IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 16-56125

ULISES GARCIA, et al.,
Plaintiffs/Appellants,

v.

XAVIER BECERRA, in his official capacity as Attorney General of California,
Defendant/Appellees.

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF APPELLANTS

On Appeal from the United States District Court
For the Central District of California

No. 2:16-cv-02572-BRO-AFM
The Honorable Beverly Reid O'Connell,
Judge, U.S. District Court

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Dated: April 10, 2017

s/Ilya Shapiro
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INTEREST OF *AMICUS CURIAE*

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No person other than *amicus* or *amicus*'s counsel authored any portion of this brief or paid for its preparation and submission. All parties have consented to this filing. Fed. R. App. P. 29(a); Circuit Advisory Committee Note to Rule 29-3.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2015, the California legislature amended the California Gun-Free School Zone Act of 1995. While the Act had formerly treated retired peace officers and those with a license to carry concealed weapons alike, the amendment eliminated this equal treatment. Now, no concealed-carry license holder can carry his or her weapon within 1000 feet of a school; retired peace officers, on the other hand, retain that right.

Appellants are concealed-carry license holders who have challenged this differing treatment as a violation of the Equal Protection Clause. In the district court, appellants argued that the amendment violated the Equal Protection Clause because it was enacted "for the improper purpose of favoring a politically powerful group and to disfavor a politically unpopular one." Slip op. 11–12 (quoting Br. in Opp. 16).

The district court dismissed this claim in a single paragraph, writing that "[t]he legislative history of the Act here does not indicate that the California Legislature was trying to prejudice civilian firearm owners when it retained the Retired Peace Officers Exemption. Absent evidence of explicit legislative intent to cause harm to civilian gun

owners, Plaintiffs cannot establish a violation of the Equal Protection Clause under this theory." Slip. op. 12.

This dismissal is wrong as a matter of law, which requires that the district court's opinion be vacated. A long line of Supreme Court cases, from *Yick Wo v. Hopkins* to *Romer v. Evans* makes clear that investigating legislative motives goes far beyond the legislative history. Floor statements and committee reports are only one means by which improper motives can be shown. The court below, in dismissing this claim in a single paragraph, did not engage in the searching inquiry of "the totality of the relevant facts" that Supreme Court precedent requires.

The district court's error is a serious one. As legal scholars and political scientists have frequently noted, legislatures will respond to the incentives that courts give them. They know courts are listening. When legislators take to the floor, they are highly unlikely to create the sort of "evidence of explicit legislative intent" that the district court demanded, precisely because they know that such evidence could later prove fatal to the very bills they support. Thus, an examination of the "totality of the relevant facts" is a vital tool, without which courts would be seriously hampered in their ability to enforce the equal protection of the laws.

In this case, an examination of the full factual circumstances proves fatal to the differing treatment contained in the amendment. Both the effects of the amendment itself and the history of lobbying from which the differing treatment arose show that no serious policy concern was on the minds of legislators. Instead, the amendment was enacted purely to advantage one politically powerful class at the advantage of a less powerful and less popular class. Such a motivation is impermissible under the Equal Protection Clause, and for that reason the differing treatment contained in the amendment must be struck down.

ARGUMENT

I. Supreme Court Precedent Requires that Courts Investigate the Totality of Relevant Facts When Determining Legislative Motives

For at least 200 years, the Supreme Court has warned that lawmakers might sometimes conceal their true motives. In *McCulloch v. Maryland*, Chief Justice John Marshall contemplated that Congress might "under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). The admonition was clear: judicial review requires that courts look beyond legislative pretenses to find the true purpose of a law.

In 1879, Justice Stephen J. Field put this principle to practice. San Francisco enacted an ordinance requiring that all males taken into police custody have their hair shaved to one inch. But, as Field (riding circuit) recognized, the ordinance "was not intended and cannot be maintained as a measure of discipline or as a sanitary regulation." *Ho Ah Kow v. Nunan*, 12 F. 252, 254 (C.C.D. Cal. 1879). Instead, the true aim of the law was clear: to punish and demean the Chinese population, many of whom wore their hair in a traditional "queue" ponytail. Acknowledging the law as one of many aimed at the Chinese, Field struck down the ordinance under the Equal Protection Clause. In doing so, he delivered a timeless summation of the judge's duty, writing that "we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." *Id.* at 255.[1]

[1] *See also In re Wo Lee*, 26 F. 471, 474–75 (C.C.D. Cal. 1886) ("That [a laundry-licensing ordinance] does mean prohibition, as to the Chinese, it seems to us must be apparent to every citizen of San Francisco who has been here long enough to be familiar with the course of an active and aggressive branch of public opinion and of public notorious events. Can a court be blind to what must necessarily be known to every intelligent person in the state?").

