

**COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE**

CITIZENS OVERSIGHT, INC., a Delaware
non-profit corporation; RAYMOND LUTZ,
an individual,

Plaintiffs and Cross-Appellants,

v.

MICHAEL VU, San Diego Registrar of
Voters, HELEN N. ROBBINS-MEYER, San
Diego County Chief Administrative Officer,
SAN DIEGO COUNTY, a public entity;
DOES 1-10,

Defendants and Appellants.

4th Civil No. **D071907**

(San Diego Superior Court
Case No. 37-2016-00020273-CL-MC-CTL)

Appeal from a Judgment of the Superior Court,
State of California, County of San Diego
Honorable, Joel R. Wohlfeil, Judge Presiding

**APPELLANTS' OBJECTIONS TO REQUEST FOR JUDICIAL
NOTICE OF RESPONDENTS AND CROSS-APPELLANTS**

THOMAS E. MONTGOMERY, County Counsel
County of San Diego
TIMOTHY M. BARRY, Chief Deputy (SBN 89019)
Email: timothy.barry@sdcounty.ca.gov
STEPHANIE KARNAVAS, Senior Deputy
(SBN No. 255596)
Email: stephanie.karnavas@sdcounty.ca.gov
1600 Pacific Highway, Room 355
San Diego, CA 92101
Tel: (619) 531-6259; Fax: (619) 531-6005
Attorneys for Appellant County of San Diego
and Michael Vu, Registrar of Voters

Received by Fourth District Court of Appeal, Division One

Pursuant to rule 8.54 of the California Rules of Court and Evidence Code section 459, Appellants hereby object to the Request for Judicial Notice of Respondents and Cross-Appellants (“Respondents”) as follows:

Objections to Exhibit 59 Asserted at Trial

On the first day of trial plaintiffs sought to introduce documents marked as Exhibit 59. Plaintiffs represented that the documents were “legislative intent documents” provided to plaintiffs by the Secretary of State’s Office. (Reporter’s Transcript (“RT”) 139:9-10.) Defendants objected to plaintiffs’ request that the court take judicial notice of the documents. (RT, 139:19-140:2; 140:23-141:22.) The court deferred its ruling on whether to admit the documents into evidence but allowed counsel to ask questions of plaintiff relating to the documents. (RT, 142:25-143:1.) Under direct examination plaintiff admitted that Exhibit 59 consisted of just 54 of 207 pages that he had received from the Secretary of State’s Office stating that he had tried to “boil it down to the key documents” that he felt reflected the history of SB 1235. (RT, 143:23-28.)

On the morning of the second day of trial, counsel for plaintiffs provided defendants’ counsel with a disk that he represented contained the entire 204 pages of documents received by plaintiffs from the Secretary of State’s office. (RT, 270:12-23.) When plaintiffs’ counsel sought to question Deborah Seiler relating to a document contained within the new Exhibit 59, defense counsel again objected on numerous grounds and after a lengthy discussion the court overruled defendants’ objections and admitted Exhibit 59, in its entirety, into evidence subject to plaintiffs providing further verification regarding the authenticity of the documents. (RT, 263:21-274:25.) Because defense counsel had not yet had an opportunity to review the documents provided to them on the disk, counsel reserved further objections pending actual review of the documents. (RT, 270:12-14.)

On the morning of the third day of trial, October 6, 2016, after defense counsel had an opportunity to review the documents provided on the disk, defense counsel again asked the court to revisit its decision to admit Exhibit 59 because certain documents that were represented to be among the documents received from the Secretary of State's Office were not included on the disk provided by plaintiffs to defense counsel. (RT 371:7-18.) The court again deferred any further discussion until the last day of trial. (RT 371:25-373:10.)

On the last day of trial, defense counsel again renewed their objections to the admission of Exhibit 59 arguing, among other things, that the exhibit contained "markings and notations" placed on the document by plaintiff. (RT 561:19-562:4.) The court resolved the objection by allowing plaintiffs to reorder the documents from the Secretary of State's Office and replace existing Exhibit 59 with the new set of documents once received. (RT 565:3-24.) Plaintiffs' counsel filed the new Exhibit 59 with the court on October 24, 2016, thirteen days after the case had been taken under submission by the court. (2 Clerk's Transcript ("CT") 451-453.)

