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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PRESCOTT DIVISION

Center for Biological Diversity, et al.,

Plaintiffs,

vs.

United States Forest Service,

Defendant, and

National Rifle Association of America and Safari Club International, and National Shooting Sports Foundation, Inc.,

Defendants-Intervenors.

CASE NO. 3:12-cv-08176-PCT-SMM

REPLY IN SUPPORT OF NRA/SCI'S MOTION TO DISMISS

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I. Condors from a Captive Breeding Program Used in a Government-run Experiment Are Not Part of the "Environment" under RCRA.

NRA/SCI's motion to dismiss explained that the condors are not part of the "environment" for purposes of RCRA due to their experimental nature. NRA/SCI Mot. Dismiss at 4-6. Plaintiffs contend that the population here is part of the "environment" for purposes of their RCRA claim, effectively arguing that Congress intended to make the exact same alleged "take" legal under ESA but illegal under RCRA. Opp'n at 25. "[W]hen Congress uses more sweeping language than it would if it were attending carefully to fact situations, outside the scope of its purpose, to which the language might be erroneously understood to apply[,] a court may correct by interpretation[.]" *Heppner v. Alyeska Pipeline Service Co.* 665 F.2d 868, 872 (9th Cir. 1981).

It is not reasonable to claim, as Plaintiffs do, that the "environment" language in RCRA was intended to include animals expressly allowed to be taken in a very specific manner under ESA. The statutory purposes of the ESA would not be served by statutorily authorizing the creation of experimental populations, but then leaving them vulnerable to non-ESA based attacks. Plaintiffs wrongly claim that "RCRA's imminent and substantial endangerment provision furthers ESA section 10(j)'s conservation purpose by allowing citizens to act to abate an . . . endangerment" (Opp'n at 26)—***without*** mentioning how application of that provision ***in this instance*** would require nullifying a project that is ***actually*** performed under section 10(j) (i.e., 16 U.S.C. §1539(j)(1)).[1]

Notwithstanding that Congress authorized the Department to oversee the creation of experimental population (16 U.S.C. §§ 1532(15), 1539(j)(1)), Plaintiffs suggest that

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[1] Similarly, Plaintiffs claim that there is no statutory conflict here because "the relevant RCRA and ESA provisions serve similar purposes." Opp'n at 25. This is not so. Section 10(j) serves the purpose of providing the Department of the Interior ("Department") flexibility to allow certain activities (such as hunting) to occur—despite alleged impacts—to help recover listed species by garnering public support for reintroduction. RCRA is an anti-pollution law. And in any event, the issue is whether there is a conflict in *implementation*, not in purpose.

Congress nonetheless intended RCRA to be available to citizens wanting to thwart conservation operations expressly authorized under ESA. Because RCRA's undefined reference to the "environment" cannot reasonably be stretched to include an experimental population—derived solely from captive breeding[2]—without creating an untenable conflict with ESA, Plaintiffs' interpretation of "environment" should be disregarded.

II. Plaintiffs Fail to Plead an Element of a RCRA Citizen Suit.

In their motion to dismiss, NRA/SCI explained that RCRA requires the disposal of a solid waste. NRA/SCI Mot. Dismiss at 2, 9-10; *see also* NSSF Mot. J. Plead. at 14 n.7 (defining disposal). RCRA's citizen suit provision does not apply ***unless*** the alleged "disposal" of "solid waste" actually introduces the waste "into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment[.]" 42 U.S.C. § 6903(3); *see Ctr. for Cmty. Action & Envtl. Justice v. BNSF Ry. Co.,* 764 F.3d 1019, 1024 (9th Cir. 2014) (citing 42 U.S.C. § 6903(3), and holding that "'disposal' includes only conduct that results in the placement of solid waste 'into or on any land or water'"). Plaintiffs omit the "into or on any land or water" limitation when they refer to RCRA's definition of "disposal." Opp'n at 21. The harm Plaintiffs complain of—that animals are ingesting spent lead found in carcasses or gut piles (Compl., ¶¶ 27-29)—necessarily means the lead at issue ***never reaches any "land or water"*** as is required for a disposal-based RCRA suit. Further, "disposal" is a two-step process: "the solid waste is *first* placed 'into or on any land or water' and is *thereafter* 'emitted [to the environment.]'" *Ctr. for Cmty. Action*, 764 F.3d at 1024. Plaintiffs make no allegation concerning the second step. Because Plaintiffs did not allege facts to meet either of these requirements, their RCRA citizen suit claim fails, and their action should be dismissed.

