

No. 23-16031

**IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT**

AURORA REGINO,

Plaintiff–Appellant,

v.

KELLY STALEY,

Defendant–Appellee,

and

CAITLIN DALBY; REBECCA KONKIN; TOM LANDO; EILEEN ROBINSON:
MATT TENNIS

Defendants.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:23-cv-00032-JAM-DMC
Hon. John A. Mendez

**APPELLEE’S OPPOSITION TO APPELLANT’S REQUEST FOR
JUDICIAL NOTICE**

BRIAN A. DUUS, ESQ. (SBN: 263403)
JIMMIE E. JOHNSON, ESQ. (SBN: 223344)
LEONE ALBERTS & DUUS, APC
1390 Willow Pass Road, Suite 700
Concord, CA 94520
Telephone: (925) 974-8600
Facsimile: (925) 974-8601

Attorneys for Defendant–Appellee
KELLY STALEY

INTRODUCTION

Defendant-Appellee KELLY STALEY (“Superintendent Staley”) opposes each request for judicial notice made by Plaintiff-Appellant AURORA REGINO (“Regino”). Regino asks this Court to take judicial notice of several court documents and other government records not for the purpose of establishing the existence of opinions given in various other litigations; but rather, for the purpose of having the Court accept those opinions as truth – specifically, in this case, what Regino believes is the correct definition of “social transitioning.” As this Court has explained several times, however, taking judicial notice of court documents and government records is restricted to the former, and does not include the latter. Moreover, requests for judicial notice are not the appropriate vehicle for proffering medical opinions. Had Regino wanted the Court to consider such opinions, she needed to introduce them in the trial court below.

Additionally, for the same purpose of having the Court accept the truth of the matter asserted, Regino requests that this Court take judicial notice of a similar medical opinion posted on a private webpage. Not only, again, are requests for judicial notice not the appropriate vehicle for proffering medical opinions, but the courts of this Circuit have repeatedly determined that opinions found on private platforms are not subject to judicial notice.

For these reasons, as detailed below, the Court should deny each of the requests for judicial notice requested by Regino.

ARGUMENT

I. Court Documents and Other Government Records Are Subject to Judicial Notice to Establish the Existence of Statements Made in Other Litigations, Not for the Purpose of Establishing the Truth of the Matters Asserted

“A court may take judicial notice of facts that are ‘not subject to reasonable dispute’ because they are either ‘generally known within the trial court's territorial jurisdiction’ or ‘can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’” *Polanco v. Diaz*, 76 F.4th 918, 932 (9th Cir. 2023) (quoting Fed. R. Evid. 201(b)). Here, Regino asks this Court to take judicial notice of the following court documents:

(1) Brief of Amici Curiae Medical, Nursing, Mental Health, and Other Health Care Organizations in *Adams v. The School Board of St. Johns County*, United States Court of Appeals for the Eleventh Circuit, Case No. 18-13592;

(2) Declaration of Dr. Christine Brady filed in *California v. Chino Valley Unified School District*, Superior Court of California, County of San Bernardino, Case No. CIV SB 2317301; and

(3) Declaration of Dr. Erica Anderson filed in *California v. Chino Valley Unified School District*, Superior Court of California, County of San Bernardino, Case No. CIV SB 2317301.

App. Req. Jud. Notice, p. 1 (ECF 8, Oct. 30, 2023) (“RJN”). Similarly, Regino

further asks this Court to take judicial notice of the following government record:

(4) Relevant excerpts from *Nondiscrimination in Health Programs and Activities*, United States Department of Health and Human Services (“DHHS”) Proposed Rule, 87 FR 47,824-01 (August 4, 2022).

RJN, p. 1.

Regino admittedly seeks judicial notice of these documents because she “alleges, among other things, that social transitioning is a form of psychological

treatment and ... [t]he documents that are the subject of this Request ... all opine that social transitioning is a form of psychological treatment.” RJN, pp. 3-4. However, “[o]n a [Federal Rule of Civil Procedure] 12(b)(6) motion to dismiss, when a court takes judicial notice of [a court document providing an opinion], it may do so ‘not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.’” *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (quoting *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426-27 (3rd Cir. 1999)). In other words, while the Court can certainly recognize that opinions have been given in other litigations as to what constitutes “social transitioning,” it cannot take judicial notice as to the truth of those opinions. The same rule applies to other forms of government records. *Polanco*, 76 F.4th at 932.

As such, given that Regino has proffered the documents in question for the purpose of establishing the truth as to what constitutes “social transitioning;” but given that this Court cannot take judicial notice for that intended purpose, it should deny the request.

II. The Court Is Not Authorized to Take Judicial Notice of the Truth of Opinions Given on Private Websites

Regino also asks this Court to take judicial notice of the following document:

(5) Zucker, Ken J., *The myth of persistence: Response to “A Critical Commentary on Follow-Up Studies and Desistance Theories about*

Transgender and Gender Non-Conforming Children” by Temple Newhook et al., 19 International Journal of Transgenderism, (2018). RJN, pp. 1-2. She seeks judicial notice of this article for the same reason as the previously-discussed court documents and government records – i.e., to establish the truth of what constitutes a “social transition.” RJN, pp. 3-4.

As such, for the same reasons discussed above, the Court should deny this request because it cannot take judicial notice of a document for the truth of the opinion asserted therein. *Lee*, 250 F.3d at 690.

In addition, the document is the opinion of a private person posted on a private webpage. RJN, pp. 1-2, 6. To that end, citing *Matthews v. Nat’l Football League Mgmt. Council*, 688 F.3d 1107 (9th Cir. 2012), Regino argues that any posting on a private webpage is subject to judicial notice as long as the article appears to be “what it purports to be.” RJN, p. 6. However, the courts of this Circuit have long counseled against taking judicial notice of documents on private websites. “[I]nformation appearing on the third party websites is not a proper subject of judicial notice because it is not capable of accurate and ready determination.” *Gerritsen v. Warner Bros. Entm’t*, 112 F.Supp.3d 1011, 1029 (C.D. Cal. 2015). “One court has gone so far as to describe information available from private Internet websites as ‘no[t] remotely akin to the type of facts which may be appropriately judicially noticed.’” *Id.* at 1030 (quoting *Ruiz v. Gap*, 540 F.Supp.2d 1121 (N.D. Cal. 2008)). In *Ruiz*, when asked to take judicial notice of a study posted on a private web page, the Court promptly rejected the request, finding

“these documents [do not] contain information which is ‘generally known within the territorial jurisdiction of the trial court’ or ‘capable of accurate and ready determination.’ Fed. R. Evid. 201.” 540 F.Supp.2d at 1124. Indeed, even in *Matthews* – the case cited by Regino in support of her contention, this Court only permitted judicial notice of the information found on a private website because the opposing party did not raise an objection, nor question the accuracy of the information at issue. 688 F.3d at 1113 n.5. Here, as set forth in this opposition and the contemporaneously-filed responsive brief, not only does the District object to this request, but further disputes Regino’s suggested definition of the term “social transition.”

Accordingly, the Court should deny this request, as well.

CONCLUSION

For the reasons set forth above, the Court should deny each and every request for judicial notice made by Regino.

DATED: January 2, 2023

/s/ Jimmie E. Johnson
JIMMIE E. JOHNSON
Attorneys for Defendant-Appellee
KELLY STALEY

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
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