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COUNTY OF KERN, *ET AL.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

OSCAR LUNA, *et al.*,
Plaintiffs,

vs.

COUNTY OF KERN, *et al.*,
Defendants.

Case #1:16-cv-00568-DAD-JLT

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' OBJECTIONS TO
REQUEST FOR JUDICIAL
NOTICE**

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

1 **I. INTRODUCTION.**

2 Plaintiffs’ objections to Defendants’ Request for Judicial Notice are not well taken
3 and should be overruled.

4 Insofar as Plaintiffs’ objections are based on the notion that the Complaint does not
5 “necessarily rely” on the MALDEF map, Plaintiffs’ arguments miss the mark because they
6 are briefing *the wrong exception* to the rule that facts outside the pleadings may not be
7 considered in connection with a motion to dismiss. One exception—for any document that
8 is mentioned in the complaint—requires the sort of “necessary reliance” that Plaintiffs
9 (rather implausibly) disclaim. But the other main exception recognized by the Ninth
10 Circuit—for public records like those presented by Defendants—does not require a
11 showing of reliance by the Plaintiffs.

12 Moreover, inasmuch as Plaintiffs’ objection is that public records may not be
13 judicially noticed for the truth of matters contained therein, they overstate the sweep of that
14 rule, which is that “a court may judicially notice matters of public record *unless the matter*
15 *is a fact subject to reasonable dispute.*” *Disabled Rights Action Comm. v. Las Vegas*
16 *Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (emphasis added). In opposing the
17 pending motion to dismiss, Plaintiffs have conspicuously and explicitly *declined* to dispute
18 the facts reflected in the public records that Defendants have presented, expressly stating:

19 Plaintiffs do not dispute that the 2011 MALDEF map included prisoner population
20 in the population base for evaluating total population, or that Kern County excluded
21 those prisoners, or that the County did so following the advice from the Attorney
22 General. Indeed, Plaintiffs do not dispute that excluding prisoners from the 2011
MALDEF map *could possibly* cause the total deviation in the plan to exceed 10%.

23 See Plaintiffs’ Opposition to Motion to Dismiss (Dkt. #19) at 7:12-17 (underline added).

24 Moreover, the documents for which judicial notice is sought are exactly the types of
25 public records for which judicial notice is routinely granted.

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1 **II. A PLAINTIFF NEED NOT HAVE “RELIED” UPON OR EVEN**
 2 **MENTIONED PUBLIC RECORDS IN THE COMPLAINT FOR THE**
 3 **COURT TO JUDICIALLY NOTICE THE FACTS REFLECTED THEREIN.**

4 Plaintiffs simply contend that the Court should disregard the facts reflected in
 5 undisputed public records on the grounds that (1) most of the records are not referred to in
 6 the Complaint, and (2) the map that *was* referred to in the Complaint is purportedly not
 7 “central” to Plaintiffs’ claims (though one therefore wonders why Plaintiffs saw fit to call
 8 the Court’s attention to it). But this argument addresses a different exception to the rule
 9 limiting review of extrinsic evidence on a motion to dismiss than the exception relied upon
 10 by Defendants.

11 Under Ninth Circuit case law, there are “two exceptions to the requirement that
 12 consideration of extrinsic evidence converts a 12(b)(6) motion to a summary judgment
 13 motion[.]” *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001):

14 First, a court may consider “material which is properly submitted as part of the
 15 complaint” on a motion to dismiss without converting the motion to dismiss into a
 16 motion for summary judgment. *Branch[v. Tunnell]*, 14 F.3d [449,] 453 [9th Cir.
 17 1994] (citation omitted). If the documents are not physically attached to the
 18 complaint, they may be considered if the documents’ “authenticity ... is not
 19 contested” and “the plaintiff’s complaint necessarily relies” on them. *Parrino v.*
 20 *FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998). Second, under Fed. R. Evid. 201, a
 court may take judicial notice of “matters of public record.” *Mack v. South Bay Beer*
Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986).

21 *Lee*, 250 F.3d at 688-89. *See also Hicks v. City of Vallejo*, 2015 U.S. Dist. LEXIS 68621,
 22 *8 (E.D. Cal. May 27, 2015) (Drozd, J.) (noting same exceptions).

23 The theories underlying these two exceptions are different. The premise underlying
 24 the first—the incorporation-by-reference exception—is that the court may “treat such a
 25 document as ‘*part of the complaint*, and thus may assume that its contents are true for
 26 purposes of a motion to dismiss under Rule 12(b)(6).’” *Marder v. Lopez*, 450 F.3d 445, 448
 27 (9th Cir. 2006) (emphasis added). The purpose of the exception is to prevent a plaintiff
 28 from opportunistically omitting key documents from his or her complaint solely to avoid a

12(b)(6) motion. *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The premise underlying the second exception (for public records) is that “on a motion to dismiss a court may properly look *beyond the complaint* to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment.” *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (emphasis added); *see also Hall v. Va.*, 385 F.3d 421, 424 n.3 (4th Cir. 2004), *cert. denied*, 544 U.S. 961 (2005) (affirming dismissal of Section 2 claim under Rule 12(b)(6), and relying on population statistics not cited in the complaint but available from the “official redistricting website of the Virginia Division of Legislative Services”).