[2] *See Establishment of a Nonessential Experimental Population of California Condors in Northern Arizona*, 61 Fed. Reg. 54044, 54048 (Oct. 16, 1996).

1 **III. *Ecological Rights* and Other Cases Are on Point and Defeat Plaintiffs' Case.**

2 NRA/SCI has explained that *Ecological Rights* and other on-point cases
3 demonstrate that the use of lead-based ammunition for its intended purpose of hunting in
4 the Kaibab National Forest ("KNF") is not a "disposal" of "solid waste" under RCRA.
5 NRA/SCI Mot. Dismiss at 7-9. For several reasons, Plaintiffs fail to refute these
6 arguments. Opp'n at 18-21. First, Plaintiffs wrongly claim that the Military Munitions
7 Rule is irrelevant to this case because it addresses the regulatory, and not statutory,
8 definition of "solid waste." *Id.* at 18-19. *Ecological Rights* holds otherwise: "EPA's
9 application of its regulations [is] relevant when construing the statutory definition of
10 'solid waste.'" *Ecological Rights Found. v. Pac. Gas and Elec. Co.*, 713 F.3d 502, 516 &
11 n.9 (9th Cir. 2013). *Ecological Rights* relies on the Military Munitions Rule to help
12 explain why preservative that seeps out of utility poles is not a "solid waste," although
13 the seepage was not caused by the military nor was it ammunition. *Id.* at 516.

14 Second, Plaintiffs overstate the ruling in *Safe Air for Everyone v. Meyer*, 373 F.3d
15 1035, 1043 (9th Cir. 2004). Plaintiffs claim that the Ninth Circuit found "three factors
16 relevant when determining whether something constitutes 'solid waste,'" suggesting that
17 these factors are the "test" for determining what constitutes "discarded material" and
18 "solid waste." Opp. at 17. But *Safe Air* only identified those factors as considerations it
19 would "also evaluate" in addressing the particular facts of that case. *Safe Air,* 373 F.3d at
20 1043. *Ecological Rights* cites *Safe Air,* but does not address the three factors, much less
21 adopt them as an exclusive test for identifying "solid waste." 713 F.3d at 514-15.

22 Third, Plaintiffs contend that the *Ecological Rights* court "concluded that wood
23 preservative from utility poles was 'not automatically' a solid waste because it was still
24 wanted by the consumer for its intended purpose as a preservative." Opp'n at 18. But the
25 Ninth Circuit's position was *not* that the utility pole owners specifically wanted the
26 escaped preservative, but rather that "escaping preservative is n[ot] a material that the

1 consumer . . . no longer wants ***and*** has disposed of or thrown away[.]" *Ecological Rights*,
2 713 F.3d at 515 (emphasis added). That is, the Ninth Circuit held "wood preservative that
3 escapes from treated utility poles through normal wear and tear . . . is not automatically a
4 RCRA 'solid waste'" not because the utility companies still wanted it, but because it was
5 not "disposed of or thrown away[,]" and therefore was not "discarded." *Id.* Material must
6 be ***both*** unwanted ***and*** discarded to be characterized as "solid waste." Plaintiffs
7 misrepresent *Ecological Rights* in suggesting otherwise. Opp'n at18.
8 Fourth, Plaintiffs attempt to distinguish *Ecological Rights* by arguing that "the
9 hunter no longer wants the spent lead ammunition and it no longer serves a useful
10 function." *Id*. Plaintiffs incorrectly equate their concocted phrase "useful function" with
11 the phrases used in the case law—"intended purpose" and "intended use." Like the
12 pesticide in *No Spray Coal., Inc. v. City of N.Y.*, 252 F.3d 148, 150 (2d Cir. 2001), the
13 presence of hunters' ammunition in an animal is part of its intended purpose; in fact, it is
14 basically the sine qua non of hunting with a firearm. Hunters' ammunition is not used for
15 an intended purpose, and ***then*** disposed of into a different environment.
16 Fifth, *Ecological Rights* shows that unintended, ***but expected***, consequences of an
17 intended purpose or use (e.g., ammunition present in shot but unrecovered game) of a
18 product fall outside the statutory definition of "solid waste." *Ecological Rights* relies on
19 the Environmental Protection Agency's interpretation of "solid waste" ("whether a
20 product was used as it was intended to be used, not on whether the purpose of the product
21 is to perform some function once on the ground"). *Ecological Rights*, 713 F.3d at 516.
22 The Ninth Circuit then reaches a "common sense" conclusion: "it defies reason to suggest
23 that" "36 million utility-owned wood poles" are "producing 'solid waste.'" *Id.* at 515.
24 Specifically, *Ecological Rights* holds that seepage of the material that is "released into the
25 environment as a natural, expected consequence of its intended use" is not "solid waste."
26 *Id.* at 518. Like the seepage in *Ecological Rights*, spent ammunition present in hunter-

