1st Civil Nos. A162872, A162873, A162874, A162875

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Appellant,

v.

CHRISTIAN NOEL PADILLA-MARTEL,
Defendant-Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Appellant,

v.

VICTOR ZELAYA,
Defendant-Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Appellant,

v.

JAROLD SANCHEZ,
Defendant-Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Appellant,

v.

GUADALOUPE AGUILAR-BENEGAS,
Defendant-Respondent.

Appeal from the Superior Court for San Francisco County
The Honorable Ethan P. Schulman
San Francisco County Superior Court Case Nos. CGC-20-586763, CGC-20-586761, CGC-20-586753, CGC-20-586732

RESPONDENTS' OPPOSITION TO MOTION FOR JUDICIAL NOTICE

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INTRODUCTION

The City Attorney's Motion for Judicial Notice asks this Court to take notice of information that is both immaterial and improper. The Motion sets forth general factual propositions that are irrelevant to the narrow legal issue on appeal. And even if these propositions were relevant, the Motion fails to demonstrate why they qualify for judicial notice under California Rule of Court 8.252 and Evidence Code sections 452 and 459. Additionally, the Motion invites this Court to make new findings of fact and law—an exercise that should be undertaken in exceptional circumstances and only after proper procedures have been followed. For these reasons, Respondents oppose the City Attorney's Motion and respectfully request that it be denied. (Evid. Code, §§ 455, subd. (a), 459, subd. (d).)

ARGUMENT

1. The Proffered Factual Information is Irrelevant to the Disposition of the Narrow Legal Issue on Appeal.

A motion for judicial notice must state "[w]hy the matter to be noticed is relevant to the appeal." (Cal. Rules of Court, rule 8.252, subd. (a)(2)(A)). The information proffered must also concern matters relevant to a dispositive point that will be decided by the appellate court. (*See Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544 fn.4; *Roth v. Jelley* (2020) 45 Cal.App.5th 655, 678 fn. 10 [collecting cases].) The City Attorney's Motion satisfies neither of these criteria.

In its concurrently-filed Answer to the amici curiae brief submitted by public interest groups with ties to the Tenderloin, the City Attorney repeatedly emphasizes that the "question before this Court is a narrow legal one." (Answer at p. 15.) The City Attorney attempts to relegate as "largely

beside the point" *Amici*'s thoughtful analysis of the Tenderloin's longstanding challenges.[1] (*Id.* at p. 5.) The City Attorney does so on the grounds that "the sole issue" in this appeal is "purely legal – whether the proposed injunctions were statutorily authorized and constitutionally permissible." (*Ibid.*)

And yet, having made this "purely legal" argument so strenuously in its Answer, the City Attorney adopts the opposite tack in its Motion. It requests that the Court take notice of factual propositions. Specifically, the Motion seeks judicial notice of: (1) Mayor London Breed's December 17, 2021 Proclamation "Declaring the Existence of a Local Emergency: Drug Overdoses in the Tenderloin" [Mot., Exh. A, hereafter Proclamation]; (2) the San Francisco Board of Supervisors December 23, 2021 "Motion Concurring in Proclamation of Local Emergency" [Mot., Exh. B, hereafter Concurrence]; and (3) the proposition that "the nuisance in the Tenderloin found by the trial court is still ongoing." (Mot. at p. 3.) The Motion fails to explain, however, why this information is relevant to what the City Attorney readily recognizes as ***the*** dispositive point on appeal—the lawfulness of the City Attorney's proposed exclusion orders. (Answer at pp. 5, 15.)

