

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

DAVID GENTRY; JAMES PARKER;
MARK MIDLAM; JAMES BASS; AND
CALGUNS SHOOTING SPORTS
ASSOCIATION,

PLAINTIFFS AND APPELLANTS,

v.

XAVIER BECERRA, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL FOR
THE STATE OF CALIFORNIA; STEPHEN
LINDLEY, IN HIS OFFICIAL CAPACITY AS
ACTING CHIEF OF THE CALIFORNIA
DEPARTMENT OF JUSTICE; BETTY T.
YEE, IN HER OFFICIAL CAPACITY AS
STATE CONTROLLER; AND DOES 1-10,

DEFENDANTS AND RESPONDENTS.

Case No. C089655

**APPELLANTS' MOTION FOR JUDICIAL NOTICE IN
SUPPORT OF OPENING BRIEF; MEMORANDUM OF
POINTS AND AUTHORITIES; PROPOSED ORDER**

Superior Court of California, County of Sacramento
Case No. 34-2013-80001667
Honorable Judge Richard K. Sueyoshi

C. D. Michel – SBN 144258
Sean A. Brady – SBN 262007
Anna M. Barvir – SBN 268728
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: 562-216-4444
Email: cmichel@michellawyers.com

Counsel for Plaintiffs-Appellants

MOTION

To the Honorable Judges of the Court of Appeal of the State of California for the Third Appellate District, and to All Parties and their Attorneys of Record:

Under California Rules of Court 3.1306(c) and 8.252(a), Evidence Code sections 452, subdivision (c), and 459, and Rule 4 of the California Rules of Court, Third Appellate District, Appellants David Gentry, James Parker, Mark Midlam, James Bass, and Calguns Shooting Sports Association request that this Court take judicial notice of the following exhibits. These documents, listed below, are attached as Exhibits 1 through 9 to the accompanying declaration of Sean A. Brady (“Brady Decl.”):

1. Assem. Bill No. 689 (1997-1998 Reg. Sess.).
2. Assem. Bill No. 991 (1997-1998 Reg. Sess.).
3. Assem. Bill No. 161 (2003-2004 Reg. Sess.).
4. Assem. Bill No. 1669 (2019-2020 Reg. Sess.).
5. Assem. Amend. to Assem. Bill No. 1669 (2019-2020 Reg. Sess.)
May 24, 2019.
6. Sen. Rules Com., Off. of Sen. Floor Analyses, 3rd reading analysis
of Assem. Bill No. 1669 (2019-2020 Reg. Sess.) as amended June
20, 2019.
7. Assem. Floor Analyses, Concurrence in Sen. Amendments of
Assem. Bill No. 1669 (2019-2020 Reg. Sess.) as amended June 20,
2019.
8. Economic and Fiscal Impact Statement “Addendum” to
Department Regulations (Regarding Dealer Record of Sale
(DROS) Fees).

9. Economic and Fiscal Impact Statement “Attachment A” to Department Regulations (Regarding Identification Requirements for Firearms and Ammunition Eligibility Checks).

“Judicial notice is the recognition and acceptance by the court, for use . . . by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.” (*Lockley v. Law Office of Cantrell, Green* (2001) 91 Cal.App.4th 875, 882, citations and quotations omitted.) “The underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is *not reasonably subject to dispute*.” (*Ibid.*; see also Cal. Evid. Code § 452, subd. (h), original italics.) The court may thus take judicial notice of “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Cal. Evid. Code § 452, subd. (c).) A reviewing court may also judicially notice any matter specified in Section 452. (Cal. Evid. Code § 459, subd. (a).)

All documents attached to this request are official acts of either the California Legislature or the Department of Justice. They may thus be judicially noticed as to their existence and content under Evidence Code section 452. Moreover, none of these documents are reasonably subject to dispute, and they are capable of immediate and accurate determination by resort to sources of indisputable accuracy. As such, the Court should judicial notice of these documents.

