

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 RECONSIDERATION;  
MEMORANDUM OF POINTS AND AUTHORITIES;  
PROPOSED ORDER**

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

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## 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 Code of Civil Procedure section 1008(a), California Rules of Court 3.1306(c) and 8.252(a), California 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 reconsider its February 28, 2020 order and take judicial notice of the following exhibits. These documents, listed below, were previously submitted as Exhibits 8 and 9 to the Declaration of Sean A. Brady in Support of Appellants' Motion for Judicial Notice, which is attached as Exhibit 1 to the accompanying declaration of Sean A. Brady ("Brady Decl.):

1. Economic and Fiscal Impact Statement "Addendum" to Department Regulations (Regarding Dealer Record of Sale (DROS) Fees).
2. Economic and Fiscal Impact Statement "Attachment A" to Department Regulations (Regarding Identification Requirements for Firearms and Ammunition Eligibility Checks).

California Code of Civil Procedure section 1008, subdivision (a) "permits any affected party to seek reconsideration of a court's order, regardless of how the court ruled on the motion, provided the motion is based upon an alleged "different" set of facts and is made within 10 days of knowledge of the court's order." (*Graham v. Hansen* (1982) 128 Cal.App.3d 965, 970.)

“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).)

Both 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, neither of these documents is 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 reconsider its February 28, 2020 Order and take judicial notice of these documents.

Dated: March 9, 2020

**MICHEL & ASSOCIATES, P.C.**

*s/ Sean A. Brady*

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Sean A. Brady

Attorneys for Plaintiffs-Appellants

## MEMORANDUM OF POINTS AND AUTHORITIES

This Court's order following Appellants' Motion for Judicial Notice was issued on February 28, 2020. That order granted Appellants' Motion in part and denied it in part, rejecting only the two proposed exhibits. The order did not specify the Court's reasoning for denying judicial notice of those two exhibits. As such, Appellants will address the two issues that most likely support the denial: relevance and admissibility under Evidence Code Section 452, subdivision (c).

California Code of Civil Procedure section 1008, subdivision (a) allows "any affected party to seek reconsideration of a court's order, regardless of how the court ruled on the motion, provided the motion is based upon an alleged "different" set of facts and is made within 10 days of knowledge of the court's order." (*Graham v. Hansen* (1982) 128 Cal.App.3d 965, 970.) New facts are not required; facts *different* from those asserted in the original motion are all that is required on reconsideration. *Ibid.* Here, Appellants offer more factual context showing that the two exhibits are relevant, as well as additional legal authorities proving that judicial notice is proper.

Again, 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).) Both of the exhibits are official acts of the California legislative and executive branches that may be judicially noticed under section 452. And neither was presented

to the trial court because each was published after the trial court had issued its decision.

Appellants now turn to establishing why each of the exhibits is relevant to this action, before showing why they are admissible under Evidence Code Section 452(c).

## **I. Both Proposed Exhibits Are Relevant to this Appeal**

### **A. 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 399<sup>1</sup> 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 materials related to the Department’s proposal.<sup>2</sup>

Exhibit 8 is relevant because the DROS Fee, how the revenues it generates are spent, and any deficits the Department alleges result from it, are exactly what this litigation concerns. The exhibit shows that state employee pension loan repayments are in part funded by the DROS Fee, and also provides tables breaking down all costs and revenues the Department

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<sup>1</sup> 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/](https://oal.ca.gov/publications/oal_forms_office_of_administrative_law/)> [as of Feb. 6, 2020].)

<sup>2</sup> 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].)

claims are associated with the fee. There can be no serious argument that it is not relevant to this litigation.

**B. 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 by the Department with proposed regulations regarding Identification Requirements for Firearms and Ammunition Eligibility Checks. 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.<sup>3</sup>

The attachment concerns, in part, Personal Firearms Eligibility Check applications which are funded in part by the DROS Fee, even though DROS Fee payors do not necessarily ever use that application. As the exhibit states: “As a whole, the revenue generated by the fee does not exceed the approximate costs to process the forms. *The remaining costs to process the PFEC form are paid for through the Dealer Record of Sale fee under Penal Code section 28225, subdivision (a)(11).*” (Ex. 9, italics added.) Again, because the exhibit pertains to the use of DROS Fees—the subject of this appeal—the relevance of this exhibit is clear.