shot animals is clearly an "expected consequence" of "a product [that i]s used as it was intended to be used" and therefore is not "solid waste." *Id.* at 517-18.

And sixth, *Ecological Rights* does not, as Plaintiffs intimate (Opp'n at 18), opine that utility poles, ***as used***, could, under some other hypothetical conditions, lead to the accumulation of preservative in the environment such that it would constitute "solid waste." Plaintiffs failed to explain that the plaintiff in *Ecological Rights*, ***just like the Plaintiffs here***, did "not allege that dangerous ***accumulations*** . . . have resulted"[3] from the complained-of conduct. *Ecological Rights*, 713 F.3d at 518 (emphasis added). The plaintiff in that action alleged the seepage was solid waste entering the environment and causing harm. *See Ecological Rights Found. v. Pac. Gas & Elec. Co.* 803 F. Supp. 2d 1056, 1064 (N.D. Cal. 2011). But neither that plaintiff, nor the Ninth Circuit, asserted that multiple individual releases occurring sporadically across vast acreage was an "accumulation" under RCRA. *Ecological Rights*, 713 F.3d at 518.

This critical point directly parallels the sporadic presence of hunter-shot, lead-based ammunition in the KNF. The Ninth Circuit carefully explained that ***in the case of utility poles as normally used***, the seepage was not "discarded" and therefore not "solid waste." *Id.* That court distinguished the situation where sufficient accumulation occurred to create a disposal of solid waste. *Id.* (discussing cases in which millions of pounds of material in small area accumulated over decades). The Complaint does not allege that ammunition has sufficiently "accumulated" in the KNF. Thus, the main holding of *Ecological Rights* remains applicable.

IV. A Key ESA Provision Prevents Adopting Plaintiffs' Position.

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[3] In Plaintiffs' Response, they claim that "Plaintiffs have alleged a[n] endangerment to the environment caused by spent ammunition that has accumulated on the Kaibab[,]" citing various paragraphs in Plaintiffs' complaint, ***none of which*** refer to accumulation. Opp'n at 20. If Plaintiffs intended to argue that the occasional presence of spent lead-based ammunition across hundreds of thousands of acres constitutes an "accumulation[,]" they should at least be required to plead the issue more clearly. Fed. R. Civ. P. 8(a)(2).