Dated: February 7, 2020

MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady

Sean A. Brady

Attorneys for Plaintiffs-Appellants

MEMORANDUM OF POINTS AND AUTHORITIES

Under Evidence Code section 459, subsection (b), reviewing courts have the same power to take judicial notice of documents as trial courts, particularly when it comes to the matters specified in Evidence Code section 452. “The reviewing court may take judicial notice of any matter specified in Section 452.” (Evid. Code, § 459.) This includes “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).) Indeed, courts may take judicial notice of the various legislative materials related to the enactment of a statute, particularly when a statute is “susceptible to more than one reasonable interpretation.” (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1153.)

All the exhibits to be noticed under this request constitute official acts of the California legislative and executive branches and may thus be judicially noticed under Section 452. What’s more, under rule 8.252(a) of California Rules of Court, the exhibits to be noticed are relevant on appeal because they constitute the legislative history of the creation of and modifications to the “DROS Fee”¹ at issue in this appeal. (See Pen. Code, §§ 28225-28233; Cal. Code Regs., tit. 11, § 4001.) Per the rules of this Court, additional legal authority to grant judicial notice of each of the above-listed exhibits is described separately below.

The included documents regarding Economic and Fiscal Impact Statements from the California Department of Justice (hereafter “the

¹ As explained in the opening brief, Appellants use the general term “DROS Fee” herein because it is the common name for the levy at issue, notwithstanding the fact that Appellants contend that, as a result of AB 1669 (and SB 819 before it), it is not technically correct to refer to the entire amount being charged as a “fee” inasmuch as at least part of the amount collected thereunder is now effectively a tax.

Department”) were likewise not presented to the trial court because they were published after the trial court had issued its decision.

I. Exhibit 1: Assem Bill No. 689 (1997-1998 Reg. Sess.)

Exhibit 1 is an Assembly Bill related to the DROS fee approved by California’s Governor on August 6, 1997. Because Exhibit 1 constitutes an official act of the California Legislature, it may be judicially noticed under Evidence Code section 452, subdivision (c). What’s more, “predecessor bills” constitute “cognizable legislative history in the court of appeal for the Third Appellate District.” (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005)133 Cal.App.4th 26, 36 (hereafter *Kaufman*); *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1199 (hereafter *Richmond*).)

II. Exhibit 2: Assem. Bill No. 991 (1997-1998 Reg. Sess.)

Exhibit 2 is an Assembly Bill related to the DROS fee approved by California’s Governor on September 23, 1997. Because Exhibit 2 constitutes an official act of the California Legislature, it may be judicially noticed pursuant to section 452, subdivision (c). What’s more, “predecessor bills” constitute “cognizable legislative history in the court of appeal for the Third Appellate District.” (See *Kaufman, supra*, 133 Cal.App.4th at p. 36; *Richmond, supra*, 64 Cal.App.4th at p. 1199.)

III. Exhibit 3: Assem. Bill No. 161 (2003-2004 Reg. Sess.)

Exhibit 3 is an Assembly Bill related to the DROS fee approved by California’s Governor on October 10, 2003. Because Exhibit 3 constitutes an official act of the California Legislature, it may be judicially noticed pursuant to section 452, subdivision (c). What’s more, “predecessor bills” constitute “cognizable legislative history in the court of appeal for the Third Appellate

District.” (See *Kaufman, supra*, 133 Cal.App.4th at p. 36; *Richmond, supra*, 64 Cal.App.4th at p. 1199.)

IV. Exhibit 4: Assem. Bill No. 1669 (2019-2020 Reg. Sess.)

Exhibit 4 is an Assembly Bill related to the DROS Fee approved by California’s Governor on October 11, 2019. Because Exhibit 4 constitutes an official act of the California Legislature, it may be judicially noticed under section 452, subdivision (c). What’s more, “predecessor bills” constitute “cognizable legislative history in the court of appeal for the Third Appellate District.” (See *Kaufman, supra*, 133 Cal.App.4th at p. 36; *Richmond, supra*, 64 Cal.App.4th at p. 1199.)

