

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD)
)
Petitioner)
)
v.) No. 17-73210
)
INTERNATIONAL ASSOCIATION OF)
BRIDGE, STRUCTURAL, ORNAMENTAL,)
AND REINFORCING IRON WORKERS,)
LOCAL 229, AFL-CIO)
)
Respondent)

**NATIONAL LABOR RELATIONS BOARD’S OPPOSITION
TO RESPONDENT’S REQUEST FOR JUDICIAL NOTICE**

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board opposes Respondent’s request for judicial notice. Respondent seeks judicial notice of a brief that the United States Government filed in a pending Supreme Court case, *U.S. v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2019), *cert. granted*, No. 19-67 (2019). The Court should reject Respondent’s request because it is an improper attempt to use judicial notice to make further legal argument and because the brief is irrelevant to the issue before the Court.¹

¹ Respondent’s further request for a stay pending a Supreme Court decision in *Sineneng-Smith* is moot. On March 3, 2020, the Court issued an order staying

1. Though couched as a motion for judicial notice, Respondent's motion is a thinly veiled and improper attempt to make a legal argument to the Court. Under Federal Rules of Evidence 201(b)(2), the Court can take judicial notice of a "fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." A request for judicial notice is not, however, a proper vehicle for legal argument. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2009) ("judicial notice is generally not the appropriate means to establish the legal principles governing the case") (citation omitted). Accordingly, the Court will not take judicial notice of pleadings filed in other cases for the purpose of noticing the truth of the facts alleged or arguments made therein. *See, e.g., Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001). This is so because such alleged facts and arguments are subject to reasonable dispute, and, therefore, not a proper subject of judicial notice. *Id.*

2. The Court should reject Respondent's request as an improper attempt to use judicial notice to make a legal argument and because Respondent seeks judicial notice of disputed matters. Resolution of the instant case turns on the disputed issue of whether one of the secondary-boycott provisions of the National

further action on Respondent's petition for rehearing *en banc* pending the issuance of a Supreme Court decision in *Sineneng-Smith*.

Labor Relations Act (“the Act”)—Section 8(b)(4)(i)(B)—may be constitutionally applied to prohibit union efforts, including through oral and written communication, to “induce or encourage” a work stoppage for a prohibited secondary purpose. A panel of this Court answered that question affirmatively, holding that the Supreme Court had decided the First Amendment issue in the Board’s favor in *IBEW Local 501 v. NLRB*, 341 U.S. 694, 701-05 (1951), and that *IBEW* remained binding, applicable precedent. *NLRB v. IAB Local 229*, 941 F.3d 902, 905-06 (Oct. 28, 2019).

Respondent’s petition for rehearing *en banc* argues (pp. 8-9), *inter alia*, that the panel’s decision conflicts with this Court’s decision in *U.S. v. Sineneng-Smith*, 910 F.3d 461, *cert. granted*, No. 19-67 (2019), a claim that Respondent also made in FRAP 28(j) letters that it filed before and after its rehearing petition. In its opposition to rehearing, p. 15, and in its responses to Respondent’s letters, the Board explained why, in its view, Respondent’s claim of a conflict lacks merit.²

Having repeatedly argued the contested relevance of *Sineneng-Smith* to the instant case, Respondent now requests that the Court take judicial notice of the

² Respondent mischaracterizes (motion at p. 3) the Board’s opposition as claiming that *Sineneng-Smith* is irrelevant because the panel did not mention it in its opinion and criticizes the Board for “not provid[ing] a meaningful response.” Not so. The Board’s opposition explains why *Sineneng-Smith*, which concerns federal immigration law, does not affect binding Supreme Court precedent in *IBEW* addressing the constitutionality of Section 8(b)(4)(i)(B).

Government’s Supreme Court brief in that case for the purpose of making an additional legal argument—an improper use of judicial notice. Respondent does not rely on that filing for the Court to take notice of the indisputable facts of either its existence or its filing date. Rather, Respondent, selectively citing to various assertions and arguments made in the brief (motion at pp. 2-3), uses it to advance its disputed position that Section 8(b)(4)(i)(B) is unconstitutional as applied in the instant case. Respondent further argues (motion at pp. 1-2) that the brief demonstrates the relevance of another case that it brought to the Court’s attention through FRAP 28(j)—*St. Louis Cardinals, LLC*, 369 NLRB No. 3 (2020)—a claim that the Board disputed in its FRAP 28(j) reply.

Respondent does not—and cannot—claim that its argument based on the brief is an undisputed fact “whose accuracy cannot be reasonably questioned,” so as to be a proper subject of a request for judicial notice. In short, Respondent is asking the Court to take judicial notice of the arguments made in a brief in another case, and Respondent’s opinion regarding how the brief should be interpreted—a legal interpretation that the Board disputes. Because judicial notice is an inappropriate vehicle for making these legal arguments (they are not “undisputed facts”), the Court should reject Respondent’s request that it take judicial notice of the brief. *Cf. Lee v. City of Los Angeles*, 250 F.3d at 689-90 (granting judicial

notice only as to the existence of filings and undisputed fact, and not for the purposes of noticing the truth of the facts or arguments made therein).

3. Moreover, contrary to Respondent's arguments (motion at p. 3), the brief is not relevant. This Court does not take judicial notice of documents that are "not relevant to the resolution of [the] appeal." *Santa Monica Food Not Bombs v. Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006). *Accord Escobedo v. Applebee's*, 787 F.3d 1226, 1228 n.2 (9th Cir. 2015) (denying request for judicial notice of documents that were immaterial to the court's analysis).

The Government's brief in *Sineneng-Smith*, and certainly Respondent's interpretation of it, will have no bearing on any issue before this Court. The Supreme Court's decision, once issued, will speak for itself. *See 18 Moore's Federal Practice - Civil* § 134.03, n.3 (3d ed. 2018) (the principal evidence of what has been decided is the court's written opinion). Indeed, this Court has already rejected, when it issued the underlying decision in this case, Respondent's similar attempt to seek judicial notice of arguments made in a brief filed in another case. Thus, the panel denied Respondent's request that it take judicial notice of the Board's brief and another filing before the Supreme Court in *IBEW*, finding they were "immaterial" to the case before this Court. 941 F.3d at 907 n.1.

4. Finally, the Government filed its Supreme Court brief in *Sineneng-Smith* on December 2, and Respondent filed its rehearing petition in the instant

case on December 12, in which it made legal arguments based on *Sineneng-Smith* and noted that the case was before the Supreme Court. Respondent does not explain why it waited until now to bring this brief to the Court's attention. The Court should not allow Respondent to ignore judicial economy concerns by presenting its arguments in a piecemeal fashion. Nor should it permit Respondent to misuse judicial notice to make legal arguments based on an irrelevant document.

WHEREFORE, the Court should deny the request for judicial notice.

Respectfully submitted,

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, D.C.
this 9th day of March 2020

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LOCAL 229, AFL-CIO)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 1,296 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

Respectfully submitted,

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 9th day of March 2020

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that the foregoing document will be served via the CM/ECF on all counsel who are registered CM/ECF users.

/s/David Habenstreit
David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 9th day of March 2020