Nor do the documents themselves demonstrate their relevance. The Proclamation and Concurrence, for example, include no reference to California's nuisance statutes or Unfair Competition Law. They provide no

[1] The Answer also criticizes *Amici* for making policy arguments. But it is common practice for an amicus brief to describe a case's practical impacts and policy implications as a way of assisting a court in deciding a matter. (*See, e.g.*, *People v. McDaniels* (2021) 12 Cal.5th 97, 141-42.) Also, here, *Amici* are advocates and service providers intimately familiar with the Tenderloin's challenges and well positioned to speak to more effective remedies than what the City Attorney is proposing in this litigation.

guidance as to whether these legal authorities permit the City Attorney to exclude Respondents from the Tenderloin indefinitely. They offer no insight as to the constitutionality of this unprecedented effort to make a large swath of San Francisco "off limits." In fact, they include no reference whatsoever to exclusion or stay-away orders, or even to the term "nuisance."

The proffered information also lacks sufficient foundation to be relevant to Respondents specifically. The Proclamation and Concurrence describe how conditions in the Tenderloin have deteriorated over "recent months"—a time period that primarily post-dates the trial court's May 14, 2021 Order. (Mot., Exh. A at pp. 1-2; Mot., Exh. B at pp. 2-3.) But the Motion lacks any specificity as to how these latter events are linked to the earlier conduct of Respondents reflected in the record before this Court. Indeed, none of the proffered information refers to Respondents by name, by case number, or by any other identifiable factor sufficient to connect Respondents individually to the general conditions in the Tenderloin today.

The City Attorney's failure to demonstrate the relevance of this recent information is unsurprising. Respondents have never denied that the Tenderloin is in crisis. (*See* Respondents' Brief at pp. 16-17.) The trial court's ruling that conditions in the Tenderloin met the legal definition of a "public nuisance" is not the subject of the present appeal. Nor does this appeal concern the trial court's ruling that the City Attorney—at the preliminary injunction stage—had demonstrated a likelihood that Respondents "played at least a minor role in creating this nuisance."[2] (8 AA2337:7.)

[2] Respondents continue to dispute that the City Attorney would be able to prevail on its claims on a fully developed record at trial.

The City Attorney cannot have it both ways—decrying as "beside the point" facts and policies that contradict its arguments, while seeking judicial notice of facts and orders irrelevant to the narrow legal question on appeal. The Court should not condone the City Attorney's gamesmanship. Because the Motion fails to establish relevance, it should be denied. (*See Doe v. City of Los Angeles*, *supra*, 42 Cal.4th at p. 544 fn.4 [denying request for judicial notice of legislative history because movant "fail[ed] to demonstrate the relevance of this material"].)

2. Even if the Proclamation and Concurrence are Relevant, Judicial Notice Extends Only to the Fact of Their Existence, Not to the Truth of Matters Asserted Therein.

The City Attorney contends that the Proclamation and Concurrence are properly subject to judicial notice pursuant to Evidence Code section 452 subdivisions (b) and (c). (Mot. at p. 3.) But while the existence of such official acts may, when relevant, be subject to judicial notice, "the truth of matters asserted in such documents is ***not*** subject to judicial notice." (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482 [emphasis added]; *see also Day v. Sharp* (1975) 50 Cal.App.3d 904, 914.) It is particularly well-established that "the taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom . . . ." (*Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134; *see also Arce v. Kaiser Foundation Health Plan*, *supra*, 181 Cal.App.4th at p. 484.)

Notwithstanding this authority, the City Attorney appears to be requesting judicial notice of the factual statements contained within the Proclamation and Concurrence. The City Attorney contends that these documents "provide further proof of the urgent need for this Court to

correct the error of the Superior Court" and "confirm [the] continued existence of the nuisance conditions in the Tenderloin." (Mot. at pp. 3, 5.) Again, however, factual assertions contained within judicially-noticed documents do not readily suffice as evidentiary proof. (*See Mireskandari v. Gallagher* (2020) 59 Cal.App.5th 346, 360 ["The hearsay rule applies to statements contained in judicially noticed documents, thereby precluding consideration of those statements for their truth unless an independent hearsay exception exists."] [internal quotations and alterations omitted].)