The Trial Court Erroneously Admitted Exhibit 59 in its Entirety and Respondents' Application for Judicial Notice Regarding Exhibit 59 Should be Denied

Appellants do not dispute that a court may take judicial notice of relevant legislative history. It is just that in this case the documents that plaintiffs marked as Exhibit 59 includes documents that are not the proper subject of judicial notice. It is these documents to which Appellants object.

Evidence Code section 459, subdivision (a), provides that the reviewing court must take judicial notice of "(1) each matter *properly* noticed by the trial court; and (2) each matter the trial court was required to notice under Section 451 or 453," and "may take judicial notice of any matter specified in Section 452. (Evid. Code, § 452, subd. (a) [emphasis

added].) However, with limited exceptions, the court takes judicial notice of the *existence* of the document only, not the truth of the contents. (See *Ragland v. U.S. Bank National Association* (2012) 209 Cal.App.4th 182, 193-194 [judicial notice of existence of government audit report proper, but not the truth of its contents]; *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 987-988 [“we take judicial notice of the existence of these court documents [citation], but do not take notice of the disputed facts in the documents.”].)

Even when documents like legislative and official records of state agencies are subject to judicial notice, the party requesting judicial notice must establish the relevancy of the material to the issue presented, otherwise denial of a request for judicial notice is proper. (See *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4 [granting in part and denying in part requests to take judicial notice of legislative history]; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135, fn. 1 [“He also requests that we take judicial notice of certain materials concerning unrelated proposed legislation; because such materials have little relevance to a material issue in this matter, we deny the request.”].)

In addition, the statements of individual legislators, including the author of a bill, are not generally considered in construing a statute and are not the proper subject of judicial notice. *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 701. It is the court’s duty to ascertain the intent of the Legislature as a whole in adopting a piece of legislation. (*Id.*)

Here, Lutz cites *Cabral v. L.A. County Metro. Transp. Auth.* (1998) 66 Cal.App.4th 907, 910, fn. 2 (*Cabral*), for the proposition judicial notice may be taken of the trial exhibits admitted at trial. The *Cabral* Court stated, without any citation to authority, that it was taking judicial notice of the exhibits admitted by the trial court. (*Cabral*, at 910, fn. 2.) Official

acts of judicial departments are judicially noticeable. (Evid. Code, § 452, subd. (c).) However, there is nothing in *Cabral* to support an assertion that an appellate court may take judicial notice of the *content* of a trial exhibit.

There is no dispute that reviewing courts may properly consider the legislative history of a statute and amendments to a statute where the statutory language is at issue in the case and is ambiguous. (See *Jones v. Lodge at Torrey Pines* (2008) 42 Cal.4th 1158, 1169 (*Jones*); *In re Donovan L.* (2016) 244 Cal.App.4th 1075, 1088 [Fourth District, Division One took judicial notice of legislative history on its own motion to resolve statutory ambiguity].) However, the Supreme Court in *Jones* determined that not all materials contained in files related to legislative action are properly considered even if those documents are judicially noticed as a means to bring the documents before the reviewing court. (*Jones*, 42 Cal.4th at 1172 fn. 5.) Thus, for example, “the Supreme Court rejected consideration of five-page document found in the “legislative bill file of the Assembly Committee on Housing and Community Development on Assembly Bill 1167” where the document was undated, unsigned and there was nothing to indicate with clarity that which legislators, if any, even read it. (*Id.*, at 1172.)

