

1 Thomas A. Saenz (State Bar No. 159430)
2 Denise Hulett (State Bar No. 121553)
3 Matthew J. Barragan (State Bar No. 283883)
4 MEXICAN AMERICAN LEGAL DEFENSE
5 AND EDUCATIONAL FUND
6 634 S. Spring St., 11th Floor
7 Los Angeles, CA 90014
8 Telephone: (213) 629-2512
9 Facsimile: (213) 629-0266
10 Email: tsaenz@maldef.org
11 dhulett@maldef.org
12 mbarragan@maldef.org

13 *Attorneys for Plaintiffs*

14 UNITED STATES DISTRICT COURT
15 EASTERN DISTRICT OF CALIFORNIA
16

17 OSCAR LUNA, ALICIA PUENTES,
18 DOROTHY VELASQUEZ, and GARY
19 RODRIGUEZ,

20 Plaintiffs,

21 v.

22 COUNTY OF KERN, KERN COUNTY
23 BOARD OF SUPERVISORS, and
24 MICK GLEASON, ZACK SCRIVNER,
25 MIKE MAGGARD, DAVID COUCH,
26 and LETICIA PEREZ, in their official
27 capacity as members of the Kern County
28 Board of Supervisors, and JOHN
NILON, in his official capacity as Kern
County Administrative Officer, and
MARY B. BEDARD, in her official
capacity as Kern County Registrar of
Voters, inclusive,

Defendants.

Case No. 1:16-CV-00568-DAD-JLT

**PLAINTIFFS' OBJECTIONS TO
DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
MOTION TO DISMISS [FRCP 12(b)(6)];
MEMORANDUM OF POINTS AND
AUTHORITIES**

JUDGE: Hon. Dale A. Drozd
COURTROOM: 5
HEARING DATE: June 21, 2016
TIME: 9:30 a.m.

1 Plaintiffs Oscar Luna, Alicia Puentes, Dorothy Velasquez, and Gary Rodriguez
2 (collectively, “Plaintiffs”) respectfully object to Defendants’ Request for Judicial Notice in
3 Support of Motion to Dismiss.

4 **I. INTRODUCTION**

5 This is a vote dilution claim under Section 2 of the federal Voting Rights Act against the
6 County of Kern, *et al.* In support of Defendants’ Motion to Dismiss under Federal Rule of Civil
7 Procedure 12(b)(6), Defendants have submitted a Request for Judicial Notice (“Request” or
8 “RJN”). Defendants seek judicial notice of documents which were neither attached to the
9 Complaint nor central to Plaintiffs’ claims.

10 Judicial notice of these extrinsic materials is not proper in connection with this Court’s
11 consideration of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). In addition,
12 the documents are not judicially noticeable under Rule 201 of the Federal Rules of Evidence.
13 Thus, Defendants’ proffered documents cannot be considered in connection with Defendants’
14 Motion to Dismiss.

15 **II. FACTS**

16 Defendants ask the Court to take judicial notice of: (1) documents contained in Kern
17 County’s files in connection with the 2011 supervisorial redistricting process, including a 2011
18 MALDEF map (Exhibits A-F to RJN); (2) Opinion No. 91-601 of the California Attorney
19 General, 74 Ops. Cal. Atty. Gen. 162 (Aug. 23, 1991), which addresses the exclusion of prisoners
20 from the population base used in redistricting (Exhibit G to RJN); and (3) documents downloaded
21 from the website of the California Department of Corrections and Rehabilitation (Exhibits H-K to
22 RJN). Defendants heavily rely on these proffered documents in their Motion to Dismiss.

23 Defendants’ primary target is a Board of Supervisors map that Plaintiffs’ law firm, the
24 Mexican American Legal Defense and Educational Fund (“MALDEF”), drew and submitted to
25 the Board of Supervisors in 2011, during the Kern County redistricting process (Exhibit B to
26 RJN). All of the other documents in the Request are related to that map,¹ and to the argument

27 _____
28 ¹ The additional documents include census data and locations of prisons in Kern County that
Defendants use to make calculations that alter the original map’s population base and then

