No. 14-16840

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAMALA D. HARRIS,
in her official capacity as the Attorney General of California,
Defendant-Appellant,

v.

JEFF SILVESTER, et. al.,
Plaintiffs-Appellees.

Appeal from the United States District Court for the
Eastern District of California, No. 1:11-cv-02137-AWI-SKO
(Hon. Anthony W. Ishii, Judge)

APPELLEES' OPPOSITION TO APPELLANT'S MOTION TO TAKE JUDICIAL NOTICE

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May 26, 2015

Appellees submit the following opposition to Appellant's motion to take judicial notice, Dkt. 25.

A. Evidence the State Failed to Submit to the District Court (Ex. A)

With proposed Exhibit A, the State seeks to reconstruct the record by submitting legislative history from the 1975 amendment to the waiting period law, specifically to demonstrate that the legislation was supported by a "cooling off" rationale. The "legislative history" attached, however, is two letters from disgruntled *constituents* who reference an assumed "cooling off" rationale in the course of expressing their opposition to the proposed law.

These letters are entitled to no weight. Courts are reluctant to consider letters *by legislators* because they do not reflect the view of a legislature as a whole. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 579 (1995) ("Material not available to the lawmakers is not considered, in the normal course, to be legislative history."); *Montana Power Co. v. Envtl. Protection Agency*, 608 F.2d 334, 353 n.36 (9th Cir. 1979) (refusing to consider legislators' letters); *Quintano v. Mercury Casualty Co.*, 906 P.2d 1057, 1065 (Cal. 1995) ("[T]he statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation."). *Cf. Lindland v. U.S. Wrestling Ass'n, Inc.*, 227 F.3d 1000, 1008 (7th Cir. 2000) ("[A] letter . . . written as a form of constituent service is the bottom of the [legislative history] pecking order.").

Constituent letters are different in kind from letters written by legislators. Constituent opinions of a bills purpose is irrelevant. The request for judicial notice should be denied.

B. Documents the District Court Refused to Judicially Notice (Exhibits B-D)

The District Court refused to take judicial notice of the book excerpts contained as Exhibits B (Trial Exhibit EC) and C (Trial Exhibit EK) because it concluded that they did not shed light on firearm waiting period laws or the public understanding of the Second Amendment at or near the time of the founding or the ratification of the Fourteenth Amendment. ER 5:1-6:15. The court further noted that, even if it had considered the materials, they would not change the court's ruling. ER 6 nn. 4 & 6.

This Court reviews a district court's decision whether to take judicial notice for abuse of discretion. *United Sates v. Woods*, 335 F.3d 993, 1000-01 (9th Cir. 2003). The State has failed to demonstrate that this decision was an abuse of discretion, but rather tries to sneak these materials through the backdoor by claiming they are nevertheless relevant. The District Court's decision should be sustained, because the materials do not demonstrate that waiting-period laws are outside the scope of the Second Amendment as historically understood. Judicial notice is therefore not appropriate because the information does "not bear on the 'relevant issue' before the court." *Santa Monica Nativity Scenes Comm. v. Santa Monica*, --- F.3d ----, 2015 WL 1934522 (9th Cir. 2015), *10 n.6 (denying request for judicial notice) (citation omitted).

Even if the materials were relevant, it is inappropriate for the Court to take judicial notice of the truth of the contents stated in these books. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) ("Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those [publications] were in fact true.'") (citation omitted).

The District Court refused to take judicial notice of Exhibit D, because the State failed to include it in its post-trial submissions and proposed findings. ER 4:4-8. To the extent the State's request extends only to the text of the Pennsylvania Statute, Appellees do not object. Appellees do object, however, to the Court taking judicial notice of the "analysis" that follows the text of the statute (Dkt. 25-5, at 6). *Von Saher*, 592 F.3d at 960.

B. Extra-Record Evidence (Exhibits E & F)

In addition, the State attempts to bolster the record by including two exhibits that it did not submit below. This is improper. "As a general rule, documents not filed with the district court cannot be made part of the record on appeal." *Rudin v. Myles*, 766 F.3d 1161, 1174 n.17 (9th Cir. 2014) (citing, inter alia, Fed. R. App. P. 10(a)). It is this Court's practice not to consider any documents that were not part of the district court record. *See Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988) ("Papers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal."); *United States v. Walker*, 601 F.2d 1051, 1055 (9th Cir. 1979) ("We are here concerned only with the record before the trial judge when his decision was made.") (rejecting government's attempt to bolster the record with additional evidence on appeal). And "[i]t is rarely appropriate for an appellate court to take judicial notice of facts that were not before the district court." *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 392 n.7 (9th Cir. 2000).

Even if the Court were inclined to take judicial notice of these new documents, neither exhibit is relevant to the issues on appeal. The State claims it was not aware of the significance of these documents until this Court stated, in *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015), that

"early twentieth century regulations might . . . demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the record." Although Appellees question the force and meaning of this *dicta* in the accompanying brief, the State's proffered rationale is dubious because neither of the newly offered documents concerns "early twentieth century regulations."

Exhibits E and F to the State's RJN identifies waiting-period laws in effect during the 1990s (Ex. E) and in 2011 (Ex. F). These time periods are not relevant to the historical analysis required by *District of Columbia v. Heller*, 554 U.S. 570 (2008), and the State has made no attempt to develop the "historical prevalence and significance" of other jurisdictions' modern waiting-period laws. Judicial notice is therefore not appropriate. *Santa Monica Nativity Scenes Comm.*, 2015 WL 1934522 at *10 (request for judicial notice denied because information "did not bear on the 'relevant issue' before the court") (citation omitted).

The thrust of these exhibits is simply "some other states have waiting-period laws, too." Certainly, the State was aware of these laws during trial—the District Court's decision acknowledges as much. *See* ER 17:9-19 (surveying waiting period laws nationwide). As the lower court explained, "[t]he Court examined the historical evidence submitted by the parties and concluded that there were no comparable laws in existence during the relevant historical periods, and that waiting period laws exist today in only a distinct minority of States." ER 62:10-13.

* * *

For the reasons set forth above, the Court should deny Appellant's motion to take judicial notice.

Respectfully submitted,

Dated: May 26, 2014

Benbrook Law Group, PC

By: /s/ Bradley A. Benbrook
Bradley A. Benbrook
Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that 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 on May 26, 2015.

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

Dated: May 26, 2015

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