Plaintiffs’ contention that, to be considered in connection with a motion to dismiss, a document must be referred to in the complaint or be “central” to the claim focuses entirely on the test that applies to the first (incorporation-by-reference) exception (*see* Opp’n at 4:17-25), as do the cases upon which Plaintiffs rely. But no case that Plaintiffs cite, either in their Opposition or their Objections to Defendants’ Request for Judicial Notice, nor any case that Defendants have found, holds that the same test applies to the exception for public records. *See Hotel Emples. & Rest. Emples. Local 2 v. Vista Inn Mgmt. Co.*, 393 F. Supp. 2d 972, 979 (N.D. Cal. 2005) (“The general rule that a court may not consider extrinsic evidence outside the pleadings for the purposes of a motion to dismiss has two exceptions. As discussed, matters of public record may be the subject of judicial notice. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). A court may also consider documents whose authenticity cannot be questioned and on which plaintiff’s complaint ‘necessarily relies.’ *Id.* Documents appropriate for inclusion *through this latter exception* must be integral to the plaintiff’s complaint and dispositive in the dispute, raising the spectre that plaintiff failed to incorporate them by reference in the complaint as a means of avoiding Rule 12(b)(6) dismissal.” (emphasis added)); *Gammel v. Hewlett-Packard Co.*, 905 F. Supp. 2d 1052, 1061 (C.D. Cal. 2012) (“Although often conflated, the doctrine of incorporation by reference is distinct from judicial notice.”); *Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co.*, 2015 U.S. Dist. LEXIS 164527, *9 n.4 (N.D. Cal. Dec. 8, 2015)

(granting motion to dismiss, and noting “uCool contends that the Court may not consider Plaintiffs’ Supplemental Report [in connection with the motion] because ‘this document was not referenced in the complaint.’ MTD at 3 n.3. Even so, courts may take judicial notice of ‘matters of public record’ where the facts therein are not subject to ‘reasonable dispute.’”).

III. THIS COURT CAN TAKE JUDICIAL NOTICE OF THE FACTS REFLECTED IN THE PUBLIC RECORDS SUBMITTED BY DEFENDANTS, BECAUSE PLAINTIFFS HAVE NOT DISPUTED THOSE FACTS.

Plaintiffs, tellingly, have not disputed the accuracy or authenticity of any of the public records that Kern County has submitted for judicial notice, though it is their burden to do so if they wish to overcome the presumption of those public records’ trustworthiness.¹ To the contrary, as set forth in full above, Plaintiffs have expressly disclaimed any effort to dispute the facts presented by the Defendants’ request for judicial notice. This is significant, because “a court may judicially notice matters of public record *unless the matter is a fact subject to reasonable dispute.*” *Disabled Rights Action Comm.*, 375 F.3d at 866 n.1 (emphasis added).

Plaintiffs expressly *do not dispute* that Kern County omitted prisoners from the population base in drawing supervisorial district maps in 2011; they do not dispute that MALDEF’s proposed 2011 map failed to exclude those prisoners. And they do not dispute that the California Attorney General has advised that exclusion of prisoners is lawful (or that several courts have held that the failure to exclude prisoners from the population base violates constitutional one-person, one-vote principles).²

¹ See *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir. 1999) (“A trial court may presume that public records are authentic and trustworthy. The burden of establishing otherwise falls on the opponent of the evidence, who must come ‘forward with enough negative factors to persuade a court that a report should not be admitted.’”).

² See *Davidson v. City of Cranston*, 2016 U.S. Dist. LEXIS 67674 (D.R.I. May 24, 2016) (granting summary judgment for plaintiffs on claim that failure to exclude prisoners from population base violated equal protection); *Calvin v. Jefferson Cnty. Bd. of Comm’rs*, 2016 U.S.