Just seven years after *Ho Ah Kow*, in the seminal case *Yick Wo v. Hopkins*, the full Supreme Court (including Justice Field) took the same approach. There, the Court examined a law requiring that all laundry establishments in the city of San Francisco obtain a license to operate. Though the text of the law itself was facially neutral, the Court recognized that in fact it had been applied exclusively against Chinese-owned businesses. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). From this unequal *effect*, the Court easily inferred an improper *intent*. As the Court put it, the licensing laws had been "applied by the public authorities charged with their administration . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of th[e] equal protection of the laws." *Id.* at 373.

In the mid-20th Century, the Civil Rights Era brought renewed attention to legislators' motives. In the 1960 case *Gomillion v. Lightfoot*, the Court once again affirmed that an improper motive can be inferred simply from the effects of a law itself. 364 U.S. 339 (1960). The Court held that the irregularity of a newly drawn city border, and its perfect overlap with the boundary between white and black residential neighborhoods, was sufficient evidence *in itself* for an equal protection claim to go

forward. As the Court observed, the effect of a law is in some instances "tantamount for all practical purposes to a mathematical demonstration" of an intent to favor one group over another. *Id*. at 341.

As Charles Fried has explained, *Gomillion* thus represents a crucial cornerstone of legislative motive analysis:

> [S]ometimes it is simply not possible to propose a proper purpose to which the questioned action bears any remote relation, while at the same time it fits the improper purpose like a glove. The *Gomillion* example serves to illustrate, in part, that effects come back into the intents test when the effects involved are extreme in their salience.

Charles Fried, *Types*, 14 Const. Comment. 55, 62 (1997).

Sixteen years after *Gomillion*, legislative intent was formally adopted into equal protection doctrine as one prong of analyzing a facially neutral law. In *Washington v. Davis*, the Court held that facially neutral laws violate equal protection if they *both* have a disparate impact on a distinct group *and* are motivated by a legislative intent to cause such disparate impact. 426 U.S. 229 (1976). In explaining the second prong of this test, the Court laid out the touchstone for how courts must approach any inquiry into legislative purpose: "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts." *Id.* at 242. Since *Davis* concerned disparate racial impact,

the Court used race in its example of the type of inference from circumstances that this approach entails, writing that such relevant facts "includ[e] the fact, if it is true, that the law bears more heavily on one race." *Id.* Indeed, the Court acknowledged that sometimes the effect of a law would be so obvious as to constitute *sufficient* evidence of intent in itself, writing that "[i]t is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Id.* This *res ipsa loquitur* approach shows that "*Davis* was not interested in direct evidence of impure thoughts. Instead, it searched for illicit purposes through a contextual evaluation of the circumstances surrounding the challenged government action." Ian F. Haney-López, *Intentional Blindness*, 87 N.Y.U. L. Rev. 1779, 1808 (2012).

Soon after *Davis*, the Court confronted another racial disparate impact claim. In *Village of Arlington Heights v. Metro. Housing Development Corp.*, the Court took the opportunity to reaffirm and expand upon the test laid out in *Davis*. 429 U.S. 252 (1977). The Court reiterated that no evidence should be ignored in the search for legislative

motive: "Determining whether invidious discriminatory purpose was a motivating factor" in a legislative decision, the Court wrote, "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266.

The Court went on to list several specific factors that courts must consider. As in *Yick Wo* and *Gomillion*, "[t]he impact of the official action . . . may provide an important starting point" in inferring discriminatory legislative intent. *Arlington Heights*, 429 U.S. at 266. In addition to the law's effects, the Court listed several potential sources of evidence, including not just legislative history but also the "historical background of the decision," "specific sequence of events leading up to the challenged decision," and "[d]epartures from the normal procedural sequence." *Id.* at 267. Finally, to make clear that it was not foreclosing *any* relevant evidentiary source, the Court emphasized that "[t]he foregoing summary identifies, *without purporting to be exhaustive*, subjects of proper inquiry" in determining intent. *Id.* at 268 (emphasis added).

Since *Arlington Heights*, the Supreme Court has applied this "totality of the relevant facts" test in many cases. In several of them, the

Court has found improper legislative motivations despite the absence of any evidence in the legislative history.

In *Rogers v. Lodge*, the Court struck down a voting procedure in Georgia as impermissibly targeted against African-Americans. Despite no "smoking gun" in the legislative record, the Court reiterated *Davis*'s "totality of the relevant facts" approach and engaged in a detailed historical analysis of Georgia's voting laws. This history proved to be determinative, because, as the Court made clear, "[e]vidence of historical discrimination is relevant to drawing an inference of purposeful discrimination." *Rogers v. Lodge*, 458 U.S. 613, 625 (1982).

