

S240156

**IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA**

SUPREME COURT
FILED

NOV 16 2017

Jorge Navarrete Clerk

Deputy

DON L. MATHEWS, MICHAEL L. ALVAREZ and WILLIAM OWEN
Plaintiffs and Appellants,

v.

XAVIER BECERRA and JACKIE LACEY
Defendants and Respondents.

*On Review From the Court of Appeal for the Second Appellate District, Division TWO
2nd Civil No. B265900
After an Appeal From the Superior Court of Los Angeles County
Honorable Michael L. Stern, Judge
Case Number BC573135*

**DEFENDANT AND RESPONDENT JACKIE LACEY'S OPPOSITION TO
AMICI CURIAE SCHOLARS' MOTION FOR JUDICIAL NOTICE**

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Defendant and Respondent JACKIE LACEY (“defendant”) respectfully submits the following opposition to the Amici's request for judicial notice. In their Motion for Judicial Notice, Amici request the Court take judicial notice of a host of materials that Amici claim contain legislative facts. (Motion, pp. 5, 7-8; Exhibits 8 to 25.)

Defendant submits this Court should deny the request, for the following reasons. The request for judicial notice is being presented by Amici, and sets forth new materials not presented in the trial court which are irrelevant to the appeal. None of the materials attached as Exhibits 8 to 25 were presented to the trial court or the Court of Appeal below at the time those courts rendered their respective decisions; rather they are being presented for the first time by Amici. Moreover, the materials attached as Exhibits 8 to 25 are not relevant as of public policy are for the Legislature to weigh. In addition, the "truth" of the content of the materials is not subject to judicial notice. Accordingly, defendant respectfully requests the Court deny Amici's Motion with respect to Exhibits 8 to 25.

II. THE COURT SHOULD NOT JUDICIALLY NOTICE THE MATERIALS ATTACHED AS EXHIBITS 8 TO 25 BECAUSE THE MATERIALS ARE BEING PRESENTED FOR THE FIRST TIME ON APPEAL BY AMICI AND ARE NOT RELEVANT TO THE ISSUES AT HAND.

Amicus curiae must accept the case as it finds it, and cannot “launch out upon a juridical expedition of its own unrelated to the actual appellate record.” (*Younger v. State of California* (1982) 137 Cal.App.3d 806, 813-14 [187 Cal.Rptr. 310].) Pursuant to this latter principle, issues not raised by the appealing parties are generally not be considered if raised for the first time by amici curiae. (*Id.*; *Interinsurance Exch. v. Spectrum Inv. Corp* (1989) 209 Cal.App.3d 1243, 1258 [258 Cal.Rptr. 43].)

In this case, Amici admit in their Motion that the materials attached as Exhibits 8 to 25 were not presented to the courts below; thus, their request for judicial notice should be denied. (Motion, p. 7.) Further, in their Motion, Amici do not argue exceptional circumstances exist here that give this Court reason to consider the new materials, and the request should be denied. (Motion, pp. 5-8.) Moreover, Amici do not specify which specific “facts” within the materials they seek to have the Court judicially notice. Defendant respectfully requests the Court deny Amici’s Motion to the extent Amici are requesting the Court take judicial notice of the *truth* of

the contents of the materials in Exhibits 8 to 25. (*See Beckley v. Reclamation Bd. of State* (1962) 205 Cal.App.2d 734, 741-42 [23 Cal.Rptr. 428] (“We do not, however, take judicial notice that everything said therein is true. [Citation.] These reports are based upon studies made by engineers with opinions and conclusions drawn from those studies. But engineers are not infallible, nor are all statements contained in the reports, even though stated as facts, irrefutable.”)¹

Additionally, the materials attached as Exhibits 8 to 25 are not relevant to the issues at hand. It is well-settled that an appellate court will only judicially notice matters that are relevant to the determination of the issues on appeal. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4 [67 Cal.Rptr.3d 330].)

To explain, in their Motion, Amici argue the materials attached as Exhibits 8 to 25 will assist the Court determine whether the value of maintaining confidentiality of communications between patients and psychotherapists is outweighed by the purported benefits of enforcing AB

¹ Of note, Amici’s reliance on *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764 [122 Cal.Rptr.3d 213], is misplaced. There, the Court merely decided to rely on a document not before the trial court in deciding a matter of law. (*Id.* at 776, fn. 5.) Here, however, Amici have not established why the Court should consider outside materials in this case or what portions of the materials should be considered. The materials are simply an improper attempt to reweigh the 'legislative facts' underlying a legislative enactment. (*American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 372 [204 Cal.Rptr. 671].)

1775. (Motion, p. 7.) However, as will also be addressed in Defendant's Answer to Amici's Brief, Amici are asking the Court to breach the Separation of Powers. "The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." (*Superior Court v. Cty. of Mendocino* (1996) 13 Cal.4th 45, 53 [51 Cal.Rptr.2d 837].) Since the materials attached as Exhibits 8 to 25 are only relevant to policy considerations, which are for the Legislature to make, those exhibits are irrelevant here.

In sum, because Exhibits 8 to 25 were not before the courts below and because they are irrelevant to the issues at hand, defendant respectfully requests the Court deny Amici's Motion with respect to Exhibits 8 to 25. (*See San Diego Cty. Employees Ret. Assn. v. Superior Court* (2011) 196 Cal.App.4th 1228, 1240, fn. 7 [127 Cal.Rptr.3d 479] ("We deny the requests of . . . amici curiae . . . for judicial notice of various secondary materials not before the trial court and irrelevant to our opinion."); *Hernandez v. Cty. of Los Angeles* (2008) 167 Cal.App.4th 12, 18, fn. 4 [84 Cal.Rptr.3d 10] ("On appeal, the City and Amici Chamber and League have asked this court to take judicial notice of several documents not presented to the trial court or not in existence at the time of trial proceedings. We . . . now deny them as such documents are not relevant or necessary to the

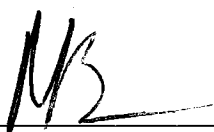
issues decided on this appeal.”.)

III. CONCLUSION.

Based on the foregoing, defendant respectfully requests the Court deny Amici’s Motion with respect to Exhibits 8 to 25.

DATED: November 15, 2017

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By: 

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 300 South Grand Avenue, Suite 1300, Los Angeles, California 90071.

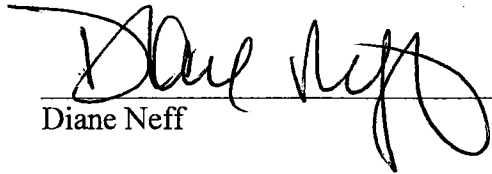
On November 15, 2017, I served true copies of the following document(s) described as **DEFENDANT AND RESPONDENT JACKIE LACEY'S OPPOSITION TO AMICI CURIAE SCHOLARS' MOTION FOR JUDICIAL NOTICE** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Hurrell Cantrall's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on November 15, 2017, at Los Angeles, California.



Diane Neff

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