Case No. S208611

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CALIFORNIA CHARTER SCHOOLS ASSOCIATION,

Plaintiff and Respondent,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT, *et al.*

Defendants and Appellants.

After a Decision by the Court of Appeal
Second Appellate District, Division Five
Case No. B242601

Los Angeles Superior Court Case No. BC438336
Honorable Terry A. Green, Presiding Judge, Dept. 14

OPPOSITION TO LAUSD'S MOTION REQUESTING JUDICIAL NOTICE IN SUPPORT OF ANSWER BRIEF ON THE MERITS

LATHAM & WATKINS LLP
James L. Arnone (Bar No. 150606)
Winston P. Stromberg (Bar No. 258252)
Vanessa C. Wu (Bar No. 274336)
Michele L. Leonelli (Bar No. 280867)
355 South Grand Avenue
Los Angeles, California 90071-1560
Telephone: (213) 485-1234
Facsimile: (213) 891-8763
Email: james.arnone@lw.com

CALIFORNIA CHARTER SCHOOLS ASSOCIATION
Ricardo J. Soto (Bar No. 167588)
Julie Ashby Umansky (Bar No. 183342)
Phillipa L. Altmann (Bar No. 186527)
250 East 1st Street, Suite 1000
Los Angeles, California 90012
Telephone: (213) 244-1446
Facsimile: (213) 244-1448
Email: paltmann@calcharters.org

Attorneys for Plaintiff and Respondent
California Charter Schools Association

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355 South Grand Avenue
Los Angeles, California 90071-1560
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250 East 1st Street, Suite 1000
Los Angeles, California 90012
Telephone: (213) 244-1446
Facsimile: (213) 244-1448
Email: paltmann@calcharters.org

Attorneys for Plaintiff and Respondent
California Charter Schools Association

I. INTRODUCTION

Defendants' and Appellants' (collectively, "LAUSD") motion for judicial notice ("RJN") suffers from many flaws that cannot be overcome.

First, having failed to introduce any admissible evidence below showing that compliance with the plain language of the Prop. 39 Implementing Regulations[1] will cause any of the dire consequences it asserts will occur, LAUSD now seeks to use judicial notice to manufacture a new factual record in this case. LAUSD had ample opportunity to present evidence at the trial court, but it failed to do so. "[A]n appellate court generally is not the forum in which to develop an additional factual record...." (*People v. Peevy* (1998) 17 Cal.4th 1184, 1207 (*Peevy*); see also *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2.)

Second, LAUSD seeks to use documents submitted in its RJN to prove the truth of the matters stated therein. That is improper. (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1360, fn. 6 (*Klein*).)

Finally, LAUSD attempts to use other documents submitted in its RJN to make improper factual inferences. "Evidence which produces only *speculative* inferences is *irrelevant evidence*." (*People v. v. De La Plane* (1979) 88 Cal.App.3d 223, 242, emphasis added.)

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[1] Cal. Code Regs., tit. 5, §§ 11969.1 – 11969.11 ("Implementing Regulations").

For the reasons described herein, Plaintiff and Respondent California Charter Schools Association ("CCSA") requests that the Court deny LAUSD's RJN. If, however, this Court is willing to consider LAUSD's newly submitted evidence, CCSA requests that the Court also consider materials submitted by CCSA in its Conditional Request for Judicial Notice, filed concurrently with CCSA's Reply Brief and this Opposition.

II. ARGUMENT

A. LAUSD's Request For Judicial Notice Of The Full Text And Sample Ballots Of Measures Q and Y Is Improper

LAUSD asks this Court to take judicial notice of the sample ballots for ballot Measure Q, approved November 4, 2008, and for ballot Measure Y, approved November 8, 2005, pursuant to Evidence Code section 452, subdivisions (b), (c), and (h). (LAUSD's RJN, pp. 3-6; Exhs. 1 & 2.) Judicial notice is inappropriate for the purposes for which LAUSD seeks to use the sample ballot measure text.