Likewise in *Cleburne v. Cleburne Living Center*, the Court found that the denial of a building permit for a group home for the mentally retarded was impermissibly motivated by "an irrational prejudice against the mentally retarded." 473 U.S. 432, 450 (1985). The Court did not cite a single statement made by the city council in reaching this conclusion; the differing treatment afforded to the mentally retarded (compared to similarly situated groups like the elderly) spoke for itself.[2]

[2] As one scholar described the reasoning of *Cleburne*:

Most recently, *Romer v. Evans* affirmed that the sweep of a law can be "so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects." 517 U.S. 620, 632 (1996). Once again, animus was inferred from *the law itself*, not from any legislative statements. *See id.* at 634 ("[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.").

The import of this long line of cases is clear. Whether one calls it "malice," "irrational prejudice," or a "bare desire to harm," impermissible legislative purpose has been an element of equal protection review since the Fourteenth Amendment's passage. And over that time, the Supreme Court has consistently affirmed that *all* relevant evidence must be examined in the judicial search for true legislative motives.

> The Court had no direct evidence before it that the purpose of the zoning ordinance was discrimination against the mentally retarded (other than the requirement of the ordinance itself that a special permit be issued). The absence of any plausible, legitimate purpose, however, combined with the singling out of the retarded, was sufficient evidence of impermissible purpose.

Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 Vill. L. Rev. 1, 38 (1992).

II. Political Science Confirms the Necessity of Looking Beyond Legislative Statements When Seeking Out a Law's True Purpose

The "totality of the relevant facts" approach to finding legislative motive understands an important truth: When legislators speak, they know judges are listening. If courts abandoned this rule and looked only to explicit legislative statements for evidence of legislative motive, as the district court did in this case, it would do a great harm to their ability to enforce the equal protection of the laws.

Legislators have long attempted to influence courts with well-placed legislative statements. *See generally* William S. Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effects in the Interpretation of Statutes*, 45 A.B.A. J. 1314 (1959).[3] And since the Court began more vigorously policing ostensibly neutral laws during the Civil Rights Era, legislators have also been on notice that what they *don't* say

[3] *See also* McNollgast, (Mathew D. McCubbins, Roger Noll, and Barry R. Weingast), *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 L. & Contemp. Probs. 3, 13 (1994) ("[G]iven the principles of interpretation [legislators] anticipate the courts will use, members of the [enacting] coalition can undertake strategic activities to influence the interpretation that agencies and courts in fact adopt, such as issuing reports and making statements on the floor to elaborate the meaning of a bill.").

could be just as important as what they *do* say. The strategy of carefully planned legislative statements has naturally extended to *avoiding* the type of statements that would be fatal to a bill's chances of passing equal protection scrutiny, making legislative history less conclusive to proving true legislative motivation than ever before.

It is no coincidence that one of the few cases in which the Supreme Court has found a "smoking gun" of invidious intent turned on statements made eighty years earlier. *See Hunter v. Underwood*, 471 U.S. 222, 229 (1985). That the explicit statements in that case had been made well before the Court's Civil Rights Era revolution is almost certainly the reason those statements existed at all. *See* Daniel L. Rotenberg, *Congressional Silence in the Supreme Court*, 47 U. Miami L. Rev. 375, 388 (1992) ("In the past, administrative and executive decisionmakers overtly showed discriminatory intent because they thought they could get away with purposes that are now forbidden. Today, society prohibits such purposes; therefore, overt evidence is not usually available. The danger is that the intent has gone underground."). *See also* Robert Nelson, *To Infer or Not To Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. Rev. 334, 336 n.13 (1986) ("Very rarely,

however, will legislators today publicly express their discriminatory motivation."); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 Tenn. L. Rev. 925, 969 (1999) ("The difficulties of the [*Washington v. Davis*] rule are well known; legislators may mask their invidious intent behind neutral justifications.").

The absence of smoking gun legislative statements in recent equal protection cases should not, then, be surprising. Thirty years ago, it was predicted that "if courts inquire into motive, decisionmakers may work harder to conceal their illicit objectives." Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts*, 63 N.C. L. Rev. 879, 885 (1985). That prediction has proved accurate. Today, inquiries must go beyond an innocuous or nonexistent legislative record.[4]

[4] A search of official legislative "findings" is unlikely to yield any more honest results than statements or colloquies. "Recitals of findings and purposes are the task of anonymous draftsmen, committee staffs, and counsel for interested parties, not legislators. Such recitals will be an attempt to provide whatever, under prevailing case law, is expected to satisfy a court." Hans A. Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197, 231 (1976).

