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12
 13 IN THE UNITED STATES DISTRICT COURT
 14 FOR THE EASTERN DISTRICT OF CALIFORNIA
 15 FRESNO DIVISION
 16

17 **JEFF SILVESTER, BRANDON COMBS,**
 18 **THE CALGUNS FOUNDATION, INC., a**
 19 **non-profit organization, and THE SECOND**
 20 **AMENDMENT FOUNDATION, INC., a**
 21 **non-profit organization,**

Plaintiffs,

v.

22 **KAMALA HARRIS, Attorney General of**
 23 **California (in her official capacity), and**
 24 **DOES 1 to 20,**

Defendants.

1:11-cv-02137-AWI-SKO

**REQUEST FOR JUDICIAL NOTICE OF
 DEFENDANT KAMALA D. HARRIS,
 ATTORNEY GENERAL OF
 CALIFORNIA**

Trial Date: March 25, 2014
 Time: 8:30 a.m.
 Courtroom: 2
 Judge: The Hon. Anthony W. Ishii

1 Defendant Kamala D. Harris, Attorney General of California (the “Attorney General”),
2 hereby requests that this Court take judicial notice of the following documents:

3 **Category 1** – Dealer’s Record of Sales (DROS) Reports, DROS Statistics from 1991-
4 2014, DROS Annual Statistics, Summary of DROS Annual Revenues, and other documents
5 prepared by either the California Department of Justice or the California Bureau of Firearms.
6 (Defendant’s Exhibits AA through AQ, AS through AZ, BA through BY, and CA through CC.)¹

7 **Category 2** – Legislative histories of relevant statutory enactments. (Defendant’s
8 Exhibits CD, CE, CF, CG, CH, CI, and CJ.)

9 **Category 3** – Excerpts from history books, law review articles, and other scholarly
10 articles. (Defendant’s Exhibits DA through DY, and EA through EK.)

11 **Category 4** – Reports issued by governmental agencies other than the Department of
12 Justice and one non-governmental organization. (Defendant’s Exhibits FA through FG.)

13 **Category 5** – News articles. (Defendant’s Exhibits CU, GA through GL, GN, and GO.)
14

15 MEMORANDUM OF POINTS AND AUTHORITIES

16 **I. This Court may take judicial notice of legislative facts to assist in the determination of** 17 **whether the challenged statute is constitutional.**

18 Plaintiffs are mounting a constitutional challenge to California’s longstanding “Waiting-
19 Period Law,” codified at California Penal Code sections 26815 and 27540. It is well established
20 that when the constitutionality of a statute is at issue, a court’s decision “must be based largely on
21 legislative, as opposed to adjudicative, facts.” *Daggett v. Comm’n on Governmental Ethics and*
22 *Election Practices*, 205 F.3d 445, 455-56 (1st Cir. 2000) (“In a [constitutional law] case like this,
23 a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it
24 necessary, in order to pass upon the Federal question, to analyze the facts. . . . Our decision must
25 be based largely on legislative, as opposed to adjudicative facts.”) (internal quotation and citation
26

27 ¹ Attached as Exhibit 1 for the Court’s convenience is a copy of Defendant’s Index of
28 Exhibits, which was submitted to the Court on March 20, 2014. The Index lists the alphabetic
identifier of each exhibit with a corresponding description of the document.

1 omitted); see also *Korematsu v. United States*, 584 F.Supp. 1406, 1414 (N.D. Cal. 1984)
2 (“Legislative facts are facts of which courts take particular notice when interpreting a statute or
3 considering whether [a legislative body] has acted within its constitutional authority.”).

4 Legislative facts go to the content and justification for a statute, and are usually “not proved
5 through trial evidence but rather by material set forth in the briefs, the ordinary limits on judicial
6 notice having no application to legislative facts.” *Dagett*, 205 F.3d at 455-456 (internal quotation
7 and citation omitted); *Assoc. of Nat’l Advertisers, Inc. v. Fed. Trade Comm’n*, 627 F.2d 1151,
8 1162 (D.C. Cir. 1979) (legislative facts are facts that help the court determine the content of law
9 and policy, and need not be developed through evidentiary hearings); see also *Sachs v. Republic*
10 *of Austria*, 737 F.3d 584, 596 n.10 (9th Cir. 2013) (court may rely on legislative facts, whether or
11 not those facts have been developed on the record, if those facts are relevant to the “legal
12 reasoning” and interpretation of the “lawmaking process”).