1 NRA/SCI explained how finding RCRA liability would conflict with section 10(j)
2 of the ESA, as specifically applied to the experimental population of condors in the KNF,
3 and therefore is precluded. NRA/SCI Mot. Dismiss at 9-12. In response, Plaintiffs claim
4 that the ESA's 10(j) provision "only loosens restrictions imposed by the ESA itself, not
5 other laws." Opp'n at 23. Thus, Plaintiffs' surreptitious argument appears to be that,
6 when the Secretary of the Interior authorizes a "take," that "take" is illegal under any
7 allegedly applicable law (e.g., RCRA) ***except*** 16 U.S.C. § 1538. A plain reading of either
8 16 U.S.C. § 1539(a)(1)(A) or section 10(j)'s legislative history confirms that section 10(j)
9 "takings" are not only legal under ESA, but legal in general.
10 "The Secretary [of the Interior] may permit, any act otherwise prohibited by
11 section 1538 [e.g., "takes"] to enhance the propagation . . . of the affected species,
12 including . . . acts necessary for . . . experimental populations pursuant to section 10(j)."
13 16 U.S.C. § 1539(a)(1)(A). Had Congress intended to limit the Secretary's ability to
14 authorize takes that violated other federal laws, e.g., RCRA, it would have used a caveat
15 to do so as it has done in other statutes, for example "[e]xcept as otherwise expressly
16 provided by Act of Congress[,]" 28 U.S.C. § 1441(a), and "except as otherwise provided
17 by law[.]" *Stanley v. Cottrell, Inc.* 784 F.3d 454, 464 (8th Cir. 2015) (quoting 28 U.S.C. §
18 1821). Indeed, when Congress wants to elevate another federal act to prevail over ESA in
19 instances of conflict, it has done so. *See* 16 U.S.C. § 1543 ("Except as otherwise provided
20 in this chapter, no provision of this chapter shall take precedence over any more
21 restrictive conflicting provision of the Marine Mammal Protection Act of 1972[.]")
22 Because Plaintiffs' interpretation requires "read[ing] words into a statute that are not
23 there" (*United States v. Watkins*, 278 F.3d 961, 965 (9th Cir. 2002)), the words of the
24 relevant statute negate Plaintiffs' RCRA claim.
25 Furthermore, the relevant legislative history removes any doubt about what
26 Congress intended with section 10(j): "[t]he committee fully expects that there will be

1 instances where the regulations allow for the incidental take of experimental populations,
2 such as the inadvertent taking of experimental fish species by those fishing for other
3 species in the same body of water." H.R. Rep. No. 97-567 at 34 (1982) U.S.C.C.A.N.
4 2807, 2834. Congress specifically knew that, by adding section 10(j), it was authorizing
5 unintentional takes caused by sportsmen and sportswomen aiming to harvest non-
6 protected animals, but who unintentionally kill or otherwise "take" members of an
7 experimental population. Considering the foregoing, Plaintiffs' position is untenable.

8 "Congress' overriding goal in enacting the Endangered Species Act is to promote
9 the protection and, ultimately, the recovery of endangered and threatened species. While
10 the protection of individual animals is one obvious means of achieving that goal, it is not
11 the only means." *Wyoming Farm Bureau Fed'n v. Babbitt,* 199 F.3d 1224, 1237 (10th
12 Cir. 2000). And yet, Plaintiffs are attempting to improperly limit the Department's
13 authority to manage vulnerable species—which indisputably includes practices that allow
14 ***avoidable*** "takes" to occur. If Plaintiffs are successful here, it will not just chill section
15 10(j) operations, but presumably, will also cast doubt upon many incidental take permits
16 issued under 16 U.S.C. § 1539(a)(1)(A). "Sound population management practices
17 tailored to the biological circumstances of a particular species could facilitate a more
18 effective and efficient species-wide recovery, even if the process renders some individual
19 animals more vulnerable. . . . ***Congress left such decisions to the Department***." *Id.*
20 (emphasis added). Because adopting Plaintiffs' RCRA argument would eviscerate section
21 10(j) in derogation of Congress's intent, that argument should be rejected.

22

23 **A. Plaintiffs Offer Unsound Arguments as to Why RCRA Does Not Conflict With the ESA.**

24 Plaintiffs claim there is no conflict between section 10(j) and their RCRA suit
25 because the Condor Rule (50 C.F.R. § 17.84(j)) does not "expressly authorize[] the use of
26 lead ammunition[,]" and therefore the Department has "admitted" that "sport hunting

1 may need to be restricted to some extent" in the KNF. Opp'n at 26. First, the Condor
2 Rule does not need to "expressly authorize" hunters' use of lead-based ammunition
3 because it was legal before the experimental population appeared in Arizona. *See* 61 Fed.
4 Reg. 54044, 54055 (Oct. 16, 1996). Second, the experimental population's "take"
5 exemption for hunters resolved any doubt regarding whether it recognized hunters'
6 ability to use lead ammunition. The Fish and Wildlife Service stated it did "not foresee
7 that any ongoing or future land . . . use will be restricted due to this reintroduction
8 project"; that "no restrictions are being placed on public hunting opportunities"; and that
9 it did "not intend to request modifications . . . to . . . hunting regulations . . . in the
10 experimental population area." *Id.* at 54049, 54052, 54054-55. Accordingly, the
11 "admission" Plaintiffs infer does not exist: the Condor Rule reflects that hunting with
12 lead-based ammunition is allowed in the experimental area.