Moreover, though Plaintiffs refusal to dispute the fact that “excluding prisoners from the 2011 MALDEF map *could possibly* cause the total deviation in the plan to exceed 10%” is phrased equivocally (*i.e.*, “could possibly”), *see* Opp’n at 17, the simple fact is that they make no affirmative effort dispute the locations of the prisons in Kern County (*see* Defendants’ Request for Judicial Notice, Exhibits H-K) or the accuracy of the Census data associated with those facilities (*id.* at Exhibit D). Accordingly, judicial notice of those facts, based on public records, is appropriate. *See, e.g., Ferguson v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 17522, *8-*9 (E.D. Cal. 2013) (overruling plaintiffs’ objections to judicial notice, because “Given that plaintiffs do not dispute the documents’ authenticity or the facts contained within them, the court will consider them for both the fact of their existence and the truth of the matter asserted.”); *Hague v. Wells Fargo Bank, N.A.*, 2011 U.S. Dist. LEXIS 84695, *1 n.2 (N.D. Cal. Aug. 2, 2011) (taking judicial notice of documents establishing the history of Wold Savings Bank, FSB, for the truth of the matter they assert, despite opposing party’s objections); *Leghorn v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 1093, 1106 (N.D. Cal. 2013) (taking judicial notice of a matter of public record because the party opposing judicial notice made no efforts to dispute the public record itself); *Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co.*, 2015 U.S. Dist. LEXIS 164527, *9 n.4 (N.D. Cal. Dec. 8, 2015) (same); *Welk v. Beam Suntory Imp. Co.*, 124 F. Supp. 3d 1039, 1042 (S.D. Cal. 2015) (“The TTB certificates are public records and, while Welk opposes judicial notice of the TTB certificates, he doesn’t question their authenticity. Thus, they’re appropriate for judicial notice.”).³

Dist. LEXIS 36121 (N.D. Fla. Mar. 16, 2016) (failure to exclude prisoners from population base resulted in unconstitutional malapportionment of districts).

³ Nor could they *reasonably* dispute these facts. *See St. Clair v. JP Morgan Chase Bank, N.A.*, 2014 U.S. Dist. LEXIS 132054, *2-*5 n.1 (E.D. Cal. Sept. 18, 2014) (judicially noticing facts reflected in public records in connection with a motion to dismiss, though “truthfulness” disputed by plaintiffs, because they were “matters of public record and capable of accurate determination”); *McGuire v. Recontrust Co., N.A.*, 2013 U.S. Dist. LEXIS 103752, *6-*9 (E.D. Cal. July 23, 2013) (taking judicial notice of public records in connection with motion to dismiss, because plaintiff had not presented sufficient reason to dispute the records’ accuracy).

1 The locations of public facilities, based on publicly available maps, websites and
 2 other public records, are judicially noticeable. *See United States v. Coutchavlis*, 260 F.3d
 3 1149, 1153-54 (9th Cir. 2001) (taking judicial notice, based on map on government
 4 website, that road was entirely within national park); *Hernandez v. Hernandez*, 2015 U.S.
 5 Dist. LEXIS 79439, *12 (E.D. Cal. June 18, 2015) (taking judicial notice of the location of
 6 the Pleasant Valley State Prison); *Kitchens v. Tordsen*, 2015 U.S. Dist. LEXIS 101324, *2
 7 (E.D. Cal. July 28, 2015) (taking judicial notice of the location of the Kings County Jail);
 8 *Klyana v. Apker*, 2015 U.S. Dist. LEXIS 167723, * (E.D. Cal. Dec. 15, 2015) (“the website
 9 of the Bureau of Prisons [is a] source[] whose accuracy cannot reasonably be questioned”);
 10 *Intertribal Sinkiyone Wilderness Council v. Nat’l Marine Fisheries Serv.*, 970 F. Supp. 2d
 11 988, 1021 (N.D. Cal. 2013) (“The court takes judicial notice of the physical location of the
 12 Sanctuary, based on the information provided by Defendants. *See*
 13 <http://sanctuaries.noaa.gov/science/condition/ocmns/history.html>.”).

14 Likewise, census data carry a strong presumption of accuracy,⁴ and are, accordingly,
 15 judicially noticeable. *See Cano v. Davis*, 211 F. Supp. 2d 1208, 1244 n.46 (C.D. Cal. 2002)
 16 (three-judge redistricting court), *aff’d*, 537 U.S. 1100 (2003); *United States v. Esquivel*, 88
 17 F.3d 722, 726-27 (9th Cir. 1996); *Cactus Corner, LLC v. United States Dep’t of Agric.*, 346
 18 F. Supp. 2d 1075, 1098 (E.D. Cal. 2004); *In re Dynamic Random Access Memory (DRAM)*
 19 *Antitrust Litigation*, 2013 U.S. Dist. LEXIS 188116, *241 n.134 (N.D. Cal. Jan. 8, 2013);
 20 *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 571-72 (5th Cir. 2011) (“United
 21 States census data is an appropriate and frequent subject of judicial notice.” (citing
 22 *Esquivel*)).

23 **IV. CONCLUSION.**

24 For the foregoing reasons, Plaintiffs’ objections to Defendants’ RJN are misplaced
 25 and should be overruled by this Court.

26
 27 ⁴ *See Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1345 (C.D. Cal.), *aff’d*, 918 F.2d
 28 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) (citing cases); *Fairley v. Hattiesburg*, 584
 F.3d 660, 674 (5th Cir. 2009); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 946 (7th Cir. 1988).

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2 Dated: June 14, 2016

Respectfully submitted,
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