Assembly Bill No. 1669 (hereafter “AB 1669”) and its related materials included in this request were not presented to the trial court because AB 1669 was enacted after the court had issued a decision. But AB 1669 is directly relevant to this matter because it concerns additional modifications to the DROS Fee. What’s more, AB 1669’s legislative history expressly states it relates to the matter present before this court.

**V. Assem. Amend. to Assem. Bill No. 1669 (2019-2020 Reg. Sess.)
May 24, 2019**

Exhibit 5 is an earlier version of AB 1669 as amended May 24, 2019. Because Exhibit 5 constitutes an official act of the California Legislature, it may be judicially noticed under section 452, subdivision (c). What’s more, “predecessor bills” constitute “cognizable legislative history in the court of appeal for the Third Appellate District.” (See *Kaufman, supra*, 133 Cal.App.4th at p. 36; *Richmond, supra*, 64 Cal.App.4th at p. 1199.)

Again, because AB 1669 was adopted only after the trial court ruled in this matter, this earlier version of the bill was not presented to the court below. Though, like the adopted version of AB 1669, this document is

relevant to this appeal because it concerns modifications to the DROS fee at issue in this matter.

VI. Exhibit 6: Sen. Rules Com., Off. of Sen. Floor Analyses, 3rd reading analysis of Assem. Bill No. 1669 (2019-2020 Reg. Sess.) as amended June 20, 2019

Exhibit 6 is a portion of the legislative history of AB 1669. Specifically, Exhibit 6 is a report and analysis of AB 1669 as amended June 20, 2019, by the Senate Rules Committee. Because Exhibit 6 is a legislative committee report and analysis, it may be judicially noticed by this court. (See *Kaufman, supra*, 133 Cal.App.4th at 35; *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 166.) Again, because AB 1669 was adopted only after the trial court ruled in this matter, this committee report on the bill was not presented to the court below. Though, like the adopted version of AB 1669, this document is relevant to this appeal because it concerns modifications to the DROS fee at issue in this matter.

VII. Exhibit 7: Assem. Floor Analyses, Concurrence in Sen. Amendments of Assem. Bill No. 1669 (2019-2020 Reg. Sess.) as amended June 20, 2019

Exhibit 7 is the Assembly Floor Analysis reflecting the Concurrence in Senate Amendments to AB 1669 as amended June 20, 2019, and as a result may be judicially noticed by this court. (See *Kaufman, supra*, 133 Cal.App.4th at p. 37; *People v. Patterson* (1999) 72 Cal.App.4th 438, 443.) Again, because AB 1669 was adopted only after the trial court ruled in this matter, this committee report on the bill was not presented to the court below. Though, like the adopted version of AB 1669, this document is relevant to this appeal because it concerns modifications to the DROS fee at issue in this matter.

VIII. Exhibit 8: Economic and Fiscal Impact Statement “Addendum” to Department Regulations (Regarding Dealer Record of Sale (DROS) Fees)

Exhibit 8 is an Economic and Fiscal Impact Statement Form Addendum to the required form STD 399² Economic and Fiscal Impact Statement submitted with proposed “emergency” regulations regarding DROS Fees from the California Department of Justice, Bureau of Firearms (hereafter “the Department”). The Addendum was first published on the Department’s website on December 12, 2019, along with the proposed text and other related materials to the Department’s proposal.³

Because Exhibit 8 constitutes an official act of an executive department of the State of California, it may be judicially noticed section 452, subdivision (c). (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 842, fn. 3 [taking judicial notice of Attorney General’s report on gasoline pricing proper as an official act of executive department].) This document was not presented to the trial court because the Department published it after the trial court had issued its decision.

IX. Exhibit 9: Economic and Fiscal Impact Statement “Attachment A” to Department Regulations (Regarding Identification Requirements for Firearms and Ammunition Eligibility Checks)

Exhibit 9 is Attachment A to the required form STD 399 Economic and Fiscal Impact Statement submitted with proposed regulations regarding Identification Requirements for Firearms and Ammunition Eligibility Checks

² As stated on the California Office of Administrative Law’s website, “The Form STD 399 is a Department of Finance form and is required for regular and emergency rulemaking actions.” (Office of Administrative Law, *Rulemaking Forms* (2020) <https://oal.ca.gov/publications/oal_forms_office_of_administrative_law/> [as of Feb. 6, 2020].)