13 Plaintiffs also claim that there is no statutory conflict here because, supposedly,
14 any "conflict" that exists is between a statute (RCRA) and a regulation (i.e., the Condor
15 Rule), and that the statute necessarily prevails. Opp'n at 26. This too is meritless.
16 Plaintiffs' quarrel is not with the Condor Rule, "which establishes the southwest
17 population of California condors as a 10(j) population" (Opp'n at 26), but with 16 U.S.C.
18 §1539(a)(1)(A), which allows the Department to permit takes of otherwise protected
19 animals. The regulation itself does not create any right to take members of the
20 population; the regulation is basically a permit—not the source of permitting authority.

21 **V. Plaintiffs' Theory Would Subject Government Agencies to Widespread**
22 **RCRA Liability, Which Supports Interpreting RCRA to Find the Service Is Not a Contributor Here.**

23 In their motion to dismiss, NRA/SCI explained that concerns related to subjecting
24 federal, state, local, and tribal governments to widespread RCRA liability for
25 "unexercised regulatory authority" support reading RCRA so that the Service is not a
26 "contributor." NRA/SCI Mot. Dismiss at 12-13. NRA/SCI never suggested that these

policy concerns dictate that the Court interpret the statute contrary to its meaning. Thus, cases cited by Plaintiffs regarding leaving policy judgments to the legislature are not relevant. *See* Opp'n at 15. The other case Plaintiffs cited involves the courts' broad powers under RCRA to craft equitable relief ***once the court established a party is liable*** for the disposal of a solid waste that creates an "endangerment" under the statute. *See* Opp'n at 15-16 (citing *United States v. Price,* 688 F.2d 204, 213-14 (3rd Cir. 1982)). In contrast, determining whether a party is a "contributor" in the first instance is a threshold inquiry—one limited by the various factors set out in the statute (e.g.*,* there must be disposal, solid waste, contributing to the disposal). 42 U.S.C. § 6972(a)(1)(B).

Plaintiffs wrongly assert that concerns over subjecting governments to widespread RCRA liability based on inaction are overblown because "the . . . Service is a landowner, not simply a regulator." Opp'n at 16. As explained by the Service, however, it is not the owner, in the traditional sense, of the land it regulates. FS Reply at 2-3. By this assertion, Plaintiffs essentially admit that an agency being a regulator of land alone is not sufficient to create RCRA liability. In addition, even limiting the analysis to lands supposedly "owned" by federal, state, local, and tribal governments would still result in tremendous potential RCRA liability for inaction. *See* NRA/SCI MTD at 13 & n.7 (describing acreage under federal agency management).

Requiring action or an affirmative decision to act—before finding RCRA liability as a contributor—eliminates the concerns over subjecting governments to liability for all the actions/decisions it does not take/make. When a government affirmatively acts, it knows it must consider the legal ramifications of its actions, including under RCRA and other laws. Inaction rarely presents the same opportunity. The cases NRA/SCI cited demonstrate that courts can and should consider the effect that an interpretation of the law might have on agencies. NRA/SCI Mot. Dismiss at 14-15. Whether or not these cases are factually distinguishable (Opp'n at 16) does not affect their ***legal*** relevance. If a

particular interpretation would subject all governmental entities to RCRA liability for inaction, then it is probably not the meaning that Congress intended and thus not a proper interpretation of the statute. *See* FS Reply at 5-6 & n.7 (discussing same point).

VI. "Solid Waste" Must Come from a Commercial Operation, Community Activity, or Similar Source; Spent Lead-based Ammunition Does Not.

NRA/SCI argued that hunting in the KNF is not a "commercial operation" or a "community activity," and therefore hunters' spent-lead ammunition is not "solid waste" under 42 U.S.C. § 6903(27). NRA/SCI Mot. Dismiss at 15-17. Plaintiffs disputed this claim in their reply, but did not offer any authority in support of their position. *See* Opp'n at 22.