1 that Plaintiffs have failed to meet an evidentiary burden under Section 2, *i.e.*, that Plaintiffs have
 2 failed to provide a map wherein Latinos are sufficiently geographically compact to constitute a
 3 majority of the voting age population in a single member district, normally referred to as
 4 “Plaintiffs’ illustrative plan.”² Defendants assume, without basis and incorrectly, that: (1) the
 5 2011 MALDEF map is attributable to these Plaintiffs, and (2) Plaintiffs will introduce it in this
 6 case as their “illustrative plan.” Defendants’ incorrect assumption and attribution to Plaintiffs in
 7 this case springs from a reference to the 2011 map in paragraph 21 of the Complaint, a reference
 8 that is part of the factual narrative surrounding the 2011 redistricting process. The 2011
 9 MALDEF map is most certainly not central to the claims in this case, because Plaintiffs could
 10 bring this action whether or not MALDEF had submitted a plan during the 2011 Kern County
 11 redistricting process. Nonetheless, Defendants ask the Court to judicially notice the five-year-old
 12 MALDEF map and other documents to support their argument that Plaintiffs have failed to allege
 13 facts sufficient to meet their burden under *Gingles*.

14 The map and Defendants’ related exhibits may not be considered in ruling on the motion
 15 to dismiss, as they are neither central to Plaintiffs’ claims nor are they judicially noticeable under
 16 Rule 201 of the Federal Rules of Evidence.

17 **III. RELEVANT LEGAL STANDARDS**

18 **A. Rule 201 of the Federal Rules of Evidence**

19 Rule 201 of the Federal Rules of Evidence governs judicial notice of evidence. Rule 201
 20 permits a court to take judicial notice of “a fact that is *not subject to reasonable dispute* because
 21 it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately
 22 and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R.
 23 Evid. 201(b) (emphasis added). “Because the effect of judicial notice is to deprive a party of an
 24 opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary

25 conclude that the districts are not equipopulous. Defendants’ Motion to Dismiss (“Defs’ MTD”) at 307.

26 ² *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Defendants do not dispute that a second
 27 Latino citizen voting age population district can be drawn, only that it is not sufficiently
 28 equipopulous with the other districts, and that it is has a “bizarre configuration.” Defs’ MTD at 3-8.

1 evidence, caution must be used in determining that a fact is beyond controversy under Rule
 2 201(b).” *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1151 (9th Cir. 2005) (internal citation
 3 omitted).

4 “Where factual findings or the contents of the documents are in dispute, those matters of
 5 dispute are not appropriate for judicial notice.” *Darensburg v. Metropolitan Transp. Comm’n*,
 6 2006 WL 167657, *2 (N.D. Cal. 2006) (citing *Del Puerto Water Dist v. U.S. Bureau of*
 7 *Reclamation*, 271 F. Supp. 2d 1224, 1234 (E.D. Cal. 2003)). Thus, if the matter sought to be
 8 noticed is reasonably disputable, consideration of that “fact” is inappropriate on a motion to
 9 dismiss.

10 “[T]he Ninth Circuit tends to be strict with its application of Rule 201(b).” *Von Grabe v.*
 11 *Sprint PCS*, 312 F. Supp. 2d 1285, 1311 (S.D. Cal. 2003). Significantly, judicial notice may not
 12 be used to trump a plaintiff’s well-pleaded allegations in the complaint, weigh evidence and
 13 resolve triable questions of fact. *Patel v. Parnes*, 253 F.R.D. 531, 546 (C.D. Cal. 2008) (“judicial
 14 notice is not a proper basis for rejecting factual allegations appearing in the plaintiff’s
 15 complaint”) (quoting *CPI Advanced, Inc. v. Kong Byung Woo Comm. Ind., Co., Ltd.*, 135 Fed.
 16 Appx. 81, 83 (9th Cir. 2005)); *In re Network Equipment Technologies, Inc. Litigation*, 762 F.
 17 Supp. 1359, 1363 (N.D. Cal. 1991) (“[t]he Court should not use judicial notice to generate an
 18 evidentiary record and then weigh evidence – which plaintiffs have not had the opportunity to
 19 challenge – to dismiss plaintiffs’ complaint”).