³ A copy of the addendum and other materials related to the Department’s regulations can be found on its website. (See California Department of Justice, Bureau of Firearms, *Regulations: Dealer Record of Sale (DROS) Fee (Emergency)* (Dec. 12, 2020) <<https://oag.ca.gov/firearms/regs/drosfee>> [as of Feb. 6, 2020].)

from the Department. The Attachment was first published on the Department's website on December 20, 2019, along with the proposed text and other related materials to the Department's proposal.⁴

Because Exhibit 9 constitutes an official act of an executive department of the State of California, it may be judicially noticed pursuant to subdivision (c) of Evidence Code section 452. (See also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 842, fn. 3 [taking judicial notice of Attorney General's report on gasoline pricing proper as an official act of executive department].) Like STD 399, this document was not presented to the trial court because the Department published it after the trial court had issued its decision.

* * * *

Based on the foregoing, Appellants respectfully request that this Court grant this motion requesting judicial notice of Exhibits 1 through 9, described in this request.

Dated: February 7, 2020

MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady
Sean A. Brady
Attorneys for Plaintiffs-Appellants

⁴ A copy of this Attachment and other materials related to the Department's regulations can be found on its website. (See California Department of Justice, Bureau of Firearms, *Regulations: Identification Requirements for Firearms and Ammunition Eligibility Checks* (Dec. 20, 2019) <<https://oag.ca.gov/firearms/regs/id-fa-ammo>> [as of Feb. 6, 2020] (listed under "45-Day Comment Period Documents").)

Proposed Order

Good cause appearing, therefore, IT IS HEREBY ORDERED that this Court will take judicial notice of the following documents:

1. Assem. Bill No. 689 (1997-1998 Reg. Sess.).
2. Assem. Bill No. 991 (1997-1998 Reg. Sess.).
3. Assem. Bill No. 161 (2003-2004 Reg. Sess.).
4. Assem. Bill No. 1669 (2019-2020 Reg. Sess.).
5. Assem. Amend. to Assem. Bill No. 1669 (2019-2020 Reg. Sess.)
May 24, 2019.
6. Sen. Rules Com., Off. of Sen. Floor Analyses, 3rd reading analysis
of Assem. Bill No. 1669 (2019-2020 Reg. Sess.) as amended June
20, 2019.
7. Assem. Floor Analyses, Concurrence in Sen. Amendments of
Assem. Bill No. 1669 (2019-2020 Reg. Sess.) as amended June 20,
2019.
8. Economic and Fiscal Impact Statement “Addendum” to
Department Regulations (Regarding Dealer Record of Sale
(DROS) Fees).
9. Economic and Fiscal Impact Statement “Attachment A” to
Department Regulations (Regarding Identification Requirements
for Firearms and Ammunition Eligibility Checks).

Dated:

s _____

PROOF OF ELECTRONIC SERVICE

Case Name: *Gentry, et al. v. Becerra, et al.*
Court of Appeal Case No.: C089655
Superior Court Case No.: 34-2013-80001667

I, Sean A. Brady, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

On February 7, 2020, I served a copy of the foregoing document(s) described as: **APPELLANTS' MOTION FOR JUDICIAL NOTICE IN SUPPORT OF OPENING BRIEF; MEMORANDUM OF POINTS AND AUTHORITIES; PROPOSED ORDER**, by electronic transmission as follows:

Robert E. Asperger
bob.asperger@doj.ca.gov
1300 I Street
Sacramento, CA 95814
Attorneys for Defendants and Respondents Xavier Becerra, et al.

Superior Court of California
County of Sacramento
Appeals Unit
720 Ninth Street, Room 102
Sacramento, CA 95814-1380

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 7, 2020, at Long Beach, California.

s/ Sean A. Brady

Sean A. Brady
Declarant