Objections to Request for Judicial Notice re Exhibit 59:

The proper procedure for requesting judicial notice of what purports to be the legislative history of a particular bill is to mark and “identify each separate document for which judicial notice is sought as a separate exhibit” and to “submit a memorandum of points and authorities citing authority why each such exhibit constitutes cognizable legislative history.” (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31.) Plaintiffs failed to do this in this instance and as a result, Appellants are now required to parse out each document within Exhibit 59 to which they have objections. Appellants’ objections

and the documents within Exhibit 59 to which they are objecting are set forth below:

<u>Document</u>	<u>Bates Stamp</u>
<u>Document 1:</u> File Item #AB 707 (Hancock)	003-009
<u>Objection:</u> Irrelevant. Materials relating to other proposed legislation not relevant to material issue in this matter. (<i>Ketchum v. Moses</i> (2001) 24 Cal.4 th 1122, 1135, fn. 1.)	
<u>Document 2:</u> Senate Committee on Elections, Reapportionment and Constitutional Amendments re Bill No. 707	010-014
<u>Objection:</u> Irrelevant. Materials relating to other proposed legislation not relevant to material issue in this matter. (<i>Ketchum v. Moses</i> (2001) 24 Cal.4 th 1122, 1135, fn. 1.)	
<u>Document 3:</u> Memorandum on Secretary of State Bruce McPherson's Letterhead, re One-Percent Manual Tally Uniform Procedures and Proposal for Legislation	015-017
<u>Objection:</u> Statements by a bill's author about the bill's intended purpose are not the proper subject of judicial notice. (<i>Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.</i> (2005) 133 Cal.App.4th 26, 38.)	
<u>Document 4:</u> Letter dated May 24, 2006 from Secretary of State Bruce McPherson to Senator Debra Bowen, re SB 1235	023-024
<u>Duplicates Also Appear At:</u>	(106-107, 165-166, 196-197)
<u>Objection:</u> Letters to particular legislator's including the bill's author are not the proper subject of judicial notice. (<i>Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.</i> (2005) 133 Cal.App.4th 26, 38.)	
<u>Document 5:</u> Letter dated June 13, 2006, from California Association of Clerks and Election Officials to Senator Debra Bowen	025-026
<u>Duplicates Also Appear At:</u>	(025-026, 193-194, 249-250)
<u>Objection:</u> Letters to particular legislator's including the bill's author are not the proper subject of judicial notice. (<i>Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.</i> (2005) 133 Cal.App.4th 26, 38.)	

Documents 6: Letter dated August 30, 2006, from Secretary of State Bruce McPherson to Governor Arnold Schwarzenegger 045

Objection: Letter from bill’s author to governor is not the proper subject of judicial notice. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 38.)

Document 7: Letter dated September 11, 2006, from Debra Bowen to Governor Arnold Schwarzenegger 048

Duplicates Also Appear At: (189)

Objection: Letter from bill’s author to governor is not the proper subject of judicial notice. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 38.)

Document 8: Memo on Debra Bowen letterhead dated May 2011 056

Objection: Irrelevant. Subject matter of memo unrelated to matter at issue.

Document 9: Letter dated June 23, 2006, from Secretary of State Bruce McPherson to Senator Debra Bowen 086-087

Duplicates Also Appear At: (198-199)

Objection: Letter from bill’s author to governor is not the proper subject of judicial notice. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 38.)

Document 10: Letter dated September 15, 2006, from California Association of Clerks and Elections Officials to Governor Arnold Schwarzenegger 105

Duplicates Also Appear At: (195)

Objection: Letters to particular legislator’s including the bill’s author are not the proper subject of judicial notice. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 38.)

Document 11: Letter dated June 2, 2006 from Secretary of State Bruce McPherson to County Clerks/Registrars of Voters 146

Duplicates Also Appear At: (242)

Objection: Authoring legislator’s files, letters, press releases, and statement not communicated to the Legislature as a whole are not the proper subject of judicial notice. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 38.)

Document 12: Letter dated April 17, 2006 from
California Election Protection Network to Debra Bowen 148

Duplicates Also Appear At: (167, 192)

Objection: Letters to particular legislator's including the bill's author are not the proper subject of judicial notice. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 38.)

Document 13: Memo dated May 8, 2006, from Debra
Bowen to Senate Appropriations Committee 149

Duplicates Also Appear At: (191)

Objection: Statements by a bill's author about the bill's intended purpose are not the proper subject of judicial notice. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 38.)

