

**Case No. 10-15152**

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

Before the En Banc Panel  
(Opinion filed February 23, 2012)

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ELIZABETH AIDA HASKELL, REGINALD ENTO, JEFFREY PATRICK LYONS, JR., and AAKASH DESAI, on behalf of themselves and others similarly situated,

*Plaintiffs-Appellants,*

v.

KAMALA D. HARRIS, Attorney General of California; EVA STEINBERGER, Assistant Bureau Chief for DNA Programs, California Department of Justice,

*Defendants-Appellees.*

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**PLAINTIFFS-APPELLANTS' MOTION FOR JUDICIAL NOTICE**

On Appeal from the United States District Court  
for the Northern District of California  
The Honorable Charles R. Breyer  
Case No. C 09-04779 CRB

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**MOTION FOR JUDICIAL NOTICE**

Pursuant to Federal Rule of Evidence 201, Plaintiffs-Appellants Elizabeth Aida Haskell, Reginald Ento, Jeffrey Patrick Lyons, Jr., and Aakash Desai (collectively, “Plaintiffs-Appellants”), on behalf of themselves and others similarly situated, hereby request that the Court take judicial notice of the following in further support of the Supplemental Brief of Appellants:

1. The data contained in Exhibit 1 to the Declaration of Michael Risher in Support of Plaintiffs-Appellants’ Motion for Judicial Notice (“Risher Declaration”), which comprises true and correct copies of the Jan Bashinski DNA Laboratory Monthly Statistics Reports from January 2010 through July 2012, as provided by the California Department of Justice on behalf of Defendant-Appellee Harris.
2. The yearly averages of the number of profiles added to California’s DNA databank per month, the number of forensic unknown profiles in that system, and the average number of hits per month, for the years 2010, 2011, and 2012 to date, as contained in Exhibit 3 to the Risher Declaration, and as calculated from the data contained in Exhibit 1.

Under Federal Rule of Evidence 201(d), judicial notice may be taken at any stage of the proceeding, including by an appellate court during the pendency of an appeal. Fed. R. Evid. 201(d); *see also Lowry v. Barnhart*, 329 F.3d 1019, 1024

(9th Cir. 2003); *Bryant v. Carleson*, 444 F.2d 353, 357-58 (9th Cir. 1971); Circuit Advisory Committee Note Seven to Ninth Circuit Rule 27-1. The Court may take judicial notice of any matter “not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

The monthly reports included in Exhibit 1 are the proper subject of judicial notice. A court may take judicial notice of figures contained in official documents, including documents appearing on a government website. *See, e.g., Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (judicial notice of information displayed on school district website); *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 864 F.2d 1475, 1479-80 & n.2 (9th Cir. 1989) (“We take judicial notice of these figures, contained in the reports of a public body, pursuant to Fed. R. Evid. 201(b)(2).”). The monthly reports included in Exhibit 1 are official reports of the California Department of Justice, Office of the Attorney General. *See* Cal. Penal Code § 295(h)(4). They are authenticated because they were obtained directly from that office or its website. *See* Declaration of Michael Risher ISO Mot. for Judicial Notice (“Risher Decl.”), ¶¶ 2-6 & Ex. 2, filed concurrently; *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 998 (N.D. Cal. 2010) (“The Court may properly take judicial notice of the documents appearing on a

governmental website.”). These data are relevant because they support Appellants’ position that it is the size of the forensic-unknown database, rather than the increase in the number of known samples taken from arrestees, that has been responsible for the increasing number of hits in California’s DNA database (specifically, that the number of hits has increased with the number of forensic unknown samples in the database, even as the number of new samples taken from arrestees has dropped precipitously). And the Defendants-Appellees can hardly object to this Court’s taking notice of the data that they themselves published on their website and rely upon. *See Cota*, 688 F. Supp. 2d at 998. Thus, the Court should “take judicial notice of these figures, contained in the reports of a public body[.]” *Sinaloa Lake Owners Ass’n*, 864 F.2d at 1479-80 & n.2.

The Court should also take judicial notice of the 2010, 2011, and 2012 averages of the monthly number of new profiles uploaded into the databank, the number of forensic unknown samples in the database, and the monthly number of hits (as well as the percentage changes). *See Risher Decl.* ¶¶ 9-14 & Ex. 3. Courts properly take judicial notice of the results of simple mathematical calculations, because they are easily verified. *See Miller v. Fed. Land Bank of Spokane*, 587 F.2d 415, 422 (9th Cir. 1978) (“This is a matter of mathematics, of which the court could and should have taken judicial notice.”); *see, e.g., United States v. Sowards*, -- F.3d --, 2012 WL 2386605, \*4 (4th Cir. June 26, 2012) (taking judicial notice of

mathematical formula for average speed and reversing trial court finding that contradicted what that average demonstrated); *Drake v. Holstead*, 757 S.W.2d 909, 911 (Tex. App. 1988) (discussing Fed. R. Evid. 201 and holding that trial court erred in failing to take judicial notice of counsel's "simple mathematical computation"); *Warboys v. Proulx*, 303 F. Supp. 2d 111, 116-17 (D. Conn. 2004); Wright & Miller, 21B Fed. Prac. & Proc. Evid. § 5105, "Combinatorial Common Knowledge" (2d ed.). Taking an average of a set of figures is a simple calculation, much simpler than the calculations that courts routinely use in determining attorneys' fees, sentences under the federal guidelines, and damages. *See, e.g., Leeward Capital, L.P. v. Archon Corp.*, 759 F. Supp. 2d 1249, 1255-58 (D. Nev. 2010). And the results of such a calculation are not subject to dispute. Thus, because the Court may judicially notice the government's data, it may also judicially notice the yearly averages of those data, as they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

Finally, these averages are relevant because they, even more than the individual monthly figures, make it clear that the government is wrong when it claims that the increase in database hits is a result of the addition of more and more arrestee samples. Far from showing that more testing of known persons (arrestees and convicted offenders) leads to more hits, these averages show an *inverse*

correlation between the two numbers: as the monthly average of new samples dropped by nearly one half (from 20,931 in 2010, to 15,749 in 2011, and to 11,915 in 2012 to date), the average number of hits increased from 361 to 377 to 397, respectively. Again, this increase in hits accompanied an increase in the number of samples in the forensic-unknown (crime-scene) database, which increased from 35,145 to 46,212 over this same period.

Plaintiffs-Appellants therefore request that the Court take judicial notice of the data set forth in the monthly reports contained with Exhibit 1 to the Risher Declaration, as well as the yearly averages of that data for 2010, 2011, and 2012 to date contained within Exhibit 3 to the Risher Declaration.

Respectfully submitted,

Dated: August 31, 2012

PAUL HASTINGS LLP

By:           /s/ Eric A. Long            
Eric A. Long

Dated: August 31, 2012

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF NORTHERN  
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By:           /s/ Michael T. Risher            
Michael T. Risher

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 31, 2012.

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

/s/ Nanette Cosentino  
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