
6 prohibition on CCW license holders from possessing a firearm “in, or on the  
7 grounds of, a public or private school,” Cal. Penal Code § 626.9(b), is precisely the  
8 kind of law “forbidding the carrying of firearms in sensitive places such as schools”  
9 that the Supreme Court has acknowledged to be presumptively lawful. *See Heller*,  
10 554 U.S. at 626; *McDonald v. City of Chi., Ill.*, 561 U.S. 742, 786 (2010) (“We  
11 made it clear in *Heller* that our holding did not cast doubt on such longstanding  
12 regulatory measures as . . . ‘laws forbidding the carrying of firearms in sensitive  
13 places such as schools and government buildings, or laws imposing conditions and  
14 qualifications on the commercial sale of arms.’” (citation omitted)); *cf. Peruta v.*  
15 *Cnty. of San Diego*, No. 10-56971, slip op. at 20 (9th Cir. June 9, 2016) (en banc)  
16 (holding that the Second Amendment does not protect a right to carry concealed  
17

18 \_\_\_\_\_  
19 <sup>10</sup> Plaintiffs also cite *Silveira* (Compl. ¶¶ 30-31), which applied rational basis  
20 scrutiny to the retired officer exemption in the Assault Weapon Control Act  
21 because the statute “neither affect[ed] the exercise of a fundamental right, nor  
22 classifie[d] persons based on protected characteristics.” *Silveira*, 312 F.3d at 1088.  
23 The court did so after determining that the Second Amendment provides “no  
24 constitutional right to own or possess weapons,” *id.*—a view that was abrogated by  
25 the Supreme Court in *Heller*. Rational basis scrutiny would still apply so long as  
26 no constitutional right has been violated and no suspect classification has been  
27 employed.

28 <sup>11</sup> (*See* Compl. ¶ 6 (“The purpose of this lawsuit is not to engineer a  
restoration of the exemption to the Act for ‘mere’ private citizens with a license to  
carry. Rather, the purpose is to obtain a ruling that the preferential treatment given  
to retired peace officers over similarly-situated private citizens violates the Equal  
Protection Clause.”); *id.* ¶ 7 (“Because Section 626.9(o)’s exemption violates the  
Equal Protection Clause, Plaintiffs seek declaratory and injunctive relief to  
invalidate it and enjoin its enforcement or application.”); *id.* at Prayer for Relief  
 (“Plaintiffs respectfully request that this Court enter a preliminary and permanent  
injunction enjoining enforcement or application of Penal Code section 626.9(o).”).)

1 firearms and noting that “[t]he court in *Heller* was careful to limit the scope of its  
2 holding”).<sup>12</sup>

3 Indeed, the Act has been upheld under the Second Amendment. *See Hall v.*  
4 *Garcia*, No. C 10-03799 RS, 2011 WL 995933, at \*4-\*5 (N.D. Cal. Mar. 17, 2011)  
5 (granting motion for judgment on the pleadings because, “[u]nder any of the  
6 potentially applicable levels of scrutiny . . . , the Gun-Free School Zone Act  
7 constitutes a constitutionally permissible regulation of firearms in public areas in or  
8 near schools”); *c.f. United States v. Lewis*, Criminal No. 2008-45, 2008 WL  
9 5412013, at \*2 (D.V.I. Dec. 24, 2008) (noting that “[i]t is beyond peradventure that  
10 a school zone, where [defendant] is alleged to have possessed a firearm, is precisely  
11 the type of location of which *Heller* spoke” and “*Heller* unambiguously forecloses  
12 a Second Amendment challenge to that offense [for violation of the federal Gun-  
13 Free School Zone Act] under any level of scrutiny”). Because Plaintiffs do not, and  
14 cannot, allege that the Act violates the Second Amendment, rational basis scrutiny  
15 applies.

## 16 **2. The Retired Officer Exemption Satisfies Rational Basis** 17 **Scrutiny.**

18 Under rational basis review, “the general rule is that legislation is presumed to  
19 be valid and will be sustained if the classification drawn by the statute is rationally  
20 related to a legitimate state interest.” *City of Cleburne*, 473 U.S. at 439. The party  
21 attacking the classification bears the burden of demonstrating that there is no  
22 reasonable basis for the challenged distinction and to “negative every conceivable  
23 basis which might support it.” *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation

24 \_\_\_\_\_  
25 <sup>12</sup> Even if Plaintiffs were to challenge the Act on Second Amendment  
26 grounds, such a challenge would not be cognizable as an equal protection claim.  
27 *See Teixeira*, 2016 WL 2849245, at \*3 (“Because [plaintiff’s] equal protection  
28 challenge is ‘no more than a [Second] Amendment claim dressed in equal  
protection clothing,’ it is ‘subsumed by, and coextensive with’ the former, and  
therefore is not cognizable under the Equal Protection Clause.” (quoting *Orin v.*  
*Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001)) (second alteration in original)).