**II. Both Exhibits Are Admissible Under California Evidence Code Section 452, Subdivision (c)**

Because Exhibits 8 and 9 are official acts of an executive department of the state of California, they may be judicially noticed under subdivision (c) of

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<sup>3</sup> 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”).)

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].)

To the extent this Court may have had doubts about the scope of subdivision (c) and its application here, Appellants submit additional examples showing the wide range of items considered to be official acts of an executive, legislative, or judicial department under section 452, subdivision (c):

1. **Death Certificates.** “Evidence Code section 452 provides that judicial notice may be taken of official acts of the legislative, executive, and judicial departments of a state and of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Accordingly, judicial notice may be taken of a death certificate.” (*People v. Terry* (1974) 38 Cal.App.3d 432, 439.)
2. **Records of a county commission.** “California courts have taken judicial notice of the records of a county commission since counties are legal subdivisions of the state (Cal.Const., art. XI, § 1, subd. (a); Gov. Code, § 23002), but have refused to take judicial notice of the records of a municipal police department since cities are not.” (*Edna Valley Assn. v. San Luis Obispo County etc. Coordinating Council* (1977) 67 Cal.App.3d 444, 449-450.)
3. **The California Debris Commission Report (the “Jackson Report”).** “[W]e take judicial notice of the fact that the reports were made, and of their contents. We do not, however, take judicial notice

that everything said therein is true.” (*Beckley v. Reclamation Bd.* (1962) 205 Cal.App.2d 734, 741.)

4. **City Budget Reports.** “After notifying the parties of our intent, we take judicial notice of this report on our own motion as it provides supplemental context for the city’s legislative action.” (*Geraghty v. Shalizi* (2017) 8 Cal.App.5th 593, 602.)
5. **Bill Analysis and Fiscal Impact Report of Another State.** “In three separate requests for judicial notice, the Board asked the court to take judicial notice of: (1) a bill analysis and fiscal impact report submitted by the New Mexico Taxation and Revenue Department in connection with New Mexico House Bill No. 349. We hereby grant these requests.” (*Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519.)

Here, Appellants are submitting economic and fiscal impact statements of the California Department of Justice. If city budget reports, records of a county commission, and even fiscal impact reports of another state are judicially noticeable under section 452, subdivision (c), then so too are the exhibits at issue here, as they constitute official acts of an executive department of the state of California.

Should this Court, however, see a distinction that disallows these exhibits to be noticed, or if this Court has any other reason to deny judicial notice that was not addressed in this memorandum, Appellants respectfully request that the Court clarify its reasoning for the denial of judicial notice so Appellants have a chance to address the Court’s concerns.

\* \* \* \*



For these reasons, Appellants respectfully request that this Court reconsider its order denying judicial notice of Exhibits 8 and 9.

Dated: March 9, 2020

**MICHEL & ASSOCIATES, P.C.**

*s/ Sean A. Brady*

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Sean A. Brady

Attorneys for Plaintiffs-Appellants

**Proposed Order**

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

1. Economic and Fiscal Impact Statement “Addendum” to Department Regulations (Regarding Dealer Record of Sale (DROS) Fees).
2. Economic and Fiscal Impact Statement “Attachment A” to Department Regulations (Regarding Identification Requirements for Firearms and Ammunition Eligibility Checks).

Dated: \_\_\_\_\_

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## 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 March 9, 2020, I served a copy of the foregoing document(s) described as: **APPELLANTS' MOTION FOR RECONSIDERATION; MEMORANDUM OF POINTS AND AUTHORITIES; PROPOSED ORDER**, by electronic transmission as follows:

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

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 March 9, 2020, at Long Beach, California.

*s/ Sean A. Brady* \_\_\_\_\_  
Sean A. Brady  
Declarant