13 Where legislative facts are concerned, a court has broad discretion in granting judicial
14 notice. Notably, there is *no* federal rule of evidence that *constrains* the judicial notice of
15 legislative facts. See Advisory Comm. Notes to FED. R. EVID. 201(a) (Rule 201 “is the only
16 evidence rule on the subject of judicial notice. It deals only with judicial notice of ‘adjudicative’
17 facts. No rule deals with judicial notice of ‘legislative’ facts.”). Because “[l]egislative facts . . .
18 are those which have relevance to legal reasoning and the lawmaking process, whether in the
19 formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative
20 body,” a “high degree of indisputability” is simply not required before a court may take judicial
21 notice of such facts. *Ibid.* Thus, judicial notice of legislative facts is not limited by “any formal
22 requirements of notice other than those already inherent in affording opportunity to hear and be
23 heard and exchanging briefs, and any requirement of formal findings at any level[.]” *Ibid.* citing
24 *Borden’s Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934).

25 **II. Each individual category of documents listed above is appropriate for judicial notice.**

26 The first category of documents comprises reports and statistics issued and compiled by the
27 California Department of Justice and the California Bureau of Firearms, in part through the
28

1 Dealer's Record of Sale (DROS) system.² The fourth category of documents comprises reports
2 issued by governmental agencies other than the California Department of Justice and one non-
3 governmental organization. The reports in these two categories of documents provide detailed
4 information about firearm-purchaser background check systems in California and other
5 jurisdictions. This information is vital in evaluating the necessity of the 10-day period utilized by
6 California's background check system, and comparing California's system to systems in other
7 jurisdictions in terms of achieving the goal of minimizing gun violence.

8 These reports are a matter of public record and are proper subjects of judicial notice. See,
9 e.g., *Rusak v. Holder*, 734 F.3d 894, 898 (9th Cir. 2013) (judicial notice taken of governmental
10 reports regarding religious intolerance in certain countries to establish plaintiff's claim of past
11 persecution); *United States v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943,
12 955 (9th Cir. 2008) (judicial notice taken of a Department of Energy report, reasoning that
13 "[j]udicial notice is appropriate for records and reports of administrative bodies") (internal
14 quotation omitted); see also *Cactus Corner, LLC v. U.S. Dept. of Agriculture*, 346 F.Supp.2d
15 1075, 1098-1099 (E.D. Cal. 2004) (granting motion for judicial notice of the fact of existence and
16 authenticity of reports created and published by the Department of Agriculture), *aff'd*, 450 F.3d
17 428 (9th Cir. 2006), *citing Greeson v. Imperial Irr. Dist.*, 59 F.2d 529, 531 (9th Cir. 1932).

18 The second category of documents comprises the legislative histories of the statutory
19 enactments that make up the Waiting-Period Law. The legislative histories of these enactments
20 are relevant because they show the California Legislature's reasons and justifications for passing
21 the law. "Courts frequently take judicial notice of legislative history, including committee
22 reports." *Korematsu*, 584 F.Supp. at 1414 citing *Territory of Alaska v. American Can Co.*, 358
23 U.S. 224, 227 (1959) (taking judicial notice of an act's legislative history); *Rabkin v. Dean*, 856
24 F.Supp. 543, 546 (N.D. Cal. 1994) (taking judicial notice of the contents and legislative history of
25 a proposed city ordinance).

26
27 ² During trial, the Attorney General intends to call witnesses who will lay a foundation to
28 some or all of the documents in this particular category.

1 The third category of documents comprises excerpts from history books, law review
2 articles, and other scholarly articles including those in the field of social science, all of which are
3 proper subjects for judicial notice for the legislative facts contained therein. See e.g., *Leo Sheep*
4 *Co. v. United States*, 440 U.S. 668, 669-670 (1979) (referencing a number of history books that
5 discussed the commercial and social aspects of living on the western frontier during the 19th
6 century; “courts, in construing a statute, may with propriety recur to the history of the times when
7 [a challenged statute] was passed; and this is frequently necessary, in order to ascertain the reason
8 as well as the meaning of particular provisions in it”); *Brown v. Board of Education*, 347 U.S.
9 483, 494 (1954) (referencing a number of psychological and social science studies demonstrating
10 the harm of “separate but equal” doctrine in public education in support of the Court’s
11 determination that doctrine was unconstitutional); *Cooper v. Pate*, 324 F.2d 165, 166 (7th Cir.
12 1963) (judicial notice taken of “accredited social studies of the Black Muslim Movement” to
13 show political objectives of the group), *rev’d on other grounds* 378 U.S. 546 (1964) (per curiam).

