

No. 19-55376

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

VIRGINIA DUNCAN, RICHARD LEWIS, PATRICK LOVETTE, DAVID
MARGUGLIO, CHRISTOPHER WADDELL, AND CALIFORNIA RIFLE &
PISTOL ASSOCIATION, INC., A CALIFORNIA CORPORATION,
Plaintiffs and Respondents,

V.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA,
Defendant and Appellant.

**On Appeal from the United States District Court
for the Southern District of California**
No. 17-cv-1017-BEN-JLB
The Honorable Roger T. Benitez, Judge

**APPELLANT'S MOTION TO TAKE JUDICIAL NOTICE;
DECLARATION OF JOHN D. ECHEVERRIA**

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July 15, 2019

MOTION TO TAKE JUDICIAL NOTICE

Pursuant to Federal Rule of Appellate Procedure 27 and Ninth Circuit Rule 27-1, Defendant-Appellant Xavier Becerra, in his official capacity as Attorney General of the State of California (Attorney General), hereby moves this Court to take judicial notice of the documents identified below in support of Appellant's Opening Brief, filed concurrently herewith:

1. Exhibit 1: S. Rules Comm., Off. of S. Floor Analyses, 3d reading analysis of S.B. 1446 (2015-2016 Reg. Sess.) as amended Mar. 28, 2016.
2. Exhibit 2: Excerpts from Cal. Sec'y of State, Supplement to the Statement of Vote, Statewide Summary by County for State Ballot Measures (Nov. 8, 2016).
3. Exhibit 3: Excerpts from Marjory Stoneman Douglas High School Pub. Safety Comm'n, Initial Report Submitted to the Governor, Speaker of the House of Representatives and Senate President (2019).
4. Exhibit 4: Veronica Miracle, *Thousand Oaks Mass Shooting Survivor: "I Heard Somebody Yell, 'He's Reloading,'"* ABC News, Nov. 8, 2018.
5. Exhibit 5: USA Today Network Staff, *People Threw Barstools Through Window to Escape Thousand Oaks, California, Bar During Shooting*, USA Today, Nov. 8, 2018.

Though these materials were not presented to the district court, this Court may take judicial notice of them for the first time on appeal. *See Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971); *see also* Fed. R. Evid. 201(d) (providing that a court “may take judicial notice at any stage of the proceeding”); Fed. R. Evid. 201 advisory committee’s note (“In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal.”).

ARGUMENT

I. LEGAL AUTHORITY FOR TAKING JUDICIAL NOTICE

This Court may take judicial notice of legislative facts, which pertain to the content and justification for a statute and are usually “not proved through trial evidence but rather material set forth in the briefs, the ordinary limits on judicial notice having no application to legislative facts.” *Daggett v. Comm’n on Governmental Ethics & Election Practices*, 205 F.3d 445, 455-56 (1st Cir. 1999) (citation omitted); *see also Sachs v. Republic of Austria*, 737 F.3d 584, 596 n.10 (9th Cir. 2013) (holding that court may rely on legislative facts, whether or not those facts have been developed on the record, if those facts are relevant to the Court’s “legal reasoning” and interpretation of the “lawmaking process” (quoting Fed. R. Evid. 201 advisory committee’s note)), *rev’d on other grounds sub nom. Obb Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015).

Where legislative facts—as opposed to adjudicative facts—are concerned, the Court has broad discretion to take judicial notice. Notably, there is no federal rule of evidence that limits the judicial notice of legislative facts. *See* Fed. R. Evid. 206 advisory committee’s note (noting that Federal Rule of Evidence 201, which “is the only evidence rule on the subject of judicial notice,” “deals only with judicial notice of ‘adjudicative’ facts” and that “[n]o rule deals with judicial notice of ‘legislative’ facts”). Because “[l]egislative facts . . . are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body,” a “high degree of indisputability” is not required for a court to take judicial notice of such facts. *See id.* Thus, judicial notice of legislative facts is not limited by “any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs,” or “any requirement of formal findings at any level.” *Id.*

Adjudicative facts, by contrast, “are simply the facts of the particular case,” which are typically established “through the introduction of evidence, ordinarily consisting of the testimony of witnesses”; if, however, the “particular facts are outside of reasonable controversy, this process is dispensed with as unnecessary” and judicial notice may be used. Fed. R. Evid. 201 advisory committee’s note. The Court may take judicial notice of an adjudicative fact, pursuant to Federal

Rule of Evidence 201, if the fact “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

II. THE MATERIALS REQUESTED TO BE JUDICIALLY NOTICED ARE PROPERLY SUBJECT TO JUDICIAL NOTICE

Each of the documents attached hereto is relevant to this appeal and properly subject to judicial notice as legislative facts concerning the enactment and constitutionality of California Penal Code section 32310.