That is why the district court's error, if allowed to stand, would be dangerous. Such a limited approach would effectively foreclose any chance of smoking out illicit purpose, and only further motivate legislative duplicity. *See* Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 Vill. L. Rev. 1, 26 (1992) ("A judicial attitude of extreme deference to statutory statements of purpose would have the effect of encouraging legislatures to dissemble about the purpose of a law."). Moreover, such an approach would effectively shield all laws passed by referendum from disparate impact review. When judicial review is cabined to only the statements of those who enacted a law, "it is particularly difficult to prove the existence of the required discriminatory purpose on the part of the vast, silent electorate." Robin Charlow, *Judicial Review Equal Protection and the Problem with Plebiscites*, 79 Cornell L. Rev. 527, 549 (1994).

The only solution to the inevitable problem of legislative gamesmanship is to keep the judicial inquiry open to all available evidence, including the effects of a law itself. *See* Fried, *supra*, at 62 ("[E]ffects become a critical piece of evidence in the determination of intent, particularly in those contexts in which those whose actions are

constrained are unlikely to acknowledge candidly their illicit motivation."). The "totality of the relevant facts" test encapsulates this principle, and represents a common-sense approach to determining intent.[5] It is the test that must be applied in this case and in all other cases where a plaintiff alleges improper legislative motive. And it is a test that the district court simply failed to apply.

III. The Effect and History of the Amendment Here Shows Impermissible Legislative Motive to Disfavor a Politically Unpopular Class

The district court's one-paragraph dismissal of appellants' improper-legislative-purpose claim was wrong as a matter of law, because "[t]he Court's animus cases show that no single one of [the *Arlington Heights*] factors must be present in order to make the inference" of improper motive. Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 Sup. Ct. Rev. 183, 246 (2013). In treating

[5] Indeed, the test is mirrored in many other judicial doctrines, such as the inquiry into the motives of prosecutorial decisions related to jury composition. *See Batson v. Kentucky*, 476 U.S. 79, 96–97 (1986) ("In deciding whether the defendant has made the requisite showing [of discrimination], the trial court should consider all relevant circumstances."). To cabin the intent inquiry to only explicit statements makes as little sense for legislators as it does for prosecutors, or for anyone else.

the absence of legislative statements of animus as a *per se* exoneration of the California State Legislature, the district court ignored its duty to investigate each of the other *Arlington Heights* factors, as well as any other evidence available.

An examination of the full record shows that the differing treatment of concealed-carry license holders could only have been motivated by a legislative desire to favor a more politically popular class. First and foremost, the terms of the amendment itself—and its inevitable effects—provide ample evidence of improper legislative motive. The amendment broadly exempts *all* "retired peace officers" and *no* concealed-carry license holders, without exception. An inevitable effect of the law—one that must have been known by the legislators who enacted it—is that even those concealed-carry holders who had acquired their licenses in response to specific and credible threats would be unable to traverse school zones with their weapon. Likewise, the legislators knew that the law *would* exempt such peace officers as "retired employees of the California Department of Fish and Game" and "retired marshals appointed 'to keep order and preserve peace at the California Exposition

and State Fair.'" App. Br. 28–29 (citing Cal. Penal Code §§ 830.2, 25450; Cal. Food & Agric. Code § 3332(j)).

Given this operation of the amendment, it is highly implausible that the differing treatment was motivated by a real concern for self-protection against enemies. Far too many retired peace officers hold jobs unlikely to inspire enemies, and far too many concealed-carry license holders obtained those licenses because of specific threats, for the line drawn by the legislature to make sense.

It is when we look at another *Arlington Heights* factor, the "historical background of the decision," that the real motivation of the legislature becomes clear. The proposed amendment originally removed the exemptions for *both* concealed-carry holders and retired peace officers. *See* App. Br. 4–7. It was then altered to preserve the retired peace officer exemption not on the basis of further policy research or legislative fact-finding, but on the basis of lobbying by well-connected groups. App. Br. 30–31. In other words, circumstances reveal that it was the relative political clout held by retired peace officers, as compared to concealed-carry holders, that motivated their differing treatment.

CONCLUSION

There is no question that determining legislative motive is a difficult endeavor. For this reason, courts must not make these difficulties greater by shutting their eyes "to matters of public notoriety and general cognizance."

For the reasons stated by appellants, the decision of the district court should be reversed. In the alternative, the decision of the district court should be vacated and the case remanded with instructions to apply the Supreme Court's "totality of the relevant facts" test.

Respectfully submitted,

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Dated: April 10, 2017

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 3,735 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: April 10, 2017

s/Ilya Shapiro
Ilya Shapiro

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: April 10, 2017

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Ilya Shapiro