1 omitted). The legislative record need not contain empirical evidence to support the  
2 classification so long as the legislative choice is a reasonable one. *Nordlinger v.*  
3 *Hahn*, 505 U.S. 1, 15 (1992) (“The Equal Protection Clause does not demand for  
4 purposes of rational-basis review that a legislature or governing decision-maker  
5 actually articulate at any time the purpose or rationale supporting its  
6 classification.”).

7 The Retired Officer Exemption is reasonably related to a legitimate  
8 government interest: the protection and safety of retired peace officers. Notably,  
9 this rationale is reflected in the legislative history of SB 707. In initially opposing  
10 SB 707, the Sacramento County Sheriff’s Association argued that the amendment  
11 would jeopardize the safety of retired peace officers. (*See* Request for Judicial  
12 Notice, Ex. A (April 14 Committee Analysis).) Plaintiffs’ insinuation that the only  
13 reason for the Retired Officer Exemption is “potent political and lobbying  
14 operations” (Compl. ¶ 36) is not enough. *Alva v. Lockyer*, 220 Fed. App’x 621 (9th  
15 Cir. 2007) (“Alva presents no argument beyond the accusation that section  
16 311.11(d) was the ‘obvious result of heavy lobbying’ to establish that the [Motion  
17 Picture Association of America] exception is not rationally related to a legitimate  
18 state interest. Accordingly, his equal protection claim fails.”).

19 Courts have upheld other exemptions for retired peace officers on similar  
20 grounds. *See Nichols*, 2013 WL 3368922, at \*6 (“[T]he California Legislature  
21 could have reasonably believed that certain groups, such as retired police officers,  
22 were in greater need of self-protection and thus should be allowed to openly carry a  
23 firearm.”); *Mehl v. Blanas*, No. CIV. S 03-2682 MCE KJM, slip op. at 11 (E.D.  
24 Cal. Sept. 3, 2004) (the “*Mehl* Dismissal Order) (granting California Attorney  
25 General’s motion to dismiss and noting that “the statutory exemption allowing  
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1 retired officers to carry concealed weapons is rationally related to a legitimate  
2 governmental interest, protecting retired law enforcement officers”).<sup>13</sup>

3 Plaintiffs may try to argue that the Retired Officer Exemption is overinclusive  
4 (in covering retired peace officers who Plaintiffs believe may have no self-defense  
5 interest (*see* Compl. ¶ 34)) or underinclusive (in excluding the Individual Plaintiffs  
6 who may have a self-defense interest). However, such an argument is of no  
7 moment under rational basis review. *Vance v. Bradley*, 440 U.S. 93,108 (1979)  
8 (“Even if the classification involved here is to some extent both underinclusive and  
9 overinclusive, and hence the line drawn by [the Legislature] imperfect, it is  
10 nevertheless the rule that in a case like this ‘perfection is by no means required.’”  
11 (quoting *Phillips Chem. Co. v. Dumas Sch. Dist.*, 361 U.S. 376, 385 (1960))); *see*  
12 *also United States v. Thornton*, 901 F.2d 738, 740 (9th Cir. 1990) (“[E]qual  
13 protection of the laws does not require [the Legislature] in every instance to order  
14 evils hierarchically according to their magnitude and to legislate against the greater  
15 before the lesser.”) (citation omitted)).

16 Plaintiffs also may try to argue that the Ninth Circuit’s *Silveira* decision  
17 supports their equal protection claim. (*See* Compl. ¶¶ 30-31, 36.) Plaintiffs would  
18 be mistaken. The exemption for retired peace officers struck down in *Silveira* bears  
19 little resemblance to the Retired Officer Exemption at issue in this case. *Silveira*  
20 concerned an exemption for retired peace officers (even those who may not have  
21 honorably retired) to possess assault weapons that they received or purchased upon  
22 their retirement.<sup>14</sup> After observing that it “must attempt to identify *any* hypothetical

23 <sup>13</sup> The *Mehl* Dismissal Order was not published and is not available on an  
24 electronic database. Accordingly, a copy of the order is annexed as Exhibit C to the  
Request for Judicial Notice, which is being filed concurrently herewith.