1. Exhibit 1 is an analysis of Senate Bill 1446 (2015-2016 Reg. Sess.) prepared by the Senate Rules Committee, Office of Senate Floor Analyses. The Court may take judicial notice of the legislative history of a statute. *See Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) (taking notice of excerpts from a Senate Report submitted during appeal); *Korematsu v. United States*, 584 F. Supp. 1406, 1414 (N.D. Cal. 1984) (“[C]ourts frequently take judicial notice of legislative history, including committee reports.” (citing *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 227 (1959))).

2. Exhibit 2 contains excerpts from the California Secretary of State’s Supplement to the Statement of Vote, Statewide Summary by County for State Ballot Measures, for the November 8, 2016 general election. The Court may take judicial notice of election results. *See Badillo v. City of Stockton*, 956 F.2d 884, 887 n.1 (9th Cir. 1992).

3. Exhibit 3 contains excerpts from the Initial Report of the Marjory Stoneman Douglas High School Public Safety Commission. The Marjory Stoneman Douglas High School Public Safety Commission was appointed by the Governor of Florida, the Speaker of the House, and the Senate President to analyze information from the February 14, 2018 shooting at Marjory Stoneman Douglas High School in Parkland, Florida and to provide recommendations to prevent and mitigate future school shootings. *See* Ex. 3 at 7-8. The Court may take judicial notice of government reports, which are a matter of public record. *See, e.g., Rusak v. Holder*, 734 F.3d 894, 898 (9th Cir. 2013) (taking judicial notice of government reports); *Kater v. Churchill Downs Inc.*, 886 F.3d 784, n.3 (9th Cir. 2018) (granting motion to take judicial notice of “slideshow, meeting minutes, and pamphlet because they are publicly available on the Washington government website, and neither party disputes the authenticity of the website nor the accuracy of the information”).

4. Exhibits 4 and 5 are news articles containing eyewitness reports of the November 7, 2018 shooting at the Borderline Bar and Grill in Thousand Oaks, California. The Court may take judicial notice of news articles “to ‘indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.’” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d

954, 960 (9th Cir. 2010) (quoting *Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006)).

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that the Court grant this motion to take judicial notice of the attached documents.

Dated: July 15, 2019

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

s/ John D. Echeverria
JOHN D. ECHEVERRIA
Deputy Attorney General
*Attorneys for Defendant-Appellant Xavier
Becerra*

DECLARATION OF JOHN D. ECHEVERRIA

I, John D. Echeverria, declare as follows:

1. I am a Deputy Attorney General with the California Department of Justice and serve as counsel to Defendant-Appellant Xavier Becerra, in his official capacity as Attorney General of the State of California, in the above-captioned matter. I have personal knowledge of the facts set forth in this declaration, and if sworn as a witness, I could testify competently as to those facts.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the Senate Rules Committee, Office of Senate Floor Analyses, 3d reading analysis of S.B. 1446 (2015-2016 Reg. Sess.) as amended Mar. 28, 2016, dated May 19, 2016. This document is available on the California Legislative Information website at http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB1446.

3. Attached hereto as **Exhibit 2** is a true and correct copy of excerpts from the California Secretary of State's Supplement to the Statement of Vote, Statewide Summary by County for State Ballot Measures (Nov. 8, 2016). The complete Supplement to the Statement of Vote from the Secretary of State's website at <https://elections.cdn.sos.ca.gov/sov/2016-general/ssov/ssov-complete.pdf>

3. Attached hereto as **Exhibit 3** is a true and correct copy of excerpts from the Marjory Stoneman Douglas High School Public Safety Commission's Initial

Report Submitted to the Governor, Speaker of the House of Representatives and Senate President (2019). The complete Initial Report is publicly available at <http://www.fdle.state.fl.us/MSDHS/CommissionReport.pdf>

4. Attached hereto as **Exhibit 4** is a true and correct copy of Veronica Miracle, *Thousand Oaks Mass Shooting Survivor: "I Heard Somebody Yell, 'He's Reloading,'"* ABC News, Nov. 8, 2018, available at <https://abc7.com/thousand-oaks-survivor-i-heard-somebody-yell-hes-reloading/4649166>.

5. Attached hereto as **Exhibit 5** is a true and correct copy of USA Today Network Staff, *People Threw Barstools Through Window to Escape Thousand Oaks, California, Bar During Shooting*, USA Today, Nov. 8, 2018, available at <https://www.usatoday.com/story/news/nation-now/2018/11/08/thousand-oaks-bar-shooting-people-broke-windows-stools-escape/1928031002>.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 15th day of July 2019 at Los Angeles, California.

s/ John D. Echeverria
John D. Echeverria

CERTIFICATE OF SERVICE

Case Name: **Duncan, Virginia et al v. Xavier** No. **19-55376**
Becerra

I hereby certify that on July 15, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**APPELLANT’S MOTION TO TAKE JUDICIAL NOTICE;
DECLARATION OF JOHN D. ECHEVERRIA
EXHIBITS 1 – 5**

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 15, 2019, at Los Angeles, California.

Beth L. Gratz
Declarant

s/ Beth L. Gratz
Signature

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