LAUSD cites to the "Findings" from the sample ballot and attempts to use those findings as truthful factual statements. As an initial matter, courts are not the proper forum to develop a new factual record. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 (*Vons*).) Further, courts may only take judicial notice of the *existence* of documents and may not take judicial notice of the truth of the contents of those documents. (*Klein, supra,* 202 Cal.App.4th at p. 1360, fn. 6; *Herrera*

v. Deutsche Bank National Trust Co. (2011) 196 Cal.App.4th 1366, 1375.) LAUSD references its own ballot measures for facts asserted therein, nearly quoting verbatim language it wrote and put in the ballot measures.

To demonstrate that LAUSD seeks to use its own ballot measures to prove the truth of the matters asserted, the below table compares LAUSD's statements in its Answer Brief against the cited text of the ballot measures:

Statement in Answer Brief	**Language in Ballot Measure**
"Between the mid-1980s and the mid-2000s the District experienced enormous growth, adding approximately 200,000 students – a number that is itself larger than any other school district in California." (AB, p. 6 [citing LAUSD's RJN, Exh. 1, p. 2)"	"The District has experienced enormous growth within the past 20 years, adding approximately 200,000 students – a number that is itself larger than any other school district in California." (LAUSD's RJN, Exh. 1 [Measure Q], p. 2.)
"By 2002, over 354,000 students attended schools operating on multi-track, year-round calendars, reducing the number of days these students attended school. [Citation] Similarly, more than 15,000 students could not attend neighborhood schools due to overcrowding and were bused to other campuses, sometimes more than an hour away." (AB, pp. 6-7 [citing LAUSD's RJN, Exh. 2, p. 92]; see also AB, p. 36.)	"By 2002, over 100,000 more students were enrolled in the District than it had two-semester seats for them to occupy, more than 15,000 students could not attend their neighborhood schools due to overcrowding and instead had to be bussed to other campuses, sometimes more than an hour away. Over 354,000 students attended schools that were operating on special calendars that could only accommodate their enrollment through the use of multi-tracking schedules that reduced the number of school-days students attended school." (LAUSD's RJN [Measure Y], Exh. 2, p. 92.)

Statement in Answer Brief	Language in Ballot Measure
"[E]ven at the completion of the District's New School Construction and Modernization Program, tens of thousands of students will remain in portable classrooms and the majority of the District's schools will be much larger than the state average." (AB, p. 8 [citing LAUSD's RJN, Exh. 1, p. 3]; see also AB, p. 35.)	"[E]ven at the completion of the currently defined Program, there will still be approximately 200,000 students learning in portable classrooms and the majority of the District's schools will be much larger than the State average." (LAUSD's RJN, Exh. 1 [Measure Q], p. 3.)

In addition, a school district ballot measure is approved by the voters, not the Legislature, an executive branch agency, or any other public agency. As such, the sample ballots for Measures Q and Y do not qualify for judicial notice under Evidence Code section 452, subdivision (b), as that subdivision only permits courts to take judicial notice of regulations and legislative enactments.

Moreover, just because a local school district ballot measure is a document created by a government agency and submitted to the voters does not mean it constitutes "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).) Here, LAUSD references sections of the "Findings" from both ballot measures in its Answer Brief. A local school district ballot measure's "Findings" are self-serving, containing information within the school district's control and drafted in order to persuade voters to approve

the measure. As such, the ballot measures should not qualify for judicial notice under Evidence Code section 452, subdivision (h).

In sum, as LAUSD seeks only to use the ballot measures for the truth of the statements made therein, LAUSD's request for judicial notice should be denied.