Section 6903(27)'s use of the term "including" does not confer an unlimited list of potential sources; instead, the examples given limit the scope of potential sources. In other words, the word including "is not one of all-embracing definition, but connotes simply an ***illustrative application of the general principle***." *Fed. Land Bank of St. Paul v. Bismarck Lumber Co*., 314 U.S. 95, 100 (1941) (emphasis added). But the associated-words cannon requires that "words grouped in a list should be given related meaning" (*Third Nat'l Bank in Nashville v. Impac Ltd., Inc.,* 432 U.S. 312, 322 (1977)), and it applies in conjunction with the "including" cannon. *Samantar v. Yousuf*, 560 U.S. 305, 317 (2010). Therefore, other sources of discarded material must be similar to the illustrative examples given in § 6903(27), which describe larger-scale, more-coordinated, group activities—not hunting.[4] Hunting does not take place in large groups because: (1) large groups of people tend to scare away wildlife, and (2) the obvious safety issues with hunters concentrated in a particular area. Thus, hunting is not a community activity.

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[4] The "including" cannon does not apply if the listed items lack "a clear conceptual principle linking" them together. *Stable Invs. P'ship v. Vilsack*, 775 F.3d 910, 917–18 (7th Cir. 2015). Here, the only principles linking the process of discarding material together is that they require larger-scale, coordinated, group activities or operations. But if the Court finds that there is no linking principle, it should find Section 6903(27)'s list to be exhaustive.

Finally, Plaintiffs fail in their attempt to distort NRA/SCI's declarations about family hunting trips and the hunting community into a concession that these involve community activities. *See* Opp. at 22. First, a family hunting trip is not a "community activity," as Plaintiffs suggest, *id*., because it goes against the ordinary meaning of the phrase. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (noting that when a statutory term is undefined, it is given "its ordinary or natural meaning") (citing *Smith v. United States,* 508 U.S. 223, 228 (1993)). Second, Mr. Cox's reference to "the hunting community" concerned NRA's advocacy activities for all hunters and had nothing to do with individuals hunting in a particular area. Although hunters generally comprise a "community" of people with common interests, the act of hunting, which is what allegedly creates the disposal of solid waste, is normally done alone or in small groups. Extending "community activity" to hunting would be an "absurd" interpretation. *Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004) (noting that statutory interpretations which would produce absurd results are to be avoided) (citing *United States v. Wilson,* 503 U.S. 329, 334 (1992)). Moreover, many people are part of some social or cultural community, and if the Court applies that standard to § 6903(27)—regardless of whether their allegedly polluting acts are communal—then the phrase "community activity" would be meaningless. *United States v. Menasche*, 348 U.S. 528, 538 (1955) (noting that courts should give effect to every word in a statute). Thus, hunters' spent ammunition is not "solid waste," and the Court should grant NRA/SCI's motion to dismiss.[5]

Respectfully submitted this 26th day of October, 2016.

/s/ Douglas S. Burdin
Douglas S. Burdin
Attorney for Defendant-Intervenor Safari Club International

MICHEL & ASSOCIATES, P.C.
/s/ C.D. Michel
C.D. Michel
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[5] Finally, if the Court is inclined to allow Plaintiffs' lawsuit to continue based on the supposed endangerment concerning non-condor animals notwithstanding the failure of Plaintiffs' RCRA claim vis-à-vis the experimental population, NRA/SCI respectfully requests this Court consider NRA/SCI's motion to dismiss, in the alternative, as a motion to strike Plaintiffs' California condor related claims, which, as argued by the Service and all of the intervenors, are without merit. *Thompson v. Paul*, 657 F.Supp.2d 1113, 1129 (D. Ariz. 2009) (construing motion to dismiss as a motion to strike where the moving party sought to strike only certain allegation in a claim for relief).

1 **CERTIFICATE OF SERVICE**

2 I, C.D. Michel, hereby certify that on this 26th day of October, 2016, I
3 electronically transmitted the Reply in Support of NRA/SCI'S Motion to Dismiss to the
4 Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of
5 Electronica Filing to the following CM/ECF registrants:

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