14 Judicial notice of this category of documents is especially appropriate given plaintiffs’
15 Second Amendment challenge to the Waiting-Period Law. Pursuant to recent Ninth Circuit
16 authority, the Court is expected to consult historical materials about how the Second Amendment
17 was understood. See *Peruta v County of San Diego*, No. 10-56971, 2014 WL 555862, at *4 (9th
18 Cir. Feb. 13, 2014) (petition for en banc review pending). This consultation necessarily takes into
19 account history books and scholarly articles, precisely the types of documents that the Attorney
20 General seeks judicial notice of. Plaintiffs agree as much, stating in their reply to the Attorney
21 General’s opposition to their motion in limine regarding the exclusion of expert testimony:
22 “Plaintiffs herein cannot (and do not) object to [historical evidence of the scope and meaning of
23 the Second Amendment] being derived from academic studies and law-journal articles.” (Doc. 63
24 at 2.)

25 Likewise, in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), an unsuccessful
26 Second Amendment challenge to a federal firearms law, the victorious federal prosecutors who
27 defended the law presented relevant social-science studies (unaided by any “presenting” witness)
28 as competent “evidence” on the key issues in the case. *Chovan*, 735 F.3d at 1137 & 1139 (citing

1 publications such as C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L.
2 & Pub. Pol'y 695, 698, 708 (2009) and Julia C. Babcock, et al., *Does Batterer' Treatment Work?*
3 *A Meta-Analytic Review of Domestic Violence Treatment*, 23 Clinical Psychol. Rev. 1023, 1039
4 (2004), and analyzing the legislative history of the challenged federal statute); *see also*
5 Declaration of Caroline Han Regarding Use of Expert Witnesses in *Chovan* Litigation, paras. 4 &
6 5.³ While the topic of judicial notice did not expressly arise in *Chovan*, the Ninth Circuit's
7 decision in that case makes clear that appellate courts take notice of social science studies as part
8 of their decision making process. It defies logic to think that an appellate court, in reviewing a
9 trial court's decision on the constitutionality of a challenged statute, should consider evidence that
10 the trial court did not or could not.

11 In sum, the history books and scholarly articles, including those in the field of social
12 science, offered by the Attorney General in this third category of documents are relevant to
13 plaintiffs' Second Amendment challenge by giving the history necessary to judge if the Waiting-
14 Period Law would have been seen by ordinary voters in the Founding Era as constitutional, and
15 by showing the efficacy of the law in minimizing gun violence.

16 The fifth category of documents comprises news articles relevant to the issues presented in
17 this case.⁴ To the extent these news articles contain legislative facts that bear directly on the
18 issues presented in this case, such as historical context and whether waiting periods effectively
19 prevent violence, they are highly relevant and appropriate subjects of judicial notice. *See*
20 Advisory Comm. Notes to FED. R. EVID. 201(a) (legislative facts that are relevant to legal
21 reasoning and the lawmaking process need not have a "high degree of indisputability" to be
22 considered proper subjects of judicial notice). To the extent this Court is inclined to take judicial
23 notice of these documents for their adjudicative facts, it also has the discretion to do so. *See*
24 *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458-59 (9th Cir. 1995) (holding that district court's

25 ³ The Han Declaration was submitted as Exhibit 1 to the Declaration of Peter H. Chang
26 filed in conjunction with Defendant's Opposition to Plaintiffs' Motion in Limine Regarding
Exclusion of Documents.

27 ⁴ The Attorney General notes that Exhibit CU was an exhibit at a deposition, and thus has
28 an independent ground for admission into the trial record.

1 judicial notice of a news article regarding layoffs at an airplane manufacturer pursuant to Fed. R.
2 Evid. 201 was not an abuse of discretion).

3 For the reasons cited above, the Attorney General respectfully requests that this Court take
4 judicial notice of the documents contained in Categories 1 through 5 listed above.

5 Dated: March 24, 2014

Respectfully submitted,

6
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11
12 */s/ Kim L. Nguyen* _____

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