Document 14: Memo dated April 19, 2006, from Debra
Bowen to Senate Elections, Reapportionment and
Constitutional Amendments 190

Objection: Statements by a bill's author about the bill's intended purpose are not the proper subject of judicial notice. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 38.)

DATE: January 11, 2018

THOMAS E. MONTGOMERY,
County Counsel

By: s/Timothy M. Barry
TIMOTHY M. BARRY, Chief Deputy
Attorneys for Appellants County of
San Diego and Michael Vu, Registrar of
Voters

ATTACHMENT A

1 Alan L. Geraci, Esq. SBN108324
2 CARE Law Group PC
3 817 W. San Marcos Blvd.
4 San Marcos, CA 92078
5 619-231-3131 telephone
6 760-650-3484 facsimile
7 alan@carelaw.net email

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
10/24/2016 at 09:15:00 AM
Clerk of the Superior Court
By E- Filing, Deputy Clerk

5 Attorney for Plaintiffs, Citizens Oversight Inc. and Raymond Lutz

8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO-CENTRAL DIVISION**

11 CITIZENS OVERSIGHT INC., a Delaware)
12 non-profit corporation; RAYMOND LUTZ,)
13 an individual,)

13 Plaintiffs,)

14 vs.)

15 MICHAEL VU, San Diego Registrar of)
16 Voters; HELEN N. ROBBINS-MEYER,)
17 San Diego County Chief Administrative)
18 Officer; COUNTY OF SAN DIEGO, a)
19 public entity; DOES 1-10,)

18 Defendants.)

CASE NO: 37-2016-00020273-CL-MC-CTL

**DECLARATION OF ALAN L. GERACI
REGARDING EXHIBIT 59 LEGISLATIVE
HISTORY**

Hon. Joel R. Wohlfeil, Judge

Complaint filed: June 16, 2016

Trial Date: October 4, 2016

Hearing Time: 9:00 a.m.

Dept: C-73

20 I, Alan L. Geraci, declare as follows:

- 21 1. I am an attorney licensed to practice law in the State of California. I am attorney of
22 record for the Plaintiffs, Raymond Lutz and Citizens' Oversight Inc. in the above-stated
23 matter.
- 24 2. I have personal knowledge of the matters stated herein unless stated under information
25 and belief in which case I believe said matter to be true. If called upon to testify, I
26 would testify consistent with the matters herein.
- 27 3. Exhibit 59 is a Plaintiffs' Exhibit which details the legislative history of the statutes
28 SB1235 and AB2769, among others, as the legislation made its way to the Governor's

1 desk and became law and codified as the subject Elections Code Section 15360.

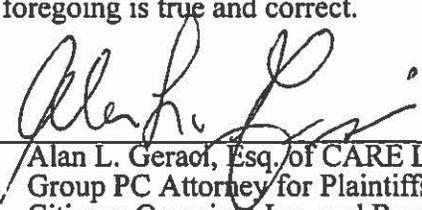
2 4. At the conclusion of trial for this matter, County Counsel objected to the form of the
3 Exhibit as containing "markings and notations" from Plaintiff. The Court resolved that
4 objection by allowing Plaintiffs to reorder the set from the Secretary of State Archive's
5 Division and thereby replace the existing Exhibit 59 with the new Exhibit 59. That task
6 has been completed.

7 5. When the documents were received from the Secretary of State (with Certification) they
8 were in a substantially different order than the original Exhibit 59 which was paginated
9 and often referred to by page number during trial and closing arguments. So as to not
10 disrupt that organization and record, I have organized the new documents with the same
11 pagination as the old Exhibit 59 so that the previously referenced pages are intact. For
12 the sake of full transparency, I have also paginated the documents received from the
13 Secretary of State Archive's Division in the exact state as they were received. Thus,
14 there are two sets of paginated records. The pagination on the lower right corner is the
15 original pagination and is consistent with the record. The second set is the records in
16 the exact form I received them from the Secretary of State. Those documents are
17 paginated on the upper right corner.

