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 14 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
 15 **SAN FRANCISCO DIVISION**

16 CITY AND COUNTY OF SAN FRANCISCO,
 Plaintiff,
 17 v.
 18 ALEX M. AZAR II, *in his official capacity as*
Secretary of Health and Human Services,
 19 *et al.,*
 Defendants.

Case Nos. 3:19-cv-2405-WHA
 3:19-cv-2769-WHA
 3:19-cv-2916-WHA

**DEFENDANTS' OPPOSITION TO
 PLAINTIFFS' ADMINISTRATIVE
 MOTION FOR LEAVE TO FILE A
 SUPPLEMENTARY REQUEST FOR
 JUDICIAL NOTICE PURSUANT TO
 LOCAL RULE 7-3(d)**

20 STATE OF CALIFORNIA, by and through
 ATTORNEY GENERAL XAVIER
 21 BECERRA,
 Plaintiff
 22 v.
 23 ALEX M. AZAR, et al.,
 Defendants.

Judge: Hon. William H. Alsup

24 COUNTY OF SANTA CLARA, et al.
 Plaintiffs,
 25 v.
 26 U.S. DEPARTMENT OF HEALTH AND
 HUMAN SERVICES, et al.,
 27 Defendants.

1 Plaintiffs' motion for leave to file a request for judicial notice of the *State of New York* transcript
2 should be denied.

3 Federal Rule of Evidence 201 permits a court to take judicial notice of adjudicative facts that are
4 "not subject to reasonable dispute" because they are either (1) "generally known within the trial court's
5 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy
6 cannot reasonably be questioned." Fed. R. Evid. 201(b). "[A] proper request for judicial notice includes
7 identification of specific facts the court is requested to notice as true." *Segura v. Felker*, No. CIV S-08-
8 2477 KJM P, 2010 WL 5313770, at *1 n.1 (E.D. Cal. Dec. 20, 2010), *aff'd sub nom. Segura v. McGuire*,
9 474 F. App'x 608 (9th Cir. 2012). A court need not take judicial notice of irrelevant facts, even if
10 contained in otherwise noticeable documents. *See, e.g., Santa Monica Food Not Bombs v. City of Santa*
11 *Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006).

12 Plaintiffs have not met their burden of identifying any specific, relevant adjudicative facts in the
13 160-page rough transcript attached to their motion, and thus, their motion should be denied at the
14 threshold. Moreover, even if Plaintiffs had attempted to identify specific facts for the court to consider
15 noticing as true, their motion should still be denied for several reasons.

16 First, the proceeding in *State of New York* was an oral argument, not an evidentiary hearing.
17 Thus, the transcript contains only arguments of counsel, not factual testimony. Rule 201 applies only to
18 adjudicative facts, not legislative facts. Fed. R. Evid. 201(a). "Adjudicative facts are simply the facts of
19 the particular case. Legislative facts, on the other hand, are those which have relevance to legal
20 reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a
21 judge or court or in the enactment of a legislative body." *Whipple v. Mann Mortgage LLC*, 2013 WL
22 12131875 *1 (D. Mont. Sept. 17, 2013) (quoting advisory committee notes to Rule 201(a)). To the
23 extent that Plaintiffs suggest this Court should take notice of the legal arguments made by counsel in the
24 transcript or statements by the judge presiding over that proceeding, such arguments and statements are
25 not adjudicative facts in this case.

26 Second, the Court need not engage in any fact finding in this case to which any judicially noticed
27 facts would be relevant. This case is brought under the Administrative Procedure Act (APA), and
28 Defendants' Opposition to Plaintiffs' Administrative Motion for Leave to File a Supplementary Request

1 “[g]enerally speaking, district courts reviewing agency action under the APA’s arbitrary and capricious
 2 standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions.”
 3 *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (citations omitted).
 4 Likewise, as Defendants previously explained, review in this case should be limited to the administrative
 5 record, not some new factual record made in the reviewing court. 5 U.S.C. § 706; *see also Cty. of*
 6 *Fresno v. Azar*, 384 F. Supp. 3d 1164, 1172–73 (E.D. Cal. 2019) (citing *Cnty. of Los Angeles v. Shalala*,
 7 192 F.3d 1005, 1011 (D.C. Cir. 1999)).

8 Furthermore, even if the transcript contained testimony regarding facts, as opposed to the
 9 arguments of counsel (which it does not), the transcript could not be judicially noticed for the truth of
 10 any facts stated therein. When a court takes judicial notice of a transcript, it may not take judicial notice
 11 of “the facts asserted therein or the court’s expressions reflected in the transcript.” *Colonies Partners*
 12 *LP v. Cty. of San Bernardino*, No. EDCV18420JGBSHKX, 2018 WL 6074577, at *1 n.2 (C.D. Cal. July
 13 12, 2018) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001)); *see also M/V Am.*
 14 *Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) (stating the general rule
 15 that “a court may not take judicial notice of proceedings or records in another cause so as to supply,
 16 without formal introduction of evidence, facts essential to support a contention in a cause then before
 17 it”). As a result, it is not clear what purpose judicial notice of the transcript would serve. The only fact
 18 it could reasonably establish is that an oral argument occurred in the *State of New York* case. But no one
 19 disputes that fact; nor is it relevant to this case.

20 Finally, although Plaintiffs style their motion as one under Civil Local Rule 7-3(d), they do not
 21 seek to submit either an objection to reply evidence, Civil Local Rule 7-3(d)(1), or a relevant judicial
 22 opinion, Civil Local Rule 7-3(d)(2), and the relevance of this provision is thus unclear.

23 For these reasons, Plaintiffs’ motion should be denied.

24
 25 Dated: October 29, 2019

Respectfully Submitted,

26 JOSEPH H. HUNT
 27 Assistant Attorney General

28 Defendants’ Opposition to Plaintiffs’ Administrative Motion for Leave to File a Supplementary Request
 for Judicial Notice Pursuant to Local Rule 7-3(d)
 Nos. 19-cv-2405-WHA, 19-cv-2769-WHA, 19-cv-2916-WHA

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Case Nos. 3:19-cv-2405-WHA
 3:19-cv-2769-WHA
 3:19-cv-2916-WHA

**[PROPOSED] ORDER DENYING
 PLAINTIFFS' ADMINISTRATIVE
 MOTION FOR LEAVE TO FILE A
 SUPPLEMENTARY REQUEST FOR
 JUDICIAL NOTICE PURSUANT TO
 LOCAL RULE 7-3(d)**

20 STATE OF CALIFORNIA, by and through
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24 COUNTY OF SANTA CLARA, et al.
 Plaintiffs,
 25 v.
 26 U.S. DEPARTMENT OF HEALTH AND
 HUMAN SERVICES, et al.,
 27 Defendants.

1 Plaintiffs have filed an Administrative Motion for Leave to File a Supplementary Request for
2 Judicial Notice, and Defendants have filed an opposition thereto.

3 Having considered the parties' filings and all materials submitted in relation thereto, **IT IS**
4 **HEREBY ORDERED** that Plaintiffs' Opposed Administrative Motion for Leave to File a
5 Supplementary Request for Judicial Notice is **DENIED**.

6
7 **IT IS SO ORDERED.**

8
9 Dated: _____

10 The Honorable William H. Alsup