

SUPREME COURT COPY

SUPREME COURT
FILED

No. S240156

DEC 01 2017

In the Supreme Court
of the State of California

Jorge Navarrete Clerk

Deputy

**DON MATHEWS, M.F.T., MICHAEL ALVAREZ, M.F.T., and
WILLIAM OWEN, CADC II,**

Plaintiffs and Petitioners,

vs.

**XAVIER BECERRA, in his official capacity as Attorney General of
California; and JACKIE LACEY in her official capacity as the
District Attorney of the county of Los Angeles and representative of
the California district attorneys,**

Defendants and Respondents.

After a Decision of the Court Of Appeal, Second Appellate District,
Division Two Case No. B265990
(Los Angeles County Superior Court Case No. BC573135,
Honorable Michael L. Stern, Judge)

**REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE BY
AMICI CURIAE SCHOLARS IN SUPPORT OF PLAINTIFFS AND
PETITIONERS**

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REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE

The opposition of Defendant Jackie Lacey (the “District Attorney”) rests on two flawed premises: (1) that Amici Scholars have raised new issues on appeal; and (2) that it is the province of the Legislature, not the Court, to say what the California Constitution is. The Court should reject the District Attorney’s misguided arguments and grant Amici Scholars’ Motion for Judicial Notice. Alternatively, the Court should consider the materials as background to its determination of the law pursuant to *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 775 fn. 5.

The District Attorney argues first that the Court should not consider Amici Scholars’ materials under the general principle that “issues not raised by the appealing parties are generally not considered if raised for the first time by amici curiae.” (Opp. at 2.) For this reason, the District Attorney argues, Amici Scholars’ materials are irrelevant. (Opp. at 3.)

Amici Scholars have not raised any new issues. Amici Scholars argue that AB 1775, as applied to a limited set of communications between patients and psychotherapists, violates the right of privacy in the California Constitution. The Plaintiffs raised this issue in every step of the case from the Complaint to their briefs in this Court.

The District Attorney also argues the Court should not consider the materials because “absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function”

and that the Court's weighing of policy concerns would violate the Separation of Powers. (Opp. at 4 [quoting *Superior Court v. City of Mendocino* (1996) 13 Cal.4th 45, 53].) The District Attorney's opposition fails to acknowledge, however, that this case *does* involve a constitutional prohibition – the California Constitution's right of privacy – that certainly limits the Legislature's choice among competing concerns. In this case, it is the role of the Court to weigh competing policy concerns (among other considerations), and the materials Amici Scholars have provided are relevant to that task. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 349 [“Numerous decisions establish that when a statute impinges upon a constitutional right, legislative findings with regard to the need for, or probable effect of, the statutory provision cannot be considered determinative for constitutional purposes”].)

The key authority cited by the District Attorney, *Beckley v. Reclamation Bd. of State* (1962) 205 Cal.App.2d 734, is not to the contrary. *Beckley* did not involve a request for judicial notice of legislative facts and therefore is not on point. The case involved a dispute over an adjudicative fact – whether plaintiffs' land was damaged because of the state's negligence in the execution of its flood control plan or because of natural causes. (*Id.* at pp. 752-753.) On demurrer, the Court refused to take judicial notice of the state's engineering reports that contradicted the plaintiff's allegations. (*Id.* at p. 753.) Amici Scholars do not seek to contradict

Plaintiffs' allegations, and they do not offer evidence of adjudicative facts. Rather, the information is offered only to the extent it "bears on the legal issue" of the proper scope of the constitutional right of privacy. (*Cabral, supra*, 51 Cal.4th at p. 775 fn. 5.) These materials are properly considered, not "as a substitute for evidence but as an aid to the court's work of interpreting, explaining and forming the law." (*Ibid.*)

For these reasons, Amici Scholars respectfully request the Court grant their motion and consider the materials as background to its decision.

Dated: November 27, 2017

Respectfully submitted,

ARNOLD & PORTER
KAYE SCHOLER LLP

By: _____



Trenton H. Norris
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Attorneys for Amici Curiae

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA)
3 COUNTY OF LOS ANGELES) ss

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18
5 and not a party to the within action; my business address is ARNOLD & PORTER KAYE
6 SCHOLER LLP, 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017.

7 On **November 27, 2017**, I served the foregoing document described as follows:

8 **REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE BY *AMICI CURIAE*
9 SCHOLARS IN SUPPORT OF PLAINTIFFS AND PETITIONERS**

10 by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

11 *See Attached Service List*

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14 Federal Express. Under said practices, items to be delivered the next business day are
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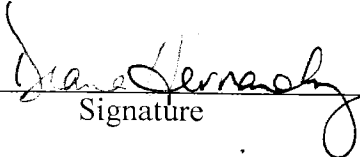
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28 I declare under penalty of perjury under the laws of the State of California that the foregoing is true
and correct.

Executed on November 27, 2017, at Los Angeles, California.

Diana Hernandez
Printed Name



Signature

SERVICE LIST

Mathews v. Becerra, et al.

California Supreme Court, Case No. S240156

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