18 6. The Court will note that any "markings or notations" on the records exist on the records
19 themselves and are part of the archived history of the legislation. There are no stray
20 "markings or notations" from any other source.

21 I declare under penalty of perjury that the foregoing is true and correct.

22
23 Dated: October 24, 2016

By: 

Alan L. Geraof, Esq. of CARE Law
Group PC Attorney for Plaintiffs
Citizens Oversight Inc. and Raymond Lutz

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: Alan L. Geraci SBN108324 FIRM NAME: CARE Law Group PC STREET ADDRESS: 817 W. San Marcos Blvd. CITY: TELEPHONE NO: 619-261-2048 STATE: ZIP CODE: FAX NO: 760-650-3484 E-MAIL ADDRESS: alan@carelaw.net ATTORNEY FOR (name): Plaintiff Citizens Oversight Inc., Ray Lutz	FOR COURT USE ONLY ELECTRONICALLY FILED Superior Court of California, County of San Diego 10/24/2016 at 09:15:00 AM Clerk of the Superior Court By E-Filing, Deputy Clerk
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego STREET ADDRESS: 330 W. Broadway MAILING ADDRESS: CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: Central	
Plaintiff/Petitioner: Citizens Oversight Inc. and Raymond Lutz Defendant/Respondent: Michael Vu, San Diego Registrar of Voters, et al	CASE NUMBER: 37-2016-00020273
<p style="text-align: center;">PROOF OF ELECTRONIC SERVICE</p>	JUDICIAL OFFICER: 73
	DEPARTMENT: Hon. Joel R. Wohlfeil

1. I am at least 18 years old.
 - a. My residence or business address is (specify): 817 W. San Marcos Blvd, San Marcos, CA 92078
 - b. My electronic service address is (specify): alan@carelaw.net
2. I electronically served the following documents (exact titles): Declaration of Alan L. Geraci regarding Exhibit 59 Legislative History

The documents served are listed in an attachment (Form POS-050(D)/EFS-050(D) may be used for this purpose.)

3. I electronically served the documents listed in 2 as follows:
 - a. Name of person served: Timothy Barry, Chief Deputy County Counsel, Stephanie Karnavas, Deputy Count
 On behalf of (name or names of parties represented, if person served is an attorney): Michael Vu, San Diego County Registrar of Voters; Helen N. Robbins-Meyer, San Diego County Chief Administrative Officer; County of San Diego, a public entity
 - b. Electronic service address of person served: Timothy.Barry@sdcounty.ca.gov; Stephanie.Karnavas@sdcounty.ca.gov
 - c. On (date): 10/24/2016
 - d. At (time): 9:15 a.m.

The documents listed in item 2 were served electronically on the persons and in the manner described in an attachment. (Form POS-050(P)/EFS-050(P) may be used for this purpose.)

Date: 10/24/2016

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Alan L. Geraci
 (TYPE OR PRINT NAME OF DECLARANT)

/s/ Alan L. Geraci
 (SIGNATURE OF DECLARANT)

Citizens Oversight, Inc., et al, v. Michael Vu, et al;
Court of Appeal, 4th Appellate District, Division One, Case No. D071907
San Diego Superior Court Case No. 37-2016-00020273-CL-MC-CTL

DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to the case; I am employed in the County of San Diego, California. My business address is 1600 Pacific Highway, Room 355, San Diego, California, 92101.

On January 11, 2018, I served the following documents:

- 1. APPELLANTS' OBJECTIONS TO REQUEST FOR JUDICIAL NOTICE OF RESPONDENTS AND CROSS-APPELLANTS.**

In the following manner:

- (BY E-mail)** I cause to be transmitted a copy of the foregoing document(s) this date via TrueFiling System, which electronically notifies all counsel as follows:

Alan L. Geraci, Esq.
CARE Law Group PC
817 W. San Marcos Blvd.
San Marcos, CA 92078
Ph: (619) 231-3131 Fax: (760) 650-3484
alan@carelaw.net

Executed on January 11, 2018, at San Diego, California.

By: _____

ODETTE ORTEGA