25 <sup>14</sup> *See* Cal. Penal Code § 12280(h) (2002) (the assault weapons ban “shall not  
26 prohibit the sale or transfer of assault weapons by an entity . . . to a person, upon  
27 retirement, who retired as a sworn officer from that entity”); *id.* § 12280(i) (2002)  
(the assault weapons ban “shall not apply to the possession of an assault weapon by  
28 a retired peace officer who received that assault weapon pursuant to  
subdivision (h)”).

1 rational basis for the exception, whether or not that reason is in the legislative  
2 record,” *Silveira*, 312 F.3d at 1090, the *Silveira* court proceeded to reject several  
3 potential justifications for the exemption. *Id.* at 1090-91. The court held that the  
4 exemption “bears no reasonable relationship to the stated legislative purpose of  
5 banning the possession and use of assault weapons in California, except for certain  
6 law enforcement purposes.” *Id.* at 1091. Critically, the court *did not* address any  
7 self-defense justification for the exemption. Here, by contrast, the Retired Officer  
8 Exemption is reasonably related to such a legitimate government interest.  
9 Moreover, contrary to the comprehensive ban at issue in *Silveira*, the Act  
10 recognizes several exemptions that permit individuals, other than honorably retired  
11 peace officers, to possess firearms within a school zone or on college or university  
12 property. *See* Cal. Penal Code § 626.9(b) (exempting an individual who has “the  
13 written permission of the school district superintendent, his or her designee, or  
14 equivalent school authority”); *id.* § 626.9(c)(3) (exempting an individual who  
15 “reasonably believes that he or she is in grave danger because of circumstances  
16 forming the basis of a current restraining order”).

17 This is not the first time that *Silveira* has been cited in an attempt to invalidate  
18 an exemption for honorably retired peace officers from a firearm regulation. In  
19 *Mehl v. Blanas*, the plaintiffs made a similar argument as Plaintiffs in this case,  
20 relying upon *Silveira* to support an equal protection challenge to the exemption for  
21 honorably retired peace officers from the CCW permitting requirements. The  
22 Honorable Morrison C. England, United States District Judge for the Eastern  
23 District of California, rejected plaintiffs’ argument and granted the Attorney  
24 General’s motion to dismiss. The court observed,

25 The justification and rationale for exempting retired peace officers from the  
26 CCW is not the same as for the exception to the assault weapon ban in  
27 *Silveira*. The justification for a CCW is personal protection, not public  
28 protection. Peace officers were entitled to carry assault weapons so that they

1 would not be inadequately armed to confront criminals while protecting the  
2 public. On the other hand, they are entitled to carry concealed weapons to  
3 protect themselves from the enemies they have made in performing their  
4 duties. While an officer's duty to respond to the public's calls for help stops  
5 when he retires, the threat of danger from enemies he might have made during  
6 this service does not. Therefore, there is a rational basis for allowing a retired  
7 officer to continue to carry a concealed weapon, even though there was no  
8 rational basis for allowing the same officer to keep an assault weapon.

9 (Request for Judicial Notice, Ex. C (*Mehl* Dismissal Order) at 10-11.) As in *Mehl*,  
10 this Court should dismiss this action against the Attorney General with prejudice  
11 given the rational basis for the Retired Officer Exemption.

## 12 **II. THE ORGANIZATIONAL PLAINTIFFS LACK STANDING.**

13 If this Court were to find that Plaintiffs have stated an equal protection claim  
14 (and, for the reasons discussed, they have not), the Court should, at a minimum,  
15 dismiss the claims of the Organizational Plaintiffs pursuant to FRCP 12(b)(1) for  
16 lack of standing. "An association has standing to bring suit on behalf of its  
17 members when its members would otherwise have standing to sue in their own  
18 right, *the interests at stake are germane to the organization's purpose*, and neither  
19 the claim asserted nor the relief requested requires the participation of individual  
20 members in the lawsuit." *Ranchers Cattlemen Action Legal Fund United*  
21 *Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1104 (9th Cir. 2005)  
22 (emphasis added) (quoting *Friends of the Earth, Inc. v. Laidlaw Env'tl. Serv. (TOC),*  
23 *Inc.*, 528 U.S. 167, 181 (2000)).

24 The Organizational Plaintiffs lack organizational standing because the  
25 interests at issue in this litigation are not germane to their alleged purpose.<sup>15</sup> The

26 <sup>15</sup> The Organizational Plaintiffs also lack direct standing. See *Valle del Sol*  
27 *Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) ("An organization has 'direct  
28 standing to sue [when] it show[s] a drain on its resources from both a diversion of  
its resources and frustration of its mission.'" (quoting *Fair Hous. Council of San*  
(continued...))