B. LAUSD's Academic Performance Index Base Reports Are Irrelevant

LAUSD requests judicial notice of district-wide Academic Performance Index ("API") Base Reports for the 2005, 2011, and 2012 school years, alleging that LAUSD's increase in performance, as measured by the API scores, directly correlates to a reduction in overcrowding and elimination of "stopgap measures" at LAUSD campuses. (LAUSD's RJN, p. 6; see also Answer Brief ("AB"), p. 9.) LAUSD claims that if it is forced to comply with CCSA's interpretation of the Implementing Regulations, LAUSD might have to overcrowd its classrooms or reinstate those former "stopgap measures," causing academic performance at LAUSD-run schools to suffer. (LAUSD's RJN, pp. 6-7.) Contrary to LAUSD's assertion, its API scores cannot be judicially noticed as they do not satisfy the requirement that "the matter to be noticed [be] relevant to the appeal." (Cal. Rules of Court, rule 8.252, subd. (a)(2)(A).)

LAUSD's API scores are irrelevant for many reasons, but especially because LAUSD offers no proof that the modest rise in API scores is

connected to, let alone the product of, a reduction in overcrowding at LAUSD campuses. In the roughly half-decade between the first API report LAUSD cites to (2005) and the last (2012), any number of other factors could have impacted student performance at LAUSD schools, such as changing demographics, improved teaching methods, the availability of school breakfasts or lunches, or a decrease in crime in neighborhoods served by LAUSD-run schools.

Second, LAUSD presumes that CCSA's interpretation of the Implementing Regulations will result in overcrowding, with nothing more than the naked assertion that "the District [would] be forced to allocate charter schools classrooms at ratios of 10 to 15 students per classroom." (LAUSD's RJN, p. 6.) As discussed in CCSA's Reply Brief on the Merits, LAUSD has repeatedly taken this alleged ratio out of context. (Reply Brief, pp. 27-28.)

LAUSD's gaps in logic demonstrate that the API base reports are irrelevant to this case, and therefore should not be judicially noticed. (Cal. Rules of Court, rule 8.252, subd. (a)(2)(A); *People v. De La Plane* (1979) 88 Cal.App.3d 223, 242 ["evidence which produces only *speculative* inferences is *irrelevant* evidence"], emphasis in original.)

LAUSD's request that this Court judicially notice the API base reports should be denied.

C. Information On LAUSD's Website Regarding Preschool Programs Is Not Subject To Judicial Notice

LAUSD's request that this Court take judicial notice of LAUSD's own website regarding preschool programs at LAUSD-run schools is improper for multiple reasons.

First, as with the ballot measures, LAUSD seeks to augment an already established factual record at the eleventh hour. The time has passed to introduce new facts in this case. In *Bullis Charter School v. Los Altos School District*, the appellate court refused to "take judicial notice of various documents, namely...the District's financial report...and other documents regarding California's public schools" because "[t]hese documents were not part of the record considered below by the trial court." (*Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal.App.4th 1022, 1043, fn. 12.) The same rationale applies here. LAUSD had ample opportunity at the trial court to seek to introduce as evidence the documents included as Exhibits 4 and 5 to its RJN. It failed to do so. As such, LAUSD's request should be denied. (*Peevy, supra*, 17 Cal.4th at p. 1207; *Vons, supra*, 14 Cal.4th at p. 444, fn. 3.)

Second, LAUSD impermissibly cites to the information contained in LAUSD's website for the truth of the matters stated, (i.e. the number of LAUSD elementary school campuses housing preschool programs and the number of preschool students enrolled in such programs). Courts are not to

take judicial notice of the truth of the contents of websites. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal. App. 4th 182, 194.) For example, in several places in its Answer Brief, LAUSD impermissibly cites to information in Exhibits 4 and 5 of its RJN for the truth of the facts contained therein:

- "For example, State Preschool programs are run on 77 elementary school campuses across the District. (RJN, Exh. 4, pp. 128-130.)" (AB, p. 9.)
- "Likewise, nearly 14,000 preschool students, across 280 elementary school campuses, are enrolled in the School Readiness Language Development Program ('SRLDP'), which prepares English Language Learners for kindergarten curriculum through primary language instruction. (RJN, Exh. 5, pp. 131-142.)" (AB, p. 9.)
- "CCSA's Inventory Approach would require the District to count all of the classrooms used exclusively for state preschool programs on 77 elementary school campuses across the District and every classroom used for the nearly 14,000 preschool students enrolled in the SRLDP taught on 280 elementary school campuses across the District. (RJN, Exh. 4, pp. 128-130; RJN, Exh. 5, pp. 131-142.)" (AB, p. 22.)