20 **B. Legal Standard for Taking Judicial Notice on a Motion to Dismiss**

21 “As a general rule, [courts] ‘may not consider any material beyond the pleadings in ruling
 22 on a Rule 12(b)(6) motion.’”³ *United States v. Corinthian Colleges*, 655 F.3d 984, 998 (9th Cir.
 23 2011) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). In limited
 24 circumstances, courts may consider materials that are not attached to the complaint on which the
 25 complaint “necessarily relies,” however, judicial notice may only be taken of such unattached
 26

27 ³ To the extent Defendants rely on these materials, the law requires their motion to be considered
 28 as a Rule 56 motion for summary judgment and requires that the parties be given a reasonable
 opportunity to present all material made pertinent to such a motion. See Fed. R. Civ. P. 12(d).

evidence if: “(1) the complaint refers to the document; (2) *the document is central to the plaintiff’s claim*; and (3) no party questions the authenticity of the document.” *Id.* at 999 (emphasis added); *see also Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994) (*overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002)); *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (unattached documents may be considered only “in situations where the complaint necessarily relies upon a document or the contents of the document are alleged in a complaint, the document’s authenticity is not in question and there are no disputed issues as to the document’s relevance”). However, a complaint’s “mere mention of the existence of a document is insufficient to incorporate the contents of a document.” *Coto Settlement*, 593 F.3d at 1038.

IV. ARGUMENT

Defendants request that this Court take judicial notice of Exhibits A through K⁴ should be rejected because the contents of the documents are not subject to judicial notice at the pleading stage under applicable Ninth Circuit precedent and Rule 201(b) of the Federal Rules of Evidence.

A. Judicial Notice of the Proffered Documents Is Not Appropriate

Defendants’ Request goes well beyond a plea for the Court to judicially notice adjudicative facts. Defendants ask the Court to take judicial notice of the 2011 MALDEF map and documents to prove the plan is not equipopulous or geographically compact.

While courts may sometimes take judicial notice of the existence of documents, they may not “draw inferences or take notice of facts that might reasonably be disputed.” *Corinthian Colleges*, 655 F.3d at 999; *see Edie v. Baca*, 2009 WL 3417844, at *3 (C.D. Cal. Oct. 19, 2009); *Del Puerto Water Dist. v. United States Bureau of Reclamation*, 271 F. Supp. 2d 1224, 1234 (E.D. Cal. 2003). In particular, “documents are judicially noticeable only for the purpose of determining what statements are contained therein, *not to prove the truth of the contents or any party’s assertion of what the contents mean.*” *United States v. Southern California Edison Co.*, 300 F. Supp. 2d 964, 975 (E.D. Cal. 2004) (emphasis added).

⁴ Krauter Decl., Exs. A-F; Skinnell Decl., Exs. G-K.

1 Because Defendants are seeking to use MALDEF's materials not for the existence of the
 2 statements in them but for what those statements mean – Defendants' contention that the map is
 3 not geographically compact or equipopulous – judicial notice is inappropriate. For example,
 4 Defendants' reliance and arguments demonstrate that the exhibits merely create disputes about
 5 the factual interpretation of the map, which cannot be resolved on a motion to dismiss. Indeed,
 6 Defendants explicitly state that "[w]hile Plaintiffs have alleged (in Paragraph 21) that the map in
 7 question is 'a geographically compact and equipopulous plan,' the map itself shows otherwise, on
 8 its face." Defs' MTD at 11. These factual disputes – how to properly interpret the map plan –
 9 cannot be resolved at this stage without the benefit of discovery.

10 Defendants' arguments are premature at this early stage of the proceedings. *Thornburg v.*
 11 *Gingles*, 478 U.S. 30 (1986), established a framework for analyzing claims under Section 2, a
 12 framework that requires Plaintiffs to meet their evidentiary burdens through the testimony of a
 13 number of expert witnesses, including demographers, political scientists, social scientists and
 14 historians. "[C]ourts have found the taking of judicial notice to be inappropriate in matters
 15 requiring detailed or specific knowledge." *Von Grabe*, 312 F. Supp. 2d at 1311. Because the
 16 facts in this matter will be proffered through expert witnesses, the 2011 MALDEF map is not
 17 appropriate for judicial notice.

18 The existence of the 2011 MALDEF map could be judicially noticed *if it were central to*
 19 *Plaintiffs' claims*, but again the argument that the map is not geographically compact or
 20 equipopulous is a legal question for this Court, is reasonably disputable and is not the proper
 21 subject of judicial notice. *See Lee v. City of Los Angeles*, 250 F.3d at 690 (finding district court
 22 committed error when "the court did more than take judicial notice of *undisputed* matters of
 23 public record. The court took judicial notice of *disputed* facts stated in public records")
 24 (emphasis in original).