1 Organizational Plaintiffs are allegedly non-profit organizations focused on Second  
2 Amendment advocacy:

- 3 • Plaintiff Firearms Policy Foundation “is a non-profit organization that  
4 serves the public through charitable and educational purposes, with a  
5 focus on advancing constitutional rights with *a particular focus on laws*  
6 *relating to firearms and affecting the fundamental right to keep and bear*  
7 *arms.”* (Compl. ¶ 20 (emphasis added).)
- 8 • Plaintiff Firearms Policy Coalition’s “purposes . . . include defending the  
9 United States Constitution and the People’s rights, privileges and  
10 immunities deeply rooted in the Nation’s history and tradition, *especially*  
11 *the fundamental right to keep and bear arms.”* (*Id.* ¶ 21 (emphasis  
12 added).)
- 13 • Plaintiff Madison Society Foundation’s “purpose is preserving and  
14 protecting the legal and constitutional right to keep and bear arms for its  
15 members and all responsible law-abiding citizens.” (*Id.* ¶ 22.)
- 16 • Plaintiff The Calguns Foundation “serves its members, supporters, and  
17 the public through educational, cultural, and judicial efforts to advance  
18 Second Amendment and related civil rights.” (*Id.* ¶ 23.)

19 Even if the Organizational Plaintiffs can establish the first and third  
20 requirements for organizational standing,<sup>16</sup> the equal protection interests at issue in

21 (...continued)  
22 *Fernando Valley v. Roomate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012))).  
23 Allegations that the Organizational Plaintiffs may have “spent funds” addressing  
24 their members concerns and questions about SB 707 are insufficient to confer direct  
25 standing upon them. (*See* Compl. ¶¶ 20-23.)

24 <sup>16</sup> It is not clear that the Organizational Plaintiffs’ members would have  
25 direct standing to assert the equal protection claim at issue in this case because  
26 some members may not be CCW license holders and, depending on the definition  
27 of Plaintiffs’ proposed control group, not all CCW license holders may have  
28 suffered a purported equal protection injury. (*See* Section 1.A, *supra.*) Even if  
some of their members may be “CCW holders who have been directly affected by  
the change in the law,” they have not necessarily suffered the same purported injury  
as the Individual Plaintiffs. (*See* Compl. ¶¶ 20-23.)

1 this litigation are not germane to the alleged purposes of the Organizational  
2 Plaintiffs. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of*  
3 *Am.*, 415 F.3d at 1104 (holding that non-profit cattle association lacked standing to  
4 assert a National Environmental Policy Act challenge because the plaintiff’s  
5 purported environmental interest asserted in the litigation was not connected to “the  
6 ‘trade and marketing’ interests it is organized to protect”); *Pac. Nw. Generating*  
7 *Co-Op v. Brown*, 38 F.3d 1058, 1063 (9th Cir. 1994) (noting that the plaintiffs  
8 “assert the [aesthetic and recreational] interests of their employees [under the  
9 Endangered Species Act],” but that “their employees’ interests are not germane to  
10 the [plaintiffs’] own purposes and cannot be asserted by them”); *Idaho Farm*  
11 *Bureau Fed’n v. Babbitt*, 900 F. Supp. 1349, 1357 (D. Idaho 1995) (“Plaintiffs have  
12 failed to carry their burden of establishing standing as organizations established to  
13 represent the aesthetic/recreational interests of their members, both because the  
14 members of Plaintiffs’ organizations lack the standing to sue individually and, *more*  
15 *importantly, because Plaintiffs are not protecting an interest germane to their*  
16 *organizations’ purpose in this regard*” (emphasis added)).

17 Thus, even if the Complaint were found to state an equal protection claim, the  
18 Organizational Plaintiffs lack standing to assert such a claim.

### 19 CONCLUSION

20 For the reasons set forth above, the Attorney General respectfully urges this  
21 Court to grant the present motion to dismiss with prejudice and without leave to  
22 amend.

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Dated: June 10, 2016

Respectfully submitted,  
  
KAMALA D. HARRIS  
Attorney General of California  
MARK R. BECKINGTON  
Supervising Deputy Attorney General

/s/ John D. Echeverria  

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Harris, California Attorney General*

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**CERTIFICATE OF SERVICE**

Case Name: **Ulises Garcia, et al. v. Kamala D. Harris** No. **2:16-cv-02572-BRO-AFM**

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I hereby certify that on June 10, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT BY CALIFORNIA ATTORNEY GENERAL KAMALA D. HARRIS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 10, 2016, at Los Angeles, California.

---

Angela Artiga  
Declarant

---

/s/ Angela Artiga  
Signature