Third, citations to LAUSD's own website are self-serving. LAUSD controls this website, and so its descriptions of the preschool programs and

lists of LAUSD campuses where such programs allegedly operate are not subject to independent, objective verification. (See *Jolley v. Chase Home Finance, LLC* (2012) 213 Cal.App.4th 872, 889 [simply because a document is on a public agency's website does not mean it is not reasonably subject to dispute].) As such, the website information is not of sufficient authenticity to even be noticeable under Evidence Code, subdivision (h), for its existence.

Moreover, LAUSD's webpages and lists say nothing about how many "classrooms" preschool programs occupy at LAUSD elementary schools. LAUSD claims CCSA's interpretation of the regulation would require LAUSD to count classrooms actually used for preschool. (LAUSD's RJN, p. 8.) But LAUSD cannot demonstrate that will occur because nothing in Exhibits 4 and 5 to LAUSD's RJN shows that preschool programs will occupy "classrooms" required to be counted in the inventory under California Code of Regulations, title 2, section 1859.31.

LAUSD's request that this Court judicially notice information from LAUSD's website regarding preschool programs should be denied.

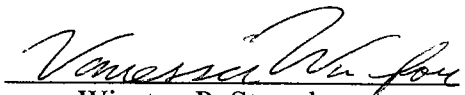
III. CONCLUSION

Based on the foregoing, CCSA respectfully requests that the Court deny LAUSD's improper RJN.

Respectfully submitted,

DATED: October 10, 2013

LATHAM & WATKINS LLP
James L. Arnone
Winston P. Stromberg
Vanessa C. Wu
Michele L. Leonelli

By: 
Winston P. Stromberg
Attorneys for Plaintiff and Respondent California Charter Schools Association

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 505 Montgomery Street, Suite 2000, San Francisco, CA 94111-6538.

I served the following document described as:

OPPOSITION TO LAUSD'S MOTION REQUESTING JUDICIAL NOTICE IN SUPPORT OF ANSWER BRIEF ON THE MERITS

by serving a true copy of the above-described document in the following manner:

BY ELECTRONIC MAIL

The above-described document was transmitted via electronic mail to the following party(ies) on **October 10, 2013**:

David M. Huff, Esq. *(dhuff@ohslegal.com)*
ORBACH, HUFF & SUAREZ LLP
1901 Avenue of the Stars, Suite 575
Los Angeles, CA 90067

BY U.S. MAIL

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David M. Huff, Esq.
Steven Graff Levine, Esq.
Marley S. Fox, Esq.
Joanna Braynin, Esq.
ORBACH, HUFF & SUAREZ LLP
1901 Avenue of the Stars, Suite 575
Los Angeles, CA 90067
Attorneys for Appellants

David R. Holmquist, Esq.
Mark Fall, Esq.
Nathan A. Reierson, Esq.
Office of General Counsel
LOS ANGELES UNIFIED SCHOOL DISTRICT
333 South Beaudry Avenue, 23rd Floor
Los Angeles, CA 90017
Attorneys for Appellants

Clerk/Executive Officer of the Court
Court of Appeal of the State of California
Second Appellate District, Division Five
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013

Clerk of the Court
Honorable Terry A. Green - Department 14
Superior Court of the State of California
County of Los Angeles
111 North Hill Street
Los Angeles, CA 90012

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **October 10, 2013**, at San Francisco, California.

Elizabeth Alvarez