The decisions cited in the City Attorney's Motion are not to the contrary. (Mot. at pp. 3-4.) In *Bullock v. Superior Court of Contra Costa County* (2020) 51 Cal.App.5th 134, the court took notice that the governor and county board of supervisors had issued declarations of emergency due to the COVID-19 pandemic. (*Id.* at p. 141 fns. 4 & 5.) The *Bullock* Court did not discuss the underlying findings or facts contained in those official acts as part of its analysis. Similarly, in *Inns by the Sea v. California Mutual Insurance Company* (2021) 71 Cal.App.5th 688, the court took notice that two counties had issued orders requiring "citizens to shelter in place" in an effort to slow the spread of COVID-19. (*Id.* at p. 693 fn. 2.) The court considered the existence of these orders and "the intent" behind them as relevant to an insurance claim for business disruptions due to COVID-19, but the court did not cite or rely on the truth of the facts contained therein—facts such as the number of confirmed COVID-19 cases in the counties, the deaths attributable to COVID-19, or the increasing transmission rates of COVID-19. (*See id.* at pp. 693-94, 711-712.)

The City Attorney also points to no case where, as here, the official acts sought to be noticed were issued by closely related government officials with an interest in having them noticed for litigation purposes.

3. Determining the "Continued Existence" of a Public Nuisance in the Tenderloin Requires New Factual Findings and Legal Conclusions.

The City Attorney, citing Evidence Code section 452, subdivision (g), seeks judicial notice of the "factual matter" that "the nuisance in the Tenderloin found by the trial court is still ongoing." (Mot. at p. 3.) For a fact to be subject to judicial notice, however, the matter must be of "such common knowledge" that it "cannot reasonably be the subject of dispute," or it must be "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subds. (g), (h).) The City Attorney's argumentative and self-servingly crafted proposition misses wide of both marks.

The proposition that the City Attorney asks this Court to notice—that there is a "continued existence" of a "public nuisance" in the Tenderloin as "found by the trial court"—requires that this Court make new factual findings outside the record and then apply legal conclusions to those additional findings in accordance with the Civil Code's legal definition of the term public nuisance.[3] Such a compound proposition is more than reasonably subject to dispute and also not capable of immediate and accurate determination. (*Cf.* Evid. Code, § 452, subds. (g), (h).)

Furthermore, in asking the Court to make this finding on appeal, the City Attorney follows the wrong procedure. Rule of Court 8.252 subdivision (b) provides that, when a party wishes for a reviewing court to make "findings on appeal," that party should move under Code of Civil

[3] Specifically, Civil Code section 3480 defines a "public nuisance" as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

Procedure section 909. Such a motion "must include proposed findings." (Cal. Rules of Court, rule 8.252, subd. (b).) The City Attorney makes no mention of this code provision or process.

While "appellate courts are authorized to make findings of fact on appeal by Code of Civil Procedure section 909 and rule [8.252(b)] of the California Rules of Court, the authority should be exercised sparingly." (*Diaz v. Prof. Cmty. Mgmt., Inc.* (2017) 16 Cal.App.5th 1190, 1213.) "Absent exceptional circumstances, no such findings should be made." (*Ibid.*) Here, the City Attorney has failed not only to follow the necessary procedures, but also to demonstrate exceptional circumstances. Absent this sufficient basis, the Court has no good cause to exercise its discretion to take notice of the City Attorney's final proposition.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Court deny the City Attorney's Motion for Judicial Notice.

Dated: January 7, 2022 Respectfully Submitted,

By: */s/ Chessie Thacher*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately 1.5-spaced, 13-point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 1,919 words.

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

Executed this 7th day of January 2022 in San Francisco, California.

By: */s/ Chessie Thacher*

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PROOF OF SERVICE

I, Sara Cooksey, declare that I am over the age of eighteen and not a party to the above action. I am an employee of the American Civil Liberties Union Foundation of Northern California. My electronic service address is scooksey@aclunc.org. My business address is 39 Drumm Street, San Francisco, CA 94111. On January 7, 2022, I served the following:

RESPONDENTS' OPPOSITION TO MOTION FOR JUDICIAL NOTICE

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

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

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