25 **B. Consideration of the Proffered Documents As Part of a Motion to Dismiss Under** 26 **FRCP 12 Is Not Appropriate**

27 It is not appropriate for the Court to consider the documents that are the subject of
 28 Defendants' Request in deciding Defendants' motion to dismiss.

1 First, Defendants do not contend that Plaintiffs' Complaint refers to Exhibits A or C
 2 through K. Defendants have not done so because a simple reading of Plaintiffs' Complaint
 3 reveals no reference to Defendants' Exhibits A or C through K.

4 Second, Exhibit B, the 2011 MALDEF map, is referenced in paragraph 21 of the
 5 Complaint as part of the factual narrative surrounding the 2011 redistricting process. It is not
 6 essential to, let alone central to, Plaintiffs' burden of proof in this case. Where, as here, a
 7 complaint mentions a document but does not reference it extensively and the document is not
 8 integral to the complaint the incorporation by reference doctrine does not apply. *Coto Settlement*,
 9 593 F.3d at 1038. The doctrine of incorporation by reference "is not intended to grant litigants
 10 license to ignore the distinction between motions to dismiss and motions for summary judgment."
 11 *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998). Rather, the policy behind the doctrine
 12 is to "[p]revent [] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting
 13 references to documents upon which their claims are based." *Parrino v. FHP, Inc.*, 146 F.3d 699,
 14 706 (9th Cir. 1998), *reversed by statute on other grounds*.

15 Accordingly, the application of this doctrine is limited to cases interpreting the legal
 16 significance of the document at issue, such as a contract. *See Levenstein*, 164 F.3d at 347. The
 17 Ninth Circuit has observed that limitation, applying the doctrine to admit an insurance plan
 18 application in a dispute over an insurance claim, *see Parrino*, 146 F.3d at 705-06, and the
 19 document that included an allegedly defamatory statement, *see Evel Knievel v. ESPN*, 393 F.3d
 20 1068, 1076-77 (9th Cir. 2005). *See also Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir.
 21 1991) (holding that the court properly took judicial notice of defendant's SEC filings, which are
 22 "the very documents that are alleged to contain various misrepresentations or omission and are
 23 relevant not to prove the truth of their contents but only to determine what the documents
 24 stated").

25 Here, Plaintiffs neither necessarily rely on nor refer extensively to the 2011 MALDEF
 26 map. *See Coto Settlement*, 593 F.3d at 1038. Furthermore, Plaintiffs in this case are Oscar Luna,
 27 Alicia Puentes, Dorothy Velasquez, and Gary Rodriguez. MALDEF is the law firm that
 28 represents them. There is no basis for imputing a 2011 MALDEF map to these Plaintiffs simply

1 because MALDEF currently represents them. Indeed, Plaintiffs could bring a Section 2 case
2 whether or not their counsel submitted a map to the Board of Supervisors in 2011. Thus,
3 Plaintiffs' allegations do not depend upon the five-year-old MALDEF map. Instead, as explained
4 above, Plaintiffs' illustrative plan will be proffered through expert witnesses.

5 Finally, Defendants' incorrect assumption leads them to request judicial notice of
6 additional documents that are not incorporated by reference, documents Defendants require to
7 alter the population base used in the 2011 MALDEF map. Defs' MTD at 3-8. Here, the
8 Complaint does not rely on Defendants' Exhibits A or C through K in any way. Additionally, as
9 the 2011 MALDEF map is not central to Plaintiffs' claims, the exhibits Defendants seek to
10 judicially notice to attack the map are also not central to Plaintiffs' claims.

11 As such, Defendants' exhibits are not central to the claims in Plaintiffs' Complaint and
12 should not be considered as part of Defendants' Motion to Dismiss.

13 **V. CONCLUSION**

14 For all the foregoing reasons, Plaintiffs respectfully request that Defendants' Request for
15 Judicial Notice be denied as to Exhibits A through K and Defendants' citations to these materials
16 be stricken from the record.

17 Respectfully submitted,

18 Dated: June 7, 2016

MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATONAL FUND

20 By: /s/ Matthew J. Barragan
21 Thomas A. Saenz
22 Denise Hulett
Matthew J. Barragan

23 *Attorneys for Plaintiffs*